

In: KSC-BC-2023-12

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

Before: Pre-Trial Judge

Judge Marjorie Masselot

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Bashkim Smakaj

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Language: English

Classification: Confidential

Smakaj Application for a Stay of Proceedings as an Abuse of Process

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I. INTRODUCTION

1. On 29 November 2024, the Single Judge confirmed an indictment (“Confirmation Decision”)¹ charging Bashkim Smakaj (“the Accused”) with two offences:

- (i) attempting to obstruct by common action of a group, official persons, including SPO prosecutors and investigators, in performing official duties, between at least 9 September 2023 and 30 October 2023, punishable under Articles 17, 21, 33, 35 and 401(2) and (5) of the Kosovo Criminal Code (“KCC”), by virtue of Articles 15(2) and 16(3) of the Law² (Count 13); and
- (ii) contempt of court, between at least 9 September 2023 and 30 October 2023, punishable under Articles 21, 33 and 393 of the KCC, by virtue of Articles 15(2) and 16(3) of the Law (Count 14).

2. The Accused hereby applies for a stay of proceedings in relation to Counts 13 and 14 as an abuse of process pursuant to Rule 110 of the Rules³.

II. APPLICABLE LAW

¹ KSC-BC-2023-12/F00036, *Decision on the Confirmation of the Indictment*, Pre-Trial Judge, 29 November 2024, Confidential at paragraph 4

² Law No.05/L-053

³ KSC-BD-03/Rev3/2020

3. A prosecution is commenced before the Kosovo Specialist Chambers by way of the confirmation of an indictment procedure.
4. The Specialist Prosecutor files an indictment, containing a concise statement of the facts and the crime or crimes with which the person is charged, with the Specialist Chambers requesting confirmation by the Pre-Trial Judge⁴.
5. In accordance with Article 38(4) of the Law and Rule 86(3) of the Rules, the indictment must be accompanied by supporting material which shall include:
 - (a) Evidentiary material supporting the material facts; and
 - (b) A detailed outline demonstrating the relevance of each item of evidentiary material to each allegation, with particular reference to the conduct of the suspect with respect to the alleged crime(s).
6. In accordance with Article 39(2) of the Law and Rule 86(4) of the Rules, the Pre-Trial Judge shall examine the supporting material in relation to each of the charges and shall determine whether a well-grounded suspicion has been established against the suspect. During such an examination, the Pre-Trial Judge may (a) request or permit the Specialist Prosecutor to present additional material in support of any or all charges; (b) request the Specialist Prosecutor to review the indictment with the aim to provide more specificity on any or all charges, and the specific conduct of the suspect, or to ensure legal accuracy or greater clarity in the presentation of the charges; or (c) request the Specialist Prosecutor to reduce or narrow the charges.

⁴ KSC-BC-2023-12/F00028, *Submission of Further Amended Indictment for Confirmation with strictly confidential and ex parte Annexes 1-2*, Prosecution, 12 November 2024, Confidential at paragraph 11(i)

7. As a result of such an examination, pursuant to Article 39(2) of the Law, the Pre-Trial Judge shall, in a reasoned decision, confirm or dismiss the charges in whole or in part (Rule 86(5)).
8. Only upon confirmation of any charge in the indictment shall the suspect attain the status of an Accused (Rule 86(6)(a)), and the Pre-Trial Judge may issue an arrest warrant or a summons to appear for the Accused (Rule 86(6)(b)).
9. In accordance with Rule 86(2), the above process is to be strictly confidential and *ex parte* (although the Pre-Trial Judge has recently acknowledged a possible discretion on her part to hear the defence as part of the confirmation process where necessary to ensure a fair and expeditious conduct of the proceedings, and in the interests of the good administration of justice⁵).
10. The Defence has no right to seek leave to appeal the Confirmation Decision⁶.
11. Instead, the only challenges to the Confirmation Decision that may be brought by the defence are specific to the jurisdiction of the Specialist Chambers, defects in the form of the indictment, and severance (see Rule 86(9) and Rule 97 of the Rules).

⁵ KSC-BC-2023-12/F00084, *Order for Submissions on the Specialist Prosecutor's Request for Leave to Appeal the "Decision on the Confirmation of the Indictment"*, Pre-Trial Judge, 13 December 2024, Confidential at paragraph 8 to 11; see also KSC-BC-2023-12/F00149, *Decision on Specialist Prosecutor's Request for Leave to Appeal the "Decision on the Confirmation of the Indictment"*, Pre-Trial Judge, 30 January 2025, Public at paragraph 4

⁶ KSC-BC-2023-12/F00084, *Order for Submissions on the Specialist Prosecutor's Request for Leave to Appeal the "Decision on the Confirmation of the Indictment"*, Pre-Trial Judge, 13 December 2024, Confidential at paragraph 8; KSC-BC-2020-06, *Public Redacted Version of Decision on Defence Motions Alleging Defects in the Form of the Indictment*, Pre-Trial Judge, 22 July 2021, Public at paragraph 47; and in contradistinction to the position in the International Criminal Court where the confirmation decision is *subject to appeal by all parties* – see Archbold International Criminal Courts: Practice, Procedure & Evidence 5th Edition §7-47

12. The Defence may not challenge the Pre-Trial Judge's decision in relation to issues of fact, evidential sufficiency, and the legal elements of a crime or a mode of liability⁷.
13. In relation to the nature of the examination required by Article 39(2) of the Law and Rule 86(4) of the Rules, the confirmation process is "meant to ensure that only those charges are considered at trial for which sufficient evidence has been presented"⁸.
14. According to Article 19.1.12 of the 2022 Kosovo Criminal Procedure Code, No.08/L-032, well-grounded suspicion is reached when the evidence "would satisfy an objective observer that a criminal offense has occurred and the defendant has committed the offence"⁹.
15. While the evidentiary threshold applicable falls short of the certainty of a proven fact, determining the existence of well-grounded suspicion requires:

"a conviction on the part of the Pre-Trial Judge, beyond mere theory or suspicion, that: (i) the offences have indeed occurred; and (ii) the suspect committed or participated in the commission of the offence(s) through the alleged mode(s) of liability. The Pre-Trial Judge bases such findings on concrete and tangible supporting material, demonstrating a clear line of reasoning underpinning the charges in the indictment. In so doing, the Pre-Trial Judge *evaluates the supporting material holistically, without scrutinising each item of evidentiary material in isolation.*"¹⁰ [emphasis added]

⁷ KSC-BC-2020-06, Public Redacted Version of Decision on Defence Motions Alleging Defects in the Form of the Indictment, Pre-Trial Judge, 22 July 2021, Public at paragraphs 47-49

⁸ Confirmation Decision at paragraph 41

⁹ Confirmation Decision at paragraph 43 and footnote 87

¹⁰ Confirmation Decision at paragraph 43

16. However, in contradistinction to the *inter partes* confirmation process in the International Criminal Court under Article 61 of the Rome Statute¹¹, the Pre-Trial Judge in the KSC can only conduct that *holistic evaluation* (incorporating the concept that the whole is more than merely the sum of its parts) upon the evidence that the SPO chooses to place before – or *isolates* - for her¹².
17. The fair conduct of the confirmation process is reliant, therefore, upon the Specialist Prosecutor complying with her inherent and implicit duty to disclose to the court any material which is potentially adverse to the prosecution request for confirmation of an indictment (“duty of candour”).
18. The role of the Specialist Prosecutor, as an officer of justice, includes ensuring that criminal proceedings before the KSC are independent, impartial and fair¹³. The Specialist Prosecutor is required to contribute to the establishment of the truth (rather than merely pursue a conviction) and shall take measures for the protection and due respect for the fundamental rights of suspects and Accused¹⁴. The Code of Professional Conduct¹⁵, adopted pursuant to Article 34(3) of the Law and Rule 23(3) of the Rules, specifically requires that Specialist Prosecutor and her Prosecutors act at all times in a manner compatible with fair trial principles¹⁶, fully respect and ensure the suspect’s and accused’s fair trial rights¹⁷ and must not knowingly mislead a Panel¹⁸.

¹¹

¹² Confirmation Decision at paragraph 45

¹³ Article 1(2) of the Law

¹⁴ Rule 62 of the Rules

¹⁵ KSC-BD-07, Code of Professional Conduct, 1 March 2019

¹⁶ Code of Professional Conduct at Article 6(e)

¹⁷ Code of Professional Conduct at Article 30(2)(d)

¹⁸ Code of Professional Conduct at Article 10(d)

19. The above duties have heightened poignancy in *ex parte* proceedings when the Specialist Prosecutor is the sole party, such as in confirmation proceedings.
20. The duty on the Specialist Prosecutor during confirmation proceedings is to observe the highest standards of integrity, of regard for the public interest and duty to act as an officer of justice and to ensure that the proceeding is fair¹⁹.
21. That duty includes ensuring that “all relevant material is made available” to the Pre-Trial Judge²⁰. The duty is one of “full and frank disclosure” which necessarily “includes a duty not to mislead the judge in any material way” and which requires the disclosure to the court of “any material which is potentially adverse to the application” or “might militate against” confirmation of the indictment²¹.
22. In effect, “a prosecutor seeking an *ex parte* order must put on his defence hat and ask himself what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge”²².
23. The confirmation of an indictment, initiating prosecution against the Accused, can have far reaching consequences²³. Those consequences may include, as in the present case, detention awaiting trial for several months, in circumstances where there is no avenue for the Accused to challenge the Pre-Trial Judge’s

¹⁹ *R (Kay) v Leeds Magistrates’ Court* [2018] 4 WLR 91 at paragraph 23(2) in relation to the equivalent summons procedure to commence prosecutions in England & Wales (“there is no doubt that the duty of candour applies to an *ex parte* application for the issue of summonses” per Sweeney J at paragraph 24)

²⁰ *R (Kay) v Leeds Magistrates’ Court*, ante at paragraph 23(1)

²¹ *R (Kay) v Leeds Magistrates’ Court*, ante at paragraph 25

²² *R (Kay) v Leeds Magistrates’ Court*, ante at paragraph 26

²³ *R (Kay) v Leeds Magistrates’ Court*, ante at paragraph 26

decision in relation to issues of fact, evidential sufficiency, and the legal elements of a crime or a mode of liability before the trial itself.

24. Compliance with the duty of candour is the foundation stone upon which decisions on confirmation are taken and its importance cannot be overstated²⁴.

25. The withholding of relevant information from the court on an *ex parte* application for confirmation of an indictment, where the non-disclosure by the prosecutor might have made a difference to the judge's decision, should result in a stay of proceedings pursuant to Rule 110 of the Rules²⁵.

III. SUBMISSIONS

26. The Specialist Prosecutor withheld from the Pre-Trial Judge relevant information which was potentially adverse to the prosecution request for confirmation of an indictment in breach of her duty of candour.

27. In course of the Specialist Prosecutor's submission of an indictment for confirmation dated 12 November 2024, it was alleged that the Accused had committed the crimes of obstruction and contempt of court, with the requisite intent, and as part of an agreement to commit the said offences, on the basis of (i) two meetings (on 9 September 2023 and 7 October 2023) with co-accused Thaçi in which it was said Thaçi directed him to provide instructions to Witness 2 on how to testify in his case and (ii) the alleged discovery of a document in the Accused's car on 30 October 2023 which was said to "cover" the subject

²⁴ *R (Kay) v Leeds Magistrates' Court*, ante at paragraph 38

²⁵ *R (Kay) v Leeds Magistrates' Court*, ante at paragraph 24, 27, 28 and 40

matter of Witness 2's anticipated testimony, contained a narrative consistent with the instructions and was printed from a printer in the Detention Centre²⁶.

28. In finding that that there was a well-grounded suspicion that the Accused agreed to attempt the offence of obstruction and assisted Thaçi to commit contempt of court, the Pre-Trial Judge inferred from the supporting material supplied to her, namely the transcript of the 7 October visit to Thaçi, that the Accused had been in contact with Witness 2 after the 9 September visit to "follow-up" on Thaçi's instructions to unlawfully influence the forthcoming testimony of Witness 2 in the *Thaçi et al* trial²⁷.

29. The inferred contact after the 9 September with Witness 2 to "follow-up" on Thaçi's instructions was an important feature in the Pre-Trial Judge's determination that Smakaj participated in a joint effort to influence the forthcoming testimony of Witness 2²⁸. It was also an important feature of the Pre-Trial Judge's assessment that the requirements of direct and/or eventual intent were satisfied in the Accused's case in relation to the offence of obstruction²⁹ and direct and purposeful intention to assist Thaçi in relation to the offence of contempt of court³⁰.

30. Nowhere in the Confirmation Decision was mention made of the interview given by Witness 2 to the Specialist Prosecutor on 6 December 2023 when he

²⁶ KSC-BC-2023-12/F00028/, *Submission of Further Amended Indictment for Confirmation with strictly confidential and ex parte Annexes 1-2*, Prosecution, 12 November 2024, Confidential at paragraph 1; KSC-BC-2023-12/F00028/A01, *ANNEX 1 to Submission of Further Amended Indictment for Confirmation*, Prosecution, Confidential at paragraphs 18-20, 29, 38, 42 and 48; and KSC-BC-2023-12/F00028/A02, *ANNEX 2 to Submission of Further Amended Indictment for Confirmation*, Prosecution, Confidential at pages 19-24, 29-30, 38, 39, 40, 42-44, 47

²⁷ Confirmation Decision at paragraph 203 (also paragraph 195)

²⁸ Confirmation Decision at paragraph 186

²⁹ Confirmation Decision at paragraph 203-204

³⁰ Confirmation Decision at paragraphs 282-283

described the extent of the contact that he had with the Accused after 9 September 2023.

31. That is unsurprising as the Prosecution had not mentioned the existence of that interview with Witness 2 in their (i) request for confirmation of an indictment, (ii) the indictment itself, or (iii) the Rule 86(3)(b) outline which accompanied the indictment.

32. All the material submitted by the Prosecution in support of the confirmation of the indictment is contained in Disclosure Packages Nos. 6 and 8³¹ and the interview with Witness 2 is not contained therein either.

33. That omission is frankly astounding.

34. In that interview³², Witness 2 confirmed that [REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

³¹ KSC-BC-2023-12/F00164, *Decision on Review of Detention of Bashkim Smakaj*, Pre-Trial Judge, 7 February 2025, Confidential at paragraph 47(iii) and footnote 100

³² ERN 118214-TR-ET Part 1 Revised

³³ ERN 118214-TR-ET Part 1 Revised pages 7-9

³⁴ ERN 118214-TR-ET Part 1 Revised page 8 lines 15-17

³⁵ ERN 118214-TR-ET Part 1 Revised page 11 lines 22-24

³⁶ ERN 118214-TR-ET Part 1 Revised page 10 lines 22-24, page 11 lines 1-2 and page 12 lines 9-15

37. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

41. The account of Witness 2, provided to the SPO as long ago as 6 December 2023, directly undermines the inference that the Pre-Trial Judge was to draw against the Accused, namely, that the Accused had been in contact with Witness 2 after the 9 September visit to “follow-up” on Thaçi’s instructions to unlawfully influence the forthcoming testimony of Witness 2 in the *Thaçi et al* trial.

42. On the contrary, the evidence from Witness 2 confirms that [REDACTED]
[REDACTED]
[REDACTED] the Accused had *not* followed up on

³⁷ ERN 118214-TR-ET Part 1 Revised page 7 lines 10-20, page 12 lines 16-25 and page 13 lines 1-10

³⁸ ERN 118214-TR-ET Part 1 Revised page 7 lines 14-21

³⁹ ERN 118214-TR-ET Part 1 Revised page 9 lines 15-19

⁴⁰ ERN 118214-TR-ET Part 1 Revised page 11 lines 3-7

Thaçi's instructions to unlawfully influence the forthcoming testimony of Witness 2 in the *Thaçi et al* trial.

43. It is impossible to believe that, if the Specialist Prosecutor had complied with her duty of candour and asked herself, what, if she were representing the suspect, he would be saying to the judge, she would not have realised that the suspect would ask the Pre-Trial Judge to consider that material if he was given the opportunity.
44. It was misleading of the Prosecution to withhold that material from the Pre-Trial Judge.
45. It cannot be stated now with certainty what the effect of disclosure of that material on the Pre-Trial Judge's independent and impartial assessment of whether Smakaj participated in a joint effort to influence the forthcoming testimony of Witness 2⁴¹, and whether the requirements of direct and/or eventual intent were satisfied in the Accused's case in relation to the offence of obstruction⁴² and direct and purposeful intention to assist Thaçi in relation to the offence of contempt of court⁴³.
46. Additionally, the withholding of the account of Witness 2, which was to the effect that the Accused had *not* followed up on Thaçi's instructions to unlawfully influence the forthcoming testimony of Witness 2 in the *Thaçi et al* trial, meant that no specific consideration was given to whether the prosecution could establish that the Accused's action amounted to more than preparatory acts⁴⁴.

⁴¹ Confirmation Decision at paragraph 186

⁴² Confirmation Decision at paragraph 203-204

⁴³ Confirmation Decision at paragraphs 282-283

⁴⁴ KSC-BC-2020-07, *Trial Judgment*, Trial Panel II, Public at paragraph 201: attempt requires action towards the commission of the offence, where the action must amount to more than preparatory acts

47. It is clearly one possible outcome that disclosure of the interview of Witness 2 in December 2023 might have resulted in the following conclusions:

- (i) that the Accused did not participate in a joint effort to influence the forthcoming testimony of Witness 2 (he having had the opportunity to but took no action);
- (ii) that the spurning of the opportunity to try to influence the testimony of Witness 2 by the Accused demonstrates that the requirements of direct and/or eventual intent were not satisfied in the Accused's case in relation to the offence of obstruction and nor direct and purposeful intention to assist Thaçi in relation to the offence of contempt of court; and
- (iii) That in any event, the Accused's actions were no more than preparatory and that he did not, in fact, attempt to obstruct the work of the SPO/SC officials by influencing the forthcoming testimony of Witness 2.

48. The non-disclosure of the interview of Witness 2 would have undoubtedly made a difference to the judge's decision. Even if the request for confirmation of the decision had not been refused without more, it may well have led the Pre-Trial Judge to have exercised further her powers in Rule 86(4). *At the very least*, the reasoning required by Rule 86(5) would inevitably have looked very different (in ways which cannot now be stated with any certainty).

49. It is not explicitly known why the interview of Witness 2 was withheld from the the Pre-Trial Judge, but an obvious inference is that it was withheld by the SPO precisely because it might have supported a conclusion by the Pre-Trial

Judge which rejected confirmation of the indictment in relation to the Accused, whether in whole or in part, on the bases as set out in paragraph 47 above and similar.

50. In any event, it may be unnecessary to enquire further as to the reason why the interview with Witness 2 was withheld – the withholding of material information should itself be a critical factor in determining whether a confirmation decision should be set aside as an abuse of the process of the court⁴⁵.

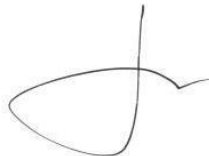
IV. CONCLUSION

51. For the reasons set out above, the court should order a stay of proceedings on counts 13 and 14 as an abuse of the process of the court.

V. CLASSIFICATION

52. This filing is classified as confidential pursuant to rule 82(4).

Word count: 3508 words



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⁴⁵ *R (Kay) v Leeds Magistrates' Court*, ante at paragraph 24 (as emphasised therein)

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