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In:	**KSC-BC-2018-01**
Before:	**Single Judge Panel**
	Judge Nicolas Guillou
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Driton Lajçi
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Reply to the Prosecution Response regarding the Defence Application to Terminate the Investigation against Driton Lajçi

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I. INTRODUCTION

1. The Defence for Mr. Driton Lajçi hereby seeks to reply to the Response of the Specialist Prosecutor's ("SPO"), filed on 25 June 2021.[1]

2. Pursuant to Rule 82(4) of the Rules of Procedure and Evidence of the Kosovo Specialist Chambers ("KSC Rules") this Reply bears the same classification of the SPO Response. However, it contains no confidential details, requires no redactions and pursuant to Rule 82(5) may be reclassified as Public by the Single Judge.

3. The Defence maintains its request for an Order pursuant to Rule 47(2) of the KSC Rules that the SPO's investigation of Mr. Lajçi be terminated, in accordance with the requirements of Article 159(1) of the Kosovo Criminal Procedure Code 2012 Law No. 04/L-123 ("Criminal Procedure Code" or "KCPC"), Article 19(2) of the Law No. 05/L-053 ("Law") and Rule 47(1) of the KSC Rules.

II. THE LAW

4. The relevant law is set out in the Defence Application.[2]

[1] KSC-BC-2018-01/F00175/RED ("SPO Response")

[2] KSC-BC-2018-01/F00172/RED ("Application").

III. BACKGROUND

5. The background is set out in the Defence Application.[3]

IV. SUBMISSIONS

The timeframe to file an indictment

6. At the outset, the SPO in its Response is unable to go around making the plain concession that more than two years have passed since Mr. Lajçi was formally notified of being under its investigation.[4] This is, accordingly, not in dispute.

7. While the SPO considers 3 May 2019, which is **the notification of Mr. Lajçi being a suspect**, to be the "relevant date" for the starting of the timeframe (Rule 47(1) KSC Rules) within which to conclude an investigation, the Defence maintains its submissions that Article 159(1) of the KCPC has a much broader starting point, namely two years from the "***initiation* of an investigation**" (emphasis added). The initiation of an investigation is logically an earlier point in time than the definite notification of being a suspect.

[3] KSC-BC-2018-01/F00172/RED ("Application").

[4] SPO Response, at § 16: The SPO considers that "the relevant timeframe runs from [3 May 2019] to the present."

8. It is noted that at the 3 May 2019 meeting between Mr. Lajçi and a representative of the SPO, at the former's place of work, the former was presented with two documents, an Order of the Single Judge dated 2 April 2019[5] and a summons for a suspect interview to take place initially on 29-30 May 2019. It is therefore clear that Mr. Lajçi had been under investigation since at least 2 April 2019, although certainly prior to that.

9. There is a clear dispute between the SPO and Defence as to what constitutes the overriding rule that sets the timeframe for the termination of an investigation after the failure of the SPO to file an indictment – the KCPC (Article 159(1)) or the KSC Rules (Rule 47(1)).

10. According to the SPO, "resorting to the KCPC as guidance would not be *appropriate* because this would be contrary to the plain language of Rule 47 [of the KSC Rules]"[6] (emphasis added). Thereby, the SPO makes clear it weighs the KSC Rules above Kosovo law. This interpretation is completely misconceived.

11. The SPO maintains that, in their view, the plain wording of Rule 47 provides the procedure for determining the 'reasonableness' of the duration of an ongoing investigation. It is notable, however, that there does not appear to be

[5] KSC-BC-2018-01/F00026/A01

[6] SPO Response, at § 15.

any definition of the meaning of 'reasonable time' in the Rules, the Law or the jurisprudence of the KSC. The SPO turns to the jurisprudence of the European Court of Human Rights for a definition, even though Article 159(1) KCPC provides a clear and unequivocal definition as to the maximum period.

12. The SPO further maintains that applying Article 159(1) KCPC would not be consonant with Article 3 of the Law. In that regard, it is submitted that Article 3(4) of the Law is quite clear that any primary or secondary domestic legislation shall not apply to the "…organisation, administration, functions or jurisdiction of the Specialist Chambers or Specialist Prosecutor's Office". With respect to the SPO, that is not what is being argued.

13. It is not for Kosovo procedural law, primary legislation, to be measured against and guided by the KSC Rules. It is for the KSC Rules to be measured against and guided by Kosovo law, to determine what is "*appropriate*" in the case of ambiguity or conflict, that is explicitly provided in Article 19(2) of the Law.

14. The KSC Rules are silent on what is reasonable. The KCPC clearly and unambiguously defines the maximum period as two (2) years.

15. In this regard it is important to recall that the KSC and the SPO are institutions of the Republic of Kosovo and therefore they are bound by the domestic legal, regulatory and constitutional framework. Whilst it is accepted that the KSC

has primacy over criminal matters within its jurisdiction, it is not accepted that the procedural rules and the regulatory framework enjoy supremacy over primary legislation of the Republic of Kosovo and its Constitution, the former must clearly be in compliance with the latter.

16. While Article 159(1) KCPC might not be expressly incorporated into the Law, as the SPO maintains, the very same Law expressly and unequivocally requires that the KSC Rules "*shall* be guided" by the KCPC.[7] To make matters abundantly clear, it is thus not the KCPC which "*shall* be guided" by the KSC Rules.

17. The *binding* guidance that Article 159(1) of the KCPC gives to the KSC Rules, in particular Rule 47(1), is that two years after the *initiation* of an investigation, if a suspect has not been indicted, that investigation *must* be terminated. That is unequivocal.

18. The SPO has not informed Mr. Lajçi, Specialist Counsel, nor the KSC, when it *initiated* the investigation against Mr. Lajçi. In any event, it is maintained that at least *by* 3 May 2021, the date that marked two years since Mr. Lajçi's notification as a suspect, the SPO should have been required to terminate the investigation of Mr. Lajçi.

[7] Article 19(2) of the Law.

19. The SPO has previously referred, in communication with Specialist Counsel, that due regard has not been given to the Strictly Confidential and *ex parte* Order of the Single Judge dated 5 February 2021,[8] **[REDACTED]**.

20. Irrespective of the aforementioned, it is respectfully submitted that the Order has no effect on whether the investigation should now be terminated as a matter of law. **[REDACTED].**

21. It is respectfully submitted that, according to Article 159(1) of the KCPC, the investigation must now be terminated with prejudice.

Reasonableness of the continued investigation of Mr. Lajçi

22. The SPO maintains that the period in which Mr. Lajçi has been under investigation does not pass the threshold of exceeding reasonableness.

23. The SPO refers to the interpretation of reasonable length of proceedings under Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). In particular, the SPO declares that the Court must look into the overall circumstances of the case, the complexity, the conduct of the relevant administrative and judicial authorities and the conduct of the accused. These factors will be considered in turn; however, it is noted that the SPO considers the assessment under Rule 47 to be akin to that

[8] KSC-BC-2018-01/F00144 (SCONF)

of Article 6(1) and as noted earlier refers to the jurisprudence of the European Court rather than the very clear wording of the KCPC. In this regard, it is important to note that Article 6(1) of the ECHR deals with the overall length of criminal proceedings from the moment a person is charged, namely the official notification of an allegation that he has committed a criminal offence,[9] until the conclusion of the criminal proceedings,[10] whilst the KCPC deals with the time period for the commencement of the investigation until charge.

24. Considering the above timeframe in domestic law which *shall guide* the KSC Rules, a continued investigation of Mr. Lajçi – more than two years after he was first notified of being a suspect, and thus well over two years since the investigating was initiated – is no longer "reasonable".

25. It is furthermore notable that the SPO has not even given any indication as to what it would consider a "reasonable" length of an investigation of Mr. Lajçi or anyone else, but in any event, it cannot be open-ended, nor is this a timeframe for the SPO to clarify – but rather for the Court to apply the appropriate law.

[9] *Eckle v. Germany*, 15 July 1982, § 73, Series A no. 51.

[10] *Findlay v. United Kingdom*, 25 February 1997, § 69, Reports of Judgments and Decisions 1997-I

26. Without prejudice to the above submissions, in the following, the Defence wishes to respond to the factors put forward by the SPO which it considers make a continued investigation "reasonable."

A. Complexity of the case

27. It is recognised that the question of complexity is one that is difficult to assess in general and any proper determination must look into the individual circumstances of the case at issue. However, the European Court of Human Rights attaches importance to a number of factors, such as the nature of the facts to be assessed, the number of accused persons, and the number of witnesses to be heard. This consideration may well concern issues of law as well as of fact.

28. It is noted that the only crime that Mr. Lajçi has so far been suspected of within the context of the SPO investigation has been obstruction **[REDACTED]**.[11]

29. To make the alleged complexity of this matter abundantly clear, this accordingly is not a case alleging the commission of crimes such as genocide, war crimes or crimes against humanity, nor is it a complex economic crime case. There is a *significant* discrepancy in complexity regarding an obstruction

[11] SPO Response, at § 2.

of justice case on one end of the spectrum and, for instance, complex international crimes at the other end.

30. As has been recognised by the SPO themselves in relation to an obstruction of justice case currently before the KSC, such a case is not complex but rather "simple and straightforward" – notably this is a case where there two co-defendants and six counts on the indictment – rather than one suspect suspected of and investigated for one crime.[12] How can the SPO consider that such an obstruction case is "simple and straightforward" while the matter involving Mr. Lajçi is so "complex" that it takes more than two years to conduct an investigation.

31. To further support its complexity argument, the SPO relies heavily on the European Court of Human Rights' ("ECtHR") judgment in *Arewa v Lithuania.*[13]

32. However, the SPO omits from its long citation of paragraph 54 of the judgment that the Lithuanian criminal proceedings in question were considered particularly complex (i) for the fact that financial crimes were at stake and that the crimes (ii) spanned across and required evidence from **five** other jurisdictions in addition to Lithuania: Hong Kong, Hungary, Spain,

[12] *See, e.*g. KSC-BC-2020-07, Transcript, 30 March 2021, at 194/21-23 (SPO: "the case against the accused is simple and straightforward").

[13] SPO Response, at § 21ff; ECtHR, *Arewa v. Lithuania*, Judgment, 16031/18, 9 March 2021.

Denmark and USA,[14] (and with that, one may add, in addition to Lithuanian, evidence in five different languages).

33. The investigation of Mr. Lajçi concerns **[REDACTED]**, not a financial crime spanning across three continents/ six countries and requiring disclosure of evidence in six languages. Accordingly, by no means is the SPO "confronted with the very similar difficulties in the current investigation" as in *Arewa v Lithuania*, as disingenuously alleged in its Response.[15]

34. Any investigation against Mr. Lajçi has been worlds apart from *Arewa v Lithuania* in terms of complexity, and thus cannot be considered so complex so as to justify a longer period of investigation than prescribed by Article 159(1) of the KCPC. Such an extension of the investigation would be completely *unreasonable* pursuant to Rule 47(1) of the Rules.

35. Finally, **[REDACTED]** and accuse Mr. Lajçi **[REDACTED]**. Rather than submitting any evidence for this claim, the SPO's exclamation appears rather desperate and therefore does not warrant further consideration by the Defence, or for that matter the court, at this stage.

B. Mr. Lajçi's conduct

[14] *Arewa v. Lithuania*, at § 52.

[15] SPO Response, at § 22.

36. The SPO puts blame for the delay in its investigation on Mr. Lajçi[16] but it cannot go further than alleging that **[REDACTED]** or **[REDACTED]**[17] (emphasis added)

37. To be clear, the SPO does not appear to be arguing that Mr. Lajçi **[REDACTED]**. In other words, the SPO **[REDACTED]**. It has not provided any information as to **[REDACTED]** or explored whether there are grounds for any failure. In this regard, it is noted that "Article 6(1) does not require accused persons actively to co-operate with the judicial authorities…Neither can any reproach be levelled against them for making full use of the remedies available under domestic law."[18] In *Zana v. Turkey*, the European Court held:[19]

> "As to the applicant's conduct, the Court reiterates that Article 6 does not require a person charged with a criminal offence to cooperate actively with the judicial authorities (see, among other authorities, the Yağcı and Sargın v. Turkey judgment of 8 June 1995, Series A no. 319-A, p. 21, § 66). It considers, like the Commission, that the applicant's conduct, even if it may to some extent have slowed down the proceedings, cannot, on its own, explain such a length of time."

[16] SPO Response, at § 19ff.

[17] SPO Response, at § 20.

[18] *Ledonne (No 1) v. Italy,* judgment of 12 May 1999, § 25

[19] (1999) 27 EHRR 667, § 79

38. Accordingly, just as in *Arewa v Lithuania*, the SPO is not able to persuade the court that "the applicant's behaviour did, on its own, account for the length of proceedings."[20]

C. The Conduct of the KSC/SPO

39. It is the SPO who without regard for its obligations of time-limited investigations and end dates for filing an indictment continues to investigate this matter well beyond two years and well beyond what is reasonable.

40. The SPO alleges **[REDACTED]**. The SPO cannot make a general sweeping allegation of **[REDACTED]** without substantiating the allegation with reference to specific facts.

41. The SPO, in its Response, refuses to accept any responsibility for the delay. It submits "Only delays attributable to the KSC/SPO may justify a finding of a failure to comply with the reasonable time requirement set out in Rule 47."[21]

42. In response to this rather broadly stated assertion, it is submitted that 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).[22] The ECHR is not a set

[20] *Arewa v. Lithuania*, at § 53. As per the same paragraph in the judgment, nor can the court reproach Mr. Lajçi for relying on his right to silence during interview.

[21] SPO Response, § 21, citing ECtHR [GC], *Idalov v. Russia*, Judgment, 5826/03, 22 May 2012, § 186; ECtHR [GC], *Pedersen and Baadsgaard v. Denmark*, Judgment, 49017/99, 17 December 2004, § 49

[22] ECtHR, *Ziacik v. Slovenia,* decision on the merits of 7 January 2003, §§ 44-45.

of 'illusory' or 'aspirational' directive principles, it is intended that the relevant judicial and prosecutorial authorities make whatever arrangements are necessary to avoid violations of the ECHR.[23]

V. CONCLUSION AND RELIEF SOUGHT

43. Mr. Lajçi has been the subject of an SPO investigation for well over two years and he has still not been charged. The case against him does not appear particularly complex, nor are the delays attributable to his actions. He has taken measures to assist the investigation to the extent he is required. There are accordingly no circumstances that would justify a prolonged investigation making it "reasonable" to do so beyond two years.

44. The Defence maintains its request for an order for the termination of the investigation, pursuant to Rule 47(2) of the Rules, applying Article 19(2) of the Rules and Article 159(1) of the KCPC, given that the SPO has investigated Mr. Lajçi for well over two years and has failed to file an indictment within the stipulated deadline.

Word Count: 2796 words

[23] Human Rights Chamber of Bosnia and Herzegovina, *Zoran Bašić & Željko Ćosić and v. the Federation of Bosnia and Herzegovina*, Decision on Admissibility and Merits of 9 May 2003, § 199.

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