



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2023-10
Before: Pre-Trial-Judge
Judge Nicolas Guillou
Registrar: Dr Fidelma Donlon
Date: 26 October 2023
Language: English
Classification: Public

Public redacted version of

Order for Further Submissions in Relation to Filing F00032

Specialist Prosecutor
Kimberly P. West

Counsel for Sabit Januzi
Jonathan Elystan Rees

Registry
Fidelma Donlon

Counsel for Ismet Bahtijari
Felicity Gerry

Counsel for Haxhi Shala
Toby Cadman

THE PRE-TRIAL JUDGE,¹ pursuant to Rules 31 and 37 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby issues this order.

I. PROCEDURAL BACKGROUND

1. On 11 September 2023, the Specialist Prosecutor’s Office (“SPO”) filed before the Pre-Trial Judge the indictment against Sabit Januzi (“Mr Januzi”) and Ismet Bahtjari (“Mr Bahtjari”), together with a request for their arrest and transfer (“Arrest Warrants”) to the Specialist Chambers (“SC”) Detention Facilities and a request for search and seizure and related requests.²

2. On 25 September 2023, the Pre-Trial Judge issued a decision authorizing, *inter alia*, the searches of the persons of the Mr Januzi and Mr Bahtjari, their mobile telephones and any bags, parcels, or other containers in their possession carried on their persons at the time of their arrest (“Possessions”), and the seizure of any and all mobile telephones (to include any and all SIM cards) and any further evidence that is believed to have been used in, connected with or may be relevant to the charged crimes and any recent efforts to interfere with the administration of justice which carried on their persons or in their Possessions (“25 September 2023 Decision”).³

¹ KSC-BC-2023-10, F00001, President, *Decision Assigning a Pre-Trial Judge*, 11 September 2023, public.

² KSC-BC-2023-10, F00002, Specialist Prosecutor, *Submission of Indictment for Confirmation and Related Requests*, 11 September 2023, strictly confidential and *ex parte*, with Annexes 1-3, strictly confidential and *ex parte*. A confidential redacted version and a public redacted version of the main filing was filed on 12 October 2023, F00002/CONF/RED and F00002/RED.

³ KSC-BC-2023-10, F00006, Pre-Trial Judge, *Decision Authorising Searches and Seizures and Special Investigative Measure*, 25 September 2023, strictly confidential and *ex parte*, para. 80(b), with Annexes 1-2, strictly confidential (“25 September 2023 Decision”).

3. On 2 October 2023, the Pre-Trial Judge confirmed the indictment against Mr Januzi and Mr Bahtjari (“the Accused”)⁴ issued the arrest warrants for the Accused and ordered their transfer to the SC Detention Facilities.⁵

4. On 5 October 2023, the Accused were arrested in Kosovo.⁶ On the next day, the Accused were transferred to the SC Detention Facilities.⁷

5. On 12 October 2023, the SPO filed the “Prosecution request for an order” (“Request”).⁸

II. SUBMISSIONS

6. In the Request, the SPO submits that, at the time of the arrest, it did not execute the orders for search and seizure issued by the Pre-Trial Judge for reasons of ensuring the safe and efficient execution of the arrest warrants (“Authorized Searches and Seizures”).⁹ The SPO avers that, rather, SPO security personnel conducted a routine

⁴ KSC-BC-2023-10, F00008, Pre-Trial Judge, *Decision on the Confirmation of the Indictment*, 2 October 2023, strictly confidential and *ex parte*. A confidential redacted version and a corrected version of the public redacted version of the decision were filed on 12 October 2023, F00008/CONF/RED and F00008/RED/COR; *see also* F00010, Specialist Prosecutor, *Submission of Confirmed Indictment*, 4 October 2023, strictly confidential and *ex parte*, with Annex 1, strictly confidential; F00016, Specialist Prosecutor, *Submission of Public Redacted Version of Confirmed Indictment*, 6 October 2023, public, with Annex 1, public.

⁵ KSC-BC-2023-10, F00009, *Decision on Request for Arrest Warrants and Transfer Orders*, 2 October 2023, strictly confidential and *ex parte* (“Decision on Arrest and Transfer”), with Annexes 1-4, strictly confidential. A public redacted version of the decision was filed on 12 October 2023, F00009/RED.

⁶ KSC-BC-2023-10, F00011, Registrar, *Notification of Arrest of Ismet Bahtjari Pursuant to Rule 55(4)*, 5 October 2023, strictly confidential and *ex parte*; F00012, Registrar, *Notification of Arrest of Sabit Januzi Pursuant to Rule 55(4)*, 5 October 2023, strictly confidential and *ex parte*.

⁷ KSC-BC-2023-10, F00014, Registrar, *Notification of the Reception of Ismet Bahtjari in the Detention Facilities of the Specialist Chambers*, 6 October 2023, strictly confidential and *ex parte*, with Annex 1, strictly confidential and *ex parte*; F00015, Registrar, *Notification of the Reception of Sabit Januzi in the Detention Facilities of the Specialist Chambers*, 6 October 2023, strictly confidential and *ex parte*, with Annex 1, strictly confidential and *ex parte*.

⁸ KSC-BC-2023-10, F00032, Specialist Prosecutor, *Prosecution Request for an Order*, 12 October 2023, strictly confidential and *ex parte* (“Request”).

⁹ Request, para. 6.

security search of the Accused's persons and recovered, *inter alia*, [REDACTED] on the persons of Mr Bahtjari and Mr Januzi, respectively (the "Subject Phones").¹⁰

7. The SPO also contends that: (i) thereafter, the custody of the Subject Phones was transferred to the SC Registry personnel in Kosovo in accordance with arrest procedure and to safeguard the personal property of each Accused;¹¹ (ii) on 6 October 2023, when the Accused were transferred to the SC Detention Facilities, the Subject Phones were delivered by the SC Registry personnel directly to the Chief Detention Officer of the Detention Management Unit ('DMU') of the SC Registry;¹² and, (iii) thus, they remain in the DMU's custody.¹³

8. Accordingly, the SPO requests from the Pre-Trial Judge: (i) an order authorizing the SPO to search and seize the Subject Phones from the DMU, and (ii) an order to the Registrar to provide the SPO with access to the personal property of the Accused currently stored at the SC Detention Facilities for the purpose of executing the search and seizure order ("Requested Searches and Seizures").¹⁴ The SPO submits that all requirements for search and seizure set forth by Rules 31 and 37 of the Rules are met.¹⁵

III. APPLICABLE LAW

9. Pursuant to Rules 31(1) and 37(1)-(3) of the Rules, a Panel may authorise the search of the property of a person, such other locations, premises or objects in respect of which that person has a reasonable expectation of privacy, or a person, and the seizure of items found during the search, if there is, *inter alia*, a grounded suspicion that (i) the person concerned has committed, is committing or is about to commit a crime within the jurisdiction of the SC, and the search will result in his or her arrest or

¹⁰ Request, para. 7.

¹¹ Request, para. 8.

¹² Request, para. 6.

¹³ Request, para. 6, 19.

¹⁴ Request, paras 1, 10, 28.

¹⁵ Request, paras. 2, 10-18.

in the discovery and seizure of evidence necessary for the investigation; and/or (ii) the evidence of a crime within the SC's jurisdiction is on the property, location, premises or object to be searched; and/or (iii) the search will result in the discovery of evidence of a crime within the jurisdiction of the SC and seizure thereof accordingly, provided that the measure is necessary for the investigation, unavoidable, and proportionate to the legitimate aim of the investigation.

10. Pursuant to Rule 37(4) of the Rules, any decision authorising the requested search and seizure shall include: (a) the time, duration and scope of its execution, including an indication of the person or property, location, premises or object in relation to which the measure is authorised; and (b) the procedure for reporting on its implementation in accordance with Rule 31(2) of the Rules.

11. Pursuant to Rule 39(1) and (2) of the Rules, the search and seizure must be executed in the presence of the person concerned, unless he or she cannot be found or refuses to attend the search, and if the delay in execution would jeopardise the investigation or the safety or property of a witness, victim or other person at risk. The SPO must likewise (i) provide the person concerned with a certified copy of the decision of the Panel, (ii) inform the person of his or her rights under Rule 42 or Rule 43 of the Rules, (iii) ensure the presence of counsel, unless the person waives this right or counsel's presence cannot reasonably be awaited, (iv) as well as the presence of an independent observer.

IV. DISCUSSION

12. The Pre-Trial Judge recalls that in the 25 September 2023 Decision the SPO request to search and seize the Subject Phones was granted. The Pre-Trial Judge also recalls that in said decision he: (i) stressed that the safeguards pursuant to Rule 39 of the Rules are to be guaranteed at the moment when the search and seizure procedure takes place; (ii) found that separating the mobile telephones from the Accused at the

time of their arrest, without any indication of concrete compelling circumstances jeopardizing the safety or security of the search and seizure operations, amounts in fact to a seizure at that time;¹⁶ and (iii) ordered, based on the SPO submissions at the time, that the Authorised Searches and Seizures were to be executed in Kosovo at the time of the arrest of the Accused at the latest.¹⁷

13. The Pre-Trial Judge observes that, in its Request, the SPO does not provide further information as to how the execution of the Authorised Searches and Seizures would have jeopardized “the safe and efficient execution of the arrest warrant”, which prompted the SPO to abstain from executing the search and seizure orders at the time of the arrests.¹⁸ The Pre-Trial Judge further lacks information about, for example, the nature of the searches conducted, the chain of custody, and the legal framework under which the SPO personnel and Registry personnel acted.

14. With a view to taking an informed decision on the merits of the Request, the Pre-Trial finds it imperative to receive from the SPO and the Registry further submissions on the factual circumstances and the events underpinning the Request.

15. The Pre-Trial Judge requests the SPO to provide additional information on the following:

- (a) Regarding the non-execution of the Authorised Searches and Seizures at the time of the arrest of the Accused in Kosovo:
 - i. What were the specific circumstances and/or security concerns, if any, impeding the execution the Authorised Searches and Seizures in Kosovo, at the time of the arrest?
 - ii. How would have the implementation of the Authorised Searches and Seizures jeopardized the safe and efficient execution of the arrest warrant?

¹⁶ 25 September 2023 Decision, paras 40-41.

¹⁷ 25 September 2023 Decision, paras 39-44, 80(b)(i).

¹⁸ Request, para. 6.

- iii. Considering that the Accused stayed under SPO/SC's custody [REDACTED],¹⁹ why did the SPO not execute and/or complete the Authorised Searches and Seizures [REDACTED]?
- (b) Regarding the recovery of the Subject Phones:
 - i. What was the legal basis for the "routine security search of the person" of each Accused referred to in paragraph 7 of the Request? Did the SPO act upon the Authorised Searches and Seizures for the search of the Subject Phones?
 - ii. Who conducted the abovementioned search and was the Registry personnel in Kosovo present and/or involved in the operation?
 - iii. What measures/guarantees were in place during the abovementioned procedure to ensure the rights of the Accused under the legal framework of the SC, such as those set forth by the Rules?
- (c) Regarding the chain of custody and handover of the Subject Phones:
 - i. Who had the Subject Phones in custody between the time of the "routine security searches" and the transfer of custody to the SC Registry personnel in Kosovo [REDACTED]? Was this documented?
 - ii. What measures were in place to ensure the safety, security and integrity of the Subject Phones between their recovery and their handover to the SC Registry personnel in Kosovo?
 - iii. Which legal provisions did the SPO apply when transferring custody of the Subject Phones to the SC Registry personnel in Kosovo "in accordance with arrest procedure", as reported in paragraph 8 of the Request?

¹⁹ KSC-BC-2023-10, F00020/COR, Registrar, *Report on the Arrest and Transfer of Sabit Januzi to the Detention Facilities* ("Report on Mr Januzi"), 9 October 2023, strictly confidential and *ex parte*, paras 12, 17-20, 28-32, with Annexes 1-3 strictly confidential and *ex parte*; F00021, Registrar, *Report on the Arrest and Transfer of Ismet Bahtjari to the Detention Facilities* ("Report on Mr Bahtjari"), 9 October 2023, strictly confidential and *ex parte*, paras 11, 19-21, 30-35, with Annexes 1-3 strictly confidential and *ex parte*.

- (d) Noting that, shortly after their arrival [REDACTED], the Accused were “security searched” again,²⁰ did the SPO receive further items in the possession of the Accused from the SC Registry personnel?

16. The Pre-Trial Judge also requests the Registry to provide additional information on the following:

- (a) Regarding the chain of custody and handover of the Subject Phones:
- i. What was the chain of custody between the time the Subject Phones were transferred from the SPO to the SC Registry personnel in Kosovo and the final transfer of custody to the Chief Detention Officer of the DMU?
 - ii. What measures were taken to ensure the safety, security and integrity of the Subject Phones?
 - iii. Were any pictures and/or detailed description of the Subject Phones made?
 - iv. What was the legal basis for the transfer of custody of the Subject Phones to the SC Registry personnel in Kosovo?

V. CONFIDENTIALITY OF FILINGS AND INVITATION FOR SUBMISSIONS

17. The SPO seeks to maintain the Request strictly confidential and *ex parte* at least until the search and seizure is executed.²¹ The SPO also requests an opportunity to make submissions before any reclassification or redacted version is ordered.²²

18. The Pre-Trial Judge, however, finds it essential to engage the Defence on the subject-matter of the Request. The Accused no longer have the Subject Phones in their possession and are entitled to be heard on the procedure to search and seize them. In this regard, while this decision remains classified as strictly confidential and *ex parte*, for the moment, the Pre-Trial Judge finds that a confidential redacted version shall be

²⁰ Report on Mr Januzi, para. 19 ; Report on Mr Bahtjari, para. 20.

²¹ Request, para. 26.

²² Request, para. 27.

made available to the Defence, as soon as practicable. This shall occur after the SPO and the Registry have filed their further submissions, as requested in the present decision. Accordingly, the Pre-Trial Judge orders the SPO to:

- (a) file a confidential redacted version of the Request, F00032;
- (b) propose redactions to the 25 September 2023 Decision, F00006; and
- (c) propose redactions to this decision.

19. With a view to enabling the Defence to make submissions on the subject-matter of the Request, both the SPO and the Registry shall submit their written submissions strictly confidential and *ex parte*, if need be, and in confidential redacted form. A redacted version of the 25 September 2023 Decision will also be made available to the Defence in due course.

VI. DISPOSITION

20. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- (a) **ORDERS** the Specialist Prosecutor's Office to propose redactions to the 25 September 2023 Decision, F00006, as referred to in paragraph 18(b)-18(c) of this decision, by **Monday, 6 November 2023**;
- (b) **ORDERS** the Specialist Prosecutor's Office to file a confidential redacted version of the filing F00032, as referred to in paragraph 18(a) of this decision, or request its reclassification as confidential, by **Monday, 6 November 2023**;
- (c) **ORDERS** the Specialist Prosecutor's Office to file written submissions on the questions, as referred to in paragraphs 15 and 19, by **Wednesday, 8 November 2023**;

- (d) **ORDERS** the Registry to file written submissions on the questions, as referred to in paragraphs 16 and 19, by **Wednesday, 8 November 2023**; and
- (e) **INVITES** the Defence to respond, upon reclassification of this decision, the 25 September 2023 Decision, and the notification of the written submissions to be made by the SPO and the Registry on the questions raised in paragraphs 15-16, by **Wednesday, 15 November 2023**.

[signed]

Judge Nicolas Guillou

Pre-Trial Judge

Dated this Thursday, 26 October 2023

At The Hague, the Netherlands.