



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

**In:** KSC-BC-2018-01/IA004

**Before:** **Court of Appeals Panel**  
Judge Michèle Picard  
Judge Emilio Gatti  
Judge Nina Jørgensen

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 1 December 2023

**Language:** English

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**Public redacted version of 'Prosecution response to Defence appeal against  
decision on continued detention'**

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## I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law<sup>1</sup> and Rules 77(2) and 170(2) of the Rules,<sup>2</sup> the Specialist Prosecutor's Office ('SPO') hereby responds to Mr Isni Kilaj's ('Kilaj') Appeal<sup>3</sup> of the Decision ordering his continued detention.<sup>4</sup> The Appeal fails to demonstrate any error in the Decision. To the contrary, Kilaj (a) reargues the same factual contentions that failed to persuade the Single Judge in the first instance and (b) improperly seeks to recast as legal error his disagreement with the Single Judge's factual conclusions. Kilaj has demonstrated no reversible legal error. Accordingly, the Panel should uphold the Single Judge's decision and dismiss the Appeal in its entirety.

## II. PROCEDURAL HISTORY<sup>5</sup>

2. On 2 November 2023, the SPO (a) executed a judicially-authorized search and seizure at Kilaj's residence in Kosovo, (b) conducted a voluntary interview with Kilaj, and (c) arrested Kilaj pursuant to an arrest order issued by the Specialist Prosecutor.

3. On 6 November 2023, the Single Judge issued the Decision ordering Kilaj's continued detention, and indicated that the reasons underlying the decision would be provided subsequently.

4. On 9 November 2023, the Single Judge issued the reasons for further detention finding, *inter alia*, grounded suspicion that certain material seized from Kilaj's residence immediately before his arrest was 'either intended or actually used for the

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<sup>1</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law unless otherwise noted.

<sup>2</sup> KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules unless otherwise noted.

<sup>3</sup> Kilaj Appeal Against Decision on Continued Detention, KSC-BC-2018-01/IA004/F00001, 20 November 2023, Confidential ('Appeal').

<sup>4</sup> Decision on Continued Detention, KSC-BC-2018-01/F00499, 6 November 2023 ('Initial Decision') and Reasons for Continued Detention, KSC-BC-2018-01/F00503, 9 November 2023, Confidential ('Reasons') (collectively with the Initial Decision, 'Decision').

<sup>5</sup> See also Initial Decision, KSC-BC-2018-01/IA004/F00001, paras 1-7.

purpose of interfering with the administration of justice, and that Kilaj may have been involved in the commission of an offence under Article 15(2) of the Law.<sup>6</sup> The Single Judge further found articulable grounds to believe that there is a risk that Kilaj may flee, obstruct the progress of the criminal proceedings, and commit further offences, thereby necessitating Kilaj's continued detention in accordance with Article 41(6)(b).<sup>7</sup>

5. On 20 November 2023, Kilaj filed the Appeal challenging the Single Judge's decision.

### III. STANDARD OF REVIEW & APPLICABLE LAW

6. Articles 41(1) and (6) of the Law provide:

1. No one shall be deprived of his or her liberty by or on behalf of the Specialist Chambers or Specialist Prosecutor, save in such circumstances and in accordance with such proceedings as are prescribed by this Law and the protections enshrined in Article 29 of the Constitution.

[...]

6. The Specialist Chambers or the Specialist Prosecutor shall only order the arrest and detention of a person when:

a. there is a grounded suspicion that he or she 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 or she will destroy, hide, change or forge evidence of a crime or specific circumstances indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices; or

iii. the seriousness of the crime, or the manner or circumstances in which it was committed and his or her personal characteristics, past conduct, the environment and conditions in which he or she lives or other personal circumstances indicate a risk that he or she will repeat the criminal offence, complete an attempted crime or commit a crime which he or she has threatened to commit.

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<sup>6</sup> Reasons, KSC-BC-2018-01/F00503, para.32.

<sup>7</sup> Reasons, KSC-BC-2018-01/F00503, para.54.

7. The standard of review applied to interlocutory appeals is the same as that for appeals against judgements: errors on a question of law must be shown to invalidate the judgment.<sup>8</sup> Thus, 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.<sup>9</sup>

8. Where a discretionary decision – such as one on pre-trial detention or provisional release<sup>10</sup> - is appealed, the appellant ‘must demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.’<sup>11</sup> The Appeals Panel will also consider whether the lower level panel has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.<sup>12</sup>

9. Finally, as the Appeals Chamber has previously held, ‘[a]n appellant’s mere disagreement with the conclusions that the first instance Panel drew from the available facts or the weight it accorded to particular factors is not enough to establish a clear error.’<sup>13</sup>

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<sup>8</sup> See *Specialist Prosecutor v. Thaçi et al.*, Decision on Hashim Thaçi’s Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA004/F00005/RED, 30 April 2021, paras 4-7.

<sup>9</sup> *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020 (‘Gucati Detention Appeal Decision’), para.12.

<sup>10</sup> Gucati Detention Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.44.

<sup>11</sup> Gucati Detention Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.14.

<sup>12</sup> Gucati Detention Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.14.

<sup>13</sup> Gucati Detention Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.64.

#### IV. SUBMISSIONS

10. The Decision complies with all applicable law. Kilaj has not – and indeed cannot – meet the legal requirements to reverse the Single Judge’s decision. The Appeal should thus be dismissed.

##### A. THE SINGLE JUDGE MADE NO LEGAL ERROR IN FINDING A GROUNDED SUSPICION

11. In his first ‘sub-ground’ for relief, Kilaj claims that the Single Judge erred by not crediting Kilaj’s claim regarding provenance of the SPO witness-related material seized at Kilaj’s residence immediately prior to his arrest (‘Seized Material’), and in doing so violated the presumption of innocence.<sup>14</sup>

12. These submissions misconstrue the Decision and the assessment required. In fact, the Single Judge specifically emphasised that any analysis of pre-trial detention is undertaken in the context of the detained person’s presumption of innocence, and that the SPO bears the burden of establishing that Kilaj’s detention is necessary.<sup>15</sup> The Single Judge correctly found that the SPO had met this burden in, *inter alia*, providing concrete evidence that Kilaj had in his possession confidential witness-related materials, for which Kilaj was not authorised to have access. Moreover, the Single Judge noted additional relevant context, including the fact that Kilaj [REDACTED].<sup>16</sup> Contrary to the Defence’s contention,<sup>17</sup> the Single Judge specifically noted, considered and addressed Defence submissions.<sup>18</sup> However, in the face of the evidence presented by the SPO, the Single Judge was not required to credit the bare, generic and unsupported assertions of Kilaj. Determining the relative merits of relevant materials and submissions placed him is the responsibility of the Single Judge. Doing so - or noting an absence of contrary evidence - does not constitute a shifting of burdens or a

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<sup>14</sup> Appeal, KSC-BC-2018-01/IA004/F00001, paras 9-13.

<sup>15</sup> Reasons, KSC-BC-2018-01/F00503, para.21.

<sup>16</sup> Reasons, KSC-BC-2018-01/F00503, para.28.

<sup>17</sup> Appeal, KSC-BC-2018-01/IA004/F00001, para.11.

<sup>18</sup> Reasons, KSC-BC-2018-01/F00503, paras 25-26.

violation of the presumption of innocence. Kilaj does not demonstrate error, he simply disagrees with the Single Judge's conclusions.

13. The second sub-ground presented by Kilaj is closely related to his first sub-ground. Kilaj contends that the alleged error under the first sub-ground 'directly led' to the Single Judge allegedly wrongly concluding that the acts of other persons must have been required.<sup>19</sup> As noted above, the Single Judge did not err in his assessment under the first sub-ground, which was concretely ground, and consequently also made no error in the logical and reasonable conclusion reached under the second sub-ground.

14. Under sub-ground 3, Kilaj argues that the Single Judge erred by 'failing to apply the correct standard of proof'<sup>20</sup> and that this failure led the Single Judge to erroneously find grounded suspicion that Kilaj committed a criminal offence.<sup>21</sup>

15. Kilaj's arguments are misplaced. In fact, the Single Judge both set out and applied the correct standard. In particular, the Single Judge exhaustively detailed the applicable legal requirements for deciding on continued detention as: (i) 'grounded suspicion that the person committed the offence(s)' and (ii) 'articulable grounds to believe that any of the requirements set out in Article 41(6)(b) of the Law have been fulfilled.'<sup>22</sup> The Single (correctly) identified grounded suspicion that the person has committed a crime as the *sine qua non* for continued detention and properly defined grounded suspicion.<sup>23</sup>

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<sup>19</sup> Appeal, KSC-BC-2018-01/IA004/F00001, paras 12-13.

<sup>20</sup> Appeal, KSC-BC-2018-01/IA004/F00001, para.14.

<sup>21</sup> Appeal, KSC-BC-2018-01/IA004/F00001, para.16.

<sup>22</sup> Reasons, KSC-BC-2018-01/F00503, para.19.

<sup>23</sup> Reasons, KSC-BC-2018-01/F00503, para.22 (quoting *Public Redacted Version of Decision on Pjetër Shala's Request for Provisional Release*, KSC-BC-2020-04, F00045/RED, 23 June 2021, para.13).

16. In attempting to demonstrate error, Kilaj selectively quotes from the Single Judge's reasoning.<sup>24</sup> The paragraphs quoted do not support his contention. On the contrary, the Single Judge's finding that a certain intention (i.e., not to disseminate materials) cannot be excluded<sup>25</sup> is entirely consistent with the applicable standard, which does not require certainty but rather a 'more likely than not assessment.' Equally, the grounded suspicion standard does not apply to individual pieces of evidence or elements of specific crimes,<sup>26</sup> but rather the overall conclusion based on a global assessment of multiple relevant factors. The Single Judge clearly set out and explained the factors<sup>27</sup> leading to his correct finding that a grounded suspicion had been demonstrated in this case.

#### B. THE SINGLE JUDGE DID NOT ERR IN FINDING DETENTION NECESSARY

17. Kilaj next claims that the Single Judge committed a legal error in finding that Kilaj poses a risk of flight, obstruction, or of committing further crimes.<sup>28</sup> Given that, as Kilaj himself acknowledges, the Single Judge identified and set out in detail the correct standard of proof,<sup>29</sup> 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.

18. In fact, the Single Judge applied the applicable standard and engaged in a highly detailed, factor-by-factor factual analysis detailing his ultimate conclusion that Kilaj posed a moderate risk of flight and as well as a risk that Kilaj 'will repeat the

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<sup>24</sup> Appeal, KSC-BC-2018-01/IA004/F00001, paras 14-16.

<sup>25</sup> Appeal, KSC-BC-2018-01/IA004/F00001, para.16.

<sup>26</sup> Contra. Appeal, KSC-BC-2018-01/IA004/F00001, paras 14-15 (where the selective portions of the Reasoning quoted come from such intermediary analysis).

<sup>27</sup> Reasons, KSC-BC-2018-01/F00503, paras 22-31.

<sup>28</sup> Appeal, KSC-BC-2018-01/IA004/F00001, paras 17-22.

<sup>29</sup> Reasons, KSC-BC-2018-01/F00503, paras 33-35.

offences alleged to have been committed by him' and commit future offences, such that continued detention is necessary.<sup>30</sup>

19. Kilaj's disagreement with the Single Judge's detailed application of the correct legal standard to the facts before him does not create grounds for an appeal, let alone meet the standard required for reversal of the detention decision.

20. Moreover, Kilaj's claim that the Single Judge improperly based his detention decision on 'nothing greater than possibility of a risk materialising' is without merit and contracted by the Single Judge's reasoning.<sup>31</sup> The SPO recalls that in 'determining the necessity of detention, the question revolves around the possibility, not the inevitability of a future occurrence.'<sup>32</sup> The SPO is mindful that, as this Chamber has previously held, '[i]t does not follow, however, that *any* possibility of a risk materializing is sufficient to justify detention.' Thus, as the Appeals Panel has stated:<sup>33</sup>

As part of the protection against arbitrariness, the Panel highlights the importance of specific reasoning and concrete grounds which are required to be relied upon by the Pre-Trial Judge in his decisions authorising detention on remand. The Panel therefore finds that the standard to be applied is, on the one hand, less than certainty, but, on the other, more than a mere possibility of a risk materialising.

21. As is evident from the Decision and the reasons issued in support of it, the Single Judge engaged in precisely the type of 'specific reasoning' and detailed 'concrete grounds' to support his finding of the risks posed by Kilaj that necessitate his detention.

22. In summary, the Single Judge applied the correct legal standard and did not err in finding that Kilaj's continued detention is necessary.

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<sup>30</sup> Reasons, KSC-BC-2018-01/F00503, paras 36-53.

<sup>31</sup> Appeal, KSC-BC-2018-01/IA004/F00001, paras 19-20.

<sup>32</sup> *Specialist Prosecutor v. Thaçi et al.*, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA001/F00005, 30 April 2021 ('Veseli Detention Decision'), para.17.

<sup>33</sup> Veseli Detention Decision, KSC-BC-2020-06/IA001/F00005, para.17.



## V. CLASSIFICATION

23. This filing is confidential pursuant to Rule 82(4) of the Rules. The SPO does not object to its reclassification as public.

## VI. RELIEF REQUESTED

24. For the foregoing reasons, the SPO respectfully requests that the Appeals Panel dismiss the Appeal in its entirety.

**Word count: 2,154**



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**Kimberly P. West**

**Specialist Prosecutor**

Friday, 1 December 2023

At The Hague, the Netherlands.