



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2023-12

**The Specialist Prosecutor v. Hashim Thaçi, Bashkim Smakaj, Isni
Kilaj, Fadil Fazliu and Hajredin Kuçi**

Before: Pre-Trial Judge

Judge Marjorie Masselot

Registrar: Fidelma Donlon

Date: 27 January 2025

Language: English

Classification: Public

**Decision on the Registrar's Referral Pursuant to Section 12(5) of the Directive
on Counsel**

Specialist Prosecutor
Kimberly P. West

Registrar
Fidelma Donlon

Participant
David Young

Specialist Counsel for Hashim Thaçi
Nina Tavakoli
Sophie Menegon

Duty Counsel for Bashkim Smakaj
Bas Martens

Specialist Counsel for Isni Kilaj
Iain Edwards
Joe Holmes

Duty Counsel for Fadil Fazliu
Michiel Pestman

Duty Counsel for Hajredin Kuçi
Alexander Admiraal

THE PRE-TRIAL JUDGE,¹ pursuant to Articles 21(4)(e) and 39(13) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), Rule 9(5) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), Section 12(5) of the Directive on Counsel,² and Article 28(3) and (4) of the Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers ("Code of Professional Conduct"),³ hereby issues the following decision.

I. PROCEDURAL BACKGROUND

1. On 5 December 2024, the Registrar assigned Michiel Pestman ("Mr Pestman") as Duty Counsel to Fadil Fazliu ("Mr Fazliu").⁴
2. On 18 December 2024, the Registrar made a referral to the Pre-Trial Judge, seeking her determination on the existence of an actual or potential conflict of interest, given that Mr Fazliu had made a request to have David Young ("Mr Young") assigned as his Counsel, who had previously represented Rexhep Selimi in Case KSC-BC-2020-06 ("Mr Selimi" and "Case 06") ("Referral").⁵
3. Between 15 and 22 January 2025, following an order of the Pre-Trial Judge,⁶ the Specialist Prosecutor's Office ("SPO"),⁷ the Defence for Mr Fazliu ("Fazliu

¹ KSC-BC-2023-12, F00015, President, [Decision Assigning a Pre-Trial Judge](#), 6 June 2024, public.

² KSC-BD-04-Rev2, Registrar, [Directive on Counsel](#), 22 February 2024.

³ KSC-BD-07-Rev1, Registrar, [Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers](#), 28 April 2021.

⁴ KSC-BC-2023-12, F00051, Registry, *Notification of Assignment of Duty Counsel to Fadil Fazliu* ("Notification of Assignment"), 6 December 2024, public, with Annex 1, confidential.

⁵ KSC-BC-2023-12, F00090, Registry, *Referral Pursuant to Section 12(5) of the Directive on Counsel*, 18 December 2024, confidential and *ex parte*.

⁶ KSC-BC-2023-12, F00099, Pre-Trial Judge, *Order for Reclassification and Submissions* ("Order for Submissions"), 20 December 2024, confidential and *ex parte*.

⁷ KSC-BC-2023-12, F00114, Specialist Prosecutor, *Prosecution Submissions Pursuant to Order F00099* ("SPO Submissions"), 15 January 2025, confidential and *ex parte*.

Defence” and “Submissions”),⁸ and Mr Young⁹ filed their submissions on the Referral.

II. SUBMISSIONS

A. REGISTRAR

4. Noting that Mr Young has represented Mr Selimi in Case 06 between 12 November 2020 and 13 February 2024, the Registrar seeks the Pre-Trial Judge’s determination as to whether an actual or potential conflict of interest exists if Mr Young is to represent Mr Fazliu in the present case. The Registrar submits that there are concrete reasons to suggest that Case 06 is substantially related to the present case and that “an evidential overlap” may arise between the two cases.¹⁰

B. SPO

5. The SPO agrees with the Registrar that Case 06 and the present case are substantially related and submits that there is a potential conflict of interest.¹¹ The SPO highlights, in particular, that it is possible that Mr Young obtained confidential information during his representation of Mr Selimi in relation to the same material that has been or will be disclosed to Mr Fazliu.¹²

⁸ KSC-BC-2023-12, F00123, Fazliu Defence, *Fadil Fazliu Submissions on Referral Pursuant to Section 12(5) Direction of Counsel & Request for Extension of Time to Respond to Pending Motions*, 20 January 2025, confidential and *ex parte*.

⁹ KSC-BC-2023-12, F00118, Mr Young, *Response to the Registrar’s Referral to the Pre-Trial Judge Pursuant to Section 12[5] of the Directive on Counsel (“Mr Young’s Submissions”)*, 16 January 2025, confidential and *ex parte*; F00130, Mr Young, *Supplemental Response to the Registrar’s Referral to the Pre-Trial Judge Pursuant to Section 12[5] of the Directive on Counsel (“Mr Young’s Supplemental Submissions”)*, confidential and *ex parte*, with Annex 1, confidential and *ex parte*.

¹⁰ Referral, paras 1, 2-5, 13, 15-16.

¹¹ SPO Submissions, para. 2.

¹² SPO Submissions, para. 2.

C. MR YOUNG

6. Mr Young submits that, on closer examination of the law and the facts, there is no actual or potential conflict of interest.¹³ More specifically, Mr Young argues that: (i) it is not alleged that Mr Selimi had any involvement in the allegations made against Mr Fazliu in the present case;¹⁴ (ii) the present case and Case 06 concern significantly different sets of allegations and any relation between the two is too remote and lacking in specificity and particularity to reach the threshold of a conflict or potential conflict of interest;¹⁵ (iii) there is no cogent evidence that Mr Fazliu's interests are (materially) adverse to those of Mr Selimi;¹⁶ (iv) he (Mr Young) has no recollection of the confidential information referred to by the SPO;¹⁷ (v) he has received the informed consent of Mr Selimi to act for Mr Fazliu;¹⁸ and (vi) Mr Fazliu made an informed choice, knowing that Mr Young had represented Mr Selimi.¹⁹

D. DEFENCE

7. The Fazliu Defence submits that: (i) the question of whether a conflict of interest exists or could arise should be answered by Mr Young first, as he is the only person able to establish whether the interests of his former and prospective clients conflict;²⁰ (ii) the mere existence of an "overlap" between the present case and Case 06 is not sufficient to conclude that a conflict of interest exists;²¹ (iii) judicial intervention should be exceptional;²² and (iv) it would serve both

¹³ Mr Young's Submissions, paras 2, 28.

¹⁴ Mr Young's Submissions, paras 13-15.

¹⁵ Mr Young's Submissions, paras 18-22.

¹⁶ Mr Young's Submissions, paras 23-25.

¹⁷ Mr Young's Submissions, paras 26-27.

¹⁸ Mr Young's Supplemental Submissions, para. 4 and Annex 1.

¹⁹ Mr Young's Supplemental Submissions, para. 5.

²⁰ Fazliu Defence Submissions, para. 12.

²¹ Fazliu Defence Submissions, para. 13.

²² Fazliu Defence Submissions, para. 13.

the interests of Mr Fazliu and the interests of justice if Mr Young were assigned as Mr Fazliu's Counsel.²³

8. The Fazliu Defence further submits that Duty Counsel can no longer effectively represent Mr Fazliu as he is not receiving instructions from him anymore.²⁴ For this reason, it requests an extension of time to respond to all pending motions in the case until Mr Young, or another Specialist Counsel, is assigned ("Fazliu Defence Request for Extension of Time").²⁵ The Fazliu Defence adds in this regard that: (i) good cause exists, as Mr Fazliu's right to an effective defence by Specialist Counsel of his own choosing outweighs the interests of an expeditious trial; and (ii) no prejudice is caused at this very early stage of the proceedings.²⁶

III. APPLICABLE LAW

9. Pursuant to Article 21(4)(e) of the Law, the accused shall be entitled to defend himself or herself through Specialist Counsel of his or her own choosing.

10. Pursuant to Article 39(13) of the Law, the Pre-Trial Judge may issue any order as may be necessary for the preparation of a fair and expeditious trial.

11. Pursuant to Section 12(5) of the Directive on Counsel, the Registrar may refer any issue of potential conflict of interest referred to in Article 28(3)(b)-(e) of the Code of Conduct to the relevant Panel for its decision, before appointing or assigning Counsel.

12. Pursuant to Article 28(3)(b) of the Code of Professional Conduct, Counsel shall not advise, represent or act on behalf of a Client in a matter before the Specialist Chambers if Counsel is advising, representing or acting or has advised, represented

²³ Fazliu Defence Submissions, para. 14.

²⁴ Fazliu Defence Submissions, para. 15.

²⁵ Fazliu Defence Submissions, paras 1, 15-17, 20.

²⁶ Fazliu Defence Submissions, para. 18.

or acted on behalf of a Client in a substantially related matter before the Specialist Chambers.

13. Pursuant to Article 28(3)(c) of the Code of Professional Conduct, Counsel shall not advise, represent or act on behalf of a Client in a matter before the Specialist Chambers if Counsel has advised, represented or acted on behalf of a former Client and the interests of the prospective or new Client are materially adverse to the interests of the former Client.

14. Pursuant to Article 28(4)(b)(1) of the Code of Professional Conduct, where an actual or potential conflict of interest arises pursuant to Article 28(3)(b) of the Code of Professional Conduct, at any stage of the proceedings, Counsel shall notify the Registrar in writing, obtain the informed consent of each potentially affected Client, and notify the relevant Panel(s), which shall determine whether a conflict of interest exists.

15. Pursuant to Article 28(4)(b)(2) of the Code of Professional Conduct, where an actual or potential conflict of interest arises pursuant to Article 28(3)(c) of the Code of Professional Conduct, at any stage of the proceedings, Counsel shall notify the Registrar in writing, obtain the informed consent of each potentially affected Client and assess whether such consent is likely to irreversibly prejudice the fair and proper administration of justice, including the Client's right to a fair trial.

16. Pursuant to Rule 9(5) of the Rules, the Pre-Trial Judge may, *proprio motu* or upon showing of good cause: (a) extend or reduce any time limit prescribed by the Rules or set by the Panel; or (b) recognise as valid any act carried out after the expiration of the time limit.

IV. DISCUSSION

A. PRELIMINARY MATTER

17. At the outset, the Pre-Trial Judge notes that the Fazliu Defence filed its Submissions three days past the time limit set by the Pre-Trial Judge.²⁷ The Fazliu Defence did not make any request to the Pre-Trial Judge to extend the time limit for its Submissions and did not provide any justification for the late filing. Nonetheless, the Pre-Trial Judge decides to recognise the Submissions as validly made, on an exceptional basis, pursuant to Rule 9(5)(b) of the Rules, considering: (i) the importance of the issue under consideration; (ii) the fact that the Submissions were originally filed in time, but had to be re-submitted because of clerical errors; (iii) that the ensuing delay is limited; and (iv) that the Submissions will assist the Pre-Trial Judge in reaching her determination.

B. REGISTRAR REFERRAL

18. To begin with, the Pre-Trial Judge emphasises that the right of an accused to be represented by Specialist Counsel of his own choosing is a fundamental right which should not be interfered with lightly.²⁸

19. Turning to the relevant applicable law, the Pre-Trial Judge clarifies that Article 28(3) of the Code of Professional Conduct contains different legal bases to determine an actual or potential conflict of interest. Article 28(3) of the Code of Professional Conduct provides not only a safeguard mechanism for removing conflicts of interests after they have arisen, but also seeks to prevent such

²⁷ See Order for Submissions, para. 11(d), ordering the Fazliu Defence and Mr Young to file their submissions by Friday, 17 January 2025. The Fazliu Defence filed its Submissions on Monday, 20 January 2025, at 17:50.

²⁸ See, in addition to Article 21(4)(e) of the Law, Article 30(5) of the Constitution of the Republic Kosovo, Article 6(3)(c) of the European Convention on Human Rights and Article 14(3)(d) of the International Covenant on Civil and Political Rights.

conflicts before they arise.²⁹ The scenarios set forth in said provision are not cumulative, but in the alternative.³⁰

20. Turning to the specificities of the case, the Pre-Trial Judge observes that, while Mr Selimi is not prosecuted in Case 12 and the present case does not overlap in terms of the scope of the charges with Case 06, the Confirmed Indictment alleges that the accused persons in the present case coordinated to unlawfully influence the testimony of and/or contact SPO witnesses in Case 06.³¹ The witnesses identified in the Confirmed Indictment, who may eventually be called by the SPO to testify in the present case, are (with some exceptions) witnesses in Case 06.³² Thus, in the Pre-Trial Judge's view, contrary to Mr Young's submissions,³³ it cannot be totally excluded that the two proceedings are "substantially related", within the meaning of Article 28(3)(b) of the Code of Professional Conduct.

21. Even if the two cases were not substantially related, the Pre-Trial Judge considers that the interests of Mr Fazliu may be materially adverse to those of Mr Selimi. While it is argued that Mr Selimi and Mr Fazliu may adopt the same or compatible strategies,³⁴ the Pre-Trial Judge discerns that this is a hypothetical projection, which may change in the course of the present proceedings. Thus, hypothetically, it may also happen that Mr Young, who is privy to the Case 06 evidence and knows the line of defence of Mr Selimi from the time he

²⁹ Similarly, KSC-BC-2020-06, F02112, Trial Panel II, [Decision on Defence Counsel Request for Determination Pursuant to Article 28\(4\)\(b\)\(i\) of the Code of Professional Conduct for Counsel and Prosecutors \(Conflict of Interest\)](#), 8 February 2024, public, para. 31.

³⁰ Contrary, Mr Young's Submissions, para. 25.

³¹ KSC-BC-2023-12, F00055/A01, Specialist Prosecutor, [Annex 1 to Submission of Public Redacted Version of Confirmed Indictment](#), 6 December 2024, public (containing the Confirmed Indictment).

³² See KSC-BC-2023-12, F00087/RED, Specialist Prosecutor, *Public Redacted Version of 'Prosecution Request for Protective Measures and Related Requests with Strictly Confidential and Ex Parte Annex 1'*, 10 December 2024 (date of public redacted version, 22 January 2025), public, para. 4, with Annex 1 confidential.

³³ Mr Young's Submissions, paras 18-22.

³⁴ Fazliu Defence Submissions, para. 13.

represented him, is prevented from using this knowledge, due to continuing confidentiality obligations *vis-à-vis* Mr Selimi, to effectively represent Mr Fazliu, which may ultimately impact adversely Mr Fazliu's strategy. In the Pre-Trial Judge's view, contrary to Mr Young's submissions,³⁵ it cannot be totally excluded that the interests of Mr Fazliu, his prospective Client, may be or become materially adverse to the interests of Mr Selimi, his former Client, within the meaning of Article 28(3)(c) of the Code of Professional Conduct.

22. That being said, for the reasons that follow, the Pre-Trial Judge does not find that there is any actual or potential conflict of interest, within the meaning of Articles 28(3)(b) or (c) and (4)(b)(1) and (2) of the Code of Professional Conduct, preventing the assignment of Mr Young as Counsel for Mr Fazliu.

23. First, the Pre-Trial Judge finds that the arguments raised by the Registrar and the SPO regarding the existence of a (potential) conflict of interest are too hypothetical, speculative and vague to support such a finding. The Pre-Trial Judge herself also cannot discern a sufficiently concrete situation that would give rise to such a conflict of interest. It is important to note in this regard that: (i) notwithstanding any overlap in terms of evidence, the two cases are different in scope; and (ii) Mr Young is no longer acting as Counsel for Mr Selimi. Thus, the Pre-Trial Judge does not discern a sufficiently concrete situation where Mr Young's duty of loyalty towards Mr Selimi could prejudice the interests of Mr Fazliu or the wider interests of justice.³⁶

24. Second, the Pre-Trial Judge notes that Mr Young has obtained the informed consent of Mr Selimi regarding his prospective representation of

³⁵ Mr Young's Submissions, paras 23-25.

³⁶ KSC-BC-2020-06, F02112, Trial Panel II, [Decision on Defence Counsel Request for Determination Pursuant to Article 28\(4\)\(b\)\(i\) of the Code of Professional Conduct for Counsel and Prosecutors \(Conflict of Interest\)](#), 8 February 2024, public, para. 22.

Mr Fazliu.³⁷ As to Mr Fazliu,³⁸ the Pre-Trial Judge observes that: (i) he is aware of Mr Young's previous representation of Mr Selimi;³⁹ (ii) he requested to have Mr Young assigned as his Counsel with this knowledge;⁴⁰ (iii) he benefits from the independent legal advice of his Duty Counsel and is free to communicate with him; and (iv) Duty Counsel supports the assignment of Mr Young.⁴¹

25. Third, the Pre-Trial Judge finds that, should an actual or potential conflict of interest arise, nonetheless, at any stage of the proceedings, Mr Young remains duty bound to notify the Registrar accordingly, pursuant to Article 28(4) of the Code of Professional Conduct. This obligation further serves to protect the interests of Mr Fazliu and the proper administration of justice and the Pre-Trial Judge has no reason to believe that Mr Young would not abide by it.

26. In light of the above, and mindful of Mr Fazliu's fundamental right to be represented by Specialist Counsel of his own choosing, the Pre-Trial Judge finds that there is no actual or potential conflict of interest arising from Mr Young's assignment as Counsel for Mr Fazliu.

C. FAZLIU DEFENCE REQUEST FOR EXTENSION OF TIME

27. Turning to the Fazliu Defence Request for Extension of Time, the Pre-Trial Judge finds, for the reasons that follow, that the Fazliu Defence has failed to show good cause, justifying an extension of the time limit as requested.⁴²

³⁷ Annex 1 to Mr Young's Supplemental Submissions.

³⁸ The Pre-Trial Judge notes that Mr Young sought also Mr Fazliu's consent, through Duty Counsel, but that it is "unclear how long such an entire process may take"; see Mr Young's Supplemental Submissions, para. 3.

³⁹ Mr Young's Supplemental Submissions, para. 5.

⁴⁰ Referral, para. 1.

⁴¹ Fazliu Defence Submissions, para. 14.

⁴² Fazliu Defence Submissions, paras 1, 20.

28. First, the Pre-Trial Judge recalls that, on 5 December 2024, the Registrar assigned Mr Pestman as Duty Counsel to Mr Fazliu, pending the appointment or assignment of Specialist Counsel.⁴³ The very purpose of assigning Duty Counsel is to ensure that Mr Fazliu has legal representation until the moment Specialist Counsel of his own choosing is appointed or assigned.⁴⁴ Throughout this period, Duty Counsel has the same duties and responsibilities that Specialist Counsel would have. Thus, the fact that Specialist Counsel has not yet been assigned to Mr Fazliu cannot constitute “good cause” within the meaning of Rule 9(5) of the Rules, justifying an extension of time until such assignment takes place. This would run counter to the very appointment of the Duty Counsel.

29. Second, the submission that Mr Fazliu is deprived of effective legal representation is misguided. In not giving instructions to Duty Counsel, Mr Fazliu has essentially chosen not to exercise his right to make submissions or respond to submissions in the case, pursuant to Rules 75 and 76 of the Rules. Mr Fazliu remains free to do so, to communicate with Duty Counsel to this end, and to avail himself of his legal advice, pending the appointment or assignment of a Counsel of his own choosing.

30. Third, a “blanket” request, such as the one made by the Fazliu Defence – for the extension of all time limits in relation to all pending requests – is unacceptable. Requests for extension of time pursuant to Rules 9(5) and 76 of the Rules must be specific and properly justified, showing why good cause exists for such an extension.

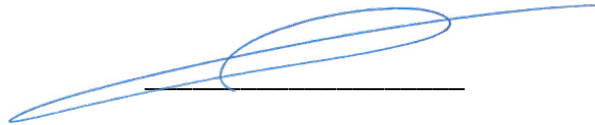
31. For these reasons, the Pre-Trial Judge rejects the Fazliu Defence Request for Extension of Time.

⁴³ Notification of Assignment, para. 2 and Annex 1.

⁴⁴ See Rule 92(1) of the Rules.

V. DISPOSITION

32. For the above reasons, the Pre-Trial Judge hereby:
- a. **FINDS** that no actual conflict or potential conflict of interest exists if Mr Young is assigned as Counsel for Mr Fazliu in the present case;
 - b. **REJECTS** the Fazliu Defence Request for Extension of Time;
 - c. **ORDERS** the Registry and Mr Young to file public redacted versions of their respective filings F00090, F00118 and F00130, or request reclassification, by no later than **Monday, 10 February 2025**; and
 - d. **ORDERS** the Registry to reclassify as public filings F00099, F00114 and F00123, currently classified as confidential and *ex parte*.



Judge Marjorie Masselot

Pre-Trial Judge

Dated this Monday, 27 January 2025

At The Hague, the Netherlands.