

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: 30 April 2024

Language: English

Classification: Public

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

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I. INTRODUCTION

1. The Defence for Mr Isni Kilaj (“Defence”, “Suspect”) responds to the Prosecution’s Second Request¹ for retention of four items (“Pending Items”) seized pursuant to the Search and Seizure Decision,² and Decision F00611.³ The Request should be denied in its entirety because the Prosecution has failed to demonstrate good cause for the extension of the Single Judge’s time limit.

II. SUBMISSIONS

2. The Pending Items, namely, (i) [REDACTED],⁴ (ii) [REDACTED],⁵ (iii) [REDACTED],⁶ and (iv) [REDACTED],⁷ were seized on 2 November 2023. The Single Judge found that a three-month time-frame from the execution of the Searches and Seizures was sufficient for the extraction and review of any seized material. That authorisation was then extended by a further three months, to 3 May 2024.⁸ Despite now having had six months to extract, or have extracted, and review the contents of the Pending Items, the Prosecution does not even have the items back in its custody to begin the process of analysis

¹ Prosecution request for retention of evidence (F00611), KSC-BC-2018-01/F00643, 24 April 2024, confidential (“Second 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

³ Confidential Redacted Version of Decision on Request on Variation of Time Limits concerning Retention of Evidence, KSC-BC-2018-01/F00611/CONF/RED, 12 March 2024 (“Decision F00611”), para. 29. A confidential lesser redacted version was filed on 18 April 2024 further to a Defence request (F00620).

⁴ [REDACTED]

⁵ [REDACTED]

⁶ [REDACTED]

⁷ [REDACTED]

⁸ Decision F00611, para. 29

and assessment, and is not in a position to say with any precision when that process will start, let alone end.

3. Before the Defence sets out its arguments on the merits, it is worth noting that the Prosecution appears to suggest that it relies on the Single Judge's finding at paragraph 24 of Decision F00611 as support for the proposition that further retention is necessary *because* it has not yet been able to analyse the contents of the Pending Items.⁹ The Single Judge did not, of course, find that as a matter of law the Prosecution's inability to analyse the contents of the Pending Items was in and of itself enough to order further retention. As is made clear from the citation at footnote 4, it is the *request* for further retention – a request which can be granted or denied – that is necessary. The mere fact that the Prosecution has not been able to review the contents of the Pending Items is not sufficient to establish the necessity for further retention.

4. It is submitted that the Prosecution's lack of diligence and expeditiousness in obtaining and analysing the data, if any, contained in the Pending Items is self-evident. Acknowledging that the imaging of, and extraction of data from, the Pending Items has been sub-contracted out to an external forensic institute,¹⁰ the Prosecution nevertheless cannot abdicate its ultimate responsibility for ensuring that the extraction and review of the contents of the Pending Items is completed within the (already extended) time-frame established by the Single Judge. The responsibility lies with the Prosecution for ensuring that the external forensic institute does its work in a timely manner; it has, however, failed to meet that responsibility.

⁹ Second Request, para. 2 and footnote 4

¹⁰ Prosecution request for retention of evidence (F00484), KSC-BC-2018-01/F00566, 2 February 2024, confidential ("First Request"); Second Request, para. 2

5. The Prosecution's lack of diligence was first raised by the Defence in its response to the First Request,¹¹ and the Defence reiterate its arguments here. The issue of the time likely required for the electronic devices seized from Mr Kilaj's homes to be processed and interrogated was anticipated by the Defence a matter of days of his arrest during the First Appearance on 4 November 2023.¹²

6. The Defence expanded on the point later the same day in its written response to the Prosecution's request for Mr 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

7. 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

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

¹¹ Kilaj response to Prosecution request for retention of evidence, KSC-BC-2018-01/F00579, 15 February 2024, confidential ("Response to the First Request"), paras 13-18

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.

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

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

8. The Defence submitted in its Response to the First Request that it was:
- 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 [Pending] Items, much less when any such analysis will be completed. [...] If the [Pending] 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.
9. The Defence argued, and repeats that argument here, that had the Prosecution bothered to take any steps to establish with the external forensic institute when its work could start, and more importantly, conclude, it would have been in a position to terminate its engagement with that institute, in the event of an unsatisfactory response, and find one that could do the work in a way that ensured compliance with the Single Judge's time-frame. The Prosecution did not bother to take such steps, and consequently never considered whether it could or should find an alternative institute that could do the work in time. It is submitted that this demonstrates a lack of diligence and expeditiousness on the part of the SPO.
10. The Prosecution made no effort in its Reply to the Response to the First Request to answer these questions. It simply stated that the items were delivered to the external forensic institute expeditiously, that – in essence – “these things take time”, and that Mr Kilaj suffers no prejudice as a result.¹⁷ It is submitted that lack of prejudice is irrelevant to the quite separate question of whether, objectively, good cause for an extension of a time limit has been demonstrated. The Defence also notes that the Single Judge made no reference to the Reply or the arguments made therein in Decision F00611.

¹⁷ Prosecution reply regarding request for retention of evidence (F00484), KSC-BC-2018-01/F00586, 20 February 2024, confidential (“Reply”), para. 3

11. No answers to these same questions are forthcoming, over two months later, in the Second Request. Silence, wilful or otherwise, on the part of the Prosecution speaks volumes in terms of the lack of any good and plausible answers or explanations. The lack of any good and plausible answers or explanations demonstrates the failure to establish good cause for the extension of the time limit.

(i) *Lack of diligence – [REDACTED] and [REDACTED]*

12. The Defence notes from the Second Request that the SPO “anticipates” the forensic imaging of the [REDACTED] and [REDACTED] will be complete and the items returned “during the week of 29 April 2024”.¹⁸ But the Prosecution declines to provide evidence of the basis of this “anticipation”. The following questions are unanswered: has the Prosecution been assured by the external forensic institute that it will return the Pending Items in the week of 29 April? Or is the information from the institute more along the lines that it will use its best, or reasonable, endeavours to return the Pending Items in the week of 29 April? Or is the week of 29 April simply aspirational, nothing more concrete than wishful thinking on the part of the Prosecution?

13. Even if the Prosecution does receive the [REDACTED] and [REDACTED] during the week of 29 April 2024, no indication is given as to how long the “required relevance analysis” will take before a decision can be taken on further retention or their return to Mr Kilaj. While it is accepted that a precise answer cannot necessarily be given before the SPO sees the forensic images of these items, experience will permit the Prosecution to give some idea of the time likely needed, whether that be one or two weeks, or one or two months,

¹⁸ Second Request, para. 3

or more. However, this information has not been provided, the question remains vague and open-ended, and yet the Prosecution evidently feels entitled to ask the Single Judge to find that good cause for the extension of the time limit has been established.

(ii) *Lack of diligence – [REDACTED] and [REDACTED]*

14. The position regarding the [REDACTED] and [REDACTED] is more chaotic still. It is clear that the forensic imaging/copying of these two devices has not even started. The Prosecution asserts, without evidence, that the process “[REDACTED]”,¹⁹ but fails to state whether its chosen external forensic institute even [REDACTED]. Has it asked? If it has asked, [REDACTED], why has the Prosecution even raised the issue in the Second Request? If it has asked, [REDACTED], why has the Prosecution not retrieved these two devices from its first choice of forensic institute and found an alternative institute that [REDACTED] *can* do the work in a way that ensures compliance with the Single Judge’s time-frame? The responsibility here lies with the Prosecution; blame cannot be heaved onto the shoulders of the external forensic institute for the delay.
15. The Defence notes from the use of the term [REDACTED] in paragraph 4 of the Second Request that availability of [REDACTED] is just one factor, among others, upon which the ability to [REDACTED]. The Prosecution does not bother to indicate how many other dependent factors there are, what these other factors are, and how these factors impact on the ability of its first choice forensic institute to do the work it has been commissioned to do in a way that ensures compliance with the Single Judge’s time-frame.

¹⁹ Second Request, para. 4 (underlining added)

16. However, of greatest concern, and the factor that fatally undermines the Prosecution's foundation for submitting that good cause for the extension of the time limit has been established, is the suggestion that the delay in accessing [REDACTED] and [REDACTED] are due to the Prosecution [REDACTED]. This is the first time the Prosecution has raised this as an issue. It was not advanced in the First Request. Nor has the Prosecution at any time written to the Defence [REDACTED]. The Single Judge may think that is the first thing a diligent and expeditious SPO would do. Its failure to do so demonstrates the extent to which the Prosecution has not been diligent or expeditious.
17. But the situation is in fact more serious: it is untrue that the Prosecution [REDACTED]. The truth is that [REDACTED] seizure of the devices. [REDACTED]. The SPO has been in possession of this information and should have passed it on to the external forensic institute six months ago. The fact it did not demonstrates conclusively its lack of diligence and expeditiousness, and therefore the lack of good cause.
18. The Defence submits that it is now too late [REDACTED]. The Prosecution had its chance over the course of the last six months, but missed that chance through what, regrettably, can only be described as incompetence.
19. It goes without saying that incompetence cannot be relied on by a Party seeking to establish good cause; incompetence is the opposite of good cause. The Single Judge should put an end to this now and order the immediate return of the Pending Items to Mr Kilaj.

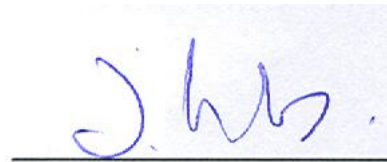
III. CONCLUSION

20. For the foregoing reasons, the Defence respectfully submits that the Second Request to retain the Pending Items be dismissed.

Word count: 2,369



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Tuesday, 30 April 2024
The Hague, The Netherlands