

**In:** KSC-BC-2020-06  
The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi  
and Jakup Krasniqi

**Before:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Defence Counsel for Jakup Krasniqi

**Date:** 18 July 2022

**Language:** English

**Classification:** Public

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**Krasniqi Defence Request**

**for Certification to Appeal the “Decision on Framework for the Handling  
of Confidential Information during Investigations and Contact between a Party  
or Participant and Witnesses of the Opposing Party or of a Participant”**

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**Specialist Prosecutor**

Jack Smith

**Counsel for Victims**

Simon Laws QC

**Counsel for Hashim Thaçi**

Gregory Kehoe

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**Counsel for Rexhep Selimi**

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## I. INTRODUCTION

1. Pursuant to Article 45(2) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 77(2) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), the Defence for Jakup Krasniqi ("Defence") seeks certification to appeal the Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant ("Impugned Decision").<sup>1</sup>

2. The Defence seeks leave to appeal the following issues:-

- (i) Whether the Impugned Decision erred in law in imposing the Framework without first establishing that it was necessary to do so;
- (ii) Whether, to the extent that the Impugned Decision did find that it was necessary to impose a framework at this stage of proceedings, the Impugned Decision erred in fact or law in finding that it was necessary to impose a framework;
- (iii) Whether the Impugned Decision erred in law and fact in imposing a framework which covers all witnesses that a party intends to call, rather than merely those witnesses who need the protection of the framework;
- (iv) Whether the Impugned Decision erred in finding that "[g]iven that the Accused assert their rights of defence through counsel, the Proposed

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<sup>1</sup> KSC-BC-2020-06, F00854, Pre-Trial Judge, *Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant*, 24 June 2022, public.

Framework must necessarily ensure that counsel act in accordance with the aforementioned findings regarding the risks faced by specified individuals and the climate of interference”;

- (v) Whether the Impugned Decision erred in finding that imposing the Framework was justified to protect the privacy of witnesses or preserve evidence or the expeditious conduct of proceedings;
- (vi) Whether the Impugned Decision erred in law in finding that the Proposed Framework does not violate the rights of the Accused, specifically the right against self-incrimination and the right to equality of arms.

## II. PROCEDURAL HISTORY

3. On 3 December 2021, the Specialist Prosecutor’s Office (“SPO”) proposed a framework for (i) handling of confidential information during investigations and for (ii) contacts with witnesses.<sup>2</sup>

4. On 10 December 2021, the Victims’ Counsel filed its response to the SPO Submissions.<sup>3</sup>

5. On 15 December 2021, the Defence for Messrs Thaçi, Selimi, Krasniqi and Veseli responded to the SPO Submissions.<sup>4</sup>

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<sup>2</sup> KSC-BC-2020-06, F00594, Specialist Prosecutor, *Prosecution Submissions on Confidential Information and Contacts with Witnesses* (“SPO Submissions”), 3 December 2021, public, para. 1.

<sup>3</sup> KSC-BC-2020-06, F00605, Victims’ Counsel, *Victims’ Counsel Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses* (“Victims’ Counsel Response”), 10 December 2021, public.

<sup>4</sup> KSC-BC-2020-06, F00625, Thaçi Defence, *Thaçi Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses* (“Thaçi Response”), 15 December 2021, public; F00626, Selimi Defence, *Selimi Defence Response to “Prosecution Submissions on Confidential Information and Contacts with Witnesses”*, 15 December 2021, public; F00627, Krasniqi Defence, *Krasniqi Defence*

6. On 21 January 2022, the Pre-Trial Judge ordered the Registrar to provide submissions on any matter arising from the SPO Submissions, Victims' Counsel Response and/or Defence Responses, including, if applicable, proposals as to the practical implementation and/or modalities of the Registry's role.<sup>5</sup>

7. On 3 February 2022, the Registry provided its observations on matters arising from the SPO submissions and the responses of the Defence and Victims' Counsel in relation to the Registry's role.<sup>6</sup>

8. On 14 February 2022, the Victims' Counsel, the SPO, and the Defence for Messrs Selimi, Taçi, Veseli and Krasniqi responded to the Registry Submissions.<sup>7</sup>

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*Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses* ("Defence Response"), 15 December 2021, confidential; F00628, Veseli Defence, *Veseli Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses*, 15 December 2021, public.

<sup>5</sup> KSC-BC-2020-06, F00650, Pre-Trial Judge, *Order to the Registrar for Submissions*, 21 January 2022, public, paras 5-7.

<sup>6</sup> KSC-BC-2020-06, F00679, Registrar, *Registrar's Submissions on Proposed Protocol for Interviews with Witnesses* ("Registry Submissions"), 3 February 2022, confidential.

<sup>7</sup> KSC-BC-2020-06, F00690, Victims' Counsel, *Victims' Counsel Further Submissions on the SPO's Framework for Handling of Confidential Information and Contacts with Witnesses During Investigations*, 14 February 2022, public; F00693, Specialist Prosecutor, *Prosecution Response to 'Registrar's Submissions on Proposed Protocol for Interviews with Witnesses'*, 14 February 2022, public; F00691, Selimi Defence, *Selimi Defence Response to "Registrar's Submissions on Proposed Protocol for Interviews with Witnesses"*, 14 February 2022, public; F00692, Taçi Defence, *Taçi Defence Response to the Registrar's Submissions on Proposed Protocol for Interviews with Witnesses* ("Taçi Further Response"), 14 February 2022, public; F00694, Veseli Defence, *Veseli Defence Response to Registrar's Submissions on Proposed Protocol for Interviews with Witnesses* ("Veseli Further Response"), 14 February 2022, public; F00695, Krasniqi Defence, *Krasniqi Defence Response to Registrar's Submissions on Proposed Protocol for Interviews with Witnesses*, 14 February 2022, public.

9. On 16 February 2022, the Pre-Trial Judge, further to a request made by the Thaçi Defence<sup>8</sup> and joined by the other Defence teams,<sup>9</sup> scheduled a hearing on the matters arising from the SPO Submissions,<sup>10</sup> which took place on 22 February 2022.<sup>11</sup>

10. On 24 June 2022, the Pre-Trial Judge issued the Impugned Decision, which granted the SPO's request to adopt the Proposed Framework subject to the modifications proposed in the Impugned Decision; adopted the Framework and ordered the Parties and participants to comply with the Framework defined in the Impugned Decision in relation to any ongoing and impending investigative activities and contacts with witnesses.<sup>12</sup>

### III. APPLICABLE LAW

11. Article 45(2) of the Law provides:

Interlocutory appeals shall lie as of right from decisions or orders relating to detention on remand or any preliminary motion challenging the jurisdiction of the Specialist Chambers. Any other interlocutory appeal must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel on the basis that it involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.

12. Rule 77(2) of the Rules further provides that a Panel "shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for

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<sup>8</sup> Thaçi Response, paras 4, 42, 43; KSC-BC-2020-06, Transcript of Hearing, 4 February 2022 ("Tenth Status Conference"), public, p. 861, lines 7- 15; Thaçi Further Response, paras 1, 12-15.

<sup>9</sup> Tenth Status Conference, p. 862, lines 23-24, p. 863, lines 15-21, p. 864, lines 2-3; Veseli Further Response, paras 16-17.

<sup>10</sup> KSC-BC-2020-06, F00698, Pre-Trial Judge, *Decision on Request for Hearing*, 16 February 2022, public.

<sup>11</sup> KSC-BC-2020-06, Transcript of Hearing, 22 February 2022, public.

<sup>12</sup> Impugned Decision, para. 213(e)-(f).

which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings”.

13. The Pre-Trial Judge has previously expounded on the test for certifying interlocutory appeals:-

- a. The first requirement is to articulate an appealable issue, which is “an identifiable topic or subject, the resolution of which is essential for determination of the matters arising in the judicial cause under examination, and not merely a question over which there is disagreement or conflicting opinion”.<sup>13</sup> An appealable issue must emanate from the ruling concerned;<sup>14</sup>
- b. The second requirement may be satisfied in one of two ways. The appealable issue must have significant repercussions for either the “fair and expeditious conduct” of the proceedings or “the outcome of the trial”.<sup>15</sup> In this context, the fair and expeditious conduct of proceedings refers to the norms of fair trial;<sup>16</sup>
- c. The third requirement is that the immediate resolution of the appealable issue will materially advance proceedings, in the sense that “prompt referral of an issue to the Court of Appeals Panel will settle the matter and rid the ‘judicial process of possible mistakes that might taint either the

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<sup>13</sup> KSC-BC-2020-06, F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal* (“Thaçi Decision”), 11 January 2021, public, para. 11.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, para. 12.

<sup>16</sup> *Ibid.*, para. 13.

fairness of proceedings or mar the outcome of the trial' thereby moving the proceedings forward along the right course".<sup>17</sup>

14. Certification is not concerned with the question of whether the Decision was correctly reasoned.<sup>18</sup> Accordingly, the Defence refrains from submitting arguments on the merits of the appeal at this stage.

#### IV. THE TEST FOR CERTIFICATION IS MET

15. All six issues satisfy the test for leave to appeal.

##### First Issue

16. The Impugned Decision found that the legal basis for the Proposed Framework is provided in Articles 35(2)(f), 39(1) and 39(11) of the Law.<sup>19</sup> Each of these provisions contains a requirement that the measures or orders adopted pursuant to them are "necessary". The First Issue challenges whether the Impugned Decision in fact applied this test and arrived at the conclusion that the Proposed Framework was "necessary" as opposed to merely finding that it was "anchored in the combined effect" of the above Articles,<sup>20</sup> "enjoys a basis in the Law and serves the purposes set out above"<sup>21</sup> or "ensure[s] [...] contacts [...] are appropriately regulated".<sup>22</sup> This issue was essential to the determination of the Impugned Decision precisely because it challenges whether the Impugned Decision correctly applied the legal basis for its decision.

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<sup>17</sup> Thaçi Decision, para. 16.

<sup>18</sup> *Ibid.*, para. 17.

<sup>19</sup> Impugned Decision, para. 115.

<sup>20</sup> *Ibid.*, para. 135.

<sup>21</sup> *Ibid.*, para. 137.

<sup>22</sup> *Ibid.*, para. 118.

17. The First Issue has significant repercussions for the fair and expeditious conduct of proceedings. The subject matter of the Impugned Decision, namely a framework which places limits on the ability of the Defence to contact witnesses, inherently has significant repercussions for the fair conduct of proceedings. Further, the additional steps that the Framework will require each defence team to take will affect the expeditious conduct of proceedings. Accordingly, the First Issue – and *mutatis mutandis* the Second to Sixth Issues – satisfy the second limb of the test.

18. The immediate resolution of this issue will materially advance proceedings. The case remains in the pre-trial stage. Defence investigations are ongoing. If the Framework was wrongly imposed, it will mean that proceedings have set out down the wrong course and investigations will be wrongly constrained, tainting the fairness of proceedings. Accordingly, the third limb of the test is also satisfied.

### Second Issue

19. The Second Issue arises from the Impugned Decision. If, contrary to the First Issue, the Impugned Decision did apply the test of necessity, the Second Issue challenges whether it was correct in law and fact to find that the imposition of the Framework was necessary. Since the Second Issue goes to the core legal reasoning underpinning the Impugned Decision, it follows that it arises from the Impugned Decision.

20. For the same reasons as the First Issue, this issue has significant repercussions for the fairness and expeditiousness of proceedings and its early resolution will materially advance proceedings.<sup>23</sup>

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<sup>23</sup> See paras 17-18 above.

### Third Issue

21. The Third Issue challenges the express finding in the Impugned Decision that the Proposed Framework “extends to all witnesses included in the SPO List of Witnesses and other notified witnesses”.<sup>24</sup> In so finding, the Pre-Trial Judge rejected the Defence submission that any framework should distinguish between those witnesses who may actually need protection and those who do not, most obviously the senior international witnesses.<sup>25</sup> Accordingly, this issue arises directly from the Impugned Decision.

22. The Third Issue has significant repercussions for the fairness of proceedings and early resolution will materially advance the proceedings for the reasons set out above.<sup>26</sup> Moreover, the Third Issue significantly affects the expeditiousness of the proceedings, since if the Framework applies to fewer witnesses, the administrative burdens it imposes will evidently be reduced.<sup>27</sup>

### Fourth Issue

23. Despite asserting that its conclusions do not “imply or presume” misconduct on the part of Defence Counsel, the Impugned Decision held that the “Proposed Framework must necessarily ensure that counsel act in accordance with the aforementioned findings regarding the risks faced by specified individuals and the climate of interference”.<sup>28</sup> The Fourth Issue arises from the Impugned Decision because it challenges the logic and legality of that conclusion, which fails to distinguish between the Accused and Defence Counsel (who are professionals subject

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<sup>24</sup> Impugned Decision, para. 135.

<sup>25</sup> *Ibid.*, para. 120.

<sup>26</sup> See paras 17-18 above.

<sup>27</sup> Registry Submissions, para. 10.

<sup>28</sup> Impugned Decision, para. 170.

to code of conduct obligations). This issue is essential to the Impugned Decision because it challenges the relevance of general findings about the climate of intimidation and influence of the Accused, on which the Impugned Decision rests,<sup>29</sup> to the imposition of the Framework on Counsel's contact with witnesses.

24. This issue significantly affects the fairness of proceedings. First, it goes to equality of arms. The Impugned Decision presumes good faith on the part of the SPO,<sup>30</sup> but in reality the same presumption was not extended to Defence Counsel. The assertion that the Framework "must necessarily ensure that Counsel act in accordance with the aforementioned findings regarding the risks"<sup>31</sup> indicates that the Impugned Decision's reasoning is predicated on an assumed need to protect witnesses from Defence Counsel. This approach significantly affects the fairness of proceedings. Second, the ability of the Accused (and his or her counsel) to have adequate facilities to prepare his or her defence is a right enshrined in Article 21(4)(c) of the Law. If leave to appeal is granted, the Defence will illustrate the ways in which this fundamental right has been negatively impacted by the Impugned Decision, through the leeway granted to SPO investigations without affording the same opportunities to Defence Counsel.

25. In addition to the arguments set out in relation to the First Issue and which equally apply to the Fourth Issue,<sup>32</sup> an immediate resolution of this issue will materially advance proceedings by maintaining equality of arms between the Parties and determining appropriate boundaries to Defence Counsel in preparing their strategic approach to the case.

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<sup>29</sup> Impugned Decision, paras 118, 124, 169-170, 173, 198.

<sup>30</sup> *Ibid.*, paras 142-143, 151, 159.

<sup>31</sup> *Ibid.*, para. 170.

<sup>32</sup> See paras 17-18 above.

### Fifth Issue

26. The Fifth Issue challenges the assertion that enforcing the Framework is necessary to protect the privacy of witnesses, preserve evidence, and ensure the expeditious conduct of proceedings. It arises directly from core findings in the Impugned Decision.<sup>33</sup> It therefore satisfies the requisite standard for the identification of an issue.

27. This issue has substantial repercussions for the fairness and expeditiousness of the proceedings. Indeed, it directly relates to findings about expeditiousness, including the Impugned Decision's suggestion that there is no way to determine whether or not Defence investigations will be slowed by the additional logistical requirements imposed by the Framework.<sup>34</sup> However, it is logical to assert that the requirement of additional steps to be undertaken by the Defence and the need for ongoing communications between the Parties would necessarily require additional time, even if the exact amount of time cannot be specified. The refusal to consider the impact the Framework could have on the length of proceedings impacts Mr. Krasniqi's right to an expeditious trial.

28. An immediate resolution of the Fifth Issue by the Court of Appeals Chamber ("Appeals Chamber") will materially advance the proceedings by preventing them heading down the wrong course and reducing litigation time.

### Sixth Issue

29. The Sixth Issue challenges the Impugned Decision's conclusion that the Proposed Framework does not violate the rights of the Accused against self-

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<sup>33</sup> Impugned Decision, paras 121, 123-125.

<sup>34</sup> *Ibid.*, para. 164.

incrimination or the right of the Parties to have an equal opportunity to present their case.<sup>35</sup> These findings are essential to the determination of the Impugned Decision, because the Framework could not have been imposed if the Impugned Decision had found that it violated the Accused's fundamental rights.<sup>36</sup>

30. Further, the Sixth Issue is inherently concerned with the fair and expeditious conduct of proceedings, since it directly relates to the norms of a fair trial. In particular, at paragraph 150, the Pre-Trial Judge expressly rejected the Defence submission that the Framework creates the risk of self-incrimination. This finding significantly affects the fair and expeditious conduct of the proceedings, since if it is wrong then the right against self-incrimination will have been violated. The same applies to the Impugned Decision's conclusion that the equality of arms is not violated.<sup>37</sup>

31. Finally, in light of the significance of the fair trial rights issues which are at stake, further clarification by the Appeals Chamber is required to ensure that the proceedings follow the correct course.

## **V. RELIEF REQUESTED**

32. The Defence respectfully requests certification to appeal on the issues outlined above.

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<sup>35</sup> Impugned Decision, paras 138-163.

<sup>36</sup> See Impugned Decision, paras 140-145, 150-154, 159-163.

<sup>37</sup> Impugned Decision, paras 138-145.

Word count: 2,773



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**Venkateswari Alagenda**

Monday, 18 July 2022

Kuala Lumpur, Malaysia.



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**Aidan Ellis**

Monday, 18 July 2022

London, United Kingdom.



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**Victor Băieșu**

Monday, 18 July 2022

The Hague, the Netherlands.