

In: KSC-BC-2018-01/IA005
Specialist Prosecutor *v.* Isni Kilaj

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

Registrar: Dr Fidelma Donlon

Filing Participant: Duty Counsel for Isni Kilaj

Date: 5 February 2024

Language: English

Classification: Public

Public redacted version of "Reply to Prosecution Response to
'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 replies to the Prosecution’s response¹ to his appeal² against the Single Judge’s decision on review of detention in which he ordered *inter alia* Mr Kilaj’s continued detention (“Impugned Decision”).³
2. On 3 November 2023, the Specialist Prosecutor’s Office (“SPO”) submitted a request for Mr Kilaj’s continued detention (“SPO Request”).⁴ The following day, Mr Kilaj had his First Appearance Hearing, during which the SPO and the Defence made submissions on the SPO Request.⁵
3. Later on 4 November 2023, the Defence filed its Response to the SPO Request, applying for Mr Kilaj’s immediate release (“Defence Response”).⁶ On 5 November, the SPO filed a Reply to the Defence Response (“SPO Reply”).⁷
4. On 6 November 2023, the Single Judge rendered his Decision on Continued Detention,⁸ with reasons following on 9 November 2023.⁹

¹ Prosecution response to ‘Kilaj Appeal Against Decision on Review of Detention of Isni Kilaj’, KSC-BC-2018-01/IA005/F00003, 30 January 2024, confidential (“Response”).

² Kilaj Appeal Against Decision on Review of Detention of Isni Kilaj, KSC-BC-2018-01/IA005/F00001, 18 January 2024, confidential (“Appeal”).

³ 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.

⁴ 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.

⁵ First Appearance Transcript, pp 171-184.

⁶ 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.

⁷ Prosecution Reply to F00497, KSC-BC-2018-01/F00498, 5 November 2023, confidential. A public redacted version was filed on 7 November 2023.

⁸ Decision on Continued Detention, KSC-BC-2018-01/F00499, 6 November 2023.

⁹ 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 Submissions").¹⁰ The SPO filed its submissions on review of detention on 15 December 2023 ("SPO Submissions"),¹¹ and the Defence filed its reply on 22 December 2023 ("Defence Reply").¹²
6. This Reply is filed pursuant to Article 45(2) of the Law,¹³ and Rules 58(1) and 170(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chamber as constituting part of an interlocutory appeal that lies as of right from decisions or orders relating to detention on remand. It addresses new issues arising from the Response.¹⁴

II. SUBMISSIONS

7. The Appeal does not misrepresent the Impugned Decision. The Single Judge's errors of law have been accurately identified and substantiated.
8. On the contrary, it is the Prosecution that misrepresents the Single Judge's findings at paragraph 65 of the Impugned Decision.¹⁵ The Single Judge went further than merely finding that, in the instant case, depositing the proposed cash security would not mitigate the purported risks of obstructing the

¹⁰ 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.

¹¹ 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.

¹² 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.

¹³ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ("Law"). All references to "Article" or "Articles" refer to articles of the Law unless otherwise stated.

¹⁴ Rule 76.

¹⁵ Response, paras 8-9.

proceedings and committing further offences. This finding comes in the sentence immediately following his erroneous conclusion that “the guarantee of bail” is designed for one thing (presence at trial) but not another (“reparation of loss”).¹⁶ The Defence did not misrepresent the Decision by complaining that the Single Judge drew a distinction between two purposes underpinning “the guarantee of bail”. This is precisely what the Single Judge did, and he did so with the support of no lawful basis.

9. Moreover, it will be noted that the Single Judge did not state that the *primary* purpose of cash bail is to ensure presence of bail, thereby leaving open some tacit acceptance that cash bail could have a *secondary* purpose of mitigating the risks of obstructing the proceedings and committing further offences.¹⁷ The Single Judge made a far clearer finding that “the guarantee of bail” is *in principle* designed to ensure presence at trial, but not reparation of loss.¹⁸ In so doing, the Single Judge not only erred in law, he erroneously fettered his own lawful ability to consider “the guarantee of bail” for the purpose of mitigating the risks of obstructing the proceedings and committing further offences.
10. Further, in its Response, the SPO chooses to highlight the factors that the Single Judge took into account when determining that a risk exists of obstructing the proceedings and committing further offences,¹⁹ without engaging in the real issue in the Appeal. The point is that, even if the Single Judge took “into account the differing possibility (sic.) to mitigating such risks”,²⁰ the one possibility that he did not properly take into account – because he wrongly found that he could not take it into account – was the

¹⁶ Impugned Decision, para. 65.

¹⁷ *Contra* Response, paras 8 and 13.

¹⁸ Impugned Decision, para. 65.

¹⁹ Response, para. 9.

²⁰ Response, para. 10.

paying in of a substantial cash security. By erroneously closing his mind to the availability and appropriateness of this singularly robust condition of provisional release, the Single Judge deprived himself of the opportunity to weigh this condition in the balance when deciding on continued detention.

11. Finally, the SPO simply does not engage with the Defence's complaint that the Single Judge failed to give weight to relevant considerations that the "guarantee of bail" of €30,000 significantly overcomes the challenges associated with the purported risks of obstructing the proceedings and committing further offences. The Prosecution points out that Single Judge explicitly referred to "Mr Kilaj's apprehension to lose EUR 30,000, in case of breach of the conditions"²¹ but fails to take the next and most important step by rebutting the Defence's argument that the Single Judge's conclusion at paragraph 65 of the Impugned Decision is unreasoned and unexplained. It hardly needs stating that a judge must do more than simply recite the Parties' arguments. A process of analysis and discernment should be undertaken before the judge decides to come down in favour of one Party or the other. In the Impugned Decision, the Single Judge does not explain *why* the prospect of €30,000 would not act as a significant disincentive on him to obstruct the proceedings or commit offences.
12. Both the Single Judge, and the SPO in its Response, ignore the fact that it is *not* the Defence's argument that the depositing of €30,000 by way of a cash security will physically prevent Mr Kilaj from, for example, meeting or speaking [REDACTED] in this or other cases. To suggest that it would, or course, be absurd. The Defence's argument, however, is that the concurrent disincentive of losing the security, and incentive of having the security

²¹ Response, para. 14, presumably citing to Impugned Decision, para. 65.

returned to him at the end of the trial, will operate on Mr Kilaj's mind to act to reduce the risk that he would disobey any conditions not to meet, speak with, or contact [REDACTED] to an acceptably low level so as to make him a good candidate for provisional release. The Single Judge baldly found that depositing €30,000 would not overcome the risks, but did not explain why *specifically* the proposed disincentive/incentive combination would not mitigate the risks identified.²²

13. The Defence's complaint is more than a "mere disagreement with the Single Judge's conclusion".²³ It is well-founded and based on an accurate representation of the Impugned Decision.

III. CONCLUSION

14. The Defence reiterates its submission 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 identified risks, his findings in respect of the arguments raised in the Defence Submissions would have been different.
15. 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, as he had done with regards to the risks of absconding, the Single Judge would not have arrived at the same conclusion that the prospect of losing such a sum

²² Appeal, paras 19-20.

²³ *Contra* Response, para. 15.

would create precisely the same incentive for Mr Kilaj to abide by all conditions of his provisional release.

16. The Defence, therefore, respectfully requests that:

(i) the appeal be allowed;

and

(ii) the Impugned Decision be reversed;

and

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

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Monday, 5 February 2024

Abidjan, Côte d'Ivoire