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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 Review of Detention of Isni Kilaj"

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 on review of detention in which he ordered *inter alia* 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]

4. On 6 November 2023, the Single Judge rendered his Decision on Continued Detention, [6] with reasons following on 9 November 2023.[7]

[1] Decision on Review of Detention of Isni Kilaj, KSC-BC-2018-01/F00547, 5 January 2024, notified on 8 January 2024. A public redacted version was filed on 18 January 2024.
[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] Decision on Continued Detention, KSC-BC-2018-01/F00499, 6 November 2023.
[7] Reasons for Continued Detention, KSC-BC-2018-01/F00503, 9 November 2023. A public redacted version was filed on 13 November 2023.

5. On 7 December 2023, the Defence filed submissions on review of Mr Kilaj's detention ("Defence Submissons").[8] The SPO filed its submissions on review of detention on 15 December 2023 ("SPO Submissions"),[9] and the Defence filed its reply on 22 December 2023 ("Defence Reply").[10]

II. RIGHT OF APPEAL AGAINST DECISION RELATING TO DETENTION

6. Article 45(2) of the Law[11] provides that interlocutory appeals shall lie as of right 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.

7. 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.[12]

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[8] Kilaj Submissions on Review of Detention, KSC-BC-2018-01/F00524, 6 December 2023, confidential with confidential Annexes 1-3. The filing is dated 6 December 2023. A public further redacted version was filed on 18 January 2024.
[9] Prosecution Submissions on Review of Detention, KSC-BC-2018-01/F00538, 15 December 2023, confidential with confidential Annexes 1-2. A public redacted version was filed on 11 January 2024.
[10] Kilaj Reply to Prosecution Submissions on Review of Detention, KSC-BC-2018-01/F00544, 22 December 2023, confidential. A public redacted version was filed on 11 January 2024.
[11] 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.
[12] 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 (footnotes omitted).

8. Regarding challenges to a decision that is, as in the instant case, a discretionary decision, the Court of Appeals Panel has held that:

> a party 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. The Court of 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.[13]

9. The Defence submits that the Impugned Decision should be reversed on the grounds that the Single Judge erred in law in finding that the sum of €30,000 proposed by Mr Kilaj by way of a recognisance (referred to as "bail" in the Impugned Decision) can only be taken into consideration as a factor mitigating the risk of flight, but not the risks of obstructing the proceedings or committing further offences (together, "Risks").[14] Further or in the alternative the Single Judge failed to give weight to relevant considerations that the sum of €30,000 proposed by Mr Kilaj by way of a recognisance significantly overcomes the challenges associated with the Risks.[15] For the reasons set out below, these errors are sufficiently egregious so as to invalidate the Impugned Decision. Had they not been made, the outcome of the Impugned Decision would inevitably have been different in that the recognisance of €30,000 would have been acknowledged as a valid and adequate factor mitigating the Risks, tilting the balance in favour of Mr Kilaj's conditional release, as was the case regarding the mitigation of the risk of flight.[16] Inevitably, Mr Kilaj's continued detention would not have been ordered.

[13] Gucati Appeal Decision, para. 14 (footnotes omitted).
[14] Impugned Decision, para. 65.
[15] Impugned Decision, para. 65.
[16] Impugned Decision, para. 62.

III. GROUNDS OF APPEAL

A. THE SINGLE JUDGE ERRED IN LAW IN FINDING THAT DEPOSITING A RECOGNISANCE CANNOT MITIGATE THE RISKS

10. The Defence submitted that Mr Kilaj was prepared to deposit €30,000 with the Court by way of a personal recognisance in order to both mitigate the risk of flight *and* the risks of obstructing the proceedings or committing further offences.[17] It was made clear that the prospect of losing what amounts to "a huge sum of money to Mr Kilaj and his family […] [REDACTED]"[18] acts as a significant disincentive to flee,[19] but also as a significant disincentive for Mr Kilaj to [REDACTED] or otherwise obstruct the proceedings, or commit any offence.[20]

11. Whereas the Single Judge found – correctly – that the €30,000 recognisance, together with the other measures proposed by the Defence, were now adequate to mitigate Mr Kilaj's risk of flight,[21] he failed to make a similar finding regarding the Risks. In so doing, it is submitted that he erred in law in unreasonably distinguishing between the disincentivising effect of the prospect of the recognisance being forfeited in the event he absconds, and the same disincentivising effect of the prospect of the recognisance being forfeited in the event he interferes with the proceedings or commits further offences.

12. The Single Judge reasoned that "the guarantee of bail is in principle designed to ensure not the reparation of loss, but the presence of the Accused at trial."

[17] Defence Submissions, paras 18 and 25.
[18] Defence Submissions, para. 18.
[19] Defence Submissions, para. 19.
[20] Defence Submissions, para. 26.
[21] Impugned Decision, para. 62.

This was the sole basis for his holding that a distinction could and should be made between the paying in of a personal recognisance to mitigate, on the one hand, the risk of flight, and on the other hand, the Risks.

13. The Single Judge cited a single decision from the European Court of Human Rights ("ECtHR") in support of his reasoning, that of *Gafà v. Malta.*[22] However, the Single Judge misapprehended the relevance of paragraph 70 of *Gafà.* The ECtHR did not find that the depositing of a recognisance could, as a matter of principle, only mitigate the risk of absconding and could never mitigate any other risks that would otherwise justify maintaining a suspect in pre-trial detention. The ECtHR certainly did not exclude the possibility or appropriateness of paying in a personally significant recognisance in order to guarantee against interference with proceedings or the commission of further offences. The ECtHR referred specifically to the principle of paying a security in order to guarantee future attendance at trial at paragraph 70 only because the Court was specifically considering the application of ECHR Article 5(3):

> 70. According to the Court's case-law, the guarantee provided for by Article 5 § 3 of the Convention is designed to ensure the presence of the accused at the hearing (see *Mangouras v. Spain* [GC], no. 12050/04, § 78, ECHR 2010). Therefore, the amount of bail must be set by reference to the detainee, his assets and his relationship with the persons who are to provide the security, in other words to the degree of confidence that is possible that the prospect of loss of the security or of action against the guarantors in case of his non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond (see *Neumeister v. Austria*, 27 June 1968, § 14, Series A no. 8).

14. ECHR Article 5(3) only addresses the possibility of release being conditioned by guarantees to appear for trial. Article 5 does not address conditions designed to mitigate other risks that may exist when accused persons are granted conditional release. But of course, conditions can be and are routinely imposed by courts to mitigate risks of Accused interfering with the course of

[22] No. 54335/14, Judgment, 22 May 2018, cited at footnote 143 of the Impugned Decision.

justice or committing further offences. No reasonable reading of paragraph 70 of *Gafà* permits of an interpretation that European human rights jurisprudence, or any other jurisprudence, excludes the possibility of a recognisance being paid into court to mitigate risks other than the risk of absconding.

15. Indeed, in the recitation of the background facts in the *Gafà* case itself, the ECtHR noted at paragraph 12, without criticism, that the Court of Magistrates in Malta eventually granted that applicant bail subject to a long list of conditions, including conditions that "he does not contact or approach, directly nor indirectly, witnesses for the prosecution; [and] that he does not commit a crime of a voluntary nature while released on bail." In addition, he was to "deposit by way of security the amount of 15,000 euros (EUR) in the court registry; and [was to] undertake a personal guarantee of EUR 25,000." Crucially, "[i]n the event of *any bail condition* being breached, the entire amount of EUR 40,000 would be forfeited in favour of the State."[23]

16. The decision in *Gafà* did not turn on whether it was or was not appropriate for any security or personal guarantee to be forfeited in the event bail conditions other than attending court were breached. Neither the applicant in *Gafà* nor the respondent State complained that there was anything wrong in the national court imposing as a condition of bail the forfeiture of the entire amount of security and guarantee in the event the applicant contacted or approached, directly or indirectly, witnesses for the prosecution, or committed a crime of a voluntary nature while released on bail.

[23] *Gafà v. Malta*, para. 12 (added emphasis).

17. In short, to the extent the Single Judge considered that *Gafà v. Malta* was authority for the proposition that the payment of a recognisance could not, in principle, mitigate the risk of interference with proceedings or the commission of further offences, he fell into error.

B. THE SINGLE JUDGE FAILED TO GIVE WEIGHT TO RELEVANT CONSIDERATIONS THAT THE SUM OF €30,000 SIGNIFICANTLY OVERCOMES THE CHALLENGES ASSOCIATED WITH THE RISKS

18. The Single Judge also erred in equating the forfeiting of the proposed recognisance with the "reparation of loss."[24] The Single Judge's reasoning is unclear. Mr Kilaj never advanced the proposition that the recognisance would be used for the reparation of loss, or to provide some sort of compensation in the event he interfered with the proceedings or committed offences. The recognisance was only ever designed to demonstrate concrete evidence of the Suspect's resolve that he would neither interfere with proceedings nor commit offences. The Single Judge failed to appreciate that it is the prospect of losing the recognisance that acts as the serious disincentive on Mr Kilaj's mind to interfere in proceedings or commit offences. It is the concurrent prospect of such an important sum of money being returned to Mr Kilaj and his family at the conclusion of these proceedings that acts as a serious incentive on his mind to comply with all the proposed conditions of provisional release strictly and to the letter. The Single Judge demonstrated no, or no adequate, appreciation of the gravamen of the Defence's submissions.

[24] Impugned Decision, para. 65.

19. Further, the Single Judge's conclusion at paragraph 65 of the Impugned Decision is unreasoned and unexplained:

> In the view of the Single Judge, while bail may adequately mitigate the risk of flight, it is not sufficient to address the risks of obstructing the proceedings and committing further offences. This is so because the bail of EUR 30,000 and Mr Kilaj´s apprehension to lose EUR 30,000, in case of breach of the conditions, would not overcome the challenges associated with the risk of obstruction and commission of further crimes, as described above.

20. Mr Kilaj's whole argument revolves around the fact that it is the very apprehension of losing the €30,000 that provides the mitigation overcoming the "challenges" of the Risks. The Single Judge merely states that it does not, without explaining *why* it does not. To be clear, the Defence is not simply complaining that the Single Judge provided inadequate reasons. The Defence submits that the finding is flawed on its face and that the Single Judge has provided no basis to explain why the finding might nevertheless be reasonable.

IV. CONCLUSION

21. For the foregoing reasons, it is submitted that, had the Single Judge not erred in his approach to the principle that depositing a personally significant amount of money into Court as a recognisance could mitigate the Risks, his findings in respect of the Defence Submissions would have been different. The Single Judge had accepted that a recognisance of €30,000 was a significant amount of money to Mr Kilaj and his family and that the prospect of losing it would act as adequate mitigation of the risk of Mr Kilaj absconding.

22. There is no principled basis to conclude that, had he applied the same reasoning regarding the paying in of a recognisance as a means of mitigating any risks of interfering with the proceedings, or committing offences, the

Single Judge would not have arrived at the same conclusion that the prospect of losing such a sum would create precisely the same incentive for Mr Kilaj to abide by all conditions of his provisional release, most relevantly, conditions that: (i) he not use any communication device (landline telephone, mobile telephone, email, text, fax machine) whether directly or indirectly, or whether himself or via another, other than to communicate with his counsel; (ii) he not access the internet in any way whatsoever, whether directly or indirectly, or whether himself or via another, other than to communicate with his counsel; and (iii) he not contact directly or indirectly [REDACTED]. All these conditions adequately meet the concern expressed by the Single Judge that Mr Kilaj might use a device belonging to a family member, or ask a family member to convey a message.[25] This is precisely why the terms "directly *or indirectly*" are included in the proposed conditions.

23. The Defence, therefore, respectfully requests that:

(i) a Panel of the Court of Appeals Chamber be appointed by the President of the Specialist Chamber without delay;

and

(ii) the appeal be allowed;

and

(iii) the Impugned Decision be reversed;

and

(iv) Mr Kilaj be released immediately subject to the proposed conditions.

[25] Impugned Decision, para. 63.

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