



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2018-01
Before: Single Judge Panel
Judge Nicolas Guillou
Registrar: Dr Fidelma Donlon
Date: 23 July 2021
Language: English
Classification: Public

**Public Redacted Version of Decision on Application for an Order Directing the
Specialist Prosecutor to Terminate the Investigation against Driton Lajçi**

Specialist Prosecutor

Jack Smith

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THE SINGLE JUDGE,¹ pursuant to Articles 3, 19(2) and 33(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 47 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 15 June 2021, the Defence for Driton Lajçi ("Defence" and "Mr Lajçi") applied for an order directing the Specialist Prosecutor to terminate the investigation against him ("Application").²

2. The Specialist Prosecutor's Office ("SPO") responded on 25 June 2021 ("Response").³ The Defence replied on 1 July 2021 ("Reply").⁴

II. SUBMISSIONS

3. The Defence submits that the failure of the SPO to file an indictment after two years of investigating Mr Lajçi requires this investigation to be terminated.⁵

¹ KSCPR-2018, F00004, President, *Decision Assigning a Single Judge Pursuant to Article 33(2) of the Law*, 29 May 2018, public.

² KSC-BC-2018-01, F00172, Specialist Counsel, *Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Mr. Driton Lajçi*, 15 June 2021, confidential. A public redacted version was submitted on the same day, F00172/RED.

³ KSC-BC-2018-01, F00175, Specialist Prosecutor, *Prosecution Response to the Application to Terminate the Investigation against Driton Lajçi*, 25 June 2021, confidential. A public redacted version was submitted on the same day, F00175/RED.

⁴ KSC-BC-2018-01, F00178, Specialist Counsel, *Reply to the Prosecution Response regarding the Defence Application to Terminate the Investigation against Driton Lajçi*, 1 July 2021, confidential. The Single Judge notes that, although the date indicated on the Reply is 30 June 2021, it was received and distributed on 1 July 2021. The Single Judge further observes that the word count of the Reply is 3,041 words, whereas Article 41 of the Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers stipulates that a reply to a response shall not exceed 2,000 words. In the interests of judicial efficiency, the Single Judge exceptionally accepts the Reply but urges the Defence to abide by all substantive and formal requirements in relation to any future filings.

⁵ Application, paras 2, 24, 36.

4. The SPO responds that the continued investigation of Mr Lajçi remains reasonable.⁶

5. In the Reply, the Defence maintains its request for an order pursuant to Rule 47(2) of the Rules that the SPO's investigation of Mr Lajçi be terminated.⁷

III. APPLICABLE LAW

6. Pursuant to Article 3(2)(b) and (c) of the Law, the Specialist Chambers ("SC") shall adjudicate and function in accordance with, *inter alia*, the Law as the *lex specialis* and other provisions of Kosovo law as expressly incorporated and applied by the Law.

7. Pursuant to Article 3(4) of the Law, any other Kosovo law, regulation, piece of secondary regulation, other rule or custom and practice which has not been expressly incorporated into the Law shall not apply to the organisation, administration, functions or jurisdiction of the SC and SPO. The Law shall prevail over any and all contrary provisions of any other law or regulation.

8. Pursuant to Article 19(2) of the Law, the Rules shall reflect the highest standards of international human rights law including the European Convention for Human Rights and Fundamental Freedoms ("ECHR") and International Covenant for Civil and Political Rights with a view to ensuring a fair and expeditious trial taking into account the nature, location and specificities of the proceedings to be heard by the SC. In determining its Rules, the SC shall be guided by the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123 ("2012 Criminal Procedure Code").

9. Pursuant to Rule 47(1) of the Rules, if the Specialist Prosecutor does not file an indictment with the SC pursuant to Article 38(4) of the Law within a reasonable

⁶ Response, para. 1.

⁷ Reply, paras 3, 44.

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.

10. Pursuant to Rule 47(2) of the Rules, if a request under Rule 47(1) of the Rules 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.

IV. DISCUSSION

A. THE APPLICABLE STANDARD

11. The Defence submits that, in an exchange with the SPO, the latter relied on the reasonable time limit to file an indictment in Rule 47(1) of the Rules and failed to mention Article 159(1) of the 2012 Criminal Procedure Code, which stipulates that, if an indictment is not filed after two years of the initiation of the investigation, the investigation shall automatically be terminated.⁸

12. In the view of the Defence, while the reasonable time limit to bring an indictment in Rule 47(1) of the Rules, would, if read in isolation of the relevant applicable and the SC's binding legal framework, appear broad, it cannot be read as such because Article 19(2) of the Law requires the determination of the Rules to be guided by the 2012 Criminal Procedure Code.⁹ The Defence adds that the 2012 Criminal Procedure Code is clear in that the termination of the investigation after two years is mandatory and not subject to any discretionary powers.¹⁰

13. The SPO responds that the Application relies on an inapplicable legal basis.¹¹ According to the SPO, Article 3 of the Law provides that other provisions of Kosovo law do not apply unless they have been expressly incorporated and

⁸ Application, paras 21, 22, 27, 33.

⁹ Application, para. 34.

¹⁰ Application, para. 6.

¹¹ Response, para. 1.

applied by the Law.¹² In this regard, the SPO adds that, save in respect of a small number of very specific references, the 2012 Criminal Procedure Code has not been adopted or incorporated into the Law.¹³

14. The SPO further avers that Rule 47 of the Rules, which has been found to be compatible with the Constitution, provides the relevant framework.¹⁴ In the view of the SPO, there is no ambiguity or lacuna in the Rules requiring resort to the 2012 Criminal Procedure Code.¹⁵

15. The Defence replies that Article 19(2) of the Law provides that the Rules must be measured against and guided by Kosovo law to determine what is “appropriate” in the case of ambiguity or conflict.¹⁶ The Defence adds that it is not accepted that the procedural rules and the regulatory framework of the SC enjoy supremacy over primary legislation of Kosovo and its Constitution.¹⁷ In addition, according to the Defence, while Article 159(1) of the 2012 Criminal Procedure Code might not be expressly incorporated into the Law, the very same Law requires that the Rules “shall be guided” by the 2012 Criminal Procedure Code.¹⁸

16. The Single Judge considers that, besides designating the Law as the *lex specialis*, Article 3 of the Law unequivocally stipulates that the SC shall only apply other provisions of Kosovo law as expressly incorporated and applied by the Law. Pursuant to Rule 4(1) of the Rules, the Rules must be construed in the same manner. Considering that Article 159(1) of the 2012 Criminal Procedure Code has not been expressly incorporated by either the Law or the Rules, a request to terminate an investigation must be assessed exclusively against Rule 47 of the Rules.

¹² Response, para. 13.

¹³ Response, para. 13.

¹⁴ Response, para. 14.

¹⁵ Response, para. 15.

¹⁶ Reply, para. 13.

¹⁷ Reply, para. 15.

¹⁸ Reply, para. 16.

17. The terms of Article 19(2) of the Law cannot affect this conclusion. This provision stipulates, *inter alia*, that the SC shall be guided by the 2012 Criminal Procedure Code in determining its Rules. The plain meaning of the words “shall be guided” does not entail an obligation to incorporate the exact same standards from the 2012 Criminal Procedure Code into the Law. Such an obligation would have had to be set forth in more express terms. Indeed, this provision further stipulates that the Rules shall reflect the highest standards of international human rights law. Had it been intended to achieve the same result in relation to the 2012 Criminal Procedure Code, a similar formulation would have been used. It follows, *a contrario*, that the reference to “shall be guided” rather signifies that, while the Judges must take the 2012 Criminal Procedure Code into account when adopting the Rules, they are not bound by any specific provisions contained in that Code.¹⁹ This conclusion is confirmed by Article 19(1) of the Rules, which expressly requires the Judges of the SC to adopt the Rules. Had the Judges of the SC been entirely bound by the 2012 Criminal Procedure Code, Article 19(1) of the Law would be devoid of any meaning.

18. This further means that it cannot be maintained that the procedural rules and the regulatory framework of the SC in relation to the possibility to terminate an investigation enjoy supremacy over primary legislation and the Constitution. The Law was approved by the Assembly in accordance with the Constitution. On this basis, the Judges of the SC, in adopting the Rules, included the possibility to terminate an investigation in accordance with the requirement to derive guidance from the 2012 Criminal Procedure Code. However, in the absence of an obligation to reproduce the corresponding provision of the Code, the Judges defined the applicable time frame differently due to, as stipulated by Article 19(2) of the Law, the nature and specificities of SC proceedings. In addition, in accordance with

¹⁹ See for instance Articles 23(1) and 35(3) of the Law, which expressly stipulate that they are not limited to the corresponding provisions of the 2012 Criminal Procedure Code.

Article 3(2)(a) of the Law, Rule 47 of the Rules has been declared constitutional.²⁰ Thus, this Rule is fully compatible with the wider legal framework.

19. Lastly, having found that Article 159(1) of the 2012 Criminal Procedure Code is inapplicable, the Single Judge finds that there is neither ambiguity that requires to be resolved by adopting the most favourable interpretation to the suspect within the meaning of Rule 4(3) of the Rules nor a lacuna within the meaning of Rule 5 of the Rules. The aforementioned conclusion is the only possible interpretation arising from the principles set forth in Articles 3 and 19(1)-(2) of the Law and Rule 4 of the Rules, and settles the matter entirely.

20. Therefore, the Single Judge considers that Article 159(1) of the 2012 Criminal Procedure Code is not applicable to a request to terminate an investigation. Within the legal framework of the SC, such a request must be determined on the basis of Rule 47 of the Rules. The Single Judge will, therefore, assess whether or not the investigation of Mr Lajçi requires to be terminated on the basis of this standard.

B. THE DURATION OF THE INVESTIGATION

21. According to the Defence, an investigation against Mr Lajçi was initiated before he was even formally invited for a suspect interview by the SPO on 3 May 2019.²¹ In this regard, the Defence refers to the fact that the SPO applied to seize Mr Lajçi's mobile telephone prior to the order of the Single Judge of 2 April 2019 authorising the SPO to do so.²² The Defence further avers that, in any event, he was formally notified of being a suspect on 3 May 2019, which is not denied by the SPO.²³ The Defence also contends that, even though the SPO argued that its investigations were ongoing and that the Defence had omitted reference to

²⁰ KSC-CC-PR-2017-01, F00004, Constitutional Court, *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/L053 on Specialist Chambers and Specialist Prosecutor's Office*, 26 April 2017, paras 12, 15, 16, 107.

²¹ Application, para. 29.

²² Application, paras 9, 29.

²³ Application, paras 9, 23, 29-30.

a [REDACTED] in an exchange between the Defence and the SPO, [REDACTED] and the SPO has not brought charges against Mr Lajçi despite having had ample opportunity to fully investigate this matter.²⁴

22. The SPO responds that the Defence's arguments ignore the essential considerations justifying the length of its investigation.²⁵ According to the SPO, Mr Lajçi was notified that he was a suspect on 3 May 2019, so the relevant timeframe runs from that date to the present.²⁶ It adds that, on the basis of the jurisprudence of the European Court of Human Rights ("ECtHR"), 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, having regard to factors such as the complexity of the case, the applicant's conduct, and the conduct of the relevant administrative and judicial authorities.²⁷

23. According to the SPO, the investigation against Mr Lajçi is of considerable complexity as it requires unravelling government affiliated interference with SPO witnesses, and many potential co-defendants could be implicated [REDACTED].²⁸ The SPO also contends that [REDACTED].²⁹ Furthermore, in the view of the SPO, [REDACTED] and Mr Lajçi's failure to provide some of the missing information contributes to the length of the investigation.³⁰ The SPO asserts, in this regard, that, in relation to an investigation lasting more than five years, the ECtHR found no violation of Article 6(1) ECHR as the delays resulted in large part from outstanding requests for assistance.³¹ The SPO acknowledges that Mr Lajçi faces potential arrest and imprisonment, but argues that he has not been detained

²⁴ [REDACTED].

²⁵ Response, para. 1.

²⁶ Response, paras 2, 16.

²⁷ Response, para. 17.

²⁸ Response, para. 18.

²⁹ Response, paras 3, 5, 6, 8, 19.

³⁰ Response, para. 20.

³¹ Response, para. 21, referring to ECtHR, *Arewa v. Lithuania*, no. 16031/18, Judgment, 9 March 2021, para. 54.

during the investigation.³² The SPO concludes that the length of the investigation against Mr Lajçi remains reasonable.³³

24. The Defence replies that the SPO concedes that more than two years have passed since Mr Lajçi was formally notified of being under its investigation.³⁴ The Defence further maintains its submissions that Article 159(1) of the 2012 Criminal Procedure Code has a much broader starting point than Rule 47(1) of the Rules, namely two years from the “initiation of an investigation”, and that it is clear that Mr Lajçi had been under investigation since at least the Single Judge issued an order in relation to him on 2 April 2019, although certainly prior to that.³⁵ Moreover, the Defence contends that [REDACTED] has no effect on whether the investigation should now be terminated as a matter of law as [REDACTED].³⁶

25. In addition, in the submission of the Defence, the SPO considers the assessment under Rule 47 of the Rules to be akin to that of Article 6(1) ECHR, but, considering the timeframe in the 2012 Criminal Procedure Code, a continued investigation of Mr Lajçi is no longer “reasonable”.³⁷ The Defence is also of the view that the SPO has not even given any indication as to what it would consider a “reasonable” length of an investigation, but in any event, it cannot be open-ended, nor is this a timeframe for the SPO to clarify.³⁸

26. As to the complexity of the case, the Defence avers that there is a significant discrepancy in complexity regarding an obstruction of justice case on one end of the spectrum and, for instance, complex international crimes at the other end.³⁹ Furthermore, in relation to the ECtHR jurisprudence invoked by the SPO, the

³² Response, para. 23.

³³ Response, para. 24.

³⁴ Reply, paras 6, 18.

³⁵ Reply, paras 7, 8.

³⁶ Reply, paras 19-20.

³⁷ Reply, paras 23-24.

³⁸ Reply, para. 25.

³⁹ Reply, para. 29.

Defence asserts that the SPO omits that the criminal proceedings in question concerned financial crimes that spanned across and required evidence from five other jurisdictions, whereas the investigation against him concerns one single and relatively small jurisdiction and an allegation of obstruction of justice.⁴⁰ In addition, in the view of the Defence, there is no evidence for the SPO's claim [REDACTED].⁴¹ The Defence additionally argues that the SPO does not appear to be arguing that Mr Lajçi withheld all documentation requested, or even a significant portion, and that Article 6(1) ECH does not require accused persons actively to co-operate with the judicial authorities.⁴² Lastly, as to the SPO's conduct, the Defence contends that it remains unclear what formal requests have been put to Mr Lajçi to obtain the allegedly missing information in his possession, and it is the duty of the relevant authorities to organise their judicial system in a way that their courts can meet the requirements of Article 6(1) ECHR.⁴³

27. At the outset, the Single Judge observes that Rule 47(1) of the Rules refers to "a reasonable time after the person became a suspect and was notified thereof". The inclusion of the word "and" signifies that these two requirements are cumulative. Therefore, the "reasonable time" criterion concerns the period starting from the moment that the person concerned is notified of his or her status as a suspect until the date of a decision on a request to terminate the investigation against him or her pursuant to Rule 47(2) of the Rules. Specifically, the Single Judge must determine whether, in absence of an indictment filed by the Specialist Prosecutor, the period from 3 May 2019 - the date on which the Specialist Prosecutor notified Mr Lajçi that he was a suspect according to both the Defence and the SPO – until the date of the present decision exceeds the "reasonable time" criterion under Rule 47(1) of the Rules and requires the investigation against

⁴⁰ Reply, paras 32-33.

⁴¹ Reply, para. 35.

⁴² Reply, para. 37.

⁴³ Reply, paras 40, 42.

Mr Lajçi to be terminated. Thus, the Defence's submissions as to when Mr Lajçi became a suspect and the impact of [REDACTED] need not be considered further.

28. The Single Judge will assess whether, on the basis of an overall assessment of the circumstances of the present case,⁴⁴ the period from 3 May 2019 until the date of the present decision constitutes a "reasonable time" within the meaning of Rule 47 of the Rules in view of: (i) the complexity of the investigation; (ii) the conduct of Mr Lajçi and the relevant administrative and judicial authorities; and (iii) what is at stake for Mr Lajçi.⁴⁵

29. As to the complexity of the investigation, the Single Judge notes that the investigation against Mr Lajçi is connected to investigations and/or cases pertaining to core crimes falling within the jurisdiction of the SC. In addition, contrary to the Defence's submissions, the investigation is not limited to Mr Lajçi, considering that the SPO specifies that many potential co-defendants could be implicated. In this regard, [REDACTED] as the mere fact that government affiliated interference is being investigated adds to the complexity of the investigation. Furthermore, [REDACTED] further augments the investigation's complexity. Lastly, the ECtHR case relied upon by the SPO was primarily invoked to demonstrate, as set out below, that requests for cooperation can protract proceedings without such delay being attributable to the prosecuting authorities. Considering these factors, while less complex than an investigation regarding the core crimes falling within the jurisdiction of the SC, the investigation against Mr Lajçi in relation to obstruction of justice is of significant complexity.

30. With regard to the conduct of Mr Lajçi and the relevant administrative and judicial authorities, the Single Judge recalls that [REDACTED].⁴⁶ [REDACTED].⁴⁷

⁴⁴ ECtHR, *Boddaert v. Belgium*, no. 12919/87, Judgment, 12 October 1992, para. 36.

⁴⁵ ECtHR, *Pélissier and Sassi v. France* [GC], no. 25444/94, Judgment, 25 March 1999, para. 67.

⁴⁶ Response, para. 3.

⁴⁷ Response, paras 5, 6, 8.

[REDACTED].⁴⁸ Mr Lajçi contributed to this situation in part [REDACTED].⁴⁹ Therefore, even though Mr Lajçi was not required to co-operate, his conduct [REDACTED] constitutes an objective fact that compounded the delay in relation to the investigation.⁵⁰ In any event [REDACTED] has, in general, significantly protracted the investigation from July 2019 and continues to hamper the investigation to the present date. [REDACTED].

31. Lastly, in relation to the question of what is at stake for Mr Lajçi, the Single Judge observes that, according to the ECtHR, in determining the reasonableness of the length of proceedings in criminal cases, the question of whether the applicant is in detention is a relevant factor.⁵¹ In the case at hand, even though he could potentially face a criminal conviction and imprisonment should an indictment be filed against him, Mr Lajçi has neither been deprived of his liberty during the investigation nor have restrictive measures falling short of detention been imposed. In these circumstances, the length of the investigation against Mr Lajçi cannot be considered to be unreasonable on this basis either.

32. In conclusion, considering the aforementioned factors, in particular the significant delay arising from [REDACTED], the Single Judge finds that the investigation against Mr Lajçi from 3 May 2019 until the date of the present decision does not contravene the “reasonable time” criterion under Rule 47 of the Rules. Accordingly, this investigation does not require to be terminated.

⁴⁸ Response, para. 8.

⁴⁹ Response, paras 3, 20.

⁵⁰ Similarly ECtHR, *Eckle v. Germany*, no. 8130/78, Judgment, 15 July 1982, para. 82; *I.A. v. France*, no 1/1998/904/1116, Judgment, 23 September 1998, para. 121.

⁵¹ ECtHR, *Khlebiak v. Ukraine*, no. 2945/16, Judgment, 25 July 2017, para. 78.

V. CLASSIFICATION OF THE REPLY

33. The Defence submits that the Reply, filed as confidential, contains no confidential details, requires no redactions, and pursuant to Rule 82(5) of the Rules may be reclassified as public by the Single Judge.⁵²

34. However, the Single Judge notes that the Defence refers to submissions from the Response that have been redacted by the SPO.⁵³ Accordingly, the Defence shall verify whether the Reply reveals any other confidential information and submit a public redacted version of the Reply by no later than 30 July 2021.

DISPOSITION

35. For the above-mentioned reasons, the Single Judge hereby:

- (a) **REJECTS** the Application; and
- (b) **ORDERS** Mr Lajçi to submit a public redacted version of the Reply by no later than 30 July 2021.



Judge Nicolas Guillou

Single Judge

Dated this Friday, 23 July 2021

At the Hague, the Netherlands.

⁵² Reply, para. 2.

⁵³ Response, para. 18; Reply, para. 35.