

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

**The Prosecutor v. Driton Lajçi**

**Before:** Single Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Driton Lajçi

**Date:** 25 July 2022

**Language:** English

**Classification:** Public

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**Corrected Version of**

**Second Application for an Order Directing the Specialist Prosecutor to Terminate  
the Investigation against Driton Lajçi**

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**Specialist Prosecutor**

Jack Smith

**Specialist Counsel**

Toby Cadman

## I. INTRODUCTION

1. On 15 June 2021, Specialist Counsel for Mr. Driton Lajçi (“Lajçi Defence”) applied, the first time, for an order directing the Specialist Prosecutor to terminate the investigation against Mr. Lajçi, given that the investigation had been ongoing for well over two years by that time.<sup>1</sup>
2. On 23 July 2021, the Single Judge rendered a decision rejecting the Application,<sup>2</sup> finding that the investigation from 3 May 2019 to the date of that Decision did not contravene the “reasonable time” criterion under Rule 47(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).<sup>3</sup>
3. On 29 July 2021, the Lajçi Defence submitted an application for leave to appeal through certification.<sup>4</sup>
4. On 24 August 2021, the Single Judge certified one issue for appeal, 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

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<sup>1</sup> 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.

<sup>2</sup> KSC-BC-2018-01/F00180/RED, Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi, 23 July 2021, Public.

<sup>3</sup> Ibid, paras 32, 35(a).

<sup>4</sup> 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 Lajçi, 29 July 2021 (notified on 30 July 2021), Confidential.

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[.]<sup>5</sup>

5. On 3 September 2021, the Lajçi Defence submitted its appeal.<sup>6</sup>
6. On 1 October 2021, the Appeals Panel rendered its decision.<sup>7</sup> The Panel agreed with the Single Judge that Article 159(1) KCPC is not applicable to a request to terminate an investigation pursuant to Rule 47(1) of the Rules.<sup>8</sup> However, it also held at [21] and [22] that:

“21. Rather the Single Judge acknowledged that in determining its Rules, the Specialist Chamber shall be guided by the KCPC. The Single Judge decided to interpret the words “shall be guided” as meaning that, while the Judges must take the KCPC into account

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<sup>5</sup> 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).

<sup>6</sup> F00002, Appeal against Decision KSC-BC-2018-01/F00180 Regarding the Termination of the Investigation against Driton Lajçi, 3 September 2021.

<sup>7</sup> KSC-BC-2018-01/IA001/F00005, Decision on Appeal Against “Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi”, Public.

<sup>8</sup> *Ibid*, paras 16-17.

when adopting the Rules, “they are not bound by any specific provisions contained in that Code”. 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.

“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. Other sources such as international human rights law including the European Convention on Human Rights (“ECHR”) are available to the Specialist Chambers for the purpose of interpreting the Law and Rules. 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. The Panel recalls that the ECHR has superiority over domestic laws according to Article 22 of the Kosovo Constitution. The Panel sees no error in the fact that the

Single Judge relied on the ECtHR standards rather than on the provisions of the KCPC and rejects Lajçi's argument thereof."

**(Emphasis added)**

4. On 2 June 2022, the Lajçi Defence wrote to the Specialist Prosecutor submitted its second request seeking an immediate termination of the investigation.<sup>9</sup>

7. The request was rejected by the Specialist Prosecutor in a letter dated 9 June 2022,<sup>10</sup> asserting, without further elaboration, that:

"[The] findings of the Single Judge, based upon standards upheld by the Court of Appeals, remain to be true. The ongoing investigation continues to be of significant complexity. The SPO has undertaken additional investigative actions which have been protracted due to provision of incomplete information. The SPO anticipates further investigative steps. Mr Lajçi is not currently detained. Considering all these factors, the length of the investigations continues to be reasonable."

8. The above paragraph constitutes the totality of the information received concerning the SPO's investigations conducted since the Appeals Panel decision of 1 October 2021. In fact, there has been no further contact with Mr.

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<sup>9</sup> See Confidential Annex A.

<sup>10</sup> See Confidential Annex B.

Lajçi or his legal representatives since his suspect interview held on 17 October 2019.

## II. THE LAW

6. According to the Appeals Panel decision,<sup>11</sup> the applicable standards for review of the reasonableness of the time spent investigating a suspect, pursuant to Rule 47(1), are the standards set by the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) and the caselaw of the European Court of Human Rights (“ECtHR”),<sup>12</sup> which includes the following factors to consider when determining the reasonableness of time spent investigating, meaning that each case turns on its own facts:

- (i) the complexity of the investigation;
  - (ii) the conduct of Mr. Lajçi;
  - (iii) the conduct of the relevant administrative and judicial authorities;
- and

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<sup>11</sup> KSC-BC-2018-01/IA001/F00005, Decision on Appeal Against “Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi”, Public. Para 22.

<sup>12</sup> The Single Judge in his Decision of 23 July 2021 cited three ECtHR judgments, namely *Boddaert v. Belgium*, no. 12919/87, Judgment, 12 October 1992, para. 36; *Pélissier and Sassi v. France* [GC], no. 25444/94, Judgment, 25 March 1999, para. 67; and ECtHR, *Khlebiak v. Ukraine*, no. 2945/16, Judgment of 25 July 2017, para. 78.

(iv) what is at stake for Mr. Lajçi.

7. However, it is submitted that although the Appeals Panel held that Article 159(1) KCPC is not directly applicable to Rule 47(1) of the Rules, the Panel confirmed that the former “...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.”<sup>13</sup> Therefore, although Article 159(1) KCPC has been held not to be directly applicable, it can still be relied upon and considered by the Single Judge when determining the reasonable time requirement.

8. Article 159(1) KCPC states 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.”

9. Rule 47(1) of the Rules states that:

“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

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<sup>13</sup> KSC-BC-2018-01/IA001/F00005, Decision on Appeal Against “Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi”, Public. Para 22.

thereof, the suspect may request the Specialist Prosecutor to terminate the investigation against him or her.” (Emphasis added)

### III. SUBMISSIONS

#### A. Starting point for the consideration of “reasonable time”

10. It remains the position that Mr. Lajçi was formally notified of being a suspect on or around 3 May 2019 when he met with the then Deputy Prosecutor, Mr. Kwai Hong Ip, and was presented with an order to seize his telephone and was subsequently issued with a summons for interview as a suspect.<sup>14</sup>
11. It is submitted that the length of the investigation against Mr Lajçi since he was notified of his suspect interview to date can no longer be considered reasonable as three years and two months have passed since he was formally notified of being under investigation and no indictment has been filed/publicly notified.
12. In determining reasonableness, in any case in which it is said that the reasonable time has been violated, the first step is to consider the period of time which has elapsed. Under Article 6(1) ECHR, time begins to run with

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<sup>14</sup> KSC-BC-2018-01/F00180/RED, Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi, 23 July 2021, Public. Para 21. See also Annex A.



*“the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”*.<sup>15</sup> Once an individual is aware that he is officially suspected of a criminal offence, from that moment he has an interest in an expeditious decision about his guilt or innocence be determined by a judicial decision. In the present case that was on 3 May 2019 as set out above. The period in which time ends is when the proceedings have been concluded or when determination becomes final.<sup>16</sup> In the present case, matters remain ongoing, therefore the relevant date will be the delivery of the Single Judge’s decision on this application.

13. Once the time period has been established, the reasonableness must be assessed by the complexity of the case, the conduct of the accused, the conduct of the relevant authorities and what is at stake for Mr. Lajçi.
14. Each of these factors is discussed below in turn.

**B. The complexity of the investigation**

15. As to the complexity of the case, the Lajçi Defence maintains that there is a significant discrepancy in complexity regarding an obstruction of justice case, even when connected to the affiliated government interference and including many potential co-defendants, on one end of the spectrum and, for instance,

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<sup>15</sup> ECtHR, *Eckle v. Federal Republic of Germany*, judgment of 21 June 1983, Series A no. 65, para. 73.

<sup>16</sup> ECtHR, *Scopatelli v. Italy*, judgment of 23 November 1993, Series A no. 278, para. 18.

complex international crimes at the other end of the spectrum. These factors may make the case arguably more complex but not significantly complex as asserted by the Specialist Prosecutor.

16. In relation to the ECtHR jurisprudence previously invoked by the SPO,<sup>17</sup> the Lajçi Defence restates the previous argument that the SPO omitted that the criminal proceedings in question concerned financial crimes that spanned across and required evidence from five other jurisdictions, whereas the investigation against Mr. Lajçi concerns a single jurisdiction and an allegation of obstruction of justice.

17. In addition, it is reiterated that there is no evidence for the SPO's claim that former members of the Kosovo Government, or any other person, were implicated in any alleged obstruction to which Mr. Lajçi stands accused, which would add to the complexity.

### **C. The conduct of Mr. Lajçi**

18. The Lajçi Defence repeats its previous arguments that the SPO does not appear to be arguing that Mr. Lajçi withheld all documentation requested, or even a significant portion, but that he has not cooperated in the SPO's

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<sup>17</sup> KSC-BC-2018-01, F00175, Specialist Prosecutor, *Prosecution Response to the Application to Terminate the Investigation against Driton Lajçi*, 25 June 2021, confidential. A public redacted version was submitted on the same day, F00175/RED, where the Specialist Prosecutor at [21] referred to the ECtHR case *Arewa v. Lithuania*, no. 16031/18, Judgment, 9 March 2021, para. 54.

investigation against him. It is of further note, that Mr. Lajçi resigned from his government post on 2 November 2020. Therefore, to suggest that he has engaged in any activities of obstructing ongoing proceedings, or having any involvement in, or responsibility for, any alleged obstruction by the Government, is contrived and unsubstantiated.

19. It remains unclear what formal requests have been put to Mr. Lajçi personally to obtain the allegedly missing information in his possession and no evidence has been disclosed to demonstrate that he has not cooperated. In any event, to the point that Mr. Lajçi has contributed to the delay by not cooperating with the investigation, as was held in *Ledonne (No. 1) v. Italy*,<sup>18</sup> there is no requirement imposed by Article 6 ECHR for an accused person to actively cooperate with the authorities in their own prosecution.
  
20. The Single Judge previously held that Mr. Lajçi's actions *partly* contributed to the delay as he headed a department in the Ministry of Justice at the relevant time.<sup>19</sup> However, it is submitted that from the information available it is not clear, and it cannot be clearly ascertained, what actions Mr. Lajçi is alleged to have taken and to what extent they contributed to the delay. Mere assertion that his actions partly contributed to the delay without having further

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<sup>18</sup> ECtHR, *Ledonne (No. 2) v. Italy*, Second Section, Appl. No. 38414/97, judgment of 12 August 1999, para. 19.

<sup>19</sup> 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, para 30. Redacted version at KSC-BC-2018-01/F00180/RED.

information about the extent is not enough to justify the reasonable time regarding this factor. Further, as Mr. Lajçi resigned from his government post on 2 November 2020, even if the SPO were able to establish that he contributed to delay, which is denied, for the period of 3 May 2019 to 2 November 2020, they have failed to account for the period following his departure from his government post, namely the past nineteen months.

**D. The conduct of the relevant administrative and judicial authorities**

21. The next criterion is the conduct of the relevant authorities. In this regard, there is a complete absence of any information upon which the Lajçi Defence can comment. However, any delay arising from an alleged lack of cooperation or failure to provide information by the Kosovo Government in general, is not attributable to Mr. Lajçi, and cannot be such a significant factor in determining that the investigation against Mr Lajçi, now lasting over three years, is reasonable.
22. Furthermore, in terms of the suggestion that the Kosovo Government is responsible for delay, the SPO should be reminded that it is a domestic prosecuting authority of the Republic of Kosovo, not a separate free-standing entity operating in a vacuum and is responsible for any perceived failure on the part of the State to advance its investigations.

23. It is the duty of the relevant domestic authorities to organise their judicial system in a way that state institutions can meet the requirements of Article 6(1) ECHR.<sup>20</sup> The administrative organising of its judicial system, including delays caused by lack of judicial or administrative staff, backlog of work or additional commitments are the responsibility of the relevant authorities.<sup>21</sup> Systematic and institutionalised problems within a judicial system, that cause repeated delays and are cause for real concern should be addressed by the relevant bodies. Even if systematic delays may be more excusable than individual failings, there must come a time when systematic causes can no longer be considered exculpatory. The ECHR is not a set of illusory or aspirational directive principles of state policy, it is intended that the State (or governing authority) should make whatever arrangements are necessary to avoid violations of the ECHR. Mr Lajçi cannot be responsible for delay in such circumstances.

**E. What is at stake for Mr. Lajçi**

24. It is accepted that Mr. Lajçi has not been detained pending the investigation, nor have restrictive measures falling short of detention been imposed. However, this matter has been in the balance for more than three years, which

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<sup>20</sup> See op. cit. f/n 12 and ECtHR, *Ziacik v. Slovakia*, decision on the merits of 7 January 2003, paras. 44-45.

<sup>21</sup> See e.g., ECtHR, *Zimmerman & Steiner v. Switzerland*, judgment of 13 July 1983, Series A no. 66, paras. 27 to 32 and *Guincho v. Portugal*, judgment of 10 July 1984, Series A no. 81, paras. 40 to 41.

has had a significant impact upon him and those close to him. There must be finality in criminal proceedings. It must also be borne in mind, that the period exceeding three years is for the pre-charge period, and that if Mr. Lajçi were to be charged, the length of pre-trial and trial proceedings is likely to be a similarly lengthy period, thereby impacting on the overall 'reasonableness'.

25. Finally, although Article 159(1) KCPC has been held not to be directly applicable to the Rule 47(1) of the Rules, or binding on the Specialist Chambers, it has been held to be *informative* and therefore, it is submitted, it can be relied upon to argue the "reasonable time" requirement.

#### IV. CONCLUSION

26. In light of the foregoing, the Lajçi Defence submits that the length of the investigation, now exceeding three years and two months, has exceeded 'reasonableness' within the meaning of Rule 47(1) of the Rules, taking into account Article 159(1) KCPC and Article 6(1) ECHR.
27. The Lajçi Defence invites the Single Judge to order the termination of the investigation pursuant to Rule 47(2) of the Rules.

Word Count: 3,079 words

AMENDMENT: This filing is refiled as an amended filing due to the absence of two confidential annexes that are now annexed to the filing and an amendment to f/n 9 to read Confidential Annex A and f/n 10 to read Confidential Annex B



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