

In: KSC-BC-2023-10

The Specialist Prosecutor v. Sabit Januzi, Ismet Bahtijari and Haxhi Shala

Before: **Pre Trial Judge**

Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: **Specialist Counsel for Ismet Bahtijari**

Date: 18 March 2024

Language: English

Classification: Confidential

BAHTIJARI FILING FOR STATUS CONFERENCE

Specialist Prosecutor's Office

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I. APPLICATION

1. These are the submissions for Mr Bahtijari for the status conference on 22 March 2024.

II. HEALTH ISSUES

2. The intersection of the funding issues and the health issues were raised at the last status conference and have been raised in correspondence and in the filing on continued detention.
3. It is respectfully requested that the pre-trial judge help progress the funding and health assessment issues.
4. Some of the difficulties are set out in the defence comments to the SPO report on the order pursuant to F00155 (see Annex 4 page 16).
5. Mr Bahtijari has multiple health issues that require expert assessment in four contexts:
 - a. His capacity to sign forms
 - b. His fitness to stand trial – physical and mental
 - c. His cognitive ability at the time of the alleged offences
 - d. His health on transfer to the KSC
6. Funding is awaited so it has not been possible to progress these matters.
7. He might be able / capable. He might not. He may need support to effectively participate, he may not. He certainly presents as vulnerable. Counsel merely seeks to ensure that he is fairly treated in this regard. For example, when Dr Gerry KC first met him in January 2024 he could not hear well and she had to request he have hearing treatment. This has now occurred. It is not known why this was not picked up before but it is an example of how counsel has had to assist Mr Bahtijari far beyond her role as counsel and without the assistance of a funded team.
8. Despite raising the health issues many times to both the Ministry of Justice and the Registry, no funding has been provided. It appears to be dependent on the signing of forms, which is not always possible.
9. Duty and emergency funding have been requested and the health issues have been outlined many times. No funding has been provided to progress these issues on Mr Bahtijari's behalf.
10. Mr Bahtijari has been provided with legal aid forms many times. To date he has managed to complete one with Dr Gerry KC's help which has been supplied to the

Registry via the defence office but some days he is simply not well enough and his health issues have to be reported to the detention unit. Recently this included pain to his arms, legs and chest. It is believed he is on heart medication.

11. Kosovan speaking medical / psychological experts have been identified but to date neither the Ministry of Justice nor the Registry have been able to solve the funding problem.

III. DEFENCE INVESTIGATIONS

12. The Defence have identified potential witnesses and locations that need to be investigated in Kosovo. To date these investigations have not been possible due to the lack of funding.
13. To complete the legal aid forms may well require funding to discover the matters Mr Bahtijari is unable to recall.
14. Defence investigations need to explore the health issues above. In the absence of expert evidence, it is not known if Mr Bahtijari has a dependence that affects his cognitive function that can be connected to PTSD but it is a legitimate line of enquiry for the defence because some limited research on PTSD in Kosovo has found the following: ¹

¹ Mimoza Shahini and Merita Shala, 'Post Traumatic Stress Disorder in Kosovo Veterans' (2016) January–March, *SAGE Open*, 1; Teuta Danuza et al, 'Post Traumatic Stress Disorder and Social Support in the Veterans of the War in Kosovo' (2014) 8(1) *Kairos Journal of Philosophy and Science* 75; Shira Maguen et al, 'PTSD Subclusters and Functional Impairment in Kosovo Peacekeepers' (2009) 174(8) *Military Medicine* 779; E Ralevski et al, 'PTSD and comorbid AUD: a review of pharmacological and alternative treatment options' (2014) (5) *Substance Abuse Rehabilitation* 25 <https://doi.org/10.2147/SAR.S37399>; Naim Fanaj and Erika Melonashi, 'Understanding and Describing PTSD in Kosovo: A Systematic Evidence-Based Review' (2017) October–December, *Sage Open* 1. See also "Between Illness and Prejudice" <<https://kosovotwopointzero.com/en/between-illness-and-prejudice/>> and Nona Mohammadi Imir, 'Transitional Justice and Mental Health: The Kosovo Case' (Masters Thesis, University of Luxembourg, 2020) <https://repository.gchumanrights.org/bitstreams/6526eeb6-86a5-4f42-8dc3-f1a167d3de4d/download>

- PTSD symptoms were reported 8 years after the war.
- some of those with PTSD did not seek medical help for their symptoms.
- A large percentage of the general population of Kosovo are reported to have mood disorders and anxiety in the years after 1999.
- There has been a dearth of specialist institutions working with veterans' PTSD in Kosovo and there was a high level of stigma around the disorder and therefore room for 'self-medication'.
- Although Kosovo became independent in 2008, economic stagnation, widespread poverty, high unemployment rates, and poor quality of life continue to burden the country (United Nations Development Program [UNDP], 2010). Research studies suggest that PTSD prevalence rates in less economically developed and non-Western countries tend to be higher as compared with other countries"
- Approaches to mental health treatment in Kosovo that take the particular socio-cultural and psychosocial contexts in account seem to be lacking.
- 90% of KLA veteran suicides are as a result of war trauma
- Even though 20 years have passed veterans may only now be seeking help for psychological trauma.
- PTSD and mental health issues are still stigmatised in Kosovar culture

15. Insofar as this may all be a unique investigative opportunity, funding remains unavailable.

16. Counsel would happily work with the Ministry of Justice or the Registry if a resolution can be found but, currently being significantly out of pocket, cannot expend any more of her own funds on this case, nor should she be expected to.

17. It is a surprise that funding has not been facilitated since 4 January 2024 when counsel was appointed, especially since the health issues were raised on a number of occasions. It is currently not known if Mr Bahtijari has capacity to sign forms. When he has not been able, counsel has made requests by email. For example, funding has been requested by email to both the Ministry of Justice and the Registry. To date, without success.

IV. TRANSCRIPTION

18. In the absence of a Kosovan speaker on the defence team, it is not and has not been possible to check transcripts which are not in English. There is an absence of funding, for a Kosovan speaker.

V. DISCLOSURE

19. The defence has sought disclosure from the Specialist prosecutor's Office in relation to Mr Bahtijari's health. Apparently there is none, although he obviously has a dependence and must have been assessed to travel and exhibited issues understanding his rights at the seizure process so it is not known why no disclosure has been forthcoming.
20. Disclosure has been sought for Mr Bahtijari's medical records. He has been supplied with a form but the form was not sent to counsel. Counsel has requested a copy of that form and suggested he have a support person. There is currently no funding for a support person.
21. The defence has sought disclosure from the Ministry of Justice. Some documents have been provided but there is no funding to have them translated in order to assess whether there may be a Constitutional challenge to the decision to drastically alter the funding arrangements.
22. The defence has sought disclosure from the Registry. in order to assess whether there may be a judicial review of the decision to drastically alter the funding arrangements. This is awaited.

VI. DEFENCE ISSUES AND AGREED FACT/ LAW

23. The evidence is that the witness suggests that Mr Bahtijari was in fear and it is alleged he was acting under instruction. Issues of knowledge, conduct, intent, duress and superior orders therefore arise on the prosecution's own case. It is not known if this has all been considered by the SPO. It is assumed there may be legal argument over such issues, particularly since preliminary research tends to suggest Kosovo is not post conflict.²

² See, for example Beat Eberle, 'Kosovo: Scenarios for an unfinished secession', *GIS Report* (online, 22 January 2024) < <https://www.gisreportonline.com/r/kosovo/>>; 'Why Kosovo's standoff with Serbs continues 15 years after statehood', *Aljazeera* (online news, 24 September 2023) < <https://www.aljazeera.com/news/2023/9/24/why-kosovos-standoff-with-serbs-continues-15-years-after-statehood>>; Leaders of Serbia, Kosovo End Talks in Brussels with No Sign of Progress on Normalising Relations', *Radio Free Europe, Radio Liberty* (online news, 26 October 2023) < <https://www.rferl.org/a/kosovo-serbia-talks-brussels-normalizing-relations-kurti-vucic/32654991.html>> ; Dimitar Bechev, 'Analysis: Are Kosovo and Serbia on the brink of war?', *Aljazeera* (online news, 3 October 2023) < <https://www.aljazeera.com/features/2023/10/3/are-kosovo-and-serbia-on-the-brink-of-war>>; 'Kosovo-Servia tension: History, latest flare-up and what's next?', *Aljazeera* (online news, 29 May 2023) <

24. Alibi on 5 April 2023 is unlikely to be an issue but may be relevant to some of the telephone contact. No funding is currently available to have the phone issues expertly examined on behalf of the defence. This includes analysis of a hard drive of data.
25. Unless and until it is known that Mr Bahtijari is fit to stand trial and to give instructions, it is not possible (or appropriate) to provide a pre- trial brief to set out the issues or to agree any facts or issues of law.
26. The above is set out in some detail so that the pre-trial judge can understand the complexities for the defence for Mr Bahtijari and to indicate (as requested) that the transmission of the case is likely to be delayed because of the funding issues and the need to properly prepare the defence case.
27. Ultimately experts reports take time and if funding had been forthcoming in January, when requested, Mr Bahtijari would not be in this situation.

Word Count: 1623



Dr Felicity Gerry KC

<https://www.aljazeera.com/news/2023/5/29/kosovo-serbia-tension-history-latest-flare-up-and-whats-next>; Hall Gardner, 'Future Scenarios' in Hall Gardner (ed) *Geopolitical Turmoil in the Balkans and Eastern Mediterranean* (Palgrave Macmillan, 2023) 275-305 < https://link.springer.com/chapter/10.1007/978-3-031-34318-6_11>; Aidan Hehir, 'Kosovo and Transitional Justice : The Pursuit of Justice after Large Scale-Conflict', edited by Aidan Hehir, and Furtuna Sheremeti, Taylor & Francis Group, 2021' in Aidan Hehir, and Furtuna Sheremeti (eds) *Kosovo and Transitional Justice: The Pursuit of Justice after Large Scale-Conflict* (Taylor & Francis Group, 2021).

Counsel for Mr Bahtijari

18 March 2024

At Melbourne, Australia