

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: 8 November 2022

Language: English

Classification: Public

Public Redacted Version of Appeal against Decision KSC-BC-2018-01/F00258

Regarding the Termination of the Investigation against Driton Lajçi

Specialist Prosecutor

Jack Smith

Specialist Counsel

Toby Cadman

I. INTRODUCTION

1. On 15 June 2021, Specialist Counsel for Driton Lajçi (“Defence”) applied for an Order directing the Specialist Prosecutor’s Office (“SPO”) to terminate the investigation against Mr. Driton Lajçi (“Appellant”).¹
2. On 23 July 2021, the Single Judge rejected the Application (“First Decision on Termination”).²
3. On 29 July 2021, the Defence applied for leave to appeal the First Decision on Termination,³ which was granted in part by the Single Judge (“First Decision Granting Leave to Appeal”).⁴
4. On 1 October 2021, the Court of Appeals Panel dismissed the appeal.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 was submitted on the same day, 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. A public redacted version was submitted on the same day, F00180/RED.

³ 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.

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

⁵ 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.

5. On 4 July 2022, the Defence filed a second application before the Single Judge to order the termination of the SPO investigation against the Appellant.⁶
6. On 3 October 2022, the Single Judge rejected the application for an order terminating the investigation against the Appellant for the second time (“Impugned Decision”).⁷
7. On 10 October 2022, the Defence requested leave to appeal the Impugned Decision,⁸ in accordance with Article 45 of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”)⁹ and Rule 77 of the Rules of Procedure and Evidence before the Specialist Chambers (“Rules”).¹⁰
8. On 31 October 2022, the Single Judge granted the application¹¹ to certify leave to appeal regarding the Second Issue (“Certified Issue”), namely:

“That the Single Judge erred by concluding that the conduct of the “relevant administrative and judicial authorities”, which had caused delay or

⁶ KSC-BC-2018-01, F00238, Specialist Counsel, *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 was filed on 25 July 2022, F00238/COR.

⁷ KSC-BC-2018-01, F00258, Single Judge, *Decision on Second Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajci*, 3 October 2022, confidential. A public redacted version was filed on 27 October 2022 (“Impugned Decision”).

⁸ 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 Lajci*, 10 October 2022, confidential. A public redacted version was filed on 13 November 2022.

⁹ Law No.05/L-053.

¹⁰ KSC-BD-03/Rev3/2020.

¹¹ 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”). A public redacted version was filed on 15 November 2022.

hampered the investigation, was attributable to [Mr Lajçi] when considering the “reasonable time” under Article 6(1) ECHR.”¹²

9. The Appellant hereby files an appeal in accordance with Rule 170(2) of the Rules.

II. GROUND OF APPEAL

1) **The Non-Attributability of the Conduct of the “relevant judicial and administrative authorities” to the Appellant**

10. It is submitted that the Single Judge erred in holding the Appellant responsible for the delay caused by the “relevant administrative and judicial authorities” when considering the “reasonable time” standard under Article 6(1) of European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) in relation to the length of the investigation against the Appellant, which, at the time of writing, has lasted since the official notification of the Appellant that he was under investigation by the SPO on 3 May 2019, three (3) years and five (5) months.

11. For the avoidance of doubt, it is noted that there whilst there is a functional distinction between the conduct of the ‘prosecutorial authorities’ and ‘judicial

¹² Decision Granting Leave to Appeal, at para 9(2).

authorities,' and the conduct of 'other state authorities' such as [REDACTED], there is no distinction in terms of attributing responsibility as such conduct, or delay, cannot be attributable to a person under investigation. Whilst the Appellant cannot complain about any delay of which he is, or may be, the architect, he cannot be held responsible for delays by [REDACTED], regardless of whether that delay is attributable to the Specialist Prosecutor, the Specialist Chambers or [REDACTED]. It is clear that conduct, or any delay, is a consideration when deciding on reasonableness that is not imputable to the Appellant. Furthermore, arguments such as lack of resources,¹³ a judicial backlog,¹⁴ or considerations as to inter-institutional cooperation is not a ground that can be relied upon by an accused person. If delay has been caused due to [REDACTED], of which [REDACTED] form part, that is not and cannot be attributable to the Appellant and he must benefit from any finding of delay or [REDACTED].

12. At paragraph 24 of the Impugned Decision the Single Judge recounted the Appellant's submissions regarding two out of five factors relevant to considerations of reasonableness of time under Article 6(1) ECHR – the conduct of authorities and the conduct of the Appellant:

¹³ HRC, *Lubuto v Zambia* (Comm. 390/1990), 31 October 1995, para. 7.3.

¹⁴ HRC, *Ashby v Trinidad & Tobago* (Comm. 580/1994), 21 March 2002, para. 10.5, and *Fillastre v. Bolivia* (Comm. 336/199), 21 March 2002, at para. 6.5.

“The Defence repeats its previous submissions that the SPO does not appear to be arguing that Mr Lajçi withheld all – or even a significant part of – the material requested, and that from the information available to the Defence, it is unclear to Mr Lajçi what actions he is alleged to have taken and how they have contributed to the delay, especially since he resigned from his government post in November 2020. In addition, the Defence argues that it is not clear what specific requests have been personally addressed to Mr Lajçi to obtain allegedly missing information in his possession, and that in any event, he is not obliged to cooperate with the authorities in his own investigation.” (citations omitted)

13. At paragraphs 26 and 27 of the Impugned Decision the Single Judge held that:

*“26. [...] **Contrary to the Defence’s claim, [REDACTED] need not be attributable to Mr Lajçi personally. The Single Judge therefore considers that [REDACTED] has significantly protracted the investigation and continues to hamper it.***

*27. With regard to the conduct of Mr Lajçi, even though Mr Lajçi is not required to contribute actively to the investigation against him, the Single Judge has already found that Mr Lajçi’s conduct [REDACTED] did compound the delay in relation to the investigation. **This finding***

continues to stand at present, since [REDACTED], remain only partially addressed to date. The Single Judge therefore takes this factor into account. (emphasis added, citations omitted)

14. The Single Judge therefore recognises that delay has been caused by [REDACTED].
15. In the Impugned Decision, along with the complexity of the case factor,¹⁵ in paragraphs 26 and 27, the Single Judge also placed significant weight on the conduct of authorities' factor, including the conduct of the Appellant [REDACTED], namely [REDACTED], deciding that the length of the investigation was reasonable.
16. However, the Single Judge wrongly held the Appellant responsible for [REDACTED] because [REDACTED]. The Single Judge failed to distinguish and acknowledge that [REDACTED]. Any alleged conduct contributing to the delay in the SPO investigation by [REDACTED] needs to be assessed in this context. Each of the [REDACTED] could be held responsible for contributing to the delay to varying extent.
17. It would appear that the Single Judge placed considerable weight on the fact that the Appellant's conduct significantly contributed to the delay by virtue of [REDACTED]. It is contended that on the scant information currently

¹⁵ Impugned Decision, at paras 20-23.

provided to the Appellant, the Single Judge incorrectly placed undue weight on these factors, which considerably impacts on the principles of natural justice, fairness, and equality of arms in the proceedings against the Appellant.

18. It is clear there has been considerable delay – the investigation has been ongoing for at least forty-one (41) months and there is no indication as to whether and when it will conclude – the question is who bears responsibility for the delay, and, more specifically, [REDACTED], if any, bear responsibility.
19. To be clear, under international human rights law, the Appellant cannot be blamed for ‘making full use of the multiple remedies available to [him] under domestic law’¹⁶, neither is he required to ‘actively co-operate with the judicial authorities’.¹⁷ The question must be whether the competent authorities failed to act with the necessary diligence and expedition, and it is submitted that, on the scant information to which the Appellant has seen, they clearly did not.
20. The Appellant recognises that he cannot, and does not, seek to rely on delay for which he is, or may be considered, the architect, but he cannot be held responsible for the conduct of the relevant state administrative and judicial authorities. It is clear that the Appellant should *only* be held responsible for

¹⁶ ECtHR, *O’Neill v. United Kingdom* (App. Nos. 41516/10 & 75702/13) 28 June 2016, para. 92.

¹⁷ ECtHR, *Eckle v. Germany* (App. No. 8130/78) 15 July 1982, para. 82.

any alleged conduct, or delay, *actually* and *personally* attributable to him, either during his time in his post or otherwise, for the reasons set out below.

21. The Appellant was [REDACTED]¹⁸ [REDACTED], [REDACTED].
22. Three salient points arise here.
23. Firstly, the Appellant was [REDACTED], [REDACTED], [REDACTED], [REDACTED].
24. Secondly, the relevant time period, in which to consider any delay attributable to the Appellant, should be restricted to [REDACTED]. Considering [REDACTED] and [REDACTED], there is a relatively short time-period during which [REDACTED]. Arguably these two factors significantly limit the impact of any alleged conduct that has caused delay. In any event it is not accepted that the Appellant caused any delay.
25. Thirdly, following [REDACTED], the Appellant cannot be held responsible for the conduct of [REDACTED], or for any [REDACTED]. In this regard, the SPO has provided no evidence of his conduct [REDACTED], compounding the delay. Further to this, [REDACTED], there has been no contact with the

¹⁸ The legal aid regime the Appellant oversaw is one that offers legal aid and financial assistance to suspects, their families, etc. where these individuals do not qualify for legal aid from the KSC.

Appellant or his legal representatives, [REDACTED], [REDACTED].

Therefore, it is unclear how the Appellant has contributed to any delay.

26. Further, there are compounding reasons why it cannot be correct that the long delay in the SPO investigation has largely been attributed to two factors, namely the complexity and the [REDACTED], including the alleged Appellant's conduct.¹⁹ The Single Judge previously held that the Appellant's actions *partly* contributed to the delay²⁰, without elaborating what 'partly' means in this regard. This mere assertion without having further information is not enough to justify the "reasonable time". Any alleged contribution to the delay by the Appellant, whilst not accepted, is limited as set out above and the conduct of [REDACTED] cannot be attributed to the Appellant and needs to be considered separately to ensure adherence to basic principles of justice, fairness, equality of arms and expeditiousness.

27. As such, the Court of Appeals Panel is requested to overturn the finding of the Single Judge regarding the attributability of the conduct of [REDACTED], [REDACTED], to the Appellant, and rule that the reasonable time period has been exceeded to the prejudice of the Appellant and order the SPO to terminate the investigation.

¹⁹ Impugned Decision paras at 20-23, and 24-27.

²⁰ KSC-BC-2018-01/F00180, *Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajci*, 23 July 2021, Confidential, para at 30. Redacted version KSC-BC-2018-01/F00180/RED.

III. CONCLUSION AND RELIEF REQUESTED

28. It is noted that the right as guaranteed under Article 6(1) of the ECHR is an independent, free-standing right and can be found in the absence of any prejudice as to the fairness of the proceedings.²¹ The purpose of the right is to ensure that accused persons do not lie under a charge for too long and that any charge is determined by a court,²² to protect against procedural delays and to prevent against a person remaining in state of uncertainty about their fate,²³ and avoid delays that might jeopardize the effectiveness and credibility of the administration of justice.²⁴

29. As noted earlier, administrative difficulties, case backlog, lack of personnel are not applicable. It is the responsibility of the State, and its institutional framework, to organise its judicial system in such a way that it complies with its obligations to secure the rights and freedoms guaranteed in the applicable legal framework, including the Constitution and the ECHR, that form an integral component of the KSC legal framework.

²¹ ECtHR, *Eckle v. Germany* (App. No. 8130/78) 15 July 1982.

²² ECtHR, *Wemhoff v. Germany* (App. No. 2122/64) 27 June 1968, para. 18

²³ ECtHR, *Stogmuller v. Austria* (App. No. 1602/62) 10 November 1969, para. 5

²⁴ ECtHR, *Guincho v. Portugal* (App. No. 8990/80) 10 July 1984, para. 80

30. In making a determination of the reasonableness of the length of proceedings, one must be mindful of the fact, that a period of forty-one (41) months has already passed pre-charge. In making a determination as to the reasonableness, the Court must consider (a) the time period; (b) the complexity of the investigation; (c) the conduct of the Appellant; (d) the conduct of the relevant administrative and judicial authorities, and in particular whether they have acted with the necessary diligence and expedition; and (e) what is at stake for the Appellant.
31. For the reasons set out above, it is submitted that the Single Judge erred in finding that the conduct of the “relevant judicial and administrative authorities” was in any way attributable to the Appellant in making a determination of the reasonable time requirement and that any delay that was attributable to “relevant judicial and administrative authorities” was to be answered in the Appellant’s favour, not his detriment.
32. The Appellant accordingly requests the Court of Appeals Panel:
- a. **GRANT** the Appeal; and
 - b. **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

- c. **ORDER** the SPO to terminate the investigation in accordance with Rule 47(2) of the Rules.

IV. CLASSIFICATION

33. As recently noted by the Court of Appeals Panel “*all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential.*”²⁵ It is therefore important that the proceedings are conducted openly and transparently with all filings being made public unless there exists ‘exceptional reasons’ or justification to depart from such a basic principle. It is noted that no such reasons exist in the present appeal.
34. Further, as noted by the Pre-Trial Judge in Case No. KSC—BC-2020-07,²⁶ pursuant to Articles 23 and 62 of the Law, Rule 80 of the Rules and Article 33 of the Practice Direction on Files and Filings, public filings should not include any information revealing: (i) the name, identity or other personal details of (potential) witnesses, other persons, including state officials, interacting with the SPO as well as staff members of the SPO; (ii) national or international organisations or entities cooperating with the SPO for the purpose of its investigations; (iii) documents or excerpts thereof disclosed to the Defence on

²⁵ KSC-BC-2020-07/IA004/F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions. 23 June 2021, para. 13. *See also* KSC-BC-2020-06, F00005/RED, Public Redacted Version of Decision on Hashim Thaçi’s Appeal Against Decision on Interim Release, 30 April 2021, para. 10. *See also e.g.*, ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Decision on Prosecution’s Motion for Summary Dismissal or Alternative Remedies, 5 July 2013, para. 9.

²⁶ KSC-BC-2020-07/F00264, Order on Reclassifications and Redacted Versions, 15 July 2021, para 10.

a confidential basis; and (iv) the content of any other documents subject to confidentiality pursuant to Specialist Chambers orders. It is noted that no such reasons information is contained in the present appeal

35. This Appeal is filed publicly as it contains no confidential information and there is no need for redactions.

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Toby Cadman

Specialist Counsel for Driton Lajçi