



REPORT OF THE OMBUDSPERSON

Following an Inquiry in the Request for Reconsideration of the Ombudsperson's Decision on the Inquiry in the Complaint of Sabit Januzi, Isment Bahtijari, Haxhi Shala and Isni Kilaj Against the Kosovo Specialist Chambers and a Request for the Ombudsperson to exercise his power pursuant to Article 49(5) of the of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutors Office ("Law") to refer the question of the constitutional validity of KSC-BD-25/Rev1 to the Specialist Chambers of the Constitutional Court

Ref No. OMB-C-2024-02/02

Issued 21 May 2024

PUBLIC

The Ombudsperson of the Kosovo Specialist Chambers ('the Ombudsperson') sitting on 21 May 2024,

Having considered the aforementioned request for reconsideration of the Decision of the Ombudsperson, decides as follows:

I. PROCEEDINGS BEFORE THE OMBUDSPERSON

1. The request for reconsideration was registered with the Ombudsperson on 9 May 2024;

II. THE FACTS

2. The facts of the case that led to the original complaint and original decision of the Ombudsperson are set out in the original Report.¹

¹ See Report of the Ombudsperson in OMB-C-2024-02, at Section II, and KSC-CC-2024-23 Referral by (1) Sabit Januzi, (2) Ismet Bahtijari and (3) Haxhi Shala to the Specialist Chamber of the Constitutional Court regarding the Constitutional Validity of KSC-BD-25/Rev1, 2 April 2024.



III. THE REQUEST FOR RECONSIDERATION

3. Counsel on behalf of the four applicants submitted a request for reconsideration of the Ombudspersons original assessment in the case OMB-C-2024-02, dated 8 May 2024.
4. Counsel on behalf of the applicants' request for reconsideration submitted the following:
 - a) That, in the Ombudspersons' assessment that he was unable to consider a request for referral to the Specialist Chamber of the Constitutional Court (SCCC), given that the time limit to make referrals that he is made subject to by Rule 26(1) of the Rules of Procedure for the Specialist Chamber of the Constitutional Court (RPSCCC) had expired, the Ombudsperson failed in his assessment to consider Rule 6(4), "which makes it clear that that time limit may be extended, and any act carried out after the expiration of the time limit may be recognised as valid". It was submitted that this is a significant error and would thus render the assessment flawed. Counsel argues that "Moreover, there are perfectly good reasons for the time limit for the Ombudsperson to refer KSC-BD-25/Rev1 to the SCCC to be extended to permit the Ombudsperson to refer the impugned law at this stage, and/or for a referral of the impugned law by the Ombudsperson to be recognised as valid at this stage. In the present circumstances, the Ombudsperson was aware of the concerns of the complainants concerning the revised legal aid regulations well before 25 April 2024."
 - b) That "on 7 March 2024, only 14 days after the Registrar, without any consultation or notice, announced the revisions to take effect immediately, the Ombudsperson met in person with the complainants at the Detention Unit who expressed their concern that the revised regulations were incompatible with the Constitution and the right to a fair trial. However, the Ombudsperson took no action at that stage."
 - c) That, the Ombudsperson *had a right* to appear and join the Referral by Counsel on behalf of Sabit Januzi, Ismet Bahtijari, Haxhi Shala and Isni Kilaj in accordance with Rule 29(1) of the Rules of Procedure and Evidence before the Specialist Chambers (RPE) and was in a position to do so well within the 2 month time limit that applies to the Ombudsperson under Rule 26(1) of the RPSCCC.²
 - d) That "the fact that *the Ombudsperson* did not take any steps to exercise his right to appear before the Specialist Chamber of the Constitutional Court on a referral of this impugned legislation within two months of its surprise announcement, with no consultation period and no notice of its coming into force and no pre or post judicial or administrative scrutiny by any independent body, is no basis for the Ombudsperson

² See KSC-CC-2024-23 Referral by (1) Sabit Januzi, (2) Ismet Bahtijari and (3) Haxhi Shala to the Specialist Chamber of the Constitutional Court regarding the Constitutional Validity of KSC-BD-25/Rev1, 2 April 2024.



to reject the request that the Ombudsperson does now exercise his power to refer the impugned law for an assessment as to its compatibility or otherwise with the Constitution, even if a referral by the Ombudsperson at this stage requires the Ombudsperson to make an application for an extension of time pursuant to Rule 6(4) of the RPSCCC. ”

- e) That “the role of the Ombudsperson is to act independently to monitor, defend and protect the rights and freedoms of individuals from unlawful or improper acts or failures to act of the public authorities that are the Specialist Chambers and its organs, including the Registry (of which, discordantly, the Ombudsperson is a constituent part) (see Article 132(1) of the Constitution, Article 34(9) of the Law on Specialist Chambers and Specialist Prosecutor’s Office No.05/L-053, and Rule 28(2) of the RPE). That role encompasses the referral of valid questions as to the compatibility of regulations created by the Registry to the Constitutional Court, using the enabling provision of Rule 6(4) RPSCCC to apply for an extension of time to do so if necessary”.
- f) “In the circumstances, Counsel requested the Ombudsperson to reconsider his assessment of the request to refer the question of the compatibility of KSC-BD-25/Rev1 to the SCCC, specifically considering Rule 6(4) RPSCCC and the provision for the Ombudsperson to seek an extension of time to refer the matter to the SCCC”.

IV. THE OMBUDSPERSON’S ASSESMENT

I. The Independence of the Ombudsperson

- 5. At the outset, the Ombudsperson wishes to address the issue of his independence, which was raised by Counsel by way of a faint reference to the position of his Office within the Registry. Rule 28 (1) of the RPE provides that the Registry includes an **independent office** for the Ombudsperson of the Specialist Chambers.
- 6. Rule 28(2) states that the Ombudsperson **acts independently** to monitor defend and protect the fundamental rights and freedoms of persons interacting with the Specialist Chambers (SC) and Specialist Prosecutor’s Office (SPO) in accordance with the Law and the Rules.
- 7. Upon his appointment, the Ombudsperson made a solemn declaration before the Registrar pursuant to Rule 28(4) of the RPE.
- 8. Article 162 (11) of the Kosovo Constitution sets out that a **separate Ombudsperson** of the Specialist Chambers with exclusive responsibility for the SC and the SPO shall be appointed and his/her functions and reporting obligations determined by a specific law.



9. In accordance with Article 162(1) of the Constitution, the organisation, functioning and jurisdiction of the SC and the SPO shall be regulated by Article 162 and by a specific law.

10. The law in question is the Law on the Kosovo Specialist Chambers and Specialist Prosecutor's Office³, the relevant provision being Article 34(9) which states:

(9) The Registry shall include within it an Ombudsperson's Office, which shall perform the function of the Ombudsperson of the Specialist Chambers with exclusive responsibility for the Specialist Chambers and the Specialist Prosecutor's Office under Amendment nr 24 of the Constitution. The Law on the Ombudsman, Law No.03/L-195, shall not apply to the work of the Specialist Chambers and the Specialist Prosecutor's Office. The Ombudsperson shall be appointed by the Appointing Authority after consideration of suitably qualified applicants⁴. The Ombudsperson shall be of high moral character, highly competent in the area of human rights and freedoms. The role and function of the Ombudsperson of the Specialist Chambers shall be provided for in the Rules of Procedure and Evidence. The Ombudsperson of the Specialist Chambers may make recommendations to the President of the Specialist Chambers or Specialist Prosecutor's Office under Article 135(3) of the Constitution and may make referrals to the Constitutional Court in accordance with Articles 113(2) and 135(4) of the Constitution and Article 49 of this Law.

11. Both the Constitutional amendment and Law No. 05/L-053 were adopted by the Kosovo Assembly.

12. The Rules of Procedure and Evidence before the Kosovo Specialist Chambers were adopted by Plenary on 17 March 2017. The Specialist Chamber of the Constitutional Court held, unanimously, that Rules 28 and 29 are among the provisions of the Rules that are not inconsistent with Chapter II of the Constitution⁵.

13. The Ombudsperson is acutely aware of his role and functions and carries out these functions totally independent of the Specialist Chambers and its organs, including the Registry and the Specialist Prosecutor's Office.

II. Request that the Ombudsperson reconsiders his assessment of the original request to refer the question of the compatibility of KSC-BD-25/Rev1 to the Specialist Chamber of the Constitutional Court (SCCC), specifically considering Rule 6(4) Rules of Procedure before the Specialist Chamber of the Constitutional Court (RPSCCC) and the

³ Law No. 05/L-053

⁴ Appointed by Head of Mission of EULEX Kosovo as the Appointing Officer under Article 1(2) and Article 34(9) of Law No. 05/L-053.

⁵ Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, KSC-CC-PR-2017-01/F00004, 26 April 2017.



provision for the Ombudsperson to seek an extension of time to refer the matter to the SCCC.

14. Article 113(2) of the Constitution, as reflected in Article 49(5) of the Law, authorises the Ombudsperson to refer questions of the compatibility with the Constitution of laws, which include Regulations. The power vested in the Ombudsperson to refer to the SCCC does not include a referral based **solely** on a request by an individual. To do so would be in direct contradiction with Article 113 of the Constitution and could be interpreted as an attempt to circumvent the law.
15. Any referral by the Ombudsperson to the SCCC must be based on his assessment that the impugned law is incompatible with the Constitution. The Ombudsperson, in considering the request by Counsel for a referral to the SCCC, examined the procedural elements of any such referral. Material to this was the provisions of Rule 6(4) of the RPSCCC which formed part of the Ombudspersons considerations.
16. In this regard, it is important to point out that, as part of his function to monitor, defend and protect the rights and freedoms of individuals interacting with the Kosovo Specialist Chambers and Specialist Prosecutor's Office, the Ombudsperson has been aware of the 2024 Legal Aid Regulations since their introduction by the Registrar.
17. In considering the requirement to provide adequate legal aid, the Ombudsperson took notice of the decision of the European Court of Human Rights in the case of *Iglin v. Ukraine* when it concluded:

"Effective legal representation includes an entitlement to adequate time and facilities to prepare one's defence. Whether such time and facilities are adequate are assessed in light of the circumstances of each particular case⁶." (Emphasis added)
18. The adequacy of the 2024 Regulations in ensuring an effective legal representation can only be measured on a case by case basis. In that regard, the Ombudsperson notes that the 2024 Legal Aid Regulations provide for a review mechanism for any decision on legal aid by a competent panel.⁷
19. As a general observation, the Ombudsperson notes again that the complainants have not alleged that any specific decision has been taken pursuant to the 2024 Legal Aid

⁶ ECtHR, *Iglin v. Ukraine*, [GC], No. 39908/05, 12 January 2012, para.65.

⁷ See Regulation 10 of the 2024 Legal Aid Regulations.



Regulations, or that any such decision violated any of their rights. In addition, all four complainants are before the criminal Chambers. It falls to the criminal Chambers, in the first instance, to protect and vindicate the rights of the accused.⁸

20. In the instant case, the Ombudsperson can only conclude that is incumbent on Counsel to engage in the legal framework and the applicable procedures as set out in the 2024 Legal Aid Regulations. The right of the accused to an effective remedy is a constituent part of these Regulations.
21. For the reasons set out above, the Ombudsperson rejects the assertion that he failed to consider the power vested in the SCCC to extend the time limit in Rule 26(2) of the RPSCCC. In addition, the Ombudsperson rejects any assertion that it was erroneous of him to fail to recognise as valid, a referral of the 2024 Legal Aid Regulations.
22. Finally, in relation to the issue raised by Counsel regarding a visit by the Ombudsperson to the Detention Facility on 7 March 2024, the Ombudsperson did not visit the Detention Facility on that date. It was, in fact, his Legal Adviser who visited the Detention Facility on his behalf and who met with Mr Januzi who had come directly from a consultation with his Counsel.
23. Mr Januzi stated that Counsel had instructed him to raise the issue of the reduction in legal aid for persons accused of administrative crimes before the Specialist Chambers and he stated that the Registrar and the Minister of Justice in Kosovo were working in partnership in an attempt to reduce the remuneration for Counsel through the legal aid scheme, as the Kosovo Government had also amended its Regulations to reduce the levels of payment to Counsel in specific categories of crimes.
24. This was neither a formal or informal complaint but rather an observation by the detainee. It was brought to the attention of the Ombudsperson who noted same. Any suggestion that Mr Januzi expressed specific concerns that the revised regulations were incompatible with the Constitution and the right to a fair trial and that this amounted to a complaint would not be reflective of the conversation which took place.
25. In any case, the aforementioned observation by the detainee does not add any relevant element to the issue at stake and does not in any way alter the conclusions set out above.

⁸ See Decision of the Ombudsperson in OMB-C-2024-02, at para. 27, and KSC-CC-2024-23(1) Sabit Januzi, (2) Ismet Bahtijari and (3) Haxhi Shala v The Registry of the Kosovo Specialist Chambers, para 20.



V. CONCLUSION

26. The Ombudsperson rejects the assertion that he failed to consider the power vested in the SCCC to extend the time limit in Rule 26(2) of the RPSCCC.
27. The Ombudsperson rejects any assertion that it was erroneous of him to fail to recognise as valid, a referral of the 2024 Legal Aid Regulations.
28. The Ombudsperson rejects the request to reconsider his original assessment of the request to refer the question of the compatibility of KSC-BD-25/Rev1 to the SCCC, specifically considering Rule 6(4) RPSCCC and the provision for the Ombudsperson to seek an extension of time to refer the matter to the SCCC.

PIETRO SPERA

Ombudsperson, Kosovo Specialist Chambers

Dated this 21 May 2024

At The Hague, The Netherlands