

In: KSC-BC-2023-10

The Prosecutor v. Sabit Januzi and Ismet Bahtijari

Before: Pre-Trial Judge

Judge Nicolas Guillou

Registrar: Fidelma Donlon

Filing Participant: Specialist Counsel for Sabit Januzi

Date: 10 November 2023

Language: English

Classification: Public

**Public Redacted Version of Corrigendum Submissions on Detention on behalf
of Sabit Januzi**

Specialist Prosecutor

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I. INTRODUCTION

1. On 2 October 2023, the Pre-Trial Judge issued the Confirmation Decision¹, confirming charges of obstructing official persons in performing official duties by serious threat, obstructing official persons in performing official duties by participating in the common action of a group and intimidation against Sabit Januzi ('Accused') relating to the period between 5 April 2023 and 12 April 2023. The charges relate to the same conduct (with charge 2 being subsidiary to charge 1) and to a single alleged victim. It is alleged that Ismet Bahtjari and Haxhi Shala are identified co-perpetrators.
2. On 2 October 2023, the Pre-Trial Judge issued arrest warrants for the Accused and Mr Bahtjari and ordered their transfer to the Detention Facilities of the Specialist Chambers².
3. On 5 October 2023, the Accused and Mr Bahtjari were arrested in Kosovo. The following day they were transferred to the SC Detention Facilities where they remain³. No trial date has been set. Mr Shala has neither been arrested nor detained.
4. It is hereby submitted that the Accused should be granted interim release from detention pending trial, with or without conditions.

¹ *Confidential Redacted Version of the Decision on the Confirmation of the Indictment*, KSC-BC-2023-10/F00008/CONF/RED, Pre-Trial Judge, 2 October 2023

² *Decision on Request for Arrest Warrants and Transfer Orders*, KSC-BC-2023-10/F00009, Pre-Trial Judge, 2 October 2023

³ *Corrected Version of the Report on the Arrest and Transfer of Sabit Januzi to the Detention Facilities*, KSC-BC-2023-10/F00020/COR, Registrar, 9 October 2023

II. LAW

5. Article 41(6) of the Law⁴ provides that the detention of a person shall only be ordered when: (a) there is a grounded suspicion that he has committed a crime within the jurisdiction of the Specialist Chambers; and (b) there are articulable grounds to believe that:

- (i) There is a risk of flight;
- (ii) He will destroy, hide, change or forge evidence of a crime or specific circumstances indicate he will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices; or
- (iii) The seriousness of the crime, of the manner or circumstances in which it was committed and his or her personal circumstances, past conduct, the environment and conditions in which he lives or other personal circumstances indicate a risk that he will repeat the criminal offence, complete an attempted crime or commit a crime which he has threatened to commit.

6. The criterion in Article 41(6)(b)(ii) of the Law is of a higher standard (belief that he *will* destroy etc./obstruct) than the criteria in Article 41(6)(b)(i) and (iii) (belief that there is a *risk* of flight/repeating the criminal offence etc.). A belief that there is a risk that the person will destroy, hide, change or forge evidence of a crime or obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices is not sufficient.

⁴ Law on Specialist Chambers and Specialist Prosecutor's Office, Law No.05/L-053

7. The criterion in Article 41(6)(b)(ii) is specific to (i) destroying, hiding, changing or forging evidence; or (ii) obstructing the progress of *the* criminal proceedings, that is, the criminal proceedings that the person subject to the decision on detention faces. A general risk of obstructing criminal proceedings is not sufficient.
8. The criterion in Article 41(6)(b)(iii) is specific to the issue of risk of repeating *the* criminal offence, completing an attempted crime or committing a crime which the person has threatened to commit. A general risk of committing further offences is not sufficient.
9. Before determining whether articulable grounds to believe that Article 41(6)(b)(i)-(iii) criteria exist, the court must consider whether any proposed conditions can otherwise address such concerns; and even where articulable grounds to believe that Article 41(6)(b)(i)-(iii) criteria exist, the court should consider whether the more lenient measures in Article 41(12) of the Law will ensure the presence of the accused during proceedings, prevent reoffending and/or ensure the successful conduct of criminal proceedings⁵. Any deprivation of liberty order for the purpose of bringing a person to trial must be a proportionate measure to the achieve the stated aim.
10. Further, it is not incumbent upon the detained person to demonstrate the existence of reasons warranting his release. The presumption is in favour of liberty⁶.

⁵ *Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary 17 March 2017 to the Specialist Chamber of the Constitutional Court pursuant to Article 19(5) of the Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office*, KSC-CC-PR-2017-01/F00004, Chamber of the Constitutional Court, 26 April 2017 at paras.108-116; e.g. *Decision on Application for Bail*, KSC-BC-2020-07/F00059, Single Judge, 27 October 2020 at para.14-15 re risk of flight

⁶ *Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary 17 March 2017 to the Specialist Chamber of the Constitutional Court pursuant to Article 19(5) of the Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office*, KSC-CC-PR-2017-01/F00004, Chamber of the Constitutional

III. ARTICLE 41(6)(a) – GROUNDED SUSPICION THAT HE HAS COMMITTED A CRIME WITHIN THE JURISDICTION OF THE SPECIALIST CHAMBERS

11. Each of the three offences charged in the indictment is based on a single threat allegedly uttered by the co-Accused Ismet Bahtjari⁷. The Accused was not present when the alleged threat was uttered by the co-Accused, and there is no evidence that the Accused was aware that the threat was uttered.
12. Although the Pre-Trial Judge has found that the ‘timing, sequence and frequency of ... communications, as evidenced in the supporting material strongly suggest that the contacts between Mr Januzi and Co-Perpetrator 1, on the one hand, and between Mr Januzi and Mr Bahtjari, on the other hand, concerned Mr Bahtjari’s visit to Witness 1 to deliver the message from Co-Perpetrator 1 that Witness 1 should withdraw his testimony against Mr Selimi’⁸, it does not follow that the any such message was to be accompanied by the use of any unlawful means to reinforce it, and if so, whether those means were serious threat (as opposed to, for example, a promise, a gift, or any other form of benefit or other means of compulsion).
13. Indeed, the alleged circumstances of the threat do not suggest any message from the co-Accused was to be accompanied by the use of serious threat. According to Witness 1, he had to provoke the co-Accused into making the threat⁹. It is alleged that the co-Accused ‘wouldn’t say that they have said me that...they’ve said me that they will kill you’; instead, Witness 1 ‘kind of pulled it out of him...’¹⁰.

Court, 26 April 2017 at para.115

⁷ *Confidential Redacted Version of the Decision on the Confirmation of the Indictment*, KSC-BC-2023-10/F00008/CONF/RED, Pre-Trial Judge, 2 October 2023 para.76, 90

⁸ *Confidential Redacted Version of the Decision on the Confirmation of the Indictment*, KSC-BC-2023-10/F00008/CONF/RED, Pre-Trial Judge, 2 October 2023 para.80

⁹ ERN 112906-TR-ET Part 1 at page 11

¹⁰ ERN 112906-TR-ET Part 1 at page 21

14. In fact, whether the co-Accused made any threat on the evidence is itself equivocal. According to Witness 1, he asked if he had been threatened and the co-Accused simply put his head down and 'moved his head in confirmation' or 'nodded'¹¹.
15. By contrast, Witness 1 states that, on the single occasion that the Accused visited upon him, the Accused was unaccompanied¹², he made no threat¹³, and there was only some conversation which Witness 1 understood to be about compensating Witness 1¹⁴ because 'they couldn't understand what was [Witness 1's] instruction'¹⁵.
16. The evidence does not support a ground suspicion that the Accused has committed the offences charged and Article 41(6)(a) is not satisfied. The Accused should accordingly be released from detention.

IV. ARTICLE 41(6)(b)(i) – RISK OF FLIGHT

17. The Accused is alleged to have participated in the commission of these offences during a period of a single week in April 2023: 6 months ago. SPO officers attended at the Accused's home address on 3 May 2023 to carry out a search of his residence and vehicle, and the Accused's mobile telephone was seized¹⁶. The Accused has been aware that he has been under investigation since that day but has remained in Kosovo throughout (save for a four day holiday in August to Durres following which he returned) and has not attempted to flee.

¹¹ ERN 112906-TR-ET Part 1 at page 11 and 21

¹² ERN 112906-TR-ET Part 1 at page 10

¹³ ERN 112906-TR-ET Part 1 at page 9

¹⁴ ERN 112906-TR-ET Part 1 at page 17

¹⁵ ERN 112906-TR-ER Part 1 at page 18

¹⁶ *Confidential Redacted Version of Decision Authorising Searches and Seizures and Special Investigative Measures*, KSC-BC-2023-10/F00006/CONF/RED, Pre-Trial Judge, 25 September 2023 at para.25

18. On 29 September 2023, the Accused received a summons from the SPO requiring him to appear for questioning before the SPO at the EULEX compound in Kosovo on 4 October 2023 pursuant to Articles 35(2), 38(2) and (3) and 42 of the Law. The Accused was informed that the SPO had ‘determined that you are likely to have information about one or more offenses falling within the jurisdiction of the Specialist Chambers’. The Accused was also informed in the summons that there were ‘grounds to believe that you have been involved in the commission of a crime within the jurisdiction of the Kosovo Specialist Chambers. In fact, the SPO had already submitted an indictment for confirmation on 11 September 2023 charging the Accused with three offences.
19. On 2 October 2023, the Pre-Trial Judge confirmed the Indictment and issued an arrest warrant and transfer order for the Accused. In accordance with Rule 86(6) of the Rules¹⁷, Mr Januzi at that stage had the status of an Accused.
20. The arrest warrant was not executed on 3 October 2023, despite the Accused having been placed under covert surveillance to track his movements in order to execute the warrant¹⁸.
21. On 4 October 2023, the Accused attended at the EULEX compound in Kosovo as requested to do so in the earlier summons. On that date the Accused was interviewed as a suspect during investigation, despite the confirmation of the Indictment two days earlier and his status as an Accused. The arrest warrant was not executed that day despite the fact that the Accused was at the EULEX compound in Kosovo and in the presence of SPO officers for some hours. The Accused was permitted to leave the compound and return home on 4 October 2023.

¹⁷ Rules of Procedure and Evidence before the Kosovo Specialist Chambers, KSC-BD-03/Rev3

¹⁸ *Confidential Redacted Version of Decision Authorising Searches and Seizures and Special Investigative Measures*, KSC-BC-2023-10/F00006/CONF/RED, Pre-Trial Judge, 25 September 2023 at para.67-68

22. The Accused was not arrested and detained until the following morning, 5 October 2023, nearly six months after the alleged offences occurred, five months after SPO officers attended to search his home address, and three days after the indictment was confirmed and the arrest warrant issued. Proceedings up to this point do not demonstrate any pressing concern about a risk of flight; on the contrary, the conduct of the SPO demonstrates that it has had no concern about flight.
23. The Accused has very strong ties to his community. The Accused has a permanent residence at [REDACTED].
24. The Accused is a bricklayer by trade who works on small housing developments and renovations. The Accused left education after secondary school. His three sons work also in construction, together forming a team of tradesmen. At present, the Accused has not been working regularly because of poor health, [REDACTED].
25. The Accused's family home is owned outright with no mortgage, but otherwise the Accused's financial means are modest. [REDACTED].
26. The Accused has an informal role with the War Veterans Association in the village, acting as a point of contact for the small group of veterans in [REDACTED] to assist the organisation of small events. The Accused has no leadership, policy or other role at the WVA.
27. In relation to politics, the Accused was previously the head of village branch of the PDK for [REDACTED] but resigned from that position at the beginning of 2023 and has been replaced. Since then the Accused has had no active role and has no intention to in the future.
28. Most of the Accused's free time is spent with his grandchildren.

29. When granting the request for the arrest warrant, the Pre-Trial Judge observed that any risk of flight for the Accused was moderate only¹⁹. The Pre-Trial Judge made that finding without further information as to the Accused's personal circumstances, such as home, occupation, assets or family ties, without any representations on behalf of the Accused and before the SPO chose to delay execution of the arrest warrant, even though the Accused attended at the EULEX compound and was in the company of SPO officers.

30. It is submitted that in fact no such risk of flight exists, or that in the alternative, any residual risk can be addressed by the following proposed conditions:

- (a) Surety in the sum of 5000 EUR;
- (b) Surrender of the Accused's passport;
- (c) Requirement to live and sleep each night at the Accused's home address; and
- (d) Daily reporting to Drenas police station or EULEX police headquarters.

V. ARTICLE 41(6)(b)(ii) – THE ACCUSED WILL DESTROY ETC. EVIDENCE OR OBSTRUCT THE PROGRESS OF THE CRIMINAL PROCEEDINGS

31. The Accused has been aware that he was under investigation since the beginning of May 2023.

32. During the five month period that followed the SPO attending his address to search it, or indeed earlier, there is no suggestion that the Accused has destroyed, hid, changed or forged evidence in relation to the criminal proceedings that he faces or any other criminal proceedings.

¹⁹ *Decision on Request for Arrest Warrants and Transfer Orders*, KSC-BC-2023-10, Pre-Trial Judge, 2 October 2023 at para.20

33. The allegation that he faces is of a different nature, namely that the Accused, together with his co-perpetrators Ismet Bahtjari (who is not detained) and Haxhi Shala (who is not detained) threatened the alleged victim to withdraw his statement.
34. Further, there are no specific circumstances which indicate that the Accused will obstruct the progress of *the* criminal proceedings (i.e. the proceedings that he faces), by influencing witnesses, victims or accomplices. The Accused has cooperated, without fault, with the investigation into his conduct in April 2023 (which is said to amount to an interference with criminal proceedings faced by others).
35. Accordingly, it is submitted in the circumstances that there are no articulable grounds to believe that the Accused *will* destroy, hide, change or forge evidence of a crime or specific circumstances indicate he will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices.
36. Any residual concern can, in any event, be properly addressed by attaching the following condition to interim release:
- (a) not to contact directly or indirectly Witness 1, Ismet Bahtjari or Haxhi Shala.
37. It is observed that, whilst Ismet Bahtjari is detained, Haxhi Shala has not been arrested. Such concerns as there are which arise out of the alleged 'joint endeavour to dissuade Witness 1 from testifying'²⁰ have not required the detention of the co-perpetrator Haxhi Shala and they do not require the detention of the Accused.

²⁰ Confidential Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2023-10/F00008/CONF/RED, Pre-Trial Judge, 2 October 2023 at para.113

VI. ARTICLE 41(6)(b)(iii) – RISK THAT HE WILL REPEAT THE CRIMINAL OFFENCE, COMPLETE AN ATTEMPTED CRIME OR COMMIT A CRIME WHICH HE HAS THREATENED TO COMMIT

38. None of the following specified factors in Article 41(6)(b)(iii) are relevant to establishing any sufficient risk:

- (a) The seriousness of the crime,
- (b) The Accused's personal circumstances,
- (c) The Accused's past conduct, or
- (d) The environment and conditions in which the Accused lives or other personal circumstances.

39. While for the purposes of issuing the arrest warrant, the Pre-Trial Judge considered that the Accused had the means and the intent to exert pressure on Witness 1 in order to dissuade him from further participating as an SPO witness²¹, it is noted that Witness 1 completed the Witness Identification Form in anticipation of his travel to give evidence at the Hague as long ago as 26 May 2023²². The SPO has refused, without explanation, to confirm whether or not Witness 1 was given evidence at trial in advance of the timetable to submit the present filing, and in those circumstances, these submissions proceed on the assumption that Witness 1 has indeed appeared before the trial panel in case KSC-BC-2020, given his evidence and his evidence has concluded²³.

40. With Witness 1 having completed his evidence before the KSC, there is no

²¹ *Decision on Request for Arrest Warrants and Transfer Orders*, KSC-BC-2023-10, Pre-Trial Judge, 2 October 2023 at para.21

²² ERN 113434 RED page 1

²³ The right to revise/amend these submissions is reserved if this assumption is incorrect

incentive for, or risk of, the Accused repeating the alleged criminal offence, completing the attempted crime or committing any crime which he has threatened to commit, when the allegation he faced was specific to dissuading Witness 1 from giving evidence.

41. It is not sufficient for Article 41(6)(b)(iii) to find a general risk of committing further offences, or even a general risk of obstructing the progress of criminal proceedings. Article 41(6)(b)(iii) requires there to be a specific risk of repeating *the* criminal offence (in this case, intimidation and obstruction directed towards Witness 1), completing an attempted crime (in this case, intimidation and obstruction directed towards Witness 1) or committing a crime which he has threatened to commit (in this case, the only threat alleged is towards Witness 1).

42. Further, the “close co-ordination” between Haxhi Shala, the Accused and Ismet Bahtjari in relation to their approaches to Witness 1, which the Pre-Trial Judge found for the purposes of issuing the arrest warrant “was indicative of the Accused’s persistence in intimidation and obstruction efforts in the context of SC proceedings”, has not required the detention of Haxhi Shala and it does not require the detention of the Accused.

43. Any residual concern can, in any event, be properly addressed by attaching the following condition to interim release:

(a) not to contact directly or indirectly Witness 1, Ismet Bahtjari or Haxhi Shala.

44. In the event that the Panel requires still further assurances, the Accused will abide by any conditions imposed, including any geographical restriction on his movement within Kosovo or areas thereof. The President has recently imposed

the following conditions on early release²⁴ and the Pre-Trial Judge is invited to consider the same:

- (a) Refraining from any contact or communication with (potential) witnesses or victims before the Specialist Chambers and SPO;
- (b) Refraining from making any direct or indirect public statements about the Specialist Chambers and SPO;
- (c) Abiding by any decision or order of the Specialist Chambers; and
- (d) Refraining from making negative, violent, intimidating, threatening or coercive comments towards or about (potential) witnesses or other persons who are at risk on the account of their cooperation with the Specialist Chambers, officials of the Specialist Chambers or the SPO.

VII. ARTICLE 41(12) MEASURES AND PROPORTIONALITY

45. Even where the criteria in Article 41(6) are made out, any deprivation of liberty ordered for the purpose of bringing a person to trial, must be a proportionate measure²⁵.

46. The present allegations feature a single alleged victim, Witness 1. No harm or injury is alleged to have been caused to Witness 1 or anyone related to him. No actual impediment to the SPO investigations has been demonstrated. No act has

²⁴ *Decision on Commutation, Modification or Alteration of Sentence with Confidential and Ex Parte Annexes*, KSC-SC-2023-01/CS001/F00002, President, 12 October 2023 at paragraph 68

²⁵ *Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary 17 March 2017 to the Specialist Chamber of the Constitutional Court pursuant to Article 19(5) of the Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office*, KSC-CC-PR-2017-01/F00004, Chamber of the Constitutional Court, 26 April 2017 at para.113

been identified which has prevented, hindered or delayed the SC/SPO from performing its work. It has not been demonstrated that the SPO has been prevented from or delayed in carrying out its regular investigative functions²⁶.

47. There are more lenient measures than detention in Scheveningen Prison at the Hague, which are provided for in Article 41 of the Law and meet the same stated aim (namely to ensure the presence of the accused during proceedings, to prevent reoffending and/or to ensure successful conduct of criminal proceedings), which are more proportionately aligned with the alleged offending in the present case.

48. Those more lenient measures include, where detention is warranted, house detention in Kosovo. If the Panel, despite the submissions of the Accused, considers that the conditions for detention in Article 41(6) are met and rejects conditional release, then it is submitted that the Panel should order house detention in Kosovo pursuant to Article 41(12)(d) of the Law as a proportionate measure in the particular circumstances of this case.

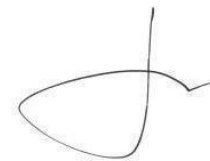
VIII. CONCLUSION

49. For the reasons set out above, the Panel should:

- (a) release the Accused pending trial without conditions; or otherwise
- (b) release the Accused pending trial on such conditions as are appropriate; or otherwise
- (c) order house detention of the Accused in Kosovo pursuant to Article 41(12)(d).

Word count: 3754 words

²⁶ *Confidential Redacted Version of the Decision on the Confirmation of the Indictment*, KSC-BC-2023-10/F00008/CONF/RED, Pre-Trial Judge, 2 October 2023 at para.113



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