



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2018-01
Before: Single Judge Panel
Judge Nicolas Guillou
Registrar: Dr Fidelma Donlon
Date: 24 August 2021
Language: English
Classification: Public

Decision on Application for Leave to Appeal the Decision F00180

Specialist Prosecutor

Jack Smith

Specialist Counsel

Toby Cadman

THE SINGLE JUDGE,¹ pursuant to Articles 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 77(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 23 July 2021, the Single Judge rejected an application on behalf of the Defence for Driton Lajçi ("Defence" and "Mr Lajçi") for an order directing the Specialist Prosecutor to terminate the investigation against Mr Lajçi ("Impugned Decision").²
2. On 29 July 2021, the Defence requested leave to appeal the Impugned Decision ("Request").³
3. On 11 August 2021, the Specialist Prosecutor's Office ("SPO") responded to the Request ("Response"),⁴ and, on 16 August 2021, the Defence replied ("Reply").⁵

II. PRELIMINARY MATTERS

4. The Single Judge observes that the word count of the Reply is 2,076 words, whereas Article 43 of the Registry Practice Direction on Files and Filings before

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, F00180, Single Judge, *Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi*, 23 July 2021, confidential. A public redacted version was submitted on the same day, F00180/RED.

³ KSC-BC-2018-01, F00181, Specialist Counsel, *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 ("Request")*, 29 July 2021 (notified on 30 July 2021), confidential.

⁴ KSC-BC-2018-01, F00182, Specialist Prosecutor, *Prosecution response to Driton Lajçi's request for leave to appeal the Decision on Application for an Order Terminating the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi ("Response")*, 11 August 2021, confidential.

⁵ KSC-BC-2018-01, F00183, Defence for Mr Lajçi, *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 ("Reply")*, 16 August 2021 (notified on 17 August 2021), confidential.

the Kosovo Specialist Chambers (“SC”) stipulates that a reply to a response in the context of a request for certification to appeal shall not exceed 1,000 words. The Single Judge recalls that in the Impugned Decision he had urged the Defence to abide by all substantive and formal requirements in relation to any future filings.⁶ The Single Judge notes that the Defence has not requested, in the present case, any variation of the word limit nor submitted any observation in support of such a variation. The Single Judge further notes that, rather than being negligible, the Reply exceeded the established word count by more than double. Having regard to the above, the Single Judge considers that the Reply has not been validly submitted. Its content will therefore not be considered for the purposes of the present decision.

III. SUBMISSIONS

5. The Defence requests that the Single Judge grant certification to appeal the Impugned Decision with respect to the following issues:

- a. whether the Single Judge erred in finding that the time limit as set out in Article 159 of the 2012 Kosovo Criminal Procedure Code of the Republic of Kosovo (“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 (“First Issue”);
- b. 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 guiding principles (“Second Issue”);

⁶ Impugned Decision, fn. 4.

c. whether the Single Judge erred by failing to set out whether, when and how Mr Lajçi can now challenge the investigation against him (“Third Issue”) (collectively, “Three Issues”).⁷

6. The SPO responds that the Request does not meet the requirements set forth in the Law and the Rules as the Three Issues address abstract and hypothetical matters or seek remedies which the Court of Appeals could not provide.⁸

III. APPLICABLE LAW

7. Pursuant to Article 45 of the Law, a Court of Appeals Panel shall hear interlocutory appeals from an accused or from the Specialist Prosecutor in accordance with the Law and the Rules. Interlocutory appeals, other than those that lie as of right, 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.

8. Rule 77(2) of the Rules further provides that 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.

⁷ Request, para. 3.

⁸ Response, para. 1.

IV. DISCUSSION

A. LEGAL STANDING

9. The Single Judge notes that Article 45(1) of the Law provides that “[a] Court of Appeals Panel shall hear interlocutory appeals from an accused or from the Specialist Prosecutor”, without mentioning suspects. Rule 77(1) of the Rules refers to interlocutory appeals from a “Party”, a term which is defined in Rule 2 of the Rules as “[t]he Specialist Prosecutor or the Defence”, the latter being defined as “[t]he suspect/Accused and/or Specialist Counsel”. Considering that Rule 47 of the Rules entitles a suspect to request the termination of the investigation against him or her, the Single Judge finds that, for reasons of fairness, a suspect must be allowed to challenge the relevant decision. The Single Judge accordingly finds that Mr Lajçi has legal standing to request leave to appeal with respect to the Impugned Decision pursuant to Article 45 of the Law.

B. LEGAL TEST

10. A right to appeal arises only if the Panel is of the opinion that the standard for certification set forth in Article 45(2) of the Law and Rule 77(2) of the Rules has been met.⁹ The Single Judge recalls the interpretation of these provisions as set out in detail previously¹⁰

11. Mindful of the restrictive nature of this remedy, the following specific requirements apply:

⁹ Similarly, ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, [Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal](#), 13 July 2006, para. 20.

¹⁰ KSC-BC-2020-07, F00169, Pre-Trial Judge, *Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions* (“Decision on Leave to Appeal Preliminary Motions”), 1 April 2021, public, paras 10-18; KSC-BC-2020-06, F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, paras 9-17.

- (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 Single Judge, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

12. In this regard, the Single Judge recalls that “proceedings” referenced in both the first and second prongs of the test for certification refer to the entirety of the judicial process before the SC, including the investigation stage.¹¹

C. FIRST ISSUE

13. The Defence submits that the First Issue constitutes an “appealable issue” insofar as it directly emanates from the conclusion of the Single Judge in the Impugned Decision and does not amount either to a disagreement, an abstract question or a hypothetical concern and is a matter of general public importance that addresses fundamental elements of the applicable legal framework.¹²

14. The SPO responds that the First Issue is not an appealable issue as it either seeks a remedy that the Court of Appeal would be unable to provide or it is too abstract to be appealable.¹³ In particular, the SPO argues that the Court of Appeal would not be able to interpret the standard of reasonableness set in Rule 47 of the Rules in the manner that Mr Lajçi seeks, as the formulation of the Rules rests in the hands of the Plenary of Judges.¹⁴ Moreover, the SPO submits that Mr Lajçi has

¹¹ Decision on Leave to Appeal Preliminary Motions, para. 14, with further references.

¹² Request, paras 10-12.

¹³ Response, para. 13.

¹⁴ Response, para. 14.

not proved that the Judges, in forming the Rules, were not guided by the KCPC and that in any case, such a question is too abstract to form an appealable issue.¹⁵

15. The Single Judge considers that the First Issue arises from the Impugned Decision, as the determination that Article 159 KCPC is inapplicable and that Rule 47 of the Rules applies defines the legal standard for Mr Lajçi's request to terminate proceedings.¹⁶ The Single Judge accordingly finds that the First Issue is appealable.

1. Whether the First Issue Would Significantly Affect the Fair and Expeditious Conduct of the Proceedings or the Outcome of the Trial

16. The Defence submits that the First Issue significantly affects the fair and expeditious conduct of the proceedings insofar as: (i) Mr Lajçi had no effective opportunity to respond to issues concerning complexity; (ii) the Impugned Decision does not scrutinise the facts as presented; and (iii) it leaves the door open for an open-ended investigation.¹⁷ In the Defence's view, the principle of legal certainty is at the heart of the notion of fair trial rights and expeditiousness of proceedings.¹⁸

17. In the alternative, the Defence avers that the First Issue has significant consequences for the proceedings as a whole, as the SPO investigation might continue for an indefinite period, even in the absence of a serious justification, in disregard of human rights standards.¹⁹ Lastly, Mr Lajçi contends that he may be left with no clear parameters as to the applicable time limits for challenging the length of investigation.²⁰

¹⁵ Response, para. 15.

¹⁶ Impugned Decision, para. 20.

¹⁷ Request, paras 15-17.

¹⁸ Request, para. 19.

¹⁹ Request, paras 23-29.

²⁰ Request, para. 28.

18. The Single Judge considers that the First Issue implicitly concerns Mr Lajçi's right to be "tried" within a reasonable time and to challenge the allegedly excessive length of the investigation against him. The Single Judge accordingly finds that the First Issue would significantly affect the fair and expeditious conduct of the proceedings.

2. Whether an Immediate Resolution by the Appeals Chamber May Materially Advance the Proceedings

19. The Defence submits that a prompt referral of the matter to the Court of Appeals Panel is necessary as the latter will clearly define legal parameters and boundaries for SPO investigations.²¹ Moreover, the Defence argues that a decision in Mr Lajçi's case will assist other suspects subject to ongoing or future SPO investigations.²²

20. The Single Judge considers that the extent of the applicability of Article 159 of the KCPC in the SC framework, if any, would benefit from an authoritative determination by the Court of Appeals Panel in the present case. In particular, an immediate resolution of the First Issue may advance the proceedings, by ensuring that there is no uncertainty about the validity of further investigations against Mr Lajçi. The Single Judge accordingly finds that an immediate resolution by the Court of Appeals Panel in relation to the First Issue may materially advance the proceedings.

3. Conclusion

21. In light of the foregoing, the Single Judge finds that the First Issue fulfils the requirements of certification under Article 45(2) of the Law and Rule 77(2) of the Rules and, accordingly, certifies the First Issue as listed in paragraph 5(a).

²¹ Request, paras 32-34.

²² Request, para. 34.

D. SECOND ISSUE

22. The Defence submits that the Second Issue is “appealable” insofar as it relates to an identifiable topic, namely the interpretation of the “reasonableness” requirement set forth in Rule 47 of the Rules in the absence of any guiding principles.²³ The Defence further submits that to assert otherwise would mean to leave the SPO with a wide and unchallenged discretion which would seriously undermine a suspect’s rights.²⁴ Lastly, the Defence avers that the Second Issue directly emanates from the conclusion of the Single Judge in the Impugned Decision and does not amount either to a disagreement, an abstract question or a hypothetical concern and is a matter of general public importance that addresses fundamental elements of the applicable legal framework.²⁵

23. The SPO responds that the Second Issue misrepresents the Impugned Decision insofar as the Single Judge has clearly defined the parameters against which the reasonableness of length of an investigation in the context of an application under Rule 47 of the Rules shall be assessed.²⁶ The SPO further challenges as abstract and hypothetical Mr Lajçi’s criticisms to the multi-factor assessment laid down by the Single Judge.²⁷

24. The Single Judge finds that the Second Issue misrepresents the Impugned Decision. In particular, the Single Judge notes that the Impugned Decision clearly set the factors to be considered when assessing the reasonable length of an investigation in the context of a Rule 47 application.²⁸ Insofar as Mr Lajçi further challenges the alleged lack of clarity of such factors and the absence of guiding principles, the Second Issue represents a mere disagreement with the Single Judge

²³ Request, paras 10, 27-28.

²⁴ Request, para. 10.

²⁵ Request, para. 12.

²⁶ Response, para. 17.

²⁷ Response, para. 18.

²⁸ Impugned Decision, para. 28.

findings which does not qualify for interlocutory appeal. Accordingly, the Single Judge finds that the Second Issue is not appealable.

25. Having found that the Second Issue does not amount to an appealable issue, the Single Judge will not assess the remainder of the legal test.

E. THIRD ISSUE

26. The Defence submits that the Third Issue is “appealable” insofar as it relates to an identifiable topic, namely the ability of the Defence to raise challenges to SPO investigations,²⁹ having regard to the fact that the Impugned Decision has not established when and if it would be “reasonable” to submit an application under Rule 47 of the Rules.³⁰ Lastly, the Defence avers that the Third Issue directly emanates from the conclusion of the Single Judge in the Impugned Decision and does not amount either to a disagreement, an abstract question or a hypothetical concern and is a matter of general public importance that addresses fundamental elements of the applicable legal framework.³¹

27. The SPO responds that the Third Issue goes well beyond Mr Lajçi initial application under Rule 47 of the Rules as well as the content of the Impugned Decision.³² It further contends that such a broad inquiry into the modalities for challenging the investigation is not an identifiable topic and does not qualify for interlocutory appeal.³³

28. The Single Judge finds that the Third Issue is not an identifiable topic which arises from the Impugned Decision. In particular, the Single Judge finds that the Third Issue was not essential for the disposition of the matter at the time, namely

²⁹ Request, para. 10.

³⁰ Request, para. 19.

³¹ Request, paras 11-12.

³² Response, para. 19.

³³ Response, para. 19.

the assessment whether, in the circumstances of the present case, the length of the investigation against Mr Lajçi meets the requirement of “reasonableness” set forth in Rule 47 of the Rules. Notably, when and how Mr Lajçi can now challenge the investigation against him, after the Impugned Decision was rendered, is not part of the legal test under Rule 47 of the Rules. Insofar as it is not the duty of a judicial decision to advise a Party on the judicial strategies (in this case modalities and timeframes according to which Mr Lajçi could further challenge the investigation) to be adopted, the Third Issue represents a hypothetical concern. As such, it is not an appealable issue.

29. Having found that the Third Issue does not amount to an appealable issue, the Single Judge will not assess the remainder of the legal test.

V. RECLASSIFICATION

30. The Single Judge notes that the Request, the Response and the Reply have been filed confidentially. Finding no basis for maintaining the confidential classification, and in the absence of any objection raised by the parties, the Single Judge accordingly directs the Registry to reclassify F00181, F00182 and F00183 as public.

31. The Single Judge further observes that the Defence has not filed a public redacted version of F00178 even though it was ordered by the Single Judge to do so by 30 July 2021.³⁴ The Single Judge thus reminds the Defence of its duty to file a public redacted version of F00178 and orders that the latter be filed by Friday, 27 August 2021.³⁵


³⁴ Impugned Decision, paras 34 and 35(b).

³⁵ The Single Judge recalls that pursuant to Article 6(d) of the Code of Professional Conduct for Counsel and Prosecutors before the Kosovo Specialist Chambers, Counsel and Prosecutors shall, within their respective roles in proceedings, act within and in compliance with the legal framework and any decision or order of a Panel.

VI. DISPOSITION

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

- (a) **DISMISSES** the Reply as not having been validly submitted;
- (b) **GRANTS** in part the Request and **CERTIFIES** the First Issue, as specified in paragraph 5(a) of the present decision;
- (c) **REJECTS** the remainder of the Request;
- (d) **REMINDS** the Defence of its duty to file a public redacted version of F00178 pursuant to the Impugned Decision;
- (e) **ORDERS** the Defence to submit a public redacted version of F00178 by Friday, 27 August 2021; and
- (f) **ORDERS** the Registry to reclassify the Request, the Response and the Reply as public.



Judge Nicolas Guillou
Single Judge

Dated this Tuesday, 24 August 2021

At the Hague, the Netherlands.