



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: 30 September 2021

Language: English

Classification: Public

Prosecution response to Hashim Thaçi's request for certification to appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment

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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 Thaçi has not carried his burden to show that any of the 15 issues he raises merit appeal at this stage in the litigation.⁴

II. PROCEDURAL HISTORY

2. On 4 November 2020, the Specialist Prosecutor's Officer ("SPO") submitted a public corrected version of the confirmed Indictment against Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi (collectively, 'Accused').⁵

3. On 12 March 2021, Thaçi filed a preliminary motion under Rule 97(1)(b) of the Rules, alleging defects in the form of the Indictment.⁶ On 15 March 2021, Veseli,⁷ Selimi,⁸ and Krasniqi⁹ filed their respective preliminary motions also challenging the Indictment. The

¹ Thaçi Defence Request for Certification to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment, KSC-BC-2020-06/F00447, 27 August 2021 ('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 15 issues for which leave to appeal is sought as identified at para. 10 of the Request ('Issues').

⁵ Submission of corrected and public redacted versions of confirmed Indictment and related requests, KSC-BC-2020-06/F00045/A03, 4 November 2020 ('Indictment').

⁶ Motion Alleging Defects in the Indictment against Mr Hashim Thaçi, KSC-BC-2020-06/F00215, 12 March 2021.

⁷ Preliminary Motion by the Defence of Kadri Veseli to Challenge the Indictment, KSC-BC-2020-06/F00225, 15 March 2021.

⁸ Selimi Defence Challenge to the Form of the Indictment, KSC-BC-2020-06/F00222, 15 March 2021.

⁹ Krasniqi Defence Preliminary Motion Alleging Defects in the Indictment, KSC-BC-2020-06/F00221, 15 March 2021.

SPO responded on 23 April 2021,¹⁰ and Thaçi,¹¹ Selimi,¹² Krasniqi,¹³ and Veseli¹⁴ replied on 14 and 17 May 2021.

4. On 22 July 2021, the Pre-Trial Judge issued his Decision,¹⁵ granting in part the Accused's motions and ordering the SPO to file a corrected version of the Indictment, but rejecting the remainder of the motions, finding that once the ordered amendments were made, the Indictment sets out with sufficient clarity and specificity the facts underpinning the charges.

5. On 27 August 2021, the Thaçi Defence filed the Request, raising the 15 issues addressed below.¹⁶

6. On 2 September 2021, the SPO requested an extension of time to respond to the Accused's leave to appeal requests.¹⁷ On 6 September 2021, the Pre-Trial Judge granted the SPO an extension until 30 September 2021 to file the responses.¹⁸

¹⁰ Consolidated Prosecution response to Thaçi, Selimi and Krasniqi Preliminary Motions on the Form of the Indictment, KSC-BC-2020-06/F00258, 23 April 2021; Prosecution response to Veseli Preliminary Motion on the Form of the Indictment, KSC-BC-2020-06/F00261, 23 April 2021.

¹¹ Thaçi Defence Reply to "Consolidated Prosecution response to Thaçi, Selimi and Krasniqi Preliminary Motions on the Form of the Indictment", KSC-BC-2020-06/F00303, 14 May 2021.

¹² Selimi Defence Reply to SPO Response to Defence Challenge to the Form of the Indictment, KSC-BC-2020-06/F00297, 14 May 2021.

¹³ Krasniqi Defence Reply to Consolidated Prosecution response to Thaçi, Selimi and Krasniqi Preliminary Motions on the Form of the Indictment, KSC-BC-2020-06/F00298, 14 May 2021.

¹⁴ Veseli Defence Reply to Prosecution Response to Preliminary Motion to Challenge the Indictment, KSC-BC-2020-06/F00309, 17 May 2021.

¹⁵ Decision on Defence Motions Alleging Defects in the Form of the Indictment, KSC-BC-2020-06/F00413, 22 July 2021 ('Decision').

¹⁶ Thaçi Defence Request for Certification to Appeal the "Decision on Defence Motions Alleging Defects in the Form of the Indictment", KSC-BC-2020-06/F00447, 27 August 2021.

¹⁷ Prosecution request for extension of time limit to respond to leave to appeal requests on decision KSC-BC-2020-06/F00413, KSC-BC-2020-06/F00451, 2 September 2021.

¹⁸ Consolidated Decision on Requests for Extension of Time, KSC-BC-2020-06/F00458, 6 September 2021.

III. THAÇI FAILS TO MEET THE REQUIREMENTS FOR GRANTING LEAVE TO APPEAL

A. APPLICABLE LAW

7. Outside of the limited circumstances—not applicable here—where interlocutory appeals are of right,¹⁹ '[i]nterlocutory appeals, interrupting the continuity of the proceedings, are the exception.'²⁰ Indeed, a recent decision observed the 'restrictive nature of this remedy.'²¹ Read together, Article 45(2) and Rule 77(2) set out the requirements applicable to granting a request for leave to appeal. Those are:

- a. that the matter is an 'appealable issue';
- b. that the decision involves an issue that would significantly affect:
 - i. the fair and expeditious conduct of the proceedings; or
 - ii. the outcome of the trial; and
- c. that, in the opinion of the relevant judicial body, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.²²

8. The burden is on the applicant to establish the existence of these requirements.²³ Consistent with this burden, where an applicant materially misrepresents the challenged decision, the request will be denied.²⁴ Moreover, the prongs identified at (a) through (c)

¹⁹ See Article 45(2).

²⁰ Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para.9.

²¹ Decision on Application for Leave to Appeal the Decision F00180, KSC-BC-2018-01/F00184, 24 August 2021, para.11.

²² See Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para.10.

²³ See, e.g., 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, ICC-02/04-01/05-20-US-Exp, 19 August 2005, paras 20-21.

²⁴ See, e.g., Decision on Application for Leave to Appeal the Decision F00180, KSC-BC-2018-01/F00184, 24 August 2021, para.24.

above are cumulative.²⁵ An applicant's failure to substantiate any one of them will be fatal to the request.

9. For purposes of prong (a), an 'appealable issue' 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.²⁶ 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.²⁷ Where a party requesting leave to appeal claims error in a decision but does not identify what should have been done differently, the issue will not be considered sufficiently discrete and specific to merit appeal.²⁸

10. For purposes of prong (b), the 'fair and expeditious conduct of proceedings' is generally understood as referencing the norms of fair trial, of which conducting a trial within a reasonable time is but one element.²⁹ In considering whether an issue affects the outcome of proceedings, 'it must be considered whether a possible error in an interlocutory decision would impact the outcome of the case.'³⁰ Even where an issue satisfying either of these possibilities is present, if the impact is not 'significant' it will not

²⁵ Prong (b) may be satisfied on either of the two bases indicated.

²⁶ Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021, para.12.

²⁷ Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para.11.

²⁸ Decision on the Krasniqi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00479, 20 September 2021, para.14.

²⁹ Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021, para.14.

³⁰ Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021, para.15.

qualify for interlocutory appeal.³¹ Speculative or unidentified impacts on fair trial rights will not be sufficient to meet this requirement.³²

11. The final prong, prong (c) above, '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.'³³

12. As described below, none of the issues Krasniqi raises meets these requirements. As a threshold matter, however, the SPO observes that Thaçi's arguments in support of his requests for leave to appeal are cursory, and only address the issues he raises in batches and broad statements. Although the SPO responds to each issue individually, it would be reasonable for the Pre-Trial Judge to consider how Thaçi's decision to not provide specific arguments geared to each issue impacts his ability to meet his burden to demonstrate that the issues he raises should be granted leave to appeal.

B. THAÇI HAS NOT CARRIED HIS BURDEN ON THE FIRST AND SECOND ISSUES

13. The first issue Thaçi raises is: 'Whether the PTJ erred in finding that Article 241 of the Kosovo Criminal Procedure Code (KCPC) does not pertain to the crimes set forth in the Law, and therefore that Mr Hashim Thaçi has been informed of the legal name of the criminal offence with citation to the applicable legal provision' ('First Issue').³⁴

14. The second issue Thaçi raises is: 'Whether the PTJ erred in finding that Article 241, subparagraph 1.5 of the 'KCPC' is inapplicable before the [Kosovo Specialist Chambers

³¹ Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para.11.

³² Decision on the Krasniqi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00479, 20 September 2021, para.25.

³³ Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021, para.17 (internal quotations omitted).

³⁴ Request, KSC-BC-2020-06/F00447, p.4 (internal citations omitted).

(‘KSC’)] given that Rule 4 of the Rules specifically states that “[t]he Rules shall be interpreted in a manner consonant with the framework as set out in Article 3 of the Law and, where appropriate, the Kosovo Criminal Procedure Code”, and Article 241, subparagraph 1.5 of the KCPC is not ‘contrary’ to any provision of the Law and therefore is not rendered inapplicable by the provisions of Article 3(2) and (4) of the Law’ (‘Second Issue’)³⁵

15. The First and Second Issues in essence seek leave to appeal the same point: the applicability of KCPC Article 241 § 1.4³⁶ before the KSC. Neither of these issues merits leave to appeal. Thaçi fails to identify how finding reference in the Kosovo Criminal Code (‘KCC’) (as required by KCPC Article 241 § 1.4) for crimes not charged under Kosovo law would add to the clarity of the Indictment, or promote a fair trial or influence the outcome of the case. Indeed, identifying related provisions in the KCC for crimes charged under the Law would decrease clarity by referencing inapplicable provisions. Providing KCC citations for crimes not charged thereunder would not advance the proceedings, but in fact would unnecessarily delay proceedings.

C. THAÇI HAS NOT CARRIED HIS BURDEN ON THE THIRD ISSUE

16. The third issue Thaçi raises is: ‘Whether the PTJ erred in finding that redactions of material facts in the Indictment do not render the Indictment defective given the Accused’s right to be promptly informed of the nature and cause of the charge against him and to have adequate time and facilities to prepare his defence’ (‘Third Issue’).³⁷

17. The Third Issue does not merit leave to appeal because the redactions’ effect on fairness of the proceedings is speculative. Thaçi can raise any claims of inadequate time

³⁵ Request, KSC-BC-2020-06/F00447, p.4 (internal citations and emphasis omitted).

³⁶ KCPC Article 241 § 1.4, English version (‘The indictment shall contain . . . the legal name of the criminal offence with a citation to the provisions of the Criminal Code.’).

³⁷ Request, KSC-BC-2020-06/F00447, p.5 (internal citation omitted).

to prepare his defence at the time that the redactions are lifted, and that would be the most appropriate time to address these matters. Moreover, the redactions are small relative to the entirety of the Indictment, and therefore cannot have a significant impact on the proceedings.

D. THAÇI HAS NOT CARRIED HIS BURDEN ON THE FOURTH AND FIFTH ISSUES

18. The fourth and fifth issues that Thaçi raises seek leave to appeal whether additional information is necessary concerning the identity of the alleged JCE members ('Fourth Issue'),³⁸ and Thaçi's contributions to the JCE and as an aider and abettor ('Fifth Issue').³⁹

19. Neither of these issues merit leave to appeal because, given the extensive information already contained in the Indictment, additional information on these points would not have a significant impact on the fairness of proceedings. Thaçi has been given adequate notice on these points and further information will be developed at trial, where he will have sufficient opportunity to address any additional concerns in this regard. Granting leave to appeal at this time on these issues will only serve to delay proceedings.

E. THAÇI HAS NOT CARRIED HIS BURDEN ON THE SIXTH ISSUE

20. The sixth issue Thaçi raises is: 'Whether the PTJ erred in finding that paragraph 48 of the Indictment was not defective (save the amendment ordered in para 106 of the Impugned Decision) in the absence of further particulars as to the nature of the Accused's contribution to the JCE including dates, locations, identities of victims, and his role, given the obligation on the prosecution to plead the material facts underpinning each of the charges and the Accused's right to be adequately informed about his role in the alleged crimes' ('Sixth Issue').⁴⁰

³⁸ Request, KSC-BC-2020-06/F00447, p.5.

³⁹ Request, KSC-BC-2020-06/F00447, p.5.

⁴⁰ Request, KSC-BC-2020-06/F00447, p.6 (internal citation omitted).

21. The Sixth Issue does not merit leave to appeal. Given the extensive information already contained in the Indictment, additional information on these points would not have a significant impact on the fairness of proceedings. Thaçi has been given adequate notice on these points and further information will be developed at trial, where he will have sufficient opportunity to address any additional concerns in this regard.

F. THAÇI HAS NOT CARRIED HIS BURDEN ON THE SEVENTH ISSUE

22. The seventh issue Thaçi raises is: 'Whether the PTJ erred in failing to consider the Defence argument that aiding and abetting was defectively pleaded in relation to the actions alleged to have been committed by the Accused in paragraph 48 of the Indictment [*sic*], given the PTJ only considered his findings about paragraphs 41-47 of the Indictment in his determination of the matter' ('Seventh Issue').⁴¹

23. The Seventh Issue does not merit leave to appeal. First, it is not a discrete appealable issue because Thaçi does not specify in the Request to which of his arguments 'that aiding and abetting was defectively pleaded'⁴² he is referring. Moreover, even if it were demonstrable that the Pre-Trial Judge had not considered a particular argument, failing to consider an argument is not an appealable issue. The underlying issue itself must merit appeal, and Thaçi does not explain why he believes the outcome of the decision concerning aiding and abetting merits appeal. Second, Thaçi misrepresents the Decision when he claims that the Pre-Trial Judge did not consider Thaçi's arguments and 'only considered his findings about paragraphs 41-47 of the Indictment in his determination of the matter.'⁴³ The Pre-Trial Judge noted Thaçi's arguments relating to aiding and abetting and therefore did not fail to consider them.⁴⁴

⁴¹ Request, KSC-BC-2020-06/F00447, p.6.

⁴² Request, KSC-BC-2020-06/F00447, p.6.

⁴³ Request, KSC-BC-2020-06/F00447, p.6.

⁴⁴ Decision, KSC-BC-2020-06/F00413, para.109.

24. Third, Thaçi does not explain why the acts related to Joint Criminal Enterprise, as incorporated by paragraph 52 of the Indictment, do not provide sufficient specificity, and how other information would have a significant impact on the fairness of the trial proceedings.

G. THAÇI HAS NOT CARRIED HIS BURDEN ON THE EIGHTH ISSUE

25. The eighth issue Thaçi raises is: ‘Whether the PTJ erred in finding the criminal conduct of the Accused’s subordinates was, without more, not defectively pleaded, given that he fails to identify which paragraphs of the Indictment “setting out the crimes charged” provide the detail that the Defence submit is lacking’ (‘Eighth Issue’).⁴⁵

26. The Eighth Issue does not merit leave to appeal. The Eighth Issue misrepresents the Decision, and is therefore not appealable, because the Pre-Trial Judge adequately identified the relevant paragraphs of the Indictment by referencing the section identifying the ‘crimes charged’.⁴⁶ The Indictment has a section labelled ‘Crimes’ that is easily identifiable.⁴⁷ Regardless, Thaçi does not explain how, reading the Indictment as a whole, it does not provide sufficient clarity and specificity concerning the criminal conduct of his subordinates such that additional information would have a significant impact on the fairness of proceedings or outcome of the case.

H. THAÇI HAS NOT CARRIED HIS BURDEN ON THE NINTH THROUGH FIFTEENTH ISSUES

27. In the ninth to fifteenth issues, Thaçi requests leave to appeal issues arguing that the Indictment was required to include additional information in various regards.⁴⁸

⁴⁵ Request, KSC-BC-2020-06/F00447, p.6.

⁴⁶ Decision, KSC-BC-2020-06/F00413, para.119.

⁴⁷ Indictment, KSC-BC-2020-06/F00045/A03, p.18.

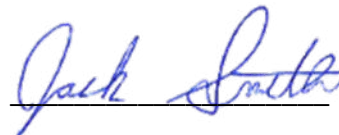
⁴⁸ Request, KSC-BC-2020-06/F00447, pp.6-8 (Issue 9 (facts showing *mens rea*); Issue 10 (information related to failing to prevent or punish); Issue 11 (information regarding identities of perpetrators); Issue 12 (information regarding identities of victims); Issue 13 (information regarding location of crimes); Issue 14 (information regarding timeframes); and, Issue 15 (information regarding Thaçi’s connection to crimes)).

28. None of these issues merit leave to appeal, as they merely represent disagreements regarding the level of detail necessary in the Indictment. Moreover, given the extensive information already contained in the Indictment, additional information on these points would not have a significant impact on the fairness of proceedings. Taçi has been given adequate notice on these points and further information will be developed at trial, where he will have sufficient opportunity to address any additional concerns in this regard.

IV. CONCLUSION AND RELIEF REQUESTED

29. For the foregoing reasons, the SPO respectfully request that the Pre-Trial Judge reject the requests for leave to appeal.

Word count: 2,919

A handwritten signature in blue ink, appearing to read "Jack Smith", written over a horizontal line.

Jack Smith

Specialist Prosecutor

Thursday, 30 September 2021

At The Hague, the Netherlands.