



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: **KSC-BC-2018-01**

Before: **A Panel of the Court of Appeals Chamber**
Judge Michèle Picard
Judge Emilio Gatti
Judge Kai Ambos

Registrar: Fidelma Donlon

Date: 1 October 2021

Original language: English

Classification: **Public**

Decision on Appeal Against “Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi”

Specialist Prosecutor’s Office:
Jack Smith

Counsel for Driton Lajçi:
Toby Cadman

THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively)¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”) is seised of an appeal filed on 3 September 2021 (“Appeal”) by Driton Lajçi (“Lajçi “ or the “Appellant”),² against the “Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi” (“Impugned Decision”).³ The Specialist Prosecutor’s Office (“SPO”) responded on 16 September 2021 that the Appeal should be rejected (“Response”).⁴ Lajçi replied on 20 September 2021 (“Reply”).⁵

I. BACKGROUND

1. On 23 July 2021, the Single Judge rejected Lajçi’s application for an order to the SPO to terminate its investigation against Lajçi, finding that the investigation from 3 May 2019 to the date of the Impugned Decision did not contravene the “reasonable time” criterion under Rule 47 of the Rules.⁶

2. On 24 August 2021, the Single Judge certified one issue for appeal (the “Certified Issue”), as follows:

[W]hether 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”

¹ F00001, Decision Assigning a Court of Appeals Panel, 27 August 2021.

² F00002, Appeal against Decision KSC-BC-2018-01/F00180 Regarding the Termination of the Investigation against Driton Lajçi, 3 September 2021 (“Appeal”).

³ F00180/RED, Public Redacted Version of Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi, 23 July 2021 (original version filed on 23 July 2021) (“Impugned Decision”).

⁴ F00003, Prosecution Response to Driton Lajçi’s Appeal Regarding Termination of Investigation, 16 September 2021 (“Response”).

⁵ F00004, Defence Reply to Prosecution Response to Driton Lajçi’s Appeal Regarding Termination of Investigation, 20 September 2021 (“Reply”).

⁶ Impugned Decision, paras 32, 35(a).

framework in Rule 47 of the Rules, as adopted by the Judges of the Kosovo Specialist Chambers[.]⁷

II. STANDARD OF REVIEW

3. The Court of Appeals Panel adopts the standard of review for interlocutory appeals set out in its first decision and applied subsequently.⁸

III. DISCUSSION

A. ISSUES FALLING OUTSIDE THE SCOPE OF THE APPEAL

4. Pursuant to Rule 170(2) of the Rules, an appeal for which leave has been granted through certification by the Pre-Trial Judge or Trial Panel shall be filed exclusively in respect of the issues certified by the lower panel.⁹ The scope of the Court of Appeals Panel's review therefore lies strictly within the confines of the issues certified by the Pre-Trial Judge in the Certification Decision.¹⁰ It is for the Pre-Trial Judge or the Trial Panel to determine not only whether a decision may be appealed, but also to what extent.¹¹ The Panel may thus decline to consider arguments of an appellant that go beyond the issue in relation to which certification has been granted.¹²

⁷ F00184, Decision on Application for Leave to Appeal the Decision F00180, 24 August 2021 ("Certification Decision"), paras 5(a), 21, 32(b). See also F00181, 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, 29 July 2021 (confidential, reclassified as public on 24 August 2021) ("Certification Application"); F00182, Prosecution response to Driton Lajçi's request for leave to appeal the Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi, 11 August 2021 (confidential, reclassified as public on 24 August 2021); F00183, 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, 16 August 2021 (confidential, reclassified as public on 24 August 2021).

⁸ KSC-BC-2020-07, F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, paras 4-14. See also e.g. KSC-BC-2020-07, F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021 ("*Gucati and Haradinaj* Appeal Decision on Preliminary Motions"), paras 8-11.

⁹ *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, paras 18, 20.

¹⁰ *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 20.

¹¹ *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 20 and references quoted therein.

¹² *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 20 and references quoted therein.

5. In that regard, the Panel acknowledges the SPO's submission that Lajçi's arguments on appeal differ from that made in the first instance.¹³ To the Single Judge, Lajçi argued that the two-year limit for investigations set in Article 159(1) of the 2012 Kosovo Criminal Procedure Code of the Republic of Kosovo ("KCPC")¹⁴ applies fully to investigations conducted by the SPO, and that the investigation must be terminated.¹⁵ Before the Appeals Panel, Lajçi argues that Article 159(1) of the KCPC must guide the interpretation of the reasonable time standard of Rule 47 of the Rules.¹⁶ The Panel nonetheless considers that the arguments raised by Lajçi in Ground of Appeal 1 fall within the scope of the Certified Issue. This is because part of the Certified Issue is whether Article 159 of the KCPC should be completely ignored, in interpreting the "reasonable time" framework in Rule 47 of the Rules.¹⁷

6. As acknowledged by the Appellant, Ground of Appeal 2 on the "Parameters for Future Challenges of the Investigation of the Applicant" exceeds the scope of the Certified Issue.¹⁸ Although Lajçi argues that this issue is only raised to "gain some certainty" as to when the length of an SPO investigation will become unreasonable,¹⁹ it is not properly brought before the Panel.²⁰ The Panel declines to consider Lajçi's arguments in this regard and dismisses Ground of Appeal 2.²¹

¹³ Response, paras 7, 10

¹⁴ 2012 Kosovo Criminal Procedure Code of the Republic of Kosovo, Law No. 04/L-123, 13 December 2012 ("KCPC").

¹⁵ Response, para. 7 referring to Article 19(2) of the Law. See also Response, para. 10. The SPO refers in particular to F00172, Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Mr. Driton Lajçi, 15 June 2021, paras 2, 6, 36.

¹⁶ Response, paras 7, 12-14. See also Appeal, paras 7, 12, 15, 18.

¹⁷ Certification Decision, paras 5(a), 21, 32(b). See also fn. 7 above.

¹⁸ Appeal, para. 26; Reply, paras 20-22. See also para. 2 above.

¹⁹ Reply, paras 20-21.

²⁰ The Panel notes that the SPO submits that such arguments should be dismissed on those grounds. See Response, paras 1, 18, 19.

²¹ Appeal, paras 26-30, 35-36.

B. ALLEGED ERROR REGARDING THE APPLICABILITY OF ARTICLE 159(1) OF THE KCPC
(GROUND OF APPEAL 1)

1. Submissions of the Parties

7. Lajçi submits that the Single Judge erred in finding that the two-year time limit set in Article 159(1) of the KCPC is “entirely inapplicable” to determining the meaning of what constitutes a “reasonable time” after which an investigation against a suspect at the Specialist Chambers must be terminated pursuant to Rule 47 of the Rules.²²

8. Lajçi concedes that as per Article 3 of the Law, Article 159(1) of the KCPC has not been incorporated into the legal framework of the Specialist Chambers.²³ However, in his view, the Single Judge failed to properly consider that other provisions of the Specialist Chambers underline the significance and guiding role of the KCPC for the purpose of adopting or interpreting the Rules.²⁴ According to Lajçi, the Single Judge erred in interpreting Rule 47 of the Rules in light of the European Court of Human Rights (“ECtHR”)’s standards rather than relying on the relevant provisions of the KCPC.²⁵

9. Lajçi further argues that the Single Judge’s finding that there is no ambiguity with regard to the (non-)applicability of Article 159(1) of the KCPC to the present circumstances is inconsistent with his other finding that an authoritative determination by the Court of Appeals Panel would be beneficial.²⁶ Lajçi submits that the Single Judge implicitly recognised that there remains ambiguity as to the applicability of Article 159(1) of the KCPC *vis-à-vis* Rule 47 of the Rules. This

²² Appeal, paras 6, 19. See also Appeal, paras 12, 13, 18, 23-24; Reply, paras 5-10, 15-16.

²³ Appeal, para. 8.

²⁴ Appeal, paras 7, 9-12, 16, 18 referring to Articles 3 and 19(2) of the Law and Rule 4(1) of the Rules. Reply, paras 11-14. Lajçi also emphasizes that according to him, the Specialist Chambers are a domestic, rather than an international or *ad hoc* tribunal. See Appeal, para. 10.

²⁵ Appeal, paras 13-17.

²⁶ Appeal, paras 20-21. See also Appeal, para. 23.

ambiguity should have been resolved by adopting the most favourable interpretation to the suspect which is the one provided for in Article 159(1) of the KCPC.²⁷

10. Lajçi requests the Panel to overturn the interpretation of the Single Judge regarding the applicability of Article 159(1) of the KCPC and to revert the case back to the Single Judge with the instruction to apply the correct legal standard and to order immediately that the investigation against him be terminated.²⁸

11. The SPO responds that Rule 4(1) of the Rules requiring the Rules to be interpreted in a manner consonant with the KCPC, where appropriate, is inapplicable in this case given that Article 159(1) of the KCPC was not incorporated into the Law.²⁹

12. According to the SPO, neither Article 19(2) of the Law nor Rule 4(1) of the Rules require the application of the two-year limit for investigations set in Article 159(1) of the KCPC to SPO investigations, either as a deadline, or as persuasive authority.³⁰ To the contrary, the plain language of Article 3(2) of the Law and Rule 47 of the Rules shows that the two-year limit does not apply.³¹ The SPO further submits that Lajçi's attempt to interpret the Single Judge's decision granting leave to appeal as creating ambiguity is unavailing given that there is no ambiguity as to the fact that Article 159(1) of the KCPC is not applicable to the SPO's investigations.³²

13. Ultimately, the SPO argues that if the Panel was to conclude that the two-year limit for investigations set in Article 159(1) of the KCPC is informative with regard to the assessment of the "reasonable time" assessment under Rule 47 of the Rules, the

²⁷ Appeal, para. 22 referring to Rule 4(3) of the Rules. See also Reply, paras 18-19.

²⁸ Appeal, paras 24-25, 31-34, 37. See also Reply, para. 3.

²⁹ Response, paras 13-14.

³⁰ Response, paras 8-14.

³¹ Response, paras 8, 11.

³² Response, paras 8, 16-17.

investigation against Lajçi should not be terminated in light of the other factors identified by the Single Judge.³³ The SPO requests the Panel to reject the Appeal.³⁴

2. Assessment of the Court of Appeals Panel

14. The Panel recalls that according to Rule 47(1) of the Rules:

If the Specialist Prosecutor does not file an indictment with the Specialist Chambers pursuant to Article 38(4) of the Law *within a reasonable time after the person became a suspect and was notified thereof*, the suspect may request the Specialist Prosecutor to terminate the investigation against him or her.³⁵

15. Article 159(1) of the KCPC stipulates that:

If an investigation is initiated, the investigation shall be completed within two (2) years. If an indictment is not filed, or a suspension is not entered under Article 157 of this Code, *after two (2) years of the initiation of the investigation, the investigation shall automatically be terminated.*³⁶

16. The Panel agrees with the Single Judge that Article 159(1) of the KCPC is not applicable to a request to terminate an investigation before the Specialist Chambers.³⁷ This finding results from a plain reading of the Law. Pursuant to Article 3(2)(b) and (c) of the Law, the Specialist Chambers shall adjudicate in accordance with, *inter alia*, the Law as the *lex specialis* and other provisions of Kosovo law *as expressly incorporated and applied by the Law.*³⁸ Pursuant to Article 3(4) of the Law, any other Kosovo law, or

³³ Response, para. 15.

³⁴ Response, paras 8, 20.

³⁵ See Rule 47(1) of the Rules (emphasis added). Rule 47(2) of the Rules stipulates that “[i]f the request is rejected or not considered, the suspect may request a Single Judge [...] to consider the matter and, if necessary, terminate the investigation against the suspect.”

³⁶ See Article 159(1) of the KCPC (emphasis added). Article 159(2) of the KCPC stipulates that “[t]he pre-trial judge may authorize a six (6) month extension of an investigation under Paragraph 1 of this Article where a criminal investigation is complex, including but not limited to if there are four or more defendants, multiple injured parties have been identified, a request for international assistance has been made, or other extraordinary circumstances exist.”

³⁷ See Impugned Decision, para. 20. See also Impugned Decision, para. 16.

³⁸ Article 3(2)(b) and (c) of the Law (emphasis added).

regulation *which has not been expressly incorporated into the Law shall not apply to the jurisdiction of the Specialist Chambers.*³⁹

17. Lajçi concedes that as per Article 3 of the Law, Article 159(1) of the KCPC has not been incorporated into the legal framework of the Specialist Chambers.⁴⁰ In his Reply, Lajçi explicitly acknowledges that Article 159(1) of the KCPC is not directly applicable to a request to terminate an investigation.⁴¹ In light of the above, the Panel considers that this issue does not need to be considered further and confirms that Article 159(1) of the KCPC is not applicable to a request to terminate an investigation.

18. Regarding Lajçi's argument that the Certification Decision reflects ambiguity,⁴² the Panel recalls that the requirement for the relevant panel to be satisfied that "an immediate resolution by a Court of Appeals Panel may materially advance proceedings" simply reflects the wording of the standard for certification.⁴³ In the Impugned Decision, the Single Judge stated that there is no ambiguity in the fact that Article 159(1) of the KCPC is inapplicable in this case.⁴⁴ He further expressly found that this conclusion, "is the only possible interpretation arising from the principles set forth in Articles 3 and 19(1)-(2) of the Law and Rule 4 of the Rules, and settles the matter entirely".⁴⁵ However, in the Certification Decision, the Single Judge stated that a determination by the Panel would be beneficial as it would ensure that there is no uncertainty about the validity of further investigations against Lajçi.⁴⁶ The Panel fails to see any uncertainty in the Single Judge's finding that Article 159(1) of the KCPC is inapplicable in this case.

³⁹ Article 3(4) of the Law (emphasis added).

⁴⁰ Appeal, paras 8-9. See also Reply, paras 5-10.

⁴¹ Reply, para. 6.

⁴² Appeal, paras 20-23.

⁴³ Article 45(2) of the Law and Rule 77 of the Rules.

⁴⁴ Impugned Decision, para. 19.

⁴⁵ Impugned Decision, para. 19.

⁴⁶ Certification Decision, para. 20.

19. The Panel turns now to the second part of the Applicant's argument which is whether, per Article 19(2) of the Law, Article 159(1) of the KCPC must guide the definition of "reasonable time" provided for in Rule 47(1) of the Rules.⁴⁷

20. The Panel observes that the wording of the Certified Issue is a verbatim reproduction of the first issue which Lajçi sought certification of.⁴⁸ It does not however reflect fully the findings made in the Impugned Decision. Notably, while it is true that the Single Judge decided that Article 159(1) of the KCPC is not applicable to a request to terminate an investigation,⁴⁹ the Single Judge never said that Article 159(1) of the KCPC "should be completely ignored, in interpreting the reasonable time framework in Rule 47 of the Rules".⁵⁰

21. Rather the Single Judge acknowledged that in determining its Rules, the Specialist Chamber shall be guided by the KCPC.⁵¹ The Single Judge decided to interpret the words "shall be guided" as meaning that, while the Judges must take the KCPC into account when adopting the Rules, "they are not bound by any specific provisions contained in that Code".⁵² The Panel is satisfied that this interpretation is correct and does not contradict Rule 4(1) of the Rules requiring the Rules to be interpreted in a manner consonant with the framework set out in Article 3 of the Law and, where appropriate, the KCPC.⁵³

22. The Panel finds that, although Article 159(1) of the KCPC is informative and can guide the relevant panel in determining what constitute a "reasonable time" for an investigation as per Rule 47(1) of the Rules, it has no binding effect as it was not expressly incorporated in the Law.⁵⁴ Other sources such as international human rights

⁴⁷ See e.g., Appeal, para. 18(a); Reply, para. 7.

⁴⁸ See Certification Decision, para. 5(a). See also Certification Application, para. 3(i).

⁴⁹ See Impugned Decision, para. 20. See also Impugned Decision, para. 16.

⁵⁰ See para. 2 above.

⁵¹ Impugned Decision, para. 8 referring to Article 19(2) of the Law.

⁵² Impugned Decision, para. 17.

⁵³ Rule 4(1) of the Rules.

⁵⁴ Article 3(2)(c) of the Law.

law including the European Convention on Human Rights (“ECHR”) are available to the Specialist Chambers for the purpose of interpreting the Law and Rules.⁵⁵ In that regard, the Panel observes that the Single Judge assessed the “reasonable time” requirement under Rule 47(1) of the Rules against the criteria established by the ECtHR which, applied to the present case, are: (i) the complexity of the investigation; (ii) the conduct of Lajçi and the relevant administrative and judicial authorities; and (iii) what is at stake for Lajçi.⁵⁶ The Panel recalls that the ECHR has superiority over domestic laws according to Article 22 of the Kosovo Constitution.⁵⁷ The Panel sees no error in the fact that the Single Judge’s relied on the ECtHR standards rather than on the provisions of the KCPC and rejects Lajçi’s argument thereof.⁵⁸

23. In light of the above, the Panel dismisses Ground of Appeal 1.

⁵⁵ The Panel recalls that pursuant to Article 3(2)(e) of the Law, “[t]he Specialist Chambers shall adjudicate and function in accordance with [...] international human rights law which sets criminal justice standards including the European Convention on Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, as given superiority over domestic laws by Article 22 of the Constitution. In addition, pursuant to Article 19(2) of the Law, the Rules shall reflect the highest standards of international human rights law including notably the ECHR.

⁵⁶ Impugned Decision, para. 28. See also Impugned Decision, paras 29-32.

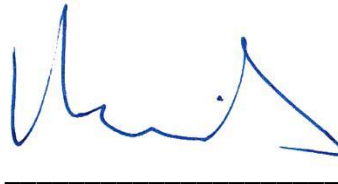
⁵⁷ Article 3(2)(e) of the Law.

⁵⁸ Appeal, paras 14-17.

IV. DISPOSITION

24. For these reasons, the Court of Appeals Panel:

DENIES the Appeal.



**Judge Michèle Picard,
Presiding Judge**

Dated this Friday, 1 October 2021

At The Hague, the Netherlands