



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2018-01

Before: Single Judge Panel
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 31 October 2022

Language: English

Classification: Public

**Public Redacted Version of Decision on the Defence Application for Leave to
Appeal Decision F00258**

Specialist Prosecutor
Jack Smith

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THE SINGLE JUDGE,¹ pursuant to Article 45 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 77 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), hereby issues the following decision.

I. PROCEDURAL BACKGROUND

1. On 15 June 2021, the Defence for Driton Lajçi ("Defence") filed an application before the Single Judge to order the termination of the investigation against Driton Lajçi ("Mr Lajçi").² On 23 July 2021, the Single Judge rejected the application ("First Decision on Termination").³
2. On 29 July 2021, the Defence submitted an application for leave to appeal the First Decision on Termination,⁴ which was granted in part by the Single Judge ("First Decision Granting Leave to Appeal").⁵
3. On 1 October 2021, the Court of Appeals dismissed the appeal.⁶

¹ KSCPR-2018, F00004, President, *Decision Assigning a Single Judge Pursuant to Article 33(2) of the Law*, 29 May 2018, public.

² KSC-BC-2018-01, F00172, Specialist Counsel, *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.

³ KSC-BC-2018-01, F00180, Single Judge, *Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi*, 23 July 2021, confidential. A public redacted version was submitted on the same day, F00180/RED.

⁴ 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, public.

⁵ KSC-BC-2018-01, F00184, Single Judge, *Decision on Application for Leave to Appeal the Decision F00180*, 24 August 2021, public.

⁶ KSC-BC-2018-01, IA001/F00005, Court of Appeals, *Decision on Appeal Against "Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi"*, 1 October 2021, public.

4. On 4 July 2022, the Defence filed a second application before the Single Judge to order the termination of the investigation against Mr Lajçi.⁷
5. On 3 October 2022, the Single Judge issued a decision rejecting the Defence's application for an order terminating the investigation against Mr Lajçi ("Impugned Decision").⁸
6. On 10 October 2022, the Defence requested leave to appeal the Impugned Decision ("Request").⁹
7. On 21 October 2022, the Specialist Prosecutor's Office ("SPO") filed its response, opposing the Request in full ("Response").¹⁰
8. On 24 October 2022, the Defence replied to the Response ("Reply").¹¹

II. SUBMISSIONS

9. In the Request, the Defence presents three issues on which it seeks to appeal the Impugned Decision:

- (1) That the Single Judge erred by failing to consider that the [Kosovo Specialist Chambers ("SC")] and SPO ("Joint Institutions") are

⁷ KSC-BC-2018-01, F00238, Specialist Counsel, *Second Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi*, 4 July 2022, public. A corrected version with confidential Annexes A and B was filed on 25 July 2022, F00238/COR.

⁸ KSC-BC-2018-01, F00258, Single Judge, *Decision on Second Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi*, 3 October 2022, confidential. A public redacted version was filed on 27 October 2022.

⁹ KSC-BC-2018-01, F00261, Specialist Counsel, *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*, 10 October 2022, confidential.

¹⁰ KSC-BC-2018-01, F00264, Specialist Prosecutor, *Prosecution Response to Driton Lajçi's Request for Leave to Appeal Decision on Second Application to Terminate Investigation (KSC-BC-2018-01/F00258)*, 21 October 2022, confidential.

¹¹ KSC-BC-2018-01, F00265, Specialist Counsel, *Reply to Prosecution Response to Defence 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/F00258)*, 24 October 2022, confidential.

institutions of the Republic of Kosovo established by domestic law and within its criminal justice system, and therefore when considering the “reasonable time” under Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), the conduct of the “relevant administrative and judicial authorities” includes the conduct of the [SC], the SPO, and other state institutions (“First Issue”);

- (2) That the Single Judge erred by concluding that the conduct of the “relevant administrative and judicial authorities”, which had caused delay or hampered the investigation, was attributable to [Mr Lajçi] when considering the “reasonable time” under Article 6(1) ECHR (“Second Issue”); and
- (3) 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 (“Third Issue”).

10. The Defence submits that each of the three issues relates to the principles and factors that may be considered in the interpretation of what may constitute a “reasonable time” for the investigation. Therefore, the issues emanate from the Impugned Decision.¹² The Defence further submits that the interpretation of “reasonable time” may provide legal certainty, which affects the fairness and expeditiousness of the proceedings,¹³ or in the alternative would significantly affect the outcome of the proceedings.¹⁴ Finally, the Defence argues that a prompt referral to the Court of Appeals Panel is necessary to determine the parameters of whether, and to what extent, Mr Lajçi and/or other national institutions can be held responsible for the delay. This, in turn, would materially advance the proceedings.¹⁵

11. In the Response, the SPO submits that the Request does not meet the test for leave to appeal in Article 45 of the Law and Rule 77 of the Rules.¹⁶ In particular, the SPO

¹² Request, paras 20-22.

¹³ Request, para. 36.

¹⁴ Request, para. 42.

¹⁵ Request, paras 44-46.

¹⁶ Response, paras 1, 11-22.

points out that the Single Judge previously rejected leave to appeal several similar issues emanating from the First Decision on Termination. The SPO also points out that a significant portion of the Request relates to the merits of the appeal rather than to the requirements for granting leave under Article 45(2) of the Law and Rule 77(2) of the Rules.¹⁷

12. In the Reply, the Defence submits that a prompt referral of the First Issue to the Court of Appeals Panel would settle whether the SPO and SC are domestic institutions and as such their conduct, as well as other domestic institutions such as the Ministry of Justice, should be considered as part of the assessment of reasonableness.¹⁸ As regards the Second Issue, the Defence submits that the SPO incorrectly contends that the Single Judge found that the delay [REDACTED] need not be attributable to Mr Lajçi.¹⁹ As regards the Third Issue, the Defence submits that the SPO and SC are domestic institutions and that this is a material consideration in the overall assessment of reasonableness.²⁰

III. APPLICABLE LAW

13. Pursuant to Article 45(2) of the Law, a Court of Appeals Panel shall hear interlocutory appeals from an accused or from the Specialist Prosecutor in accordance with the Law and the Rules. Interlocutory appeals, other than those that lie as of right, must be granted leave to appeal through certification by the Panel on the basis that it involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Panel,

¹⁷ Response, paras 8-10.

¹⁸ Reply, para. 9.

¹⁹ Reply, para. 11.

²⁰ Reply, para. 13.

an immediate resolution by a Court of Appeals Panel may materially advance proceedings.

14. Rule 77(2) of the Rules further provides that the Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

IV. DISCUSSION

A. REQUEST FOR LEAVE TO APPEAL

1. Legal Test

15. Recalling the earlier finding in the First Decision Granting Leave to Appeal, the Single Judge finds that Mr Lajçi has legal standing to request leave to appeal the Impugned Decision pursuant to Article 45 of the Law, notwithstanding that he is a suspect and not, strictly speaking, a Party.²¹

16. Regarding the standard for granting leave, a right to appeal arises only if the Single Judge is of the opinion that the standard for certification set forth in Article 45(2) of the Law and Rule 77(2) of the Rules has been met.²² The Single Judge recalls the interpretation of these provisions as set out in detail previously.²³

17. Mindful of the restrictive nature of this remedy, the following specific requirements apply:

²¹ First Decision Granting Leave to Appeal, para. 9.

²² KSC-BC-2020-06, F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal* (“Thaçi Decision on Leave to Appeal”), 11 January 2021, public, para. 9.

²³ Thaçi Decision on Leave to Appeal, paras 10-17.

- (1) Whether the matter is an “appealable issue”;
- (2) Whether the issue at hand would significantly affect:
 - i. The fair and expeditious conduct of the proceedings, or
 - ii. The outcome of the trial; and
- (3) Whether, in the opinion of the Single Judge, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.²⁴

18. In this regard, the Single Judge observes that “proceedings” in the context of Article 45 of the Law and Rule 77(2) of the Rules refers to the entirety of the judicial process before the Specialist Chambers, including the investigation stage.²⁵

2. First Issue

19. The Defence submits that the Single Judge erred in failing to consider the conduct of the SPO and the SC when assessing what constitutes the “relevant administrative and judicial authorities” and “reasonable time” under Article 6(1) of the ECHR.²⁶ The SPO responds that the First Issue is not appealable because it is merely a disagreement with the findings in the Impugned Decision.²⁷ The SPO also submits that the First Issue would not affect the fair and expeditious conduct of the proceedings, nor the outcome of the trial, as the Defence does not demonstrate how the outcome would have been different had the Single Judge not erred.²⁸ Finally, the SPO submits that a prompt referral would not advance the proceedings as the Single Judge has not held that he should not consider the conduct of relevant entities.²⁹

²⁴ *Thaçi* Decision on Leave to Appeal, para. 10.

²⁵ First Decision Granting Leave to Appeal, para. 12.

²⁶ Request, paras 20, 30-35, 39, 41, 45.

²⁷ Response, para. 12.

²⁸ Response, para. 13.

²⁹ Response, para. 14.

20. In the Impugned Decision, in considering the conduct of the “relevant administrative and judicial authorities”, the Single Judge recalled the [REDACTED].³⁰ The Single Judge observed that [REDACTED] significantly protracted the investigation and continues to hamper it.³¹

21. Thus, in the Impugned Decision the Single Judge considered the conduct of both the SPO and SC *and* [REDACTED] when making findings about the progress of the investigation as a whole.³² In particular, the Single Judge addressed the [REDACTED], and considered the conduct of the SPO and SC [REDACTED]. The First Issue, as formulated by the Defence, adopts an incorrect premise – that the Single Judge did not consider the conduct of the SPO and SC, but only that of [REDACTED].³³ The Single Judge finds that this is a misinterpretation of the Impugned Decision, and therefore the First Issue does not emanate from the Impugned Decision and it does not present an appealable issue.

22. Accordingly, the Single Judge rejects the Request in relation to the First Issue.

3. Second Issue

23. The Defence submits that the Single Judge erred in concluding that the conduct of [REDACTED], which caused delay or hampered the investigation, was attributable to Mr Lajçi.³⁴ The SPO responds that the Second Issue fails as a threshold matter because it misrepresents and it does not emanate from the Impugned Decision.³⁵

³⁰ Impugned Decision, para. 26.

³¹ Impugned Decision, paras 26-27.

³² Impugned Decision, paras 21-23, 25-26.

³³ Request, para. 39.

³⁴ Request, paras 21, 25, 28-29, 38, 44.

³⁵ Response, paras 16-17.

24. In the Impugned Decision, the Single Judge considered the possibility that Mr Lajçi's conduct may have contributed to the delay in the investigation [REDACTED].³⁶ Therefore, the Single Judge finds merit in the Defence's submission that the Second Issue emanates from the Impugned Decision.

25. Regarding whether the Second Issue significantly affects the fairness and expeditiousness of the proceedings (in this case, the investigation), the question as to who may have caused or contributed to the delay to the investigation, and whether any delay [REDACTED] is attributable to Mr Lajçi, relates directly to the "reasonableness" of the time taken by the SPO thus far. As the "reasonableness" of the period informs the ultimate decision of whether the investigation against a person should be terminated due to inexcusable delay, the Single Judge finds that the Second Issue significantly affects the fairness and expeditiousness of the proceedings.

26. Finally, the Single Judge finds that an immediate resolution of the Second Issue by the Court of Appeals Panel would materially advance the proceedings, as the issue itself bears upon whether the investigation should continue and an authoritative determination would provide legal certainty at the earliest opportunity.

27. Accordingly, the Single Judge grants the Request in relation to the Second Issue.

4. Third Issue

28. In relation to the Third Issue, the Defence submits that the Single Judge erred in failing to consider that it is the responsibility of the State to organise its judicial system in such a way that it complies with its obligations under Article 6(1) of the ECHR.³⁷ The SPO responds that the Defence misrepresents the Impugned Decision.³⁸

³⁶ Impugned Decision, para. 27.

³⁷ Request, paras 21, 26.

³⁸ Response, para. 19.

Moreover, the SPO argues that the Third Issue (i) fails to identify a discrete issue for resolution by the Court of Appeals Panel;³⁹ (ii) does not significantly impact the fair and expeditious conduct of the proceedings;⁴⁰ and (iii) does not require prompt resolution.⁴¹

29. The Single Judge observes that the Impugned Decision represents a ruling on the reasonableness of the length of time taken in the SPO's investigation of Mr Lajçi. As part of this assessment, the Single Judge considered [REDACTED] only to the extent that they may have been partly responsible for any delays to the investigation. The question, then, is a factual assessment that revolves around the delays experienced and the entities contributing thereto. Whether or not the State must in principle organise its judicial system such that it complies with international law – as presented in the Third Issue – is not directly relevant to the question of whether [REDACTED]. Nor is it the function of the Single Judge to rule upon the adequacy of the steps taken by the local authorities vis-à-vis their obligations under Article 6 of the ECHR.

30. For the foregoing reasons, the Single Judge finds that the Third Issue in the Defence's Request is irrelevant to the investigation and a resolution thereto would contribute little to the question of whether the length of these proceedings is reasonable under the circumstances. Nor does the Third Issue proposed by the Defence arise from the Impugned Decision, as the Single Judge did not make any relevant finding in this regard.

31. Accordingly, the Single Judge rejects the Request as it relates to the Third Issue.

³⁹ Response, para. 20.

⁴⁰ Response, para. 21.

⁴¹ Response, para. 22.

B. CLASSIFICATION

32. As the Request, the Response, and the Reply are currently classified as “confidential”, the present decision is also issued on a “confidential” basis. However, in order to ensure the publicity of the proceedings, the SPO and the Defence shall file public redacted versions of their submissions by **Friday, 4 November 2022**. Those public versions must contain redactions to information consistent with the redactions in the public version of the Impugned Decision (F00258/RED) and the submissions leading to it (F00240/RED).

V. DISPOSITION

33. For the above-mentioned reasons, the Single Judge hereby:

- a) **GRANTS** the Request in relation to the Second Issue;
- b) **REJECTS** the Request in relation to the First Issue and Third Issue; and
- c) **ORDERS** the SPO and the Defence to file public redacted versions of the Request (F00261), the Response (F00264), and the Reply (F00265), respectively, by **Friday, 4 November 2022** and in accordance with paragraph 32 above.



Judge Nicolas Guillou
Single Judge

Dated this Monday, 31 October 2022
At The Hague, the Netherlands.