



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:** 6 October 2021

**Language:** English

**Classification:** Public

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**Prosecution response to 'Veseli Defence Application for Leave to Appeal Decision on Motion to Challenge Jurisdiction on Basis of Violations of the Constitution'**

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## I. INTRODUCTION

1. The Request<sup>1</sup> should be denied. It ignores relevant parts of and does not arise from the Decision,<sup>2</sup> and fails to meet any of the requirements for leave to appeal under Article 45 of the Law<sup>3</sup> and Rule 77 of the Rules.<sup>4</sup>

## II. THE DEFENCE FAILS TO MEET THE REQUIREMENTS FOR GRANTING LEAVE TO APPEAL

### A. APPLICABLE LAW

2. Outside of the limited circumstances—not applicable here—where interlocutory appeals are of right,<sup>5</sup> '[i]nterlocutory appeals, interrupting the continuity of the proceedings, are the exception.'<sup>6</sup> Indeed, a recent decision observed the 'restrictive nature of this remedy.'<sup>7</sup> 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

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<sup>1</sup> Veseli Defence Application for Leave to Appeal Decision on Motion to Challenge Jurisdiction on Basis of Violations of the Constitution, KSC-BC-2020-06/F00474, 17 September 2021 ('Request').

<sup>2</sup> Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused, KSC-BC-2020-06/F00450, 31 August 2021 ('Decision').

<sup>3</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' are to the Law, unless otherwise indicated.

<sup>4</sup> 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' are to the Rules, unless otherwise indicated.

<sup>5</sup> See Article 45(2).

<sup>6</sup> Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021 ('Thaçi Decision'), para.9.

<sup>7</sup> Decision on Application for Leave to Appeal the Decision F00180, KSC-BC-2018-01/F00184, 24 August 2021 ('F00180 Decision'), para.11.

- c. that, in the opinion of the relevant judicial body, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.<sup>8</sup>
3. The burden is on the applicant to establish the existence of these requirements.<sup>9</sup> Consistent with this burden, where an applicant materially misrepresents the challenged decision, the request will be denied.<sup>10</sup> Moreover, the prongs identified at (a) through (c) above are cumulative.<sup>11</sup> An applicant's failure to substantiate any one of them will be fatal to the request.
4. 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>
5. 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

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<sup>8</sup> See *Thaçi Decision*, KSC-BC-2020-06/F00172, para.10.

<sup>9</sup> See, for example, 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.

<sup>10</sup> See, for example, F00180 Decision, KSC-BC-2018-01/F00184, para.24.

<sup>11</sup> Prong (b) may be satisfied on either of the two bases indicated.

<sup>12</sup> 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.

<sup>13</sup> *Thaçi Decision*, KSC-BC-2020-06/F00172, para.11.

<sup>14</sup> Decision on the Krasniqi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00479, 20 September 2021, Confidential ('Krasniqi Decision'), para.14.

within a reasonable time is but one element.<sup>15</sup> 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.’<sup>16</sup> Even where an issue satisfying either of these possibilities is present, if the impact is not ‘significant’ it will not qualify for interlocutory appeal.<sup>17</sup> Speculative or unidentified impacts on fair trial rights will not be sufficient to meet this requirement.<sup>18</sup>

6. 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.’<sup>19</sup>

#### B. SUBMISSIONS

7. The Issue revolves around the Pre-Trial Judge’s alleged failure to consider whether the court’s substantive legal regime gives rise to inequality.<sup>20</sup> The Defence specifically claims that the Pre-Trial Judge did not engage with the submissions in paragraphs 13-19 of its Constitutional Challenge.<sup>21</sup> However, as explicitly stated in the Decision, Defence submissions in paragraphs 13-19 of its Constitutional Challenge – which were

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<sup>15</sup> 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 (‘Case 07 Decision’).

<sup>16</sup> Case 07 Decision, KSC-BC-2020-07/F00169, para.15.

<sup>17</sup> Thaçi Decision, KSC-BC-2020-06/F00172, para.11.

<sup>18</sup> Krasniqi Decision, KSC-BC-2020-06/F00479, para.25.

<sup>19</sup> Case 07 Decision, KSC-BC-2020-07/F00169, para.17 (citations omitted).

<sup>20</sup> Request, KSC-BC-2020-06/F00474, para.2 (‘Whether the Pre-Trial Judge erred by failing to consider whether the Court’s substantive legal regime gives rise to inequality under the law in violation of Article 44 [sic] of the Constitution, rendering the Court “unlawful” for the purposes of Article 103(7)’ (‘Issue’)). *See also* paras 6-9, 12-13.

<sup>21</sup> Request, KSC-BC-2020-06/F00474, para.12, fn.6, *citing* Preliminary Motion of the Defence of Kadri Veseli to Challenge Jurisdiction on the Basis of Violations of the Constitution, KSC-BC-2020-06/F00224, 15 March 2021 (‘Constitutional Challenge’), paras 13-19.

substantively similar to the submissions made in the Defence Jurisdiction Submissions<sup>22</sup> – were addressed in the Jurisdiction Decision.<sup>23</sup> The Request therefore ignores relevant parts of the Decision and does not arise from it. The Defence has not explained why this matter should have been addressed in or otherwise impacts the Decision.<sup>24</sup> The Issue constitutes, at best, mere disagreement with the context in which the Pre-Trial Judge chose to address those particular submissions. The Request should therefore be denied as failing to raise any appealable issue arising from the Decision.<sup>25</sup>

8. Further, while the remaining leave to appeal criteria are cumulative and need not be considered, as no appealable issue has been identified,<sup>26</sup> the Defence also fails to demonstrate that the Issue or appellate resolution thereof could in any way impact the proceedings.<sup>27</sup> The Defence has appealed the relevant portions of the Jurisdiction Decision and has made submissions before the Court of Appeals Panel concerning the

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<sup>22</sup> See Veseli Defence Reply to Prosecution Response to the Preliminary Motion of the Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC (Customary International Law), KSC-BC-2020-06/F00311, 17 May 2021 ('Jurisdiction Reply'), paras 3-35 (in particular, paras 12-15, concerning, *inter alia*, the 'guarantee of equality before the law'); Veseli Defence Response to Prosecution Sur-Reply, KSC-BC-2020-06/F00342, 4 June 2021 ('Jurisdiction Further Submissions'), in particular, para.8 (concerning 'discrimination issues'). See also Preliminary motion of the Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC, KSC-BC-2020-06/F00223, 15 March 2021 ('Jurisdiction Motion'; collectively with the Jurisdiction Reply and Jurisdiction Further Submissions, 'Defence Jurisdiction Submissions'), paras 40-90.

<sup>23</sup> Decision, KSC-BC-2020-06/F00450, fn.11 ('This Decision will address paragraphs 11-12, 20-21 of the [Constitutional Challenge]. Mr Veseli's submissions on applicable law are addressed in the [Jurisdiction Decision]'). See also Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/F00412, 22 July 2021 ('Jurisdiction Decision'), paras 93-102 (addressing, *inter alia*, Defence submissions concerning the different laws that may apply in different jurisdictions concerning crimes committed during the same conflict).

<sup>24</sup> The Defence acknowledges that, only if an inequality exists, could there be a violation of Article 103(7). See Request, KSC-BC-2020-06/F00474, para.6.

<sup>25</sup> See Thaçi Decision, KSC-BC-2020-06/F00172, paras 11 (an issue must not be merely a question over which there is disagreement or conflicting opinion; resolution of the issue must be essential for determination of matters arising from the judicial cause under examination and must emanate from the ruling concerned), 17 (certification is not concerned with whether a decision is correctly reasoned, but whether the standard has been met).

<sup>26</sup> See Thaçi Decision, KSC-BC-2020-06/F00172, paras 11, 15.

<sup>27</sup> Request, KSC-BC-2020-06/F00474, paras 14-15.

Issue.<sup>28</sup> As such, the Issue already constitutes a ground of appeal pending before the Court of Appeals Panel, and the Request completely ignores this fact. Duplicative referral to the Court of Appeals would not materially advance proceedings; on the contrary, it would result in unnecessary, repetitive litigation and delay.

9. Finally, insofar as the Defence ‘relatedly’ disagrees with the Pre-Trial Judge’s finding concerning the scope of persons within the court’s jurisdiction, it does not explain how this falls within the scope of the Issue.<sup>29</sup> In any event, such submissions are speculative, unsubstantiated,<sup>30</sup> and additional to those made previously, without any explanation as to why the Pre-Trial Judge should have *proprio motu* taken them into account.<sup>31</sup> Accordingly, such submissions – even assuming *arguendo* a relation to the Issue – fail to satisfy any of the cumulative requirements for leave to appeal.

### III. RELIEF REQUESTED

10. For the foregoing reasons, the Pre-Trial Judge should reject the Request.

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<sup>28</sup> Veseli Defence Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/IA009/F00010, 27 August 2021, in particular, p.18 (‘Ground 4: The PTJ fails to adequately address the Defence’s submissions on discrimination and equality before the law’), paras 42-47. Ground 4 and the Issue essentially allege the same error. While no violation of Article 103(7) is explicitly part of Ground 4, both Ground 4 and the Issue revolve around whether the applicable ‘regime gives rise to inequality’ in violation of the Constitution. *See* Request, KSC-BC-2020-06/F00474, para.6.

<sup>29</sup> Request, KSC-BC-2020-06/F00474, paras 10-11. Other than these two paragraphs, the Issue and all other submissions in the Request in support of the applicable criteria are framed in light of the alleged impact of the applicable legal regime before the Court and related arguments of inequality.

<sup>30</sup> The Defence does not provide any support for its unfounded speculations concerning the scope of potential charged persons and temporal and budgetary constraints. *See* Request, KSC-BC-2020-06/F00474, para.11.

<sup>31</sup> Such submissions did not feature in the relevant part of the Constitutional Challenge. *See* Constitutional Challenge, KSC-BC-2020-06/F00224, paras 8-9.

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Wednesday, 6 October 2021

At The Hague, the Netherlands.