



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-06
Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 31 December 2020

Language: English

Classification: Confidential

Prosecution response to Thaçi Defence request for leave to appeal the First Protective Measures Decision

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Request¹ should be rejected because it fails to meet the requirements for leave to appeal under Article 45 of the Law² and Rule 77 of the Rules.³ None of the Issues⁴ constitute ‘appealable’ issues. Rather, the defence team for Mr Thaçi (‘Thaçi Defence’) repeatedly misrepresents the Decision,⁵ attempting to manufacture appealable issues from a decision that it simply disagrees with.

II. THE REQUIREMENTS FOR GRANTING LEAVE TO APPEAL HAVE NOT BEEN MET

2. Read together, Article 45(2) and Rule 77(2) set out the requirements applicable to granting of a request for leave to appeal, as follows:

- a. whether the decision involves an issue that would significantly affect:⁶
 - i. the fair and expeditious conduct of the proceedings; or
 - ii. the outcome of the trial; and
- b. whether, in the opinion of the panel, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

¹ Defence Request on behalf of Mr Thaçi for Certification to Appeal the “Confidential Redacted Version of Corrected Version of First Decision on Specialist Prosecutor’s Request for Protective Measures”, KSC-BC-2020-06/F00156, 21 December 2020 (‘Request’).

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (‘Law’). All references to ‘Article’ or ‘Articles’ herein refer to articles of the Law, unless otherwise specified.

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (‘Rules’). All references to ‘Rule’ or ‘Rules’ herein refer to the Rules, unless otherwise specified.

⁴ The four issues for which leave to appeal is sought as identified at para.12 of the Request (‘Issues’). The Specialist Prosecutor’s Office (‘SPO’) following the same numbering of the Issues (1-4) as contained in the Request.

⁵ Corrected Version of First Decision on Specialist Prosecutor’s Request for Protective Measures, KSC-BC-2020-06/F00133/COR, 14 December 2020 (‘Decision’). The Confidential redacted version was issued the same day.

⁶ *Contra.* Request, KSC-BC-2020-06/F00156, para.6 (referring to ‘could’ significantly affect).

3. The burden is on an applicant for leave to appeal to establish the existence of both requirements (a) and (b) set out above.⁷

4. For the purposes of the first prong of the test, an ‘issue’ should be understood as an identifiable topic or subject the resolution of which is essential for determination of the matters arising, and not merely a question over which there is disagreement or conflicting opinion.⁸ As outlined further below, none of the Issues constitute appealable issues. Rather, they misrepresent the Decision and therefore do not arise from it. Further, it is apparent from the Request, which in places just repeats prior submissions,⁹ that, rather than raising appealable issues, the Thaçi Defence simply disagrees with the Decision as a whole.

A. ISSUE 1

5. The Thaçi Defence’s claim that the Pre-Trial Judge failed to properly consider whether the risks of disclosure arise from the Defence is without merit. First, the Decision correctly recalls that the objectively justifiable risk must emanate from disclosure to the receiving party, as opposed to the general public.¹⁰ Second, in respect of each assessment, the Pre-Trial Judge expressly outlined the factors giving rise to such a risk. The factors identified in the Decision are specific, concrete and relate to each Accused. They include the Accused’s means and incentives to interfere with witnesses,¹¹ prior and recent

⁷ See, for example, ICC, Situation in Uganda, Decision on Prosecutor’s application for leave to appeal in part Pre-Trial Chamber II’s decision on Prosecutors application for warrants of arrest under Article 58, ICC02/04-01/05-20-US-Exp, 19 August 2005 (‘Decision on Situation in Uganda’), paras 20-21.

⁸ See, for example, ICC, Situation in the DRC, Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168 OA3, 13 July 2006, (‘Decision on Application for Extraordinary Review’), para.9. See also Request, KSC-BC-2020-06/F00156, para.8.

⁹ For example, Request, KSC-BC-2020-06/F00156, paras 18-21.

¹⁰ Decision, KSC-BC-2020-06/F00133/COR, para.20.

¹¹ Decision, KSC-BC-2020-06/F00133/COR, paras 33, 35, 52, 54, 78, 82, 91, 93.

positions of authority held by each of the Accused,¹² the means and incentives of persons close to the Accused, including former subordinates and named JCE members,¹³ an ongoing and escalating risk of intimidation or interference for witnesses and/or their family members, particularly in proceedings against former KLA members, which is the case in respect of each of the Accused,¹⁴ and the risk that the Accused may be in possession of illegitimately obtained confidential materials.¹⁵ Finally, lest there be any doubt, in each case where delayed disclosure was granted,¹⁶ the Pre-Trial Judge explicitly stated that the risks in question arise from disclosure to the Defence.¹⁷ The Thaçi Defence chooses to ignore each of these findings. Its attempt to generically characterise factors relied upon in the Decision as ‘subjective fears, and generalised, unsubstantiated statements’¹⁸ is itself entirely unsubstantiated, and reflects nothing more than mere disagreement. As such, Issue 1 is not an appealable issue.

B. ISSUE 2

6. The Thaçi Defence’s submission that the Pre-Trial Judge failed to conduct individualised assessments for witnesses is a deliberate misreading of the Decision. The order in which witnesses are assessed has no bearing on the nature of the assessment conducted.¹⁹ Equally, finding the same factor to be applicable to more than one witness, or identifying certain factors common to all witnesses, does not prevent an assessment from being individualised. In fact, the Decision carefully and precisely specifies which

¹² Decision, KSC-BC-2020-06/F00133/COR, paras 33, 35, 52, 54, 78, 82, 91, 93.

¹³ Decision, KSC-BC-2020-06/F00133/COR, paras 35, 54, 82, 93.

¹⁴ Decision, KSC-BC-2020-06/F00133/COR, paras 33, 52, 78, 91.

¹⁵ Decision, KSC-BC-2020-06/F00133/COR, para.103.

¹⁶ Issue 1 is framed by the Thaçi Defence as relating to ‘all the measures ordered’. In fact, at most, the issue could be relevant to delayed disclosure findings.

¹⁷ *See, for example*, Decision, KSC-BC-2020-06/F00133/COR, paras 34, 53, 81, 83, 92, 94.

¹⁸ Request, KSC-BC-2020-06/F00156, para.12 (as opposed to what it terms ‘specific and concrete grounds’).

¹⁹ Request, KSC-BC-2020-06/F00156, para.14 (seemingly taking issue with the witnesses each being considered under headings relevant to the protective measures sought in relation to them).

factors were taken account of in respect of each witness, consistently including the relevant witness pseudonym in parenthesis and citing to the basis for that finding. The Pre-Trial Judge clearly conducted individual assessments for each witness, he simply did not collate every factor relating to a witness together into one witness-specific paragraph, and there was no requirement that he do so. The Thaçi Defence's simplistic analysis attempts to convert a matter of style into one of substance. Issue 2 misrepresents, and therefore does not arise from, the Decision.

C. ISSUE 3

7. In arguing that the Pre-Trial Judge made 'a final determination' on whether protective measures were proportionate before turning to Defence concerns, the Thaçi Defence refers simply to the sequence of two paragraphs in the Decision.²⁰ In the paragraphs in question, the Pre-Trial Judge assesses the proportionality of the protective measures with respect to the individual witnesses, before turning in the following paragraph to expressly consider the cumulative impact of applying such measures to multiple witnesses. Issue 3 is a further blatant misrepresentation of the Decision and, as such, does not arise from it.

D. ISSUE 4

8. Nothing suggests that the Pre-Trial Judge failed to consider relevant factors, or otherwise failed to appropriately take into account the impact of in-court protective measures on the right of the Accused to a fair trial, including the impact on defence investigations.²¹ On the contrary, the Decision (i) acknowledges that publicity of proceedings is a necessary component of a fair trial, and that a balancing of interests is

²⁰ Request, KSC-BC-2020-06/F00156, para.15 (citing to Decision, KSC-BC-2020-06/F00133/COR, paras 96-97).

²¹ *Contra.* Request, KSC-BC-2020-06/F00156, paras 12, 16.

required when exceptions are sought,²² (ii) expressly states that Defence submissions on the matter have been taken into account,²³ and (iii) specifically cites submissions by the Selimi Defence relating to the impact of in-court protective measures on defence investigations.²⁴ The allegation that the Pre-Trial Judge failed to consider the impact on Defence investigations is therefore without foundation. Issue 4 again misrepresents the Decision, and consequently does not arise from it.

9. Finally, although the Pre-Trial Judge does not need to proceed to consider the remaining elements of the leave to appeal test, the Issues also fail there. As outlined above, in attempting to manufacture issues for appeal the Thaçi Defence misrepresents the Decision. As a result, the Issues identified are nothing more than hypothetical questions that can have no impact on the fairness and expeditiousness of the proceedings, or the outcome of the trial. Nor could resolution by the Court of Appeals materially advance proceedings.

10. Moreover, the Thaçi Defence's speculative submissions regarding the alleged impact on the fairness and expeditiousness of proceedings and/or outcome of the trial – which are directed towards the impact of the Decision as a whole, rather than towards the Issues having been wrongly decided - completely ignore the authority of the Trial Panel, in consultation with the parties, to appropriately organise and schedule proceedings in a manner consistent with fair trial rights, as noted by the Pre-Trial Judge.²⁵ Additionally, in respect of Issue 4, decisions on in-court protective measures made at this time are necessarily subject to potential changes in circumstances and, as also expressly noted by

²² Decision, KSC-BC-2020-06/F00133/COR, para.114.

²³ Decision, KSC-BC-2020-06/F00133/COR, para.116.

²⁴ *See, for example*, Decision, KSC-BC-2020-06/F00133/COR, para.113, fn.196. Notably, the 'significant omission' alleged on the part of the Pre-Trial Judge relates to a matter which the Thaçi Defence had not even raised in its own prior submissions (the matter is raised for the first time by the Thaçi Defence in para.20 of the Request).

²⁵ Decision, KSC-BC-2020-06/F00133/COR, para.37.

the Pre-Trial Judge,²⁶ are without prejudice to any future ruling of the Trial Panel. Consequently, the Thaçi Defence fails to establish that any of the Issues would significantly affect the fairness and expeditiousness of proceedings or outcome of the trial.

III. CLASSIFICATION

11. This filing and its annex are classified in accordance with Rule 82(4).

IV. RELIEF REQUESTED

12. The Request should be rejected in full.

Word count: 1,648



Jack Smith

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Thursday, 31 December 2020

At The Hague, the Netherlands.

²⁶ Decision, KSC-BC-2020-06/F00133/COR, paras 108, 113.