



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's Office

Date: 5 November 2023

Language: English

Classification: Public

Public redacted version of 'Prosecution reply to F00497'

Specialist Prosecutor's Office

Kimberly P. West

Duty Counsel for Isni Kilaj

Iain Edwards

1. The criteria for detention under Article 41(6) of the Law are satisfied. Nothing in the Response¹ displaces the grounded suspicion regarding Kilaj's responsibility for offences falling under Article 15(2) of the Law,² or the articulable risks which would arise should he be released. Kilaj's continued detention remains justified and necessary, and should be affirmed by the Single Judge.
2. Although submitting that the relevant grounded suspicion standard has not been met,³ the Defence fails to engage with what that standard is. It has been defined as 'knowledge of information which would satisfy an objective observer that a criminal offence has occurred, is occurring or there is substantial likelihood that one will occur and the person concerned is more likely than not to have committed the offence'.⁴ It is amply met in this instance.
3. Indeed, it is inherent in the definition itself that a grounded suspicion can be established even in absence of evidence that any offence has yet been completed (or has

¹ Kilaj Defence response to 'Confidential redacted version of 'Prosecution request for continued detention of Isni KILAJ', KSC-BC-2018-01/F00497 ('Response').

² Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

³ Response, KSC-BC-2018-01/F00497, paras 4-24.

⁴ Decision on Request for Arrest Warrant and Transfer Orders, KSC-BC-2020-07/F00012, para.18 (and authorities cited therein); Decision on Request for Immediate Release of Nasim Haradinaj, KSC-BC-2020-07/F00058, para.16. Notably, within the applicable legal framework, the standard is no higher than that required for undertaking special investigative measures and conducting search and seizure operations (see Rules 34, 37). In this instance, the Single Judge had already found a grounded suspicion that evidence of a crime may be found in Kilaj's possession (KSC-BC-2018-01/F00491/COR, para.15, *citing* KSC-BC-2018-01/F00484). More generally, what is reasonable in this context depends on all the circumstances, but the facts required to raise a suspicion for purposes of detention need not be of the same level as those necessary to justify a conviction, or even to bring a charge (European Court of Human Rights ('ECHR'), Grand Chamber, *Merabishvili v. Georgia*, 2017, app.72508/13, para.184). The standard required for valid detention does not pre-suppose that sufficient evidence to bring charges has already been obtained. What is required is an ability to demonstrate that that in arresting the authorities pursued in good faith the purpose of further investigation by way of confirming or dispelling the concrete suspicions which grounded the arrest (ECHR, *Petkov and Profirov v. Bulgaria*, 2014, app.50027/08 and 50781/09, paras 43, 52).

even occurred).⁵ As such, Kilaj's submissions regarding evidence supporting specific elements of offences overstate what is required in the context of an Article 41(6) assessment.⁶

4. The facts in this case - as set out in the Request,⁷ and elaborated in the initial hearing - more than meet the applicable standard. In a context of ongoing judicial proceedings, and an active climate of witness intimidation and interference, Kilaj – [REDACTED]⁸ - has been found in possession of classified witness-related materials and information to which he has no authorised access. The [REDACTED] demonstrate a level of analysis and intent inconsistent with mere curiosity. The very fact of Kilaj's possession of such material requires the acts of additional persons, and unmistakably suggest efforts aimed at obstruction of justice which would involve both further coordinated action and its dissemination.⁹

5. By contrast, the Defence presents only the bare - unreferenced and unsubstantiated - assertions¹⁰ of a man who has been caught red-handed in possession of classified materials, and whose primary explanation for such possession has been shown to be demonstrably false.

⁵ See paragraph 2, footnote 4 above (*'[i]s occurring or there is a substantial likelihood that one will occur [...]'*) (emphasis added). It is noted that, consistent with the jurisprudence of the ECHR, the preventative limb for future crimes is a distinct ground, not relied upon for purposes of Article 41(6)(a) in this instance.

⁶ See *similarly*, Decision on Kadri Veseli's Appeal Against Decision on Review of Detention, KSC-BC-2020-06/IA008-F00004, para.23 (where the Court of Appeals noted that under the framework of Article 41(6) of the Law a Panel cannot be expected to examine the merits of the case and the overall evidence submitted).

⁷ Prosecution request for continued detention of Isni KILAJ, KSC-BC-2018-01/F00496 ('Request'); Confidential Redacted Version of 'Prosecution request for continued detention of Isni KILAJ', KSC-BC-2018-01/F00496CONFRED.

⁸ See also Request, KSC-BC-2018-01/F00496CONFRED, paras [REDACTED].

⁹ *Contra*. Response, KSC-BC-2018-01/F00497, paras 10-24.

¹⁰ Response, KSC-BC-2018-01/F00497, paras 4-9.

6. Kilaj's apparent motivation to actively accumulate and analyse such materials, which he cannot but have known to be confidential, is a clear rebuttal to the Defence's contention that he can be trusted to abide by court orders and conditions imposed.¹¹ Releasing Kilaj at this time, while investigations are actively being conducted in his case and noting that [REDACTED], would generate unmanageable risks of obstruction, including of witness interference and destruction of, or otherwise tampering with, evidence.

7. None of the measures proposed by Kilaj¹² address those risks. Indeed, such risks can only be managed through, in particular, the communications monitoring regime available at the KSC Detention Centre.¹³

8. Equally, the Defence submission that fleeing to Albania would present an 'unthinkable rupture of [Kilaj's] home and family life'¹⁴ fails to account for relevant context. Kilaj knows that he could - including if ultimately charged and convicted - be facing both a lengthy period in detention and more geographical separation from his family than flight to Albania, which is in fact within relatively easy driving distance of his home.

9. Finally, submissions grounded on 'likely delay'¹⁵ are – as submitted in the hearing – entirely premature and speculative.¹⁶ Kilaj has, to date, been detained for less than three

¹¹ Response, KSC-BC-2018-01/F00497, para.31.

¹² Response, KSC-BC-2018-01/F00497, para.30.

¹³ See *Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Remanded Detention Review and Periodic Review on Detention, KSC-BC-2020-06/IA014/F00008/RED, 31 March 2022, para.38.

¹⁴ Response, KSC-BC-2018-01/F00497, para.27.

¹⁵ Response, KSC-BC-2018-01/F00497, paras 32-35.

¹⁶ Public Redacted Version of Decision on Remanded Detention Review Decision and Periodic Review of Detention of Kadri Veseli, KSC-BC-2020-06/F00576RED, para.112. See also Public Redacted Version of

days on serious allegations which carry potential sentences of up to five years. No question of proportionality arises. Moreover, pursuant to Article 41(10) and Rule 57(1),¹⁷ Kilaj's detention would be reviewed at least every two months, or as soon as any change in circumstances arises.

10. The Single Judge should continue Kilaj's detention.¹⁸

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Kimberly P. West

Specialist Prosecutor

Sunday, 5 November 2023

At The Hague, the Netherlands

Decision on Kadri Veseli's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, KSC-BC-2020-06/IA014-F00008RED, paras62-67 (upholding the Pre-Trial Judge's findings).

¹⁷ 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.

¹⁸ This filing is submitted confidentially pursuant to Rule 82(4). A public redacted version will be filed.