

In: KSC-BC-2018-01
The Prosecutor v. Driton LAJÇI

Before: **Single Judge**
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Driton Lajçi

Date: 12 November 2022

Language: English

Classification: **Public**

Public Redacted Version of Application for Certification for Leave to Appeal the Decision on Second Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi (KSC-BC-2018-01/F00258)

Specialist Prosecutor

Jack Smith

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I. INTRODUCTION

1. On 15 June 2021, Mr. Driton Lajçi (“Applicant”) applied for an order directing the Specialist Prosecutor’s Office (“SPO”) to terminate the investigation.¹
2. On 23 July 2021, the Single Judge rejected that Application.²
3. On 29 July 2021, the Applicant applied for certification to appeal the Single Judge’s decision.³
4. On 24 August 2021, the Single Judge certified the application for leave to appeal.⁴
5. On 1 October 2021, the Panel of the Court of Appeals Chamber (“Court of Appeals Panel”) dismissed the appeal.⁵
6. On 4 July 2022, the Applicant filed a second application for the termination of the investigation (“Second Application”).⁶
7. On 15 July 2022, the SPO filed its response (“Response”).⁷

¹ KSC-BC-2018-01/F00172, *Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Mr. Driton Lajçi*, 15 June 2021, Confidential. A public redacted version F00172/RED.

² KSC-BC-2018-01/F00180, *Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi*, 23 July 2021, Confidential.

³ KSC-BC-2018-01/F00181, *Application for Certification on Leave to Appeal the Decision for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi*, 29 July 2021, Confidential.

⁴ KSC-BC-2018-01/F00184, *Decision on Application for Leave to Appeal the Decision F00180*, 24 August 2021, public.

⁵ KSC-BC-2018-01/IA001/F00005, *Decision on Appeal Against “Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi”*, 1 October 2021, public.

⁶ KSC-BC-2018-01/F00238, *Second Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi*, 4 July 2022, public. A corrected version with confidential Annexes A and B F00238/COR.

⁷ KSC-BC-2018-01/F00240, *Prosecution Response to the Second Application to Terminate the Investigation against Driton Lajçi*, 15 July 2022, confidential with strictly confidential and *ex parte* Annex 1.

8. On 10 August 2022, the Single Judge requested further submissions from the SPO (“August Order”).⁸
9. On 24 August 2022, the SPO filed a report, confidential and *ex parte*, containing, *inter alia*, further information on the progress made regarding certain aspects of the investigation.⁹
10. On 26 August 2022, the SPO filed further submissions pursuant to the Single Judge’s August Order.¹⁰
11. On 3 October 2022, the Applicant filed a request seeking an order from the Single Judge.¹¹
12. On 3 October 2022, the Single Judge rejected the Second Application (“Impugned Decision”).¹²
13. In accordance with Article 45 of the Law on Specialist Chambers and Specialist Prosecutor’s Office Law No.05/L-053 (“Law”) and Rule 77 of the Rules of Procedure

⁸ KSC-BC-2018-01/F00249, *Order to the Specialist Prosecutor for Further Submissions*, 10 August 2022, strictly confidential and *ex parte*. A confidential redacted version F00249/CONF/RED.

⁹ KSC-BC-2018-01/F00252, *Prosecution Report and Request for Court Orders*, 24 August 2022, with Annexes 1-10, strictly confidential and *ex parte*.

¹⁰ KSC-BC-2018-01/F00253, *Prosecution Response to “Order to the Specialist Prosecutor for Further Submissions”* F00249, 26 August 2022, strictly confidential and *ex parte* with Annex 1.

¹¹ KSC-BC-2018-01/F00259, *Application to the Single Judge for Further Order following the Order to the Specialist Prosecutor for Further Submissions*, 3 October 2022, Public.

¹² KSC-BC-2018-01/F00258, *Decision on Second Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajci*, 3 October 2022, Confidential.

and Evidence before the Kosovo Specialist Chambers (“KSC”) (“Rules”), the Applicant seeks certification for leave to appeal on the following grounds:

- i. That the Single Judge erred by failing to consider that the KSC and SPO (“Joint Institutions”) are institutions of the Republic of Kosovo established by domestic law and within its criminal justice system, and therefore when considering the “reasonable time” under Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), the conduct of the ‘relevant administrative and judicial authorities’ includes the conduct of the KSC, the SPO, and other state institutions;
- ii. That the Single Judge erred by concluding that the conduct of the ‘relevant administrative and judicial authorities’, which had caused delay or hampered the investigation, was attributable to the Applicant, when considering the “reasonable time” under Article 6(1) ECHR; and
- iii. That the Single Judge erred by failing to consider that it is the responsibility of the State, and its judicial and prosecutorial institutions, to organise its judicial system in such a way that it complies with the obligations under Article 6(1) ECHR.

II. THE LAW

14. Article 45(2) of the Law provides:

“Any other interlocutory appeal must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel on the basis that it involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.”

15. Rule 77(2) of the Rules provides:

“The Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.”

16. This Application concentrates on the Single Judge’s determination of the conduct of the Applicant and the conduct of the ‘relevant judicial and administrative authorities’.¹³ The Applicant is not seeking Certification on leave to appeal the Single Judge’s assessment of the complexity or what is at stake for the Applicant criteria.

III. SUBMISSIONS

A. The Legal Test for Applications for Leave to Appeal

¹³ KSC-BC-2018-01/F00258, paras. 24-27.

17. The following test applies to an application for leave to appeal:
- a. Whether the matter is an “appealable issue”;
 - b. Whether the issue at hand would significantly affect:
 - i. The fair and expeditious conduct of the proceedings; or
 - ii. The outcome of the trial; and
 - c. Whether, in the opinion of the Single Judge, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.¹⁴
18. These elements will be addressed below.

B. Whether the Issues are “Appealable”

19. Appealable issues must relate to “*an identifiable topic or subject, the resolution of which is essential for determination of the matters arising in the judicial cause under examination*” and must also “*emanate from the ruling concerned and...not amount to abstract questions or hypothetical concerns.*”¹⁵
20. The Applicant submits that the Issues constitute “appealable” issues, as each relates to the identifiable topic of the interpretation and application of principles and factors concerning a “reasonable” investigative period, namely whether the KSC and SPO constitute ‘relevant administrative and judicial authorities’ of the Republic of

¹⁴ KSC-BC-2020-06/F00172, *Decision on the Thaçi Defence Application for Leave to Appeal (“Thaçi”)*, 11 January 2021, Public, para. 10.

¹⁵ *Thaçi*, para. 11.

Kosovo, and if so, then their conduct should be considered when assessing the “reasonable time” under Article 6(1) ECHR. This would clearly delineate the conduct of which institutions needs to be evaluated, and would contribute to clarifying the extent the Applicant’s conduct is to be considered. To hold that the Applicant is responsible for the delay caused by other institutions, would be contrary to the principle of fairness and equality of arms.

21. It is noted that there is a distinction between the conduct of the ‘prosecutorial authorities’ and the conduct of [REDACTED]. However, the conduct of the latter is a consideration when deciding on reasonableness that is not imputable to the Applicant. Furthermore, arguments such as lack of resources,¹⁶ a judicial backlog¹⁷ or considerations as to inter-institutional cooperation is not a ground that can be relied upon. The European Court of Human Rights has emphasised States’ responsibility to “to organise their legal systems in such a way that their courts” can comply with the requirements of trial within a reasonable time.¹⁸

22. The Issues raised emanate from the conclusions in the Impugned Decision and thus do not amount to disagreements, abstract questions, or hypothetical concerns.

C. Whether the Issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

¹⁶ HRC, *Lubuto v Zambia* (Comm. 390/1990), 31 October 1995, para. 7.3.

¹⁷ HRC, *Ashby v Trinidad & Tobago* (Comm. 580/1994), 21 March 2002, para. 10.5, and *Fillastre v. Bolivia* (Comm. 336/199), 21 March 2002, para. 6.5.

¹⁸ ECtHR (GC), *Zana v. Turkey*, (69/1996/688/880) (“Zana”), 25 November 1997, para. 83

(i) *the fair and expeditious conduct of the proceedings*

23. To be certified for appeal, an issue would have to significantly affect the fair and expeditious conduct of the proceedings. 'Fairness' is "*generally understood as referencing the norms of fair trial*", and "*extends to pre-trial proceedings as well as the investigation of a crime.*"¹⁹ 'Expeditiousness' includes the need to conduct a trial "*within a reasonable time*" and "*without prejudice to the rights of the Parties concerned*" and is "*but one attribute of a fair trial.*"²⁰
24. The Impugned Decision is understood to mean that the period of investigation of forty-one (41) months, without reference to the conduct of the KSC, the SPO and [REDACTED], is within a "reasonable time".
25. The Single Judge wrongly held the Applicant responsible for [REDACTED]. On the information currently provided, the Single Judge incorrectly placed undue weight on these factors, which considerably impacts on the fairness and expeditiousness of the process.
26. Article 6(1) ECHR imposes on States the duty to organise their (judicial) systems in such a way that their courts can meet each of its requirements.²¹ Thus, the Applicant cannot be held responsible for the conduct of other authorities.

¹⁹ *Thaçi*, para. 13.

²⁰ *Thaçi*, para. 13.

²¹ *Zana*, para. 83.

27. The Applicant [REDACTED]. [REDACTED], significantly limiting the impact of any alleged Applicant's conduct on delay.
28. [REDACTED]. The SPO has not provided [REDACTED], compounding the delay. Further, [REDACTED].
29. The Applicant is in a difficult position due to [REDACTED]. It cannot be correct that the long delay is largely attributed to two factors, namely the complexity and [REDACTED]. The Single Judge previously held that the Applicant's actions [REDACTED].²² This mere assertion without having further information is not enough to justify the "reasonable time". Any alleged contribution to the delay, whilst not accepted, is limited as set out above and the conduct of [REDACTED] cannot be attributed to the Applicant and needs to be considered separately to ensure fairness and expeditiousness.
30. As previously argued,²³ the SPO should be reminded that it is a domestic prosecuting authority, not an international tribunal operating in a vacuum. Consequently, the conduct of the SPO and [REDACTED] should also be considered.

²² [REDACTED].

²³ Second Application, at para. 22.

31. It is submitted that the joint institutions are established based on the Constitution of Kosovo and national legislation adopted by the National Assembly.²⁴ The Constitution explicitly states that the joint institutions are established.²⁵
32. The Law, a *domestic* legislative act, unequivocally states that the KSC functions “*within* the Kosovo justice system”²⁶ and is thereby “attached to each level of the court system in Kosovo [...]”²⁷ The KSC is decidedly *part of* Kosovo’s judiciary, operating *within* Kosovo’s legal order. The Law cannot be read as a self-contained legal regime, insulated from and unfettered by Kosovo’s other municipal laws and, specifically, by the supreme law, the Constitution. Article 3(2)(a) of the Law states that the KSC must exercise its functions in compliance with the Constitution. The Law is subject to the constitutional safeguards, including the ECHR. The Constitutional Court also determined that the establishment of the joint institutions would be in accordance with the Constitution.²⁸
33. Consequently, this means that the conduct of the ‘relevant administrative and judicial authorities’, must be considered when scrutinising the “reasonable time”.
34. It is respectfully submitted that the Single Judge misapplied the proper test concerning the conduct of the ‘relevant administrative and judicial authorities’ when

²⁴ On 3 August 2015, the Kosovo National Assembly adopted Article 162 of the Constitution (“Constitution”)(https://www.scp-ks.org/sites/default/files/public/amendment_of_the_constitution_-no_24.pdf) and the Law on the Kosovo Special Chambers and Specialist Prosecutor’s Office (Law No.05/L-053), following the exchange of Letters with the EU (Law No.04/L-274).

²⁵ Constitution, Art.162.1.

²⁶ The Law, Art.1(2).

²⁷ The Law, Art.3(1).

²⁸ Constitutional Court, Case No. KO26/15, 15 April 2015, paras. 58-60.

determining reasonableness. It is clear there has been considerable delay. The question is who bears responsibility for the delay, whether the SPO has demonstrated expeditiousness and due diligence, and whether the Court has “actively [monitored] and [ensured] that judicial proceedings before them comply with the reasonable time requirement”.²⁹

35. The SPO investigation has yet again been left open-ended, without the proper consideration of the conduct of all the ‘relevant administrative and judicial authorities’. Further, the Applicant is unable to challenge whether the SPO has acted with due diligence and expeditiousness, on the basis that the disclosures to the Single Judge are confidential and *ex parte*.

36. Legal certainty goes to the very heart of the fairness, equity and expeditiousness. Accordingly, the current Issues satisfy the first prong of the test for certification.

(ii) *the outcome of proceedings*

37. Where an issue does not impact upon the fairness and expeditiousness, the first prong of the test for certification may be met when an error in the interlocutory decision may significantly affect the outcome of proceedings. This “*exercise involves a forecast of the consequence of such an occurrence.*”³⁰

38. The Single Judge failed to consider, whether the joint institutions are national institutions, which meant that he failed to study the conduct of other administrative

²⁹ ACtHR, *Onyango Nganyi v. Tanzania* (App. 006/2013), 18 March 2016, paras. 151-155; ECtHR, *Cuscani v. United Kingdom*, (App. 32771/96), 24 September 2002, para. 39

³⁰ *Thaçi*, para. 14.

and judicial authorities that may have delayed proceedings to the detriment of the Applicant.

39. The Impugned Decision concluded that [REDACTED].³¹ However, this conclusion was seemingly limited to the conduct of [REDACTED]. Respectfully such a finding cannot be correct.
40. This was an error that has significant consequences for the outcome of the SPO's investigation and for the proceedings. Firstly, the investigation has yet again been allowed to continue for an as yet undefined period.
41. Secondly, all the relevant considerations in assessing "reasonable time" were not reflected in the Impugned Decision. Had it been so, this would clarify the extent to which the Applicant's conduct and [REDACTED] *actually* contributed to the delay.
42. A denial of legal certainty in this regard, can significantly affect the outcome and fairness of any trial. This lack of certainty may preclude the Applicant's ability to further challenge the temporally unlimited investigation against him. Accordingly, it is submitted that the current Issues satisfy the first prong of the test for certification.

D. Whether an immediate resolution by the Appeals Chamber may materially advance the proceedings

43. The second limb of the test for certification "*requires a determination that prompt referral of an issue to the Court of Appeals Panel will settle the matter and rid the "judicial process of*

³¹ [REDACTED].

*possible mistakes that might taint either the fairness of proceedings or mar the outcome of the trial" thereby moving the proceedings forward along the right course."*³²

44. It is submitted that the prompt referral to the Court of Appeals Panel is necessary to determine the parameters of whether, and to what extent, the Applicant and/or other national institutions can be held to be responsible for the delay.
45. Further, this determination is necessary as it will clarify the status of the joint institutions as national institutions, and consequently, the conduct of relevant 'administrative and judicial authorities' as a factor in assessing the "reasonable time" would include the conduct of the SPO, the KSC, and the conduct of [REDACTED].
46. This would provide legal certainty and aid the Applicant in arguing whether and to what extent they or other 'relevant administrative and judicial institutions' can be held responsible for any delay. This will rectify the obvious error in applying the correct test.

IV. CONCLUSION

47. The Applicant submits that the three Issues would significantly affect the fair and expeditious conduct or outcome of any proceedings against the Applicant and an immediate resolution by the Court of Appeals Panel in this regard would materially

³² *Thaçi*, at para. 16.

advance any proceedings against him. The Applicant accordingly requests certification of the three Issues for leave to appeal.

V. CLASSIFICATION

48. This Application is filed confidentially, with reference to the confidential classification of the Impugned Decision. There is no objection to reclassifying the filing as public and there is no need for redactions.

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