



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2020-06

**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi,
and Jakup Krasniqi**

Before: Pre-Trial Judge

Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 11 January 2021

Language: English

Classification: Confidential

Decision on the Thaçi Defence Application for Leave to Appeal

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 45 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 77 of Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), hereby issues the following decision.

I. PROCEDURAL BACKGROUND

1. On 10 December 2020, the Pre-Trial Judge ("PTJ") issued the "First Decision on Specialist Prosecutor's Request for Protective Measures" ("Impugned Decision") in which he authorised protective measures for a number of witnesses relied upon by the Specialist Prosecutor's Office ("SPO").²

2. On 21 December 2020, the Defence for Hashim Thaçi ("Thaçi Defence") submitted the "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'" ("Application") seeking certification to appeal four issues emanating from the Impugned Decision.³

3. On 31 December 2020, the SPO responded to the Application ("SPO Response").⁴ The other three Accused did not respond to or join the Application.

¹ KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

² KSC-BC-2020-06, F00133/COR, *Corrected Version of First Decision on Specialist Prosecutor's Request for Protective Measures*, 10 December 2020, strictly confidential and *ex parte*. A confidential redacted version thereof was notified to the Defence on 14 December 2020, F00133/COR/CONF/RED.

³ KSC-BC-2020-06, F00156, Thaçi Defence, *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"*, 21 December 2020, confidential.

⁴ KSC-BC-2020-06, F00157, Specialist Prosecutor, *Prosecution Response to Thaçi Defence Request for Leave to Appeal the First Protective Measures Decision*, 31 December 2020, confidential.

II. SUBMISSIONS

4. The Thaçi Defence presents four issues on which it seeks to appeal the Impugned Decision:

- (1) Whether, in respect of all the measures ordered, the PTJ erred by failing to identify for each individual witness at issue any specific and concrete grounds for concluding that disclosure of that witness' identity to the defence, as opposed to the general public, would pose an objectively justifiable risk to the witness, relying instead on subjective fears and generalised, unsubstantiated statements which fail to make the necessary links between any purported risk and the defence.
- (2) Whether the PTJ erred by failing to carry out an individual assessment for each witness which ought to have included a proper and considered assessment as to whether the measures requested were the least restrictive measure necessary to provide for the protection of victims and witnesses.
- (3) Whether the PTJ erred in his approach to assessing the proportionality of the protective measures requested, by first making a final determination as to whether the measures were "proportionate", before then turning to (and dismissing) defence concerns as to the impact on the fair trial rights of the accused, whereas a proper assessment of proportionality of protective measures must be conducted "in view of the prejudice caused to the Accused and a fair trial".
- (4) Whether by justifying the granting of in-court protective measures on the basis that witness' identities will "only be withheld from the public" and finding no inconsistency between in-court protective measures and the rights of the accused because "the Accused will know the identity of the witness", the PTJ erred by failing to take into account relevant considerations such as the impact of in-court protective measures on the public and transparent nature of the proceedings and their stifling effect on defence investigations in the field.⁵

⁵ Application, para. 12.

5. The SPO responds that the Pre-Trial Judge should dismiss the Application as the issues (i) do not constitute “appealable” issues,⁶ and (ii) fail to fulfil the legal requirements of Article 45 of the Law and Rule 77 of the Rules.⁷

III. APPLICABLE LAW

6. Pursuant to Article 45 of the Law, a Court of Appeals Panel shall hear interlocutory appeals from an accused or from the Specialist Prosecutor 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 it involves 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 proceedings.

7. Rule 77(2) of the Rules further provides that 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. DISCUSSION

8. Before turning to the issues presented by the Thaçi Defence, the Pre-Trial Judge finds it necessary to expound on the legal test for certifying interlocutory appeals.

⁶ SPO Response, paras 1, 5, 6, 7, 8.

⁷ SPO Response, para. 9.

A. LEGAL TEST

9. 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.⁸ Interlocutory appeals, interrupting the continuity of the proceedings, are the exception.⁹ Considerations that an interlocutory appeal would address fundamental questions or would be to the benefit of the Specialist Chambers do not *per se* warrant certifying the appeal.¹⁰

10. 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

⁸ Similarly, ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal (“Judgment on Extraordinary Review”), 13 July 2006, para. 20.

⁹ Similarly, STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Decision Denying Certification to Appeal Decision Under Rule 167 not to Acquit Hussein Hassan Oneissi and to Stay the Trial – With a Short Separate Opinion of Judge David Re (“Oneissi Decision Denying Certification to Appeal”), 14 May 2018, para. 8; ICC, *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05-20, Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest Under Article 58 (“Kony Decision on Prosecutor’s Application for Leave to Appeal”), 19 August 2005, paras 18-19; ICTR, *Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, ICTR-97-21-T, Decision on Ntahobali’s and Nyiramasuhuko’s Motions for Certification to Appeal the “Decision on Defence Urgent Motion to Declare Parts of the Evidence of the Witnesses RV and QBZ Inadmissible” (“Decision on Ntahobali’s and Nyiramasuhuko’s Motions for Certification to Appeal”), 18 March 2004, para. 15.

¹⁰ Similarly, ICC, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-529, Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521 (“Ongwen Decision on Defence Request for Leave to Appeal”), 2 September 2016, para. 8; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-532, Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 18 September 2009, para. 12.

(3) Whether, in the opinion of the Panel, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

11. Only an “issue” may form the basis of an appealable decision. An “issue” has been described as an identifiable topic or subject, the resolution of which is essential for determination of the matters arising in the judicial cause under examination, and not merely a question over which there is disagreement or conflicting opinion.¹¹ An appealable issue requires the applicant to articulate clearly discrete issues for resolution by the Court of Appeals Panel that emanate from the ruling concerned and do not amount to abstract questions or hypothetical concerns.¹² It is generally insufficient to argue that the entirety of the Pre-Trial Judge’s reasoning is erroneous.¹³

12. Not every issue will be certified for appeal. The first prong of the certification test, as set out in (b), contains two alternatives: The issue must have significant repercussions on either (i) “the fair and expeditious conduct of proceedings” or (ii) “the outcome of the trial”.¹⁴ Use of the term “significantly” in the wording of the first prong of the certification test indicates that an applicant must not only show how the issue affects (i) the fair and expeditious conduct of proceedings, or (ii) the outcome of the trial, but must also demonstrate the (significant) degree to which

¹¹ Similarly, ICC, ICC-01/04-168, Judgment on Extraordinary Review, para. 9.

¹² Similarly, ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-75, Decision on the Prosecutor’s Application for Leave to Appeal Pre-Trial Chamber III’s Decision on Disclosure (“*Bemba* Decision on Prosecutor’s Application for Leave to Appeal”), 25 August 2008, para. 11.

¹³ Similarly, ICC, ICC-02/04-01/15-529, *Ongwen* Decision on Defence Request for Leave to Appeal, para. 6; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-596, Decision on the Joint Defence Request for Leave to Appeal the Decision on Witness Preparation, 11 February 2013, para. 11.

¹⁴ Similarly, ICC, ICC-01/04-168, Judgment on Extraordinary Review, para. 10.

these factors are affected.¹⁵ The issue must be one likely to have repercussions on either of the above two elements.¹⁶

13. The “fair and expeditious conduct of proceedings” is generally understood as referencing the norms of fair trial.¹⁷ The principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings as well as the investigation of a crime.¹⁸ Expeditiousness, i.e. conducting a trial within a reasonable time or, put differently, conducting a speedy trial without prejudice to the rights of the Parties concerned,¹⁹ is but one attribute of a fair trial.²⁰ “Proceedings” referenced in both the first and second prongs of the test for certification refer to the entirety of the judicial process before the Specialist Chambers.²¹

14. Alternatively, the first prong of the certification test may be met if the issue significantly affects the outcome of proceedings. Thus, it must be considered whether a possible error in an interlocutory decision would impact the outcome of the case. The exercise involves a forecast of the consequence of such an occurrence.²²

15. The second prong of the test for certification is an additional limiting factor. Because of the test’s cumulative nature, the failure of an applicant to establish the first prong of the test will necessarily exempt the Panel from considering whether the second prong has been met.²³

¹⁵ *Similarly*, ICTR, Decision on Ntahobali’s and Nyiramasuhuko’s Motions for Certification to Appeal, para. 16.

¹⁶ *Similarly*, ICC, ICC-01/04-168, Judgment on Extraordinary Review, para. 10.

¹⁷ *Similarly*, ICC, ICC-01/04-168, Judgment on Extraordinary Review, para. 11.

¹⁸ *Similarly*, ICC, ICC-01/04-168, Judgment on Extraordinary Review, para. 11.

¹⁹ *Similarly*, ICC, ICC-01/05-01/08-75, *Bemba* Decision on Prosecutor’s Application for Leave to Appeal, paras 17-18.

²⁰ *Similarly*, ICC, ICC-01/04-168, Judgment on Extraordinary Review, para. 11.

²¹ *Similarly*, ICC, ICC-01/04-168, Judgment on Extraordinary Review, paras 12, 17.

²² *Similarly*, ICC, ICC-01/04-168, Judgment on Extraordinary Review, para. 13.

²³ *Similarly*, ICC, ICC-02/04-01/05-20, *Kony* Decision on Prosecutor’s Application for Leave to Appeal, paras 20-21; ICTR, Decision on Ntahobali’s and Nyiramasuhuko’s Motions for Certification to Appeal, paras 23-24.

16. The second prong of the test for certification requires a determination that prompt referral of an issue to the Court of Appeals Panel will settle the matter and rid the “judicial process of possible mistakes that might taint either the fairness of proceedings or mar the outcome of the trial” thereby moving the proceedings forward along the right course.²⁴

17. Lastly, certification is not concerned with whether a decision is correctly reasoned, but whether the standard for certification has been met.²⁵ The decision examining a request for leave to appeal is not an opportunity to explain the contested decision to the parties. However, where necessary, the Pre-Trial Judge will provide clarifications if it is clear that a misrepresentation of the decision so warrants.²⁶

B. ISSUES

Issue 1

18. In relation to Issue 1, the Thaçi Defence avers that the Pre-Trial Judge did not set out for each witness concerned the specific and concrete link between the purported risk and the Defence, but relied on “subjective fears and generalised, unsubstantiated statements”.²⁷ The SPO responds that the Pre-Trial Judge has conducted an individual assessment as to whether disclosure to the Defence poses

²⁴ Similarly, ICC, ICC-01/04-168, Judgment on Extraordinary Review, paras 14-16, 18-19.

²⁵ Similarly, STL, *Oneissi* Decision Denying Certification to Appeal, para. 8; ICTY, *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Decision on Accused’s Application for Certification to Appeal Denial of Motion for Judgement of Acquittal Under Rule 98 *Bis*, 18 July 2012, para. 6; ICTR, *Prosecutor v. Callixte Nzabonimana*, ICTR-98-44D-T, Decision on Defence Motion for Leave to Appeal the Trial Chamber’s Decision on the Defence Request to Call Prosecution Investigators, 10 May 2011, para. 12.

²⁶ Similarly, ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-75, Decision on Prosecutor’s Application for Leave to Appeal Pre-Trial Chamber III’s Decision on Disclosure, 25 August 2008, para. 9.

²⁷ Application, paras 12-13.

an objectively identifiable risk to the witness concerned and contends that the Defence wrongly characterises the factors relied upon.²⁸

19. The Pre-Trial Judge recalls the legal test, applied in the Impugned Decision,²⁹ according to which withholding information from the Defence may be permitted if it is ascertained that disclosure of the information to the Defence, as opposed to the public, entails an objectively identifiable risk to the protected person.³⁰ In the Impugned Decision, the Pre-Trial Judge has set out the relevant concrete factor(s) for each witness (identified by pseudonym in brackets) that underpin the conclusion that such a risk exists as a result of disclosure to the Defence. Therefore, the Defence claim that the Pre-Trial Judge erroneously applied the test without linking the purported objectively identifiable risk to the Defence does not arise from the Impugned Decision. Further, the Defence does not clearly specify in which instance and for which specific witness the Pre-Trial Judge relied on, and which factors amount to, “subjective fears and generalised, unsubstantiated statements”. Such broad assertions by the Thaçi Defence express a general disagreement but are not apt to identify an issue emanating from the Impugned Decision. Accordingly, the Thaçi Defence does not present an appealable issue that stems from the Impugned Decision.

Issue 2

20. In relation to Issue 2, the Thaçi Defence takes issue with the fact that the Pre-Trial Judge considered the witnesses in groups and did not conduct an individual assessment for each witness concerned, including the necessity of the protective measures.³¹ The SPO responds that the Pre-Trial Judge conducted an individual assessment, specifying the factors for each witness, and that identifying a common

²⁸ SPO Response, para. 5.

²⁹ *See, for example*, Impugned Decision, paras 22, 34, 53, 61, 79-81, 92, 102, 109.

³⁰ Impugned Decision, para. 20.

³¹ Application, paras 12, 14.

factor for all witnesses does not entail that the assessment is not individualised.³² In the SPO's view, the grouping of witnesses in the Impugned Decision has no bearing on the nature of the assessment; hence, the Defence raises a question of style but not of substance.³³

21. The Pre-Trial Judge recalls that, as set out above, in the Impugned Decision the assessment was individualised for each witness, including the necessity requirement,³⁴ and that, for presentation purposes, the witnesses were grouped by reference to the particular protective measure and related disclosure in the course of the proceedings ("witness category"). In addition, it is recalled that each witness is explicitly listed in the relevant witness category, together with the factor(s) that the Pre-Trial Judge relied upon. The *Thaçi* Defence claim that, due to the consideration of witnesses in groups, no individual assessment was conducted finds no basis in the Impugned Decision. Accordingly, the *Thaçi* Defence does not present an appealable issue that stems from the Impugned Decision.

Issue 3

22. In relation to Issue 3, the *Thaçi* Defence claims that the Pre-Trial Judge has not properly considered the proportionality when authorising the protective measures "which will significantly impact the ability of the defence to investigate and to effectively and efficiently confront the evidence at trial".³⁵ In particular, referring to paragraphs 96-97 of the Impugned Decision, it avers that the Pre-Trial Judge erroneously made a final finding before addressing and dismissing the Defence

³² SPO Response, para. 6.

³³ SPO Response, para. 6.

³⁴ *See, for example*, Impugned Decision, paras 36, 42, 55, 62, 83, 94, 103.

³⁵ Application, para. 15.

concerns on the matter.³⁶ The SPO responds that the Defence misrepresents the Impugned Decision.³⁷

23. The Pre-Trial Judge recalls that any protective measure must be proportionate in view of the prejudice caused to the Accused and a fair trial.³⁸ The Thaçi Defence appears to take issue with the Pre-Trial Judge's analysis in relation to only six witnesses whose identities were sought to be disclosed 30 days before their respective testimonies.³⁹ Contrary to what the Thaçi Defence alleges, the conclusion contained in paragraph 96 of the Impugned Decision relates to the proportionality of the measures involving said six witnesses, while the assessment and conclusion set forth in paragraph 97 of the Impugned Decision discusses the cumulative impact on the Defence rights of these protective measures and those already authorised in relation to five additional witnesses.⁴⁰ In this context it is worth noting that the findings in paragraph 97 of the Impugned Decision are a result of the Thaçi Defence concerns regarding the purported impact of the measures on the Defence's ability to challenge the SPO's case and to conduct proper investigations ahead of the witnesses' testimonies.⁴¹ Suffice to say that the Thaçi Defence misrepresents the Impugned Decision by contending that the Pre-Trial Judge did not assess properly the proportionality element. Accordingly, the Thaçi Defence does not present an appealable issue that stems from the Impugned Decision.

³⁶ Application, paras 12, 15.

³⁷ SPO Response, para. 7.

³⁸ Impugned Decision, para. 20. A proportionality assessment was made for each of the witnesses, *see, for example*, Impugned Decision, paras 37-39, 43-44, 56-58, 63-64, 84-88, 95-98, 104-105.

³⁹ Impugned Decision, paras 89-98.

⁴⁰ *See* Impugned Decision, paras 68-72, and footnote 171. It is recalled that the protective measures already authorized in other proceedings continue to have effect in the present proceedings and do not require a *de novo* assessment in the present proceedings. *See* Rule 81(1)(a) of the Rules.

⁴¹ *See* Impugned Decision, footnote 170.

Issue 4

24. In relation to Issue 4, the Thaçi Defence maintains that, as a result of the Impugned Decision, the public will not know the identities of 71 witnesses, thus encroaching significantly on the fundamental right of Mr Thaçi to a public trial.⁴² It also avers that the Pre-Trial Judge omitted to give due consideration to the serious impact of the in-court protective measures on the Defence investigation.⁴³ The SPO responds that the Thaçi Defence misrepresents the Impugned Decision as the impact of in-court protective measures on the Defence investigation has been considered as part of the arguments raised by the Defence for Rexhep Selimi ("Selimi Defence").⁴⁴

25. The Pre-Trial Judge recalls that in-court protective measures were authorised for the witnesses concerned after having applied the legal test set forth in paragraph 20 of the Impugned Decision.⁴⁵ It is further recalled that when ruling on in-court protective measures, the Pre-Trial Judge is mindful that the principle of publicity is subject to exceptions and must be balanced with other interests at stake, such as those of protected witnesses. Lastly, the Pre-Trial Judge recalls that the in-court measures authorised are "without prejudice to any other ruling in this regard to be made by the Trial Panel".⁴⁶

26. The Thaçi Defence complains that 71 witnesses will testify without the public (as opposed to the Thaçi Defence) knowing their identity. At the same time, the Pre-Trial Judge notes that the Thaçi Defence appears to accept, in general, the necessity for protective measures for witnesses, when justified.⁴⁷ Other than relying on the right to a public trial, and the overall number of witnesses provisionally benefitting

⁴² Application, paras 16, 18.

⁴³ Application, para. 16.

⁴⁴ SPO Response, para. 8.

⁴⁵ Impugned Decision, para. 114.

⁴⁶ Impugned Decision, para. 113.

⁴⁷ See, for example, KSC-BC-2020-06, F00129, Thaçi Defence, *Thaçi Defence Response to "Request for Protective Measures"*, KSC-BC-2020-06/F00094, dated 19 November 2020 with confidential Annex 13", 8 December 2020, paras 3, 9, 36, 118.

from in-court protective measures, the Thaçi Defence offers a speculative argument in this regard as the definitive ruling on in-court protective measures for the witnesses to be called at trial lies with the Trial Panel.⁴⁸ Nothing prevents the Thaçi Defence from requesting appropriate relief at trial, as the case may be. This issue, therefore, is a hypothetical concern that has not arisen in the present circumstances and therefore cannot serve as a basis for an appeal. Furthermore, it is recalled that the concern regarding the alleged impact of the in-court protective measures on the Defence's investigation was duly taken into account by the Pre-Trial Judge when assessing in-court protective measures, as set forth in the Impugned Decision.⁴⁹ Hence, insisting that it is otherwise, merely reflects a conflict of opinion. Accordingly, the Thaçi Defence does not present an appealable issue.

Conclusion

27. Having found that none of Thaçi Defence submissions emanate from the Impugned Decision, the Pre-Trial Judge will not assess the remainder of the legal test.

C. CLASSIFICATION

28. The Pre-Trial Judge notes that the Application and SPO Response are classified confidential, as they relate to the Impugned Decision bearing such classification.⁵⁰ With a view to upholding the principle of publicity, the Pre-Trial Judge considers it necessary to order the Parties to either indicate, in a filing, whether their respective filing can be made public, or to submit a public redacted version of their respective

⁴⁸ See also KSC-BC-2020-06, F00129, Thaçi Defence, *Thaçi Defence Response to "Request for Protective Measures"*, KSC-BC-2020-06/F00094, dated 19 November 2020 with confidential Annex 13", 8 December 2020, para. 114.

⁴⁹ See Impugned Decision, footnote 196.

⁵⁰ Rule 82(4) of the Rules.

filing, as the case may be. Subsequently, the present decision shall be reclassified as public.

V. DISPOSITION

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

- a) **REJECTS** the Application; and
- b) **ORDERS** the Parties to indicate, by **Friday, 15 January 2021**, in a filing, whether their respective filings (F00156 and F00157) can be made public, or to submit a public redacted version of their respective filings, as the case may be.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Monday, 11 January 2021
At The Hague, the Netherlands.