

In: KSC-BC-2018-01

Before: Court of Appeals Panel

Judge Michèle Picard

Judge Emilio Gatti

Judge Kai Ambos

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Driton Lajçi

Date: 3 September 2021

Language: English

Classification: Public

Appeal against Decision KSC-BC-2018-01/F00180

Regarding the Termination of the Investigation against Driton Lajçi

Specialist Prosecutor

Jack Smith

Specialist Counsel

Toby Cadman

I. INTRODUCTION

1. On 15 June 2021, Specialist Counsel for Driton Lajçi (“Applicant”) applied for an order directing the Specialist Prosecutor to terminate the investigation against the Applicant, given that it has been ongoing for well over two years and the Specialist Prosecutor’s Office (“SPO”) has not filed an indictment (“Application”).¹
2. On 23 July 2021, the Single Judge rendered a decision rejecting the Application (“Impugned Decision”) on the grounds that the two-year time limit to file an indictment stipulated in the 2012 Kosovo Criminal Procedure Code (“KCPC”)² was inapplicable to the “*reasonable time*” limit contained in Rule 47 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“RPE”) and the investigation continued to be within a “*reasonable time*.”³
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 RPE, the

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 Law No. 04/L-123, Official Gazette of the Republic of Kosovo, No. 37 of 28 December 2012.

³ 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. A public redacted version was submitted on the same day, F00180/RED.

Applicant requested leave to appeal the Impugned Decision on three issues (“Request”).⁴

4. On 24 August 2021, the Single Judge granted⁵ the Applicant’s request for leave to appeal regarding the first issue (“Certified Issue”), namely:

“Whether the Single Judge erred in finding that the time limit in Article 159(1) of the 2012 Kosovo Criminal Procedure Code 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 KSC.”⁶

5. The Applicant hereby files an appeal in accordance with Rule 170(2) RPE.

II. GROUNDS OF APPEAL

1) The Application of 159(1) KCPC to the Termination of an Investigation

⁴ 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 Lajci, 29 July 2021 (notified on 30 July 2021), Confidential.

⁵ KSC-BC-2018-01/F00184, Decision on Application for Leave to Appeal the Decision F00180, 24 August 2021 (“Decision Granting Leave to Appeal”).

⁶ Decision Granting Leave to Appeal, at paras 5(a) and 32(b).

6. It is submitted that the Single Judge erred in finding that the two-year time limit in Article 159(1) KCPC is entirely “*inapplicable*”⁷ to determining the meaning of what constitutes a “*reasonable time*” after which an investigation against a suspect at the Kosovo Specialist Chambers and Specialist Prosecutor’s Office (“KSC” or “Specialist Chambers”) must be terminated pursuant to Rule 47 RPE.
7. Article 19(2) of the Law stipulates that the Judges of the Specialist Chambers, in adopting the RPE, “*shall be guided by*” the KCPC. In turn, Rule 4(1) RPE, as adopted by the Judges, provides:

“The Rules shall be interpreted in a manner consonant with the framework as set out in Article 3 of the Law and, where appropriate, the Kosovo Criminal Procedure Code.” (emphasis added)

8. In the Impugned Decision, the Single Judge correctly considered that as per Article 3 of the Law, Article 159(1) KCPC has not been expressly incorporated into the KSC Law or RPE.⁸
9. However, the Single Judge erred by going on to find that the SPO’s investigative activities were in no way regulated by the time limit contained

⁷ Impugned Decision, at paras. 19 and 20.

⁸ Impugned Decision, at para. 16.

therein on the grounds that the unincorporated primary legislation of Kosovo did not enjoy precedence over the Law or the RPE.⁹

10. For the avoidance of doubt, the Applicant maintains its prior submissions with regard to the applicability and significance of the domestic criminal legislation of Kosovo, the KSC being a domestic, rather than an international or *ad hoc* tribunal.
11. Nonetheless, even if the Single Judge was correct in finding that the Law is the primary interpretative framework, that conclusion does not affect the fact that it affords a special significance to the KCPC, a position that is also reflected in the RPE. Consequently, even if the KCPC does not displace the primacy of the Law and/or the RPE, the interpretative framework of each is nonetheless fundamentally shaped by it.
12. It is noted that in refusing to affirm the above position in the Impugned Decision, the Single Judge justifies his approach in light of the fact that:

“The plain meaning of the words “shall be guided” does not entail an obligation to incorporate the exact same standards from the 2012 Criminal Procedure Code into the Law. Such an obligation would have had to be set forth in more express terms. Indeed, this provision further stipulates that the Rules shall reflect the highest standards of international human rights law.

⁹ Impugned Decision, at para. 16.

Had it been intended to achieve the same result in relation to the 2012 Criminal Procedure Code, a similar formulation would have been used.”¹⁰

13. However, in doing so, the Single Judge fails to consider that the effect of interpreting Rule 47 RPE with reference only to factors identified by the European Court of Human Rights (“ECtHR”),¹¹ and completely separately from the KCPC, is akin to denying the existence of Article 159(1) KCPC altogether, which contravenes the obligation to weigh the KCPC both in the adoption and subsequent interpretation of the RPE.¹²
14. It is further submitted that the Single Judge’s justifications for this course of action are wholly unmeritorious.
15. According to the Single Judge, principles from the ECtHR are given precedence over the KCPC because the obligation in Article 19(2) of the Law to ensure that the RPE “reflects” international human rights law is stronger than the fact that it should be “guided by” the provisions of the KCPC.¹³
16. However, this approach focusses only on the Law and ignores the strength of the wording in Rule 4(1) RPE, pursuant to which, as noted above, “[t]he Rules

¹⁰ Impugned Decision, at para. 17.

¹¹ Impugned Decision, at para. 28.

¹² Article 19(1) of the Law and Rule 4(1) of the RPE.

¹³ Impugned Decision, at para. 17.

shall be interpreted in a manner consonant" (emphasis added) i.e., in agreement or harmony, with the KCPC.

17. Further, other than on the basis of narrow terminological distinctions within the Law, this approach also fails to justify why opaque, euro-centric, and indirectly relevant provisions of 'international' human rights law should be preferred over and above the directly relevant and specific domestic provisions of the KCPC. This is particularly so given that the effect of preferring discretionary factors from the ECtHR effectively deprives Article 159(1) KCPC of any substantive content, whilst preferring the defined time limits in Article 159(1) KCPC, if anything, reinforces the right to trial within a reasonable time, thereby protecting the Applicant's fair trial rights whilst preventing logical and interpretative absurdities in the application of the Law and the RPE.
18. In that light, the Single Judge therefore erroneously and without proper justification failed to recognise:
 - a. that per Rule 19(2) of the Law, the Judges of the Specialist Chambers must have been guided by the clear two-year time limit in Article 159(1) KCPC in adopting Rule 47 RPE;
 - b. that per Rule 4(1), the RPE must subsequently be interpreted in a manner consonant with the KCPC, as appropriate here; and

c. that as such the two-year time limit in Article 159(1) KCPC must inform the meaning of a “reasonable time” in Rule 47 RPE.

19. Accordingly, the Single Judge erred in finding that Article 159(1) KCPC is entirely “inapplicable”¹⁴ to the application and interpretation of Rule 47 RPE.

20. Further, the Single Judge erred in finding that there is no ambiguity¹⁵ as to the applicability of Article 159(1) KCPC in the current matters. In his subsequent Decision granting the Applicant leave to appeal, the Single Judge accepted:

*“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”.*¹⁶

21. In making that finding, the Single Judge infers that he does not consider his own findings authoritative, despite suggesting in the Impugned Decision that the principles considered, and conclusions drawn therein “[settle] the matter entirely.”¹⁷

22. Further, in expressly recognising the existence of a question of law that requires an “authoritative determination” from the Court of Appeals Panel, the Single Judge implicitly recognises that there remains ambiguity as to the

¹⁴ Impugned Decision, at paras. 19 and 20.

¹⁵ Impugned Decision, at para. 16.

¹⁶ Decision Granting Leave to Appeal, at para. 20.

¹⁷ Impugned Decision, at para. 19.

applicability of Article 159(1) KCPC *vis-à-vis* Rule 47 RPE. Accordingly, pursuant to Rule 4(3) RPE, this ambiguity “*shall be resolved by the adoption of the most favourable interpretation to the suspect or the Accused in the given circumstances*” (emphasis added). This most favourable interpretation is that found in Article 159(1) KCPC, which demands that the investigation of the Applicant be terminated immediately, as it has been going for well over two years.

23. Accordingly, the Single judge erred, and recognised that he erred, by finding that the inapplicability of Article 159(1) KCPC “*is the only possible interpretation*”¹⁸ of matters on which he himself has not drawn an authoritative final conclusion.
24. As such, the Court of Appeals Panel is requested to overturn the interpretation of the Single Judge regarding the applicability of Article 159(1) KCPC, specifically as to the “*reasonable time*” standard in Rule 47 RPE, as was required in the Rules’ original adoption¹⁹ and is required in its subsequent interpretation.²⁰
25. If the appeal is granted, the Applicant submits that the Appeals Panel should revert the case back to the Single Judge with the correct legal standard, for a

¹⁸ Impugned Decision, at para. 19.

¹⁹ Article 19(2) of the Law.

²⁰ Rule 4(1) RPE.

redetermination as to whether the investigation of the Applicant ought to be allowed to continue, or ought to be terminated. The Applicant maintains its request that the investigation must be terminated immediately with prejudice.

2) Parameters for Future Challenges of the Investigation of the Applicant

26. It is recognised that leave was granted to the first issue alone. However, it is quite clear that should the Court of Appeals Panel rule in favour of the Applicant, but not order the termination of the investigation, guidance will be required on the further conduct of the investigation.
27. It is recalled that the Single Judge abruptly ended his conclusions in the Impugned Decision with the final sentence: *“Accordingly, this investigation does not require to be terminated.”*²¹
28. With this, the Single Judge left the SPO’s investigation against the Applicant effectively open-ended, with unclear factors and no legal certainty for the Applicant as to the applicable procedure, modalities, or timeframe to challenge the investigation after a refusal to terminate it, and after the expiry of the two-year time limit in the KCPC. The Single Judge thereby erred by creating a lacuna in the Law and RPE.²² In his Decision granting the

²¹ Impugned Decision, at para. 32.

²² Impugned Decision, at para. 19.

Applicant's request for leave to appeal, the Single Judge recognised this problem, noting that:

*"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.**"*²³ (emphasis added)

29. It is noted that this lacuna demonstrates that the KCPC two-year limit does have meaning. It informed the initial request to terminate the investigation of the Applicant and the Single Judge recognises that now the two years have passed, and termination of the investigation has been requested, there is a lacuna in the law and procedure going forward. This is yet another reason why the two-year time limit weighs into the meaning of Rule 47 RPE and the procedure to terminate an investigation.

30. The Appeals Panel is requested to fill the lacuna created by the Single Judge and set out clear parameters limiting the investigation of suspects by the SPO, as well as clearly set out means of recourse available to a suspect after two years of investigation and a refusal to terminate the investigation. Such a lacuna is to be filled in accordance with Rule 5 RPE *"in accordance with Article 19(2) and (3) of the Law, and the principles set out in Rule 4."*²⁴

²³ Decision Granting Leave to Appeal, at para. 20.

²⁴ This accordingly includes adopting the most favourable interpretation to the suspect as per Rule 4(3) RPE.

III. CONCLUSION

31. For the reasons set out above, the learned judge was in error in finding Article 159(1) KCPC "*inapplicable*" to the termination of the investigation of the Applicant and Rule 47 RPE.
32. The remedies sought are as follows.
33. The Appeals Panel is requested, applying Article 159(1) KCPC, to set out the correct legal standard for the termination of the investigation of a suspect and to revert the matter back to the Single Judge for a redetermination as to whether the investigation against the Applicant ought to be allowed to continue, or ought to be terminated. Given the ambiguity recognised by the Single Judge, in setting out this legal standard, the Applicant seeks the application of the most favourable interpretation to the suspect.
34. For the avoidance of doubt, the Defence maintains its request for the investigation against the Applicant to be terminated with immediate effect.
35. The Defence further requests the Appeals Panel to fill the lacuna created by the Pre-Trial Judge after the refusal to terminate the investigation. The Appeals Panel is requested to set out clear parameters to limit SPO

investigations and to guide how and when the Applicant can bring challenges against any ongoing investigation.

36. It is not permissible for the KSC to keep the parameters of the SPO investigations as broad and general as possible, without clear limits and without the stipulation of future challenges and recourse for a suspect. An uncertain and unfair legal and temporal framework for investigations, such as the present one (which is not yet cured of its defects and legal uncertainty), constitutes a prejudice to the Applicant and any other suspect.
37. The appeal should be granted.

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