

In: KSC-BC-2018-01
Before: Single Judge
Registrar: Dr Fidelma Donlon
Filing Participant: Specialist Counsel for Driton Lajçi
Date: 16 August 2021
Language: English
Classification: Confidential

**Reply to Prosecution Response to Defence Application for Leave to Appeal
the Decision on Application for an Order Directing the Specialist Prosecutor to
Terminate the Investigation against Driton Lajçi**

Specialist Prosecutor

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I. INTRODUCTION

1. On 23 July 2021, the Single Judge rendered a decision rejecting Mr. Lajçi's Application for the Termination of the Specialist Prosecutor's Office ("SPO") Investigation against him ("Impugned Decision").¹
2. On 29 July 2021, the Defence for Mr. Lajçi applied for leave to certify appeal against the Impugned Decision ("Application").²
3. On 11 August 2021, the SPO submitted its response ("SPO Response").³
4. The Defence for Mr. Lajçi makes the following submissions in reply.

II. SUBMISSIONS

5. It is submitted that the SPO Response fails to set out any discernible basis upon which the Single Judge should rule. The submissions by the SPO merely set out a disagreement with the issues being argued rather than any matter

¹ 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.

² KSC-BC-2018-01/F00181, 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, Confidential.

³ KSC-BC-2018-01/F00182, 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, 11 August 2021, Confidential.

within Article 45 of the Law on the Kosovo Specialist Chambers and Specialist Prosecutor's Office ("Law")⁴ or Rule 77 of the Rules of Procedure and Evidence of the Kosovo Specialist Chambers ("Rules").⁵

6. The Defence maintains that the issues under consideration are of general public importance, go to the interpretation of legal certainty and the interrelation between principles of Kosovo national law and practice and the Kosovo Specialist Chambers ("Specialist Chambers").

A. Issue One

7. The SPO submits that the Defence misrepresents the Decision in that it states that the Single Judge declares the law is to be applied above the Constitution.⁶ This is a common theme adopted by the SPO where there is disagreement with the issues being raised. Respectfully, it is a reasonable inference to draw based on the approach of the Specialist Chambers and the lack of clarity as to its status as a national judicial institution guided by the hierarchy of domestic laws.

⁴ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

⁵ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules')

⁶ KSC-BC-2018-01/F00182, Prosecution Response, f/n 24.

8. The Defence submits that it is a point of relevance as to whether the Law, a *lex specialis*, is to be applied above *all* other domestic laws of the Republic of Kosovo, including the Kosovo Criminal Procedure Code (Law No. 04-L123) (“KCPC”), and whether it is to be applied above the Constitution, or whether it is to be ‘guided’ by the practice and procedure of national law and national judicial institutions.
9. The Single Judge holds, at paragraph 16 of his Decision, 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 applied by the Law.” The Single Judge goes on, in the same paragraph, to declare that as Article 159(1) of the KCPC has not been expressly incorporated into the Law or the Rules, a request to terminate must be accessed exclusively against Rule 47 of the Rules.⁷ It is submitted that that is an erroneous application of the law.
10. The Single Judge, at paragraph 17 of his Decision, takes the approach that Article 19(1) would have no meaning if the Court was bound to apply the KCPC. That is not the point being made. The point being made is where the Rules are vague, using the undefined term of ‘reasonableness’, and where the KCPC provides greater certainty, a period of two (2) years, the latter should

⁷ Such a principle would mean that there can be no subsequent declaration of incompatibility and that a rule or practice that was not foreseen by the legislative drafters cannot subsequently be amended to ensure a consistent practice in relation to matters that were not predicted or foreseen at the time of adoption of the Law and the Rules

be applied to give greater legal certainty to a suspect who otherwise would be left in a state of uncertainty for what is now twenty-seven months.

11. In terms of the supremacy of laws, the Single Judge makes the point at paragraph 18 of his Decision, that the procedural rules and regulatory framework of the Specialist Chambers do *not* enjoy supremacy over 'primary legislation' or the 'Constitution'. That is quite right, but regrettably the Single Judge then goes on to do exactly the opposite. He applies a provision of the Rules, secondary (delegated) legislation, above the KCPC, primary legislation.
12. The Single Judge maintains that the Law was adopted by the National Assembly in accordance with the Constitution and that the Rules were deemed to be in accordance with the Constitution by the Specialist Chambers.⁸
13. Again, the provision under consideration is Rule 47 – not a provision the Law – secondary legislation that was adopted by the *Plenary of Judges* of the Specialist Chambers, *not* the legislature of the Republic of Kosovo. Whilst the Rules may have been adopted by the Judges in accordance with the Constitution, it is quite clear that not every eventuality could have been

⁸ 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

predicted at the time of adoption of the Rules, and as a living instrument it must be the subject of constant review.

14. At the outset, the Defence for Mr. Lajçi avers that the time limit for bringing an indictment and terminating an investigation, as expressly stipulated in the KCPC, as per Article 19(2), should have significantly weighed into the adoption of Rule 47 of the Rules. Thereby, it informs the meaning of the “reasonable time” criterion in Rule 47 of the Rules.⁹
15. It is not accepted that the Single Judge could have gone to adopt a *significantly* different timeframe as the timeframe they “shall be guided by”.
16. The SPO argues that the issue whether the judges were guided by the KCPC in adopting the “reasonable time” standard in Rule 47 is “too abstract.”¹⁰ This is respectfully rejected. There remain judges at the Specialist Chambers who were the very judges that adopted the Rules; further, there must be preparatory notes or “travaux préparatoires” of such deliberations. Accordingly, it cannot be deemed “abstract” to review how they were adopted. Nor does it constitute a “conflict of opinion.” The SPO offers no information as to how reviewing the adoption or meaning of Rule 47, as guided by the KCPC, conflicts with anyone’s opinion, except for its own.

⁹ *Contra*, SPO Response, at para. 14.

¹⁰ SPO Response, at para. 15.

17. In its Response, the SPO further wrongly asserts that the Defence is seeking from the Court of Appeals an “amendment” to Rule 47 of the Rules in this respect.¹¹ The Defence is not seeking an amendment, nor did it say that it is. What the Defence is seeking is more legal certainty and guidance as to the meaning and interpretation of the timeframe within which it can challenge the lengthy, ongoing investigation of a suspect going forward. If the Specialist Chambers considers that the Rule should be amended to give greater legal certainty in other cases, that is a matter that the Rules Committee of the Specialist Chambers will need to consider in accordance with the Practice Direction on the Rules Committee Pursuant to Rule 7 of the Rules.¹²
18. As it stands now, after the Impugned Decision, and with that, in the absence of the strict applicability of the two-year time limit stemming from the KCPC timeframe, the point in the proceedings when the Defence could challenge the investigation again, is completely unclear.

B. Issue Two

19. The SPO wrongly dismisses the second issue as an “abstract and hypothetical concern.”¹³

¹¹ SPO Response, at para. 14.

¹² BD-KSC-05

¹³ SPO Response, at para. 18.

20. Neither is the question of what constitutes “reasonable time” to terminate an investigation abstract, nor is it hypothetical. It is a relevant question that arises now, and will continue to arise in the future, in respect of Mr. Lajçi as well as other suspects. There is accordingly nothing abstract or hypothetical about the issue being raised. Time limits of investigations are put in place for a specific reason, to prevent abuse and to ensure that a suspect is not confronted with potential punitive action for unreasonably lengthy periods of time. The distress caused by such uncertainty runs the risk of being an improper or abusive use of power that requires limitation or curtailment.
21. To date, Mr. Lajçi, has been under investigation for twenty-seven months. He has not thus been charged or given any indication of when a charging decision will be made. The SPO has in fact offered abstract arguments on the nature of the investigation against him, that it concerns multiple accused, involves obtaining electronically generated evidence and is complex. It remains quite unclear as to the parameters. The SPO has referred to the jurisprudence of the European Court of Human Rights to justify the length of proceedings thus

far¹⁴ and the Single Judge has even gone as far to suggest that the mere fact that Mr. Lajçi is not detained is a relevant factor.¹⁵

22. It is respectfully submitted that merely citing the complexity of the investigation and referring to factors that have never been brought to Mr. Lajçi's attention do little to strengthen the argument put forward by the SPO.¹⁶ On the contrary, it is the SPO that is putting forward arguments that are "abstract and hypothetical". As to the point regarding the fact that Mr. Lajçi is not being detained, it is not accepted that it is a relevant consideration. There is a requirement that prosecuting authorities display special diligence in all cases where a person is detained, but the fact that he is not detained does not indicate that they are absolved of special diligence and merely take as much time as they wish. Whilst relevant considerations, there is a requirement to provide legal certainty and for there to be certain constraints to prevent the abuse of power.

C. Issue Three

¹⁴ 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, at para. 1, 17

¹⁵ KSC-BC-2018-01/F00180RED, Public Redacted Version of Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi, 23 July 2021, Public, at para. 31.

¹⁶ 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.

23. The Defence, by applying for termination of the investigation against Mr. Lajçi, did not first “originally [seek] a ruling concerning time limits”¹⁷ – it understood the time limits to be perfectly clear.
24. Now that the time limit is no longer clearly determinable at all, indeed the Defence is entitled to seek information on what the modalities of requesting the termination of an investigation are going forward.
25. It is submitted that it is not a “broad inquiry” to request further detail or next steps to challenge.¹⁸ If the notion of “reasonable time” in Rule 47 was as clear as is maintained by the SPO, next steps for the Defence could be easily identified and set by a Court of Appeals Panel – for example, either after a certain event has happened or a time has elapsed.
26. Finally, the third issue is identifiable and not abstract and hypothetical. It is real and relevant and will, with certainty – and not hypothetically – come into play.

IV. CONCLUSION

¹⁷ SPO Response, at para. 19.

¹⁸ SPO Response, at para. 19.

27. The Defence for Mr. Lajçi maintain their submissions in the Application and request certification of the three issues for leave to appeal.

V. CLASSIFICATION

28. This application for leave to appeal is filed confidentially, with reference to the confidential classification of the Impugned Decision. There is no objection to reclassify the filing as public.

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