



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
Date: 11 August 2021
Language: English
Classification: Confidential

**Prosecution response to Driton Lajçi's request for leave to appeal the Decision on
Application for an Order Directing the Specialist Prosecutor to Terminate the
Investigation against Driton Lajçi**

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I. INTRODUCTION

1. The Request¹ should be rejected because it fails to meet the requirements for leave to appeal under Article 45 of the Law² and Rule 77 of the Rules.³ None of the three issues Lajçi states he wishes to address if granted leave to appeal ('Issues')⁴ merit certification pursuant to the applicable standards as they address abstract and hypothetical matters or seek remedies which the Court of Appeals Panel could not provide.

II. PROCEDURAL HISTORY

2. On 15 June 2021, Lajçi applied for an order directing the Specialist Prosecutor's Office ('SPO') to terminate the investigation concerning him.⁵ Lajçi argued primarily that investigations at the Kosovo Specialist Chambers ('KSC') were subject to a two-year limit contained in Article 159(1) of the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123, ('KCPC') and that the investigation had exceeded the allotted time. The SPO responded on 25 June 2021, opposing the request on the basis that Article 159(1) is not applicable to investigations before the KSC, and that the investigation's duration had not exceeded any applicable limits.⁶ Lajçi replied on 1 July 2021.⁷

¹ 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, KSC-BC-2018-01/F00181, 29 July 2021 ('Request').

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

⁴ The three issues for which leave to appeal is sought as identified at para. 3 of the Request ('Issues').

⁵ Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Mr. Driton Lajçi, KSC-BC-2018-01/F00172, 15 June 2021.

⁶ Prosecution Response to the Application to Terminate the Investigation against Driton Lajçi, KSC-BC-2018-01/F00175, 25 June 2021.

⁷ Reply to the Prosecution Response regarding the Defence Application to Terminate the Investigation Against Driton Lajçi, KSC-BC-2018-01/F00178, 30 June 2021.

3. On 23 July 2021, the Single Judge issued his Decision,⁸ denying the Request in full. The Single Judge held that Article 159(1) of the KCPC has not been incorporated into the Rules, and that therefore the pertinent standard was solely that of reasonableness contained in Rule 47.⁹ The Single Judge further held that the length of the investigation had not exceeded the reasonableness requirement.¹⁰

4. On 29 July 2021, Lajçi sought leave to appeal, raising the three Issues addressed below.¹¹

III. LAJÇI FAILS TO CARRY HIS BURDEN OF JUSTIFYING INTERLOCUTORY APPEAL

5. Outside of the limited circumstances—not applicable here—where interlocutory appeals are of right,¹² ‘[i]nterlocutory appeals, interrupting the continuity of the proceedings, are the exception.’¹³ Read together, Article 45(2) and Rule 77(2) set out the requirements applicable to granting a request for leave to appeal. Those are:

- a. that the matter is an ‘appealable issue’;
- b. that the decision involves an issue that would significantly affect:
 - i. the fair and expeditious conduct of the proceedings; or
 - ii. the outcome of the trial; and
- c. that, in the opinion of the relevant judicial body, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.¹⁴

⁸ Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi, KSC-BC-2018-01/F00180, 23 July 2021 (‘Decision’).

⁹ Decision, KSC-BC-2018-01/F00180, para.16.

¹⁰ Decision, KSC-BC-2018-01/F00180, para.32.

¹¹ Rule 77(1).

¹² See Article 45(2).

¹³ Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para.9.

¹⁴ See Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para.10.

6. The burden is on the applicant to establish the existence of these requirements.¹⁵ Moreover, the prongs identified at (a) through (c) above are cumulative.¹⁶ An applicant's failure to substantiate any one of them will be fatal to the request.
7. For purposes of prong (a), an 'appealable issue' is an identifiable topic or subject the resolution of which is essential for determination of the matters arising in the judicial cause under examination, and not merely a question over which there is disagreement or conflicting opinion.¹⁷ An appealable issue requires the applicant to articulate clearly discrete issues for resolution by the Court of Appeals Panel that emanate from the ruling concerned and do not amount abstract questions or hypothetical concerns.¹⁸
8. For purposes of prong (b), the 'fair and expeditious conduct of proceedings' is generally understood as referencing the norms of fair trial, of which conducting a trial within a reasonable time is but one element.¹⁹ In considering whether an issue affects the outcome of proceedings, 'it must be considered whether a possible error in an interlocutory decision would impact the outcome of the case.'²⁰ Even where an issue satisfying either of these possibilities is present, if the impact is not 'significant' it will not qualify for interlocutory appeal.²¹

¹⁵ See, e.g., ICC, Situation in Uganda, Decision on Prosecutor's application for leave to appeal in part Pre-Trial Chamber II's decision on Prosecutors application for warrants of arrest under Article 58, ICC-02/04-01/05-20-US-Exp, 19 August 2005, paras 20-21.

¹⁶ Prong (b) may be satisfied on either of the two bases indicated.

¹⁷ Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021, para.12.

¹⁸ Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para.11.

¹⁹ Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021, para.14.

²⁰ Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021, para.15.

²¹ Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para.11.

9. The final prong, prong (c) above, '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.'²²

10. As described below, none of the Issues meet these requirements.

A. ISSUE ONE

11. The first Issue Lajçi raises is:

Whether the Single Judge erred in finding that the time limit as set out under Article 159(1) of the [KCPC] is entirely "*inapplicable*" and *de facto* should be completely ignored, in interpreting the "reasonable time" framework in Rule 47 of the Rules, as adopted by the Judges of the Kosovo Specialist Chambers[.]²³

12. As a preliminary matter, Lajçi's submissions misrepresent the Decision.²⁴

13. Moreover, this is not an appealable issue because it either seeks a remedy that a Court of Appeals Panel would be unable to provide, and, as such cannot qualify as 'essential for determination,' or it is too abstract to be an appealable issue. The thrust of Lajçi's argument is that, by not applying KCPC Article 159(1)'s two-year limit to Rule 47(1)'s requirement that investigations conducted by the SPO be concluded within a 'reasonable time', the Single Judge has violated Article 19(2) of the Law. Lajçi argues that Article 19(2)'s requirement that '[i]n determining its Rules of Procedure and Evidence the Specialist Chambers shall be guided' by the KCPC dictates the application of KCPC Article 159(1)'s two-year limit.²⁵

²² Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021, para.17 (internal quotations omitted).

²³ Request, KSC-BC-2018-01, para.3(i) (emphasis in original).

²⁴ See, for example, Request, KSC-BC-2018-01, para.22 (claiming - without any reference - that the Single Judge suggested 'the Law is to be applied above the Constitution').

²⁵ Request, KSC-BC-2018-01/F00181, para.10.

14. The first error in this reasoning is that Article 19(2) of the Law relates to the formation of the Rules before the Specialist Chamber Judges sitting in Plenary, not to the interpretation of the Rules. In forming the Rules, the Judges chose to implement a 'reasonable time' standard in Rule 47.²⁶ Amendment of the Rules can only be done by the Judges sitting in Plenary.²⁷ Thus, it is inapposite for Lajçi to attempt to utilize Article 19(2)'s 'shall be guided' language to argue for his preferred interpretation of Rule 47's reasonableness standard. Nor would the Court of Appeals Panel be able to amend Rule 47's reasonableness standard in the manner Lajçi seeks. As such, referral of this matter to the Court of Appeals will not settle the matter.

15. The second error in Lajçi's argument, as explained by the Single Judge in his Decision, is that even to the extent Lajçi is claiming error in the formation of Rule 47, Article 19(2)'s requirement that the Rules be 'guided by' the KCPC does not equate with transposing the KCPC into the Rules. As stated by the Single Judge, 'The plain meaning of the words "shall be guided" does not entail an obligation to incorporate the exact same standards from the [KCPC] into the Law.'²⁸ Thus, Lajçi has provided no basis to show that the Judges, in forming the Rules, were not guided by the KCPC (let alone a particular article of the KCPC).²⁹ Moreover, the question of whether the Judges were 'guided by' the KCPC

²⁶ Lajçi's submission that provisions adopted must remain subject to judicial review, including for purposes of assessing their constitutionality (Request, KSC-BC-2018-01/F00181, para.11) is off-point. The Rules, including Rule 47, have been reviewed and held constitutional. 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, KSC-CC-PR-2017-01/F00004, 26 April 2017. Equally, whether or not something is of 'general public importance' (Request, KSC-BC-2018-01/F00181, para.11), is not a sufficient basis for granting certification for leave to appeal (ICC, Situation in Uganda, Decision on Prosecutor's application for leave to appeal in part Pre-Trial Chamber II's decision on Prosecutors application for warrants of arrest under Article 58, ICC-02/04-01/05-20-US-Exp, 19 August 2005, para.21).

²⁷ Article 19(4).

²⁸ Decision, KSC-BC-2018-01/F00180, para.17.

²⁹ Article 19(2) also required the Rules to be informed by other sources, specifically 'the highest standards of international human rights law . . . 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 Specialist Chambers.'

is too abstract to form an appealable issue, and would merely constitute a conflict of opinion.

16. For both of these reasons, Lajçi has failed to carry his burden to merit interlocutory appeal in relation to this issue.

B. ISSUE TWO

17. The second Issue Lajçi raises is a claim that 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.’³⁰ This assertion is demonstrably false, as the Single Judge explicitly identified three factors that would inform a Rule 47 reasonableness determination: (i) the complexity of the investigation; (ii) the conduct of the individual(s) being investigated and the relevant administrative and judicial authorities; and (iii) what is at stake for the individual(s) being investigated.³¹ Indeed, Lajçi himself later quotes these factors in his Request.³² Where, as here, a proffered issue materially misrepresents a decision, it does not ‘arise from’ that decision, and thus does not merit interlocutory appeal.³³

18. Lajçi then turns to criticizing this multi-factor assessment as (in his view) insufficiently precise or clear, such that he will not know when an investigation has violated Rule 47.³⁴ This is a quintessentially abstract and hypothetical concern for which

³⁰ Request, KSC-BC-2018-01/F00181, para.3(ii).

³¹ Decision, KSC-BC-2018-01/F00180, para.28.

³² Request, KSC-BC-2018-01/F00181, para.27. Lajçi’s submission that he was ‘not permitted to respond’ (Request, KSC-BC-2018-01/F00181, para.29) is also untrue. The litigation on this matter was conducted *inter partes* and Lajçi was informed of the factors being relied upon by the SPO.

³³ See Decision on the Haradinaj Application for Leave to Appeal the Decision on the Search and Seizure Videos, KSC-BC-2020-07/F00236, 15 June 2021, para.18; Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para.19.

³⁴ Request, KSC-BC-2018-01/F00181, para.28.

interlocutory appeal is not available. As such, this issue does not qualify for interlocutory appeal.

C. ISSUE THREE

19. The third issue Lajçi raises is whether the Single Judge erred 'by failing to set out whether, when and how the Applicant can now challenge the investigation against him.'³⁵ This issue strays well beyond the subject matter of Lajçi's initial request for an order to terminate the investigation against him, as well as the content of the Decision he seeks to appeal. Where Lajçi originally sought a ruling concerning time limits on investigations, he now apparently seeks information on all possible modalities for challenging the investigation. Such a broad inquiry is not a sufficiently identifiable topic to be an appealable issue, and regardless is abstract and hypothetical. As such, Issue 3 does not qualify for interlocutory appeal.

IV. CLASSIFICATION

20. This filing is classified in accordance with Rule 82(4). The SPO has no objection to its reclassification as public.

V. CONCLUSION AND RELIEF REQUESTED

21. Based on the foregoing, the SPO respectfully requests that the Request be rejected in full.

³⁵ Request, KSC-BC-2018-01/F00181, para.3(iii).

Word count: 2205



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Wednesday, 11 August 2021

At The Hague, the Netherlands.