

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: 26 September 2024

Language: English

Classification: Public

Public Redacted Version of ‘Thaçi Defence Motion to Compel the Specialist Prosecutor to Call Witnesses [REDACTED]’

Specialist Prosecutor’s Office

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Counsel for Hashim Thaçi

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I. INTRODUCTION

1. On 16 September 2024, the SPO submitted its 'Prosecution notice of witness changes'. In this notice, the SPO stated that it no longer intended to rely upon the evidence of eleven (11) witnesses, including [REDACTED]. The decision to drop these witnesses was characterised by the SPO as "further progress in streamlining its witness list."¹

2. The SPO has framed Mr Thaçi's alleged criminal responsibility as arising from his participation in a joint criminal enterprise, and his alleged failures as a commander. As such, the overwhelming majority of the charges do not allege any direct involvement of Mr Thaçi in crimes. One of the few exceptions is the allegation that Mr Thaçi was directly involved in [REDACTED].²

3. [REDACTED] have information directly relevant to the alleged [REDACTED]. Importantly, several other SPO witnesses have been cross-examined in front of the Trial Panel on the basis of [REDACTED]'s prior statements about the alleged circumstances of [REDACTED].³ The inconsistencies between the accounts of [REDACTED] and other SPO witnesses raise significant doubt as to Mr Thaçi's alleged direct involvement. They also render the evidence of [REDACTED] highly relevant to any assessment of the credibility of these other SPO witnesses. For these reasons, the appearance and testimony of [REDACTED] before the Trial Panel is an essential step towards the establishment of the truth.

¹ KSC-BC-2020-06/F02576, *Prosecution notice of witness changes*, Confidential ("SPO Notice").

² KSC-BC-2020-06/F00999/A01, *Amended Indictment*, 30 September 2022, Confidential, [REDACTED]; KSC-BC-2020-06/F01594/A03, *Lesser Redacted Version of 'Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief'*, 9 June 2023, Confidential, [REDACTED].

³ See the Defence cross-examinations referring to [REDACTED]'s SPO interview [REDACTED] in: [REDACTED]. See the Defence cross-examination referring to [REDACTED]'s SPO interview [REDACTED] in: [REDACTED]. See also the examination of [REDACTED] discussing the information which was allegedly disclosed to [REDACTED] by [REDACTED] regarding the circumstances of [REDACTED].

4. While the SPO has some discretion as to how it wishes to present its own case, the Trial Panel has the power pursuant to Rules 116(1) and 116(4) to compel the SPO to call [REDACTED] if the Trial Panel concludes that hearing these witnesses will contribute to the establishment of the truth. Rule 62 of the Rules⁴ obligates the Specialist Prosecutor to “contribute to the establishment of the truth by the Specialist Chambers.” Failure to hear two witnesses with important information about [REDACTED] allegations risks putting the Trial Panel in breach of its own “responsibility to establish the truth”⁵ and obligation to ensure that the trial is fair.⁶ On this basis, the Defence requests the Trial Panel to: (1) enter a finding that hearing evidence from [REDACTED] would contribute to the establishment of the truth by the Specialist Chambers; and (2) compel the SPO to call the evidence of [REDACTED], pursuant to Rule 62 and Rules 116(1), 116(4), and 143(4)(a) and Article 40(2) of the Law. In the alternative, the Defence requests that the Trial Panel take note that the Defence will ask the Trial Panel at the conclusion of the trial to draw adverse inferences from the SPO’s failure to call them.

II. PROCEDURAL BACKGROUND

5. [REDACTED] were first listed as witnesses in the SPO preliminary witness list notified in October 2021.⁷ [REDACTED]’s SPO interview was relied upon by the SPO as supporting material to the indictment submitted for confirmation.⁸

6. The size of the SPO case has been a consistent area of concern for the parties, the Pre-Trial Judge, and the Trial Panel. The Defence has repeatedly submitted, since

⁴ KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 (“Rules”).

⁵ KSC-BC-2020-06, Transcript of Hearing, 20 April 2023, Oral Order, p. 3269.

⁶ Article 40(2) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”).

⁷ KSC-BC-2020-06/F00542/A02/COR, *Corrected Version of Prosecution submission of preliminary witness list*, 22 October 2021, Confidential, [REDACTED].

⁸ See [REDACTED], first released in disclosure package 9 pursuant to Rule 102(1)(a).

the pre-trial phase⁹ and during the SPO preparation conference,¹⁰ that the size and anticipated length of the SPO's case is incompatible with a fair and expeditious trial.

7. In July 2022, the Pre-Trial Judge asked the SPO whether it was “amenable to streamlining their case by dropping some crime sites, limiting the number of witnesses per crime site, limiting the number of *viva voce* witnesses, limiting the total number of witnesses and/or limiting the number of items on the Exhibit List”.¹¹ Supporting these proposals,¹² the Defence has repeatedly invited the SPO to reduce the number of crime sites and witnesses,¹³ in order to ensure a fair and expeditious trial.¹⁴ The SPO has dropped only one minor crime site, for which they anticipated calling only one witness.¹⁵ The SPO has refused to drop any other sites¹⁶ or charges, despite the Trial Panel’s invitations.¹⁷

⁹ See, *inter alia*, KSC-BC-2020-06/F00744/RED, *Public Redacted Version of Veseli Defence Submissions for Eleventh Status Conference*, 22 March 2022, public, paras. 19-22.

¹⁰ KSC-BC-2020-06, Transcript of Hearing (SPO Preparation Conference), 15 February 2023 (“Transcript of SPO Preparation Conference”), pp. 1927-1942.

¹¹ KSC-BC-2020-06/F00863, Pre-Trial Judge, *Order Setting the Date for a Thirteenth Status Conference and for Submissions*, 1 July 2022, public, para. 22(3)(c).

¹² See, *inter alia*, KSC-BC-2020-06/F00870, *Thaçi Defence Submissions for the Thirteenth Status Conference*, 8 July 2022, public, para. 22 and fn. 20. See also KSC-BC-2020-06/F01242, *Thaçi Defence Motion to Narrow Charges in the Indictment Pursuant to Rules 116, 117 and 118*, 1 February 2023, public, paras. 5, 21.

¹³ For example, the Defence has regularly suggested to the SPO to drop crime sites witnesses that have low relevance, limited probative value, and credibility issues during *inter partes* exchanges about proposed Rule 153 witnesses.

¹⁴ The Victims’ Counsel similarly stressed during the status conference of 20 May 2022 that the none of the victim-witnesses “should be called unnecessarily”; that “the trial should be concluded as soon as possible”; that “the area in which there is the most room for saving court time is in relation to the witnesses dealing with the crime base”, and that “the list of witnesses giving oral evidence should reflect the true issues in the case; that’s to say, the matters that are really in dispute.”: KSC-BC-2020-06, Transcript of Hearing (Twelfth Status Conference), 20 May 2022, p. 1308, lines 6-14; p. 1310, lines 14-16.

¹⁵ KSC-BC-2020-06/F01291, *Prosecution Submission in advance of Specialist Prosecutor’s preparation conference*, 14 February 2023, public, para. 7, fn. 17.

¹⁶ See, *inter alia*, KSC-BC-2020-06/F00869, *Prosecution submissions for thirteenth status conference*, 8 July 2022, public, para. 9.

¹⁷ Transcript of SPO Preparation Conference, p. 1908, lines 2-20; p. 1916 line 23 – p. 1917 line 6; p. 1918, lines 4-6; KSC-BC-2020-06, Transcript of Hearing (Status Conference), 21 February 2024, p. 12807: PRESIDING JUDGE SMITH So by May 1st, I want to have a new estimate. MR. HALLING: Your Honour, could we have that in the third week of May? We're trying to do a significant assessment of our streamlining, and we can give a more complete proposal if it's a little deeper into the month. PRESIDING JUDGE SMITH: May 21st. MR. HALLING: Thank you. PRESIDING JUDGE SMITH: Okay. And I expect a streamlining, not just we've managed to cut out three witnesses. You know, that's not

8. By June 2024, the SPO had removed only 20 witnesses from a list of 292 witnesses.¹⁸ On 21 June 2024, the SPO produced its “Roadmap”¹⁹ for the completion of the case, in which no further witnesses had been removed.²⁰

9. On 29 May 2024, the Trial Panel ordered the SPO to provide further notice of efforts to streamline their case by 16 September 2024. The Trial Panel stated that it expected to receive clear and detailed accounting of the steps and measures taken by the SPO to further shorten and expedite the presentation of its case.²¹

10. In accordance with the Trial Panel’s Order, on 16 September 2024, the SPO filed its notice of witness changes,²² reporting on “further progress in streamlining its witness list”. The SPO stated that it no longer intended to rely upon the evidence of eleven (11) witnesses, including [REDACTED].

III. APPLICABLE LAW

11. Rule 62 of the Rules defines the duties of the SPO:

In performing his or her functions, the Specialist Prosecutor shall contribute to the establishment of the truth by the Specialist Chambers. He or she shall take measures for the protection and due respect of the victims and witnesses and for the fundamental rights of suspects and Accused.

12. Rule 143 of the Rules, related to the examination of witnesses, provides that:

going to work. MR. HALLING: Yes. We know we need to do something meaningful. It will also need to be done after that moment as well and just to foreshadow.

¹⁸ The SPO witness list in June 2024 contained 292 witnesses, as a result of witnesses removed via emails from the SPO dated 4 September 2023 and 19 February 2024, and KSC-BC-2020-06/F02325, *Prosecution notice of witness changes*, 21 May 2024, confidential.

¹⁹ KSC-BC-2020-06/F02400/CONF/RED, *Confidential Redacted Version of ‘Prosecution submissions concerning the completion of its case’ with confidential Annex 1 and confidential redacted Annex 2*, 21 June 2024, confidential (“SPO Roadmap”).

²⁰ SPO Roadmap, para. 29.

²¹ KSC-BC-2020-06, Transcript of Hearing, 29 May 2024, Oral Order, p. 16328.

²² SPO Notice.

(4) Upon an objection raised by a Party or proprio motu, the Presiding Judge may exercise control over the mode and the order of questioning witnesses and presenting evidence so as to: (a) make the questioning and presentation effective for the ascertainment of the truth; [...]

13. Rule 116(1) of the Rules obliges the Trial Panel to “take all measures and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the trial proceedings,” while Rule 116(4) states that the “Presiding Judge may issue trial management orders and decisions pursuant to Rule 15(4),” and that the “Panel may issue orders or decisions on any matter as necessary to ensure a fair and expeditious trial.”

14. Article 40(2) of the Law obliges the Trial Panel to ensure that the trial progresses in a manner that is fair, and in accordance with full respect for the rights of the accused:

2. The Trial Panel shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. The Trial Panel, having heard the parties, may adopt such procedures and modalities as are necessary to facilitate the fair and expeditious conduct of proceedings. It may give directions for the conduct of fair and impartial proceedings and in accordance with the Rules of Procedure and Evidence.

IV. SUBMISSIONS

A. THE SPO SHOULD BE COMPELLED TO CALL [REDACTED]

15. Rule 62 of the Rules provides that, in performing his or her functions, “the Specialist Prosecutor shall contribute to the establishment of the truth by the Specialist Chambers.” It then provides that he or she shall take measures “for the fundamental rights of suspects and Accused.”

16. The SPO has previously described the requirement under Rule 62 of the Rules as a “duty”, which is “a far more onerous duty than the one of defence counsel, which

is solely to vindicate the interests of their individual clients.”²³ According to the SPO, it “faces a different burden of proof than the Defence and has a very different mission. The SPO has a duty to contribute to the establishment of the truth”.²⁴

17. In the adversarial context of the ICTY and ICTR, the Prosecution was entitled to present only that evidence which most closely aligned with its case as charged. Neither the ICTY nor the ICTR Rules contained a procedural obligation like the one imposed on the SPO by Rule 62. In contrast to the practice at the ICTY and ICTR, the SPO’s duty under the KSC Rules precludes the SPO from dropping witnesses whose evidence contributes to the establishment of the truth by the Specialist Chambers, on the basis of “streamlining” the SPO case.

18. The SPO does not provide reasons for its decision to no longer rely on [REDACTED], apart from a reference to “streamlining its witness list”. The SPO does not assert, for example, that [REDACTED] are no longer available, or are no longer willing to testify, or that their testimony would be repetitive of other evidence already presented, or that their evidence is less relevant to the charges than the hundreds of witnesses who remain on the SPO Witness List, the majority of whom have no information about any direct involvement of Mr Thaçi in crimes. If the SPO wishes to “streamline” its case (and the Defence encourages it to continue to do so), the SPO should drop witnesses with no direct evidence against the four Accused, and not witnesses concerning the SPO’s allegation that the former President of Kosovo directly participated in [REDACTED].

19. A review of [REDACTED]’s proposed evidence demonstrates the importance of their evidence to the SPO allegation that Mr Thaçi was directly involved in [REDACTED]. First, both [REDACTED] have knowledge drawn from their own

²³ KSC-BC-2020-06/F00097, *Prosecution submissions further to the status conference of 18 November 2020*, 23 November 2020, public, para. 6.

²⁴ *Ibid.*

experience of the events, and their own interactions and relationships with the those involved and implicated. For example, [REDACTED],²⁵ [REDACTED].²⁶ [REDACTED],²⁷ and that [REDACTED].²⁸ [REDACTED],²⁹ and that [REDACTED].³⁰ Evidence of threats of violence, killing, blood feuds and prior conflicts provide alternative motives and explanations for [REDACTED], which must form part of any reasonable assessment of whether Mr Thaçi is criminally liable.

20. Second, [REDACTED]'s evidence is now directly relevant to the credibility of other SPO witnesses who have testified about the circumstances of the [REDACTED]. Specifically, SPO witnesses have been questioned on the basis of [REDACTED]'s SPO interview,³¹ including [REDACTED],³² [REDACTED],³³ [REDACTED],³⁴ and [REDACTED].³⁵ [REDACTED] was questioned on the basis of [REDACTED]'s SPO interview³⁶ [REDACTED].³⁷

21. Where these SPO witnesses have denied [REDACTED]'s accounts or allegations, the testimony of [REDACTED] becomes directly relevant to assessments of their credibility. By way of an example, on [REDACTED], [REDACTED] was questioned on the basis of [REDACTED]'s prior statement that [REDACTED]. [REDACTED] denied being the source of this information and said [REDACTED].³⁸

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

As such, [REDACTED]'s evidence is directly relevant to the credibility of [REDACTED]'s testimony before the Trial Panel.

22. On [REDACTED], [REDACTED] confirmed the content of [REDACTED].³⁹ During [REDACTED]'s testimony on [REDACTED], however, [REDACTED] confirmed [REDACTED].⁴⁰ And while [REDACTED] was interviewed extensively about [REDACTED],⁴¹ [REDACTED]. As such, [REDACTED]'s evidence is directly relevant to the credibility of [REDACTED]'s testimony before the Trial Panel.

23. In this context, the SPO's justification for dropping [REDACTED] as being part of ongoing streamlining efforts⁴² is insufficient. The SPO cannot reasonably submit that dropping witnesses with highly relevant information concerning a core allegation against Mr Thaçi is necessary for streamlining, while leaving crime-base witnesses on the SPO Witness List who have little or no relevance to Mr Thaçi's responsibility. To do so is inconsistent with the SPO's mantra, consistently repeated, that it is acting in compliance with its duty to establish the truth. A search for the truth would demand the presentation of [REDACTED]'s evidence, rather than its concealment. This is particularly so where both [REDACTED] were listed by the SPO as Rule 154 witnesses, whose evidence could be presented in a streamlined manner.

24. Nor can it reasonably be argued that the SPO is entitled to drop witnesses relevant to a core allegation in the case because the Defence can always call them. This presupposes, firstly, that the Defence will present a positive Defence case, which should not be assumed. It is also far from clear that either [REDACTED] would cooperate with the Defence or agree to be called on behalf of Mr Thaçi. All indications are to the contrary, with [REDACTED] having already demonstrated hostility toward

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² SPO Notice, para. 1.

Mr Thaçi, [REDACTED].⁴³ As such, shifting the burden to the Defence to call [REDACTED] does not assist the SPO to comply with its duty to establish the truth. Moreover, in light of witness protection measures issued to [REDACTED],⁴⁴ and [REDACTED],⁴⁵ as well as the Witness Contact Protocol,⁴⁶ there is a risk that Defence contact with [REDACTED] may result in disclosure that reveals information about [REDACTED] that is protected by prior orders of the Specialist Chambers.

25. The SPO's decision not to call [REDACTED] also has implications for the Trial Panel. The Trial Panel has previously held that it is composed of professional judges who are "required to take steps they consider necessary for the determination of the truth",⁴⁷ framing this as a "responsibility to establish the truth".⁴⁸ The Trial Panel also has an obligation to ensure that the trial is fair.⁴⁹ Article 40(2) of the Law empowers the Trial Panel to adopt such procedures and modalities as are necessary to facilitate fair proceedings, and give directions to this end, while Rule 143(4)(a) provides that upon an objection raised by a Party or *proprio motu*, the Presiding Judge may exercise control over the presenting evidence so as to make the questioning and "presentation effective for the ascertainment of the truth."

26. Rules 116(1) and 116(4) give the Trial Panel the power to issue orders necessary to ensure that the Specialist Prosecutor complies with her obligations under Rule 62 to assist the Specialist Chambers in establishing the truth.

⁴³ See [REDACTED].

⁴⁴ KSC-BC-2020-06/F00133/COR/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Corrected Version of First Decision on Specialist Prosecutor's Request for Protective Measures*, 10 December 2020, confidential.

⁴⁵ KSC-BC-2020-06/F00373/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Sixth Decision on Specialist Prosecutor's Request for Protective Measures*, 25 June 2021, confidential.

⁴⁶ 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.

⁴⁷ KSC-BC-2020-06, Transcript of Hearing, 20 April 2023, Oral Order, p. 3265.

⁴⁸ KSC-BC-2020-06, Transcript of Hearing, 20 April 2023, Oral Order, p. 3269.

⁴⁹ Article 40(2) of the Law.

27. As such, and pursuant to this framework, the Trial Panel should compel the SPO to present the evidence of [REDACTED], on the grounds that it is necessary for the establishment of the truth, and that considerations of streamlining cannot outweigh the SPO's obligations under Rule 62 of the Rules.

B. IN THE ALTERNATIVE, THE TRIAL PANEL SHOULD TAKE NOTE THAT THE DEFENCE WILL ASK THE PANEL TO DRAW ADVERSE INFERENCES FROM THE SPO'S FAILURE TO CALL [REDACTED]

28. In the alternative, the Defence asks the Trial Panel to take note that the Defence will ask the Trial Panel at the conclusion of the trial to draw adverse inferences arising from the SPO's failure to call [REDACTED].

29. The drawing of adverse inferences is appropriate where a prosecuting authority has knowledge of a person who can be located and brought to testify, and can be expected to give testimony of distinct importance to the case, but does not call the witness to give evidence, without explanation. In this case, a fact finder is entitled to infer that the evidence of the witness would be unfavourable to the prosecutor.⁵⁰

⁵⁰ See, e.g., *Commonwealth v. Schatvet*, [23 Mass. App. Ct. 130](#), 134 (1986): "Where a party has knowledge of a person who can be located and brought forward, who is friendly to, or at least not hostilely disposed toward, the party, and who can be expected to give testimony of distinct importance to the case, the party would naturally offer that person as a witness. If, then, without explanation, he does not do so, the jury may, if they think reasonable in the circumstances, infer that that person, had he been called, would have given testimony unfavorable to the party." See also *State v. Clawans*, [38 N.J. 162](#), 170 (1962): The failure to call a witness may give rise to a "natural inference that the party so failing fears exposure of those facts [that] would be unfavorable". In order for such inference to be drawn, however, "it must appear that the person was within the power of the party to produce and that [the witness's] testimony would have been superior to that already utilized in respect to the fact to be proved."; See also *R. v. Ellis*, [2013 ONCA 9](#), paras. 45-48: "In some instances, a trier of fact may draw, and be instructed about its authority to draw, an adverse inference from the failure of a party to call a witness or produce other evidence. This 'adverse inference' principle derives from ordinary logic and experience. The principle is not intended to punish a party who exercises its right not to call a witness by imposing an "adverse inference" that a trial judge, aware of the explanation for the decision, considers wholly unjustified [...] The "adverse inference" principle applies in criminal cases" and is "rooted in the soil of ordinary logic and experience".

30. Different jurisdictions have different requirements which must be met before an adverse inference can be drawn. In Canada, for example, the calling party must first be given the opportunity to explain their failure to call the witness,⁵¹ and an inference may be drawn only where there is no other reasonable explanation for this failure.⁵² In Australia, a longstanding common law rule provides that a failure of a party to call a witness who would reasonably be expected to testify may give rise to an inference that the witness' evidence would not have assisted the party.⁵³ The judiciary has developed the elements to be met before an inference can be drawn, namely: (i) the evidence would have been expected to be called by the party against whom the rule is to be relied on; (ii) the evidence would have been relevant to determining facts in issue; and (iii) no explanation has been given for the absence to present this evidence.⁵⁴

31. In 2021, the UK High Court emphasised the need for the party seeking the adverse inference to identify the affected evidence, finding that:

It is well-known that, in certain circumstances, the court may be justified in drawing adverse inferences from the absence of a witness who might have been called, and who might be expected to have material evidence to give; but the burden is on the party who invites the court to draw an adverse inference from the failure to call such a witness clearly to identify the nature of the evidence which the court is invited to infer, and to explain why the absence of evidence on the point from that witness is material to that issue.⁵⁵

⁵¹ *R. v. Jolivet* [2000] 1 SCR 751, para. 26.

⁵² *R v. Lapensee*, 2009 ONCA 646, para. 42.

⁵³ *Jones v. Dunkel* [1959] HCA 8, 101 CLR 298; *Dyers v. R* [2002] HCA 45, (2002) 210 CLR 285.

⁵⁴ *Payne v Parker* [1976] 1 NSWLR 191 at 201. See also *Jury Directions Act 2015* (Vic), s 43:

(1) If the prosecution does not call or question a particular witness, defence counsel may request under section 12 that the trial judge direct the jury on that fact.

(2) The trial judge may direct the jury as referred to in subsection (1) only if the trial judge is satisfied that the prosecution (a) was reasonably expected to call or question the witness; and (b) has not satisfactorily explained why it did not call or question the witness.

(3) In giving a direction referred to in subsection (1), the trial judge may inform the jury that it may conclude that the witness would not have assisted the prosecution's case.

⁵⁵ *Ahuja Investments Ltd v. Victorygame Ltd & Anor* [2021] EWHC 2382 (Ch), para. 23.

32. However, as recently held by the UK Supreme Court, in drawing an adverse inference from a failure to present a witness, there was a risk of making “overly legal and technical what really is or ought to be just a matter of ordinary rationality”. Tribunals should be free to draw inferences in this situation “using their common sense without the need to consult law books when doing so”, but rather with reference to “the context and the circumstances”. The UK Supreme Court specified that:⁵⁶

Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.

33. Adopting this common-sense approach, [REDACTED] have information directly relevant to the SPO allegation that Mr Thaçi was directly involved in the [REDACTED]. [REDACTED]’s proposed testimony is also directly relevant to the credibility of other SPO witnesses who have been examined on specific aspects of [REDACTED]’s prior statements. [REDACTED]’s evidence is significant to the case as a whole, given that it relates to one of the very few allegations of direct involvement of Mr Thaçi in the crimes charged. No reason has been given for [REDACTED]’s unavailability, beyond SPO preferences as regards the streamlining of its case, despite numerous other witnesses remaining on the SPO’s Witness List who have no information about any direct involvement of Mr Thaçi in crimes. Given that the SPO has submitted that the reason for their withdrawal is streamlining, it can be safely concluded that [REDACTED] remain willing and available to testify.

34. On this basis, the Defence asks the Trial Panel to take note that, at the conclusion of the trial, it will ask the Trial Panel to draw an inference adverse to the

⁵⁶ *Efobi v. Royal Mail Group Ltd* [2021] UKSC 33, para. 41.

SPO that [REDACTED] would have established the following facts, all of which have been put to other SPO witnesses during the proceedings:

- (i) [REDACTED];⁵⁷
- (ii) [REDACTED];⁵⁸
- (iii) [REDACTED];⁵⁹
- (iv) [REDACTED];⁶⁰
- (v) [REDACTED];⁶¹
- (vi) [REDACTED];⁶²
- (vii) [REDACTED];⁶³
- (viii) [REDACTED];⁶⁴ and
- (ix) [REDACTED].⁶⁵

V. CLASSIFICATION

35. This filing is classified as confidential in accordance with Rule 82(4), because it responds to a filing with the same classification and for which no public redacted version has yet been filed. The Defence undertakes to file a public redacted version once directed to do so.

VI. CONCLUSION AND RELIEF SOUGHT

36. The SPO has an obligation to assist the Trial Panel in reaching a judgment that most closely reflects the truth of the events charged, regardless of whether this results

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ [REDACTED].

⁶¹ [REDACTED].

⁶² [REDACTED].

⁶³ [REDACTED]7.

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

in convictions or acquittals on particular counts. The SPO has charged Mr Thaçi with direct involvement in [REDACTED]. [REDACTED] have relevant and probative information concerning these allegations. Given the SPO's duty to assist in the establishment of the truth, the testimony of [REDACTED] should be presented. The Trial Panel should take note that the SPO has been placed on notice that the Defence will argue at the conclusion of the trial that a failure by the SPO to call [REDACTED] properly gives rise to adverse inferences as regards their missing testimony.

37. On this basis, the Defence requests the Trial Panel to:

ENTER a finding that hearing evidence from [REDACTED] would contribute to the establishment of the truth by the Specialist Chambers;

COMPEL the SPO to retain [REDACTED] on the SPO List of Witnesses and present their evidence to the Trial Panel or, in the alternative,

TAKE NOTE that the Defence will ask the Trial Panel at the conclusion of the trial to draw inferences adverse to the SPO as set out in paragraph 34 above, and the SPO has been placed on notice of this potential argument should it insist on not calling [REDACTED].

[Word count: 5.878 words]

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Luka Misetic', is centered on the page.

Luka Misetic

Counsel for Hashim Thaçi

Thursday, 26 September 2024

At New York, United States