

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: 15 February 2024

Language: English

Classification: Public

**Public redacted version of Kilaj response to
Prosecution request for retention of evidence**

Specialist Prosecutor's Office
Kimberly P. West

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I. INTRODUCTION

1. The Defence for Mr Isni Kilaj (“Defence”, “Suspect”) hereby responds to the Prosecution’s request¹ for retention of 11 items seized pursuant to the Search and Seizure Decision.² The Request should be denied in respect of four of the items because the Single Judge’s authorisation for further retention lapsed at 00:00 hours on 2 February 2024. The Request was submitted on Friday, 2 February 2024 at 17:10 hours, and notified on Monday, 5 February 2024.

II. APPLICABLE LAW

2. Rule 32(1)(b) and (c) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chamber (“Rules”) provides that:

Material collected or seized as a result of any measure pursuant to Rule 34 to Rule 41 shall be appropriately retained, stored and protected. Any decision by a Panel authorising such measures shall include:

[...]

(b) the duration of the retention of the collected or seized material and, where applicable, the procedure for their preservation under Rule 71; and

(c) instructions and a timeline for the return or destruction, where applicable, of the collected or seized material.

3. Rule 33(1)(a)(ii) provides that:

Material collected or seized pursuant to Rule 34 to Rule 41 shall be returned or destroyed:

(a) Immediately,

[...]

(ii) if such material is unlawfully obtained, in particular where a Panel denies approval or fails to render a decision on an order of the Specialist Prosecutor pursuant to Rule 36 or Rule 38[.]

¹ Prosecution request for retention of evidence (F00484), KSC-BC-2018-01/F00566, 2 February 2024, confidential (“Request”).

² Confidential Redacted Version of Decision Authorising Search and Seizure [REDACTED], KSC-BC-2018-01/F00484/CONF/RED, 20 October 2023, Strictly Confidential and *Ex Parte* (“Search and Seizure Decision”), para. 50.

4. At paragraphs 50-51 of the Search and Seizure Decision, the Single Judge stated (in relevant part):

50. The Single Judge finds that a three (3)-month time-frame from the execution of the Searches and Seizures is sufficient for the extraction and review of the seized material. At the end of this period, the items seized, including any mobile phone, shall be duly returned to Mr Kilaj [...], unless it is requested that their further retention is necessary for the ongoing investigation or future proceedings.

51. Furthermore, if the SPO decides that other seized material or data extracted from the seized items is necessary for the ongoing investigation or future proceedings, it may retain it in accordance with Rule 33(1)(b) of the Rules until such time that it is no longer relevant for the purpose for which it was obtained. [...]

III. SUBMISSIONS

5. The Defence acknowledges the SPO's assessment that six items are not relevant to its investigations, that data on three other items [REDACTED], and that consequently these nine items will be returned to Mr Kilaj.³ The Defence and SPO have already communicated about the modalities for return of these items.
6. The Defence makes no submissions in respect of the seven items that have been assessed to "contain information relevant to the SPO's ongoing investigations".⁴

³ Request, para. 3.

⁴ Request, para. 4.

7. In respect of the final four items referred to in the Request,⁵ that is, (i) [REDACTED],⁶ (ii) [REDACTED],⁷ (iii) [REDACTED],⁸ and (iv) [REDACTED],⁹ (“Four Items”) the Defence objects to their retention and submits that they should be returned to Mr Kilaj without delay.

A. THE SPO IS OUT OF TIME

8. The Single Judge found that that a three-month time-frame from the execution of the Searches and Seizures was sufficient for the extraction and review of the seized material. It is common ground that the seizure of the Four Items occurred on 2 November 2023.¹⁰ The last day of that three-month time-frame, therefore, was 1 February 2024. It is not 2 February 2024; that day is the first day of the *fourth* month following the search and seizure.
9. The only procedure available to the SPO if it felt that “further retention [was] necessary for the ongoing investigation or future proceedings”¹¹ was to go back to the Single Judge in a timely manner and request an extension of authorisation to retain. This should have been done, it is submitted, 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 three-month period. This process ought to have commenced, therefore, no later than 1 January 2024. 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 the

⁵ See para. 7.

⁶ [REDACTED]

⁷ [REDACTED]

⁸ [REDACTED]

⁹ [REDACTED]

¹⁰ Request, para. 2.

¹¹ Search and Seizure Decision, para. 50.

applicable time limits in accordance with Rule 9(5)(a). The SPO chose not to do so.

10. The SPO may seek to argue that all it was required to do was submit an application for an extension of the authorisation to retain before the end of the three-month time-frame, and that it was not obliged to take steps to permit the Single Judge to be in a position to rule on an extension motion before the 1 February deadline. Such a submission should be rejected. Firstly, even if the SPO were right, by filing its application on 2 February 2024 (and after the 16:00 hours deadline for same-day notification at that), the Request is still out-of-time. The deadline was 1 February 2024 and the SPO has not bothered to raise any preliminary arguments under Rule 9(5).
11. Secondly, if the SPO's approach were to be accepted as valid, it would nullify the essence of the Single Judge's finding that three months was sufficient to extract and review the seized material. It would unacceptably present the Court and the Defence with a *fait accompli* and result in the SPO securing, without authorisation, the very extension to the retention regime that they seek, and which is strongly opposed. Judicial authority to oversee the retention of the seized material would be rendered nugatory. This *fait accompli* point applies, of course, irrespective of whether the deadline applies to the delivery of a judicial decision on an extension application following full briefing by the Parties, or simply to the making of an extension application by the Prosecution. In both scenarios, the effect of the Prosecution's cavalier approach to the Single Judge's order is that an extension is *de facto* obtained whereas the Four Items should have been returned to Mr Kilaj on or very shortly after 2 February 2024.
12. Unauthorised retention of the Four Items from 2 February 2024 is unlawful.

B. THE SPO HAS NOT ACTED WITH DILIGENCE OR EXPEDITIOUSNESS

13. The Single Judge will recall that the issue of the time it is likely to take for electronic devices seized from Mr Kilaj's homes to be processed and interrogated was foreshadowed by the Defence during the First Appearance on 4 November 2023:

[A]part from the things that were alluded to in private session that were seized from the accused were other items that traditionally one would expect would need to be interrogated. And with the best will in the world, it's just very difficult to see how this is going to be done in the space of a few weeks. We must be talking in terms of months, not weeks, and, consequently, that makes it all the more prejudicial for Mr. Kilaj to remain in detention whilst waiting for the Prosecution to get on and do their job.¹²

14. The Defence expanded on the point later the same day in its written response to the Prosecution request for Mt Kilaj's continued detention:

The Defence notes that, in addition, it might be expected that the Prosecution will need to interrogate a number of electronic devices seized at the time of Mr Kilaj's arrest. These include: (i) [REDACTED]; (ii) [REDACTED]; (iii) [REDACTED]; (iv) [REDACTED]; (v) [REDACTED]; (vi) [REDACTED]; (vii) [REDACTED]; (viii) [REDACTED]; and (ix) [REDACTED]. *Experience shows that interrogation of such a quantity of electronic devices and a proper analysis of any information extracted therefrom will take time, and likely a substantial amount of time. It would be sanguine in the extreme to presume this could be achieved in a matter of weeks, or even a few months. Realistically, the timeline must be estimated in terms of many months, and this is even before an indictment can be prepared.*¹³

15. The Prosecution went to some lengths to seek to reassure the Judge during the First Appearance:

We are working as expeditiously as we can to analyse these materials [...].¹⁴

¹² Transcript (open session), 4 November 2023, p. 187.

¹³ Corrected Version of Kilaj Defence response to "Confidential redacted version of 'Prosecution request for continued detention of Isni KILAJ'", KSC-BC-2018-01/F00497/COR, 4 November 2023, confidential (emphasis added). A public redacted version was filed on 8 November 2023.

¹⁴ Transcript (open session), 4 November 2023, p. 181.

So just to go over some of the steps that we're going to need to do in the coming weeks. We need to analyse all of the materials obtained from the search of the residence [...].¹⁵

So these are some of the issues that arise for us, but we're working expeditiously through them [...].¹⁶

16. Notwithstanding these soothing words, the Prosecution has not acted expeditiously with regards to analysis of the contents of the Four Items. According to the Prosecution, imaging of the Four Items is still pending with the external forensic institute.¹⁷ It is unclear what steps, if any, the SPO has taken to inform itself of when the external forensic institute's work could start, and more importantly, conclude. There is no indication of when the SPO will be in a position to start its analysis of the contents of the Four Items, much less when any such analysis will be completed. What should be clear, however, is that it was the SPO's responsibility to assure itself that the external forensic institute could work in a way that ensured compliance with the Single Judge's three-month time-frame. If the Four Items were transferred in November 2023, it was the SPO's responsibility to secure an undertaking that the requisite work would be completed by the forensic institute in enough time for the SPO to carry out and complete its analysis before 1 February 2024.

17. If the SPO had been more diligent in terms of knowing when the external forensic institute's work could start and conclude, it would have been in a better position to either (i) terminate its engagement with that institute and find one that could do the work in a way that ensured compliance with the three-month time-frame, or (ii) make a timely application before the Judge for an extension of that three-month deadline. The Prosecution did neither.

¹⁵ Transcript (open session), 4 November 2023, p. 186.

¹⁶ Transcript (open session), 4 November 2023, p. 187.

¹⁷ Request, para. 7.

18. It is respectfully submitted that this lack of diligence and expeditiousness should be taken into account by the Single Judge in his consideration of any future – belated – application by the SPO, or indeed *proprio motu*, under Rule 9(5)(b) for recognition of the Request as valid notwithstanding the expiration of the time limit. The Defence say that this lack of diligence and expeditiousness strongly militate against the success of any such application.

IV. CONCLUSION

19. For the foregoing reasons, the Defence respectfully submits that the Request to retain the Four Items be dismissed.

Word count: 1,938



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Thursday, 15 February 2024

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