



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

Pronouncement of Ruling on the Referral by Mr Mahir Hasani

Concerning Prosecution Order of 20 December 2018

(KSC-CC-2019-05)

20 February 2019

At The Hague, the Netherlands

Introduction

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

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

Brief Procedural Background

In the Applicant’s Referral of 15 January 2019, he complained that an order of the Specialist Prosecutor’s Office (the “Order”) directing him, as a suspect, to provide certain documents and information violated his right to silence and breached the privilege against self-incrimination, under Article 30(6) of the Constitution. He also claimed that the Order violated his right to be presumed innocent, under Article 31(5)

of the Constitution and Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms (the “Convention”).

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

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

On 18 January 2019, the Chamber allowed the Specialist Prosecutor to file replying submissions in relation to the Applicant’s request for an interim measure. On 25 January 2019, the Specialist Prosecutor filed these submissions.

On 7 February 2019, the Chamber suspended the Order in so far as it *obliged* the Applicant to provide the documents, data, notes and information specified therein. The Chamber confirmed that its suspension of the Order was without prejudice to its determination of the Referral. It also confirmed that it was without prejudice to the Applicant’s obligation to appear for questioning before the Specialist Prosecutor’s Office on 11 February 2019.

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

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

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

Brief Factual Background

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

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

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

Jurisdiction

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

Findings

Preliminary Considerations on the Law

At the outset, the Chamber recalls its supervisory duty to oversee the work of the Kosovo Specialist Chambers and Specialist Prosecutor's Office in so far as fundamental rights and freedoms guaranteed by the Constitution are concerned.

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

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

Alleged Violations

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

The European Court of Human Rights has confirmed that the protections afforded by Article 6(1) and (3) of the Convention apply to a person who is subject to a "*criminal charge*". Article 30 of the Constitution also sets out the minimum rights of a person "*charged with a criminal offense*". The Strasbourg Court takes a substantive rather than a formal approach to the question of when a person can be considered as being subject to a criminal charge. In 2016 in the case of *Ibrahim and Others v. the United Kingdom*, the Grand Chamber endorsed the approach taken earlier in

Aleksandr Zaichenko v. Russia wherein the Court had explained that once there is a suspicion of a criminal offence against a person, that person is considered as being subject to a 'charge' for the purposes of Article 6 of the Convention.

In that light, the Chamber observes that the Order, as issued, had confirmed that there was a suspicion against the Applicant. In view of that confirmation, the Chamber considers that Article 30 of the Constitution and Article 6 of the Convention, more particularly, the right to silence and the privilege against self-incrimination, were engaged and were applicable to the Applicant's situation.

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

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

The first strand relates to the subsequent use at trial of information obtained under threat. It involves cases, such as, *Saunders v. the United Kingdom*, where a suspect provides evidence on foot of a threat of sanctions and that evidence is subsequently used at his or her trial. In the present case, the Applicant submitted that, in the event of a trial against him, the documents and data he was ordered to provide under threat of sanction could, subsequently, harm his defence and give an unfair advantage to the Specialist Prosecutor's Office.

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

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

In the Applicant's submission, the Order had constituted an improper compulsion to provide the Specialist Prosecutor's Office with potential evidence, in that it had contained a warning that the Applicant's failure to provide the documents would be considered contempt and a threat that, as a result of such failure, enforcement measures could be taken to ensure compliance with the Order. In relation to those aspects of the Order, as issued, the Chamber recalls that in *Heaney and McGuinness v. Ireland* the Strasbourg Court found a violation of Article 6 of the Convention in circumstances where, during the course of a criminal investigation, the applicants, who were suspects, had been requested under threat of sanctions to provide certain information to police officers. The suspects had refused to do so and the authorities had then prosecuted them for failing to provide the information.

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

In order to preserve the Applicant's constitutional rights to silence and to not incriminate himself, the Chamber, on 7 February 2019, suspended the Order, as issued, in so far as it had *obliged* the Applicant to produce the documents and the information specified therein. The interim measure ensured that the *status quo* was maintained pending the determination of the Referral. It also ensured that the Applicant could not have been found in contempt and that enforcement measures could not have been taken against him should he have chosen to exercise his rights to silence and to not incriminate himself when he appeared for questioning on 11 February 2019.

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

Subsequent Developments

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

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

In that regard, the Chamber recalls that the European Court of Human Rights has confirmed that a decision or measure favourable to an applicant is not, in principle, sufficient to deprive him or her of victim status unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention.

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

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

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

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

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

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

Conclusions

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

In accordance with Article 49(1) and (3) of the Law, the task of this Chamber is to assess whether the circumstances complained of by the Applicant violated his individual rights and freedoms guaranteed by the Constitution. It is not the role of the Chamber to deal with alleged errors made in the course of criminal proceedings except and only in so far as such errors may involve a violation of the rights and freedoms guaranteed by the Constitution. The complaints in the present case had raised important issues concerning alleged infringements of the Applicant's rights under the Constitution by reason of the Order, as issued.

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

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

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

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

Effective Date

This Decision on the Referral is effective immediately.

Decision

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

FOR THESE REASONS,

The Specialist Chamber of the Constitutional Court, unanimously,

Declares the Referral concerning the Order of the Specialist Prosecutor's Office dated 20 December 2018 inadmissible.

This concludes the Chamber's pronouncement.

A handwritten signature in blue ink that reads "Ann Power-Forde". The signature is written in a cursive, flowing style.

Judge Ann Power-Forde

Presiding Judge