

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: 22 December 2023

Language: English

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Public redacted version of
“Kilaj Reply to Prosecution Submissions on Review of Detention”

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 submissions on review of detention¹ pursuant to Article 41(6) and (10) of the Law,² Rule 57 of the Rules,³ and the Single Judge’s order.⁴ The SPO Submissions are a response to the Defence’s submissions on the review of Mr Kilaj’s detention.⁵ This Reply addresses new issues arising from the Response.⁶
2. The procedural history is set out in the Defence Submissions and SPO Submissions, and are incorporated by reference.

II. SUBMISSIONS

3. The Defence Submissions focussed on the issue of whether measures other than detention would sufficiently reduce the risk of the Article 41(6)(b) factors occurring,⁷ and proposed a robust suite of measures, arguing that these measures sufficiently reduce the risk of the Article 41(6)(b) factors occurring.⁸ It was made clear that those submissions were made without prejudice to the Defence’s position that: (i) there is no sufficient basis to conclude that there is

¹ Prosecution submissions on review of detention, KSC-BC-2018-01/F00538, 15 December 2023, confidential (“SPO Submissions”).

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 Rules of Procedure and Evidence Before the Kosovo Specialist Chamber (“Rules”). Unless otherwise indicated, all references to “Rule(s)” are to the Rules.

⁴ Reasons for Continued Detention, KSC-BC-2018-01/F00503, 9 November 2023 (“Reasons”), para. 66(a).

⁵ Kilaj Submissions on Review of Detention, KSC-BC-2018-01/F00524, 6 December 2023, confidential (“Defence Submissions”).

⁶ Rule 76.

⁷ Defence Submissions, para. 5.

⁸ Defence Submissions, para. 6.

a grounded suspicion that Mr Kilaj has committed a crime within the jurisdiction of the KSC; and (ii) there are no articulable grounds to believe that Mr Kilaj represents a flight risk, or will obstruct the progress of any criminal proceedings, or will commit any offences.⁹

4. The Prosecution nevertheless submits that the grounded suspicion that Mr Kilaj has committed a crime within the jurisdiction of the KSC has strengthened¹⁰ and that this fact increases the risks of flight,¹¹ obstruction of proceedings,¹² and commission of offences.¹³
5. The SPO wants its cake and eat it.¹⁴ It is submitted that there is a fundamental tension, and unfairness, in the Prosecution's position: in the very early stages of the investigation, it is suggested that Mr Kilaj must remain in detention "while investigations are actively being conducted in his case"¹⁵ to prevent him from engaging in obstruction of justice. It then suits the SPO to drip-feed evidence to the Defence that it contends supports its case, thereby permitting it to argue that Mr Kilaj's knowledge of the purported strength of the Prosecution case is a factor that increases his alleged incentive to obstruct the progress of criminal proceedings.
6. If the Prosecution's approach had any merit, there would never be the slightest chance of anyone in KSC detention ever qualifying for provisional release. Any suspect unfortunate enough to attract the attention of the SPO and arrested would be damned at every stage of proceedings, albeit damned

⁹ Defence Submissions, para. 6.

¹⁰ SPO Submissions, paras 11-15.

¹¹ SPO Submissions, paras 16-17

¹² SPO Submissions, paras 18-20.

¹³ SPO Submissions, para. 21.

¹⁴ "Vouloir le beurre et l'argent du beurre;" "Të hysh në ujë e të mos lagesh."

¹⁵ Prosecution reply to F00497, KSC-BC-2018-01/F00498, 5 November 2023, confidential, para. 6.

for shifting reasons. That cannot be right. The Prosecution's approach does not have merit. It is unfair and utterly neglects the important principle that any analysis of pre-trial detention is undertaken in the context of the detained person's presumption of innocence.¹⁶ That principle must be all the more closely hewed to when the detained person is not even the subject of an indictment, let alone an indictment that has been confirmed.

7. The Prosecution persist in suggesting that *no* modalities of conditional release are sufficient to mitigate risk. It is submitted that this represents nothing more than a closed-minded and dogmatic attitude that Kosovan suspects must remain locked up, irrespective of the individual merits of each case. This is best illustrated by the suggestion that "no combination of release conditions...could sufficiently, *and to a degree comparable to that of detention at the KSC detention facilities* mitigate the existing risk with respect to Kilaj."¹⁷ It is a point so obvious that it hardly needs to be made that caging a suspect is the apex solution when considering mitigation of any purported risks. However, pre-trial detention must be a solution of last resort, not the default position. The question of risk must be approached with discernment and discrimination.
8. In the instant case, the SPO simply falls back on its default and facile argument regarding a "well-recognised climate of witness intimidation in Kosovo".¹⁸ The SPO does not attempt to hide that its approach involves no discernment and no discrimination: in essence, a Kosovan suspect – and a former ranking KLA member at that – can and must be tarred with the same brush as everyone else associated with KLA. Once again, this simply cannot be right.

¹⁶ Reasons, para. 21.

¹⁷ SPO Submissions, para. 23 (italics added).

¹⁸ SPO Submissions, para. 24.

9. At paragraph 27, the SPO avers that the proposed conditions cannot be effectively monitored and enforced. This is incorrect. The Defence proposed in terms that in addition, or as an alternative, to electronic monitoring by use of an ankle tag, the Single Judge could order that regular and unannounced visits by either the Kosovo Police *and/or members of the SPO* be carried out to monitor Mr Kilaj's compliance.¹⁹
10. Firstly, the suggestion that monitoring compliance with these proposed conditions would be ineffective because of vague assertions that "corruption continues to affect the criminal justice sector in Kosovo"²⁰ lacks any merit to the point at issue. The SPO cited to a finding of the Single Judge in a decision on review of detention of Hashim Thaçi dating back two years.²¹ The case law supporting the factual contention is far from contemporaneous. Moreover, the evidence supporting the Single Judge's finding is older still.²²
11. Paragraph 30 of the UN Report – which is over three years old – reported criticisms made of the prosecution service in Kosovo relating to its handling of cases involving allegations of high-level corruption and organised crime. The criticisms were not related to the actions of police monitoring defendants' bail conditions, or to police corruption in that regard. In any event, the UN

¹⁹ Defence Submissions, para. 14.

²⁰ SPO Submissions, para. 26.

²¹ Public Redacted Version of Decision on Review of Detention of Hashim Thaçi, KSC-BC-2020-06/F00624/RED, 14 December 2021 ("Thaçi Decision").

²² Thaçi Decision, footnote 145: United Nations Interim Administration Mission in Kosovo, *Report of the Secretary-General*, UN Doc. S/2020/964, 1 October 2020 ("UN Report": https://unmik.unmissions.org/sites/default/files/s_2020_964_e.pdf), para. 30; European Union Rule of Law Mission, *Justice Monitoring Report*, October 2020 ("EU Report": https://www.eulex-kosovo.eu/eul/repository/docs/19102020_EU%20Rule%20of%20Law%20Mission%20Justice%20_EN.pdf), p. 21; European Commission, *Kosovo Report 2021*, 19 October 2021 ("EC Report": https://neighbourhood-enlargement.ec.europa.eu/system/files/2021_10/Kosovo%202021%20report.PDF) pp 23, 25.

Report referred to the willingness of the prosecution in Kosovo to tackle police corruption: “An indictment was also filed on 23 April [2020] against five Kosovo police officers on charges of organized crime, abuse of official position or authority, and smuggling of goods.” It was further noted in Annex 1 to the UN Report that: “The Mission continued to support the Kosovo police in the field of international police cooperation at different levels.”

12. Similarly, page 21 of the EU Report – which is also over three years old – reported criticisms of Kosovan courts either acquitting or passing short sentences in cases involving corruption, and of the prosecuting authorities failing to prosecute high-profile officials adequately or at all. There was a single report of a police officer being prosecuted (and convicted and sentenced) for “trading in influence”. The criticisms were not related to the actions of police monitoring defendants’ bail conditions, or to police corruption in that regard.
13. Pages 23 and 25 of the EC Report also appear to refer to inadequacies in the prosecution or corruption cases. No criticisms relate to the actions of police monitoring defendants’ bail conditions.
14. Secondly, the Prosecution ignores the provisions of Article 53 of the Law relating to co-operation and judicial assistance. Specifically, Article 53(2) provides:

An order by the Specialist Chambers shall have the same force and effect as an order issued by any other Kosovo court or judge. Every natural person, corporation, authority or other entity in Kosovo shall comply with any order, decision or request issued by the Specialist Chambers. Any entity or person executing an order of the Specialist Chambers shall comply with any direction specified in that order.

15. The Prosecution has pointed to no evidence that the Kosovan police would be unwilling or unable to effectively monitor and enforce the proposed conditions attached to Mr Kilaj's provisional release. Nor has the Prosecution adduced any evidence to suggest that Article 53(2) would not be fully respected by the Kosovan police in practice. The presumption must be that the provision would be abided by, and it is for the SPO to displace that presumption. It has not.

16. To the extent that there may be a risk – which suggestion is wholly rejected – that Mr Kilaj might seek to corruptly influence anyone tasked with monitoring his compliance with conditions of house arrest, the alternative solution of placing that duty in the hands of the SPO completely removes that risk. And the fact that any visits to his Prishtina home would be unannounced would provide him with a serious disincentive to breach the condition. The Prosecution fails to address the proposal that the SPO itself could be involved in such monitoring.

17. At paragraph 28, the SPO avers that monitoring and enforcing any limitation of communications is impossible. Once again, this is incorrect insofar as enforcing limitation of communications is possible. The Prosecution entirely fails to address the proposal that a security of €30,000 be paid into Court in order to ensure not only that Mr Kilaj remain in the jurisdiction, but also to provide a guarantee that he not [REDACTED] or in any other way interfere with investigations. The SPO does not explain how or why the paying in of such a significant amount of money over which the KSC itself, and not the Kosovan authorities, would have control would not adequately mitigate the risks that it suggests are present. The Defence reiterates that the risk of forfeiting such a sum is a powerful incentive to Mr Kilaj to abide by all

conditions attached to his provisional release and thus an effective and realistic means of enforcing limitation of communication.

18. Finally, when considering the question of proportionality,²³ the Single Judge is respectfully urged to remind himself that the question of the relative seriousness of the allegations formulated against Mr Kilaj cannot be discounted. In its Submissions, the SPO did not seek to contradict the Defence's argument that there was no suggestion that violence was ever used or threatened by Mr Kilaj. The Prosecution did not contradict the submission that there was no evidence that [REDACTED] by Mr Kilaj, whether directly or indirectly. Nor did the Prosecution refute the contention that the fact that there is no evidence Mr Kilaj [REDACTED], whether directly or indirectly, during the period between [REDACTED] and 2 November 2023 when he had the time and every opportunity to do so had that been his intention, is a relevant factor to take into account when assessing the question of risk posed by him.
19. The Defence concludes by noting that, whilst the SPO avers that the filing of an indictment is imminent,²⁴ no further details of what is meant by "imminent" are given. This is yet another example of the Prosecution engaging in vague and nebulous advocacy to which the Single Judge is respectfully invited to attach little weight.
20. For the foregoing reasons, the Defence respectfully reiterates its request that Mr Kilaj be released immediately with the conditions proposed, and any other conditions the Single Judge might consider appropriate.

²³ SPO Submissions, para. 31.

²⁴ SPO Submissions, para. 31.

Word count: 2,006

A handwritten signature in blue ink, appearing to read 'I. Edwards', written in a cursive style.

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Friday, 22 December 2023

Abidjan, Côte d'Ivoire