



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: **KSC-BC-2023-10**
Specialist Prosecutor v. Sabit Januzi, Ismet Bahtijari and
Haxhi Shala

Before: **Pre-Trial Judge**
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

Date: 12 February 2024

Language: English

Classification: Public

Public redacted version of 'Prosecution request for direction to Counsel to comply
with their obligations with confidential Annexes 1-4'

Specialist Prosecutor's Office

Kimberly P. West

Counsel for Sabit Januzi

Jonathan Elystan Rees

Counsel for Ismet Bahtijari

Felicity Gerry

Counsel for Haxhi Shala

Toby Cadman

1. Specialist Counsel are required *inter alia* to safeguard their client's best interests at all times, and to perform their duties on behalf of their client until termination or replacement. The Specialist Prosecutor's Office ('SPO') is deeply concerned by indications that Counsel for Bahtijari, and possibly also Januzi, are not providing active representation to their clients, seemingly for financial reasons.¹ Communications from Counsel for Bahtijari suggest that this situation may have been continuing for up to two weeks, without steps having been taken to even notify the Registrar.

2. The SPO requests that Counsel be directed to comply with their obligations under the Directive² and Code of Conduct,³ or failing this to refer the matter to the Registrar for the appointment of duty counsel.

A. PROCEDURAL HISTORY

3. On 5 February 2024, the SPO circulated to all Accused via *inter partes* email a list of proposed agreed facts.⁴

4. On 6 February 2024, Counsel for Januzi acknowledged receipt of the list and wrote, [REDACTED].⁵

5. Also on 6 February 2024, Counsel for Bahtijari responded as follows: [REDACTED].⁶

6. That same day, the SPO responded to Counsel for Januzi and Bahtijari, and wrote, 'Thank you both for your updates. We trust that you have informed the

¹ [REDACTED]

² Registry Practice Direction: Directive on Counsel, KSC-BD-04-Rev1/2021, 28 April 2021 ('Directive'), see especially Section 16.

³ Registry Practice Direction: Code of Professional Conduct – for Counsel and Prosecutors Before the Kosovo Specialist Chambers, KSC-BD-07-Rev1/2021, 28 April 2021 ('Code of Conduct'), see especially Articles 23-25.

⁴ Annex 1.

⁵ Annex 1.

⁶ Annex 2.

Registry and/or Pre-Trial Judge as appropriate. If not, our office may be obliged to make each aware of this development.’⁷

7. Counsel for Bahtijari responded with the following information: ‘[REDACTED]’⁸

8. On 9 February 2024, Counsel for Bahtijari provided the following update, suggesting that it had been two weeks since Counsel had stopped work on behalf of Bahtijari:

[REDACTED].⁹

9. Shortly afterwards on 9 February 2024, Counsel for Bahtijari addressed a largely duplicative message to the Registrar, and added:

[REDACTED].¹⁰

10. Also on 9 February 2024, Counsel for Januzi responded to the SPO’s email dated 6 February asking if Counsel had informed the Registry and/or Pre-Trial Judge of the situation. Counsel wrote, ‘[REDACTED]’¹¹

B. SUBMISSIONS

11. The Directive clearly contemplates that the suspension or early termination of the representation of an Accused before the Specialist Chambers by Counsel is a decision to be made by the Registrar – not independently by Counsel – upon a showing of good cause by Counsel or the Accused.¹² Chief among the considerations to be weighed by the Registrar in any circumstance where an Accused’s representation may be suspended is ‘the importance of continuity of representation.’¹³

⁷ Annex 2.

⁸ Annex 2.

⁹ Annex 2 (emphasis in the original).

¹⁰ Annex 3.

¹¹ Annex 4.

¹² Directive, Section 16(2)(b). *See also* Code of Conduct, Art. 23(2)(a).

¹³ Directive, Section 16(1). *See also* Directive, Section 16(4).

12. The Code of Conduct also requires Counsel to ‘act in and safeguard the Client’s best interests’ and ‘conclude all matters undertaken for the Client within the scope of their legal representation’ ‘until the representation is . . . terminated in accordance with Section 16 of the Direction.’¹⁴ Elsewhere, the Code of Conduct elaborates that the duties of Counsel continue until Counsel can be replaced, until termination, or during any overlapping period, except for those duties which subsist past the date of termination, as set forth in Directive Section 16(4) and elsewhere.¹⁵

13. It follows from the above that Counsel may not suspend their services before the Registrar has (i) been presented with an application setting forth good cause for suspending or terminating the Accused’s representation, and (ii) made a formal determination. Counsel may then nevertheless be required to continue to assist in the representation for up to forty-five days after replacement Counsel has been assigned and appointed.

14. Co-Counsel, who have been appointed for both Januzi and Bahtijari, are also obliged to continue in their representation of the Accused until such a time as they have been officially relieved by the Registrar. For Co-Counsel to suspend their services, Counsel must present the proposed termination of Co-Counsel’s contract to the Registrar and ‘demonstrate that the termination may be accomplished without material adverse effect on the interests of the client(s) and the duration of the proceedings.’¹⁶

15. These established procedures are designed to avoid unnecessary delay, uncertainty, and waste of resources, and, importantly, ensure that the Registrar and Pre-Trial Judge have all necessary information with regard to the representation of the Accused.¹⁷

¹⁴ Code of Conduct, Art. 23(1), 24(1)(b)-(c).

¹⁵ Code of Conduct, Art. 25(1), 25(3)(a).

¹⁶ Directive, Section 18(6).

¹⁷ See, similarly, ICTY, *Prosecutor v. Blagojević*, IT-02-60-AR73.4, Public and redacted reasons for decision on appeal by Vidoje Blagojević to replace his defence team, 7 November 2003, para.7 (considering that

16. The recent communications from Counsel indicate that they are not providing active representation to their clients, or are only doing so in a limited capacity, thus resulting in a *de facto* suspension of services. For example, Counsel for Bahtijari has indicated: (i) in response to proposed agreed facts, that she is '[REDACTED]' on the matter; (ii) that despite many filings over the past two weeks,¹⁸ it is '[REDACTED]'; and (iii) that she will only attend the upcoming status conference '[REDACTED]' but otherwise is '[REDACTED]'. Indeed, Counsel for Bahtijari stated that '[REDACTED]'. Similarly, Counsel for Januzi indicated that '[REDACTED]'¹⁹

17. That Counsel permitted this situation to continue seemingly without even informing the Registrar, let alone utilising (as applicable) the comprehensive framework for legal aid, and/or duty counsel representation,²⁰ operated by the Specialist Chambers is deeply concerning.²¹

18. Regardless of the circumstances facing their Counsel, neither Januzi nor Bahtijari should suffer gaps in representation, whether for two weeks or a day. Counsel must expeditiously make the appropriate request of the Registrar, discharge their burden to show good cause, and have their requests granted by the Registrar before suspending services.

the competence and responsibilities of the Registrar in representation matters should be respected, and that following the established procedure may avoid extended delays to the detriment of all parties).

¹⁸ Since 24 January 2024, two weeks prior to this 9 February 2024 notification, there have been 3 disclosures and 17 confidential or public filings made in Case 10, including a request for the retention of evidence seized from Bahtijari, and the SPO's Rule 102(3) Notice – which required Counsel to request Rule 102(3) disclosure on behalf of Bahtijari by 9 February 2024.

¹⁹ [REDACTED]

²⁰ See Registry Practice Direction: Legal Aid Regulations, KSC-BD-25/2020, 3 September 2020 ('Legal Aid Regulations').

²¹ [REDACTED] In this regard, the SPO notes that other courts have found that consideration by the President of a defence request for an increase in funding does not necessarily warrant postponement of a trial in order to effectively safeguard an Accused's rights to a fair trial. See IRMCT, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.7, Public redacted Decision on appeal from decision on motion for further postponement of trial, 31 March 2010, paras 21-22.

19. Mindful that representation matters are firmly within the purview of the Registrar, the SPO nevertheless requests that the Pre-Trial Judge address and clarify certain matters with Counsel for the Accused at the fourth status conference:

- a. First, to state whether they are actively representing their client or have suspended or reduced their services (either at present or at any point in the past);
- b. Second, to state whether any filings since the start of their representation have gone unreviewed because of the stated lack of funding;
- c. Third, to remind Counsel of their obligations to continue in the active representation of their clients until such a time as they are relieved of those or any other obligations by the Registrar, including by participating fully at the status conference;²² and
- d. Fourth, to ascertain whether Counsel plan to make any applications to the Registrar in connection with the current situation, what relief they plan to seek and when those applications will be made.

20. Finally, in the event that Counsel decline to make any applications to the Registrar and also do not intend to actively represent their clients, the SPO would ask the Pre-Trial Judge to refer the matter to the Registrar for the appointment of Duty Counsel.²³

C. CLASSIFICATION

21. This filing is classified as confidential because it refers to information related to ongoing confidential proceedings. A public redacted version of the filing will be filed.

²² The SPO recalls that when Duty Counsel for Bahtijari indicated at the third status conference that his role was limited due to the imminent appointment of Counsel, the Pre-Trial Judge directed him to 'assume the full functions of [his] office. There is no limited contribution in the framework for assistance of counsel . . . [Y]ou are the lawyer of Mr. Bahtijari and you should assume the totality of the functions until further decision.' Transcript (Status Conference), 14 December 2023, p.101, lines 13-19.

²³ Directive, Section 17(2); Legal Aid Regulations, Reg. 21(1).

Word count: 2,208



Kimberly P. West

Specialist Prosecutor

Monday, 12 February 2024

At The Hague, the Netherlands.