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In:	**KSC-BC-2018-01**
	Specialist Prosecutor *v.* Isni Kilaj
Before:	**The President of the Specialist Chamber**
	Judge Ekaterina Trendafilova
Registrar:	Dr Fidelma Donlon
Filing Participant:	Duty Counsel for Isni Kilaj
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Public redacted version of

"Kilaj Appeal Against Decision on Continued Detention"

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Defence for Mr Isni Kilaj ("Defence", "Suspect") hereby appeals against the Single Judge's decision ordering Mr Kilaj's continued detention ("Impugned Decision").[1]

2. On 3 November 2023, the Specialist Prosecutor's Office ("SPO") submitted a request for Mr Kilaj's continued detention ("SPO Request").[2] The following day, Mr Kilaj had his First Appearance Hearing, during which the SPO and the Defence made submissions on the SPO Request.[3]

3. Later on 4 November 2023, the Defence filed its Response to the SPO Request, applying for Mr Kilaj's immediate release ("Defence Response").[4] On 5 November, the SPO filed a Reply to the Defence Response ("SPO Reply").[5]

II. RIGHT OF APPEAL AGAINST DECISION RELATING TO DETENTION

4. Article 45(2) of the Law[6] provides that interlocutory appeals shall lie as of right

[1] 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").
[2] Prosecution Request for Continued Detention of Isni Kilaj, KSC-BC-2018-01/F00496, 3 November 2023, strictly confidential and *ex parte*, with Annexes 1-2, strictly confidential and *ex parte*. A public redacted version of the request was filed on 7 November 2023.
[3] First Appearance Transcript, pp 171-184.
[4] Corrected Version of Kilaj Defence Response to "Confidential Redacted Version of 'Prosecution Request for Continued Detention of Isni KILAJ'", KSC-BC-2018-01/F00497/COR, 4 November 2023, confidential. A public redacted version was filed on 8 November 2023.
[5] Prosecution Reply to F00497, KSC-BC-2018-01/F00498, 5 November 2023, confidential. A public redacted version was filed on 7 November 2023.
[6] 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.

from decisions or orders relating to detention on remand. Further, Rule 58(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chamber ("Rules") reiterates that appeals before the Court of Appeals against decisions relating to detention on remand shall lie as of right pursuant to Article 45(2). Rule 170(1) provides that the Appellant may file an appeal within 10 days of an impugned decision. Although the Impugned Decision is dated 6 November 2023, full reasons were not filed until 9 November;[7] those full reasons were only notified the following day. This Appeal is filed within the deadline.

5. Regarding claims of an error of law, the Court of Appeals Panel has held that:

> It is not any and every error of law or fact that will cause the Court of Appeals Panel to overturn an impugned decision. A party alleging an error of law must identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision. An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground. However, even if the party's arguments are insufficient to support the contention of an error, the Panel may find for other reasons that there is an error of law.[8]

6. The Defence submits that the Impugned Decision should be reversed on the grounds that the Single Judge: (i) erred in law in finding that a grounded suspicion that Mr Kilaj had committed a crime within the SC's jurisdiction had been established; and (ii) erred in law in finding that Mr Kilaj's continued detention was necessary. For the reasons set out below, these errors are sufficiently egregious as to invalidate the Impugned Decision. Had they not been made, the outcome of the Impugned Decision would inevitably have been different in that Mr Kilaj's continued detention would not have been ordered.

[7] At 18:38.

[8] Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020 ("Gucati Appeal Decision"), para. 12.

III. GROUNDS OF APPEAL

A. THE SINGLE JUDGE ERRED IN LAW IN FINDING THAT A GROUNDED SUSPICION HAD BEEN ESTABLISHED

7. As the Single Judge rightly found, the establishment of a grounded suspicion that Mr Kilaj had committed a crime within the SC's jurisdiction is a condition *sine qua non* for the validity of his (continued) detention.[9]

8. Under this umbrella ground of appeal are three sub-grounds. These sub-grounds, individually and collectively, are sufficient to invalidate the Impugned Decision. The Defence submits, moreover, that each error identified in the following sub-grounds directly led to subsequent errors.

9. *Sub-ground 1:* The Single Judge erred in finding that the Defence claim that the seized material depicted in photographs in Annex 2 to the SPO Request ("Seized Material") were in the public domain to be without merit.[10] Specifically, the Single Judge committed an error of law in suggesting that it was for the Defence to present proof for its assertion that Mr Kilaj obtained the Seized Material from a public source. The phase of proceedings involving submissions on continued detention is to be distinguished from a trial. It is irrational to expect Mr Kilaj to present concrete support for his contention, and to suggest that he should amounts to a fundamental violation of the principle that "any analysis of pre-trial detention is undertaken in the context

[9] Reasons, para. 22.
[10] Reasons, para. 26.

of the detained person's presumption of innocence."[11] It is submitted that a correct application of this principle requires the according of any benefit of the doubt to the detained person. Otherwise, the Single Judge is doing little more than paying lip-service to the principle.

10. In the event, the Single Judge indicates that he expects Mr Kilaj to provide a detailed explanation at this stage as to how the Seized Material came into his possession, and to substantiate the claim that the Seized Material was found in the public domain. The Single Judge errs by both unreasonably placing the burden of proof on the Defence, and by setting the standard of proof unreasonably high.

11. The Single Judge also erred in law in his assessment of the SPO's assertion that, since it had [REDACTED] confidential witness-related material, the Suspect's argument that he had obtained the information in the Seized Material in the public domain as a result of that unlawful dissemination was directly contradicted. The error of law flows from the Single Judge's decision to entirely ignore the Defence's contention that the confidential witness-related information [REDACTED] source in the public domain.[12] The Defence had made it clear that it did not suggest the Seized Material originated *exclusively* from the confidential material [REDACTED].[13] In unreasonably failing to engage with the Defence's submissions, the Single Judge erred in concluding that the Defence's explanation was contradicted by the facts and thus devoid of merit.

[11] Reasons, para. 21.
[12] Defence Response, para. 9.
[13] Defence Response, para. 8.

12. *Sub-ground 2:* The commission of the error set out in sub-ground 1 directly led to further error in the Single Judge's assessment of the circumstances of Mr Kilaj's possession of the Seized Material. Had he not committed this further error, the Single Judge would inevitably have found that there was no grounded suspicion that the Suspect had committed a crime within the SC's jurisdiction.

13. The Single Judge took as his starting point that the information contained in the Seized Material was conclusively not in the public domain. As demonstrated above, the Single Judge was wrong in that assessment. But it permitted him to find that Mr Kilaj's possession of confidential witness-related material must have "required the acts of other persons"[14] whereas there was no reasonable basis to arrive at that conclusion. That conclusion was reached on the back of nothing more than unevidenced speculation.

14. *Sub-ground 3:* The Single Judge erred in law by failing to apply the correct standard of proof. Having made the error set out in sub-ground 2, he permitted himself to conclude that Mr Kilaj

> *may have* acted jointly with or assisted [these other persons] for the purposes of further coordinated action and, *possibly*, further dissemination of the confidential material.[15]

15. Whilst acknowledging that facts which raise a suspicion need not be of the same level as those necessary to properly found a conviction, or even bring a charge,[16] there must nevertheless be a reasonable factual basis for a conclusion that an objective observer *would* be satisfied that a criminal has occurred, is occurring or there is a substantial likelihood that one will occur, *and* the

[14] Reasons, para. 27.
[15] Reasons, para. 27 (added emphasis).
[16] Reasons, para. 23.

person concerned is *more likely than not* to have committed the offence.[17] The "more likely than not" standard (variously described in common law jurisdictions as the civil, or "balance of probabilities", standard) necessarily requires a finding that a given circumstance or result *probably* occurred. A finding that a given circumstance or result *possibly* occurred is undeniably inadequate. And yet this is precisely all the Single Judge concluded: he specifically used the terms "*may have* acted jointly…" and "*possibly*" in arriving at his findings at paragraph 27.

16. Furthermore, the Single Judge specifically stated that he "*cannot*, at this stage, *exclude* that the Seized Material was not intended for dissemination, should the opportunity arise."[18] An inability to exclude an eventuality falls significantly short of a finding that the Single Judge was satisfied that Mr Kilaj more likely than not committed the offence. The very terms used in the Reasons demonstrate that the Single Judge applied the wrong standard of proof in finding a grounded suspicion. In other words, had he applied the correct standard of proof, the Single Judge would have been obliged to find that, while Mr Kilaj had possibly committed the alleged offence, he could arrive at no conclusion more certain than that. Such a conclusion could not result in a proper finding of grounded suspicion, and consequently, continued detention as a condition *sine qua non* could not be justified.

[17] Reasons, para. 23 (added emphasis).
[18] Reasons, para. 27.

B. THE SINGLE JUDGE ERRED IN LAW IN FINDING THAT DETENTION WAS NECESSARY

17. The Defence notes that the Single Judge found that, while a risk of flight exists for Mr Kilaj, the risk was moderate,[19] and could be mitigated by the imposition of some of the conditions proposed. [20]

18. The risks of greatest concern to the Single Judge related to obstruction of the progress of SC proceedings,[21] and committing further offences.[22] However, the erroneous assessment of the evidence that Mr Kilaj had committed any offence in the past inextricably contributed to the Single Judge's errors in finding a risk of future obstruction and future offending.

19. More concrete is the Single Judge's error, once again, in applying the wrong standard of proof. Whilst the Single Judge identified the correct standard of proof in paragraph 33 ("less than certainty, but more than a mere possibility of a risk materialising"), the degree of risk he actually found to exist was nothing greater than a possibility of a risk materialising.

20. The Single Judge concluded his assessment of the arguments relating to the risk of obstruction of the progress of SC proceedings by stating that Mr Kilaj "may be likely to obstruct the proceedings where he may be an accused."[23] It is submitted that the phrase "may be likely" is undoubtedly far less that certainty; indeed it is synonymous with the expression of no more than a possibility of a risk materialising. That standard, however, and as identified by the Single Judge, is inadequate to meet the applicable standard.

[19] Reasons, para. 42.
[20] Reasons, para. 59.
[21] Reasons, paras 43-48.
[22] Reasons, paras 49-53.
[23] Reasons, para. 46.

21. Two paragraphs further, the Single Judge concludes that Mr Kilaj "may obstruct the progress of criminal proceedings." The Defence reiterates its submission that this finding is not enough to meet the standard of "more than a mere possibility of a risk materialising": the formulation is synonymous with the "may [obstruct]" finding.

22. Precisely the same argument can be deployed in relation to the risk of further offending: the Single Judge found that Mr Kilaj "may" commit further offences.[24] If that finding amounts to more than a possibility of a risk of further offending materialising, the Single Judge does not explain how.

IV. CONCLUSION

23. For the foregoing reasons, the Defence submits that it has identified the errors of law committed by the Single Judge, presented its arguments in support of its claim, and explained how the errors of law invalidate the Impugned Decision.

24. The Defence respectfully requests that:

(i) a Panel of the Court of Appeals Chamber be appointed without delay; **and**

(ii) the appeal be allowed; **and**

(iii) the Impugned Decision be reversed; **and**

[24] Reasons, para. 53.

(iv) Mr Kilaj be released immediately.

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The Hague, Netherlands