

In: KSC-BC-2023-10

The Prosecutor v. Sabit Januzi, Ismet Bahtijari and Haxhi Shala

Before: Pre-Trial Judge

Judge Nicolas Guillou

Registrar: Fidelma Donlon

Filing Participant: Specialist Counsel for Sabit Januzi

Date: 25 April 2024

Language: English

Classification: Confidential

Reply to Prosecution Filing F00266

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I. REPLY

1. The Prosecution would do well to confine itself with addressing its own repeated failures – none of which can be attributed to the funding difficulties presently faced collectively by the three defence teams in this matter.
2. The Prosecution has been aware from very early on in these proceedings that the Accused will challenge the admissibility of:
 - a. the interview of Sabit Januzi on the grounds that it was obtained by means of a violation of the Law, the Rules and of standards of international human rights law; and
 - b. the alleged recording of 12 April 2023 on the basis that it was obtained by means of a violation of the Law, the Rules and of standards of international human rights law.
3. At this stage, the Accused also anticipates making an application to stay proceedings as an abuse of process, relating to the loss of the alleged recording of 5 April 2023 (subject to outstanding disclosure relating to the phones of [REDACTED]).
4. Despite having been directed to (i) complete disclosure of Rule 102(1)(b) material as long ago as 15 December 2023, (ii) file the Rule 102(3) Notice by 26 January 2024, and (iii) as, of 24 October 2023, to disclose all remaining Rule 103 material *immediately*¹, on 19 April 2024, the SPO has continued to serve Rule 102(1)(b)

¹ KSC-BC-2023-10/F00076, *Framework Decision on Disclosure of Evidence and Related Matters*, Pre-Trial Judge, 24 October 2023, Confidential

material, Rule 102(3) Notice addendums and Rule 103 material up to and including 19 April 2024².

5. Despite the order on 24 October 2023 that all remaining Rule 103 material be disclosed *immediately*, the Rule 103 disclosed on 19 April 2024 dates as far back as July, August and September 2023 – *before* the Accused was arrested and detained.
6. There are still a number of matters outstanding.
7. As long ago as the 2nd Status Conference on 3 November 2023, the Accused requested disclosure of Witness 1's phone records, including a forensic analysis of his phone³. Nothing has yet been received and there is no entry on the Rule 102(3) Notice in relation thereto.
8. The Accused, as yet does not even know the form of the charges that he is to face at trial. Although the Pre-Trial Judge previously ordered the 'cases' of KSC-BC-2023-10 and KSC-BC-2023-11 to be joined, the Pre-Trial Judge considered the Joint Indictment proposed by the SPO *inoperative* because the SPO had inappropriately sought to add a new factual charge against the Accused therein (a charge which had been previously been dismissed), so that the joint case proceeds at this stage on the basis of two separate indictments, namely the Case 10 Confirmed Indictment and the Case 11 Confirmed Indictment⁴.
9. The Prosecution has either failed to appreciate the order of the Pre-Trial Judge in relation to joinder, or otherwise effectively disregards it, claiming that the Pre-Trial Judge has 'granted joinder of the confirmed indictments in Case 10 and Case 11'⁵.

² See for example Disclosures 27 and 29, and KSC-BC-2023-10/F00257, *Prosecution's supplemental Rule 102(3) notice with confidential Annex 1*, Prosecutor, 19 April 2024, Public

³ Transcript 3 Nov 2023 page 16, lines 10-14

⁴ KSC-BC-2023-10/F00161, *Decision on Request for Joinder and Amendment of the Indictment*, Pre-Trial Judge, 8 February 2024, Confidential at paragraph 55

⁵ KSC-BC-2023-10/F00260, *Prosecution Detailed Notice of Disclosure Process*, Prosecutor, 19 April 2024,

10. Whilst the Prosecution has effectively simply re-submitted the same *inoperative* proposed Joint Indictment with a further application for leave to be given to add the same new factual charge against the Accused therein (a charge which had been previously been dismissed)⁶, six weeks after all written submissions in relation to that application were filed it is yet to be ruled on⁷, such that the joint case continues to proceed at this stage on the basis of two separate indictments, namely the Case 10 Confirmed Indictment and the Case 11 Confirmed Indictment.

11. In relation to legal aid, although the Specialist Chamber of the Constitutional Court has declared the Accused's referral to be inadmissible, the Specialist Chamber of the Constitutional Court has not declared that the revised regulations KSC-BD-25/Rev1 are compatible with the Constitution of Kosovo⁸. The Constitutional Court did find that the referral engaged Article 33(1) of the Constitution and Article 6 of the European Convention on Human Rights⁹ but, as the Accused was not permitted as an individual to challenge the compatibility, the merits of the argument as to incompatibility remain to be considered.

12. In light of the Constitutional Court's decision to decline to consider the merits, the KSC Ombudsman, who does have the power to refer questions of constitutional compatibility of laws to the Constitutional Court pursuant to Article 49(5) of the Law, has today been requested by the Accused (and by Messrs

Public at paragraph 4

⁶ KSC-BC-2023-10/F00189, *Request to amend pursuant to Rule 90(1)(b) with confidential Annexes 1 and 2*, Prosecutor, 27 February 2024, Confidential

⁷ The final submission in relation thereto being filed on 15 March 2024 - KSC-BC-2023-10/F00216, *Prosecution reply to 'Response to the Request to Amend pursuant to Rule 90(1)(b)'*, Prosecutor, 15 March 2024, Confidential

⁸ KSC-CC-2024-23/F00006, *Decision on the Referral of Sabit Januzi, Ismet Bahtijari and Haxhi Shala to the Constitutional Court Panel Concerning the Constitutional Validity of the Legal Aid Regulations of the Specialist Chambers*, Constitutional Court, 24 April 2024, Public

⁹ KSC-CC-2024-23/F00006, *Decision on the Referral of Sabit Januzi, Ismet Bahtijari and Haxhi Shala to the Constitutional Court Panel Concerning the Constitutional Validity of the Legal Aid Regulations of the Specialist Chambers*, Constitutional Court, 24 April 2024, Public at paragraph 11

Shala and Kilaj) to so refer KSC-BD-25/Rev1. That request is presently outstanding.

13. Meanwhile, the independent Association of Defence Counsel Practising Before the International Courts and Tribunals (ADC-ICT) has publicly stated that the remuneration adopted in KSC-BD-2024/Rev1 is insufficient, when compared to comparative rates concerning contempt proceedings before other international courts and tribunals, to safeguard the right of accused persons facing contempt-style proceedings before the KSC to effective representation and therefore a fair trial¹⁰. As the ADC-ICT has also stated, the fees set out by the Registry in KSC-BD-2024/Rev1, without any consultation, and with no democratic or judicial scrutiny whatsoever, amount to a concrete prejudicial impact of inadequate resourcing on the rights and interests of accused persons.

14. The SPO says nothing about the concerns of the independent ADC-ICT, just as the Registry has said nothing to date about the concerns of the independent ADC-ICT (or the merits of the referral as a whole).

15. The Accused has in fact:

- a. repeatedly submitted a completed declaration of means forms to the Defence Office for the Defence Office to make an assessment of indigence. The Defence Office has refused to; and
- b. repeatedly asked the Defence Office to confirm that it will consider an application for legal aid under KSC-BD-25/Rev1 on an interim basis and without prejudice to the complaint that KSC-BD-25/Rev1 is incompatible with the Constitution and thus invalid. The Defence Office – and indeed the Deputy Registrar in open court when asked to do so by the Pre-Trial

¹⁰ KSC-CC-2024-23/F00003, *ADC-ICT Request for Leave to Appear as amicus curiae*, Association of Defence Counsel Practising Before the International Courts and Tribunals (ADC-ICT), 15 April 2024, Public

Judge¹¹ – has refused to so confirm, without providing any justification or reason for so refusing.

16. Meanwhile, defence counsel, together with co-counsel and team member, continue to prepare the matter without any remuneration or reimbursement of expenses because of our collective commitment to the Accused. The Registry (and the SPO for that matter) should not seek to exploit or take advantage of it.
17. The Constitutional Court has suggested that (in the absence of a referral from the Ombudsman at least) it falls in the first instance to the criminal chambers to assess whether there is any merit to the alleged violations of the Accused's article 6 rights resulting from the incompatibility of KSC-BD-25/Rev1 and whether this can or should be remedied in the course of proceedings.
18. However, unlike the Constitutional Court on a referral from the Ombudsman as to the incompatibility of KSC-BD-25/Rev1 with the Constitution, the criminal chambers have no power to declare KSC-BD-25/Rev1 incompatible with the Constitution, lacking in constitutional validity from the date of its entry into force and thus ceasing to have legal effect (and in the process reviving the previous legal aid regime in KSC-BD-25).
19. Whereas there is a provision for a panel to review a decision by the Registrar to determine the amount of the Legal Aid Fee in accordance with Regulation 13(1) of KSC-BD-25/Rev1 (see Article 18(7) thereof), any review to re-determine the amount of the Legal Aid Fee will itself be required to determine it in accordance with Regulation 13(1) of KSC-BD-25/Rev1 – which does not, in the independent view of the ADC-ICT, provide remuneration which is sufficient, when compared to comparative rates concerning contempt proceedings before other international

¹¹ Transcript 22 March 2024 at pages 234 to 236

courts and tribunals, to safeguard the right of accused persons facing contempt-style proceedings before the KSC to a fair trial. It is no effective remedy at all.

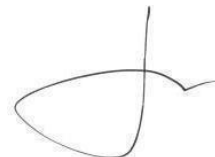
20. It is hoped, instead, that the Ombudsman will refer the constitutional compatibility of KSC-BD-25/Rev1 to the Constitutional Chamber so that a decision can be taken on the merits as a matter of urgency.

21. If not, the only effective remedy to seek in the criminal chambers will be a stay of proceedings on the basis of abuse of process.

II. CLASSIFICATION

22. This filing is classified as confidential pursuant to Rule 82(4).

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