



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2018-01
Before: Single Judge Panel
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon
Filing Participant: Specialist Prosecutor
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**Public redacted version of Prosecution Response to the Application to Terminate
the Investigation against Driton Lajçi**

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I. INTRODUCTION

1. Continued investigation of Driton LAJÇI remains reasonable. The Application¹ relies on an inapplicable legal basis in Article 159 of the Kosovo Criminal Procedure Code ('KCPC')² instead of the controlling provisions of the Law and Rules.³ LAJÇI's arguments also ignore the essential considerations justifying the length of the Specialist Prosecutor's Office's ('SPO') investigation.

II. BACKGROUND

2. On 3 May 2019, the SPO met LAJÇI [REDACTED].⁴ LAJÇI was informed at this meeting that he was suspected of intimidating witnesses within the meaning of Article 395 of the Kosovo Criminal Code.⁵

¹ Publicly Redacted Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Mr. Driton Lajçi, KSC-BC-2018-01/F00172/RED ('Application').

² Article 159(1) of the KCPC provides: '1. If an investigation is initiated, the investigation shall be completed within two (2) years. If an indictment is not filed, or a suspension is not entered under Article 157 of this Code, after two (2) years of the initiation of the investigation, the investigation shall automatically be terminated'.

³ Article 3 of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'); Rule 47 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Article' or 'Articles' herein refer to articles of the Law, and all references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

⁴ [REDACTED].

⁵ Contrary to LAJÇI's submissions, whether the meeting was 'formal' or 'informal' is not a material point of dispute. LAJÇI's remark is in reference to an SPO letter of 27 May 2021, which commented on the formality of the meeting only to show LAJÇI's inconsistency in describing it. *See* letter at paragraph 11 below ('[a]s an initial matter, I note that your account of the meeting between your client and the then Deputy Specialist Prosecutor of the Specialist Prosecutor's Office on 3 May 2019 differs significantly from the inaccurate account that you provided to [REDACTED]. I draw your attention to [REDACTED], in which you claim that the meeting in question occurred on 29 December 2019, was "rather informal" and involved the then Deputy Specialist Prosecutor handing your client a "summons" [REDACTED], containing no details as to the nature of the allegations. Your letter of 24 May 2021 now says that the meeting occurred on 3 May 2019, was a "formal meeting," and entailed the then Deputy Specialist Prosecutor providing your client not with a summons but with [REDACTED]). By way of a subsequent letter on 27 May 2021, LAJÇI's counsel explained that the inconsistency was a typo and that the intention was to again characterise it as an informal meeting. Whether the meeting was formal or informal, in other words, is a dispute that counsel for Mr Lajçi had with himself, not with the SPO.

3. [REDACTED],⁶ [REDACTED].⁷ [REDACTED].
4. On 25 September 2019, the SPO summonsed LAJÇI for an interview.⁸ LAJÇI ultimately exercised his right to remain silent, and his constitutional challenge that his rights were violated during this interview procedure was dismissed.⁹
5. [REDACTED],¹⁰ [REDACTED].¹¹
6. [REDACTED],¹² [REDACTED].¹³
7. On 11 December 2020, LAJÇI requested that the SPO terminate the investigation against him.¹⁴ The SPO did not do so, disputing the characterisations made in this letter.
8. [REDACTED],¹⁵ [REDACTED].¹⁶ [REDACTED]. [REDACTED]. [REDACTED].
9. [REDACTED]. [REDACTED],¹⁷ [REDACTED]¹⁸ [REDACTED].¹⁹ [REDACTED].
10. On 24 May 2021, LAJÇI again sent a letter to the SPO requesting termination of the investigation on grounds of Article 159 of the KCPC.

⁶ [REDACTED].

⁷ [REDACTED].

⁸ Annex 1 to Prosecution response to Mr Driton Lajçi's Referral to the Constitutional Court Panel on the Legality of the Interview Procedure, KSC-CC-2019-07/F00008/A01, 2 December 2019, Confidential.

⁹ Decision on the Referral of Driton Lajçi Concerning Interview Procedure by the Specialist Prosecutor's Office, KSC-CC-2019-07/F00013, 13 January 2020.

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ *Prosecutor v. Thaçi et al.*, Annex 7 to Application for Interim Release of Kadri Veseli, KSC-BC-2020-06/F00151/A07, 17 December 2020, Confidential.

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

11. On 27 May 2021, the SPO rejected this latest request to terminate the investigation, noting the applicability of Rule 47.²⁰

III. SUBMISSIONS

A. LAJÇI RELIES UPON AN INAPPLICABLE LEGAL BASIS

12. LAJÇI's heavy reliance on Article 159 of the KCPC - which automatically terminates investigations going beyond two years as a general rule - is misplaced.²¹

13. Article 3 of the Law sets out the applicable legal framework before the KSC. In particular, it provides that other provisions of Kosovo law do not apply unless they have been expressly incorporated and applied by the Law.²² Save in respect of a small number of very specific references,²³ the KCPC has not been adopted or incorporated into the Law. Rather than adopting the KCPC, the Law provides that rules of procedure and evidence were to be drafted and adopted by the KSC Judges.²⁴

14. The Rules also do not incorporate Article 159 of the KCPC. It is Rule 47 which provides the relevant framework, requiring that an investigation be terminated if no indictment has been issued within 'a reasonable time' from when a person became a

²⁰ SPO Letter, 27 May 2021 (in part: '[t]he investigation of your client is still ongoing and active lines of enquiry are being pursued. As you know, but do not cite in your letter, [REDACTED], a clear indication that the investigation of your client is still ongoing. Accordingly, we are not in a position to terminate the investigation at this time').

²¹ Application, KSC-BC-2018-01/F00172/RED, paras 2, 6, 32-35.

²² Article 3(2)(c) and (4).

²³ Articles 23(1), 35(3). *See also* Article 37(3)(b) (specifying that evidence given pursuant to certain provisions of the KCPC is admissible before the KSC).

²⁴ Article 19(1).

suspect and was notified thereof.²⁵ Rule 47 has been found to be compatible with the rights and freedoms in Chapter II of the Constitution.²⁶

15. In this respect, there is no ambiguity or lacuna in the Rules requiring resort to the KCPC. Applying Article 159 of the KCPC directly would not be consonant with Article 3 of the Law,²⁷ and resorting to it as guidance would not be appropriate because this would be contrary to the plain language of Rule 47.²⁸

B. CONTINUED INVESTIGATION REMAINS REASONABLE

16. Rule 47 provides that that the period to be taken into account runs from when LAJÇI was notified that he was a suspect. LAJÇI was so notified on 3 May 2019, so the relevant timeframe runs from this date to the present.²⁹

17. The reasonableness of the length of proceedings is to be determined in the light of the circumstances of the case, which call for an overall assessment.³⁰ When determining whether the duration of criminal proceedings has been reasonable, the

²⁵ The rule provides, in full: '(1) If the Specialist Prosecutor does not file an indictment with the Specialist Chambers pursuant to Article 38(4) of the Law within a reasonable time after the person became a suspect and was notified thereof, the suspect may request the Specialist Prosecutor to terminate the investigation against him or her. (2) If a request is rejected or not considered, the suspect may request a Single Judge, assigned pursuant to Article 25(1)(f) of the Law, to consider the matter and, if necessary, terminate the investigation against the suspect'.

²⁶ Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, KSC-CC-PR-2017-01/F00004, 26 April 2017, para.107.

²⁷ See especially Article 3(2)(c). Rule 3 provides that the Rules shall be interpreted in a manner 'consonant with the framework as set out in Article 3 of the [Law] and, where appropriate, the [KCPC]'.

²⁸ See Article 19(2). *Contra* Application, KSC-BC-2018-01/F00172/RED, para.34.

²⁹ Despite indicating that the investigation must have commenced prior to this date, LAJCI does not appear to contest that 3 May 2019 is the relevant date for the period of time. See Application, KSC-BC-2018-01/F00172/RED, paras 23, 28-29. The period running from this date is also in accord with ECtHR jurisprudence. ECtHR [GC], *Simeonovi v. Bulgaria*, Judgment, 21980/04, 12 May 2017, para.110; ECtHR [GC], *McFarlane v. Ireland*, Judgment, 31333/06, 10 September 2010, para.143 (a 'criminal charge' exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him).

³⁰ ECtHR, *Boddaert v. Belgium*, Judgment, 12919/87, 12 October 1992, para.36.

ECtHR has had regard to factors such as the complexity of the case, the applicant's conduct and the conduct of the relevant administrative and judicial authorities.³¹

18. *Complexity of the case.* LAJÇI's investigation is of considerable complexity. The conduct under investigation requires unravelling government affiliated interference with SPO witnesses in the context of the SPO's investigation in the *Thaçi et al.* case. Many potential co-defendants could be implicated, [REDACTED]. [REDACTED].

19. *Conduct of SPO and LAJÇI.* The complexity of the case is amplified by [REDACTED]. [REDACTED]. As is clear from Section II above, requests for orders essential to further the investigation were diligently made and followed up on, but then went partially or wholly unanswered. This non-compliance necessitated both delays and further inquiries. The SPO is still missing critical information [REDACTED], impacting the progress of the investigation.

20. Some of this missing information was within LAJÇI's control to provide, and his failure to do so contributes to the length of the investigation. [REDACTED].³²

21. Only delays attributable to the KSC/SPO may justify a finding of a failure to comply with the reasonable time requirement set out in Rule 47.³³ In particular, necessary delays to obtain information pursuant to requests for assistance have been recognised by the ECtHR to be relevant to a reasonable time assessment. In *Arewa v. Lithuania*, the applicant complained of a pre-trial investigation lasting over five years. The ECtHR found no reasonable time violation under Article 6(1) of the ECHR, in large part because delays were necessitated by outstanding assistance requests:

As regards the conduct of the Lithuanian authorities, the Court acknowledges that for more than two years – between 16 September 2014 and 23 January 2017 – they did not perform investigative actions while waiting for replies to their legal assistance requests from foreign

³¹ ECtHR [GC], *Nicolae Virgiliu Tănase v. Romania*, Judgment, 41720/13, 25 June 2019, para.209; ECtHR [GC], *Frydlender v. France*, Judgment, 30979/96, 27 June 2000, para.43.

³² [REDACTED]. [REDACTED]. [REDACTED].

³³ See ECtHR [GC], *Idalov v. Russia*, Judgment, 5826/03, 22 May 2012, para.186; ECtHR [GC], *Pedersen and Baadsgaard v. Denmark*, Judgment, 49017/99, 17 December 2004, para.49.

jurisdictions [...] Being mindful not to substitute its view for that of the investigating officers, the Court does not see how the Lithuanian authorities could have done more to expedite the pre-trial investigation, or that some investigative measures could have been performed while the Lithuanian authorities were waiting for the replies to their legal assistance requests from abroad. The Court also observes that when holding that the proceedings in the applicant's criminal case had not been excessive, the domestic courts not only underscored the need for legal assistance requests that had been sent abroad as such, but also referred to the fact that the replies received to certain of those requests had been inconclusive, only prompting further questions, and thus requiring further correspondence with law enforcement authorities abroad.³⁴

22. The SPO is confronted with the very similar difficulties in the current investigation. LAJČI does not even appear to dispute that these difficulties exist, relying instead on an erroneous premise that Article 159 of the KCPC renders any outstanding investigative steps irrelevant.³⁵

23. *What is at stake for LAJČI.* It is acknowledged that LAJČI faces potential arrest and imprisonment as a result of the SPO's investigation. The maximum penalty for the offences under investigation is significant, though not nearly as much as in core crimes cases before the KSC. It must also be emphasised that LAJČI has never been detained during this investigation, and this is a factor to consider in evaluating whether the proceedings have taken a reasonable time.³⁶

24. *Conclusion.* Considering these factors, the length of LAJČI's investigation remains reasonable.

³⁴ ECtHR, *Arewa v. Lithuania*, Judgment, 16031/18, 9 March 2021, para.54.

³⁵ Application, KSC-BC-2018-01/F00172/RED, para.6; Letter from LAJČI's Counsel to SPO, 27 May 2021 ('[t]hird, in your letter you refer to the [REDACTED] and suggest that I have omitted to refer to it as that would somehow impact on the reasonable time it has taken to conduct the investigation. In our view that is entirely irrelevant. Any actions your Office has taken outside of the stipulated [two year] time frame do not impact upon whether charges should or should not have been brought').

³⁶ ECtHR, *Sagura v. Ukraine*, Judgment, 33736/16, 21 January 2021, para.39; ECtHR, *Khlebiuk v. Ukraine*, 2945/16, 25 July 2017, para.78.

IV. CLASSIFICATION

25. The present submission is filed confidentially in accordance with Rule 82(4). A public redacted version will be filed.³⁷

V. RELIEF SOUGHT

26. For the foregoing reasons, the relief sought should be rejected in full.

Word count: 2172



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Friday, 25 June 2021

At The Hague, the Netherlands.

³⁷ [REDACTED]. [REDACTED].