In:	**KSC-BC-2018-01/IA004**
	Specialist Prosecutor *v.* Isni Kilaj
Before:	**Court of Appeals Panel**
	Judge Michèle Picard
	Judge Emilio Gatti
	Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Duty Counsel for Isni Kilaj
Date:	8 December 2023
Language:	English
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Kilaj Reply to Prosecution Response to Appeal Against Decision on Continued Detention

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Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Defence for Mr Isni Kilaj ("Defence", "Suspect") hereby replies to the Prosecution's response[1] to his appeal[2] against the Single Judge's decision ordering Mr Kilaj's continued detention.[3] This Reply addresses new issues arising from the Response.[4]

2. This Reply is filed pursuant to Article 45(2) of the Law,[5] and Rules 58(1) and 170(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chamber as constituting part of an interlocutory appeal that lies as of right from decisions or orders relating to detention on remand. The SPO is incorrect to suggest that the Response can be filed pursuant to Rules 77(2) and 170(2)[6] since those provisions apply only to interlocutory appeals requiring certification.

II. SUBMISSIONS

A. REGARDING THE FINDING THAT A GROUNDED SUSPICION HAD BEEN ESTABLISHED

3. The argument that sub-grounds 1, 2 and 3 of the Appeal amount to nothing more than a simple disagreement with the Single Judge's conclusion[7] is not

[1] Prosecution response to Defence appeal against decision on continued detention, KSC-BC-2018-01/IA004/F00003, 1 December 2023, confidential ("Response"). The filing was notified on Monday, 4 December 2023.
[2] Kilaj Appeal Against Decision on Continued Detention, KSC-BC-2018-01/IA004/F00001, 20 November 2023, confidential ("Appeal").
[3] Decision on Continued Detention, KSC-BC-2018-01/F00499, 6 November 2023; Reasons for Continued Detention, KSC-BC-2018-01/F00503, 9 November 2023 ("Reasons"; together, "Impugned Decision").
[4] Rule 76, Rules of Procedure and Evidence Before the Kosovo Specialist Chamber ("Rules").
[5] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ("Law"). All references to "Article" or "Articles" refer to articles of the Law unless otherwise stated.
[6] Response, para. 1.
[7] Response, para. 12.

just unimaginative and reflexive advocacy. It misrepresents the substance of the Defence's contentions. The Defence identified clear examples of the Single Judge's reversal of the burden of proof to the Suspect's detriment, thereby violating the principle that "any analysis of pre-trial detention is undertaken in the context of the detained person's presumption of innocence."[8] The mere fact the Single Judge recited the test that he was obliged to apply in one part of the Impugned Decision[9] cannot insulate him from criticism that he erred in law by failing to correctly apply that very test in another part of the Impugned Decision. Paying lip service to the presumption of innocence does not confer immunity from appellate interference when it can be shown – as the Defence has done – that the presumption of innocence has not just been ignored, but has been turned on its head.

4. The SPO commits the same error as the Single Judge's in placing excessive reliance on the fact that Mr Kilaj was found to be in possession of confidential witness-related material for which he had no authorisation.[10] That fact is not and has never been in dispute. But mere possession of confidential witness-related material is not an offence known to the Law. Instead of requiring the SPO to demonstrate that Mr Kilaj had done, or was about to do, more than simply possess the confidential material, the Single Judge effectively required Mr Kilaj to prove that he was in innocent possession of the entirety of the confidential material, obtained from the public domain.[11]

5. The SPO argues that "the Single Judge was not required to credit the bare, generic and unsupported assertions of Kilaj".[12] The Defence's complaint,

[8] Appeal, para. 9.
[9] Reasons, para. 21
[10] Response, para. 12.
[11] Reasons, paras 25-27.
[12] Response, para. 12.

however, is not that the Single Judge was *required* to credit those assertions, but that in noting that the Defence presented no support for its assertion about how Mr Kilaj obtained the confidential material, the Single Judge unfairly and unreasonably dismissed that assertion out of hand. A correct and fair application of the presumption of innocence demanded that the Single Judge give the benefit of the doubt to the Suspect. Instead, the Single Judge accorded the benefit of unevidenced speculation to the Prosecution. Had he not done so, the Single Judge's conclusions on the question of Mr Kilaj's continued detention would have been different.

6. Regarding sub-ground 3, the SPO once again attaches undue importance to the mere fact the Single Judge recited the applicable legal requirements for deciding on continued detention.[13] Demonstration of an awareness of the applicable requirements is no inoculation from which the Single Judge's findings can benefit when concrete examples have been provided showing that he has applied a different standard to the facts as found.

7. Those concrete examples amount to more than selectively quoting from the Single Judge's reasoning:[14] the Defence's citing of relevant examples from the Impugned Decision forms the evidential foundation for its argument that a lower standard of proof was applied by the Single Judge. The Defence was bound to provide examples, and would no doubt have been criticised by the SPO if examples had not been provided. Rather than meaningfully engaging with the substance of Mr Kilaj's complaint, and explaining why the Defence's analysis of each cited example is wrong, the Prosecution can do no more than airily dismiss the examples provided as selective quoting.

[13] Response, para. 15.
[14] *Contra* Response para. 16.

8. The SPO boldly, but unpersuasively, seeks to draw an equivalence between a "finding that a certain intention (i.e., not to disseminate materials) cannot be excluded" with a "more likely than not" standard.[15] The SPO is wrong. The SPO fails to recognise the difference between what might merely possibly be the state of affairs – that is, what "cannot be excluded" – and what is probably the state of affairs – that is, what is "more likely than not". These are different legal standards. They are not esoteric or obscure. They are well-understood in most legal systems. They are commonplace.

9. The Defence agrees with the Prosecution than an overall conclusion must be arrived at based on a holistic assessment of the evidence. However, it is respectfully submitted that the Court of Appeals Panel must reverse the Single Judge's ultimate conclusions when, as here, those conclusions are based on facts that the Defence has established have consistently only been established to the lower, "possibly", standard of proof, and have not attained the requisite higher, "balance of probability" / "more likely than not" standard.

10. By way of an analogy, there can be no doubt that a judge or jury would commit an error of law if, at the conclusion of a criminal trial, they purported to convict an accused because they considered the accused had probably committed the crime. It is trite to point out that "probably guilty" falls short of guilt beyond reasonable doubt (or guilt based on an *intime conviction*). In such a situation, notwithstanding the purported conclusion that the accused was guilty, an appeals court would have no choice but to vacate the conviction and substitute a "not guilty" verdict.

[15] Response, para. 16.

11. It is irrelevant for the Prosecution to argue that the "Single Judge clearly set out and explained the factors leading to his correct finding that a grounded suspicion had been demonstrated in this case"[16] when those factors have only been found to the lower standard. In such circumstances, the Single Judge is simply not entitled to find that a grounded suspicion has been demonstrated. This goes beyond a mere disagreement with the Single Judge's conclusion.

B. REGARDING THE FINDING THAT DETENTION WAS NECESSARY

12. Again, the Prosecution places undue weight on the fact the Single Judge simply articulated the correct standard of proof to apply when assessing whether detention was necessary.[17] Indeed, as noted by the SPO, the Defence acknowledged that the Single Judge set out the correct standard of proof.[18] The Prosecution's difficulty is that there is a disconnect between what the Single Judge said was the correct standard and the standard he actually applied to the facts as he found them to be.

13. The Prosecution states in its Response that "there is no basis for presuming that the Single Judge's subsequent use of the word 'may' should be interpreted in a manner inconsistent with that standard." Firstly, the Defence would observe that the SPO appears to recognise that the Single Judge's use of the word "may" *prima facie* indicates that the wrong standard was applied when arriving at the ultimate conclusion, that is, no more than "a mere possibility of a risk materialising."

[16] Response, para. 16.
[17] Response, para. 17.
[18] Response, para. 17.

14. Secondly, the SPO seems to suggest that the Court of Appeals Panel should go behind the actual findings of fact arrived at by the Single Judge and effectively say to itself, "We know what he *really* meant to say." It is respectfully submitted that that would be an illegitimate approach to take. The Court of Appeals Panel can proceed only on the basis of the actual words employed by the Single Judge. There can be no second guessing or exercises in *ex post facto* contortions of those findings.

15. At paragraph 18 of the Response, the Prosecution cites the Single Judge's finding relating to the risk that Mr Kilaj "will repeat the offences alleged to have been committed by him"[19] and commit further offences. However, the SPO carefully avoids quoting the Single Judge's conclusions as set out in paragraph 48: "In light of the foregoing, the Single Judge finds that Mr Kilaj *may* obstruct the progress of criminal proceedings", and the near-identical paragraph 53: "In light of the foregoing, the Single Judge considers that Mr Kilaj *may* commit further offences."[20]

16. In short, while the Single Judge undoubtedly makes a finding that there is a risk Mr Kilaj will commit further offences, he twice articulates that risk as being nothing more than that he *may* do so. The Prosecution fails to explain how the use of the word "may" indicates anything more than "a mere possibility of a risk materialising."

17. Finally, the fact that the Single Judge may have engaged in "specific reasoning" and detailed "concrete grounds" to support his findings[21] cannot rebut the clear evidence of the standard of proof that was in fact applied to

[19] *See* Reasons, para. 52.
[20] Italics added.
[21] Response, para. 21

the fruits of that specific reasoning. To revisit the analogy set out at paragraph 10 above, imagine a judge or jury that engaged in specific reasoning and gave concrete grounds for arriving at findings of fact that permitted them to find that an accused was *probably* guilty of a crime. If they then purported to convict the accused of that crime, such a verdict would inevitably be overturned on appeal for amounting to an error of law.

III. CONCLUSION

18. For the foregoing reasons, the Defence respectfully requests that the Court of Appeals Panel allow the Appeal, reverse the Impugned Decision, and order Mr Kilaj's immediate release.

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