



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

In: KSC-BC-2018-01
Before: Single Judge Panel
Judge Nicolas Guillou
Registrar: Dr Fidelma Donlon
Filing Participant: Specialist Prosecutor
Date: 1 November 2022
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Public Redacted Version of 'Prosecution Response to Driton Lajçi's Request for Leave to Appeal Decision on Second Application to Terminate Investigation (KSC-BC-2018-01/F00258)', KSC-BC2018-01/F00264, dated 21 October 2022

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I. INTRODUCTION

1. The Request¹ should be rejected because Lajçi fails to meet his burden to show that any of the proffered issues merit consideration by the Court of Appeals. None of the three issues Lajçi seeks to appeal from the Decision² merit certification when compared against the applicable standards for leave to appeal under Article 45 of the Law³ and Rule 77 of the Rules.⁴

II. APPLICABLE LAW

2. 'Interlocutory appeals, interrupting the continuity of the proceedings, are the exception.'⁵ Read together, Article 45(2) and Rule 77(2) set out the requirements applicable to granting a request for leave to appeal. Those are:

- A. that the matter is an 'appealable issue';
- B. that the decision involves an issue that would significantly affect:
 - 1. the fair and expeditious conduct of the proceedings; or
 - 2. the outcome of the trial; and
- C. that, in the opinion of the relevant judicial body, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.⁶

¹ Application for Certification for Leave to Appeal the Decision on Second Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi, KSC-BC-2018-01/F00261, 10 October 2022, Confidential ('Request').

² Decision on Second Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi, KSC-BC-2018-01/F00258, 3 October 2022, Confidential ('Decision').

³ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All reference to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

⁴ 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.

⁵ Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para.9 ('Thaçi Decision').

⁶ See Thaçi Decision, KSC-BC-2020-06/F00172, para.10.

3. The burden is on the applicant to establish the existence of these requirements.⁷ Consistent with this burden, where an applicant materially misrepresents the challenged decision, the request will be denied.⁸ Moreover, the prongs identified at (a) through (c) above are cumulative.⁹ An applicant's failure to substantiate any one of them for any individual issue will be fatal to the request for that issue.

4. For purposes of prong (a), an 'appealable issue' is an identifiable topic or subject the resolution of which is essential for determination of the matters arising in the judicial cause under examination, and not merely a question over which there is disagreement or conflicting opinion.¹⁰ An appealable issue requires the applicant to articulate clearly discrete issues for resolution by the Court of Appeals Panel that emanate from the ruling concerned and do not amount to abstract questions or hypothetical concerns.¹¹ Where a party requesting leave to appeal claims error in a decision but does not identify what should have been done differently, the issue will not be considered sufficiently discrete and specific to merit appeal.¹²

5. For purposes of prong (b), the 'fair and expeditious conduct of proceedings' is generally understood as referencing the norms of fair trial, of which conducting a trial within a reasonable time is but one element.¹³ In considering whether an issue affects the outcome of proceedings, 'it must be considered whether a possible error in an interlocutory decision would impact the outcome of the case.'¹⁴ Even where an issue

⁷ See, e.g., ICC, Situation in Uganda, Decision on Prosecutor's application for leave to appeal in part Pre-Trial Chamber II's decision on Prosecutors application for warrants of arrest under Article 58, ICC-02/04-01/05-20-US-Exp, 19 August 2005, paras 20-21.

⁸ See, e.g., Decision on Application for Leave to Appeal the Decision F00180, KSC-BC-2018-01/F00184, 24 August 2021, para.24.

⁹ Prong (b) may be satisfied on either of the two bases indicated.

¹⁰ Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021, para.12.

¹¹ *Thaçi* Decision, KSC-BC-2020-06/F00172, para.11.

¹² Decision on the Krasniqi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00479, 20 September 2021, para.14 ('Krasniqi Decision').

¹³ Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021, para.14 ('Case 07 Decision').

¹⁴ Case 07 Decision, KSC-BC-2020-07/F00169, para.15.

satisfying either of these possibilities is present, if the impact is not ‘significant’ it will not qualify for interlocutory appeal.¹⁵ Speculative or unidentified impacts on fair trial rights will not be sufficient to meet this requirement.¹⁶

6. The final prong, prong (c) above, ‘requires a determination that prompt referral of an issue to the Court of Appeals Panel will settle the matter and rid the judicial process of possible mistakes that might taint either the fairness of proceedings or mar the outcome of the trial thereby moving the proceedings forward along the right course.’¹⁷

7. The Single Judge has previously held that Article 45(1) extends to suspects.¹⁸

III. SUBMISSIONS

8. The Request is repetitive and untimely, and should be summarily dismissed. Lajçi seeks to appeal three issues (‘Issues’), all of which concern the reasonableness of the length of proceedings standard (including the ‘applicant’s conduct and that of the relevant administrative and judicial authorities’)¹⁹ adopted in the First Decision,²⁰ acknowledged in the Appeal Decision,²¹ and re-applied in the Decision.²² The Single Judge previously rejected leave to appeal an issue challenging this standard, including on the basis of the same or similar arguments raised in the Request.²³ He

¹⁵ Thaçi Decision, KSC-BC-2020-06/F00172, para.11.

¹⁶ Krasniqi Decision, KSC-BC-2020-06/F00479, para.25.

¹⁷ Case 07 Decision, KSC-BC-2020-07/F00169, para.17 (internal quotations omitted).

¹⁸ Decision on Application for Leave to Appeal the Decision F00180, KSC-BC-2018-01/F00184, 24 August 2021, para.9.

¹⁹ Application, KSC-BC-2018-01/F00261, paras 13, 20.

²⁰ 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, Confidential (‘First Decision’), para.28

²¹ Decision on Appeal Against “Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi”, KSC-BC-2018-01/IA001/F00005, 1 October 2021, para.22.

²² Decision, KSC-BC-2018-01/F00258, para.19.

²³ 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, Confidential, paras 3(ii) (concerning the reasonable time standard), 10, 17 (arguing that the Single Judge left open whether the SPO will be required to demonstrate due diligence and

considered that the First Decision clearly set the factors, including the conduct of the suspect and the relevant authorities, to be considered when assessing the reasonable length of an investigation.²⁴ The same reasoning applies to the repetitive Issues and reasoning in the Request and detailed consideration thereof is not justified.

9. Even on the merits, from the outset Lajçi's claims go only to marginal aspects of one factor in a multi-factor test that the Single Judge must weigh holistically. This reality raises the bar significantly concerning what Lajçi must demonstrate in order to satisfy the requirement that he demonstrate the Issues will *significantly* affect the proceedings or trial, and that an immediate resolution would *materially* advance the proceedings. Regardless, under any measure, the Issues fail to meet the requirements for leave to appeal.

10. The Specialist Prosecutor's Office ('SPO') notes that a significant portion of Lajçi's argument goes to the merits of his claims rather than to the requirements for interlocutory appeal. The SPO reserves the right to respond to the substance of these claims should it be necessary at the appropriate time.

A. LAJÇI'S FIRST ISSUE FAILS TO MERIT APPEAL

11. Lajçi's first issue on which he requests leave to appeal ('First Issue') argues that the Single Judge erred by failing to consider the conduct of the Kosovo Specialist Chambers ('KSC') and SPO as 'conduct of the "relevant administrative and judicial authorities"'.²⁵

12. The First Issue is not an appealable issue because it is merely a disagreement with the Single Judge concerning which actions of 'administrative and judicial authorities'

expeditiousness), 19 (arguing that legal certainty concerning the relevant standard is necessary), 27 (claiming the standard applied by the Judge prevents Lajçi from challenging the reasonableness); 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, Confidential, para.22.

²⁴ Decision on Application for Leave to Appeal the Decision F00180, para.24.

²⁵ Request, KSC-BC-2018-01/F00261, para.13(i).

are relevant to consider in the context of this particular Decision. The Single Judge need not discuss the actions of entities that would not impact his ultimate decision. In this respect, Lajçi's submissions primarily concerned the conduct of Lajçi and [REDACTED].²⁶ These submissions were referenced and addressed in the Decision.²⁷ In any event, the conduct of the SPO and KSC is discussed throughout the Decision, including in sections concerning the complexity of the investigation and when discussing [REDACTED].²⁸ In failing to acknowledge such reasoning, the First Issue is also a misrepresentation of the Decision.

13. The First Issue would also not affect the fair and expeditious conduct of the proceedings, nor the outcome of the trial. Lajçi does not identify any additional actions of any entities that the Single Judge should have, but failed to, consider; nor does he even claim (and regardless, any such unsubstantiated claim would be speculative) that had the Single Judge explicitly discussed such other actions, the outcome would have been different.

14. The First Issue also does not satisfy the third prong of the test. A prompt referral of this issue to the Court of Appeals will not settle the matter as the Single Judge has not held that he should not consider the conduct of relevant entities. Rather, he did countenance the conduct of such entities and, to the extent other conduct was not considered, merely did not consider other conduct relevant in the context of the delays raised by Lajçi.

B. LAJÇI'S SECOND ISSUE FAILS TO MERIT APPEAL

15. Lajçi's second issue on which he requests leave to appeal ('Second Issue') argues that the Single Judge erred 'by concluding that the conduct of the "relevant administrative and judicial authorities"', which had caused delay or hampered the

²⁶ Second Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi, KSC-BC-2018-01/F00238, 4 July 2022, paras 21-23.

²⁷ Decision, KSC-BC-2018-01/F00258, paras 8, 24-27.

²⁸ Decision, KSC-BC-2018-01/F00258, paras 21-23, 25-26.

investigation, was attributable to the Applicant, when considering the “reasonable time” under Article 6(1) ECHR.’²⁹

16. This issue fails as a threshold matter because it misrepresents the Decision. Contrary to Lajçi’s assertion that the Single Judge attributed to Lajçi the delays caused [REDACTED], the Single Judge held that ‘[REDACTED] need not be attributable to Mr Lajçi personally.’³⁰ It is true that [REDACTED],³¹ and that those actions had ramifications [REDACTED]. But to the extent the Single Judge considered delays occasioned by [REDACTED] not connected to Lajçi, the Single Judge did not attribute them to him.

17. Because the Second Issue lacks a basis in the Decision, it does not emanate from the ruling concerned, and it also cannot satisfy any of the prongs for granting an interlocutory appeal.

C. LAJÇI’S THIRD ISSUE FAILS TO MERIT APPEAL

18. Lajçi’s third issue on which he requests leave to appeal (‘Third Issue’) argues that the Single Judge erred ‘by failing to consider that it is the responsibility of the State, and its judicial and prosecutorial institutions, to organise its judicial system in such a way that it complies with the obligations under Article 6(1) ECHR.’³²

19. The standard applied by the Single Judge is based on ECtHR jurisprudence establishing that one factor is the conduct of the relevant administrative and judicial authorities.³³ As set out above, the Single Judge expressly considered this factor, addressing the conduct [REDACTED] the SPO and KSC. In this respect, the Single Judge held in the First Decision that the delays [REDACTED] were not attributable to either the SPO or the ‘legal system of the [KSC]’.³⁴ The conclusions in the Decision are

²⁹ Request, KSC-BC-2018-01/F00261, KSC-BC-2018-01/F00261, para.13(ii).

³⁰ Decision, KSC-BC-2018-01/F00258, para.26.

³¹ Decision, KSC-BC-2018-01/F00258, para.31; see also Prosecution Response to the Second Application to Terminate the Investigation against Driton Lajçi, KSC-BC-2018-01/F00240, 15 July 2022, para 12.

³² Request, KSC-BC-2018-01/F00261, para.13(iii).

³³ Decision, KSC-BC-2018-01/F00258, para.19.

³⁴ First Decision, KSC-BC-2018-01/F00180, para.30.

consistent with this finding. Accordingly, this issue is a misrepresentation of the Decision, ignores the First Decision, and necessarily fails to satisfy the leave to appeal standard.

20. In any event, the Third Issue fails the first prong of the leave to appeal standard because it fails to identify a discrete issue for resolution by the Court of Appeals, but instead merely suggests that the Single Judge should 'consider' a proffered obligation, without demonstrating in any concrete fashion how it would result in a different outcome.

21. This issue fails the second prong because, as noted above, the Single Judge was clearly cognizant of the need to satisfy the requirements of ECHR Article 6, which indeed is the very basis for the reasonable time test that the Single Judge applied.³⁵ This issue therefore would not significantly impact the fair and expeditious conduct of the proceedings, nor the outcome of the trial.

22. Finally, the Third Issue also fails the final prong because there is no need for a prompt referral of this issue. The delays that the SPO has encountered and that the Single Judge noted³⁶ have not had to do with the organisation of the legal system,³⁷ [REDACTED]. The consideration of this issue by the Court of Appeals would therefore not move the proceedings forward.

IV. CLASSIFICATION

23. This response is confidential pursuant to Rule 82(4). The SPO does not object to reclassification as public.

V. CONCLUSION

24. Accordingly, the SPO requests the Single Judge to dismiss the Request.

³⁵ See First Decision, KSC-BC-2018-01/F00180, para.28, citing ECtHR, *Pélissier and Sassi v. France* [GC], no. 25444/94, Judgment, 25 March 1999, para.67.

³⁶ Decision, KSC-BC-2018-01/F00258, paras 26-27.

³⁷ *Contra* Request, KSC-BC-2018-01/F00261, para.21.

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At The Hague, the Netherlands.