

**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

**Date:** 17 September 2021

**Language:** English

**Classification:** Public

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**Thaçi Defence Request for Certification to Appeal the “Decision on Motions  
Challenging the Legality of the SC and SPO and Alleging Violations of Certain  
Constitutional Rights of the Accused”**

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## I. INTRODUCTION

1. On 31 August 2021, the Pre-Trial Judge issued the “Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused”.<sup>1</sup>

2. In the Impugned Decision, the Pre-Trial Judge addressed challenges raised in two of Mr Thaçi’s Preliminary Motions, concerning the compatibility of central aspects of the Kosovo Specialist Chambers’ (“KSC”) framework with the Constitutional limits in place, and with the fundamental rights of the accused to which Mr Thaçi is entitled.<sup>2</sup>

3. In addition to dismissing the Defence submissions, the Pre-Trial Judge also held that these challenges could not properly be considered “jurisdictional”, on the basis that they did not fit within the four “traditional categories” of jurisdiction, being “subject matter, temporal, territorial and personal”.<sup>3</sup> As such, the Pre-Trial Judge purported to address the challenges not within the rubric of Rule 97(1)(a) of the Rules,<sup>4</sup> but pursuant to Article 39(1) of the KSC Law.<sup>5</sup> As such, an appeal lies not as of right, but following certification.

4. While reserving Mr Thaçi’s rights as regards the nature of the challenges, in accordance with Rule 77 of the Rules and Article 45 of the KSC Law, the Defence of Mr Thaçi (“the Defence”) hereby applies for leave to appeal from the Impugned

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<sup>1</sup> KSC-BC-2020-06/F00450, Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused, 31 August 2021 (“Impugned Decision”).

<sup>2</sup> KSC-BC-2020-06/F00216, Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, 12 March 2021 (“Thaçi Preliminary Motion on Jurisdiction”); KSC-BC-2020-06/F00217, Motion challenging jurisdiction on the basis of violations of fundamental rights enshrined in the Constitution, 12 March 2021 (“Thaçi Preliminary Motion on Fundamental Rights”).

<sup>3</sup> Impugned Decision, para. 54.

<sup>4</sup> Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).

<sup>5</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“KSC Law”); Impugned Decision, para. 55.

Decision in relation to eight appealable issues identified below. Each of the issues meets the criteria for certification, warranting examination by the Appeals Chamber.

## II. APPLICABLE LAW

5. Article 45(2) of the KSC Law provides, in the relevant part, that the Pre-Trial Judge shall grant certification where an appeal:

“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.”

6. Rule 77(2) of the Rules 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 a Court of Appeals Panel may materially advance the proceedings.”

7. The following specific requirements, as confirmed by the jurisprudence of the KSC therefore apply:

- (a) Whether the matter is an “appealable issue”;
- (b) 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
- (c) Whether, in the opinion of the Pre-Trial Judge, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.<sup>6</sup>

8. An “issue” is “an identifiable topic or subject, the resolution of which is essential for determination of the matters arising in the judicial cause under

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<sup>6</sup> KSC-BC-2020-07/F00169, Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, 1 April 2021 (“Gucati and Haradinaj Decision on Leave to Appeal”), para. 6; KSC-BC-2020-06/F00172, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021 (“Thaçi Decision on Leave to Appeal”), para. 10.

examination, and not merely a question over which there is disagreement or conflicting opinion.”<sup>7</sup> The applicant must 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.”<sup>8</sup>

9. Certification does not concern whether a decision is correctly reasoned, but whether the standard for certification is met.<sup>9</sup>

### III. THE PROPOSED ISSUES FOR APPEAL

10. Certification is sought to appeal the following eight issues (“Issue” or together “Issues”), all of which satisfy the requirements of Article 45(2) of the KSC Law and Rule 77(2) of the Rules:

**Issue 1:** Whether the Pre-Trial Judge’s finding that the KSC and SPO’s temporal mandate has *not* expired<sup>10</sup> is undermined by its failure to consider, or provide any or sufficient reasoning in relation to (i) the Assembly’s legislative intent; (ii) the proposed Constitutional Amendment No. 26; (iii) the Article 162(14) notification being applicable to the *minimum* temporal mandate; and (iv) that the delegation of sovereignty under Article 20 of the Constitution<sup>11</sup> must not be indefinite, uncertain and unilateral.<sup>12</sup>

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<sup>7</sup> Gucati and Haradinaj Decision on Leave to Appeal, para. 12; Taçi Decision on Leave to Appeal, para. 11.

<sup>8</sup> *Ibid.*

<sup>9</sup> Gucati and Haradinaj Decision on Leave to Appeal, para. 18; Taçi Decision on Leave to Appeal, para. 17.

<sup>10</sup> Impugned Decision, paras. 65-68.

<sup>11</sup> Constitution of the Republic of Kosovo (“Constitution”).

<sup>12</sup> Taçi Preliminary Motion on Jurisdiction, paras. 44-52. See also KSC-BC-2020-06/F00304, Taçi Defence Reply to “Prosecution Response to Preliminary Motions Concerning Council of Europe Report, Investigation Deadline and Temporal Mandate”, 14 May 2021, paras. 29-30.

**Issue 2:** Whether the Pre-Trial Judge erred in concluding that the question of the KSC's temporal mandate had been "decided upon by the SCCC"<sup>13</sup> in the absence of any or sufficient reasoning, and in a manner inconsistent with Articles 113(7) and 144(3) of the Constitution, which the Pre-Trial Judge failed entirely to consider.

**Issue 3:** On the question of whether the SPO investigation had a legal or constitutional basis, whether the Pre-Trial Judge erred in incorrectly basing his finding on whether Article 159(1) of the KCPC<sup>14</sup> had been *expressly incorporated* into the KSC Law,<sup>15</sup> rather than being properly guided by the question of the applicability of the KCPC when the KSC Law and Rules are silent, and having ignored Defence submissions on the Exchange of Letters.<sup>16</sup>

**Issue 4:** Whether the Pre-Trial Judge erred by simply dismissing the Defence submissions as to why the KSC Law creates an "extraordinary court" on the basis of an earlier finding that the KSC were established by law,<sup>17</sup> thereby failing to address the substance of the Defence arguments.<sup>18</sup>

**Issue 5:** Whether the Pre-Trial Judge erred by failing to engage with or provide sufficient reasoning in relation to the issues raised by the Defence as regards Mr Thaçi's right to be tried by an independent and impartial tribunal, having erroneously relied on inapplicable ECtHR jurisprudence,<sup>19</sup> and by failing entirely to consider whether "**taken cumulatively**, these features lead to the inescapable conclusion that the KSC *structurally* fail to satisfy Article 6(1) of the ECHR requirements".<sup>20</sup>

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<sup>13</sup> Impugned Decision, para. 67.

<sup>14</sup> Kosovo Criminal Procedure Code 2012, Law No. 04/L-123 ("KCPC").

<sup>15</sup> Impugned Decision, paras. 73-77.

<sup>16</sup> Thaçi Preliminary Motion on Jurisdiction, para. 57 and fn. 74.

<sup>17</sup> Impugned Decision, para. 113.

<sup>18</sup> Thaçi Preliminary Motion on Jurisdiction, paras. 36-43.

<sup>19</sup> Impugned Decision, para. 101.

<sup>20</sup> Thaçi Preliminary Motion on Fundamental Rights, para. 49 (emphasis added). See also, paras. 36-51.

**Issue 6:** Whether it was open to a reasonable Pre-Trial Judge to find that the requirement of independence and impartiality does not operate to constrain interference with the Specialist Prosecutor,<sup>21</sup> particularly given that this contravenes Articles 109(1) and (2) of the Constitution.

**Issue 7:** As regards the right to be tried within a reasonable time, whether the Pre-Trial Judge erred in finding that the relevant period began only on 17 November 2019, having adopted a mistakenly restrictive interpretation of the relevant ECtHR caselaw.<sup>22</sup>

**Issue 8:** Whether the Pre-Trial Judge erred in assessing the violation Mr Thaçi's presumption of innocence with respect to the Marty Report itself,<sup>23</sup> thereby failing to engage with the Defence submissions that the violation stems from the KSC defining itself with respect to a report which condemns the accused, and the benediction of the report by the KSC and SPO.<sup>24</sup>

#### IV. SUBMISSIONS: THE TEST FOR CERTIFICATION IS MET

##### A. THE ISSUES ARE APPEALABLE ISSUES

11. The eight identified Issues are appealable as they arise from the Impugned Decision and contest the specific findings therein.<sup>25</sup> They are not mere disagreements with the Impugned Decision, nor do they amount to abstract questions or hypothetical concerns. Rather, the Defence has articulated discrete and concrete errors of reasoning or law, the resolution of which is essential for the determination of the matters arising in the judicial cause under examination, being the compatibility of central aspects of

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<sup>21</sup> Impugned Decision, para. 108.

<sup>22</sup> Impugned Decision, paras. 123-130.

<sup>23</sup> Impugned Decision, paras. 136-142.

<sup>24</sup> Thaçi Preliminary Motion on Fundamental Rights, paras. 34, 35.

<sup>25</sup> See above para. 10.

the KSC's framework with the Constitutional limits in place, and the fundamental rights of the accused to which Mr Thaçi is entitled.

B. THE ISSUES WOULD SIGNIFICANTLY AFFECT 1) THE FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS OR 2) THE OUTCOME OF THE TRIAL

12. The Issues identified in the present request for certification go to the heart of the fairness and legitimacy of proceedings at the KSC. While the Pre-Trial Judge has previously ruled that interlocutory appeals interrupting the continuity of the proceedings are the exception,<sup>26</sup> the preliminary issues identified in the present appeal address central questions of the legitimacy, legality, mandate and fairness of the institution and its proceedings, and therefore fall squarely within the bounds of Article 45(2) of the KSC Law and Rule 77(2) of the Rules.

13. Concretely, if the KSC Law indeed created an extraordinary court, which is currently operating pursuant to an expired mandate, this cannot be divorced from issues of fairness, expeditiousness and outcome, and warrants examination on appeal. If the investigation and subsequent proceedings are without a legal and constitutional basis, or are being run in a manner that does not respect fundamental rights such as the right to expeditious proceedings or the respect for the presumption of innocence, then appellate examination of these issues is also warranted for the same reasons. While it is not being submitted that the fundamental nature of these questions is alone sufficient to warrant certification,<sup>27</sup> the Issues raised in this case are such that a different resolution would *significantly* affect not only the fairness and expeditiousness of the proceedings, but whether the trials could in fact proceed at all.

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<sup>26</sup> Thaçi Decision on Leave to Appeal, para. 9.

<sup>27</sup> Thaçi Decision on Leave to Appeal, para. 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".

14. Specifically, as regards **Issues 1 and 2**, if indeed the KSC and SPO's temporal mandate has expired, then the proceedings themselves are deprived of any legal or constitutional basis, which would not only preclude any fair and expeditious proceedings but would mean the trials could not take place, thereby significantly affecting their outcome. Similarly, as regards the legal and constitutional basis of the SPO investigation, raised in **Issue 3**, if the SPO was not entitled to re-investigate the case but rather was established to run "trial and appellate proceedings arising from the SITF investigation" as outlined in the Exchange of Letters, then the fairness, expeditiousness and outcome would be similarly and significantly affected.

15. As regards **Issues 4 and 5**, at the centre of the Thaçi Preliminary Motion on Fundamental Rights was an examination of the structure and functioning of the KSC, assessed against the right of Mr Thaçi to be tried by an independent and impartial tribunal, established by law. The Defence provided extensive reasoning in support of its submission that the KSC Law created an extraordinary court,<sup>28</sup> which fails to satisfy the guarantees of independence and impartiality, given the absence of adequate legislation safeguarding these guarantees.<sup>29</sup> In addition, seven concrete indicators were given of the inability of the KSC to function wholly autonomously and without being subject to constraint or subordination.<sup>30</sup> **Issue 6** identifies errors of law and reasoning in the Pre-Trial Judge's adjudication of the Defence submissions, which also necessarily significantly impact the fairness and expeditiousness of any proceedings conducted by the KSC against the accused, as well as their outcome.

16. **Issues 7 and 8** directly concern fairness and expeditiousness, concentrating solely on errors in the adjudication of challenges of alleged violations of fair trial rights; being the presumption of innocence and the right to be tried without undue

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<sup>28</sup> Thaçi Preliminary Motion on Fundamental Rights, paras. 36-46.

<sup>29</sup> Thaçi Preliminary Motion on Fundamental Rights, para. 47.

<sup>30</sup> Thaçi Preliminary Motion on Fundamental Rights, paras. 48-51.



delay. As such, Issues 7 and 8 would self-evidently significantly affect the fair and expeditious conduct of the proceedings. In addition, if in fact the proceedings are being conducted in a manner that violates these rights, any remedies to address these violations would also significantly affect the outcome of any subsequent trial.

17. As such, all Issues identified in the present request for leave to appeal satisfy the first and second criteria regarding their significant impact on the fair and expeditious conduct of proceedings, and the outcome of the trial.

C. AN IMMEDIATE RESOLUTION BY THE COURT OF APPEALS PANEL MAY MATERIALLY ADVANCE THE PROCEEDINGS

18. The second prong of the test for certification requires a determination that prompt referral of an issue to the Court of Appeals Panel would 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.<sup>31</sup>

19. The Issues identified in the present appeal all meet this second prong. A determination on each of these Issues may materially advance the proceedings by providing legal certainty as to the compatibility of central aspects of the KSC’s framework with the Constitutional limits in place, and the fundamental rights of the accused to which Mr Thaçi is entitled. These are Issues that, by their very nature, require an immediate resolution, given their ability to taint the fairness or mar the outcome of the trial. Their determination at the pre-trial phase would also minimise any subsequent delays arising from re-litigation or ongoing procedural uncertainty. As such, an immediate resolution by the Appeals Panel in respect of the eight Issues

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<sup>31</sup> Thaçi Decision on Leave to Appeal, para. 16.

would materially advance the proceedings,<sup>32</sup> meaning that the criteria for certification have been met.

## V. RELIEF SOUGHT

20. For the above reasons, the Defence respectfully requests that the Pre-Trial Judge grant leave to appeal the Issues pursuant to Article 45(2) of the Law and Rule 77(2).

[Word count: 2,478 words]

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'G. W. Kehoe', is written over a white rectangular redaction box.

**Gregory W. Kehoe**

**Counsel for Hashim Thaçi**

Friday, 17 September 2021

At Tampa, United States

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<sup>32</sup> See, Gucati and Haradinaj Decision on Leave to Appeal, para. 32; ICTR, *Prosecutor v. Uwinkindi*, ICTR-01-75-PT, Decision on Defence Application for Certification to Appeal Decision on Preliminary Motion Alleging Defects on the Form of the Amended Indictment, 28 March 2011, para. 10.