

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

Filing Participant: Specialist Counsel for Hashim Thaçi

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Public Redacted Version of

Thaçi Defence Reply to “Prosecution response to Thaçi Defence Submissions on Detention Review”

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I. SUBMISSIONS

A. UNDUE DELAY ON THE PART OF THE SPO

1. Mr. Thaçi's pre-trial detention will be prolonged by at least a year from original estimates. The SPO does not contradict this. It responds by saying that extensions of time were authorised by the Pre-Trial Judge ("PTJ"). This response is irrelevant to Mr. Thaçi's submissions.

2. No suggestion was made that the SPO has been missing deadlines without authorisation. However, the PTJ is under an obligation to ensure that a person "is not detained for an unreasonable period prior to the opening of the case".¹ Whether extensions have been authorised is irrelevant to whether the period of Mr. Thaçi's detention has moved from being "reasonable" to "unreasonable" prior to the case's opening. A one-year delay stemming from the SPO being unprepared to disclose or present its case, and due to ongoing unauthorised investigations, means this shift from "reasonable" to "unreasonable" has taken place.

3. The SPO then cites two apparent extensions sought by the Defence; for the present application (which did not delay proceedings), and preliminary motions.² This is a misrepresentation. On 14 December 2020, a joint Defence request sought an extension for filing preliminary motions until **10 February 2021**. The SPO did not oppose this extension, which was approved.³ However, on 5 February 2021, the PTJ further extended the deadline until **15 March 2021**, following the SPO's failure to disclose Rule 102(1)(a) material until 12 February 2021, triggering the 30-day deadline in Rule 97(2).⁴ The SPO then sought an extension to file its responses until

¹ Rule 56(2).

² KSC-BC-2020-06/F00394, Prosecution response to Thaçi Defence Submissions on Detention Review, 12 July 2021 ("SPO Response"), para. 30.

³ F00137, F00147 and F00150.

⁴ F00190.

23 April 2021 (from 1 April 2021), which was granted.⁵ The Defence sought no extension of time to file replies, but the PTJ twice delayed the issuance of his decisions, to **16 July 2021** and then **22 July 2021**. The SPO's attempt to blame the Defence for shifting preliminary motions deadlines is accordingly unsustainable. The Defence has not caused any delay in commencement of the trial, which is the sole responsibility of the SPO.

B. THE CHANGE IN MR THAÇI'S "INFLUENCE AND AUTHORITY"

4. The SPO alleges that Mr Thaçi continues to enjoy unwavering support from networks of supporters and former subordinates who allegedly run "highly vocal campaigns", and stand ready to interfere with witnesses or help him abscond. It fails to explain why these networks, despite being apparently willing to commit crimes on his behalf, do not support Mr. Thaçi enough to turn out to vote.

5. Of course, these alleged widespread networks are nothing more than a lazy and inaccurate caricature. The SPO is wrong that the "Freedom is a Name" campaign was established after Mr. Thaçi's arrest.⁶ It was not.⁷ Nor does it demonstrate "a concrete and active support network";⁸ the campaign was a failure, and backfired after it was viewed as a PDK pre-electoral campaign.⁹ Even the KLA Veterans Association criticised it for creating divisions,¹⁰ and the slogan was used *against* the PDK and Mr. Thaçi by the press and public.¹¹

⁵ F00235 and Fifth Oral Order, 24 March 2021.

⁶ SPO Response, para. 6.

⁷ <https://ekonomiaonline.com/nacionale/liria-ka-emer-platforma-qe-synon-dokumentimin-e-lirise/>.

⁸ SPO Response, para. 6.

⁹ <https://klankosova.tv/duriqui-per-liria-ka-emer-kampanje-parazgjedhore-e-pdk-se-ska-te-beje-asgje-me-uck-ne/>.

¹⁰ <https://insajderi.org/kampanja-e-pdk-se-liria-ka-emer-merre-goditje-nga-organizata-e-veteraneve-te-luftes/>.

¹¹ <https://kosovapost.net/maloku-liria-ka-emer-ama-emer-ka-edhe-hajnia/>.

6. The SPO's claim that these alleged networks "remain as active as ever" is supported only by a US Department of State Report from 2020.¹² The sole present-day reference is to an article referencing a billboard of Mr. Thaçi in Llapushnik.¹³ Almost comically, the article "*In Kosovo, New Political General Sweep Old Guard Aside*", characterises this billboard as being out of step with the "drastic" changes and "new political landscape" post-February 2021. Moreover, if Mr. Klinaku's alleged threat to publish confidential KSC documents was perceived as credible,¹⁴ it would be the subject of an SPO investigation for obstruction, rather than simply repeated as a justification for keeping accused incarcerated indefinitely.

7. Similarly, the SPO gives a partial picture of the Presidential safe incident. Significantly, the Acting President, Mr. Thaçi's political rival, filed a criminal complaint, alleging abuse of authority. The Special Prosecutor's Office determined that "*the opening of the safe does not contain any elements of criminal wrongdoing*".¹⁵ A reasonable inference is that this incident – heavily publicised by the President (then Acting President) – was orchestrated as a basis to dismiss the relevant officials.¹⁶ Regardless of motive, the event demonstrates that the 'old guard' is being systematically removed, undermining the PTJ's reliance on "a vast network of supporters to influence witnesses or interfere with the proceedings"¹⁷ in determining both Mr Thaçi's risk of flight,¹⁸ and risk of obstruction.¹⁹

¹² SPO Response, fn. 12.

¹³ SPO Response, fn. 14.

¹⁴ SPO Response, para. 7.

¹⁵ https://www.syri.net/syri_kosova/lajme/197827/rasti-i-kasafortes-prokuroria-vendos-ne-favor-te-aki-se-s-ka-elemente-te-vepres-penale/.

¹⁶ SPO Response, para. 11.

¹⁷ KSC-BC-2020-06/F00177, Decision on Hashim Thaçi's Application for Interim Release, 22 January 2021 ("First Decision"), para. 38.

¹⁸ First Decision, para. 31.

¹⁹ First Decision, paras. 38, 57.

C. THE PROTECTIVE MEASURES REGIME

8. The SPO cannot reasonably assert that the protective measures regime was “eminently foreseeable” as of the First Decision.²⁰ Since the First Decision,²¹ the PTJ has rendered decisions on five additional SPO requests for protective measures, with two decisions outstanding.²² The true magnitude of the regime was concealed by the SPO’s approach of filing piecemeal applications, rather than being sufficiently prepared to make a collective and comprehensive request.

9. Moreover, the SPO has thus far concealed or sought to conceal the identity of 102 of its 200 witnesses until 30 days before trial, at the earliest, on the basis that extreme measures are necessary for witness protection. The SPO now argues that the “efficacy of these measures will be fatally compromised if the Accused is released,” without explanation or authority.²³ This is likely because the opposite is plainly true: the extreme non-disclosure measures make witness interference while on provisional release *much less*, not more, likely. If, as argued, the accused “have the incentive and ability to obtain confidential materials,”²⁴ even in the face of non-disclosure of the identities of 102 of 200 witnesses, one wonders why the non-disclosure measures were requested.

D. INTERIM RELEASE IS CONSISTENT WITH THE RIGHTS OF THE ACCUSED

10. The suggestion that ongoing SPO disclosure increases Mr. Taçi’s incentive to flee²⁵ amounts to nothing more than the SPO saying “we think our case is strong”. The Defence could just as easily submit that it has formed the opposite view. Indeed,

²⁰ SPO Response, para. 8.

²¹ First Decision, para. 51.

²² F00190, F00211, F00239, F00338, F00373.

²³ SPO Response, para. 9.

²⁴ *Ibid.*

²⁵ SPO Response, para. 5.

the Defence has seen no credible evidence against Mr. Thaçi to date. The SPO's continued investigation months (possibly a year) after the investigation was supposedly complete, supports the Defence view and suggests to Mr Thaçi that the SPO is aware of the weakness of its case.

11. Nor does the SPO position even make sense; Mr. Thaçi did not flee when he thought he was facing serious allegations of organ trafficking. Now, he faces allegations dependant on a tenuous theory of derivative liability – joint criminal enterprise – for a disconnected set of purported crimes, for which he has seen no credible evidence. As such, the starting premise of the SPO's argument is flawed.

12. Regardless, these submissions are immaterial. The SPO is effectively inviting the PTJ to take a position on the strength of the disclosed evidence, which would undermine the presumptions and burdens that must underpin a criminal trial. As such, any self-serving assessment by the parties of the partial record of SPO disclosure must be dismissed as irrelevant to a provisional release assessment, or risk undermining the fairness of the proceedings. Of course, the SPO itself adopted this same position to challenge Mr. Veseli's argument that the weakness of the evidence against him merited provisional release.²⁶

²⁶ F00354, paras. 9-13.

E. THIRD PARTY STATE GUARANTEES

13. While the SPO is correct that “[t]hird states do not have the same obligation to cooperate with the KSC like Kosovo”,²⁷ these Third States are saying that they will. The SPO’s position that release will “fundamentally compromise” the KSC’s enforcement of conditions, pre-judges the behaviour of these NATO Member States, presuming they will unilaterally breach or amend existing international treaties or *ad hoc* agreements with the KSC.

14. This is baseless and offensive speculation, particularly regarding a contributing state. It cannot be that the KSC is willing to accept [REDACTED]’s financial contributions to its operating budget, but then reject its statements of willingness to implement judicial orders.

15. Nor can the SPO argue that provisional release should be denied because the guarantees are not detailed enough. The KSC regime **requires** the PTJ to “hear the Third State to which the detained person seeks to be released”.²⁸ Third Party guarantees are required to do nothing more at this stage than to indicate a willingness to accept a provisionally released accused, and undertake to cooperate. It is during consultation that further conditions can be discussed and agreed.

16. [REDACTED]²⁹ [REDACTED]. [REDACTED]. [REDACTED].³⁰ [REDACTED]. [REDACTED].

17. [REDACTED].³¹ [REDACTED].³² [REDACTED].

²⁷ SPO Response, para. 15.

²⁸ Rule 56(4).

²⁹ SPO Response, para. 18.

³⁰ [REDACTED].

³¹ SPO Response, para. 20.

³² [REDACTED].

18. [REDACTED],³³ [REDACTED],³⁴ [REDACTED].

19. The SPO submissions on monitoring are similarly misleading. The SPO wrongly asserts that a “fatal defect” of release is that Mr. Thaçi “will have regular opportunities to speak privately with those who have the freedom to come and go”.³⁵ It has been proposed that – if released under conditions – Mr. Thaçi should have contact only with his Defence Team and immediate family.³⁶ This risk is imaginary.

20. Regardless, Mr. Thaçi’s communications with his Defence Team are privileged and cannot be monitored even while in the DMU. Nor can Mr. Thaçi’s physical meetings with his family.³⁷ As such, unless the SPO is asserting that such communications are currently being monitored, there will be no change to Mr. Thaçi’s communication upon release. Moreover, any risks can be addressed through technical means for monitoring and/or blocking communication.

II. CLASSIFICATION

21. This submission is filed confidentially in accordance with Rule 82(4). A public redacted version will be filed.

Word count: 1697 words

³³ SPO Response, para. 25.

³⁴ [REDACTED]

³⁵ SPO Response, para. 13.

³⁶ KSC-BC-2020-06/F00377, Thaçi Defence Submissions on Detention Review - Annex A, 30 June 2021, p. 3.

³⁷ KSC-BD-09-Rev1, Registry Practice Direction on Detainees: Visits and Communications, Article 24(1).

Respectfully submitted,



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Monday, 21 July 2021

At Tampa, United States