

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: Defence Counsel for Jakup Krasniqi

Date: 27 September 2021

Language: English

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Public Redacted Version of

**Krasniqi Defence Request for Certification to Appeal the “Eighth Decision on
Specialist Prosecutor’s Request for Protective Measures”, KSC-BC-2020-06/F00448,
dated 31 August 2021**

Specialist Prosecutor

Jack Smith

Counsel for Victims

Simon Laws QC

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson QC

Counsel for Rexhep Selimi

David Young

Counsels for Jakup Krasniqi

Venkateswari Alagendra, Aidan Ellis

I. INTRODUCTION

1. As a result of the Eighth Decision on Specialist Prosecutor's Request for Protective Measures,¹ cumulatively with earlier protective measures decisions, out of an estimated 200 prosecution witnesses, [REDACTED], [REDACTED].² The effect of [REDACTED], [REDACTED] is that the Defence for Jakup Krasniqi ("Defence") are denied adequate time and facilities to prepare for trial. The Defence therefore seek certification to appeal the Eighth Decision.

II. APPLICABLE LAW

2. Article 45(2) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") provides:

Interlocutory appeals shall lie as of right from decisions or orders relating to detention on remand or any preliminary motion challenging the jurisdiction of the Specialist Chambers. Any other interlocutory appeal 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.

3. Rule 77(2) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules") further provides that a 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".

¹ KSC-BC-2020-06, F00438/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Eighth Decision on Specialist Prosecutor's Request for Protective Measures* ("Eighth Decision"), 24 August 2021, confidential.

² [REDACTED]; [REDACTED].

4. The Pre-Trial Judge has previously expounded on the test for certifying interlocutory appeals:-

- a. The first requirement is to articulate an appealable issue, which is “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”.³ An appealable issue must emanate from the ruling concerned;⁴
- b. The second requirement may be satisfied in one of two ways. The appealable issue must have significant repercussions for either the “fair and expeditious conduct” of the proceedings or “the outcome of the trial”.⁵ In this context, the fair and expeditious conduct of proceedings refers to the norms of fair trial;⁶
- c. The third requirement is that the immediate resolution of the appealable issue will materially advance proceedings, in the sense 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”.⁷

³ KSC-BC-2020-06, F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal* (“Thaçi Decision”), 11 January 2021, public, para. 11.

⁴ *Ibid.*

⁵ *Ibid.*, para. 12.

⁶ *Ibid.*, para. 13.

⁷ Thaçi Decision, para. 16.

5. The Defence further note that certification is not concerned with the question of whether the Decision was correctly reasoned.⁸ Accordingly, the Defence refrain from submitting arguments on the merits of the appeal (if certified) at this stage.

III. THE PROPOSED ISSUES FOR APPEAL

6. The Defence respectfully seek certification to appeal the following issues arising from the Eighth Decision:-

- a. Whether the Pre-Trial Judge erred in finding that the Defence was overall in a position to provide meaningful responses to the Specialist Prosecutor's Eighth Request for Protective Measures;⁹
- b. Whether the Pre-Trial Judge erred in finding that the disclosure [REDACTED] to the Defence would pose an objectively justifiable risk to the witnesses, and that delayed disclosure was necessary on the basis of generic factors [REDACTED], [REDACTED], [REDACTED];¹⁰
- c. Whether the Pre-Trial Judge erred in finding that the delayed disclosure to the Defence [REDACTED] does not encroach upon the overall fairness of proceedings and the fair trial rights of the Accused.¹¹

IV. THE TEST FOR CERTIFICATION IS MET

A. THE ISSUES ARE APPEALABLE ISSUES

⁸ *Ibid.*, para. 17.

⁹ Eighth Decision, para. 27.

¹⁰ *Ibid.*, paras 31-35, 42-48, 53-57.

¹¹ Eighth Decision, para. 66.

7. The three issues are appealable; they emanate from the Eighth Decision and they constitute identifiable topics or subjects which were essential to the determination of the Eighth Decision. The first issue emanates from paragraph 27 of the Eighth Decision in which the Pre-Trial Judge [REDACTED] on the basis that the Defence was overall in a position to provide meaningful responses. The first issue arises from that Decision because it addresses whether the Defence were indeed in a position to provide meaningful responses. Moreover, that issue was essential to the determination [REDACTED], the Defence would have been entitled to make further submissions before the decision was rendered.

8. The second issue emanates from the Eighth Decision's assessment of the objectively justifiable risks and necessity of delayed disclosure [REDACTED].¹² The determination of an objectively justifiable risk and the strict necessity of the protective measures sought are both parts of the applicable legal test for determining whether information may be withheld from the Defence.¹³ In order to grant protective measures, both these elements of the test must be satisfied. The conclusion in relation to these issues was therefore determinative of the outcome; protective measures could not have been granted if the Pre-Trial Judge had reached a different conclusion on these issues. The sufficiency of the factors relied upon by the Eighth Decision for those conclusions is thus an appealable issue.

9. The third issue arises from paragraph 66 of the Eighth Decision in which the Pre-Trial Judge found that the delayed disclosures and associated measures did not limit the fair rights of the Defence to such an extent as to encroach on the overall fairness of proceedings. The third issue emanates directly from this paragraph which sets out the Pre-Trial Judge's determination on a matter [REDACTED]. It was essential to the

¹² *Ibid.*, paras 31-35, 42-48, 53-57.

¹³ *Ibid.*, para. 29.

determination because had the Pre-Trial Judge concluded that the delayed disclosures and associated measures were inconsistent with the overall fairness of proceedings and the rights of the Accused, protective measures could not have been granted pursuant to Rule 80(4).

B. THE ISSUES SIGNIFICANTLY AFFECT THE FAIR AND EXPEDITIOUS CONDUCT OF PROCEEDINGS

10. The issues satisfy the first prong of the second requirement; they significantly affect the fair and expeditious conduct of proceedings. As to the first issue, it relates to the fairness of the procedure applied to requests for protective measures. It appears to be common ground that the Defence are entitled to be put in a position that they can make meaningful representations on the SPO Request. [REDACTED].¹⁴ The Eighth Decision's conclusion that the Defence were nevertheless able to make meaningful representations significantly affects the fair conduct of proceedings because it allows protective measures to be sought in circumstances where redactions prevent the Defence from understanding and engaging with the reasons for them.

11. The second issue directly affects the fair and expeditious conduct of proceedings. Protective measures significantly affect the norms of a fair trial because they curtail the ability of the Defence to investigate and constitute an exception to the usual rules on disclosure. Indeed, in relation to protective measures, the rights of the Accused should remain the first consideration.¹⁵ If the standard for granting protective measures is set too low, as the Defence contend, then the interference with the rights of the Defence would be disproportionate and unjustified. Given the number of

¹⁴ [REDACTED].

¹⁵ ICTY, *Prosecutor v. Brđanin et al.*, IT-99-36, Trial Chamber II, *Decision on Motion by Prosecution for Protective Measures*, 3 July 2000, para. 30.

witnesses affected, both in the Eighth Decision and other relevant decisions, the impact on the fair conduct of proceedings is, at the very least, significant.

12. The third issue also significantly affects the fair and expeditious conduct of proceedings. Indeed, the third issue is founded on the fundamental norms of a fair trial. Delayed disclosure [REDACTED] directly impacts fair trial norms including the right to adequate time and facilities to prepare the defence. The issue whether delayed disclosure in this case has reached the level at which it encroaches on the fairness of proceedings and the fair trial rights of the Accused is integral to the fair and expeditious conduct of these proceedings. [REDACTED],¹⁶ it must equally be apparent that the greater the number of witnesses subject to protective measures, the more extensive the intrusion into the fair trial rights of the Accused. The third issue raises the question whether the number and scope of protective measures granted in the specific circumstances of this case has become so intrusive that fair trial rights are violated. The number of delayed disclosure [REDACTED] – [REDACTED], [REDACTED] – is so substantial that the effect on the fairness of proceedings is obvious and significant. Further, this issue could also significantly affect the expeditiousness of proceedings because the investigative burden imposed on the Defence by delayed disclosure is likely to lead to later applications to delay the trial.

C. RESOLUTION OF THE ISSUES WILL MATERIALLY ADVANCE PROCEEDINGS

13. The third requirement is satisfied because the resolution of the issues will materially advance proceedings. Resolution of the first issue will materially advance proceedings because [REDACTED]. Further protective measures requests are expected. Indeed, protective measures may be litigated again before the Trial Panel. Accordingly, resolution by the Court of Appeals Panel of the amount of information

¹⁶ Eighth Decision, para. 64.

required to be provided to the Defence to enable a meaningful response would materially advance these issues because it would provide a framework for the resolution of these issues for all further protective measures and related applications.

14. Resolution of the second issue will materially advance proceedings because, if the Eighth Decision is wrong, then proceedings will have taken a wrong pathway in that the Defence will be denied information to which they should be entitled. That would entail a delay in Defence investigations and to the start date of trial. It is more efficient to resolve this issue now, in order that proceedings can continue down the right path. It is no answer to urge that the Defence can re-litigate this issue before the Trial Panel – by the time that the matter is transferred to the Trial Panel, the Defence investigation will already have been delayed and prejudiced.

15. Prompt resolution of the third issue will also materially advance proceedings. If the Eighth Decision is erroneous then, absent an appeal, proceedings will advance down the wrong path. There will be no further opportunity to redress the unfairness during the pre-trial phase and the next opportunity to litigate the issue will be before the Trial Panel. By the time the file is transferred to a Trial Panel, if the Eighth Decision is erroneous then the fairness of proceedings will already have been affected because the Defence will have been denied the relevant disclosure for a period of months. Moreover, if the Trial Panel determine that the Defence will not receive adequate time to prepare the defence, the Trial Panel would be bound to redress the balance by delaying the trial. This issue should be tackled now in order to avoid a serious misstep, which would have significant repercussions for the future conduct of the case.

V. RELIEF REQUESTED

16. The Defence therefore respectfully request certification to appeal on the issues identified above.

Word count: 1,912



Venkateswari Alagenda

Monday, 27 September 2021

Kuala Lumpur, Malaysia.



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