

In: KSC-BC-2020-06

Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: A Court of Appeals Panel

Judge Michèle Picard

Judge Emilio Gatti

Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Kadri Veseli

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Veseli Defence Appeal 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 (F00854)

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I. INTRODUCTION

1. The Defence for Mr Kadri Veseli ("Defence") files this appeal against the Impugned Decision,¹ pursuant to Article 45(2) of the Law, and Rules 77 and 170 of the Rules.

II. STANDARD OF APPELLATE REVIEW

2. Pursuant to Article 45(2) of the Law and Rule 77 of the Rules, the Court of Appeals shall hear interlocutory matters where the issue(s) at stake would impede the fair and expeditious conduct of the proceedings, or where their resolution could materially advance proceedings.
3. In deciding interlocutory matters, the Court of Appeals applies the same standard, *mutatis mutandis*, for interlocutory appeals as it does for appeals against judgements.² Hence, the Court of Appeals shall intervene in cases where the Pre-Trial Judge (i) erred in law; (ii) erred in fact; or, (iii) committed a clear error in the exercise of his discretion.³

III. APPLICABLE LAW

4. Article 23(1) of the Law:

The Specialist Chambers' Rules of Procedure and Evidence shall provide for the protection of victims and witnesses including their safety, physical and psychological well-being, dignity and privacy. Such protective measures shall include, but shall not be limited to, those set out at Articles 221-226 of the Criminal Procedure Code of Kosovo, Law No. 04/L-123, Articles 5-13 of the Law on Witness Protection, Law No. 04/L-015, the conduct of in camera proceedings, presentation of evidence by electronic or other special means and the protection of identity.

¹ 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, ("Impugned Decision").

² See, IA001/F00005, paras 4-8; KSC-BC-2020-07/IA001/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, paras 10-14.

³ Article 46(1) of the Law. See also, IA001/F00005, paras 7-8; Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, para. 14.

5. Pursuant to Article 35(2)(f) of the Law, the Specialist Prosecutor's Office ("SPO") has the authority to take, or request that, "necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence."⁴

6. Article 39(1) of the Law:

The Pre-Trial Judge shall have the power to review an indictment, rule on any preliminary motions, including challenges to the indictment and jurisdiction, and make any necessary orders or decisions to ensure the case is prepared properly and expeditiously for trial.

7. Article 39(11) of the Law:

The Pre-Trial Judge may, where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons and national security information or the preservation of assets which may be subject to a forfeiture under this Law and the Rules of Procedure and Evidence, including temporary freezing orders, temporary confiscation orders or other temporary measures.

8. Rule 80(1) of the Rules:

Pursuant to Article 23(1) of the Law, a Panel may, *proprio motu* or upon request by a Party, the Witness Protection and Support Office, a witness, or Victims' Counsel, where applicable, order appropriate measures for the protection, safety, physical and psychological well-being, dignity and privacy of witnesses, victims participating in the proceedings and others at risk on account of testimony given by witnesses, provided that the measures are consistent with the rights of the Accused.

IV. SUBMISSIONS

A. The Pre-Trial Judge Erred in his Assessment of the Legal Basis to Order the Framework.

9. The Pre-Trial Judge erred by issuing the Impugned Decision pursuant to Articles 35(2)(f), 39(1) and 39(11) of the KSC Law when the issue is clearly governed by Article 23(1) and Rule 80. In the view of the Pre-Trial Judge, these provisions authorised him to "[order] general measures regarding the handling of confidential information and the regulation of contacts with witnesses."⁵ The

⁴ Article 35(2)(f) of the Law.

⁵ F00854, para. 115.

Pre-Trial Judge rejected SPO submissions⁶ to order the Framework based on, *inter alia*, Rule 80 of the Rules,⁷ thereby implicitly conceding that Rule 80 concerns individual and individualised measures, rather than “general measures”. In this respect, the Pre-Trial Judge considered that:

[A]ny protective measures ordered pursuant to Rule 80 of the Rules do not exhaust the more general responsibility of the SPO and the function of the Pre-Trial Judge to ensure the protection of witnesses under Article 39(11) of the Law. This provision stipulates that the Pre-Trial Judge may provide for the protection and privacy of witnesses “where necessary”, thus expressly establishing that this function involves the exercise of judicial discretion. As such, the Proposed Framework, is not an indirect request for additional or new measures pursuant to the Rule 80 of the Rules.⁸

10. The Defence submits that the Pre-Trial Judge made a series of legal errors which considered separately and/or cumulatively have the effect of invalidating the Impugned Decision.
11. First, the Defence notes that, despite acknowledging that Article 23(1) of the Law constitutes “the primary provision on the protection of witnesses”,⁹ the Pre-Trial Judge failed to consider said provision as the legal basis for ordering the Framework, relying instead primarily on Article 39(11) of the KSC Law.
12. Similar to its preceding and succeeding paragraphs, Article 39(11) simply provides for the power of the Pre-Trial Judge to issue orders and decisions the substance of which is usually provided in other provisions of the Law or the Constitution. It follows that while Article 39(11) provides answers to questions pertaining “who” (i.e. the Pre-Trial Judge) and “how” (i.e. where necessary), it is Article 23(1) of the Law – as the “substantive” provision – which should provide the answer to the Certified Issue. Therefore, Article 39(11) does not operate independently from Article 23(1) of the Law; and nor does it authorise

⁶ Summarised at F00854, para. 66.

⁷ F00854, para. 117.

⁸ F00854, para. 117.

⁹ F00854, para. 121.

the Pre-Trial Judge to order other measures than those provided by Article 23(1) of the Law and Rule 80 of the Rules.

13. Had the Pre-Trial Judge relied upon Article 23(1) of the Law, he would have easily concluded that the ‘the protection of victims and witnesses including their safety, physical and psychological well-being, dignity and privacy’ are provided by the ‘Specialist Chambers’ Rules of Procedure and Evidence’. Article 23(1) of the Law therefore specifically delegates to the Rules *all* measures concerning the protection of victims and witnesses.
14. Turning to the Rules, it is plain that measures under Rule 80 may only be ordered if necessary and proportionate to the aim sought – because they infringe on the rights of the Accused, which is an assessment that is to be taken on the basis of the particular circumstances of each victim or witness. This means that, contrary to the finding of the Pre-Trial Judge, the KSC legal framework does not allow the application of measures of general nature. It follows that the Pre-Trial Judge erred in failing to properly consider Article 23(1) of the Law, which mandates that any such measures listed in Article 39(11) of the Law shall be provided by the Rules.
15. Second – and regardless to whether the Rules bar the imposition of the Framework – Articles 23(1) and 39(11) of the Law do not escape the requirement of necessity and proportionality, thereby excluding measures of a general nature which, by definition, do *not* entail an assessment of necessity or proportionality. In this respect, the Pre-Trial Judge made a discernible error when interpreting the phrase “where necessary” in Article 39(11) of the Law as providing him judicial discretion to order, in violation of Article 23(1) of the Law, other measures not envisaged by Rule 80 of the Rules.¹⁰ Properly interpreted, the phrase “where necessary” in Article 39(11) of the Law has the

¹⁰ F00854, para. 117.

opposite effect, namely to limit – rather than expand – the judicial discretion of the Pre-Trial Judge to order protective measures contemplated by Article 23(1) of the Law and Rule 80 of the Rules, only in such cases where, due to objective and specific concerns, the safety and wellbeing of the relevant witness may be at risk. In addition, such measure shall be proportionate to the risk identified and not be prejudicial to the rights of the Accused.¹¹

16. Third, the Pre-Trial Judge erred by failing to provide any criteria for determining when it is appropriate to operate outside the Rule 80 framework (and when is it not) or how the necessity of judicial intervention pursuant to Article 39(11) is to be assessed. Other than repeating the “usual” generic concerns about the existence of a climate of witness interference in connection with criminal proceedings regarding former members of the KLA,¹² the Pre-Trial Judge fails to identify any concrete facts which would necessitate an order for measures other than those envisioned by Rule 80. The decision thereby (i) fails to establish that Article 39(11) provides an independent legal basis for the Protocol; and (ii) introduces an unacceptable open-endedness to the exercise of “judicial discretion” in Article 39(11).
17. Moreover, the Pre-Trial Judge erred when considering that “these safeguards ensure that the protection provided by the Proposed Framework will exclusively be extended to those who themselves seek to invoke it”.¹³ This is factually incorrect. The Framework applies by default to all SPO witnesses and the Defence is currently barred from initiating direct contact with such witnesses. Even if a witness ultimately states a preference for being interviewed without the SPO’s being present, *and* permission to override the witness’s preference is ultimately refused by the judge, the Defence still bears

¹¹ Rule 80(1).

¹² F00854, para. 118.

¹³ F00854, para. 119.

the additional, unnecessary, burden of adhering to the mandated procedures – in every instance.

18. Fourth, with respect to privacy issues, the Pre-Trial Judge observed that ‘Article 39(11) of the Law is not confined to ensuring the protection of witnesses but extends to their privacy as well’.¹⁴ However, this is not “unique” to Article 39(11) since – as noted above – Article 39(11) is simply a *renvoi* to the substantive provisions, namely Article 23(1) of the Law and Rule 80(1) of the Rules.¹⁵ Therefore, the Pre-Trial Judge fails to provide reasons as to why Rule 80 is insufficient to protecting the privacy of witnesses. As regards the application of Rule 30(2)(b) of the Rules, the Defence submits that such provision is utterly inapposite, considering that it relates to the SPO’s responsibilities towards persons during its own investigation. At the present stage, which concerns Defence investigation, such responsibility falls upon the Pre-Trial Judge. In any event, privacy concerns provided in Article 23(1) of the Law are mostly directed towards the public rather than the Defence. It would be illogical for a witness to invoke privacy concerns in respect to questions pertaining to issues material to the Defence.

B. The Framework is *Ultra Vires*.

19. At paragraph 129 of the Impugned Decision, the Pre-Trial Judge noted that the Framework is “similar to other framework decisions” and that he:

[R]etains the authority to concretise certain procedures that have not been explicitly regulated in the Law or Rules. In these circumstances, the fact that the legal texts do not explicitly provide for the Proposed Framework is of no consequence.

¹⁴ F00854, para. 121.

¹⁵ See, Rule 80(1): Pursuant to Article 23(1) of the Law, a Panel may, *proprio motu* or upon request by a Party, the Witness Protection and Support Office, a witness, or Victims’ Counsel, where applicable, order appropriate measures for the protection, safety, physical and psychological well-being, dignity and privacy of witnesses [...]

20. Setting aside the contradiction to the preceding argument that the “Proposed Framework has a specific basis in the Law”,¹⁶ the Defence notes that, contrary to the Impugned Decision, previous framework decisions were all based upon the Rules and simply explicated the procedure already laid down therein.¹⁷ In the present case, the Pre-Trial Judge does not point to any specific Rule – except to state that Rule 80 does *not* govern the matter¹⁸ and instead seeks to enlarge or expand the meaning of Article 39(11) of the Law.¹⁹
21. The Defence recalls that the Pre-Trial Judge’s legal functions are articulated in Article 39 of the Law, and in the corresponding Rules. While, pursuant to Article 39(1) of the Law and Rule 95 of the Rules, the Pre-Trial Judge may issue any necessary orders or decisions to ensure the case is prepared properly and expeditiously for trial, this cannot be construed as limitless to the point where the Pre-Trial Judge is able to, *sua sponte*, create rules and procedures beyond the material scope of the KSC legal framework. Such action is wholly inconsistent with the duties and function assigned to the judiciary.
22. The Defence submits that, taking into account where (i) the scope of behaviour which the decision seeks to legislate ; (ii) the importance of the issues at stake (*e.g.* Mr Veseli’s right to have adequate time and facilities to prepare his defence); and, (iii) the non-individualised nature of the framework decision

¹⁶ F00854, para. 129.

¹⁷ F00099, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020; F00159, Framework Decision on Victims’ Applications, 4 January 2021.

¹⁸ F00854, para. 117.

¹⁹ See, ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13, [Appeal Judgement](#), 31 May 2017, paras 162–166, 180–188, in which the Appeal Chamber determined that the Trial Chamber had acted *ultra vires* when it inserted two different definitions of the term “witness” into Article 70 of the Rome Statute. Importantly, the Trial Chamber’s determination “[pointed] no relevant legal authority, nor commentary on the construction of the Statute to justify this radical action which [violated] the principle of strict construction under Article 22(2).” Accordingly, the Appeals Chamber stated that, whilst in possession of “inherent power” (*i.e.*, discretion) deriving from judicial function, the Trial Chamber could not simply “alter the wording of the Rome Statute, or to interpret its provisions through enlarging or expanding their meaning.

(i.e., applicable to all witnesses on the SPO witness list), it is clear that the Pre-Trial Judge has exceeded his discretion under Article 39(1) and Article 39(11)

V. CONCLUSION

23. For the reasons set out above, the Defence requests the Court of Appeals Panel to grant the Appeal and find that the Pre-Trial Judge erred in his assessment of the legal basis used to adopt the Framework; or in the alternative, acted *ultra vires*; and consequently, set aside the Impugned Decision.


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