

**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:** 28 November 2023

**Language:** English

**Classification:** Confidential

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**Addendum to Submissions re F00013 Prosecution Request for Retention of  
Evidence on behalf of Sabit Januzi**

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**Specialist Prosecutor**

Kimberly P. West

**Counsel for Sabit Januzi**

Jonathan Elystan Rees KC  
Huw Bowden

**Counsel for Ismet Bahtijari**

Hendrik Sytema

## I. INTRODUCTION

1. On 16 November 2023, the Defence filed its Submissions re F00013 Prosecution Request for Retention of Evidence on behalf of Sabit Januzi ('Defence Submissions')<sup>1</sup>.
2. On 21 November 2023, the Defence were given access to a redacted version of an *ex parte* decision originally dated 11 October 2023, finding that [REDACTED] fell outside the scope of the authorisation dated 25 September 2023, but granting approval to retain [REDACTED] pursuant to Rule 36 of the Rules ('*Ex Parte* Decision')<sup>2</sup>.
3. On the same day, the Defence were invited by the Pre-Trial Judge to amend the Defence Submissions by 28 November 2023, considering that the *Ex Parte* Decision had been notified to the Defence.
4. In accordance with the above, the Defence makes the following supplemental submissions.

## II. SUBMISSIONS

### A. EXPIRY OF THE TIME LIMIT IN RULE 36(3)

5. The effect of Rules 36(3) and 36(4) of the Rules is that the Panel may approve a special investigative measure 'within three days of the request' only.

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<sup>1</sup> KSC-BC-2023-10/F00106, *Submissions re F00013 Prosecution Request for Retention of Evidence on behalf of Sabit Januzi*, Januzi, 16 November 2023, Confidential

<sup>2</sup> KSC-BC-2023/10/F00029/COR/CONF, *Confidential Redacted Version of Corrected Version of Decision on Prosecution Request for Retention of Evidence or, Alternatively, Request for Approval of a Special Investigative Measure*, Pre-Trial Judge, 11 October 2023, Confidential

6. Where the Panel fails to render a decision within the three days of the request, the 'order of the Specialist Prosecutor for special investigative measures shall cease to have effect', 'the Specialist Prosecutor shall immediately terminate the measures applied' and 'the collected material, if any, may not be used for investigation or prosecution'.
7. In the present case, the Request was made by the Prosecution on 5 October 2023.
8. The Pre-Trial Judge did not render any decision until 11 October 2023, outside the three-day time limit. The consequence of that failure is that any effect that the special investigative measure had ceases and [REDACTED] may not be used for investigation or prosecution.

*B. NO ORDER FROM THE SPECIALIST PROSECUTOR TO APPROVE*

9. Contrary to what is asserted in paragraph 22 of the *Ex Parte* Decision, Rule 36 of the Rules does *not* provide "that the *SPO* may order or undertake a SIM" without authorisation of a Panel in defined circumstances.
10. Rule 36 (which is entitled, "Special Investigative Measures Ordered by the Specialist Prosecutor") provides that 'the *Specialist Prosecutor* may order special investigative measures' without the authorisation of a Panel in defined circumstances.
11. Article 35(9) of the Law makes it clear that the terms 'Specialist Prosecutor' and 'Specialist Prosecutor's Office' are not synonymous.
12. Further, Article 35(2) of the Law and Rule 2(1) of the Rules make it clear that (i) only other Prosecutors in the Specialist Prosecutor's Office, (ii) who have been

authorized by the Specialist Prosecutor in person to represent him/her in the exercise of his/her functions, share his/her authority, unless the context otherwise requires that he/she exercises those functions alone.

13. Police or other office holders and staff within the Specialist Prosecutor's Office cannot perform the functions of the Specialist Prosecutor.

14. Judicial expansion of the scope of Rule 36 to enable *ex post facto* approval of SIM's *undertaken* by any employee(s) of the SPO without any prior order by the Specialist Prosecutor is inappropriate.

15. In the present case, there is no 'order' identified to approve, whether by the Specialist Prosecutor or by another Prosecutor, authorized by the Specialist Prosecutor to represent him/her in the exercise of his/her functions.

16. Accordingly, Rule 36 is wholly inapplicable.

*C. RE THE CRITERIA IN RULE 36(1)(A) AND (B)*

17. [REDACTED]  
[REDACTED].

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

19. [REDACTED]  
[REDACTED]

[REDACTED]

20. The attempt by the SPO to retrospectively seek judicial approval for the disregard of the terms of the 25 September 2023 order by their investigator(s) should be refused outright as a clear attempt by the SPO to manipulate the court.

### III. EFFECT OF *EX PARTE* DECISION

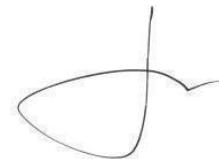
21. As above, it is submitted that the *Ex Parte* Decision was not made within the three day time limit set out by Rule 36(3) and is thus without effect.

22. Alternatively, as the *Ex Parte* Decision was reached in advance of notification to the Defence of the Request and without any opportunity for the Defence to make submissions in relation to it, it is submitted that the Pre-Trial Judge can and should consider the matter *de novo*.

23. Alternatively, Rule 79(1) provides for a power to reconsider in exceptional circumstances and where a clear error of reasoning has been demonstrated or

where reconsideration is necessary to avoid injustice. In the present case, it is submitted that the circumstances are exceptional (retrospective approval sought [REDACTED] otherwise than in accordance with the order of the court), there are clear errors demonstrated (see sections A, B and C above) and reconsideration is necessary to avoid injustice (the decision was taken *ex parte* without any opportunity for the defence to make submissions).

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JONATHAN ELYSTAN REES KC

Specialist Counsel for Mr Januzi

HUW BOWDEN

Specialist Co-Counsel for Mr Januzi

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Cardiff, UK