

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 Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

Date: 4 July 2023

Language: English

Classification: Public

Public Redacted Version of “Thaçi Defence Request as regards contact with W04290 with Confidential Annexes 1 and 2”

Specialist Prosecutor’s Office

Alex Whiting

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. By placing a witness on its witness list, the SPO indicates its intention to call that witness to give evidence. Inclusion in the SPO witness list also triggers a number of rights and protections for the witness, including limitations on the ability of the opposing party to contact that witness. When the SPO then indicates that it no longer intends to call the witness at this stage, this is a material change in circumstances which alters the opposing party's right to contact that witness. While seemingly straightforward, this situation has led to a dispute between the parties in relation to W04290. After attempts to resolve the issue *inter partes* have failed, the Defence seeks clarification from the Trial Panel.

II. PROCEDURAL HISTORY

2. On 24 June 2022, the Pre-Trial Judge issued a decision setting out a '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' ("Contact Protocol").¹

3. On 8 September 2022, the Defence for Mr Hashim Thaçi ("Defence") appealed four issues arising from the Contact Decision,² having been granted certification to do

¹ 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 Contact Protocol.

² 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").

so.³ On 27 December 2022, the Court of Appeals Panel dismissed appeals from all four defence teams in their entirety, upholding the Contact Protocol.⁴

4. On 25 January 2023, the Trial Panel issued an Order on the Conduct of Proceedings.⁵ Most relevantly, paragraph 71 set the following guidelines:

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 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.

5. On 21 June 2023, the SPO contacted the Parties and Participants *inter partes* to provide information regarding the witnesses to be called in July and August. As part of this correspondence, the SPO noted "[REDACTED]".⁶

6. On 26 June 2023, the Defence contacted the SPO by email to seek clarification regarding the impact of this decision on Defence contact with W04290.⁷ In light of the SPO's stated decision "not to call W04290 at this stage", the Defence made the following proposal:

The Defence submits that in these circumstances, the application of the Contact Protocol should be lifted. In balancing the need to protect witnesses against the Accused's right to investigate and to prepare their defence, the Defence submits that

³ 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.

⁴ 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 ("Appeal Decision").

⁵ 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.

⁶ See Annex 1, Email from SPO, 21 June 2023, 16:50.

⁷ See Annex 2, Email from Thaçi Defence to SPO, 26 June 2023, 13:01.

the SPO's conclusion that it will not call W04290 at this stage tips the scales in favor of the Accused's rights to interview the witness outside the presence of the SPO.

The Defence wishes to interview him prior to W04746's testimony, and therefore the Defence would like to know whether you have any objection to such an interview being conducted in the absence of the SPO, without recording; in case of disagreement between the parties, the issue may be raised before the Panel.

7. By email dated 28 June 2023, the SPO referred to paragraph 71 of the Order on the Conduct of Proceedings, and stated:

The mere fact that we are not calling W04290 at this time in order to prioritize other witnesses does not amount to changed circumstances. The order in which witnesses are called has no bearing upon the application of the Framework to them. We further note that the conditions of the Framework do not impede on your ability to investigate and collect evidence (IA024/F00019, para. 83).

III. SUBMISSIONS

8. The Contact Protocol prevents a party from contacting or interviewing another party's witness, if the intention to call the witness to testify has been notified to the opposing party.⁸ As recently as 9 June 2023, the SPO notified the Defence of its intention to call W04290 to testify, by including him on the SPO List of Witnesses.⁹ It has now indicated the opposite; that at this stage the SPO does not intend to call W04290.¹⁰

9. W04290 is, by any reasonable assessment, a central SPO witness. The SPO summary lists him [REDACTED].¹¹ This reflects the role he played during the events alleged in the indictment, [REDACTED].¹²

⁸ Contact Protocol, II a.

⁹ See KSC-BC-2020-06/F01594/A02, Annex 2 – Prosecution Amended List of Witnesses, 9 June 2023 (“SPO List of Witnesses”), p. 9 no. 146.

¹⁰ See Annex 1, Email from SPO, 21 June 2023, 16:50.

¹¹ SPO List of Witnesses, p. 9, no. 146. *See also*, pp. 249-250.

¹² *See* KSC-BC-2020-06/F01594/A03, Annex 3 - Lesser Redacted Version of ‘Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief’, 9 June 2023.

10. W04290's prior interviews and testimony demonstrate, however, that he is able to present the Trial Panel with significant exculpatory evidence, which undermines the SPO's case in several respects. As such, the decision "[REDACTED]", cannot reasonably be understood as being due to scheduling, efficiency or preferred witness order. It is, rather, a strategic decision. And one where, on balance, the SPO has decided not to call W04290, presumably because of the risks he poses to the SPO case, and the uncertainty surrounding his testimony.

11. The dropping of SPO witnesses will likely continue to occur with increasing frequency. As the Trial Panel has recognised, at the current pace, the SPO witness list cannot be presented within the timeframe set.¹³ After hearing 10 witnesses, the Trial Panel has expressed concern "about the current pace of the in-court testimony given the target for the end of the SPO case in April 2025".¹⁴ Witnesses must, and will, continue to be dropped. Once they do, it is a near certainty that the Defence will want to speak with them. As such, when the SPO identifies witnesses, such as W04290 which it no longer intends to call, the ability of the Defence to contact the witness necessarily changes.

12. The Defence has made a previous submission, which remains uncontested, that the Contact Protocol "is the most restrictive regime for witness contact in the history of international criminal justice and negatively impacts the Defence."¹⁵ It requires the Defence to audio video record all interviews with SPO witnesses, and then disclose this recording to the SPO, and the Trial Panel itself. The Panel can then admit this recording into evidence *proprio motu*.¹⁶ So far, given the risk of eliciting inculpatory evidence which is then entered directly into the trial record and can be relied upon to

¹³ KSC-BC-2020-06, Transcript of Hearing (Procedural Matters), 19 June 2023, Oral Order 1 - pp. 4983-4985

¹⁴ *Ibid.*

¹⁵ Thaçi Contact Decision Appeal , para. 7.

¹⁶ Contact Protocol, II o.

make adverse findings against an accused, no Defence team has sought to interview any SPO witness since the Protocol was put in place.

13. Against this backdrop, the SPO decision “[REDACTED]”, must be considered as constituting a material change in circumstances. If there was no change in circumstances, the SPO would never have notified the Defence of its changed intention. Importantly, this change in circumstances triggers the right of the Defence to seek appropriate relief.¹⁷ In this case, the relief sought is for the Trial Panel to confirm that the Defence is relieved of its obligations under the Protocol when speaking with W04290.

14. Indeed, this is the only reasonable outcome of the SPO’s indication that it will not be calling W04290 at this stage. It is also consistent with a plain reading of the Protocol itself, which prevents contact with a witness of another Party “if the intention to call the witness to testify or to rely on his or her statement has been notified to the opposing Party”.¹⁸ The SPO’s notification has been materially altered by its second notification as regards W04290. At this stage, W04290 is not being called to testify.

15. During exchanges on this issue, the SPO asserted that the conditions of the Contact Protocol “[REDACTED]”. They mistakenly do. Witnesses with whom the Defence were in regular contact and were seeking to call as Defence witnesses, for example, were placed out of the Defence’s reach by virtue of the Contact Protocol. The evidence of witnesses such as W04290, who have the ability to give exculpatory evidence, would normally form part of the Defence’s investigations and provide valuable information for cross-examination of other SPO witnesses. The Contact Protocol makes it impossible for the Defence to interview these witnesses without the risk of significant prejudice to the accused. The Contact Protocol impedes Defence

¹⁷ Order on the Conduct of Proceedings, para. 71.

¹⁸ Contact Protocol, II a.

investigations and its ability to collect evidence because it forces the Accused to choose between his right to fully investigate the case against him, and his right not to be compelled to produce evidence against himself. The Contact Protocol must therefore be strictly limited to the witnesses whom the SPO intends to call to testify.

16. There are also considerations of efficiency. Where a party is able to interview and learn more about a witness' knowledge and potential evidence, this assists in building, narrowing, and refining the party's case, and assists in ensuring that the most relevant and probative evidence is presented to the Trial Panel, contributing to the efficient conduct of proceedings. To that end, the Defence wishes to interview W04290, and the changed intention of the SPO, communicated to the parties and Trial Panel, should now facilitate this line of investigation.

IV. CONCLUSION & RELIEF SOUGHT

17. Accordingly, the Defence respectfully requests the Trial Panel to:

CLARIFY that the Defence is relieved of its obligations under the Contact Protocol when speaking with W04290.

[Word count: 1,995 words]

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'G. W. Kehoe', is written over a white rectangular redaction box.

Gregory W. Kehoe

Counsel for Hashim Thaçi

Tuesday, 4 July 2023

At The Hague, The Netherlands