



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: 6 May 2025

Language: English

Classification: Public

Decision on Smakaj Application for Leave to Appeal Decision F00247

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), and Rules 9(5)(b) and 77 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules") hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 4 March 2025, the Defence for Bashkim Smakaj ("Mr Smakaj") applied for a stay of proceedings on the grounds of abuse of process ("Stay of Proceedings Request").²

2. On 7 April 2025, the Pre-Trial Judge issued the "Decision on Bashkim Smakaj's Application for Stay of Proceedings" ("Decision F00247").³ The decision was notified the same day.

3. On 16 April 2025, the Defence for Mr Smakaj ("Smakaj Defence") filed an application requesting leave to appeal Decision F00247 ("Application").⁴

4. On 29 April 2025, the Specialist Prosecutor's Office ("SPO") responded, requesting that the Application be dismissed *in limine* or, in the alternative, that it be rejected ("Response").⁵

5. On 5 May 2025, the Smakaj Defence replied to the SPO Response ("Reply").⁶

¹ KSC-BC-2023-12, F00015, President, *Decision Assigning a Pre-Trial Judge*, 6 June 2024, public.

² KSC-BC-2023-12, F00202, Smakaj Defence, *Smakaj Application for a Stay of Proceedings as an Abuse of Process*, 4 March 2025, confidential. A public redacted version was filed on 5 March 2025, F00202/RED.

³ KSC-BC-2023-12, F00247, Pre-Trial Judge, *Decision on Bashkim Smakaj's Application for Stay of Proceedings*, 7 April 2025, confidential. A public redacted version was filed on the same day, F000247/RED.

⁴ KSC-BC-2023-12, F00263, Smakaj Defence, *Application for Leave to Appeal through Certification from Decision KSC-BC-2023-12/F00247 Pursuant to Article 45(2) and Rule 77(1)*, 16 April 2025, confidential. A corrected version as filed on 24 April 2025, F00263/COR.

⁵ KSC-BC-2023-12, F00275, Specialist Prosecutor, *Prosecution Response to Smakaj Certification Request (F00263)*, 29 April 2025, confidential, with Annex 1, public.

⁶ KSC-BC-2023-12, F00279, Smakaj Defence, *Smakaj Reply re Prosecution Response to Smakaj Certification Request (F00263)*, 5 May 2025, confidential.

II. SUBMISSIONS

A. SMAKAJ DEFENCE APPLICATION

6. The Smakaj Defence requests that the Pre-Trial Judge grant certification to appeal Decision F00247 with respect to the following three issues (collectively, the “Three Issues”):

- (a) Whether the Pre-Trial Judge erred in conflating the two alternative limbs of the jurisdiction to stay proceedings as an abuse of process (“First Issue”);
- (b) Whether the Pre-Trial Judge erred by finding that the obligation upon the prosecution under the duty of candour at the confirmation stage was limited to drawing to the Pre-Trial Judge’s attention “any evidence that would, on its face, challenge or contradict the SPO’s overall theory” (“Second Issue”); and
- (c) Whether the Pre-Trial Judge erred by requiring the Accused to convince her that Witness 2’s interview alone, had it been submitted, “would have undoubtedly made a difference to the judge’s decision” (“Third Issue”).

7. As regards the First Issue, the Smakaj Defence submits that the Pre-Trial Judge in denying the Stay of Proceedings Request erroneously conflated the two alternative limbs of the legal test for such requests, namely (i) whether it is sufficiently shown that the rights of the accused have been violated to such an extent that the essential preconditions of a fair trial are missing, and (ii) whether it would be repugnant or odious to the administration of justice to allow the case to continue.⁷ According to the Smakaj Defence, while its Stay of Proceedings Request was based on the argument that it was repugnant or odious to the administration of justice to allow the case to continue due to the conduct of the SPO, the Pre-Trial Judge assessed whether Mr Smakaj could still have a fair trial.⁸

⁷ Application, paras 10-18.

⁸ Application, paras 19-20.

8. As regards the Second Issue, the Smakaj Defence avers that the Pre-Trial Judge erroneously held, without jurisprudential authority, that the SPO's obligation in the *ex parte* confirmation stage went no further than to "draw the Pre-Trial Judge's attention to any evidence that would, on its face, challenge or contradict the SPO's overall theory".⁹ It claims that the Pre-Trial Judge's formulation is vague and that she gave no reasons for rejecting Mr Smakaj's formulation of the Divisional Court in *R(Kay) v Leeds Magistrates' Court*, which is clear and straightforward.¹⁰

9. As regards the Third Issue, the Smakaj Defence contends that, had the interview of Witness 2 been submitted, it would have been sufficient that said material challenged the SPO's overall theory, even if it did not fundamentally undermine it.¹¹ In its view, by stating that she was not convinced that Witness 2's interview alone would have undoubtedly made a difference to her decision to confirm the charges against Mr Smakaj, the Pre-Trial Judge placed the hurdle too high and, therefore, was in error.¹²

10. In relation to all Three Issues, the Smakaj Defence argues that they are appealable issues emanating from Decision F00247¹³ and that they relate directly to the question whether the charges Mr Smakaj faces should be permitted to proceed to trial at all.¹⁴ In the view of the Smakaj Defence, an authoritative ruling on the proper approach of the court will materially advance the proceedings and future applications.¹⁵

11. Lastly, the Smakaj Defence requests that the Application be recognised *ex post facto* as valid on the basis of *mea culpa*, having missed the time limit by less than

⁹ Application, paras 21-24.

¹⁰ Application, paras 25-26.

¹¹ Application, paras 28-29.

¹² Application, paras 27, 30.

¹³ Application, para. 32.

¹⁴ Application, para. 34.

¹⁵ Application, paras 35-38.

24 hours due to an error made by Counsel.¹⁶ In the alternative, the Smakaj Defence requests that the Pre-Trial Judge grant *proprio motu* an extension of time *ex post facto* in the interests of justice.¹⁷

B. SPO RESPONSE

12. The SPO argues that the Application should be dismissed *in limine* for being filed out of time. In case the Application is accepted, the SPO alleges that the Application be rejected as either the Three Issues misrepresent Decision F00247, or the Smakaj Defence merely disagrees with said decision, thus failing to satisfy the requirements of Article 45 of the Law and Rule 77 of the Rules.¹⁸

13. As regards the First Issue, the SPO maintains that the Smakaj Defence misconstrues the legal nature and development of the stay of proceedings remedy in international criminal jurisprudence, insofar as the “either/or” disjunctive test has been rejected.¹⁹ In the SPO’s view, the Pre-Trial Judge correctly understood Mr Smakaj’s complaint and enquired whether a fair trial was possible.²⁰ The SPO concludes that, as a result, the First Issue misrepresents Decision F00247 and presents no appealable issue.²¹

14. As regards the Second Issue, the SPO contends that the Smakaj Defence disagrees with Decision F00247 over terminology as the formulation chosen by the Pre-Trial Judge is not substantively different from the wording of a case preferred

¹⁶ Application, paras 39-45.

¹⁷ Application, para. 46.

¹⁸ Response, paras 1, 20-21, 23.

¹⁹ Response, paras 2-10.

²⁰ Response, paras 12-13.

²¹ Response, para. 14.

by the Smakaj Defence.²² The SPO concludes that, as a result, the Second Issue is a mere disagreement and not appealable.²³

15. As regards the Third Issue, the SPO alleges that the Smakaj Defence merely disagrees with the Pre-Trial Judge's conclusion that Witness 2's interview was one of the factors considered in Decision F00247.²⁴ The SPO concludes that, as a result, the Third Issue is a mere disagreement.²⁵

C. SMAKAJ DEFENCE REPLY²⁶

16. As regards the First Issue, the Smakaj Defence reiterates that whether there are two alternative and separate limbs to the stay of proceedings test is an appealable issue.²⁷ It argues that, because the Pre-Trial Judge assessed the Stay of Proceedings Request through the single lens of the fair trial limb, she failed to consider separately whether the failure of the SPO to disclose Witness 2's interview was odious or repugnant to the administration of justice.²⁸ As regards the Second Issue, the Smakaj Defence elaborates on the interpretative difference between the formulation adopted by the Pre-Trial Judge in Decision F00247 and that stipulated by UK courts.²⁹ As regards the Third Issue, the Smakaj Defence reiterates that, had Witness 2's interview been disclosed prior to the confirmation decision, it *might* have made a difference to the judge's decision as Mr Smakaj's contact with Witness 2 would no longer have been one of the factors considered, or the Pre-Trial

²² Response, paras 15-17.

²³ Response, para. 17.

²⁴ Response, paras 18-19.

²⁵ Response, para. 19.

²⁶ The Pre-Trial Judge notes that, according to Article 43 of the Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers (KSC-BD-15), any reply shall not exceed 1,000 words. The Reply consists of 2,637 words, more than double the amount foreseen by the legal framework. The Pre-Trial Judge draws Counsel's attention to the Practice Direction on Files and Filings and urges the Smakaj Defence to comply with it.

²⁷ Reply, paras 3-4.

²⁸ Reply, paras 5-14.

²⁹ Reply, paras 15-19.

Judge would have had to explain why, despite the clear and unequivocal account of Witness 2, such contact was relevant to the confirmation decision.³⁰ Lastly, the Smakaj Defence contends that, if the Pre-Trial Judge erred in denying the Stay of Proceedings Request, certification would advance the proceedings.³¹

III. APPLICABLE LAW

17. Pursuant to Article 45(2) of the Law, a Court of Appeals Panel shall hear interlocutory appeals from an accused or from the SPO in accordance with the Law and the Rules. Interlocutory appeals, other than those that lie as of right, must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel on the basis that they involve an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance the proceedings.

18. Pursuant to Rule 77(2) of the Rules, the Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

19. Pursuant to Rule 9(5)(b) of the Rules, the Panel may, *proprio motu* or upon showing of good cause, recognise as valid any act carried out after the expiration of the time limit.

³⁰ Reply, paras 20-24.

³¹ Reply, para. 26.

IV. DISCUSSION

A. LEGAL TEST

20. A right to appeal arises only if the Panel is of the opinion that the standard for certification set forth in Article 45(2) of the Law and Rule 77(2) of the Rules has been met.³² The Pre-Trial Judge recalls the interpretation of these provisions as set out previously in the present proceedings.³³

21. Mindful of the restrictive nature of this remedy, the following specific requirements apply:

- (1) Whether the matter is an “appealable issue”;
- (2) Whether the issue at hand would significantly affect:
 - i. The fair and expeditious conduct of the proceedings, or
 - ii. The outcome of the trial; and
- (3) Whether, in the opinion of the Pre-Trial Judge, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.³⁴

B. THE APPLICATION

22. The Pre-Trial Judge recalls that Decision F00247 was notified on 7 April 2025. The Application was due on Monday, 14 April 2025, within seven (7) days from notification of the impugned decision, as prescribed by Rule 77(1) of the Rules. Rule 9(1) of the Rules clearly states that time limits under the Rules are calculated

³² KSC-BC-2023-12, F00149, Pre-Trial Judge, [Decision on Specialist Prosecutor’s Request for Leave to Appeal the “Decision on the Confirmation of the Indictment”](#) (“30 January 2025 Decision”), 30 January 2025, public, para. 15. See also KSC-BC-2020-06, F00172, Pre-Trial Judge, [Decision on the Thaçi Defence Application for Leave to Appeal](#), 11 January 2021, public, para. 9.

³³ 30 January 2025 Decision, paras 15-22, with further references.

³⁴ 30 January 2025 Decision, para. 16, with further references.

by calendar days. The Application was submitted on Wednesday, 16 April 2025, thus past the time limit prescribed by the Rules.

23. The Pre-Trial Judge finds that Counsel has not shown good cause so as to convince her to accept the Application as validly made, pursuant to Rule 9(5)(b) of the Rules.³⁵ None of the reasons advanced by Counsel constitute good cause within the meaning of Rule 9(5)(b) of the Rules and can justify the late filing of the Application. Counsel is not new to the proceedings before the Specialist Chambers and is aware of the time limit to request leave to appeal pursuant to Rule 77(1) of the Rules.³⁶ The Pre-Trial Judge further stresses that procedural time-limits are to be respected as they are indispensable to the proper and expeditious functioning of the Specialist Chambers, especially in a multi-accused case.³⁷ The Smakaj Defence's submission that no prejudice is caused to the SPO or any other party by accepting the Application is misplaced.

24. As to the Smakaj Defence's alternative request, that the Pre-Trial Judge *proprio motu* "grant the *ex post facto* extension" of time in the interests of justice,³⁸ the Pre-Trial Judge observes that, for the reasons set forth above, the Pre-Trial Judge does not consider it appropriate to recognise *proprio motu* the Application as validly made.

25. In light of the foregoing, the Pre-Trial Judge dismisses the Application for having been filed out of time.

³⁵ As the Application was submitted after the expiry of the time limit, Rule 9(5)(a) of the Rules is inapplicable.

³⁶ See also KSC-BC-2023-10, F00444, Pre-Trial Judge, *Decision Dismissing Application for Leave to Appeal F00433*, 23 August 2024, public, para. 7.

³⁷ See also KSC-BC-2023-10, F00451, Pre-Trial Judge, *Decision on Request for Reconsideration of F00444*, 27 August 2024, public, para. 13. Similarly, KSC-BC-2023-12, IA003/F00004, Court of Appeals Panel, *Decision on Defence Request for an Extension of Time to Appeal the "Second Decision on Review of Detention of Fadil Fazliu"*, 25 April 2025, public, para. 5.

³⁸ Application, para. 46.

26. Even if, for the sake of argument, the Pre-Trial Judge were to recognise the Application as valid, it would still fail, for the following reasons. As regards the First Issue, the Pre-Trial Judge is of the view that the Smakaj Defence merely disagrees with Decision F00247, as the Pre-Trial Judge's conclusions would remain the same, even if the legal test applied had been that proposed by the Smakaj Defence.³⁹ In Decision F00247, the Pre-Trial Judge made clear that: (i) contact with Witness 2 was one of several factors and elements considered by the Pre-Trial Judge to determine Mr Smakaj's criminal responsibility; (ii) the Smakaj Defence manifestly overstated the importance of Mr Smakaj's contact with Witness 2 *vis-à-vis* her conclusions on Mr Smakaj's alleged responsibility; and (iii) the SPO had not violated its obligations *vis-à-vis* the Pre-Trial Judge in not including Witness 2's interview in the indictment-supporting material.⁴⁰ As a result and in addition, any determination by the Court of Appeals on the First Issue would also not materially advance the proceedings.

27. As regards the Second Issue, the Pre-Trial Judge considers that the Smakaj Defence again merely disagrees with Decision F00247. The UK case-law cited by the Smakaj Defence is obviously not binding on the Specialist Chambers, let alone capable to disturb the findings of the Pre-Trial Judge.⁴¹ As a result and in addition, any determination by the Court of Appeals on the Second Issue would not materially advance the proceedings.

28. As regards the Third Issue, the Smakaj Defence clearly misrepresents Decision F00247. In essence, the Smakaj Defence alleges that while it would have been "enough that the material [*i.e.* Witness 2's interview] *might* have made a difference to the judge's decision on confirmation",⁴² the Pre-Trial Judge seemingly adopted a

³⁹ *In the same vein*, Response, para. 13.

⁴⁰ Decision F00247, para. 30.

⁴¹ *In the same vein*, Response, para. 17.

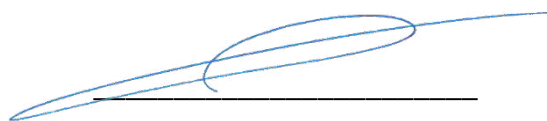
⁴² Application, paras 28-29; Reply, paras 20-24.

more stringent approach in requiring that said material “undoubtedly [make] a difference to the judge’s decision”.⁴³ In the Pre-Trial Judge’s view, the Smakaj Defence inappropriately selects discrete aspects of the Pre-Trial Judge’s findings in Decision F00247 and in doing so misrepresents the standard applied by the Pre-Trial Judge. At no point in time did the Pre-Trial Judge deviate from the evidentiary standard applicable at the confirmation stage.⁴⁴ As a result, the Third Issue does not arise from Decision F00247.

V. DISPOSITION

29. For the above reasons, the Pre-Trial Judge hereby:

- a. **DISMISSES** the Application;
- b. **ORDERS** the Smakaj Defence to indicate whether the Application (F00263/COR) and its Reply (F00279) may be reclassified as public, or file public redacted versions thereof, by no later than **Monday, 12 May 2025**; and
- c. **ORDERS** the Registry to reclassify as public the Response (F00275).



Judge Marjorie Masselot
Pre-Trial Judge

Dated this Tuesday, 6 May 2025

At The Hague, the Netherlands.

⁴³ Application, paras 27, 30-31.

⁴⁴ See Decision F00247, para. 31; KSC-BC-2023-12, F00036, Pre-Trial Judge, *Decision on the Confirmation of the Indictment*, 29 November 2024, confidential, paras 40-46. A public redacted version was filed on 12 February 2025, F00036/RED.