



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

**In:** KSC-BC-2018-01/IA005  
**Before:** Court of Appeals Panel  
Judge Michèle Picard  
Judge Emilio Gatti  
Judge Nina Jørgensen  
**Registrar:** Dr Fidelma Donlon  
**Filing Participant:** Specialist Prosecutor  
**Date:** 30 January 2024  
**Language:** English  
**Classification:** Public

---

**Public Redacted Version of 'Prosecution response to "Kilaj Appeal Against Decision on Review of Detention of Isni Kilaj"'**

---

**Specialist Prosecutor's Office**  
Kimberly P. West

**Duty Counsel for Isni Kilaj**  
Iain Edwards

## 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 Court of Appeals Panel ('Appeals Panel') should deny the Appeal in its entirety. The Appeal fails to show any error of law or fact, or abuse of discretion, that could invalidate the Decision. To the contrary the Appeal repeatedly misrepresents the Decision and improperly seeks to recast disagreements with the Single Judge's factual conclusions as errors of law.<sup>5</sup>

## II. PROCEDURAL HISTORY

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 ordered KILAJ's continued detention and filed the reasons for his decision on 9 November 2023.<sup>6</sup>

---

<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 Review of Detention of Isni Kilaj, KSC-BC-2018-01/IA005/F00001, 18 January 2024, Confidential ('Appeal').

<sup>4</sup> Decision on Review of Detention of Isni Kilaj, KSC-BC-2018-01/F00547, 5 January 2024 ('Decision').

<sup>5</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.14.

<sup>6</sup> Decision on Continued Detention, KSC-BC-2018-01/F00499, 6 November 2023, confidential; Reasons for Continued Detention, KSC-BC-2018-01/F00503, 9 November 2023, confidential ('First Detention Decision').

4. On 20 November 2023, KILAJ filed an appeal challenging the First Detention Decision.<sup>7</sup> The SPO responded on 1 December 2023,<sup>8</sup> and KILAJ replied on 8 December 2023.<sup>9</sup>
5. On 5 January 2024, the Single Judge ordered KILAJ's continued detention.<sup>10</sup>
6. On 11 January 2024, the Appeals Panel denied KILAJ's appeal against the First Detention Decision.<sup>11</sup>
7. On 18 January 2024, KILAJ filed the Appeal.

### III. SUBMISSIONS

#### A. THE FIRST GROUND MISREPRESENTS THE DECISION

8. Contrary to KILAJ's submissions,<sup>12</sup> the Single Judge did not hold that cash bail could – as a matter of law – be considered only as mitigation against risk of flight. Instead, the Single Judge merely repeated the principle – reflected in Article 5(3) of the ECHR and supported by uncontested ECtHR jurisprudence – that the primary

---

<sup>7</sup> Kilaj Appeal Against Decision on Continued Detention, KSC-BC-2018-01/IA004/F00001, 20 November 2023.

<sup>8</sup> Prosecution response to Defence appeal against decision on continued detention, KSC-BC-2018-01/IA004/F00003, 1 December 2023.

<sup>9</sup> Kilaj Reply to Prosecution Response to Appeal Against Decision on Continued Detention, KSC-BC-2018-01/IA004/F00004, 8 December 2023.

<sup>10</sup> Decision, KSC-BC-2018-01/F00547.

<sup>11</sup> Decision on Isni Kilaj's Appeal Against Decision on Continued Detention, KSC-BC-2018-01/IA004/F00006, 11 January 2024.

<sup>12</sup> Appeal, KSC-BC-2018-01/IA005/F00001, para.13. *See also* para.14: '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.' *See also* para.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.'

purpose of cash bail is to safeguard the presence of an accused at trial.<sup>13</sup> KILAJ offers no authority to the contrary.

9. Nor did the Single Judge err in distinguishing between the risks of flight and those of obstruction and committing further crimes.<sup>14</sup> KILAJ again misrepresents the Decision by claiming that *Gafa v. Malta* was ‘the sole basis’ for Single Judge’s finding that the proposed cash bail was more effective against the risk of flight than the other established risks.<sup>15</sup> This is not so. In fact, the distinction drawn by the Single Judge was based on his detailed assessment of the particular risks that could materialise if KILAJ were granted provisional release in Kosovo. This assessment must be viewed in the context of the Single Judge’s finding that:

...given the ongoing nature of the investigations relating to Mr Kilaj, the risk of obstructing the proceedings and committing further offences, [REDACTED], can be effectively managed only through the communications monitoring regime available at the SC Detention Facilities.<sup>16</sup>

10. Under these circumstances, the Single Judge found that the proposed cash bail ‘would not overcome the challenges associated with the risk of obstruction and commission of further crimes’ that apply to KILAJ.<sup>17</sup> This represented a careful, qualitative assessment of the different risks at issue, and takes into account the differing possibility to mitigating such risks, or indeed to detect that a violation had occurred.<sup>18</sup>

---

<sup>13</sup> See e.g. ECtHR, Guide on Article 5 of the European Convention on Human Rights (Right to liberty and security), para.233 (and cases cited therein); Germany, Criminal Procedure Code (StPO), §116 (which only lists cash bond as a relevant condition for risk of flight); Australia, *R v Mokbel* [2006] VSC 158, paras 53-58.

<sup>14</sup> *Contra*. Appeal, KSC-BC-2018-01/IA005/F00001, para.11.

<sup>15</sup> Appeal, KSC-BC-2018-01/IA005/F00001, para.12.

<sup>16</sup> Emphasis added, Decision, KSC-BC-2018-01/F00547, para.64.

<sup>17</sup> Decision, KSC-BC-2018-01/F00547, para.65.

<sup>18</sup> It is noted that the Single Judge had previously found conditions proposed by Kilaj sufficient to mitigate the risk of flight, therefore Kilaj (i) ignores the fact that First Detention Decision has already, properly, distinguished between the risks at issue, and the adequacy of available measures to mitigate between them, and (ii) overstates the degree to which the proposed bail served as mitigation even for the risk of flight. Compare for example Appeal, KSC-BC-2018-01/IA005/F00001, para.21 and Decision, KSC-BC-2018-01/F00547, para.62.

11. The Decision and the required risk assessment is clear. The Single Judge observed that: (i) KILAJ knows '[REDACTED], as well as other confidential [REDACTED] information that pertains to SC proceedings'; and (ii) he 'could use a device belonging to a family member to do so, or ask a family member to convey a message, whether by means of such a communications device, the internet, or orally'.<sup>19</sup> In light of these findings, the Single Judge properly concluded that the proposed cash bail would not sufficiently disincentivise KILAJ from obstructing the proceedings or committing offences, and would thus be an insufficient condition to mitigate the risks.<sup>20</sup>

12. In other words, the Single Judge found that KILAJ's provisional release would bring about a risk that he may obstruct the proceedings or commit further offences; the Single Judge was not persuaded that the proposed conditions – including the cash deposit – could effectively mitigate these risks. The Single Judge engaged in precisely the legal analysis that KILAJ now improperly claims the Single Judge failed to do. KILAJ thus attempts to circumvent the high threshold for challenging the Single Judge's discretionary decision by fabricating an error of law in order to challenge a factual finding KILAJ disagrees with.<sup>21</sup> This ground of appeal must be rejected.

#### B. THE SECOND GROUND MISREPRESENTS THE DECISION

13. KILAJ's second ground of appeal fails for the same reason.<sup>22</sup> Contrary to KILAJ's claim, the Single Judge did not equate the forfeiture of the proposed cash bail with the reparation of loss.<sup>23</sup> Rather, the Single Judge simply quoted ECtHR

---

<sup>19</sup> Decision, KSC-BC-2018-01/F00547, para.63.

<sup>20</sup> Decision, KSC-BC-2018-01/F00547, paras 63-65.

<sup>21</sup> Gucati Detention Appeal Decision, KSC-BC-2020-07/IA001/F00005, paras 12, 14. *See also* para.49: 'Because of the fact-specific nature of provisional release decisions, the Single Judge is better placed to assess these factors'.

<sup>22</sup> Appeal, KSC-BC-2018-01/IA005/F00001, paras 18-20.

<sup>23</sup> *Contra* Appeal, KSC-BC-2018-01/IA005/F00001, para.18.

jurisprudence to point out the established principle that cash bail's primary use is to ensure the presence of an accused at court.<sup>24</sup>

14. Nor did the Single Judge fail 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 the proceedings or commit offences'.<sup>25</sup> Indeed, the Decision explicitly refers to 'Mr Kilaj's apprehension to lose EUR 30,000, in case of breach of the conditions'.<sup>26</sup>

15. Finally, KILAJ makes the conclusory claim that the Single Judge's conclusion is unreasoned and unexplained.<sup>27</sup> This claim is baseless. As detailed above, the Single Judge identified in detail the facts relevant to the applicable legal analysis and engaged in a rigorous risk assessment.<sup>28</sup> KILAJ's mere disagreement with the Single Judge's conclusion from the available facts is not enough to establish a clear error, and this ground of appeal must be denied.<sup>29</sup>

#### IV. CONCLUSION

16. In sum, the Single Judge committed no error of law, let alone one that has any 'chance of changing the outcome' of the decision.<sup>30</sup>

#### V. CLASSIFICATION

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

---

<sup>24</sup> Decision, KSC-BC-2018-01/F00547, para.65.

<sup>25</sup> Appeal, KSC-BC-2018-01/IA005/F00001, para.18.

<sup>26</sup> Decision, KSC-BC-2018-01/F00547, para.27.

<sup>27</sup> Appeal, KSC-BC-2018-01/IA005/F00001, paras 19-20.

<sup>28</sup> Gucati Detention Appeal Decision, KSC-BC-2020-07/IA001/F00005, paras 14, 61.

<sup>29</sup> Gucati Detention Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.64.

<sup>30</sup> Gucati Detention Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.12.

VI. RELIEF REQUESTED

18. For the foregoing reasons, the Panel should deny the Appeal in its entirety.

**Word count: 1518**



---

**Kimberly P. West**  
**Specialist Prosecutor**

Tuesday, 30 January 2024

At The Hague, the Netherlands.