

In: KSC-BC-2018-01

Before: Single Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Driton Lajçi

Date: 29 July 2021

Language: English

Classification: Confidential

Application for Certification on Leave to Appeal
the Decision on Application for an Order Directing the Specialist Prosecutor to
Terminate the Investigation against Driton Lajçi

Specialist Prosecutor

Jack Smith

Specialist Counsel

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I. INTRODUCTION

1. On 15 June 2021, Specialist Counsel for Driton Lajçi (“Applicant”) applied for an order directing the Specialist Prosecutor’s Office (“SPO”) to terminate the investigation against the Applicant, given that the investigation has been ongoing for well over two years (“Application”).¹
2. On 23 July 2021, the Single Judge rendered a decision rejecting the Application (“Impugned Decision”).²
3. In accordance with Article 45 of the Law on Specialist Chambers and Specialist Prosecutor’s Office Law No.05/L-053 (“Law”) and Rule 77 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), the Applicant applies for leave to appeal from the Impugned Decision on the following three Issues, namely:
 - i. Whether the Single Judge erred in finding that the time limit as set out under Article 159(1) of the 2012 Criminal Procedure Code of the Republic of Kosovo (“KCPC”) is entirely “*inapplicable*” and *de facto* should be completely ignored, in interpreting the “reasonable

¹ KSC-BC-2018-01, F00172, 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.

² KSC-BC-2018-01/F00180, Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi, 23 July 2021, Confidential.

time” framework in Rule 47 of the Rules, as adopted by the Judges of the Kosovo Specialist Chambers (“Specialist Chambers”);

- ii. Whether the Single Judge erred by failing to set out the applicable parameters for what constitutes a “reasonable time” for an SPO investigation within the meaning of Rule 47 of the Rules in the absence of any guiding principles;
- iii. Whether the Single Judge erred by failing to set out whether, when and how the Applicant can now challenge the investigation against him.

II. THE LAW

4. Article 45(2) of the Law provides:

“Any other interlocutory appeal must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel on the basis that it involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.”

5. Rule 77(2) of the Rules provides:

“The Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.”

6. Further relevant legal provisions are set out in paragraphs 6-10 of the Impugned Decision and paragraphs 3-6 of the Application.

III. SUBMISSIONS

A. The Legal Test for Applications for Leave to Appeal

7. In light of the above, the following test applies to an application for leave to appeal:
 - a. Whether the matter is an “appealable issue”;
 - b. Whether the issue at hand would significantly affect:
 - i. The fair and expeditious conduct of the proceedings; or
 - ii. The outcome of the trial; and

c. Whether, in the opinion of the Pre-Trial Judge, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.³

8. These elements will be addressed in relation to Issues 1-3 below.

B. Whether the Issues are “Appealable” Issues

9. Appealable issues must relate to *“an identifiable topic or subject, the resolution of which is essential for determination of the matters arising in the judicial cause under examination”* and must also *“emanate from the ruling concerned and...not amount to abstract questions or hypothetical concerns.”*⁴

10. In light of this framework, the Applicant submits that the three Issues identified in paragraph 3 of this Application constitute “appealable” issues, as each relates to the identifiable topic of the interpretation and application of provisions concerning a “reasonable” investigative period, to what extent the “shall be guided” principle in Article 19(2) of the Law applies, and the ability of the Defence to raise challenges to SPO investigations in light of that interpretation. It is quite clear to the Applicant that to do otherwise would

³ KSC-BC-2020-06/F00172, Decision on the Thaçi Defence Application for Leave to Appeal (“Thaçi Decision on Leave to Appeal”), 11 January 2021, Public, at para. 10.

⁴ Thaçi Decision on Leave to Appeal, at para. 11.

leave the SPO with such wide and unchallenged discretion so as to render any procedural protection meaningless.

11. It is submitted that there are clear issues as to whether, in determining the appropriate legal framework, whether expressly incorporating or expressing excluding a provision of the domestic law is the correct approach. In this regard, it is noted that the mere fact that parliament has adopted a legal provision or legal principle does not mean that it is exempt from judicial review as to do so would exclude the possibility of seeking a declaration of incompatibility with the Constitution or an international legal obligation imposed by the agreements and treaties under the Constitution. These are matters of general public importance that go to the very core of the applicable legal framework.

12. Further, the three Issues raised emanate directly from the conclusions of the Single Judge in the Impugned Decision and thus do not amount to disagreements, abstract questions, or hypothetical concerns.

C. Whether the Issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

(i) *the fair and expeditious conduct of the proceedings*

13. In order to be certified for appeal, it must be shown that an issue would significantly affect the fair and expeditious conduct of the proceedings.

'Fairness' is "*generally understood as referencing the norms of fair trial*", and "*extends to pre-trial proceedings as well as the investigation of a crime.*"⁵

'Expeditiousness' includes the need to conduct a trial "*within a reasonable time*" and "*without prejudice to the rights of the Parties concerned*", and is "*but one attribute of a fair trial.*"⁶

14. The Impugned Decision is understood to mean that the Single Judge determined that a period of more than twenty-six (26) months, without reference to the nature of any potential charges, any evidence under consideration, or any factor enabling the Applicant to respond, is within a "*reasonable time*" for an investigation by the SPO.

15. Further, in coming to this conclusion, it is noted that at paragraph 32 of the Impugned Decision the Single Judge abruptly ends with the final sentence: "*Accordingly, this investigation does not require to be terminated.*" No information is given as to when such termination will in fact be required, or whether and how the Applicant may subsequently challenge that investigation in light of the Impugned Decision.

16. The Single Judge does not scrutinise the facts as presented, nor is the Applicant given an effective opportunity to respond to issues concerning

⁵ *Thaçi* Decision on Leave to Appeal, at para. 13.

⁶ *Thaçi* Decision on Leave to Appeal, at para. 13.

complexity other than in the abstract. It cannot be the case that the SPO merely cites 'complexity' and makes reference to 'other persons' when the nature of the case as presented now by the SPO appears to be wholly different to the allegations that were originally put to the Applicant. It is a reasonable question to put, as part of the substantive appeal arguments, if leave is certified, that if the allegations are so serious and go to witness intimidation, as now alleged, rather than financial irregularities, as previously alleged, then why has it taken more than two years to consider whether charges should be brought. One might consider whether the SPO has demonstrated expeditiousness in the conduct of its investigation.

17. At this juncture, the Single Judge therefore leaves the SPO investigation against the Applicant effectively open-ended, with no indication as to when the length of that investigative period, which has already proceeded for over two years, will become unreasonable, and whether the SPO will be required to demonstrate that they have acted due diligence and expeditiousness in carrying out their investigations.
18. Moreover, as a result of its imprecision the Impugned Decision leaves the Applicant with no legal certainty as to when, whether, or how he may challenge the ongoing investigation against him in the future.

19. It cannot be left open for the Applicant to guess when he can next submit a challenge, or when and if it would be “reasonable” to do so. Legal certainty as to the possible length of an investigative period and when to file another challenge goes to the heart of the notion of the expeditiousness of proceedings. Similarly, legal certainty as to whether and how to do so goes to the very heart of the fairness of the proceedings. Accordingly, it is submitted that the current Issues satisfy the first prong of the test for certification to appeal.

(ii) *the outcome of proceedings*

20. Where an issue does not impact upon the fairness and expeditiousness of proceedings, the first prong of the test for certification to appeal may also be met where it is shown that an error in the interlocutory decision may significantly affect the outcome of proceedings. This “*exercise involves a forecast of the consequence of such an occurrence.*”⁷

21. In this regard it is recalled that at paragraph 20 of the Impugned Decision, it was found that the time limit in Article 159(1) of the 2012 Kosovo Criminal Procedure Code (“KCPC”), which imposes a mandatory two-year time limit on investigations, is “*not applicable*” and should be ignored in interpreting the “reasonable time” framework in Rule 47 of the Rules.

⁷ *Thaçi* Decision on Leave to Appeal, at para. 14.

22. The Impugned Decision therefore concluded that the Law and the Rules are to be applied above and indeed instead of the KCPC, and even goes as far to suggest that the Law is to be applied above the Constitution. Such an interpretation, it is respectfully submitted, cannot be correct.
23. It is submitted that this was an interpretive error that has significant consequences for the outcome of the SPO's investigation and for the proceedings as a whole, as the result is that the investigation has been allowed to continue for an as yet undefined period, whereas it may otherwise have been terminated, having continued at this point for twenty-six (26) months, two months longer than the maximum period allowed by the Kosovo Criminal Procedure Code.
24. Furthermore, in terms of general principles as to the reasonableness requirement and the Strasbourg jurisprudence on interpreting such imprecise terms, one should not forget that we are still dealing with the pre-charge period. The Strasbourg jurisprudence tends to consider the proceedings as a whole and in the present case we are only looking at the first, and very preliminary, phase of the proceedings.
25. Further, in finding that the clear temporal boundaries of Article 159(1) were inapplicable, no substantive indication was given as to what might be expected to constitute a "reasonable time" for an SPO investigation within the

meaning of Rule 47 of the Rules, or when, whether, or in light of what factors the Applicant may consider re-applying for the termination of the investigation.

26. The Single Judge's ruling would tend to indicate that so long as the SPO raises the argument of complexity and multiple accused persons, the deadline is without qualification.
27. Instead, at paragraph 28 of the Impugned Decision the Single Judge preferred an "*overall assessment of the circumstances of the present case*" which considered "*(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.*" The difficulty in adopting such an approach is that the Applicant is effectively prevented in engaging in any discussion as the matters remain as part of a confidential, and largely *ex parte*, investigation, the details of which the Applicant remains unaware.
28. In the absence of any relevant indications, it is entirely unclear as to when (or if) those factors, and the evidence taken into consideration when assessing those factors, will be deemed to have altered with sufficient materiality so as to justify a further challenge to the investigation. As a further consequence of the interpretive error in the Impugned Decision, the Applicant is therefore again left with no clear parameters as to the applicable time limits for the

investigation against him or the possible parameters for his next legal recourse with regard to that investigation.

29. It is respectfully submitted that merely endorsing, or rubber stamping, those submissions put forward by the SPO, and not permitting the Applicant to respond, on the basis that they consist of confidential and *ex parte* communications with the Single Judge, deprives the Applicant from putting forward argument in rebuttal.

30. A denial of legal certainty and defined routes to legal recourse can significantly affect the outcome and fairness of any trial. This is particularly so in the case of the Applicant, as in practice this lack of certainty may well preclude his ability to bring a further challenge to the as yet temporally unlimited investigation being conducted against him by the SPO. Accordingly, it is again submitted that the current Issues satisfy the first prong of the test for certification to appeal.

D. Whether an immediate resolution by the Appeals Chamber may materially advance the proceedings

31. The second limb of the test for certification to appeal *“requires a determination that prompt referral of an issue to the Court of Appeals Panel will settle the matter and rid the “judicial process of possible mistakes that might taint either the fairness*

of proceedings or mar the outcome of the trial” thereby moving the proceedings forward along the right course.”⁸

32. In the instant case, it is submitted that the prompt referral of the matter to the Court of Appeals Panel is necessary in order to define clearer parameters limiting the investigation of suspects by the SPO and to clearly set out the means of recourse available to a suspect at this juncture.
33. This determination is necessary to grant legal certainty to the Applicant regarding when, whether, and how he may seek legal recourse for the termination of the present investigation, if it continues *ad infinitum*, which is essential for ensuring the expeditiousness and fairness of, and materially advancing the proceedings against him.
34. Further, this determination is also necessary in as far as it will clarify the indeterminacy of when and how the Defence is able to challenge the SPO’s investigations under the applicable legal, regulatory and constitutional framework and will rectify the interpretive error of the Impugned Decision in this regard. It will therefore assist in moving proceedings along the right course for other “suspects” subject to ongoing or future SPO investigations at the Specialist Chambers.

⁸ *Thaçi* Decision on Leave to Appeal, at para. 16.

IV. CONCLUSION

35. In light of the foregoing, the Applicant submits that the Issues would significantly affect the fair and expeditious conduct or outcome of any proceedings against the Applicant and an immediate resolution by the Court of Appeals Panel in this regard would materially advance any proceedings against him and other suspects at the Specialist Chambers. The Applicant accordingly requests certification of the Issues for leave to appeal.

V. CLASSIFICATION

36. This Application is filed confidentially, with reference to the confidential classification of the Impugned Decision. There is no objection to reclassifying the filing as public and there is no need for redactions.

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