



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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 Prosecutor

Date: 16 September 2021

Language: English

Classification: Public

**Prosecution Response to Driton Lajçi's Appeal Regarding Termination of
Investigation**

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I. INTRODUCTION

1. The Appeal¹ should be rejected because it fails to show error in the Single Judge's ruling that Article 159(1) of the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123 ('KCPC') is not applicable to investigations by the Specialist Prosecutor's Office ('SPO'). Article 159(1) of the KCPC does not form part of the applicable legal framework, having not been expressly incorporated by the Law.² Instead, the time limit for SPO investigations is governed by Rule 47,³ providing a 'reasonable time' standard. Moreover, even if, *arguendo*, KCPC Article 159(1) is considered as one among many factors relevant to identifying the 'reasonable time' for an investigation, it would not require—or even advise—termination of the investigation in the current instance. Lajçi also improperly seeks to raise additional issues that were not certified for appeal, and those submissions should be summarily dismissed.

II. PROCEDURAL HISTORY

2. On 15 June 2021, Lajçi applied for an order directing the SPO to terminate the investigation concerning him.⁴ Lajçi argued primarily that SPO investigations are subject to a two-year limit contained in KCPC Article 159(1) 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 Kosovo Specialist

¹ Appeal against Decision KSC-BC-2018-01/F00180 Regarding the Termination of the Investigation against Driton Lajçi, KSC-BC-2018-01/IA001/F00002, 3 September 2021 ('Appeal').

² Law on Specialist Chambers and Specialist Prosecutor's Office, Law No.05/L-053, 3 August 2015 ('Article' or 'Articles', unless otherwise noted.), Art.3(2).

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

Chambers ('KSC'), and that the investigation's duration had not exceeded any applicable limits.⁵ Lajçi replied on 1 July 2021.⁶

3. On 23 July 2021, the Single Judge issued his Decision,⁷ denying the Request in full. The Single Judge held that Article 159(1) of the KCPC has not been incorporated into the Law or the Rules, and that therefore the pertinent standard was solely that of reasonableness contained in Rule 47.⁸ The Single Judge further held that the length of the investigation had not exceeded the reasonableness requirement.⁹

4. On 29 July 2021, Lajçi sought leave to appeal three issues.¹⁰ On 11 August 2021, the SPO responded,¹¹ and on 16 August 2021, Lajçi replied.¹²

5. On 24 August 2021, the Single Judge issued a decision certifying one issue for appeal:

[W]hether the Single Judge erred in finding that the time limit as set out in Article 159 of the 2012 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.¹³

6. Lajçi's Appeal was notified as filed on 6 September 2021.¹⁴

⁵ Prosecution Response to the Application to Terminate the Investigation against Driton Lajçi, KSC-BC-2018-01/F00175, 25 June 2021.

⁶ Reply to the Prosecution Response regarding the Defence Application to Terminate the Investigation Against Driton Lajçi, KSC-BC-2018-01/F00178, 30 June 2021 ('Application Reply').

⁷ 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').

⁸ Decision, KSC-BC-2018-01/F00180, para.16.

⁹ Decision, KSC-BC-2018-01/F00180, para.32.

¹⁰ Rule 77(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 ('Leave Application').

¹¹ Prosecution response to Driton Lajçi' request for 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/F00182, 11 August 2021.

¹² 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, KSC-BC-2018-01/F00183, 16 August 2021.

¹³ Decision on Application for Leave to Appeal the Decision F00180, KSC-BC-2018-001/F00184, 24 August 2021, para.5(a) (emphasis in original) ('Decision on Leave').

¹⁴ Appeal, KSC-BC-2018-01/IA001/F00002.

III. ARGUMENT

7. Lajçi's argument on appeal differs significantly from that made to the Single Judge in the first instance. To the Single Judge, Lajçi argued that KCPC Article 159(1)'s two-year limit for investigations applies fully through Article 19(2) to investigations conducted by the SPO, and that therefore the investigation must be terminated.¹⁵ Before this Panel, on the other hand, Lajçi argues that KCPC Article 159(1)'s two-year time limit must merely 'inform' the 'reasonable time' standard of Rule 47. In addition to claiming that Article 19(2) supports this argument, Lajçi raises for the first time on appeal a claim based on Rule 4(1).

8. Neither Article 19(2) nor Rule 4(1) require the application of KCPC Article 159(1)'s two-year investigation limit to SPO investigations, either as a mandatory deadline, or as persuasive authority. To the contrary, the plain language of Article 3(2) and Rule 47 shows that the two-year limit does not apply. Lajçi's attempt to construe the Single Judge's decision granting leave to appeal as creating ambiguity is unavailing, and in addition Lajçi improperly seeks to raise matters that were not certified for appeal. The Appeal should be rejected.

a. Article 19(2) Does Not Require Application of KCPC Article 159(1)

9. Lajçi concedes that KCPC Article 159(1) has not been expressly incorporated into the Law or Rules.¹⁶ However, he now argues that pursuant to Article 19(2), the Judges sitting in Plenary 'must have been guided' by KCPC Article 159(1) when they decided on Rule 47(1)'s requirement that investigations be terminated within a 'reasonable time.'

10. This is a retreat from his position at first instance, where he argued that KCPC Article 159(1) not only must 'inform' the 'reasonable time' standard, but must directly apply to

¹⁵ Application, KSC-BC-2018-01/F00172, paras 2, 6, 36.

¹⁶ Appeal, KSC-BC-2018-01/IA001/F00002, para.8.

it.¹⁷ Regardless, both claims are incorrect. Article 19(2) required the Judges sitting in Plenary to be ‘guided’ by the KCPC as a whole—alongside the ‘highest standards of international human rights law’ and considerations of the KSC’s ‘nature, location and specificities’—in formulating the Rules. That the Judges were ‘guided’ by the KCPC as a whole in creating the Rules does not mean that they intended Rule 47(1) to incorporate KCPC Article 159(1). The Judges have completed the process of establishing the Rules—including any consideration of the KCPC, as well as the other factors identified in Article 19(2)—and chose to impose the ‘reasonable time’ standard found in Rule 47.

11. Indeed, the plain language of Rule 47(1) would indicate that the Judges did not intend to incorporate KCPC Article 159(1)’s two-year limit, given that they could have explicitly stated, or otherwise referenced, such a limit in the Rule but chose instead to use the standard of ‘reasonable time’. Elsewhere in the Rules, the Judges demonstrated that they both know how to impose explicit time periods,¹⁸ as well as to make explicit reference to the articles of the KCPC,¹⁹ when they so desire and intend. That they did not do so in Rule 47(1) is strong evidence that they purposely applied a standard different from that found in KCPC Article 159(1). Thus, Article 19(2) does not support the application of a two-year limit to SPO investigations.

b. Rule 4(1) Does Not Require Application of KCPC Article 159(1)

12. Lajçi raises for the first time on appeal a claim that Rule 4(1) requires that the KCPC Article 159(1)’s two-year limit ‘inform’ the ‘reasonable time’ standard.²⁰ This claim is similarly unsupportive of Lajçi’s argument.

¹⁷ See Application, KSC-BC-2018-01/F00172, para.34; Application Reply, KSC-BC-2018-01/F00178, paras 13, 16.

¹⁸ See, e.g., Rules 10(3), 13(1), 28(3), 57(1), 165(4).

¹⁹ See Rule 2 (defining Special Investigative Measures as measures defined in various articles of the KCPC).

²⁰ Lajçi made no reference to Rule 4 in his submissions to the Single Judge.

13. Rule 4(1) states: '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.' As is clear from the language of Rule 4(1), the first obligation of Judges is that the Rules be interpreted in a manner consonant with Article 3, and then only 'where appropriate' the KCPC. Article 3, in turn, clarifies where it is 'appropriate' to interpret the rules consonant with the KCPC. Article 3 states that the Law is *lex specialis*;²¹ that the KSC shall only adjudicate and function in accordance with Kosovo law 'as expressly incorporated and applied' by the Law;²² and that other than those provisions of Kosovo law expressly incorporated

'[a]ny other Kosovo law, regulation, piece of secondary regulation, other rule or custom and practice which has not been expressly incorporated . . . shall not apply to the organisation, administration, functions or jurisdiction of the Specialist Chambers and Specialist Prosecutor's Office. This Law shall prevail over any and all contrary provisions of any other law or regulation.'²³

14. Thus, under Rule 4(1) it is 'appropriate' to interpret the Rules in a manner consonant with the KCPC in situations where provisions of Kosovo legal authority are explicitly incorporated. As Lajçi acknowledges, KCPC Article 159(1) is not incorporated into the Law.

c. Even if KCPC Article 159(1) should 'Inform' the Reasonable Time Standard, the Investigation Should not be Terminated

15. Even were this Panel to find that it is 'appropriate' under Rule 4(1) (or under Article 19(2)) for KCPC Article 159(1) to 'inform' in some sense the 'reasonable time' assessment under Rule 47, this would not lead to termination of the investigation. It would be for the Single Judge to consider the KCPC two-year limit alongside the considerable other sources identified in Article 3(2), including the factors the Single Judge has already

²¹ Article 3(2)(b).

²² Article 3(2)(c).

²³ Article 3(4).

identified.²⁴ Thus, the Single Judge would still need to take account of all of the relevant sources of authority, and determine what a ‘reasonable time’ for an investigation is given the nature and circumstances of proceedings before the KSC. Consideration of the KCPC Article 159(1)’s two-year limit would consequently not change the Single Judge’s finding that the period of investigation remains reasonable in the circumstances.

d. KCPC Article 159(1) Unambiguously Does not Apply

16. Lajçi attempts to construct an argument that there is ambiguity as to the applicability of KCPC Article 159(1), in an attempt to trigger Rule 4(3)’s directive that ambiguity not settled pursuant to Rule 4(1) ‘shall be resolved by the adoption of the most favourable interpretation to the suspect’. This argument fails because, as described above, there is no ambiguity as to the fact that KCPC Article 159(1) is not applicable to the SPO’s investigations.

17. Lajçi argues that a line in the Single Judge’s decision granting leave to appeal, which states that the applicability of KCPC Article 159(1) ‘would benefit from an authoritative determination by the Court of Appeals Panel,’²⁵ thereby ‘implicitly recognises that there remains ambiguity.’²⁶ Lajçi misconstrues the sentence on which he hangs this argument. The Single Judge’s use of the phrase ‘authoritative determination’ refers to the Appeals Panel’s position in the court structure as sitting above and in review of the Single Judge, not a determination that there is ambiguity as to the law itself. If any matter that is subject to review by the Appeals Chamber is thereby inherently ambiguous, nearly every legal question at the KSC would be subject to Rule 4(3). This argument is therefore unavailing.

²⁴ Decision, KSC-BC-2018-01/F00180, paras 28-32.

²⁵ Decision on Leave, KSC-BC-2018-01/F00184, para.20.

²⁶ Appeal, KSC-BC-2018-01/IA001/F00002, para.22.

e. Lajçi Improperly Raises an Additional Appeal Issue

18. In addition to the issue that the Single Judge granted Lajçi leave to appeal on, Lajçi had requested leave to appeal on two other issues that were denied. First was a claim of error that the Single Judge had not 'set out the applicable parameters for what constitutes a "reasonable time"'.²⁷ Second was a claim of error that the Single Judge had not 'set out whether, when and how the Applicant can now challenge the investigation against him.'²⁸

19. Although these issues were rightly denied interlocutory appeal,²⁹ Lajçi seeks to combine them and then shoehorn them into the Appeal. As part of the Appeal, he asks this Panel to rule on the 'parameters for future challenges of the investigation of the applicant'.³⁰ Beyond effectively being a request for a legal advisory opinion, the Panel should reject the request as improperly raised. Regardless, the Single Judge has, contrary to Lajçi's assertion, addressed the applicable parameters.³¹ Lajçi is free to raise, before the appropriate Panel, any issues he deems necessary and as permitted under the Rules going forward.

IV. CONCLUSION AND RELIEF REQUESTED

20. Based on the foregoing, the SPO respectfully requests that the Appeals Panel reject the Appeal.

²⁷ Leave Application, KSC-BC-2018-01/F00181, para.3(ii).

²⁸ Leave Application, KSC-BC-2018-01/F00181, para.3(iii).

²⁹ Decision on Leave, KSC-BC-2018-01/F00184, paras 25, 29.

³⁰ Appeal, KSC-BC-2018-01/IA001/F00002, p.10, paras 26-30.

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

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At The Hague, the Netherlands.