

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 Fadil Fazliu

Date: 2 July 2025

Language: English

Classification: Public

**Fazliu Defence Request for Certification to Appeal the Decision
on Preliminary Motions Alleging Defects in the Indictment**

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I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law on Specialist Chambers and Specialist Prosecutor's Office ('Law', 'SC', 'SPO', respectively) and Rule 77 of the Rules of Procedure and Evidence ('Rules'), the Defence for Mr. Fadil Fazliu ('Fazliu Defence') hereby request certification to appeal the Decision on Preliminary Motions Alleging Defects in the Indictment ('Impugned Decision').¹
2. Certification is sought in relation to the following two issues:
 - (i) whether the Pre-Trial Judge erred in law by concluding that, because the offence charged is attempted obstruction, the SPO is relieved from specifying in the Indictment how the Accused's conduct *could* prevent or impede the SC/SPO officials in their duties ('**First Issue**');
 - (ii) whether the Pre-Trial Judge erred in law by finding that the concurrent application of Article 28 of the 2019 Kosovo Criminal Code, Law No. 06/L-074 ('KCC') alongside Article 401(2) of the KCC is legally untenable ('**Second Issue**').
3. Both issues are appealable, would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and their immediate resolution may materially advance proceedings.

II. PROCEDURAL BACKGROUND

4. On 29 November 2024, the Pre-Trial Judge confirmed the indictment against Messrs

¹ KSC-BC-2023-12, F00347, Decision on Preliminary Motions Alleging Defects in the Indictment, 24 June 2025 ('Impugned Decision'), public.

Hashim Thaçi, Bashkim Smakaj, Isni Kilaj, and Hajredin Kuçi ('Confirmation Decision').²

5. On 14 April 2025, the Pre-Trial Judge amended the Confirmation Decision and ordered the parties to submit any preliminary motions by 8 May 2025.³
6. On 16 April 2025, the SPO filed the Amended Confirmed Indictment ('Indictment').⁴
7. On 8 May 2025, the Fazliu Defence and the Defence for Mr. Hashim Thaçi ('Thaçi Defence') filed the motions alleging defects in the Indictment.⁵
8. On 29 May 2025, the SPO filed a consolidated response thereto.⁶
9. On 3 June 2025, the Thaçi Defence replied to the SPO's consolidated response.⁷
10. On 24 June 2025, the Pre-Trial Judge issued the Impugned Decision.

III. APPLICABLE LAW

11. Pursuant to Article 45 of the *Law*, a Court of Appeals Panel shall hear interlocutory appeals from an accused in accordance with the *Law* and *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

² KSC-BC-2023-12, F00036, Decision on the Confirmation of Indictment, 29 November 2024, confidential ('Confirmation Decision'). Public redacted version dated 12 February 2025.

³ KSC-BC-2023-12, F00260, Decision Amending the 'Decision on the Confirmation of the Indictment' and Setting a Date for the Submission of Preliminary Motions, 14 April 2025, public.

⁴ KSC-BC-2023-12, F00264/A01, Amended Confirmed Indictment, 16 April 2025, confidential ('Indictment'). Public redacted version filed simultaneously as F00264/A02.

⁵ KSC-BC-2023-12, F00288, Thaçi Defence Motion on Defects in the Indictment, 8 May 2025, public; F00289, Fazliu Defence Challenge to the Form of the Indictment, 8 May 2025, public.

⁶ KSC-BC-2023-12, F00313, Consolidated Prosecution Response to Preliminary Motions Alleging Defects in the Form of the Indictment, 29 May 2025, public.

⁷ KSC-BC-2023-12, F00321, Thaçi Defence Reply to SPO Response to Preliminary Motion on Defects in the Indictment, 3 June 2025, public.

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.

12. 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.

IV. SUBMISSION

A. The Issues Are Appealable

13. The **First Issue** directly arises from the Impugned Decision. The Pre-Trial Judge found that, because the charged offence is attempted obstruction, the SPO is relieved from detailing in the Indictment ‘how [the Accused]’s action *actually* impeded or prevented the performance of duties of (specific) SC/SPO officials’.⁸ Whilst not in and itself erroneous, this finding conflates the absence of an obligation for the SPO to demonstrate actual obstruction, on one hand, with their obligation to adequately set forth how the alleged conducts were capable of causing the prohibited result in the first place. If such capacity does not exist, the fact that actions were carried out ‘*towards* the commission of the offence’⁹ cannot sustain a charge of

⁸ Impugned Decision, paras. 55 (emphasis per original) and 63.

⁹ Impugned Decision, para. 63.

attempt.¹⁰ In dispensing with the pleading of the existence of such capacity,¹¹ the Impugned Decision erroneously departed from the legal standards for charging attempted crimes.

14. This issue is not a mere disagreement with or a general critique of the Impugned Decision. Nor does it repeat arguments previously considered and dismissed. When rejecting the Fazliu Defence's request for sufficient notice regarding *how* the alleged conducts rise to the level of an attempted offence, the Impugned Decision did not address the underpinning legal issue as set out above.¹²
15. Regarding the **Second Issue**, the Pre-Trial Judge found that the addition of Article 28 of the KCC alongside Article 401(2) of the KCC would amount to pleading an '*attempt of the attempted obstruction*', which is '*legally untenable*'.¹³ Logically, this finding precludes the concurrent application of the two articles to the same offence, giving rise to the Second Issue.
16. The Second Issue involves more than a mere difference of opinion. It challenges a discrete legal error pertaining to the scope of Indictment's legal basis. As the general provision on attempt, Article 28 of the KCC necessarily informs the interpretation of any attempted crime, including that provided under Article 401(2) of the KCC. Its applicability and relevance to the charge against Mr. Fazliu is not an issue that has been litigated or ruled upon in the present case.

¹⁰ Cf. KCC, Article 29 (re inappropriate attempt).

¹¹ See, e.g., Impugned Decision, para. 48 ('[T]he Amended Confirmed Indictment does not charge Messrs Thaçi, Fazliu, Smakaj, and Kilaj with discrete incidents which purportedly impeded, hindered and/or delayed the work of identifiable SC or SPO officials, such as investigators or teams of investigators. This is actually why the alleged conduct of Messrs Thaçi, Fazliu, Smakaj, and Kilaj fell short of the full commission of obstruction and is characterised as attempted obstruction.').

¹² Impugned Decision, para. 63; see also, para. 55.

¹³ Impugned Decision, para. 64 (emphasis per original).

B. The Issues Affect the Fair and Expeditious Conduct of Proceedings or the Outcome of the Trial

17. Both the First and the Second Issues significantly affect the fairness and expeditious conduct of the proceedings as well as the outcome of the trial.
18. The First Issue addresses the core fairness concern of notice.¹⁴ Mr. Fazliu has not been sufficiently informed of the nature and scope of charges against him without the crucial aspect as to *how* his conduct, in the SPO's view, could lead to obstruction. This question of 'how' is far from self-evident. Mr. Fazliu is not charged with discrete incidents which purportedly impeded, hindered and/or delayed the work of the SC/SPO officials.¹⁵ Nor are his alleged conducts underpinning Count 16 inherently unlawful.¹⁶ As such, an adequate description of the purported risk to the administration of justice is essential to his understanding of the charge as well as his ability to instruct counsel to prepare his defence.
19. The Second Issue similarly impacts fairness and the trial outcome as it pertains to the correct statutory interpretation and the appropriate identification of relevant legal provisions relevant to attempt. Whereas Article 28 of the KCC encompasses the definition of attempt and the appropriate degree of punishment for attempt, the interpretive ambiguity – if not a paradox – introduced by the Impugned Decision would lead to extensive debate at trial and, in case of conviction, the sentencing phase.

¹⁴ *Law*, Articles 21(4) and 38(4); *Rules*, Rule 86(3).

¹⁵ Impugned Decision, para. 48.

¹⁶ Regarding Mr. Fazliu, the alleged conducts include meeting between Messrs Fazliu, Fahri Fazliu and Witness 1 on 29 June 2023, exchanging messages between the trio on the same day, engaging in discussion with Mr. Thaçi about Case 6 as well as the Fazliu family's pre-existing relationship with Witness 1 during the Detention Centre visit on 2 July 2023. See, Confirmation Decision, para. 185.

C. Immediate Resolution May Materially Advance Proceedings

20. A prompt resolution of both issues via appellate intervention at this stage would decisively clarify these foundational legal standards. This, in turn, would allow both the SPO and the Defence to streamline their pre-trial preparation, including the drafting of any pre-trial brief. All parties would be able to conduct their respective investigation and presentation of evidence in full knowledge of the scope of their evidentiary burdens, thereby minimising interruptions at trial. Given the legal significance of the two issues raised, in case of conviction, they would likely form part of the appeal. Therefore, the proceedings may be materially advanced by their immediate resolution.

V. CONCLUSION AND RELIEF

21. For the reasons above, the Defence respectfully requests that the Pre-Trial Judge grant certification for both issues identified in the present filing.

Word count: 1540 words

Respectfully submitted,

A handwritten signature in black ink, reading "David A. Young". The signature is written in a cursive, flowing style.

David A. Young

Specialist Counsel for Fadil Fazliu

2 July 2025

The Hague, the Netherlands