

1 Wednesday, 20 February 2019

2 The Hague, Netherlands

3 Kosovo Specialist Chambers - Constitutional Court

4 [Ruling]

5 [Open Session]

6 --- Upon commencing at 12.00 p.m.

7 THE COURT USHER: All rise. Please be seated.

8 THE COURT OFFICER: The Specialist Chamber of the Constitutional
9 Court of the Kosovo Specialist Chamber, Judge Ann Power-Forde
10 presiding; and myself, Riaz Haider, Court Officer; in the matter of
11 Mahir Hasani versus the Specialist Prosecutor's Office, file number
12 KSC-CC-2019-05.

13 JUDGE POWER-FORDE: Mirëdita. Dobar dan. Good afternoon.

14 This pronouncement is a summary of the ruling of the Specialist
15 Chamber of the Constitutional Court (the "Chamber") on a Referral
16 lodged by Mr. Mahir Hasani (the "Applicant") with the Chamber on 15
17 January 2019 (the "Referral"), under Article 113(7) of the
18 Constitution of the Republic of Kosovo (the "Constitution"). The
19 Applicant was represented by Dr. Artan Qerkini.

20 Following the Chamber's notification on 13 February 2019 to the
21 Registrar of the date of this pronouncement, the public has been
22 informed, in advance, of the date and the time thereof. The text of
23 this pronouncement is available on the website in the three official
24 languages of the Kosovo Specialist Chambers.

25 In the Applicant's Referral of 15 January 2019, he complained

1 hat an order of the Specialist Prosecutor's Office (the "Order")
2 directing him, as a suspect, to provide certain documents and
3 information violated his right to silence and breached the privilege
4 against self-incrimination, under Article 30(6) of the Constitution.
5 He also claimed that the Order violated his right to be presumed
6 innocent, under Article 31(5) of the Constitution and Article 6(2) of
7 the European Convention on Human Rights and Fundamental Freedoms (the
8 "Convention").

9 The Applicant applied, pursuant to Rule 21(1) and (2) of the
10 Rules of Procedure for the Specialist Chamber of the Constitutional
11 Court (the "Rules"), for an interim measure suspending the Order,
12 pending a determination by the Chamber of the Referral.

13 On 15 January 2019, the President of the Specialist Chambers,
14 pursuant to Article 33(3) of the Law No. 05/L-053 on Specialist
15 Chambers and Specialist Prosecutor's Office (the "Law"), assigned a
16 Constitutional Panel to rule on the Referral.

17 On 18 January 2019, the Chamber allowed the Specialist
18 Prosecutor to file replying submissions in relation to the
19 Applicant's request for an interim measure. On 25 January 2019, the
20 Specialist Prosecutor filed those submissions.

21 On 7 February 2019, the Chamber suspended the Order insofar as
22 it obliged the Applicant to provide the documents, data, notes, and
23 information specified therein. The Chamber confirmed that its
24 suspension of the Order was without prejudice to its determination of
25 the Referral. It also confirmed that it was without prejudice to the

1 applicant's obligation to appear for questioning before the
2 Specialist Prosecutor's Office on 11 February 2019.

3 On 15 February 2019, the Specialist Prosecutor filed a Notice of
4 Withdrawal and a Request for Dismissal of the Referral.

5 Having already ruled on the Applicant's request for an interim
6 measure, this pronouncement summarises the Chamber's ruling on the
7 substantive aspect of the Referral. In so doing, it also sets out
8 the Chamber's response to the Specialist Prosecutor's Request for
9 Dismissal thereof.

10 The Constitutional Panel, composed of Judge Ann Power-Forde,
11 presiding, and Judge Vidar Stensland and Judge Roland Dekkers,
12 reached its findings on the Referral following deliberations held
13 both in person and remotely.

14 Factual Background.

15 On 20 December 2018, the Specialist Prosecutor's Office served
16 on the Applicant two documents, namely, a summons to appear for
17 questioning on 11 February 2019 and the Order to provide certain
18 documents and information to the Specialist Prosecutor's Office on
19 the same day.

20 The Order had stated that the Applicant was "obligated to
21 produce" certain documents and information specified therein. The
22 Order had also warned that a failure to produce the documents would
23 be considered "contempt", as a result of which the Specialist
24 Prosecutor's Office may seek enforcement measures to ensure
25 compliance with the Order.

1 he Order had further confirmed that there were reasons to
2 believe that the Applicant had been involved in the commission of a
3 crime within the jurisdiction of the Kosovo Specialist Chambers.

4 Jurisdiction.

5 In the Referral, filed under Article 113(7) of the Constitution,
6 the Applicant complains about the Order, as issued by the Specialist
7 Prosecutor's Office. The Referral thus relates to the Specialist
8 Chambers and Specialist Prosecutor's Office, as required by Article
9 162(3) of the Constitution and Articles 3(1) and 49(2) of the Law.
10 It follows that the Chamber has jurisdiction to rule on the Referral.

11 Findings.

12 *Preliminary Considerations on the Law.*

13 At the outset, the Chamber recalls its supervisory duty to
14 oversee the work of the Kosovo Specialist Chambers and Specialist
15 Prosecutor's Office insofar as fundamental rights and freedoms
16 guaranteed by the Constitution are concerned.

17 As regards the fundamental rights and freedoms guaranteed by
18 Chapter II of the Constitution, Article 22(2) thereof provides for
19 the direct application of the European Convention on Human Rights.
20 Furthermore, pursuant to Article 53, human rights and fundamental
21 freedoms guaranteed by the Constitution are to be interpreted in a
22 manner consistent with the decisions of the European Court of Human
23 Rights.

24 In that light, the Chamber has had particular regard to the case
25 law of the Strasbourg Court in its review of the instant Referral.

1 *Alleged Violations.*

2 The Applicant's Referral concerns the right to silence and the
3 privilege against self-incrimination, as guaranteed under Article
4 30(6) of the Constitution and Article 6(1) of the Convention. The
5 Referral raises the question of whether those guarantees apply to the
6 investigative stage of criminal proceedings, and, particularly, to
7 circumstances in which the authorities order a confirmed suspect to
8 provide documents and information during the course of a criminal
9 investigation.

10 The European Court of Human Rights has confirmed that the
11 protections afforded by Article 6(1) and (3) of the Convention apply
12 to a person who is subject to a "criminal charge". Article 30 of the
13 Constitution also sets out the minimum rights of a person "charged
14 with a criminal offense". The Strasbourg Court takes a substantive
15 rather than a formal approach to the question of when a person can be
16 considered as being subject to a criminal charge. In 2016 in the
17 case of *Ibrahim and Others v. the United Kingdom*, the Grand Chamber
18 endorsed the approach taken earlier in *Aleksandr Zaichenko v. Russia*
19 wherein the Court had explained that once there is a suspicion of a
20 criminal offence against a person, that person is considered as being
21 subject to a "charge" for the purposes of Article 6 of the
22 Convention.

23 In that light, the Chamber observes that the Order, as issued,
24 had confirmed that there was a suspicion against the Applicant. In
25 view of that confirmation, the Chamber considers that Article 30 of

1 he Constitution and Article 6 of the Convention, more particularly,
2 the right to silence and the privilege against self-incrimination,
3 were engaged and were applicable to the Applicant's situation.

4 The Chamber recalls that the purpose of the right to silence and
5 the privilege against self-incrimination is to protect an accused
6 person against improper compulsion by the authorities and, thereby,
7 to avoid a miscarriage of justice. It is the existence of compulsion
8 that raises an issue as to whether the privilege against
9 self-incrimination has been respected.

10 The Chamber is satisfied that under the terms of the Order, as
11 issued, there existed a clear element of compulsion. It had
12 consisted of a warning that if the Applicant had failed to produce
13 the specified documents, such failure would be considered "contempt".
14 The threat of legal proceedings being instituted to enforce
15 compliance, if the Applicant had failed to produce the documents, had
16 served to compound the element of compulsion. The Chamber considers
17 it appropriate to recall two relevant strands of the Strasbourg case
18 law on the consequences of such compulsion.

19 The first strand relates to the subsequent use at trial of
20 information obtained under threat. It involves cases, such as
21 *Saunders v. the United Kingdom*, where a suspect provides evidence on
22 foot of a threat of sanctions and that evidence is subsequently used
23 at his or her trial. In the present case, the Applicant submitted
24 that, in the event of a trial against him, the documents and data he
25 was ordered to produce under threat of sanction could, subsequently,

1 arm his defence and give an unfair advantage to the Specialist
2 Prosecutor's Office.

3 The Chamber observes that unlike the case of *Saunders v. the*
4 *United Kingdom*, there has been no trial or conviction in the
5 Applicant's case. The Chamber cannot speculate whether the Applicant
6 would have been put on trial, whether the documents which had been
7 specified in the Order would have been used, whether the Applicant
8 would have been convicted and whether the fairness of the trial as a
9 whole, if any, would, thereby, have been compromised. Had the Order
10 not been withdrawn, the Chamber is satisfied that this aspect of the
11 Applicant's complaint, namely, that compulsion to provide the
12 specified documents would have affected the fairness of a trial, was
13 premature.

14 The second strand of Strasbourg case law relates to sanctions
15 which are imposed upon a suspect for refusing to provide specific
16 information. It arises in cases, such as, *Heaney and McGuinness v.*
17 *Ireland*, where a suspect is requested to provide information under a
18 threat of sanction and, subsequently, is punished for refusing so to
19 do. The Chamber is satisfied that, in such a situation, an issue
20 under Article 6 of the Convention can still arise even if an
21 individual is not indicted in the underlying proceedings or is
22 acquitted following a trial, if any.

23 In the Applicant's submission, the Order had constituted an
24 improper compulsion to provide the Specialist Prosecutor's Office
25 with potential evidence, in that it had contained a warning that the

1 Applicant's failure to provide the documents would be considered
2 contempt and a threat that, as a result of such failure, enforcement
3 measures could be taken to ensure compliance with the Order. In
4 relation to those aspects of the Order, as issued, the Chamber
5 recalls that in *Heaney and McGuinness v. Ireland*, the Strasbourg
6 Court found a violation of Article 6 of the Convention in
7 circumstances where, during the course of a criminal investigation,
8 the applicants, who were suspects, had been requested under threat of
9 sanction to provide certain information to police officers. The
10 suspects had refused to do so and the authorities had then prosecuted
11 them for failing to provide the information.

12 In the light of that case law, the impermissible nature of the
13 Order, which the Specialist Prosecutor's Office had issued, was
14 evident to the Chamber. Had the Applicant been found in contempt for
15 exercising his constitutional rights and had enforcement measures
16 been taken against him for so doing, then such a situation could, in
17 all likelihood, have led to a situation impermissible under Article
18 30(6) of the Constitution and Article 6(1) of the Convention.

19 In order to preserve the Applicant's constitutional rights to
20 silence and to not incriminate himself, the Chamber, on 7 February
21 2019, suspended the Order, as issued, insofar as it had obliged the
22 Applicant to produce the documents and information specified therein.
23 The interim measure ensured that the *status quo* was maintained
24 pending the determination of the Referral. It also ensured that the
25 Applicant could not have been found in contempt and that enforcement

1 measures could not have been taken against him should he have chosen
2 to exercise his rights to silence and to not incriminate himself when
3 he appeared for questioning on 11 February 2019.

4 Having examined the Applicant's situation, the Chamber is
5 satisfied that, as matters stand, there has been no finding of
6 contempt nor have any enforcement measures been taken against him for
7 failing to produce the documents specified in the Order, as issued.
8 Had such proceedings been initiated, then an issue could have arisen
9 as regards the right to silence and the privilege against
10 self-incrimination, even if the Applicant's status did not change
11 from that of a suspect to that of an accused.

12 Subsequent Developments.

13 The Chamber observes that on 15 February 2019 the Specialist
14 Prosecutor filed a Notice of Withdrawal of the Order, the subject
15 matter of the Referral, and a Request for Dismissal of the Referral
16 herein.

17 In support of his Request, the Specialist Prosecutor submitted
18 that, by his withdrawal of the Order, the circumstances complained of
19 by the Applicant no longer existed. He further submitted that any
20 potential impact of any alleged violation of the Applicant's rights
21 had been redressed, firstly, by the interim measure ordered by this
22 Chamber and, secondly, by the Specialist Prosecutor's withdrawal of
23 the Order.

24 In that regard, the Chamber recalls that the European Court of
25 Human Rights has confirmed that a decision or measure favourable to

1 an applicant is not, in principle, sufficient to deprive him of his
2 or her victim status unless the national authorities have
3 acknowledged, either expressly or in substance, and then afforded
4 redress for the breach of the Convention.

5 However, the Chamber considers that, at this early stage of the
6 proceedings, there is no requirement to consider the sufficiency or
7 otherwise of any acknowledgement or redress, particularly, in
8 circumstances where the Applicant's Referral had not been declared
9 admissible prior to the withdrawal of the Order.

10 The Chamber considers that in determining whether a case should
11 be dismissed it may take into account events occurring subject to the
12 lodging of a Referral. For the Chamber, the issue of whether the
13 Applicant may still claim to be a victim of the alleged violations of
14 his constitutional rights essentially means that the realities of his
15 situation must be taken into account. It also means that
16 developments which have occurred since the filing of the Referral
17 must, of necessity, be considered.

18 In considering all of the circumstances of the Applicant's case,
19 the Chamber observes that he had requested this Chamber to declare
20 the Order, as issued, void or alternatively "to order the Specialist
21 Prosecutor's Office to revoke the said Order." The Chamber is
22 satisfied that by filing the Notice of Withdrawal, the Specialist
23 Prosecutor has, in fact, and of his own volition, revoked the Order.
24 This measure has effectively returned the Applicant to the situation
25 he was in prior to the Order being made.

1 In these circumstances, the Chamber concludes that there is no
2 longer any objective justification for the Applicant to pursue the
3 Referral.

4 The Chamber is satisfied that by withdrawing the Order, the
5 circumstances objected to by the Applicant no longer obtain. It is
6 further satisfied that the effects of any possible violation of the
7 Applicant's constitutional rights by virtue of the Order, as issued,
8 have been obviated.

9 It follows that the Applicant may no longer claim to be a victim
10 of the alleged violations of his constitutional rights.

11 Conclusions.

12 The Chamber considers that the right to silence and the
13 privilege against self-incrimination under Article 30 of the
14 Constitution and Article 6 of the Convention were engaged in the
15 Applicant's situation under the terms of the Order, as issued. The
16 Order was problematic on its face insofar as it had obliged the
17 Applicant, a confirmed suspect, to supply the documents and
18 information and it had warned that contempt would be found and
19 possible enforcement measures taken if the Applicant had failed to
20 produce the documents.

21 In accordance with Article 49(1) and (3) of the Law, the task of
22 this Chamber is to assess whether the circumstances complained of by
23 the Applicant violated his individual rights and freedoms guaranteed
24 by the Constitution. It is not the role of the Chamber to deal with
25 alleged errors made in the course of criminal proceedings except and

1 only insofar as such errors may involve a violation of the rights and
2 freedoms guaranteed by the Constitution. The complaints in the
3 present case had raised important issues concerning alleged
4 infringements of the Applicant's rights under the Constitution by
5 reason of the Order, as issued.

6 However, having regard to the fact that the Applicant's
7 constitutional rights to silence and to not incriminate himself were
8 preserved by the interim measure when he appeared for questioning on
9 11 February 2019 and in view of the Specialist Prosecutor's
10 subsequent withdrawal of the Order, as issued, the Chamber is
11 satisfied that the Applicant can no longer claim to be a victim of
12 the violations he had alleged under Article 30(6) of the Constitution
13 and Article 6(1) of the Convention.

14 This finding also applies to the alleged violation of Article
15 31(5) of the Constitution and Article 6(2) of the Convention wherein
16 the Applicant complained that the Order, as issued, had violated the
17 presumption of innocence by having shifted the burden of proof.

18 As the Order grounding the Applicant's complaints has been
19 withdrawn, the Referral must be declared inadmissible pursuant to
20 Rule 14(f) of the Rules.

21 Pursuant to Rule 21(6) of the Rules and bearing in mind the
22 Specialist Prosecutor's withdrawal of the Order, the interim measure
23 ordered on 7 February 2019 expires with immediate effect.

24 This Decision on the Referral is effective immediately.

25 The Decision.

1 Having provided this summary of the Chamber's ruling, the
2 operative provisions of its Decision are as follows:

3 For these reasons,

4 The Specialist Chamber of the Constitutional Court, unanimously,

5 Declares the Referral concerning the Order of the Specialist

6 Prosecutor's Office dated 20 December 2018 inadmissible.

7 This concludes the Chamber's pronouncement.

8 THE COURT USHER: All rise.

9 --- Whereupon the hearing adjourned at 12.22 p.m.

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