

In: KSC-BC-2023-10

The Prosecutor v. Sabit Januzi and Ismet Bahtijari

Before: The President of the Specialist Chambers

Judge Ekaterina Trendafilova

Registrar: Fidelma Donlon

Filing Participant: Specialist Counsel for Sabit Januzi

Date: 20 December 2023

Language: English

Classification: Public

**Public Redacted Version of Appeal Against the Decision on Interim Release on
Behalf of Sabit Januzi**

Specialist Prosecutor

Kimberly P. West

Counsel for Sabit Januzi

Jonathan Elystan Rees KC
Huw Bowden

Counsel for Ismet Bahtijari

Hendrik Sytema

I. INTRODUCTION

1. On 8 December 2023, the Accused received notification of the decision refusing his request for interim release from detention pending trial ('Impugned Decision on Detention')¹.
2. In accordance with Article 45(2) of the Law², the Accused hereby brings an interlocutory appeal as of right from the Impugned Decision relating to detention on remand.

II. APPLICABLE LAW

3. Article 45(2) of the Law provides that interlocutory appeals shall lie as of right against decisions or orders relating to detention on remand. A decision, such as the Impugned Decision on Detention, that continued detention is necessary clearly relates to detention on remand and falls within Article 45(2) of the Law³.
4. Neither the Law nor the Rules⁴ specify the standard of review to be applied to interlocutory appeals. The Court of Appeals Panel has decided that it will apply the standard already provided for in Article 46(1) of the Law in relation to appeals against judgments *mutatis mutandis* to interlocutory appeals, that is, the Court of Appeals Panel will hear appeals on the following grounds:

- a. An error on a question of law invalidating the judgment; and

¹ KSC-BC-2023-10/F00123, *Decision on Sabit Januzi's Request for Interim Release*, Pre-Trial Judge, 8 December 2023, Confidential

² Law on Specialist Chambers and Specialist Prosecutor's Office, Law No.05/L-053

³ KSC-BC-2020-07/IA001/F0005, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, Court of Appeals Panel, 9 December 2020, Public at paragraph 18

⁴ Rules of Procedure and Evidence before the Kosovo Specialist Chambers KSC-BD-03/Rev3/2020

- b. An error of fact which has occasioned a miscarriage of justice⁵.
5. 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 decision⁶.
6. The Court of Appeals Panel will only find the existence of an error of fact when no reasonable trier of fact could have made the impugned finding⁷.
7. If a decision that is being challenged is a discretionary decision, 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 discretion⁸.

III. GROUND OF APPEAL

8. The Pre-Trial Judge erred in law and fact when he refused to consider that the President of the Kosovo Specialist Chambers has recently held that orders as to non-contact/communication with witnesses can be both enforced and monitored, and that the machinery to enforce and monitor such conditions has been established⁹.

⁵ KSC-BC-2020-07/IA001/F0005, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, Court of Appeals Panel, 9 December 2020, Public at paragraphs 5 and 10; KSC-BC-2020-06/IA001/F00005, *Decision on Kadri Veseli's Appeal Against Decision on Interim Release*, Court of Appeals Panel, 30 April 2021, Public at paragraph 4

⁶ KSC-BC-2020-07/IA001/F0005, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, Court of Appeals Panel, 9 December 2020, Public at paragraph 12

⁷ KSC-BC-2020-07/IA001/F0005, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, Court of Appeals Panel, 9 December 2020, Public at paragraph 13

⁸ KSC-BC-2020-07/IA001/F0005, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, Court of Appeals Panel, 9 December 2020, Public at paragraph 14

⁹ Impugned Decision at paragraph 67

IV. SUBMISSIONS

9. It was a relevant consideration that the President of the Kosovo Specialist Chambers had recently held that orders as to non-contact/communication with witnesses can be both enforced and monitored, with the machinery to enforce and monitor conditions of non-contact/communication to be established¹⁰.
10. The Pre-Trial Judge refused to consider that the President had so held on the basis that the factual circumstances with respect to the President's decision were different¹¹. They were different, but so were the factual circumstances in earlier rulings relating to Case 06 which the Pre-Trial Judge did not hesitate to consider and rely upon¹².
11. Instead, it was a relevant factor to consider and apply, albeit in the individual circumstances of the Accused's application for interim release, that the machinery to enforce and monitor conditions of non-contact/communication with witnesses in Kosovo is now established using [REDACTED]. As is emphasized in the Impugned Judgment, the Registrar and the Panel, who have unrestricted access to confidential information concerning witnesses and victims, are able to take prompt action to prevent obstruction and commissions of further crimes¹³.
12. The Pre-Trial Judge's refusal to consider this machinery lead him to hold erroneously that:

¹⁰ KSC-SC-2023-01/CS001/F00002, *Decision on Commutation, Modification, or Alteration of Sentence with Confidential and Ex Parte Annexes*, President, 12 October 2023, Public at paragraph 68(f) to (j) and paragraph 72 Order 2 (order to the Registrar to take all necessary measures to ensure the conditions set forth in paragraph 68), Order 3 (order to the Kosovo police or any other authority of Kosovo to cooperate pursuant to Article 51(1) of the Law with the Registrar on the enforcement of the conditions set forth in paragraph 68) and Order 4 (order to the Registrar to report on a monthly basis on adherence to the conditions set forth in paragraph 68); and [REDACTED]

¹¹ Impugned Decision at paragraph 67

¹² Impugned Decision at paragraph 71

¹³ Impugned Decision at paragraph 71

- a. a commitment such as an order to refrain from contact with a witness can ‘neither be enforced nor monitored’¹⁴; and that
 - b. there is not the capacity to implement in Kosovo corresponding measures that mitigate risks of obstruction and commission of further crimes¹⁵.
13. Where the judge fails to consider a relevant factor, or factors, the corresponding decision is unreasonable (as the reasonable judge considers all relevant factors and excludes all irrelevant factors).
14. If the Pre-Trial Judge had correctly considered that the machinery to enforce and monitor conditions of non-contact/communication with witnesses in Kosovo had recently been established using [REDACTED], the Pre-Trial Judge would have granted interim release on conditions of non-contact/communication.
15. Such conditions do not operate to remove the risk of direct/indirect contact/communication entirely (indeed, detention cannot do that). But they operate to provide for intervention before any action which amounts to obstruction/further crimes occurs. As the [REDACTED], *any* reported contact (direct or indirect) of whatever nature, would be immediately brought to the Panel’s attention (and lead to the prompt return to detention).
16. Any residual risk of obstruction/further crimes in the Accused’s case would be no more than a mere possibility of a risk materializing. The SC can rely upon the witness to report immediately any attempt at direct or indirect contact, as the witness has done so far. Moreover, other than on the single occasion charged, there is no suggestion of the Accused having made any inappropriate contact with a witness, whether directly or indirectly, and there is no evidence *at all* of

¹⁴ Impugned Decision at paragraph 69

¹⁵ Impugned Decision at paragraph 71

the Accused having previously done so in knowing breach of an order from the court.

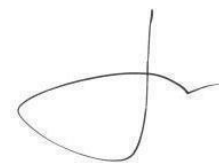
17. The Pre-Trial Judge has wide-ranging powers to require the effective implementation of orders of the court, including the enforcement and monitoring of conditions of non-contact/communication with witnesses. As the President has recognized, the court should be prepared to use those wide-ranging powers not only to assist the Prosecution but also, where it is fair and just to do so, to assist the Defence.

18. It is equally compatible with the mandate of the SC to exercise the court's powers to require the effective enforcement and monitoring of conditions of non-contact/communication with witnesses to enable the interim release pending trial of an Accused, who should enjoy both the presumption of innocence and the presumption of liberty, as it is to exercise the court's powers to require the effective enforcement and monitoring of conditions of non-contact/communication with witnesses to enable a convicted person to be released early from their sentence of imprisonment.

V. CONCLUSION

19. For the reasons set out above, the Court of Appeals Panel should allow the appeal and order the interim conditional release of the Accused pending trial.

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JONATHAN ELYSTAN REES KC

Specialist Counsel for Mr Januzi

HUW BOWDEN

Specialist Co-Counsel for Mr Januzi

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Cardiff, UK