



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 Marjorie Masselot

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

Date: 16 July 2024

Language: English

Classification: Public

Public redacted version of 'Prosecution submissions on Bahtijari Defence request for medical examination'

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

I. INTRODUCTION

1. Pursuant to the Order,¹ Article 39(1), (10), and (13) of the Law,² and Rule 69(1) of the Rules,³ the Specialist Prosecutor's Office ('SPO') hereby provides submissions responding to Ismet Bahtijari's Request⁴ for examination regarding fitness to stand trial, taking into account the Observations⁵ of the Registry. The Request should be dismissed because it fails to identify medical conditions which impact on Bahtijari's ability to meaningfully exercise his fair trial rights.

II. SUBMISSIONS

2. As noted by the Pre-Trial Judge, the concept of 'fitness to stand trial' has been recognised as an aspect of the broader notion of a fair trial.⁶ Whenever an accused is, for reasons of ill health, unable to meaningfully exercise his/her procedural rights, the trial cannot be fair and criminal proceedings must be adjourned until the obstacle ceases to exist.⁷ Relevant capacities for the meaningful exercise of these procedural rights include the ability to understand the charges and the conduct, purpose, and possible consequences of the proceedings; instruct counsel; and make a statement.⁸ In this context,

¹ Second Order for Submissions, KSC-BC-2023-10/F00358, 2 July 2024, Confidential and *Ex Parte* ('Order'), paras 10, 15, 17(c).

² Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

⁴ BAHTIJARI FILING FOR MEDICAL REPORTS *ex parte*, KSC-BC-2023-10/F00273, 1 May 2024, Confidential and *Ex Parte* ('Request').

⁵ [REDACTED].

⁶ Order, KSC-BC-2023-10/F00358, para.11.

⁷ Order, KSC-BC-2023-10/F00358, para.11; Rule 69(2).

⁸ ICC, *Prosecutor v. Al Hassan*, ICC-02/11-01/15-1318, Public redacted version of Decision on the Defence notice on Mr Al Hassan's unfitness to stand trial, 20 March 2020 ('*Al Hasan* Decision'), para.34; ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-637-Red, Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen, 16 December 2016 ('*Ongwen* Decision'), para.8; ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-286-Red, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before

and consistent with Rule 69(1), when read together with Article 39(1), (10), and (13),⁹ a request for a medical examination to assess fitness must be supported by indications suggesting the existence of medical conditions which: (i) may impact on the accused's ability to meaningfully exercise his fair trial rights; and (ii) a panel is unable to resolve without the assistance of one or more medical experts.¹⁰ In the absence of any such indications, 'it must be concluded that the accused is fit to stand trial'.¹¹

A. THE REQUEST FAILS TO DEMONSTRATE AN IMPACT ON FAIR TRIAL RIGHTS

3. The Request only provides an assortment of medical conditions that Bahtijari may or may not suffer from without detailing any meaningful connection to the exercise of his fair trial rights.¹² However, it is well-established that the question of whether an accused is unfit to stand trial does not concern, in and of itself, whether he or she has particular medical conditions, but whether the accused is able to exercise effectively his/her fair trial rights in the proceedings.¹³

4. Insofar as the Request makes passing reference to [REDACTED],¹⁴ [REDACTED]. Again, nothing about these representations has any meaningful relationship to Bahtijari's capacities to exercise his fair trial rights. It is not required that these capacities must be present at their notionally highest level, or at the highest level that a particular accused

this Court, 2 November 2012 ('*Gbagbo* First Decision'), para 50. See also ICTY, *Prosecutor v. Strugar*, IT-01-42-T, Decision re the Defence Motion to Terminate the Proceedings, 26 May 2004 ('*Strugar* Trial Decision'), para.36; ECCC, *Co-Prosecutors v. Nuon Chea et al.*, 002/19-09-2007/ECCC/TC, Decision on IENG Thirith's Fitness to Stand Trial, 17 November 2011, para.26.

⁹ The provisions provide that orders for the preparation of a fair and expeditious trial must be necessary.

¹⁰ *Ongwen* Decision, para.12.

¹¹ *Ongwen* Decision, para.12.

¹² Request, KSC-BC-2023-10/F00273, paras 2, 11, 12, 13, 16. [REDACTED].

¹³ See *Al Hassan* Decision, ICC-02/11-01/15-1318, para.36; *Ongwen* Decision, para.13. See also *Prosecutor v. Strugar*, IT-01-42-A, Judgement, 17 July 2008 ('*Strugar* Appeal Decision'), para.61 ('medical diagnoses alone, no matter how numerous, do not suffice to assess a person's competency to stand trial').

¹⁴ Request, KSC-BC-2023-10/F00273, paras 3, 15.

has ever enjoyed in respect of each capacity; the threshold is met when an accused has these capacities, viewed overall and in a reasonable manner.¹⁵ Indeed, 'processing the wealth of complex information inherent in international criminal proceedings is the role of defence counsel, in order to advise their clients, and the standard of fitness indicates that a defendant may sometimes require assistance to participate in the proceedings'.¹⁶

5. Bahtijari, with the assistance of Counsel, appears fully capable of understanding the charges and the conduct, purpose and possible consequences of the proceedings, and instructing counsel. During two separate initial hearings, Bahtijari has confirmed that he understands the charges,¹⁷ and his rights,¹⁸ and entered a plea of not guilty without being legally required to do so.¹⁹ On the second occasion, this occurred after consulting with current Counsel, who raised no objections.²⁰ Bahtijari has also been able to instruct

¹⁵ *Al Hassan* Decision, para.34; *Strugar* Trial Decision, para.37; *Strugar* Appeal Decision, para. 55; *See also* ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/15-349, Decision on the fitness of Laurent Gbagbo to stand trial, 27 November 2015 ('*Gbagbo* Second Decision'), para.36; ICTY, *Prosecutor v. Hadžić*, IT-04-75-T, Consolidated Decision on the Continuation of Proceedings, 26 October 2015, para.39.

¹⁶ *Al Hassan* Decision, para.35, ICTY, *Prosecutor v. Popović et al*, IT-05-88-A, Public Redacted Version of 30 November 2012 Decision on Request to Terminate Appellate Proceedings in Relation to Milan Gvero, 16 January 2013, para.22.

¹⁷ Transcript (Initial Appearance of Ismet Bahtijari), 9 October 2023, p.8; Transcript (Further Appearance), 12 July 2024, p.270.

¹⁸ Transcript (Initial Appearance of Ismet Bahtijari), 9 October 2023, p.10; Transcript (Further Appearance), 12 July 2024, pp. 270-274. In the first hearing this confirmation was explicit, while in the second hearing Bahtijari entered his plea and raised no further issues after being informed of his rights.

¹⁹ Transcript (Initial Appearance of Ismet Bahtijari), 9 October 2023, pp. 11-12; Transcript (Further Appearance), 12 July 2024, pp. 273-274.

²⁰ Transcript (Further Appearance), 12 July 2024, pp. 273-274.

Counsel²¹ on a variety of issues including obtaining his medical records for proceedings,²² the application of redactions,²³ and avoiding delays in proceedings.²⁴

6. In fact, Bahtijari has demonstrated the required capacities for the entirety of this case, including even prior to the assignment of Counsel. For example, during his SPO interview of 5 October 2023, Bahtijari indicated that he had ‘no need for a lawyer’ and that he understood his rights, which was confirmed by his initial waiver of his right to remain silent, followed by his subsequent invocation of that right.²⁵

7. In short, the Request fails to identify any medical conditions which may impact on the accused’s ability to meaningfully exercise his fair trial rights, when considered in combination with the assistance provided by Counsel. As such, at this stage, there is no need for the assistance of medical experts to assist the Pre-Trial Judge in her obligation to ensure a fair trial.

B. NO JUDICIAL INTERVENTION IS REQUIRED

8. That judicial intervention is unnecessary is further supported by a variety of other reasons. In this respect, the medical examination has been requested in conjunction with a request for medical records, which Counsel has acknowledged are necessary to assess the impact of any medical conditions.²⁶ Counsel for Bahtijari has been in possession of his

²¹ BAHTIJARI REVIEW OF DETENTION SUBMISSIONS, KSC-BC-2023-10/F00195, 1 March 2024, para.20.

²² Request, KSC-BC-2023-10/F00273, para.20.

²³ BAHTIJARI FILING IN RELATION TO F00358, KSC-BC-2023-10/F00375, 8 July 2024, Confidential and *ex parte* (‘Filing F00375’), para.2.

²⁴ BAHTIJARI FILING FOR RECLASSIFICATION OF F00273, KSC-BC-2023-10/F00305, 28 May 2024, Confidential and *ex parte* (‘Filing F00305’), para.9; Request, KSC-BC-2023-10/F00273, para.3.

²⁵ 116065-TR-ET Part 1 RED, pp. 4, 20.

²⁶ See e.g. Filing F00305, KSC-BC-2023-10/F00305, para.9.

medical records since 31 May 2024 and while they appear to be in translation,²⁷ Bahtijari has not supplemented or foreshadowed that he may supplement the Request.

9. In addition, it appears that Bahtijari's health is improving. [REDACTED]²⁸
[REDACTED].²⁹

10. Further, mechanisms are in place to address the health of Bahtijari should that be necessary. [REDACTED].³⁰ [REDACTED].³¹ [REDACTED].³²

11. Bahtijari has failed to make any showing of necessity for the at least ten (10) different medical assessments that he has requested.³³

III. CLASSIFICATION

12. This filing is submitted as confidential in accordance with Rule 82(4).

IV. CONCLUSION

13. For the foregoing reasons, the Pre-Trial Judge should dismiss the Request as unsubstantiated. The record demonstrates that Bahtijari is fit to stand trial.

Word count: 1,645



Kimberly P. West

²⁷ [REDACTED]. Counsel indicates that these records are currently being translated (Filing F00375, KSC-BC-2023-10/F00375, para.3(xi)).

²⁸ Request, KSC-BC-2023-10/F00273, para.14.

²⁹ Request, KSC-BC-2023-10/F00273, para.15.

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ See Request, KSC-BC-2023-10/F00273, para.5.

Specialist Prosecutor

Tuesday, 16 July 2024

At The Hague, the Netherlands