

In: KSC-BC-2018-01
Specialist Prosecutor *v.* Isni Kilaj

Before: Single Judge Panel
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Duty Counsel for Isni Kilaj

Date: 4 November 2023

Language: English

Classification: Public

**Public redacted version of "Corrected Version of
Kilaj Defence response to 'Confidential redacted version of
"Prosecution request for continued detention of Isni KILAJ'"**

Specialist Prosecutor's Office
Kimberly P. West

Duty Counsel for Isni Kilaj
Iain Edwards

I. INTRODUCTION

1. The Defence for Mr Isni Kilaj (“Defence”, “Suspect”) hereby responds to the Specialist Prosecutor’s Office request for the Suspect’s continued detention,¹ in conformity with the Single Judge’s oral decision of 4 November 2023 granting the Defence leave to file written submissions on the matter.²
2. It is submitted that the criteria for detention under Article 41(6) of the Law³ are not satisfied. In all the circumstances, Mr Kilaj is an excellent candidate for provisional release back to Kosovo, with or without one or more of the conditions set out in Article 41(12). The Request should be denied.
3. Given the short deadline accorded the Defence, the procedural history and applicable legal framework as set out at paragraphs 2 7 of the Request save for the single redacted sentence at paragraph 2 which, it goes without saying, the Defence knows nothing about are incorporated by reference.

II. SUBMISSIONS

A. THE PROSECUTION HAS DEMONSTRATED NO GROUNDED SUSPICION THAT ANY CRIME HAS BEEN COMMITTED

4. The Defence does not dispute that the seized material depicted in photographs in Annex 2 to the Request (“Seized Material”) were in the

¹ Confidential redacted version of ‘Prosecution request for continued detention of Isni KILAJ’ with confidential annexes 1 and 2, KSC-BC-2018-01/F00496, 3 November 2023 (“Request”). The Request was transferred to Duty Counsel via the KSC Secure File Exchange platform at 23:33.

² Transcript (open session), 4 November 2023, p.190.

³ 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.

Suspect's possession.⁴ It is noted that the Prosecution only refers to two documents amounting to confidential witness related materials although it is suggested that these are simply (non exhaustive) examples of such materials. It is submitted that, in the absence of details of additional concrete examples of confidential witness related material, fairness demands that the Single Judge only take into account these two referenced documents.

5. The document [REDACTED], accessible to a substantial section of the population in Kosovo, even if not to the world at large. To that extent, it can properly be described as having been in the public domain. It was a document disseminated by a third party. Mr Kilaj did not solicit its transmission; there is no evidence to the contrary.
6. The information contained [REDACTED], and also accessible to a substantial section of the population in Kosovo, even if not to the world at large. It was a document disseminated by a third party. Mr Kilaj did not solicit its transmission; there is no evidence to the contrary.
7. In oral argument, Duty Counsel stated:
[REDACTED].⁵
8. It ought to have been clear that the suggestion was the Seized Material [REDACTED]. That is not, of course, to say that Mr Kilaj's case is that the Seized Material [REDACTED]. [REDACTED].⁶ [REDACTED].⁷

⁴ Request, para. 14.

⁵ Transcript (private session), 4 November 2023, p.177.

⁶ [REDACTED].

⁷ [REDACTED].

9. Prosecution Counsel asserted that [REDACTED].⁸ All that demonstrates, of course, is that the confidential witness related information [REDACTED] in the public domain. This fact in no way rebuts Mr Kilaj's contention that the Seized Material was found in the public domain.

(i) *No evidence of revelation*

10. The most important point, however, is that the Prosecution has produced no evidence that Mr Kilaj: (i) ever revealed secret information, or (ii) ever attempted to reveal secret information.

11. Revelation is a necessary ingredient of the offence provided for in Article 392:

- (1) Whoever, without authorization, *reveals* information disclosed in any official proceeding [...]
- (2) Whoever without authorization *reveals* information on the identity or personal data of a person under protection in the criminal proceedings [...]

12. Revelation has a plain and commonly understood meaning. Revelation of information was defined in the Gucati & Haradinaj Judgment as including:

displaying, publicising, broadcasting, publicly disseminating or distributing material, in original or copied/recorded form, citing, describing or referring to the content of the material, as well as making the material available to others so as to allow them to read, copy or record the material or its content.⁹

13. It is clear that mere possession of material or information, even classified witness related material or information to which one has no right, does not and cannot attract criminal sanction under Article 392. It is not illegal.

14. The Prosecution seeks to argue that, since the Suspect had no right to the Seized Material, he could only have had it for some nefarious reason. The

⁸ Transcript (private session), 4 November 2023, pp 182-183.

⁹ Gucati & Haradinaj Judgment, para. 72.

Prosecution has to advance the argument that he has already revealed confidential information to meet the requirements of Article 392, but it cannot. The best the Prosecution can do is resort to wild speculation and innuendo.

15. For example, the Prosecution refers to a single [REDACTED] report that Mr Kilaj had in some way been involved [REDACTED].¹⁰ Analysis of the [REDACTED] report, [REDACTED]¹¹ and includes [REDACTED], reveals that the basis of the Prosecution's assertion is nothing more than that Mr Kilaj [REDACTED]. No information is provided about who [REDACTED], by whom [REDACTED], or why [REDACTED]. It is submitted that this is an unfortunate example not only of [REDACTED] but of rather insouciant written advocacy on the part of the SPO. The concluding sentence at paragraph 12 of the Request is wholly unsupported by evidence and should be disregarded.
16. The Prosecution has produced no evidence to rebut Mr Kilaj's account that, [REDACTED].¹² It is submitted that the Single Judge should disregard the lazy innuendo employed by the SPO that [REDACTED].
17. Further, the SPO employs more innuendo and rests on more insubstantial speculation by relying on Mr Kilaj's words [REDACTED].¹³ The Prosecution seems to invite the Single Judge to draw an inference that Mr Kilaj could only have wanted [REDACTED]. Plainly this is not the only inference that can be drawn; there are any number of matters [REDACTED]. Unsurprisingly, the Prosecution does not go so far as to say in terms that the Single Judge ought

¹⁰ Request, para. 12.

¹¹ [REDACTED]

¹² Request, para. 15.

¹³ Request, para. 15.

to conclude that Mr Kilaj [REDACTED]; the Prosecution could not, because it would be unsupported by evidence. In the absence of evidence, whispered insinuation is the best that can be offered, and the Defence submits that this must be ignored.

18. Finally, the Defence submits that the fact [REDACTED] is powerful evidence that Mr Kilaj had no intention of revealing or disseminating that or any other confidential document to a third party. The document was going no further. Moreover, it is self evident that [REDACTED] given Mr Kilaj had no idea that he was to be arrested and taken into SPO custody before it occurred.

(ii) *No evidence of participation in a group of persons and the taking of common action*

19. The Prosecution has produced no evidence that Mr Kilaj participated in a group of persons and committed the offence of obstructing official persons in performing official duties by common action.

20. Participation in a group of persons is a necessary ingredient of the offence provided for in Article 401(2):

(2) Whoever participates in a group of persons which by common action obstructs or attempts to obstruct an official person in performing official duties [...]

21. What amounts to a group of persons was considered in the Gucati & Haradinaj Judgment:

As regards the notion of a “group”, the Panel takes into consideration Article 113(12) of the KCC and finds that it must consist of three or more persons.¹⁴

¹⁴ Gucati & Haradinaj Judgment, para. 161

22. “Common action” was defined as covering, in principle, “any type of collective criminal activity that pursues the relevant obstructive purpose.”¹⁵
23. Whilst the Prosecution may be able to prove that the Suspect had simple possession of the Seized Material, its difficulty is that there is absolutely no evidence that he had been acting in any way other than on his own.
24. In light of the fact that the Prosecution can point to no evidence (as opposed to flimsy innuendo and conjecture) to support critical elements of the offences alleged against Mr Kilaj, it is submitted that it has failed to establish grounded suspicion of criminal responsibility. This must prove fatal to the Request that he continue to be detained in the Detention Centre.

B. THERE ARE NO ARTICULABLE GROUNDS TO BELIEVE MR KILAJ WOULD ABSCOND, DESTROY ETC. EVIDENCE, OR COMMIT OFFENCES

25. Continued detention is subject to a conjunctive test. The conditions set out in Article 41(6)(a) and (b) must both be met.
26. Mr Kilaj does not present a flight risk. He has demonstrated his willingness to cooperate with the SPO, not least by his agreement to undergo a voluntary interview after his arrest.¹⁶ He is anxious to clear his name by having his trial and proving his innocence. He has no desire to flee the jurisdiction.
27. In addition, the Defence highlights that Mr Kilaj has very close community ties in Kosovo. He has lived and worked in Malisheva his entire life. He has

¹⁵ Gucati & Haradinaj Judgment, para. 163.

¹⁶ Request, para. 3.

been married to his wife for some 40 years. They have six children. Fleeing to, for example, Albania, would represent an unthinkable rupture of his home and family life.

28. For the reasons set out in Part A. above, the Prosecution's submissions regarding any suggested risk of obstructing proceedings and/or committing offences are wholly misplaced. The evidence that Mr Kilaj has committed any offence is extremely insubstantial.
29. Equally misplaced is the repeated mantra regarding the "prevailing climate of obstruction in connection with KLA related criminal proceedings".¹⁷ It would self evidently be completely wrong to tar Mr Kilaj with same brush as other charged with obstruction of justice offences. It would be objectionable to suggest that, because of his connections with the KLA, and because of historical criminality on the part of other persons associated with the KLA, there is some sort of presumption that Mr Kilaj should be remanded in custody. Each case must, of course, be considered on its own merits.
30. Any residual concerns about granting provisional release can be properly allayed by the imposition of one or more of the conditions provided for in Article 41(12), notably a condition that he not leave Malisheva, and that he attend his local police station at a frequency to be determined by the Single Judge. In addition, the Single Judge may, in his discretion, order that Mr Kilaj surrender his passport and any other international travel document, that he not apply for another passport or any other international travel document, and that his movements be electronically monitored by way of an ankle tag or

¹⁷ Request, para. 17. *See also* para. 23 and Transcript (private session), 4 November 2023, p. 182.

similar. Finally, the Single Judge could order that Mr Kilaj [REDACTED] Seized Material.

31. The Defence takes the opportunity to underscore that, if released, Mr Kilaj will abide by any conditions the Single Judge might consider appropriate.

C. LIKELY DELAY

32. As articulated before the Single Judge Panel during Mr Kilaj's first appearance this morning, the Defence submits that there is simply no way of knowing when the SPO's investigations will be complete, or when an indictment might be drafted, or when any such indictment might be confirmed. Unlike in a situation when the SPO is well advanced with its investigations and an indictment has already been prepared and confirmed prior to arrest, Mr Kilaj was arrested upon an arrest order pursuant to Rule 52. The Prosecution is at the very beginning of its investigations.

33. Counsel for the Prosecution highlighted some of what needs to be achieved before a draft indictment can be presented for confirmation:

So just to go over some of the steps that we're going to need to do in the coming weeks. We need to analyse all of the materials obtained from the search of the residence, in particular the ones that we have been discussing in private session. We need to collect information from persons implicated by the seized material so as to determine the full scope of the criminality issue. And we need to analyse Mr. Kilaj's recent SPO suspect interview and any further steps arising from it.

And in this regard, and in relation to the point previously on the agenda, much of the information collected in this investigation would need to be translated from Albanian into English both to facilitate the SPO's analysis as well as the Court's consideration of the eventual indictment.¹⁸

¹⁸ Transcript (open session), 4 November 2023, pp 186-187.

34. The Defence notes that, in addition, it might be expected that the Prosecution will need to [REDACTED] at the time of Mr Kilaj's arrest. These include: (i) [REDACTED]; (ii) [REDACTED]; (iii) [REDACTED]; (iv) [REDACTED]; (v) [REDACTED]; (vi) [REDACTED]; (vii) [REDACTED]; (viii) [REDACTED]; and (ix) [REDACTED]. Experience shows that [REDACTED] will take time, and likely a substantial amount of time. It would be sanguine in the extreme to presume this could be achieved in a matter of weeks, or even a few months. Realistically, the timeline must be estimated in terms of many months, and this is even before an indictment can be prepared.
35. In the circumstances, it is submitted that this delay factor must militate in favour of provisional release, especially given the paucity of evidence.

III. CONCLUSION

36. Mr Kilaj is a man of nearly 60 years old. He is of good character, that is, he has no previous convictions in Kosovo or indeed anywhere else. Prior to 2 November 2023, he had never even been arrested, much less placed in detention. He is a man the Single Judge can trust with provisional release.
37. The Prosecution's Request for continued detention is misplaced and inadequate to justify such a serious and disproportionate interference with the Suspect's right to liberty.
38. For the foregoing reasons, the Defence respectfully submits that Mr Kilaj be released immediately.

Word count: 2808



Iain Edwards

Duty Counsel for Isni Kilaj

Saturday, 4 November 2023

The Hague, Netherlands

Explanatory Note

Page numbers have been included.

The footer on the first page has been deleted.

In paragraph 4, the word “non exclusive” has been replaced with “non exhaustive”.

In paragraph 6, the words “It was a document disseminated by a third party. Mr Kilaj did not solicit its transmission; there is no evidence to the contrary.” have been added.

In paragraph 14, the letter “s” has been added to the word “seek”, the word “have” has been replaced with “has”, and the word “they” has been replaced with “it”.

In paragraph 24, the words “they have” have been replaced with “it has”.

In paragraph 28, the letters “ting” have been added to the word “commit”.

In paragraph 30, the letter “s” has been added to the word “movement”.

In paragraph 34, the word “[REDACTED]” has been replaced with “[REDACTED]”.