



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

**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

**Date:** 25 October 2021

**Language:** English

**Classification:** Public

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**Decision on Applications for Leave to Appeal “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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**THE PRE-TRIAL JUDGE**,<sup>1</sup> pursuant to Article 45 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 77 of Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), hereby issues the following decision.

## I. PROCEDURAL BACKGROUND

1. On 31 August 2021, the Pre-Trial Judge, issued the "Decision on Motions Challenging the Legality of the SC and the SPO and Alleging Violations of Certain Constitutional Rights of the Accused ("Impugned Decision").<sup>2</sup>

2. On 17 September 2021, having been granted an extension of time,<sup>3</sup> the Defence for Hashim Thaçi ("Mr Thaçi" and "Thaçi Defence") and the Defence for Kadri Veseli ("Mr Veseli" and "Veseli Defence") submitted applications ("Thaçi Application" and "Veseli Application", respectively) seeking certification to appeal issues in relation to the Impugned Decision.<sup>4</sup>

3. On 24 September 2021, the Pre-Trial Judge, at the request of the Specialist Prosecutor's Office ("SPO"),<sup>5</sup> granted the SPO an extension until 6 October 2021 to file

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<sup>1</sup> KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

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

<sup>3</sup> KSC-BC-2020-06, F00458, Pre-Trial Judge, *Consolidated Decision on Requests for Extension of Time*, 6 September 2021, public, para. 11.

<sup>4</sup> KSC-BC-2020-06, F00473, Thaçi Defence, *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"*, 17 September 2021, public; F00474, Veseli Defence, *Veseli Defence Application for Leave to Appeal Decision on Motion to Challenge Jurisdiction on the Basis of Violations of the Constitution (KSC-BC-2020-06/F00450)*, 17 September 2021, public. On 18 October 2021, a corrected version of the Veseli Application was filed F00474/COR.

<sup>5</sup> KSC-BC-2020-06, F00488, Specialist Prosecutor, *Request for Extension of Time Limit to Respond to Leave to Appeal Requests on Decision KSC-BC-2020-06/F00450*, 24 September 2021, public.

the responses to the Thaçi Application and the Veseli Application and granted an extension until 18 October 2021 for replies.<sup>6</sup>

4. On 6 October 2021, the SPO responded to the Thaçi Application (“Response to Thaçi Application”)<sup>7</sup> and the Veseli Application (“Response to Veseli Application”).<sup>8</sup>

5. On 18 October 2021, the Veseli Defence and the Thaçi Defence filed replies (respectively, “Veseli Reply” and “Thaçi Reply”).<sup>9</sup>

## II. SUBMISSIONS

6. The Thaçi Defence seeks leave to appeal the Impugned Decision on the following eight issues:

- (1) Whether the Pre-Trial Judge’s finding that the KSC and SPO’s temporal mandate has not expired 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 must not be indefinite, uncertain and unilateral (“First 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” in the absence of any or sufficient reasoning, and in a manner inconsistent with

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<sup>6</sup> KSC-BC-2020-06, F00490, Pre-Trial Judge, *Decision on Prosecution Request for Extension of Time Limit to Respond to Leave to Appeal Requests on Decision KSC-BC-2020-06/F00450* (“Order Extending Deadlines for Responses and Replies”), 24 September 2021, public, para. 11.

<sup>7</sup> KSC-BC-2020-06, F00506, Specialist Prosecutor, *Prosecution Response to Hashim Thaçi’s 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’*, 6 October 2021, public.

<sup>8</sup> KSC-BC-2020-06, F00507, Specialist Prosecutor, *Prosecution Response to ‘Veseli Defence Application for Leave to Appeal Decision on Motion to Challenge Jurisdiction on Basis of Violations of the Constitution’*, 6 October 2021, public.

<sup>9</sup> KSC-BC-2020-06, F00530, Veseli Defence, *Veseli Defence Reply to SPO Response to Filing KSC-BC-2020-06/F00474*, 18 October 2021, public; F00532, Thaçi Defence, *Thaçi Defence Reply to “Prosecution Response to Hashim Thaçi’s Request for Certification to Appeal the ‘Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violation of Certain Constitutional Rights of the Accused’”*, 18 October 2021, public.

Articles 113(7) and 144(3) of the Constitution, which the Pre-Trial Judge failed entirely to consider (“Second 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 had been expressly incorporated into the KSC Law, 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 (“Third 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, thereby failing to address the substance of the Defence arguments (“Fourth 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, 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” (“Fifth 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, particularly given that this contravenes Articles 109(1) and (2) of the Constitution (“Sixth 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 (“Seventh Issue”); and
- (8) Whether the Pre-Trial Judge erred in assessing the violation Mr Thaçi’s presumption of innocence with respect to the Marty Report itself, 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 (“Eighth Issue”).<sup>10</sup>

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<sup>10</sup> Thaçi Application, para. 10.

7. The Veseli Defence seeks leave to appeal the Impugned Decision on the following issue:

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 Articles 3 and 24 of the Constitution, rendering the Court "unlawful" for the purposes of Article 103(7) ("Ninth Issue").<sup>11</sup>

8. The SPO responds that the Thaçi Application should be rejected because it fails to meet the requirements for leave to appeal and fails to demonstrate that any of the eight issues merit appeal at this stage of the litigation.<sup>12</sup> The SPO further responds that the Veseli Application should be rejected because it ignores relevant parts of, and does not arise from, the Impugned Decision.<sup>13</sup>

9. The Veseli Defence replies that its application should be granted.<sup>14</sup>

10. The Thaçi Defence replies that the Response to Thaçi Application is over the word limit and should therefore be dismissed "or immediately re-filed with the Defence afforded a further right of reply."<sup>15</sup>

### III. APPLICABLE LAW

11. Pursuant to Article 45 of the Law, a Court of Appeals Panel shall hear interlocutory appeals from an accused or from the Specialist Prosecutor in accordance with the Law and the Rules. Interlocutory appeals, other than those that lie as of right, 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,

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<sup>11</sup> Veseli Application, para. 2.

<sup>12</sup> Response to Thaçi Application, paras 1, 43.

<sup>13</sup> Response to Veseli Application, paras 1, 10.

<sup>14</sup> Veseli Reply, para. 8.

<sup>15</sup> Thaçi Reply, para. 1.

in the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.

12. Rule 77(2) of the Rules further 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 the Court of Appeals Panel may materially advance the proceedings.

#### IV. DISCUSSION

##### A. WORD LIMIT OF SPO RESPONSE

13. The Pre-Trial Judge notes that, while responses generally have a word limit of 6,000 words, responses to any request for certification are not to exceed 3,000 words.<sup>16</sup> The SPO's Response to Thaçi Application is 4,104 words in length. The Pre-Trial Judge accordingly reminds the SPO to follow the practice direction in the future and monitor the length of their responses to any request for certification. The Pre-Trial Judge does not consider that the Thaçi Defence was prejudiced by extra length of the SPO's filing as the additional length was not excessive. The Pre-Trial Judge further considers that the Thaçi Defence could have requested an extension of the word limit *before* the filing of its reply if it needed to supplement its reply given the length of the SPO's filing, particularly as the Thaçi Defence was given an additional week to file its reply.<sup>17</sup>

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<sup>16</sup> KSC-BD-15, Registry Practice Direction on Files and Filings Before the Kosovo Specialist Chambers, 17 May 2019, public, Articles 41 and 43.

<sup>17</sup> Order Extending Deadlines for Responses and Replies, para. 11.

14. The Pre-Trial Judge accordingly denies the Thaçi Defence request to dismiss the SPO Response to Thaçi Application and its request to file a further reply.

#### B. LEGAL TEST

15. A right to appeal arises only if the Panel is of the opinion that the standard for certification set forth in Article 45(2) of the Law and Rule 77(2) of the Rules has been met.<sup>18</sup> The Pre-Trial Judge recalls the interpretation of these provisions as set out in detail previously.<sup>19</sup>

16. Mindful of the restrictive nature of this remedy, the following specific requirements apply:

- (1) Whether the matter is an “appealable issue”;
- (2) 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
- (3) Whether, in the opinion of the Panel, an immediate resolution by the Appeals Chamber may materially advance the proceedings.<sup>20</sup>

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<sup>18</sup> See also KSC-2020-06, F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal* (“Thaçi Decision on Leave to Appeal”), 11 January 2021, public, para. 9. Similarly, ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 20.

<sup>19</sup> See *Thaçi Decision on Leave to Appeal*, paras 9-17.

<sup>20</sup> See *Thaçi Decision on Leave to Appeal*, para. 10.



## C. ISSUES

### 1. The First Issue

17. The Thaçi Defence argues that, if the temporal mandate has expired, then the proceedings are deprived of any legal and constitutional basis and cannot proceed, precluding any fair and expeditious proceedings and significantly affecting their outcome.<sup>21</sup>

18. The SPO responds that, with respect to the First Issue, the Thaçi Defence: (i) does not precisely identify the source of the error or explain how the alleged error would affect the Impugned Decision; (ii) misrepresents the Impugned Decision; and (iii) fails to explain how referral to a Panel of the Court of Appeals would materially advance proceedings given the authoritative pronouncements of the Specialist Chamber of the Constitutional Court (“SCCC”) on this matter.<sup>22</sup>

19. The Thaçi Defence replies that Pre-Trial Judge has a duty to provide a reasoned decision and failure to give such reasons is an error of law.<sup>23</sup>

20. As concerns the First Issue and the Thaçi Defence allegation that the Impugned Decision did not consider or provide legal reasoning on every one of its arguments, the Pre-Trial Judge recalls that all essential arguments<sup>24</sup> of Mr Thaçi had been taken into account.<sup>25</sup> Raising now the same arguments merely reflects the Thaçi Defence disagreement with the findings of the Pre-Trial Judge and rests on a misreading of the

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<sup>21</sup> Thaçi Application, para. 14.

<sup>22</sup> Response to Thaçi Application, paras 15-17.

<sup>23</sup> Thaçi Reply, paras 3-6.

<sup>24</sup> See, for example, ECtHR, *Case of Van de Hurk v. the Netherlands*, 16034/90, Judgment, 19 April 1994, para. 61 (“Article 6 para. 1 [...] obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument”); *Case of Taxquet v Belgium* [GC], 926/05, Judgment, 16 November 2010, para. 91 (“While courts are not obliged to give a detailed answer to every argument raised, it must be clear from the decision that the essential issues of the case have been addressed”).

<sup>25</sup> Impugned Decision, paras 61-68.



Impugned Decision. An appealable issue requires that the applicant must articulate clearly discrete issues for resolution by the Court of Appeals.<sup>26</sup> Here, the Thaçi Defence simply reiterates arguments previously put before the Pre-Trial Judge without precisely defining the asserted error in relation to any of the findings of the Pre-Trial Judge.<sup>27</sup> Furthermore, the issue as presented simply queries whether the Pre-Trial Judge's conclusion was "undermined" without indicating how points (i)-(iv) set forth in the First Issue would lead to the opposite conclusion reached by the Pre-Trial Judge. The Pre-Trial Judge therefore finds that the First Issue does not amount to an appealable issue and as a result will not assess the remainder of the legal test.

21. The Pre-Trial Judge accordingly finds that the First Issue does not meet the test for certification.

## **2. Second Issue**

22. The Thaçi Defence argues that, if the temporal mandate has expired, then the proceedings are deprived of any legal and constitutional basis and cannot proceed, precluding any fair and expeditious proceedings and significantly affecting their outcome.<sup>28</sup>

23. As concerns the Second Issue, the SPO responds that the issue: (i) is not sufficiently precise or specific to be an appealable issue; (ii) misrepresents the Impugned Decision; and (iii) would not have a significant effect on the fairness or the outcome of the proceedings as it is only contended that the Pre-Trial Judge should have provided additional reasoning and should not have referred to the views of the Specialist Chamber of the Constitutional Court ("SCCC").<sup>29</sup>

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<sup>26</sup> Thaçi Decision on Leave to Appeal, para. 11.

<sup>27</sup> KSC-BC-2020-06, F00216, Defence for Mr Thaçi, *Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction* ("Thaçi Motion on Lack of Jurisdiction"), 12 March 2021, paras 44-52.

<sup>28</sup> Thaçi Application, para. 14.

<sup>29</sup> Response to Thaçi Application, paras 19-21.

24. The Thaçi Defence replies that Pre-Trial Judge has a duty to provide a reasoned decision and failure to give such reasons is an error of law.<sup>30</sup>

25. The Pre-Trial Judge finds that the Thaçi Defence presents an appealable issue which emanates from the Impugned Decision in so far as it asserts that the Pre-Trial Judge erred in concluding that the issue of the Kosovo Specialist Chambers (“KSC”)’s mandate had been decided upon by the SCCC.

26. The Second Issue relates to the Accused’s right to be tried by a court established by law, to which Mr Thaçi is entitled by virtue of Article 6(1) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”). Determination of whether SCCC has ruled on the KSC’s mandate would potentially forestall future litigation on whether the KSC has exceeded its mandate, thereby significantly affecting the expeditious conduct of proceedings and ensuring that the continuation of proceedings has not occurred in contravention of the Accused’s rights. For these reasons, the Pre-Trial Judge finds that the Second Issue significantly affects the fair and expeditious conduct of the proceedings, as provided in Article 45(2) of the Law and Rule 77(2) of the Rules.

27. The Pre-Trial Judge also considers that an authoritative determination of the Court of Appeals Panel of the Second Issue will materially advance proceedings as the KSC’s temporal mandate is a fundamental issue relevant to whether the KSC has a legal basis for continuing and an issue, which if not settled, would mar the outcome of proceedings.

28. The Pre-Trial Judge accordingly finds that the Second Issue meets the test for certification and grants leave to appeal the Second Issue.

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<sup>30</sup> Thaçi Reply, paras 3-6.

### 3. Third Issue

29. In the Third Issue, the Thaçi Defence contests the legal and constitutional basis of the SPO investigation. The Thaçi Defence argues that, if the SPO was not entitled to re-investigate, then the fairness, expeditiousness and outcome of proceedings would be similarly and significantly affected.<sup>31</sup>

30. The SPO responds that the Third Issue does not merit leave to appeal because: (i) it misrepresents the Impugned Decision; (ii) presents a hypothetical question that does not merit leave to appeal; and (iii) argues that the process of reaching the relevant conclusion, rather than the outcome, was incorrect.<sup>32</sup>

31. The Thaçi Defence replies that the Pre-Trial Judge committed an error by failing to consider the Exchange of Letters<sup>33</sup> and any presumption that the same finding would have been reached had the error not been committed is purely speculative.<sup>34</sup>

32. The Pre-Trial Judge considers, with respect to the Exchange of Letters, that this argument was only supportive of the Defence's main submission regarding the applicability of Article 159 of the Kosovo Criminal Procedure Code ("KCPC").<sup>35</sup> In fact, the Thaçi Defence challenge to the lawfulness of SPO investigations centred on the applicability of Article 159 of the KCPC. As the applicability of the KCPC in the KSC legal framework has already been put before and decided by a Panel of the Court

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<sup>31</sup> Thaçi Application, para. 14.

<sup>32</sup> Response to Thaçi Application, paras 23-26.

<sup>33</sup> The President of Kosovo's and the High Representative's exchange of letters in 2014 were ratified by the Assembly of Kosovo. *See* Law No. 04/L-274 on Ratification of the International Agreement Between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission, 23 April 2014. These letters will be collectively referred to as "Exchange of Letters".

<sup>34</sup> Thaçi Reply, paras 7-8.

<sup>35</sup> Thaçi Motion on Lack of Jurisdiction, para. 57.

of Appeals, the Pre-Trial Judge finds that this issue would not materially advance proceedings.<sup>36</sup>

33. The Pre-Trial Judge accordingly finds that the Third Issue does not meet the test for certification.

#### **4. Fourth Issue and Fifth Issue**

34. The Thaçi Defence argues that the KSC Law created an extraordinary court, which fails to satisfy the guarantees of independence and impartiality, given the absence of adequate legislation safeguarding these guarantees.<sup>37</sup>

35. The SPO responds that the Fourth Issue and Fifth Issue do not merit leave to appeal because they: (i) misrepresent the Impugned Decision;<sup>38</sup> (ii) are insufficiently precise;<sup>39</sup> and (iii) seek additional reasoning without explaining how such reasoning would have a significant impact on the fairness or outcome of the proceedings.<sup>40</sup>

36. The Thaçi Defence replies, with regard to the Fourth Issue, that providing further explanations as to how the Pre-Trial Judge erred, as insisted on by the SPO in its Response to Thaçi Application, would “morph the certification process into litigation on the merits.”<sup>41</sup> With regard to the Fifth Issue, the Thaçi Defence replies that the Pre-Trial Judge has a duty to provide a reasoned decision and failure to give such reasons is an error of law.<sup>42</sup>

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<sup>36</sup> KSC-BC-2018-01, F00005, Court of Appeals Panel, *Decision on Appeal Against “Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi”*, 1 October 2021, public, paras 2, 14-23.

<sup>37</sup> Thaçi Application, para. 15.

<sup>38</sup> Response to Thaçi Application, paras 28, 32.

<sup>39</sup> Response to Thaçi Application, paras 29, 31.

<sup>40</sup> Response to Thaçi Application, paras 29, 33.

<sup>41</sup> Thaçi Reply, paras 9-10.

<sup>42</sup> Thaçi Reply, paras 3-6.

37. As concerns the Fourth Issue, the Impugned Decision did not simply rely on the finding that the KSC were established by law in order to conclude that it was not an extraordinary court. Rather, the Impugned Decision determined that “[h]aving found [...] that the [K]SC are established by law and that its independence and impartiality have not been called into question, either by, *inter alia*, the procedures surrounding the appointment of judges or the [K]SC’s reliance on a separate law, [there is] no basis in the assertion that the [K]SC are *de facto* an extraordinary court in violation of Article 103(7) of the Constitution”.<sup>43</sup> The relevant finding in the Impugned Decision accordingly relies on factors other than the KSC being established by law and the Fourth Issue therefore misrepresents the Impugned Decision. The Pre-Trial Judge therefore finds that the Fourth Issue does not represent an appealable issue and as a result will not assess the remainder of the legal test. The Pre-Trial Judge accordingly finds that the Fourth Issue does not meet the test for certification.

38. As concerns the Fifth Issue, the Pre-Trial Judge considers that portions of the issue, as presented, are not appealable because they are insufficiently precise. The Thaçi Defence does not specify to what “issues raised by the Defence” it is referring. In addition, reference to “inapplicable [European Court of Human Rights (“ECtHR”)] jurisprudence” is too broad as there is a failure to specify the jurisprudence in question or the finding to which it relates. This imprecision is further compounded by the equivocal claim that the Pre-Trial Judge “failed to engage with or provide sufficient reasoning”.

39. The Pre-Trial Judge, however, does find that the last portion of Fifth Issue is an issue that emanates from the Impugned Decision. The Pre-Trial Judge will accordingly apply the test for certification to the following issue:

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<sup>43</sup> Impugned Decision, para. 113.

Whether the Pre-Trial Judge erred by failing to consider that, taken cumulatively, the features of the KSC raised by the Thaçi Defence lead to the conclusion that the KSC structurally fail to satisfy Article 6(1) of the ECHR.

40. The Fifth Issue relates to the Accused's right to be tried by an independent and impartial court established by law, to which Mr Thaçi is entitled by virtue of Article 6(1) of the ECHR. Early resolution of the issue would also streamline the proceedings and advance Mr Thaçi's right to be tried within a reasonable time, as provided in Article 21(4)(d) of the Law. The Pre-Trial Judge considers that resolution of this issue at the appellate level would forestall future litigation and determine whether, structurally, the KSC operate in contravention of the Accused's rights under Article 6(1) of the ECHR. For these reasons, the Pre-Trial Judge finds that the Fifth Issue, as reformulated, significantly affects the fair and expeditious conduct of the proceedings, as provided in Article 45(2) of the Law and Rule 77(2) of the Rules.

41. The Pre-Trial Judge also finds that an authoritative determination of the Court of Appeals Panel of the reformulated issue will materially advance proceedings as the issue of whether the KSC's structure operates in contravention of Article 6(1) of the ECHR is an issue so fundamental to these proceedings, which if not settled, would mar the outcome of proceedings.

42. The Pre-Trial Judge accordingly finds that the Fifth Issue, as reformulated in paragraph 39, above, meets the test for certification and grants leave to appeal the reformulated Fifth Issue.

## 5. Sixth Issue

43. The Thaçi Defence argues that the Sixth Issue identifies errors of law and reasoning in the Pre-Trial Judge's adjudication, which necessarily significantly impacts the fairness and expeditiousness of proceedings as well as their outcome.<sup>44</sup>

44. The SPO argues that the Sixth Issue: (i) introduces new arguments in relation to Articles 109(1) and (2) of the Constitution; (ii) misrepresents the conclusion upon which the Pre-Trial Judge pronounced; and (iii) seeks additional reasoning without explaining how such reasoning would have a significant impact on the fairness or the outcome of the proceedings.<sup>45</sup>

45. The Thaçi Defence replies that the Pre-Trial Judge introduced a novel and unanticipated position which the Court of Appeals should be permitted to consider.<sup>46</sup>

46. The Pre-Trial Judge considers that the issue as presented does not arise from the Impugned Decision. The Pre-Trial Judge did not make a finding that the requirement of independence and impartiality does not operate to constrain interference with the Specialist Prosecutor. The relevant question before the Pre-Trial Judge was the independence and impartiality of the KSC in the context of Article 6(1) of the ECHR and it was on this issue that a finding was ultimately made.<sup>47</sup> In addition, the Pre-Trial Judge notes that the Thaçi Defence is impermissibly presenting its arguments regarding Articles 109(1) and (2) of the Constitution for the first time in its application for leave to appeal. The Pre-Trial Judge therefore finds that the Sixth Issue does not amount to an appealable issue and as a result will not assess the remainder of the legal test.

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<sup>44</sup> Thaçi Application, para. 15.

<sup>45</sup> Response to Thaçi Application, paras 35-36.

<sup>46</sup> Thaçi Reply, para. 11.

<sup>47</sup> Impugned Decision, paras 108, 111.



47. The Pre-Trial Judge accordingly finds that the Sixth Issue does not meet the test for certification.

## **6. Seventh Issue**

48. The Thaçi Defence argues that, as the Seventh Issue concerns the right to be tried without undue delay, it therefore would self-evidently significantly affect the fair and expeditious conduct of proceedings as well as the outcome of any subsequent trial.<sup>48</sup>

49. The SPO responds that the Seventh Issue does not merit leave to appeal because the Thaçi Defence does not explain how the Pre-Trial Judge's interpretation of ECtHR case law was erroneous or significantly impacts the fairness or the outcome of proceedings.<sup>49</sup>

50. The Thaçi Defence replies that providing further explanations as to how the Pre-Trial Judge erred, as insisted on by the SPO in its Response to Thaçi Application, would "morph the certification process into litigation on the merits."<sup>50</sup>

51. The Pre-Trial Judge finds that the Seventh Issue is an issue that emanates from the Impugned Decision as the right to be tried within a reasonable time was at issue. The issue also significantly affects the fairness of the proceedings as it is directly linked with Mr Thaçi's right to be tried without undue delay, as provided in Article 21(4)(d) of the Law. It also significantly affects the expeditious conduct of proceedings because appellate resolution of the relevant period from which to measure the right to be tried within a reasonable time would avoid any future litigation on this matter and ensure that proceedings do not continue in contravention of the Accused's rights. For these reasons, the Pre-Trial Judge finds that the Seventh Issue significantly affects the fair

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<sup>48</sup> Thaçi Application, para. 16.

<sup>49</sup> Response to Thaçi Application, para. 38.

<sup>50</sup> Thaçi Reply, paras 9-10.

and expeditious conduct of the proceedings, as provided in Article 45(2) of the Law and Rule 77(2) of the Rules.

52. The Pre-Trial Judge also considers that an authoritative determination of a Court of Appeals Panel of the Seventh Issue would materially advance proceedings as it would put all Parties on notice of the starting point in which to calculate reasonable time and ensure that such time is accurately measured.

53. The Pre-Trial Judge finds that the Seventh Issue meets the test for certification and grants leave to appeal the Seventh Issue.

## **7. Eighth Issue**

54. The Thaçi Defence argues that the Eighth Issue concerns the right to be presumed innocent and therefore would self-evidently significantly affect the fair and expeditious conduct of proceedings as well as the outcome of any subsequent trial.<sup>51</sup>

55. The SPO responds that the Eighth Issue: (i) misrepresents the Impugned Decision; (ii) presents an abstract question; and (iii) does not significantly impact the fairness or the outcome of proceedings.<sup>52</sup>

56. The Thaçi Defence replies that the Pre-Trial Judge failed to consider the KSC's and the SPO's own benediction of the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011 ("Marty Report") and that certification should be granted because this issue raises fundamental issues of fairness.<sup>53</sup>

57. The Pre-Trial Judge considers that portions of the Eighth Issue, as presented by the Thaçi Defence, are not appealable because they misrepresent the Impugned Decision. In particular, the Pre-Trial Judge notes that the Thaçi Defence argument in

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<sup>51</sup> Thaçi Application, para. 16.

<sup>52</sup> Response to Thaçi Application, paras 40-42.

<sup>53</sup> Thaçi Reply, para. 12.

relation to the Marty Report's status as a "Foundational Document" was explicitly dealt with in the Impugned Decision.<sup>54</sup> The Pre-Trial Judge will accordingly apply the test for certification to the following reformulation of the Eighth Issue:

Whether the Pre-Trial Judge erred in finding that the Marty Report's inclusion among the "Foundational Documents" of the KSC did not violate Mr Thaçi's presumption of innocence.

58. The Pre-Trial Judge finds that the Eighth Issue, as reformulated, significantly affects the fair and expeditious conduct of proceedings. It affects significantly the fairness of the proceedings as it relates to Mr Thaçi's right to be presumed innocent, as provided for in Article 21(3) of the Law. It also affects significantly the expeditious conduct of the proceedings, as the Eighth Issue, if resolved at the appellate level, would avoid future litigation surrounding the Marty Report's inclusion among the "Foundational Documents" of the KSC and ensure that proceedings do not continue in the face of alleged violations of Mr Thaçi's right to be presumed innocent. For these reasons, the Pre-Trial Judge finds that the Eighth Issue, as reformulated, significantly affects the fair and expeditious conduct of the proceedings, as provided in Article 45(2) of the Law and Rule 77(2) of the Rules.

59. The Pre-Trial Judge finds that resolution of the Eighth Issue by the Court of Appeals, as reformulated, will materially advance proceedings as it will determine whether Mr Thaçi's presumption of innocence has been violated, an issue which if not settled, would mar the outcome of proceedings.

60. The Pre-Trial Judge accordingly finds that the Eighth Issue, as reformulated in paragraph 57, above, meets the test for certification and grants leave to appeal the reformulated Eighth Issue.

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<sup>54</sup> Impugned Decision, para. 141.

## 8. Ninth Issue

61. The Veseli Defence further argues that the Ninth Issue arises from the Pre-Trial Judge's failure to rule on whether the peculiarities of the Law create a different substantive legal regime that results in unequal treatment before the Law in violation of the Constitution.<sup>55</sup> The Veseli Defence argues that Pre-Trial Judge has failed to engage with its submissions.<sup>56</sup>

62. The SPO responds that the Ninth Issue does not arise from the Impugned Decision as Defence submissions were addressed in another decision of the Pre-Trial Judge and the Veseli Defence does not explain why this issue should have been addressed in the Impugned Decision.<sup>57</sup> The SPO further responds that the Ninth Issue is currently before the Court of Appeals and a duplicative referral would not materially advance proceedings.<sup>58</sup> The SPO also argues that the Veseli Defence's submissions concerning the scope of persons within the KSC's jurisdiction do not fall within the ambit of the Ninth Issue.<sup>59</sup>

63. The Veseli Defence replies that the introduction of a separate substantive law (in the form of the Law) violates the Accused's constitutional rights as it was not anticipated by the Kosovo Constitutional Court in Judgment KO26/15 that the KSC would operate on the basis of a different substantive law.<sup>60</sup> The Veseli Defence argues that consideration must be given to whether the Law gives rise to a difference in treatment between Mr Veseli and other persons tried by other Kosovo courts.<sup>61</sup> The

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<sup>55</sup> Veseli Application, paras 6-7.

<sup>56</sup> Veseli Application, paras 8-10, 12-13.

<sup>57</sup> Response to Veseli Application, para. 7.

<sup>58</sup> Response to Veseli Application, para. 8.

<sup>59</sup> Response to Veseli Application, para. 9.

<sup>60</sup> Veseli Reply, paras 4-5.

<sup>61</sup> Veseli Reply, para. 6.

Veseli Defence further argues that any potential overlap with an issue currently before the Court of Appeals is not determinative of the outcome of the present application.<sup>62</sup>

64. The Pre-Trial Judge finds that the Ninth Issue emanates from the Impugned Decision as the Pre-Trial Judge made a determination regarding the right not to be tried by an extraordinary court and it was in relation to this matter that Mr Veseli had mentioned the issue of inequality under the law.<sup>63</sup> The Ninth Issue also significantly affects the fairness of the proceedings as it is directly linked with Mr Veseli's fair trial rights under Article 6(1) of the ECHR. It also significantly affects the expeditious conduct of proceedings because appellate resolution of whether the KSC's substantive legal regime renders the KSC unlawful for the purposes of Article 103(7) of the Constitution would avoid any future litigation on this matter and ensure that proceedings do not continue in contravention of the Accused's rights. For these reasons, the Pre-Trial Judge finds that the Ninth Issue significantly affects the fair and expeditious conduct of the proceedings, as provided in Article 45(2) of the Law and Rule 77(2) of the Rules.

65. The Pre-Trial Judge also considers that an authoritative determination of the Court of Appeals Panel of the Ninth Issue would materially advance proceedings as it will determine whether Mr Veseli's right not to be tried by an extraordinary court has been violated, an issue which if not settled, would mar the outcome of proceedings.

66. The Pre-Trial Judge finds that the Ninth Issue meets the test for certification and grants leave to appeal the Ninth Issue.

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<sup>62</sup> Veseli Reply, para. 7.

<sup>63</sup> See KSC-BC-2020-06, F00224, Veseli Defence, *Preliminary motion of the Defence of Kadri Veseli to Challenge Jurisdiction on the basis of violations of the Constitution*, 15 March 2021, public, para. 6.

## 9. Conclusion

67. In light of the foregoing, the Pre-Trial Judge certifies the Second Issue, the Seventh Issue and the Ninth Issue, as well as the Fifth Issue and Eighth Issue, as reformulated in paragraphs 39 and 57, respectively, for appellate review. The Pre-Trial Judge denies leave to appeal the First Issue, the Third Issue, the Fourth Issue, and the Sixth Issue.

## V. DISPOSITION

68. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a) **GRANTS** the Veseli Application;
- b) **GRANTS**, in part, the Thaçi Application;
- c) **DENIES** the Thaçi Defence request to dismiss the Response to Thaçi Application and its request to file a further reply;
- d) **CERTIFIES** the Second Issue, the Seventh Issue, and the Ninth Issue;
- e) **CERTIFIES**, as reformulated in paragraphs 39 and 57, above, the Fifth Issue and the Eighth Issue; and
- f) **DENIES** leave to appeal the First Issue, the Third Issue, the Fourth Issue, and the Sixth Issue.



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**Judge Nicolas Guillou**  
**Pre-Trial Judge**

Dated this Monday, 25 October 2021  
At The Hague, the Netherlands.