

In: KSC-BC-2023-10

The Prosecutor v. Sabit Januzi and Ismet Bahtijari

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Fidelma Donlon

Filing Participant: Specialist Counsel for Sabit Januzi

Date: 15 November 2023

Language: English

Classification: Confidential

**Submissions re F00032 Prosecution Request for an Order
on behalf of Sabit Januzi**

Specialist Prosecutor

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Counsel for Sabit Januzi

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Counsel for Ismet Bahtijari

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I. INTRODUCTION

1. On 12 October 2023, the Prosecution requested an order to authorize the search and seizure of a phone said to belong to the Accused in the possession of the Detention Centre ('Request')¹.
2. Following an order for further submissions from the Prosecution in relation to the Request², the Prosecution supplemented the Request ('Prosecution Submissions')³.
3. It is hereby submitted that the Request should be refused.

II. CHRONOLOGY

4. On 11 September 2023, the Prosecutor submitted for confirmation an indictment against the Accused⁴.

5. [REDACTED]

¹ KSC-BC-2023-10/F00032/CONF/RED, *Confidential Redacted Version of 'Prosecution request for an order'*, Prosecutor, 12 October 2023, Confidential

² KSC-BC-2023-10/F00079, *Order for Further Submissions in Relation to Filing F00032*, Pre-Trial Judge, 26 October 2023, Confidential

³ KSC-BC-2023-10/F00095/COR/CONF, *Confidential Redacted Version of 'Corrected Version of "Prosecution Further Submissions Pursuant to Order F00079"'*, Prosecutor, 8 November 2023, Confidential

⁴ KSC-BC-2023-10/F00002/CONF/RED, *Confidential Redacted Version 'Submission of Indictment for Confirmation and Related Requests'*, Prosecutor, 11 September 2023, Confidential

⁵ KSC-BC-2023-10/F00002/CONF/RED, *Confidential Redacted Version 'Submission of Indictment for Confirmation and Related Requests'*, Prosecutor, 11 September 2023, Confidential at para.19

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

6. On 25 September 2023, whilst a decision on confirmation of the indictment was still outstanding, the Pre-Trial Judge granted the request for authorisation to search the person of the Accused and the seizure of any and all mobile telephones carried on his person at the time of arrest. However, the Pre-Trial Judge *specifically rejected* the SPO's plans to execute the search and seizure after the Accused had been arrested and transferred to the Netherlands and instead attached the following *conditions*⁶:

- a. The search and seizure was to be executed in Kosovo at the time of the arrest at the latest;
- b. To permit Mr Januzi and his counsel to be present, unless counsel's delay jeopardizes the execution of the measure, and an independent observer to be present during the execution of the authorised search and seizure; and
- c. That the SPO representative(s) present record the time, duration, scope, and all other relevant details of the execution of this decision, as well as to prepare an inventory with a detailed description of and information regarding each mobile telephone seized.

7. [REDACTED]

[REDACTED]

[REDACTED]

⁶ KSC-BC-2023-10/F00006/CONF/RED, *Confidential Redacted Version of Decision Authorising Searches and Seizures and Special Investigative Measures*, Pre-Trial Judge, 25 September 2023, Confidential at paragraphs 38, 39-43 and 80(b)

[REDACTED]

[REDACTED]

[REDACTED]

8. On 29 September 2023, the Pre-Trial Judge issued an order setting a target date for the issuance of a decision reviewing the Indictment (no version has been disclosed to the Accused at present).
9. On the same date, the SPO issued a summons requiring the Accused to attend the Specialist Prosecutor's Office at the EULEX Compound in Kosovo on Wednesday 4 October 2023 at 11:00hrs for questioning pursuant to Articles 35(2), 38(2) and (3) and 42 of the Law No/05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ('Law').
10. Articles 35(2) and 38(2) of the Law authorise the SPO to question 'suspects, victims and witnesses'. Article 42 of the Law authorises the SPO to summons a witness.
11. On 30 September 2023, the SPO Officer [REDACTED], successfully located the Accused and personally served upon him the summons to appear for questioning as a suspect, victim or witness.
12. On 2 October 2023, the Pre-Trial Judge confirmed an indictment charging the Accused with three offences⁸.
13. In accordance with Rule 86(6) of the Rules⁹, Mr Januzi at that stage was granted the status of an *accused*.

⁷ KSC-BC-2023-10/F00006/CONF/RED, *Confidential Redacted Version of Decision Authorising Searches and Seizures and Special Investigative Measures*, Pre-Trial Judge, 25 September 2023, Confidential at paragraph 62-76 and 80(i)

⁸ KSC-BC-2023-10/F00008/CONF/RED, *Confidential Redacted Version of the Decision on the Confirmation of the Indictment*, Pre-Trial Judge, 2 October 2023, Confidential

⁹ Rules of Procedure and Evidence before the Kosovo Specialist Chambers, KSC-BD-03/Rev3

14. On the same day, 2 October 2023, the Pre-Trial Judge issued an arrest warrant for the Accused and an order for his transfer to the Detention Facilities of the KSC without delay¹⁰.
15. On 4 October 2023, the Accused reported to the Specialist Prosecutor's Office located within the EULEX compound in Kosovo in accordance with the summons. The Accused was accompanied by counsel.
16. Despite being present with SPO officers for some hours in the safe and private confines of the SPO premises within the EULEX compound, the arrest warrant was not executed and the Accused was not informed of his status and rights as an accused. There is no suggestion of any disorderly conduct inside or outside the EULEX compound while the Accused was in the company of SPO officers on 4 October 2023 inside the compound.
17. On 5 October 2023, attended at the Accused's home address where they again located the Accused and executed the arrest warrant *outside* the Accused's home - not in the safe and private confines of the SPO premises within the EULEX compound but in public where the SPO assessed there was a potential security risk¹¹.

18. [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

¹⁰ KSC-BC-2023-10/F00009, *Decision on Request for Arrest Warrants and Transfer Orders*, Pre-Trial Judge, 2 October 2023, Confidential; KSC-BC-2023-10/F00009/A01, *Arrest Warrant for Sabit Januzi*, Pre-Trial Judge, 2 October 2023, Confidential; KSC-BC-2023-10/F00009/A02, *Order for Transfer to Detention Facilities of the Specialist Chambers*, Pre-Trial Judge, 2 October 2023, Confidential

¹¹ Request at para.6; Further Submissions at para.10

¹² Request at para.7

[REDACTED]

19. The Accused was then taken to the EULEX compound (where he had reported to the day before). There is no suggestion of any disorderly conduct inside or outside the EULEX compound while the Accused was in the company of SPO officers on 4 October 2023 inside the compound. No independent observer was present. No counsel on behalf of the Accused was present. The SPO concedes that it did not lawfully execute the authorised search and seizure of that mobile phone at the EULEX compound¹⁴.

20. It is alleged that possession of the mobile phone was then transferred to KSC Registry personnel in Kosovo, and then on 6 October 2023 delivered from KSC Registry personnel to the Chief Detention Officer of the Detention Management Unit (DMU)¹⁵. No details as to the identities of the SPO officers or KSC Registry personnel involved in the transfers above have been provided.

21. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

22. [REDACTED]
[REDACTED]
[REDACTED]

¹³ Request at para.6; Further Submissions at para.4

¹⁴ Further Submissions at para.19

¹⁵ Request at para.8-9

¹⁶ KSC-BC-2023-10/F00096, *Registrar's Submissions Pursuant to Order for Further Submissions (F00079) with confidential and ex parte (redacted) Annexes 1-4*, Registrar, 8 November 2023, Confidential at para.22

¹⁷ Further Submissions at para.34

¹⁸ KSC-BC-2023-10/F00096, *Registrar's Submissions Pursuant to Order for Further Submissions (F00079) with confidential and ex parte (redacted) Annexes 1-4*, Registrar, 8 November 2023, Confidential at para.26-27

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

23. Neither counsel for the Accused, nor an independent observer, were present during the above procedures.

24. Although there were other handovers of the personal property of the Accused to different personnel at different points from his arrest to his reception at the DMU, no other record has been disclosed¹⁹.

III. LAW

25. The applicable law relating to search and seizure by the Prosecution is set out in paragraphs 10 to 16 of the Pre-Trial Judge's decision authorising the search of the Accused on his arrest and seizure of any mobile phone on his person²⁰.

26. In contrast with the SPO, the Registry and the Detention Management Unit (and their officials) are organs of the Specialist Chambers themselves²¹.

IV. SUBMISSIONS

27. The SPO previously sought authorisation for precisely the course of action that it has taken and which the SPO seeks to conclude and the Pre-Trial Judge has

¹⁹ E.g. KSC-BC-2023-10/F00096, *Registrar's Submissions Pursuant to Order for Further Submissions (F00079) with confidential and ex parte (redacted) Annexes 1-4*, Registrar, 8 November 2023, Confidential at footnote 26 refers to 'Annex 3 to Registry Report on Mr Januzi (Property Handover)' – that annex has not been disclosed to the Accused

²⁰ KSC-BC-2023-10/F00006/CONF/RED, *Confidential Redacted Version of Decision Authorising Searches and Seizures and Special Investigative Measures*, Pre-Trial Judge, 25 September 2023, Confidential

²¹ Article 24(1) of the Law

specifically refused it.

28. As the Pre-Trial Judge previously observed, “the envisaged procedure, proposed by the SPO, namely to separate in the interim the relevant items to be seized from the arrested person(s) concerned, but to formally conclude the search and seizure of the separated items at a later stage, is not foreseen under the SC legal framework”²².
29. As a matter of fact, the SPO has executed a search of the Accused and seizure of his mobile phone on arrest on 5 October 2023 outside his home address, but (i) it made no attempt to comply with the conditions that the Pre-Trial Judge placed upon that search and seizure and (ii) it makes no attempt to suggest that that search and seizure was in anyway compliant with the authorised search and seizure.
30. No reasons at all (or no reasons which could amount to concrete or compelling circumstances) have been provided in the Request or in the SPO’s Further Submissions as to why the arrest warrant was not executed when the Accused attended the SPO’s premises within the EULEX compound on 4 October 2023. Neither safety concerns, or the need to keep the progress of proceedings confidential at that stage, can justify not executing the arrest warrant within the EULEX compound where the SPO have the greatest control over the conditions of safety and communications of any location within Kosovo. The suggestion that the Accused instead was arrested outside his home for safety and operational reasons is nonsense²³.
31. In relation to the arrest, the Prosecution submit inconsistently (i) that they didn’t

²² KSC-BC-2023-10/F00006/CONF/RED, *Confidential Redacted Version of Decision Authorising Searches and Seizures and Special Investigative Measures*, Pre-Trial Judge, 25 September 2023, Confidential at paragraph 40

²³ Further Submissions at paras.6 and 10

execute the authorised search of the Accused's person for safety and efficiency reasons, whilst at the same time (ii) maintaining that a search of the person is a necessary and proper part of the procedure of any arrest²⁴.

32. If the SPO were serious about respecting the rights of the Accused (as provided for in the Law and the Rules), and of complying with the orders of the Pre-Trial Judge, the arrest warrant and search and seizure order could have been properly executed on 4 October 2023 when the Accused attended within the EULEX compound, with counsel for the Accused and an independent observer present. The Accused was, after all, within the compound for some hours.

33. Instead, the SPO rides roughshod over the rights of the Accused and regards itself as in a position to take "prosecutorial decisions that some authorised investigative measures should not reasonably be executed in the manner requested"²⁵. That is not an approach consistent with good faith.

34. The Pre-Trial Judge did not 'request' that the investigative measure be executed in accordance with the Law and the Rules, as reflected in the conditions that he attached to the authorisation – the Pre-Trial Judge *required* that the investigative measures be executed in accordance with the conditions attached.

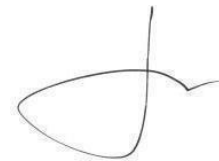
35. The arrests and searches in this case were not actions that were forced upon the SPO in haste due to circumstances outside their control but were instead actions anticipated by the SPO since at least 11 September 2023 when the SPO submitted an indictment for confirmation. The conditions attached to the arrest and search were made clear to the SPO by the Pre-Trial Judge on 25 September 2023, ten days before the SPO executed the arrest warrant, searched the Accused and seized a mobile phone from his person.

²⁴ Further Submissions at para.10, 12, 23, 25, 27, 36

²⁵ Further Submissions at para.13

36. The SPO had ten days to plan the execution of the arrest warrants and compliance with the conditions of the Pre-Trial Judge's authorisation to search for and seize any mobile phone on the Accused's person at the time of arrest. Within those ten days, the Accused was in the company of SPO personnel on three separate occasions – on 29 September 2023, 4 October 2023 and 5 October 2023.
37. The attempt by the SPO to retrospectively seek for judicial approval of their prior refusal to accept the conditions applied to the exercise of the search and seizure powers after arrest by the Pre-Trial Judge (in accordance with the Law and the Rules) should be refused outright as a clear attempt by the SPO to manipulate the court.
38. Moreover, the course proposed by the SPO on 11 September 2023 subsequently rejected by the Pre-Trial Judge and now revived in the Request seeks to pull the Specialist Chambers, its organs the Registry and the Detention Unit, and its officials, away from their necessary impartiality and into the operational arena inhabited by the Prosecution, by purporting to use officials of the Specialist Chambers as part of the chain of custody in relation to the handling, storing and preservation of prosecution evidence. The same is improper and undermines the independence and impartiality of the Specialist Chambers.
39. For all the reasons above, the Request should be refused.

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