



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

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: Acting Specialist Prosecutor

Date: 24 November 2022

Language: English

Classification: Public

Public redacted version of 'Prosecution response to Driton Lajçi's second appeal seeking termination of the investigation' dated 21 November 2022

Specialist Prosecutor's Office
Alex Whiting

Counsel for Mr Lajçi
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I. INTRODUCTION

1. The Court of Appeals Panel ('Panel') should summarily dismiss the Appeal¹ because it fails to comply with the requirements for appeal and strays beyond the appeal issue the Single Judge granted ('Issue').² Even if the Appeal is considered on its merits, the Decision should be affirmed because the Appellant's argument is premised on a fundamental misunderstanding of the Decision.³ Moreover, the Appeal concerns only a marginal aspect of one factor in a multi-factor test⁴ that the Single Judge weighed holistically, and the Appellant does not challenge the findings relating to the other factors. Thus, even if successful, the Appellant fails to demonstrate that the Appeal would lead to a different outcome.

II. PROCEDURAL HISTORY

2. The Appellant filed his first application seeking to terminate the investigation on 15 June 2021.⁵ On 23 July 2021, the Single Judge rejected the Appellant's arguments and declined to terminate the investigation.⁶

¹ Appeal against Decision KSC-BC-2018-01/F00258 Regarding the Termination of the Investigation against Driton Lajçi, KSC-BC-2018-01/IA002/F00002, 8 November 2022 ('Appeal').

² Decision on the Defence Application for Leave to Appeal Decision F00258, KSC-BC-2018-01/F00267, 31 October 2022 ('Certification Decision').

³ 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 ('Decision').

⁴ Decision, KSC-BC-2018-01/F00258, para.19 (The reasonableness of the length of proceedings is to be determined in light of the circumstances of the case, which calls for an overall assessment, having regard to factors, such as the (i) complexity of the case; (ii) applicant's conduct; and that of the relevant administrative and judicial authorities; and (iii) what was at stake for the applicant in the dispute).

⁵ Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Mr. Driton Lajçi, KSC-BC2018-01/F00172, 15 June 2021; *see also* Prosecution Response to the Application to Terminate the Investigation against Driton Lajçi, KSC-BC-2018-01/F00175, 25 June 2021 ('Prosecution Response'); Reply to the Prosecution Response regarding the Defence Application to Terminate the Investigation against Driton Lajçi, KSC-BC-2018-01/F00178, 30 June 2021.

⁶ 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 ('First Decision').

3. The Appellant sought⁷ and received⁸ permission to appeal one issue from the First Decision. The Appellant filed his appeal on 3 September 2021⁹ and on 1 October 2021, the Appeals Panel dismissed it.¹⁰
4. On 4 July 2022, the Appellant filed a second application to terminate the investigation.¹¹ On 3 October 2022, the Single Judge rejected the Appellant's arguments and declined to issue a termination order.¹²
5. The Appellant sought permission to appeal the Decision on the basis of three issues.¹³ On 31 October 2022, he received permission to appeal one issue,¹⁴ and on 8 November 2022, he filed the Appeal.

III. SUBMISSIONS

A. THE APPEAL SHOULD BE SUMMARILY DISMISSED

⁷ 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.

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

⁹ Appeal Against Decision KSC-BC-2018-01/F00180 Regarding the Termination of the Investigation against Driton Lajçi, KSC-BC-2018-01/IA001/F00002, 3 September 2021; *see also* Prosecution Response to Driton Lajçi's Appeal Regarding Termination of the Investigation, KSC-BC-2018-01/IA001/F00003, 16 September 2021; Defence Reply to Prosecution Response to Driton Lajçi's Appeal Regarding Termination of Investigation, KSC-BC-2018-01/IA001/F00004, 20 September 2021.

¹⁰ 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 ('First Appeals Decision').

¹¹ Second Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi, KSC-BC-2018-01/F00238, 4 July 2022; *see also* Prosecution Response to the Second Application to Terminate the Investigation against Driton Lajçi, KSC-BC-2018-01/F00240, 15 July 2022.

¹² Decision, KSC-BC-2018-01/F00258.

¹³ 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), KSC-BC-2018-01/F00261, 10 October 2022; *see also* Prosecution Response to Driton Lajçi's Request to Appeal Decision on Second Application to Terminate Investigation (KSC-BC-2018-01/F00258), KSC-BC-2018-01/F00264, 21 October 2022; Reply to Prosecution Response to Driton Lajçi's Request to Appeal Decision on Second Application to Terminate Investigation (KSC-BC-2018-01/F00258), KSC-BC-2018-01/F00265, 24 October 2022.

¹⁴ Certification Decision, KSC-BC-2018-01/F00267, 31 October 2022.

6. The Appeal is based on deficient, unfounded submissions that do not meet the formal requirements for appeal,¹⁵ and exceeds the scope of the permitted Issue. Despite Court of Appeals panels previously raising concerns and issuing warnings in relation to flawed submissions by Counsel for Mr Lajçi,¹⁶ the Appeal repeats similar errors and should be summarily dismissed.¹⁷

7. First, the Appellant fails to concretely set out the alleged error and to indicate, with sufficient precision, how this error would have materially affected the Decision. Instead, the Appellant makes a meandering and diffuse argument without stating whether the alleged error in the Single Judge's decision is purported to be an error of law, an error of fact, or an abuse of discretion.¹⁸

8. Second, the Appeal contains arguments that go beyond the scope of the certified Issue. The Issue certified for appeal concerned the Appellant's claim that the Single Judge had improperly attributed the conduct of 'relevant administrative and judicial authorities' to the Appellant. However, the Appellant's arguments seek to litigate additional issues, including issues that the Single Judge explicitly declined to certify for appeal.

9. For example, the Single Judge declined to certify an issue claiming that in assessing the conduct of the relevant administrative and judicial authorities the SPO should be considered [REDACTED].¹⁹ The Single Judge similarly declined to certify

¹⁵ Decision on the Defence Appeals Against Decision on Preliminary Motions, KSC-BC-2020-07/IA004/F00007, 23 June 2021 ('Preliminary Motion Appeals Decision'), paras 14-15, 20.

¹⁶ See First Appeals Decision, KSC-BC-2018-01/IA001/F00005, paras 4, 6; Decision on Haradinaj's Request for Variation of Word Limit to File Appeal Brief and SPO's Request for Order to Re-File Haradinaj's Notice of Appeal, KSC-CA-2022-01/F00021, 1 July 2022, paras 5-6; Decision on the Appeals Against Disclosure Decision, KSC-BC-2020-07/IA005/F00008, 29 July 2021 ('Disclosure Appeals Decision'), para.16; Preliminary Motion Appeals Decision, KSC-BC-2020-07/IA004/F00007, paras 15-17, 20-23.

¹⁷ Preliminary Motion Appeals Decision, KSC-BC-2020-07/IA004/F00007, paras 14-17, 20-23; Disclosure Appeals Decision, KSC-BC-2020-07/IA005/F00008, paras 16-18.

¹⁸ See Article 46(1) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015; Preliminary Motion Appeals Decision, KSC-BC-2020-07/IA004/F00007, paras 8-11.

¹⁹ Certification Decision, KSC-BC-2018-01/F00267, paras 19-22.

an issue regarding the judicial system's compliance with ECHR Article 6(1).²⁰ Nevertheless, the Appellant relies on both of these arguments in his Appeal.²¹

10. Other contentions in the Appeal also fall entirely outside the certified Issue. For instance, the Appellant raises arguments concerning the weight the Single Judge purportedly ascribed to various factors,²² the impact of the Appellant's influence when he was in government,²³ and whether he can be held accountable for [REDACTED].²⁴ None of these go to the Issue on appeal, and as the Appeals Panel held in the First Appeals Decision, '[t]he scope of the Court of Appeals Panel's review ... lies strictly within the confines of the issues certified by the Pre-Trial Judge in the Certification Decision.'²⁵

11. Third, and finally, the Appellant fails to adequately substantiate his argument with references to relevant authority. As just one example, the Appellant asserts, without citation, that the Decision 'considerably impacts on the principles of natural justice, fairness, and equality of arms'.²⁶

12. The Appeal, as shown above, does not meet the requirements for appeal and contains submissions that fall outside of the scope of the certified Issue. Therefore, it should be summarily dismissed.

B. THE APPEAL IS BASED ON A FUNDAMENTAL MISREPRESENTATION OF THE DECISION

13. Should the Panel nevertheless consider the merits of the Appeal, it should be rejected because the Appellant wrongly asserts that the Single Judge attributed delays to him that were actually caused [REDACTED].²⁷ This claim is a clear misrepresentation of the Decision, which expressly held that 'the delay of the

²⁰ Certification Decision, KSC-BC-2018-01/F00267, paras 28-31.

²¹ Appeal, KSC-BC-2018-01/IA002/F00002, paras 11, 29.

²² Appeal, KSC-BC-2018-01/IA002/F00002, para.17.

²³ Certification Decision, KSC-BC-2018-01/F00267, paras 23-24.

²⁴ Certification Decision, KSC-BC-2018-01/F00267, para.25.

²⁵ First Appeals Decision, KSC-BC-2018-01/IA001/F00005, para.4.

²⁶ Appeal, KSC-BC-2018-01/IA002/F00002, para.17.

²⁷ Appeal, KSC-BC-2018-01/IA002/F00002, para.10.

[REDACTED] need not be attributable to Mr Lajci personally'. He proceeded to clearly and separately set out [REDACTED] before addressing Lajçi's conduct.²⁸

14. In the Decision, the Single Judge considered delays occasioned by [REDACTED] entities.²⁹ This assessment was grounded in the Single Judge's finding in the First Decision that [REDACTED].³⁰ This conclusion went undisturbed by the Appeals Panel, and the reasoning in the Decision is consistent with this finding. In this respect, the Single Judge considered – regardless of whether any delays were attributable to Lajçi personally – that [REDACTED] has significantly protracted the investigation and continues to hamper it'.³¹ As a separate and additional matter, the Single Judge also properly considered the Appellant's conduct [REDACTED].³²

15. The Appellant's fundamental misunderstanding of the basis for the Single Judge's assessment of the reasonable time factors in the Decision is fatal to the Appeal. The Single Judge did not attribute [REDACTED] to the Appellant personally, but did properly consider delays occasioned [REDACTED] in reaching the determination that the length of the investigation continued to be reasonable. Therefore, the Appellant's arguments to the contrary fail to identify an error in the Decision, let alone an error that would materially affect the outcome.

IV. CLASSIFICATION

16. The present submission is filed confidentially in accordance with Rule 82(4). A public redacted version will be filed.

V. RELIEF REQUESTED

17. For the foregoing reasons, the Panel should dismiss the Appeal in its entirety.

²⁸ Decision, KSC-BC-2018-01/F00258, paras 26-27.

²⁹ Decision, KSC-BC-2018-01/F00258, para.26.

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

³¹ Decision, KSC-BC-2018-01/F00258, para.26.

³² Decision, KSC-BC-2018-01/F00258, para.27.

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Thursday, 24 November 2022

At The Hague, the Netherlands.