

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

Before: **Trial Panel II**
Judge Charles L. Smith, III, Presiding Judge
Judge Christoph Barthe
Judge Guénaél Mettreaux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

Date: 6 March 2023

Language: English

Classification: Public

Public Redacted Version of “Thaçi Defence Request to vary the Contact Decision 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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I. INTRODUCTION

1. The SPO intends to call Witness W04147 in its first 40 witnesses.¹ Pursuant to the Contact Decision issued by the Pre-Trial Judge (“PTJ”) on 24 June 2022,² upheld by the Appeals Panel on 27 December 2022,³ the Defence for Mr Hashim Thaçi (“Defence”) is severely limited in the way it can interact with Witness W04147.

2. The Defence files this motion to request a variation to the Contact Decision to enable it to interview this witness in advance of his testimony outside the constraints of that Decision and without the presence of the SPO.

3. On 25 January 2023, the Trial Panel indicated that the parties may seek appropriate relief from the Contact Decision if “circumstances have changed in a material way since the Court of Appeal Panel’s Decision so as to affect the basis on which that decision was taken”.⁴ For the reasons set out below, the Defence submits that circumstances have materially changed enabling it to seek such relief in the form of this variation.

¹ KSC-BC-2020-06/F01117/A02, Annex 2 - Prosecution submission of provisional list of first 40 witnesses to be called at trial, 18 November 2022, Confidential, p. 3 (no. 19).

² KSC-BC-2020-06/F00854, 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 (“Contact Decision”), and see pages 85-91 containing the ‘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’ (“Framework”).

³ KSC-2020-06/IA024/F00019, Decision on Defence Appeals against “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”, 27 December 2022 (“Court of Appeals Panel’s Decision on the Framework”).

⁴ KSC-BC-2020-06/F01226, Trial Panel II, Order on the Conduct of Proceedings, 25 January 2023; KSC-BC-2020-06/F01226/A01, Annex 1- Order on the Conduct of Proceedings, 25 January 2023 (“Order on the Conduct of Proceedings”), para. 71.

4. In accordance with Rule 82(3) of the Rules, this motion has been filed confidentially because it refers to confidential matters pertaining to the circumstances of this witness.⁵

II. PROCEDURAL HISTORY

5. On 24 June 2022, the PTJ issued the Contact Decision, which included the Framework, setting out the procedures by which the parties can contact the opposing party's witnesses.

6. On 8 September 2022, the Defence appealed four issues arising from the Contact Decision,⁶ having been granted certification to do so.⁷ Issue 4 of the appeal was in the following terms: "Whether the proper scope and terms of Article 39(11) required the PTJ to differentiate between categories of SPO witnesses in the Framework's application."⁸ On 27 December 2022, the Court of Appeals Panel dismissed the appeals in their entirety, upholding the Framework.⁹

7. On 25 January 2023, the Trial Panel issued an order on the conduct of proceedings, noting that:

71. With respect to the procedure and safeguards applicable to contacts with the opposite Party's or participant's witnesses, Parties and participants shall abide by the

⁵ KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 ("Rules").

⁶ KSC-BC-2020-06/IA024/F00002, *Thaçi Appeal Against 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"*, 8 September 2022 ("*Thaçi Contact Decision Appeal*").

⁷ KSC-BC-2020-06/F00939, *Decision on Defence Requests for Leave to Appeal Decision F00854*, 26 August 2022. *See also*, KSC-BC-2020-06/F00883, *Thaçi 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 Part or of a Participant"*, 18 July 2022. Note that the Defence sought to appeal 15 issues, but was only granted leave to appeal 4. All four defence teams appealed the decision.

⁸ *Thaçi Contact Decision Appeal*, paras. 38-45.

⁹ Court of Appeals Panel Decision on the Framework.

Court of Appeals Panel's Decision of 27 December 2022. Where a Party or participant considers that circumstances have changed in a material way since the Court of Appeals Panel's Decision so as to affect the basis on which that decision was taken, the Party or participant may seek appropriate relief from the Panel.¹⁰

III. APPLICABLE LAW

A. THE CONTACT DECISION FRAMEWORK

8. The Contact Decision sets out the following requirements for 'Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant' (i.e. the Framework):

- a. Except under the conditions specified herein, prior to testimony, Parties and participants shall not contact or interview a witness of another Party or participant if the intention to call the witness to testify or to rely on his or her statement has been notified to the opposing Party or participant.
- b. If an opposing Party or participant wishes to interview a witness of another Party or participant, it shall notify the calling Party, the Court Management Unit ("CMU") [...]. The calling Party shall ascertain in good faith if the witness consents to being interviewed by the opposing Party and shall also inform the witness of the possibility of having a representative of the calling Party, a legal representative of the witness, Victims' Counsel in relation to dual status witnesses and/or a WPSO representative present during the interview. In exceptional circumstances, a Party or participant may, after having consulted sufficiently in advance with the Registry, apply to the Panel to additionally require the presence of Registry representatives. The calling Party shall inform the opposing Party whether the witness consents. In addition, where the calling Party believes that the safety and security of a witness may be at stake, or for other legitimate reason, it may request the Panel to permit it to attend any meeting between the opposing Party and the witness, regardless of the witness's expressed preferences. If the calling Party seizes the Panel or indicates to the opposing Party that it shall do so, the opposing Party shall refrain from interviewing the witness until the Panel has issued its decision. The procedure in this section shall not apply to an interview conducted by the SPO with an opposing Party witness concerning other cases unless the SPO plans to ask questions at that interview that are relevant to the charges in this case.
- c. [...] A witness's consent to be interviewed may be obtained only through the procedure set out in the previous sub-paragraph.
- d. The opposing Party conducting the interview ("interviewing Party") shall:
 - i. ensure that the interview is conducted effectively and expeditiously;

¹⁰ Order on the Conduct of Proceedings, para. 71.

- ii. prepare copies of all documents to be shown to the witness in a language which he or she understands together with an English translation to be provided to the calling Party;
 - iii. refrain from talking to the witness outside the timeframe of the interview and the video-recording, so that all statements and utterances made are duly recorded;
 - iv. refrain from any action that could be regarded as threatening or provocative; and
 - v. otherwise comply with any order made by the Trial Panel.
- e. The interviewing Party shall facilitate the preparation and conduct of any interview under this section. Communications between the calling Party and the interviewing Party shall be filed as correspondence in the case file in accordance with the Practice Direction on Files and Filings (KSC-BD-15). The calling Party shall bear the costs associated with its attendance at the interview. In consultation with the Parties and/or participants, the Registry may, based on the information provided pursuant to section II, paragraph (e)-(g) of the Framework and if feasible, facilitate the process. Further, as set out in section II, paragraph (h) of this Framework, when considered necessary by the WPSO, the Registry shall ensure that a WPSO representative is on site or otherwise available.
- f. Once a witness has agreed to be interviewed, the calling Party shall, in consultation with WPSO where applicable, provide, as appropriate and applicable, the interviewing Party with the following information:
 - i. the preferred dates for, and an estimate of the duration of, the interview;
 - ii. whether protective measures have been ordered, requested or will be requested under Rule 80 of the Rules in relation to the witness and whether the witness has any special needs as defined in Rule 146 of the Rules or requires special measures as listed in Rule 80(4)(c) of the Rules;
 - iii. an updated Witness Information Form for the witness;
 - iv. the language which the witness is expected to use during the interview;
 - v. any information as to the persons expected to be present at the interview, including any indication of whether the witness may require the presence of a representative of the calling Party, a WPSO representative, the Registry, Victims' Counsel or a legal representative; and
 - vi. any other information that may facilitate the preparation for the interview, as required by the interviewing Party.
- g. The interviewing Party may seek additional information, if required, to facilitate the preparation for the interview. The Panel shall be seized in relation to any unresolved dispute between the Parties, participants and/or WPSO/CMU regarding measures recommended by the Parties, participants and/or by WPSO/CMU.
- h. The interviewing Party shall facilitate the process by:
 - i. providing a venue for the interview and audio-video recording equipment; and

ii. providing interpretation, where necessary.

Furthermore, where applicable, the Registry shall ensure that a Court Officer or another designated representative of the Registry is present during the interview, and that a witness-support representative is on site, where considered necessary by WPSO.

- i. Prior to the commencement of the interview, the interviewing Party shall advise the witness that he or she:
 - i. is not required to participate in the interview and can decide to stop being interviewed at any time;
 - ii. can refuse to answer questions, in particular if they are thought to be potentially self-incriminating;
 - iii. can ask for a recess at any time; and
 - iv. can ask to meet with a WPSO representative at any time during the interview.
- j. During the interview, the interviewing Party shall:
 - i. ensure the presence of only the authorized individuals;
 - ii. verify the identity of the witness;
 - iii. ensure that all individuals present identify themselves on the record;
 - iv. ensure that the interview is audio-video-recorded;
 - v. ensure the safety and well-being of the witness; and
 - vi. ensure that the procedural elements of the interview are conducted in accordance with the Law, the Rules, and any subsequent order, decision, observations, or recommendations of the Panel.
- k. In the event the calling Party objects to any part of the procedure followed or any particular line or manner of questioning during the interview, it shall raise the issue with the interviewing Party outside the presence of the witness. Any disagreement shall be recorded and shall not impede or unduly disrupt the interview. On an exceptional basis, the calling Party may apply to the Panel to terminate the interview in relation to flagrant breaches of this Framework in case the parties cannot reach an agreement in accordance with the preceding procedure.
- l. In the event that a Registry representative is present during the interview in accordance with this section of the Framework, the Parties shall respect the Registry's neutrality and shall refrain from seeking to involve its representative in the proceedings. Should the witness need to consult with a legal representative during the interview, the interview shall be suspended so that this can be arranged. The interviewing Party shall inform the Defence Office, so that the necessary arrangements to assign Counsel to the witness may be made.
- m. If the interviewing Party intends to show confidential or strictly confidential records to the witness other than the witness's own statements, it shall proceed, mutatis mutandis, in accordance with section I, paragraphs (c) and (d) of this Framework.
- n. Following the completion of the interview, the interviewing Party shall prepare:

- i. a memorandum recording the process (indicating time, place, attendees, classification – i.e., public, confidential or strictly confidential – and any other relevant circumstance) and submit it to the Parties and the Panel; and
 - ii. the audio-video recording of the session and submit copies thereof to the Parties and to the Panel.
- o. Neither the record of the interview nor any materials used during the interview shall become part of the record in the case unless admitted in evidence by the Trial Panel *proprio motu* or upon an application by a Party, where the conditions for its admission under the Rules are met. Where admission of such a video recording is sought, the interviewing Party shall also produce the transcript of the interview.

B. CHANGE OF CIRCUMSTANCES

9. Drawing from the jurisprudence concerning detention reviews under Rule 57, the Defence submit that whether there has been a material “change of circumstances” will depend on whether facts underlying the initial ruling have changed or new facts require a modification of the prior ruling.¹¹

IV. SUBMISSIONS

10. For the reasons set out below, circumstances have changed in a material way since the Court of Appeal Panel’s Decision on the Framework was issued on 27 December 2022, so as to affect the basis on which that decision was taken. First, while the issue of whether the PTJ erred in finding that the Framework should apply equally to different categories of witnesses, namely victims and high ranking international witnesses alike¹² was considered by the Appeals Panel, it was considered hypothetically.¹³ Indeed the Appeals Panel rejected arguments that it should conduct an individual assessment of the situation of each witnesses rather than issue a blanket framework applicable to all. Specifically, the Appeals Panel held that “[g]iven the

¹¹ See, *Prosecutor v. Gucati & Haradinaj*, KSC-BC-2020-07/F00058, Single Judge, Decision on Request for Immediate Release of Nasim Haradinaj, 27 October 2020, para. 14.

¹² Contact Decision, para. 135.

¹³ Court of Appeals Panel’s Decision on the Framework, paras. 43-49.

Framework is not contingent upon any actual need for protection and is of a preventative nature, it will apply to all notified witnesses regardless of whether they have expressed security concerns.”¹⁴ The specific issues related to W04147 raised in this motion were not litigated by the Defence at the time, and thus are new facts which require consideration.

11. Prior to the imposition of the Framework, the Defence had been in substantial and significant contact with Witness W04147 who had indicated that he would be very happy to continue speaking to them. On the basis of these conversations, the Defence intended to call him as a witness for the Defence. However, the Defence did not have the opportunity to confirm this with Witness W04147 as the Framework came into force, preventing the Defence from any further contact with him. Therefore we are now in a situation where both parties seek him as a witness. Consequently, this witness is covered by the Contact Decision for both the SPO and arguably also the Defence, which means that neither party can talk to him without consulting the other and undertaking the arduous procedures for contact set out in the Framework. Indeed the fact that this witness is arguably covered by the Contact Decision for both parties is why the Defence does not seek to make an application to interview him under the conditions set out in the Contact Decision as recently suggested by the Trial Panel.¹⁵ The Defence submit that this would be inappropriate in circumstances where the SPO is arguably also prevented from speaking to this witness any further due to the Contact Decision. In these circumstances, the Defence submit that it would be more preferable and more efficient if the application of the Contact Decision was waived for this witness so that both parties can speak to him freely to ascertain in the first instance which party he will testify on behalf of; and then to prepare him to testify accordingly.

¹⁴ Court of Appeals Panel’s Decision on the Framework, para. 45.

¹⁵ KSC-BC-2020-06/F01250, Decision on Thaci Motion Regarding the Preservation of Evidence, 2 February 2023, para. 40.

12. Secondly, the Defence recalls that the basis for the PTJ's finding that the Contact Decision applied to all categories of witnesses was that "the mere fact that a witness has not expressed any fear so far or that he or she has an international profile and/or occupied a high-ranking position does not, as such, establish that he or she should not be allowed to request the protection under the terms of the Proposed Framework in light of the aforementioned considerations."¹⁶ Far from expressing any fear, this Witness has already spoken extensively to the Defence and indicated he would be happy to speak to them again. Therefore, there is no need for preventative protection from witness intimidation and/or pressure that the Contact Decision is intended to guard against.

13. Thirdly, as per [REDACTED] policy, officials from the [REDACTED] were present when the SPO took its statement from Witness W04147.¹⁷ In July 2022, [REDACTED] confirmed to Defence Co-Counsel that it was willing to authorize the Defence to interview W04147 under certain conditions. Namely, that any information gleaned from the interview would remain confidential and could not be disseminated outside the authorised members of the Defence team without written permission of [REDACTED]. [REDACTED] requires counsel present at any interview or who receive information gleaned from it to sign non-disclosure agreements. Moreover, representatives of [REDACTED] are required to be present in any interview.¹⁸ The justification for the Contact Decision is to "ensure the protection of witnesses by defining the appropriate procedure for contacts between the Defence and the witnesses included in the SPO List of Witnesses and other notified Witnesses and by

¹⁶ Contact Decision, para. 120.

¹⁷ 075522-075551, p. 1.

¹⁸ See Annex 1 - Letter from [REDACTED], to Ambassador Pierre Richard Prosper, 18 July 2022. A redacted version has been filed. The Defence is unable to file a non-redacted version due to data protection and confidentiality issues.

permitting the witnesses to seek assistance regarding such contacts.”¹⁹ This need for protection arises from what the PTJ held (and disputed by the Defence) is “a climate of witness intimidation and interference in connection with criminal proceedings regarding former members of the KLA”.²⁰ It seeks to ensure that in these circumstances contacts between the Defence and SPO witnesses are “appropriately regulated”.²¹ It is submitted that the stringent conditions required by [REDACTED] and the presence of their officials at any interview between the Defence and Witness W04147 will ensure this level of safety and it is unnecessary for the SPO to also be present.

14. Finally, compliance with the Framework will put the Thaçi Defence in breach of its obligations to [REDACTED]. Specifically, the Defence has agreed to protect the confidentiality of the information, not to disclose it or its source to anyone other than member/s of the Thaçi Defence team who have signed the NDA. The logic of this is that this information belongs to [REDACTED], the witness is merely a vessel. Sharing this information with the SPO by allowing them to be present at an interview pursuant to the Framework will thus put the Defence in breach of its obligations to [REDACTED].

V. RELIEF SOUGHT

15. The Defence seeks the variation of the Contact Decision to enable it to interview this witness in advance of his testimony without the presence of the SPO and free from the constraints set out in the Framework.

¹⁹ Contact Decision, para. 116 (internal citations omitted).

²⁰ Contact Decision, para. 118.

²¹ *Ibid.*

Word count: 3,262 words

Respectfully submitted,



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Monday, 6 March 2023

At The Hague, The Netherlands