

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: 23 November 2022

Language: English

Classification: Public

**PUBLIC REDACTED version of Reply to the SPO Response to the Appeal against
Decision KSC-BC-2018-01/F00258 Regarding the Termination of the Investigation
against Driton Lajçi**

Acting Specialist Prosecutor

Alex Whiting

Specialist Counsel

Toby Cadman

I. PROCEDURAL BACKGROUND

1. On 15 June 2021, Mr. Driton Lajçi (“Appellant”) applied for an order directing the Specialist Prosecutor’s Office (“SPO”) to terminate the investigation.¹
2. On 23 July 2021, the Single Judge rejected that Application.²
3. On 29 July 2021, the Appellant applied for certification to appeal the Single Judge’s decision.³
4. On 24 August 2021, the Single Judge certified the application for leave to appeal.⁴
5. On 1 October 2021, the appeal was dismissed.⁵

¹ 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 F00172/RED.

² 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.

³ KSC-BC-2018-01/F00181, *Application for Certification on Leave to Appeal the Decision for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi*, 29 July 2021, Confidential.

⁴ KSC-BC-2018-01/F00184, *Decision on Application for Leave to Appeal the Decision F00180*, 24 August 2021, public.

⁵ 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”*, 1 October 2021, public.

6. On 4 July 2022, the Appellant filed a second application for the termination of the investigation (“Second Application”).⁶
7. On 15 July 2022, the SPO filed its response.⁷
8. On 10 August 2022, the Single Judge requested further submissions from the SPO on the status of the investigation (“August Order”).⁸
9. On 24 August 2022, the SPO filed a report, confidential and *ex parte*, containing, *inter alia*, further information on the progress made regarding certain aspects of the investigation.⁹
10. On 26 August 2022, the SPO filed further submissions, strictly confidential and *ex parte*, pursuant to the Single Judge’s August Order.¹⁰
11. On 3 October 2022, the Single Judge rejected the Second Application (“Impugned Decision”).¹¹

⁶ KSC-BC-2018-01/F00238, *Second Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajci*, 4 July 2022, public. A corrected version with confidential Annexes A and B F00238/COR.

⁷ KSC-BC-2018-01/F00240, *Prosecution Response to the Second Application to Terminate the Investigation against Driton Lajci*, 15 July 2022, confidential with strictly confidential and *ex parte* Annex 1.

⁸ KSC-BC-2018-01/F00249, *Order to the Specialist Prosecutor for Further Submissions*, 10 August 2022, strictly confidential and *ex parte*. A confidential redacted version F00249/CONF/RED.

⁹ KSC-BC-2018-01/F00252, *Prosecution Report and Request for Court Orders*, 24 August 2022, with Annexes 1-10, strictly confidential and *ex parte*.

¹⁰ KSC-BC-2018-01/F00253, *Prosecution Response to “Order to the Specialist Prosecutor for Further Submissions” F00249*, 26 August 2022, strictly confidential and *ex parte* with Annex 1.

¹¹ KSC-BC-2018-01/F00258, *Decision on Second Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajci*, 3 October 2022, Confidential.

12. On 10 October 2022, the Appellant applied for leave to certify appeal.¹²
13. On 21 October 2022, the SPO submitted its Response.¹³
14. On 24 October 2022, the Appellant filed his reply.¹⁴
15. On 31 October 2022, the Single Judge granted the application¹⁵ to certify leave to appeal regarding the Second Issue (“Certified Issue”).¹⁶
16. On 8 November 2022, the Appellant filed the appeal (“Appeal”)¹⁷ within the 10-day deadline within the meaning of Rule 170(2) of the Rules of Procedure and Evidence before the Specialist Chambers (“Rules”)¹⁸ and Rule 9(1) of the Practice Direction on Files and Filings before the Kosovo Specialist Chambers.¹⁹

¹²KSC-BC-2018- 01/F00261, 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.

¹³ KSC-BC-2018-01/F00264, 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.

¹⁴ KSC-BC-2018-01, F00265, *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.

¹⁵ KSC-BC-2018-01, F00267, *Decision on the Defence Application for Leave to Appeal Decision F00258*, 31 October 2022, Confidential (“Decision Granting Leave to Appeal”).

¹⁶ Decision Granting Leave to Appeal, at para 9(2).

¹⁷ KSC-BC-2018-01/IA002/F00002, *Appeal against Decision KSC-BC-2018-01/F00258 Regarding the Termination of the Investigation against Driton Lajçi*, 8 November 2022, Confidential (“Appeal”).

¹⁸ KSC-BD-03/Rev3/2020.

¹⁹ KSC-BD-15/1.

17. On 21 November 2022, the SPO filed its response to the appeal (“SPO Response”).²⁰
18. It is noted that the SPO Response was filed three (3) days out of time, the deadline being 18 November 2022, and no application for an extension of time has been submitted.²¹ The Appeals Panel is therefore invited to disregard in its entirety the arguments put forward by the SPO in its out of time Response.
19. Notwithstanding the aforementioned, the Appellant hereby files its Reply in accordance with Rule 170(2) within the 5-day deadline.

II. SUBMISSIONS

1. The Appeal should not be summarily dismissed.

20. Regarding paragraph 1 of the SPO Response, the Appellant maintains that the Certified Issue does not concern only a marginal aspect of one factor in a multi-factor test for considering the reasonableness of the delay under Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”). The crux of the Appeal relates to two out of the five factors: the conduct of the “relevant judicial and administrative authorities”, and the conduct of the “Appellant”. The Appellant can clearly

²⁰ KSC-BC-2018-01/IA002/F00003, *Prosecution response to Driton Lajçi’s second appeal seeking termination of the investigation*, 21 November 2022, Confidential (“SPO Response”).

²¹ See Rule 9 of the Practice Direction on Files and Filings.

demonstrate that had the correct test been applied and appropriate weight assigned to these factors, the overall balancing exercise of the five factors would have resulted in the Appellant's favour by the Single Judge holding the length of the SPO investigation, now lasting for three years and five months, to have exceeded reasonableness within the meaning of Article 6(1) ECHR and Rule 47 of the Rules.

21. In Reply to paragraph 7 of the SPO Response, it is contended that the Certified Issue clearly states where the Single Judge erred, namely in attributing to the Appellant the responsibility for the conduct of the "relevant judicial and administrative authorities", when he is not actually and personally responsible – an error of fact. The Single Judge cannot base this finding on any legal rule or principle, or parliamentary convention. If the Single Judge correctly considered the Certified Issue, this would have had a significant impact on the balancing exercise of the five factors relevant to the reasonableness of the delay, tipping the scales in the Appellant's favour as any alleged responsibility for the delay would be limited as outlined in paragraphs 23 to 25 of the Appeal. In this regard, it is quite clear that the two factors under consideration, the conduct of the Appellant and the conduct of the "relevant judicial and administrative authorities" are two entirely separate considerations. The Appellant cannot claim to be a victim of delay for which he is the architect, but importantly, he cannot be blamed for delay

for which the state is responsible. To do otherwise would be to reverse the longstanding jurisprudence of the European Court of Human Rights.

22. Regarding paragraphs 8 and 9 of the SPO Response, it is submitted that paragraph 11 of the Appeal is not seeking to deal with the issue not certified by the Single Judge, namely that the SPO and KSC are national institutions – that is a matter beyond any reasonable doubt in any event. Paragraph 11 merely emphasises the point that the Appellant should not be held responsible for the conduct of state institutions whatever they are unless he is actually and personally responsible for the delay.
23. Regarding the other issue which the Single Judge did not certify for appeal, namely the judicial system's compliance with Article 6(1) ECHR, the Appellant is not seeking to litigate this on appeal. In paragraph 29 of the Appeal, the Appellant only restates the law as applicable to the States' obligations under the ECHR in support of his arguments relating to the Certified Issue.
24. In Reply to paragraph 10 of the SPO response, the Appellant's submissions regarding arguments concerning the weight the Single Judge ascribed to various factors, the impact of the Appellant's [REDACTED], and whether he can be held accountable for the effects of [REDACTED], these submissions directly relate to and are relevant to the Certified Issue.

25. In Reply to the SPO Response paragraph 11, it is submitted that no authorities need to be cited in relation to these general and well-established principles and their applicability to these as well as other court proceedings. However, for the avoidance of doubt, the key principles governing the application of Article 6(1) is one of procedural fairness,²² including the equality of arms,²³ in that each party be given a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent.

2. The Appeal is not based on a fundamental misrepresentation

26. In Reply to paragraphs 13 to 15 of the SPO Response, it is submitted that, on a correct reading of paragraphs 26 and 27 of the Impugned Decision the Single Judge incorrectly conflated the conduct of [REDACTED], notably [REDACTED], and the conduct of the Appellant, thus attributing the responsibility of [REDACTED] to conduct to the Appellant [REDACTED]. Alternatively, if the [REDACTED] has caused delay, again that is a matter to be resolved in favour of the Appellant, not to his detriment.

27. In this regard, the Single Judge stated in the Impugned Decision that [REDACTED]. This is an indirect inference that the Appellant need not be actually and personally responsible for the conduct to be still attributable to

²² ECtHR, *Gregačević v. Croatia* (Application No. 58331/09) 2012, [49].

²³ ECTHR, *Ocalan v. Turkey* [GC] (Application No. 46221/99) 2005, [140].

him by virtue of [REDACTED]. The Single Judge did not explain in the Impugned Decision what he based this conclusion on: was it a legal rule or principle, or parliamentary convention such as the concept of ministerial responsibility. Further, as noted at paragraphs 28 to 31 of the Appeal, if the Single Judge is asserting that the delay has been caused by [REDACTED], that is an issue that must be answered in the Appellant's favour, as it is the responsibility of the state to organise its judicial system to meet the requirements of Article 6(1) ECHR.²⁴

28. In addition, by holding that despite the conduct of [REDACTED] the delay in the SPO investigation was still reasonable, the Single Judge clearly considered this factor as weighing against the Appellant. If the Single Judge did not hold the delay caused by [REDACTED] against the Appellant, logically he would be required to conclude that this factor was in the Appellant's favour in that the length of the delay could no longer be considered reasonable as the delay caused by [REDACTED] could not be attributed to the Appellant.

III. CLASSIFICATION

29. This Reply is filed confidentially in accordance with Rule 82(4).

IV. RELIEF REQUESTED

²⁴ ECtHR, *Abdoella v The Netherlands* (Application No. 12728/87) 1992, [24].

30. The Appellant accordingly maintains his requests that the Court of Appeals

Panel:

- a. **DISREGARD** the SPO Response in its entirety as filed out of time;
- b. **GRANT** the Appeal; and
- c. **HOLD** that the SPO has failed to act diligently and expeditiously, and that the investigation has exceeded a reasonable time in breach of Article 6(1) of the ECHR and Rule 47 of the Rules; and
- d. **ORDER** the SPO to terminate the investigation in accordance with Rule 47(2) of the Rules.

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Toby Cadman

Specialist Counsel for Driton Lajçi