

**In:** KSC-BC-2018-01  
Specialist Prosecutor *v.* Isni Kilaj

**Before:** Single Judge Panel  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Duty Counsel for Isni Kilaj

**Date:** 25 April 2024

**Language:** English

**Classification:** Public

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**Public redacted version of**  
**Kilaj request for leave to appeal “Decision on Request on Variation of**  
**Time Limits concerning Retention of Evidence” (F00611)**

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**Specialist Prosecutor’s Office**  
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Iain Edwards  
Joe Holmes

## I. INTRODUCTION AND THE APPEAL ISSUE

1. Pursuant to Article 45 of the Law,<sup>1</sup> and Rule 77 of the Rules,<sup>2</sup> the Defence for Mr Isni Kilaj (“Defence”, “Suspect”) seeks leave to appeal the Single Judge’s decision<sup>3</sup> granting the SPO’s request for a variation of the time limits for the retention of evidence.<sup>4</sup>

2. Leave is sought to certify the following single appeal issue:

*Given the terms of Rule 76 of the Rules, did the Single Judge err in fact and/or in law in finding that the Request was filed in a timely manner?*

## II. APPLICABLE LAW

3. An interlocutory appeal, other than an appeal that lies as of right, can only be heard following certification by the Pre-Trial Judge or Trial Panel on the basis that they involve 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.<sup>5</sup>

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<sup>1</sup> Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (“Law”), Unless otherwise indicated, all references to “Article(s)” are to the Law.

<sup>2</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chamber (“Rules”). Unless otherwise indicated, all references to “Rule(s)” are to the Rules.

<sup>3</sup> Confidential Redacted Version of Decision on Request on Variation of Time Limits concerning Retention of Evidence, KSC-BC-2018-01/F00611, 12 March 2024 (“Impugned Decision”). A confidential lesser redacted version was circulated, further to a Defence request, on 18 April 2024.

<sup>4</sup> Prosecution Request for Retention of Evidence (F00484), KSC-BC-2018-01/F00566, 2 February 2024, confidential, (“Prosecution Request”).

<sup>5</sup> *The Prosecutor v. Hysni Gucati and Nasim Haradinaj*, Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect, KSC-BC-2020-07/F00423, 8 November 2021 (“Gucati & Haradinaj Decision”), para. 11; *The Prosecutor v. Hysni Gucati and Nasim Haradinaj*, Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021, para. 10.

4. Rule 77(2) of the Rules further provides that certification shall be granted 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<sup>6</sup> (“Certification Test”).
5. In order for the Pre-Trial Judge or Trial Panel to be in a position to verify whether the requirements of Rule 77(2) of the Rules have been met, a Party must identify the issue(s) for which leave to appeal is sought in a way that these requirements can be established by the Party seeking certification and verified by the Panel. Such issues must emanate from the ruling concerned and cannot amount to abstract questions or hypothetical concerns.<sup>7</sup>
6. The first prong of the Certification Test contains two alternatives. The issue must be shown to significantly affect (i) the fair and expeditious conduct of proceedings, or (ii) the outcome of the trial. Use of the term “significantly” in the wording of the first prong of the Certification Test indicates that an applicant must not only show how the issue affects the fair and expeditious conduct of proceedings, or the outcome of the trial, but must also demonstrate the (significant) degree to which these factors are affected. The issue must be one likely to have repercussions on either of the above two elements.<sup>8</sup>
7. The “fair and expeditious conduct of proceedings” is generally understood as referencing the general requirement of fairness. One of the fundamental

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<sup>6</sup> Gucati & Haradinaj Decision, para. 12.

<sup>7</sup> Gucati & Haradinaj Decision, para. 16.

<sup>8</sup> Gucati & Haradinaj Decision, para. 17.

aspects of this requirement is that proceedings should be adversarial in nature and that there should be equality of arms between the parties. Expeditionousness is an attribute of a fair trial and is closely linked to the requirement that proceedings should be conducted within a reasonable time.<sup>9</sup>

8. Alternatively, the first prong of the Certification Test may be met if the issue significantly affects the outcome of the trial. Thus, it must be considered whether a claimed error is likely to impact the outcome of the case. The exercise involves a forecast of the consequence of such an occurrence.<sup>10</sup>
9. The second prong of the Certification Test is an additional limiting factor. Because of the test's cumulative nature, the failure of an applicant to establish the first prong of the test would normally exempt the Panel from considering whether the second prong has been met. The second prong 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 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.<sup>11</sup>
10. Lastly, certification is not concerned with whether a decision is correctly reasoned, but whether the Certification Test has been met.<sup>12</sup> Consequently, the Defence does not include argument on the merits of the appeal at this stage.

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<sup>9</sup> Gucati & Haradinaj Decision, para. 18.

<sup>10</sup> Gucati & Haradinaj Decision, para. 19.

<sup>11</sup> Gucati & Haradinaj Decision, para. 20.

<sup>12</sup> Gucati & Haradinaj Decision, para. 21.

### III. SUBMISSIONS

11. The Defence submits that the identified appeal issue satisfies both prongs of the Certification Test. It emanates from the Impugned Decision, it does not amount to mere disagreement with the Single Judge, it affects the fair and expeditious conduct of the proceedings or the outcome of any future trial, and its immediate resolution by the Court of Appeals Panel would materially advance the proceedings.

*(a) The appeal issue arises from the Impugned Decision*

12. The appeal issue emanates directly from the Impugned Decision. In its response to the Prosecution Request, the Defence argued that the application by the SPO for an extension of time *was itself* out of time, and that no request for an extension of time to file the Prosecution Request had been made under Rule 9(5)(a).<sup>13</sup> The Defence submitted that the only procedure available to the SPO if it felt that further retention was necessary for the ongoing investigation or for future proceedings was to go back to the Single Judge in a timely manner and request an extension of authorisation to retain.<sup>14</sup> The Defence argued that this should have been done in adequate time for the matter to be fully litigated and for the Single Judge to make a reasoned ruling on any extension request *before* the end of the relevant three-month period.<sup>15</sup> It was further submitted that if there were concerns that this would not allow enough time for the application to be litigated within the time limits provided for by Rule 76, it was always open to the SPO to request that the Single Judge reduce

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<sup>13</sup> Kilaj response to Prosecution request for retention of evidence, KSC-BC-2018-01/F00579, 15 February 2024, confidential (“Defence Response”), para. 9

<sup>14</sup> Defence Response, para. 9

<sup>15</sup> Defence Response, para. 9.

the applicable time limits in accordance with Rule 9(5)(a). The SPO did not do so.<sup>16</sup> The Defence's position was that the Prosecution Request was not filed in a timely manner.

13. The Single Judge addressed the Defence's submissions at paragraph 20 of the Impugned Decision. Although he found that the Prosecution Request had been made within the applicable three-month period, he recalled that, pursuant to Rule 76 of the Rules, applications for extension of time must be filed sufficiently in advance to enable the Panel to rule on the application before the expiry of the relevant time limit. The Single Judge noted that the Prosecution Request was only filed on the working day before the expiry of the applicable time limit, but found that, in the circumstances, the Prosecution Request had been "filed in a timely manner."<sup>17</sup> The appeal issue goes directly to this finding.

*(b) The appeal issue does not amount to a mere disagreement*

14. The appeal issue is not simply a disagreement with the Single Judge's finding. On the Single Judge's own analysis, the Prosecution had not complied with Rule 76, which deals with applications for extension of time using the imperative term "shall". The Prosecution had demonstrably not made its Request sufficiently in advance to enable the Single Judge to rule on the application before the expiry of the time limit. Nor had the SPO bothered to make an application under Rule 9(5)(a) to vary the time limit to make the Prosecution Request. The Single Judge took into account mitigating (and, it is submitted, extraneous) factors that had not been pleaded by the Prosecution

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<sup>16</sup> Defence Response, para. 9.

<sup>17</sup> Impugned Decision, para. 20.

in finding that the Request was filed in a timely manner. The Defence does not merely disagree with the Single Judge; rather, it is submitted that the Single Judge erred in fact and/or in law in arriving at the decision that underpins the appeal issue.

*(c) The appeal issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial*

15. There is a fundamental issue of fairness at the heart of this application. The Prosecution Request ultimately related to the continued retention of four [REDACTED], (“Four Items”). The Single Judge acknowledged that the retention of the Four Items amounted to a “continued interference with the right to privacy of Mr Kilaj” but that in the circumstances, such interference was proportionate.<sup>18</sup> So long as the continued retention of the Four Items remains judicially authorised, it is lawful, the SPO can [REDACTED], and can exploit at trial any material or [REDACTED]. Conversely, if the judicial authorisation for continued retention is found to be fatally vitiated by error, the lawfulness of the retention of the [REDACTED] evaporates away. The only remedy for unlawful retention of private property is its return to its owner. It follows that any [REDACTED] of the unlawfully retained [REDACTED] is similarly unlawful, as are the fruits of any unlawful [REDACTED].
16. The fairness of any future trial will be compromised were the Prosecution to be allowed to continue to unlawfully retain Mr Kilaj’s private property and potentially [REDACTED] that unlawfully held property evidence upon which it later sought to rely at trial. Thus, it is submitted, the appeal issue significantly affects the fair and expeditious conduct of the proceedings.

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<sup>18</sup> Impugned Decision, para. 27.

17. In the alternate, it is necessary for the Single Judge to undertake a forecast of the following occurrence: if unlawfully obtained incriminating evidence [REDACTED] that the Prosecution had no lawful basis to retain were used at trial by the Prosecution, and relied on by the Trial Panel in convicting Mr Kilaj, it is self-evident that this would be a state of affairs that had significantly affected the outcome of the trial.

18. In both scenarios, the appeal issue is significant. The first prong of the Certification Test is amply met.

*(d) Immediate resolution of the appeal issue would materially advance the proceedings*

19. The second prong of the Certification Test is also met. Prompt referral of the appeal issue to the Court of Appeals Panel will settle the question of whether the Single Judge erred in fact and/or in law in finding that the Request was filed in a timely manner. This will in turn materially advance the proceedings because the Court of Appeals Panel will have the opportunity to provide clarity on whether the SPO's application for a variation of time limits concerning the retention of the Four Items should have been recognised by the Single Judge as timely, and thus whether retention of the Four Items is properly subject to judicial authorisation. Resolving this issue in the Defence's favour will rid the "judicial process of 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.<sup>19</sup> In concrete terms, if it is held that the Prosecution cannot lawfully retain the Four Items, and therefore cannot lawfully [REDACTED] from the Four Items, then any such material

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<sup>19</sup> Gucati & Haradinaj Decision, para. 20.



cannot lawfully be used in support of an eventual amended indictment. This could significantly impact on the contours of the SPO's case against Mr Kilaj, and even on the Single Judge's decision on the confirmation of charges.

20. In short, the instant situation is a paradigm example of when an identified issue should be promptly referred to the Court of Appeals Panel to settle the question because it will undeniably materially advance the proceedings. The second prong of the Certification Test is satisfied.

#### IV. REMEDY

21. For the foregoing reasons, the Defence seeks leave to appeal the single identified issue.

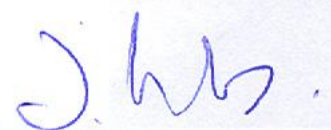
Respectfully submitted.

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The Hague, The Netherlands