



In: KSC-BC-2018-01
Before: Single Judge Panel
Judge Marjorie Masselot
Registrar: Dr Fidelma Donlon
Date: 16 July 2024
Language: English
Classification: Confidential and *Ex Parte*

Decision on Defence Request for Assurance of Protection of Legal Privilege

Specialist Prosecutor

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Trial Panel II

Judge Charles L. Smith III, Presiding Judge

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

Counsel for Jakup Krasniqi

Venkateswari Alagendra

THE SINGLE JUDGE,¹ pursuant to Articles 21(4)(c), 33(2), 34(1) and (12) and 35(2) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), and Rule 23(7) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby issues this decision.

I. PROCEDURAL BACKGROUND

1. On 19 December 2023, upon request by the Defence for Hashim Thaçi ("Mr Thaçi" and "Thaçi Defence"), Kadri Veseli ("Mr Veseli" and "Veseli Defence"), and Rexhep Selimi ("Mr Selimi" and "Selimi Defence") (collectively "Case 06 Accused"),² following the revelation that, for certain periods during 2023, the Single Judge authorised special investigative measures ("SIMs") concerning covert audio recordings of non-privileged visits of the Case 06 Accused within the Detention Facilities of the Specialist Chambers ("SC") ("Monitoring SIMs"),³ the Single Judge issued the "Decision on Defence Request for Measures to Ensure Counsel-Client Privilege," confirming and providing assurance regarding the scope of the Monitoring SIMs ("Decision on Assurances").⁴

2. On 17 June 2024, the Thaçi Defence, Veseli Defence, Selimi Defence and Defence for Jakup Krasniqi ("Mr Krasniqi" and "Krasniqi Defence") (collectively "Defence" or

¹ KSC-BC-2018-01, F00697, President, *Decision Assigning a Single Judge*, 6 June 2024, public. A corrected version was issued on 12 July 2024, F00697/COR.

² KSC-BC-2018-01, RAC001/F00005, Defence for Mr Thaçi, Mr Veseli and Mr Selimi, *Urgent Defence Request for Measures to Ensure Counsel-Client Privilege*, 1 December 2023, confidential and *ex parte*.

³ See KSC-BC-2018-01, RAC001/F00003, Defence for Mr Thaçi, Mr Veseli and Mr Selimi, *Urgent Defence Request for Reclassification of Further Filings, Suspension of Deadlines, and Extension of Time for Leave to Appeal Decisions Relating to the Authorisation of Covert Recordings and Previous Related Requests*, 27 November 2023, confidential and *ex parte*, para. 3. A corrected version was filed on 28 November 2023, F00003/COR.

⁴ KSC-BC-2018-01, RAC001/F00011, Single Judge, *Decision on Defence Request for Measures to Ensure Counsel-Client Privilege*, 19 December 2023, confidential and *ex parte*.

“Accused”) filed the “Joint Defence Request for Assurance of the Protection of Legal Privilege” (“Request”).⁵

3. On 28 June 2024, the Specialist Prosecutor’s Office (“SPO”) responded to the Request (“Response”).⁶ The Defence did not reply.

II. SUBMISSIONS

4. In the Request, noting that it has received no further information regarding current SIMs or the status of the SPO’s investigation since the Decision on Assurances nearly six months ago,⁷ the Defence requests further assurances that legal privilege has not been breached in the proceedings through the interception of (i) any oral Defence communications, including in-person meetings, Zoom conferences and telephone calls, in which counsel or co-counsel are participants; or (ii) written Defence communications or documentary exchanges, including communications and documents transmitted through SEDS.⁸ In support, the Defence submits that, despite efforts through *inter partes* correspondence with the Registrar, it has been unable to receive confirmation that no audio or visual recordings of legal visits are taking place at the SC Detention Facilities.⁹ As a result, the Defence avers that it remains entirely unaware whether privileged legal meetings are currently being intercepted.¹⁰

5. Recalling the importance of privileged communications, pursuant to Rules 31(3) and 111(1) of the Rules,¹¹ the Defence submits that the omnipresent risk of interception

⁵ KSC-BC-2018-01, F00711, Defence for Mr Thaçi, Mr Veseli, Mr Selimi and Mr Krasniqi, *Joint Defence Request for Assurance of the Protection of Legal Privilege*, 17 June 2024, confidential, with Annex 1, confidential.

⁶ KSC-BC-2018-01, F00717, Specialist Prosecutor, *Prosecution Response to “Joint Defence Request for Assurance of the Protection of Legal Privilege”*, 28 June 2024, confidential.

⁷ Request, paras 8, 18-19, 21.

⁸ Request, paras 2, 17, 22-23.

⁹ Request, paras 9-11.

¹⁰ Request, para. 8.

¹¹ Request, paras 13-14.

by the SPO of legally privileged communications in the proceedings poses a significant threat to the rights of the Accused and the preparation of their case.¹²

6. The SPO responds no assurances are necessary or justified, considering that: (i) the SC legal framework provides robust protection of privileged communications between a person and his/her Specialist Counsel;¹³ (ii) the Defence is not entitled to receive information concerning confidential and *ex parte* investigations beyond what is subject to disclosure or notification under the Rules;¹⁴ and (iii) the Taçi Defence, Veseli Defence and Selimi Defence have already received repeated assurances beyond those required, as well as access to relevant filings on the Monitoring SIMs, enabling them to confirm the extent of the measures which concerned exclusively non-privileged communications.¹⁵ Nonetheless, the SPO confirms that it has not intercepted any communications protected under Rules 31(3) and 111(1) of the Rules.¹⁶

III. APPLICABLE LAW

7. Pursuant to Article 21(4)(c) of the Law, the accused shall be entitled to have adequate time and facilities for the preparation of his or her defence and to communicate with Specialist Counsel of his or her own choosing.

8. Pursuant to Article 34(1) of the Law, the Registrar shall be responsible for the administration and servicing of the SC and all necessary and affiliated functions.

9. Pursuant to Article 34(12) of the Law and Rule 23(7) of the Rules, and without prejudice to judicial oversight when necessary, the Registrar shall be responsible for

¹² Request, paras 8, 17, 19-20, 21. In this regard, the Defence points out that some legal visits have taken place in meeting rooms equipped with a visible camera. *See* Request, para. 19.

¹³ Response, para. 1.

¹⁴ Response, para. 1.

¹⁵ Response, para. 2.

¹⁶ Response, para. 3.

managing and administering the detention function and facilities for the SC in line with international standards and the Law.

10. Pursuant to Article 35(2) of the Law, the SPO shall have the authority to conduct criminal investigations within the subject matter jurisdiction of the SC, in accordance with the modalities established by the Law.

IV. DISCUSSION

11. Before turning to the merits, the Single Judge clarifies that the Request consists of two components: (i) confirmation that no privileged meetings to the Case 06 Accused at the SC Detention Facilities were at any point ordered to be recorded during the Monitoring SIMs (“Request for Confirmation”); and (ii) assurance that there are no ongoing Monitoring SIMs that would potentially include privileged counsel-client meetings (“Request for Assurances”). They will be addressed in turn.

12. At the outset, the Single Judge recalls that the Case 06 Accused have been apprised of and received access to confidential redacted versions of all relevant decisions and filings relating to the Monitoring SIMs.¹⁷ The Single Judge further recalls that the Case 06 Accused were previously provided assurances that: (i) the Monitoring SIMs specifically excluded the monitoring of privileged communications; (ii) no privileged visits had been deliberately or inadvertently recorded during the relevant timeframe; and (iii) there were no ongoing Monitoring SIMs at the SC Detention Facilities that would potentially include privileged counsel-client meetings between

¹⁷ See KSC-2018-01-RAC001/F00016, Single Judge, *Notification to the Defence of the Issuance of the Confidential Redacted Versions of all the Relevant Decisions*, 24 January 2024, confidential and *ex parte*, paras 3, 4(a).

the Case 06 Accused and their respective counsel.¹⁸ Recently, the Krasniqi Defence equally received access to all said filings and decisions.¹⁹

13. As regards the Request for Confirmation, the Single Judge reiterates that it is manifestly evident and unambiguously clear from the filings and decisions provided to the Defence that the scope of the authorised Monitoring SIMs concerned only *non-privileged* visits to the Case 06 Accused at the SC Detention Facilities.²⁰ This was made abundantly clear in the Decision on Assurances. Nonetheless, considering the time that has elapsed since the Decision on Assurances, the Single Judge reaffirms these previous assurances and confirms that there has been no monitoring of privileged communications, in any shape or form (in person visits, telecommunications, written communications and exchange of documentary evidence), between the Accused and their respective Counsel at the SC Detention Facilities.

14. As regards the Request for Assurances, considering the Defence's concerns, the Single Judge finds it appropriate to assure the Defence that no further orders or decisions exist relating to the monitoring of communications, in any form, of the Accused at the SC Detention Facilities, of which they have not been apprised.

¹⁸ Decision on Assurances, paras 15-17.

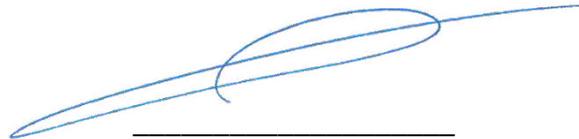
¹⁹ See KSC-BC-2018-01, RAC002/F00006, Single Judge, *Order Granting Access to Filings in KSC-BC-2018-01*, 4 July 2024, confidential.

²⁰ Decision on Assurances, para. 15. See also, among others, *Thaçi Monitoring Request*, paras 1, 37, 39, 42, 43, 50(a); *Selimi Monitoring Request*, paras 1, 17, 22-25, 28-29, 32; *Veseli Monitoring Request*, paras 1, 7, 28-31, 34-35, 47; *Thaçi Monitoring Decision*, paras 1, 26, 28-33, 38-39, 50(b)(ii); *Veseli Monitoring Decision*, paras 5, 8, 38, 40-42, 44-46, 50-52, 56, 62(c)(ii); *Selimi Monitoring Decision*, paras 5, 8, 27, 29-31, 33-34, 36, 40-41, 52(b)(ii).

V. DISPOSITION

15. For the above reasons, the Single Judge hereby:

GRANTS the Request and refers to the confirmation and assurance set out
in paragraphs 13 and 14 of the present decision.



Judge Marjorie Masselot

Single Judge

Dated this Tuesday, 16 July 2024

At The Hague, the Netherlands