

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: 20 September 2021

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Defence Reply to Prosecution Response to Driton Lajçi's Appeal Regarding

Termination of Investigation KSC-BC-2018-01-IA001/F00003

Specialist Prosecutor

Specialist Counsel

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I. INTRODUCTION

1. Specialist Counsel for Driton Lajçi (“Applicant”) hereby replies to the Response of the Specialist Prosecutor’s Office (“SPO”) regarding the Appeal on the termination of its investigation against him (“Response”).¹

II. BACKGROUND

2. The background to this issue has been set out previously and is not rehearsed here.²

III. SUBMISSIONS

3. The Applicant maintains and does not rehearse his previous submissions, instead focussing on aspects of the Response requiring a reply.
4. The Response contains five groups of submission (respectively, “Issues (a)-(e)”), which are addressed in turn.

¹ Prosecution Response to Driton Lajçi’s Appeal Regarding Termination of the Investigation, KSC-BC-2018-01/IA001/F00003, 16 September 2021.

² See, 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”), paras 1-5.

a. That Article 19(2) does not require the Application of KCPC Article 159(1)

5. The Applicant's submissions falling within Issue (a) are not a "*retreat from [the] position taken at first instance.*"³ The Applicant merely uses the Appeal to contextualise and develop his original position, the crux of his argument having remained consistent.
6. The Applicant does not seek to argue that Article 159(1) of the Kosovo Criminal Procedure Code ("KCPC") "*must directly apply*"⁴ through Article 19(2) of the Law on Specialist Chambers and Specialist Prosecutor's Office, ("Law").⁵
7. To be clear, the Applicant's arguments were (and are) that per Article 19(2) of the Law, Article 159(1) KCPC must guide the definition of 'reasonableness' in Rule 47(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers⁶ ("Rule" or "Rules").⁷
8. Accordingly, it is not argued that Article 159(1) KCPC, which is not expressly incorporated into the Law or the Rules, is given direct, binding force. Rather, it is submitted that pursuant to Article 19(2) of the Law, the interpretation of

³ Response, para. 10.

⁴ Response, para. 10.

⁵ Law No.05/L-053

⁶ KSC-BD-03/Rev3/2020

⁷ Appeal, paras 6-25.

'reasonableness' per Rule 47(1), which does have binding force, must be guided by Article 159(1) KCPC.

9. Thus, whilst those arguments are not intended to displace Rule 47(1), it is nonetheless submitted that unless Article 159(1) KCPC is to have no effect on that interpretation at all (contrary to Article 19(2) of the Law), the outermost limit of a 'reasonable' investigation per Rule 47(1) must be two years.
10. The SPO's position in this regard is that rather than being 'guided' by Article 159(1) KCPC, the Judges, in adopting Rule 47(1), must have chosen to entirely disregard it, preferring instead changeable, 'fact-dependent' frameworks to determine the appropriate length of SPO investigations.⁸ This position contravenes Article 19(2) and is untenable.

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

11. The SPO suggest that pursuant to Rule 4(1), determining "*where it is 'appropriate' to interpret the rules consonant with the KCPC*"⁹ requires exclusive reference to Article 3 of the Law. Given that, under Article 3(4), the KSC functions in accordance with expressly incorporated and applied provisions

⁸ Response, paras 10-11.

⁹ Response, para 13.

of Kosovo law, the SPO argues that it is inappropriate to consult Article 159(1) KCPC as a non-expressly incorporated provision. This is not accepted.

12. Rule 4(1) states that: “[t]he 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).
13. The use of “*and, where appropriate*” in Rule 4(1) is disjunctive from the reference to Article 3. ‘Appropriateness’ is therefore not to be assessed within the framework of those sources listed in Article 3 and is instead be determined by reference to other factors that necessitate reference to the KCPC, such as the ambiguity present in the instant case.
14. It is therefore appropriate to consult Article 159(1) KCPC in the instant case.

c. That Even if KCPC Article 159(1) should ‘Inform’ Rule 47(1), the Investigation Should not be Terminated

15. Regarding Issue (c), it is highlighted that the issue being appealed is whether the Single Judge erred in finding that Article 159(1) KCPC is “*entirely ‘inapplicable’*” to an interpretation of Rule 47(1).¹⁰ Notwithstanding the outcome, an acceptance that the Single Judge should have considered the

¹⁰ Appeal, para. 4.

effect of Article 159(1) KCPC would therefore represent a finding that he erred in failing to consider it *per se*.

16. Further, the Applicant maintains that if rightly found to be applicable, the limit in Article 159(1) should be preferred as the outer limitation of a 'reasonable' investigative period for the purposes of Rule 47(1). The Applicant continues to rely upon his previous submissions in this regard.¹¹

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

17. The SPO's submissions regarding Issue (d) improperly presuppose that its own submissions will be preferred on Appeal, such that there is no room for any other interpretation.
18. However, for reasons stated previously¹² and maintained here, it is submitted that there remains significant ambiguity regarding the definition of 'reasonableness' in Rule 47(1).
19. Accordingly, Rule 4(3) does apply, this ambiguity should be resolved in favour of the Applicant, and the investigation should be terminated.

e. That Mr. Lajçi Improperly Raises an Additional Appeal Issue

¹¹ Appeal, paras 6-25.

¹² Appeal, para. 22.

20. The Applicant's request for clarification as to when the SPO's investigation will be terminated does not represent an improper 'additional appeal issue'.
21. The Applicant does not raise this issue as a basis of appeal. Rather, he does so to gain some certainty as to when the SPO's seemingly open-ended investigation will become 'unreasonable', having been subjected to it for well over two years.
22. Thus, even if accepted that the Single Judge correctly elucidated the applicable factors per Rule 47(1) (which is not accepted), it is submitted that it is not improper to request an authoritative assessment/application of those factors. That request is not for a "*legal advisory opinion*",¹³ but merely an attempt to afford the Applicant some certainty as to when he might expect to finally be free from the SPO's ceaseless investigative efforts against him.

IV. CONCLUSION

23. For the reasons stated above and previously, the Applicant respectfully requests the Chamber to grant the Appeal.

¹³ Response, para. 19.

Word count: 1,029 words



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