



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-04
Specialist Prosecutor v. Pjetër Shala

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 10 November 2021

Language: English

Classification: Confidential

**Prosecution Response to the Defence application for leave to appeal the Decision
on Motion Challenging the Form of the Indictment**

Specialist Prosecutor
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Counsel for the Accused
Jean-Louis Gilissen

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 The Accused has not carried his burden to show that any of the four Issues he raises merit appeal at this stage in the litigation.⁴

II. PROCEDURAL HISTORY

2. On 14 February 2020, the SPO submitted for confirmation a strictly confidential and *ex parte* indictment against Pjetër Shala.⁵ On 18 March 2020, the SPO submitted a revised indictment for confirmation.⁶ On 12 June 2020, the Pre-Trial Judge confirmed the revised indictment against the Accused.⁷ On 25 May 2021, the Specialist Prosecutor's Office ('SPO') filed a further lesser redacted version of the indictment ('Indictment').⁸

¹ Defence Application for Leave to Appeal the Decision on Motion Challenging the Form of the Indictment, KSC-BC-2020-04/F00094, 26 October 2021, Confidential ('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 four issues for which leave to appeal is sought are identified at para. 2 of the Request ('Issues').

⁵ Submission of Indictment for Confirmation and Related Requests, KSC-BC_2020-04/F00002, 14 February 2020, strictly confidential and *ex parte*, with Annexes 1-3.

⁶ Submission of Revised Indictment for Confirmation and Related Requests, KSC-BC-2020-04/F00004, 18 March 2020, strictly confidential and *ex parte* with Annexes 1-3.

⁷ Confidential Redacted Version of Decision on the Confirmation of the Indictment against Pjetër Shala, KSC-BC_2020-04/F00007/CONF/RED, 12 June 2020.

⁸ Confidential Annex 1 to Submission of Further Lesser Redacted Version of Confirmed Indictment, KSC-BC-2020-04/F00038/A01, 25 May 2021.

3. On 12 July 2021, the Accused filed a preliminary motion under Rule 97(1)(b) of the Rules alleging defects in the form of the Indictment.⁹ The SPO responded on 6 September 2021,¹⁰ and the Accused replied on 24 September 2021.¹¹

4. On 18 October 2021, the Pre-Trial Judge issued the Decision,¹² granting in part the Motion and ordering the SPO to file a corrected version of the Indictment,¹³ but rejecting the remainder of the Motion, finding that once the ordered amendments were made, the Indictment sets out with sufficient clarity and specificity the facts underpinning the charges.

5. On 26 October 2021, the Accused filed the Request, raising the four Issues addressed below.¹⁴

III. APPLICABLE LAW

6. Outside of the limited circumstances – not applicable here – where interlocutory appeals are of right,¹⁵ ‘[i]nterlocutory appeals, interrupting the continuity of the proceedings, are the exception.’¹⁶ Indeed, a recent decision observed the ‘restrictive nature of this remedy.’¹⁷ 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’;

⁹ Corrected Version of ‘Preliminary Motion by the Defence of Pjetër Shala Challenging the Form of the Indictment,’ KSC-BC-2020-04/F0055/COR, 12 July 2021, Confidential (‘Motion’).

¹⁰ Prosecution Response to the SHALA Defence’s Corrected Version of the Preliminary Motion Challenging the Form of the Indictment, KSC-BC-2020-04/F00070, 6 September 2021, Confidential.

¹¹ Defence Reply to the Prosecution Response to the Preliminary Motion of Pjetër Shala Challenging the Form of the Indictment, KSC-BC-2020-04/F00083, 24 September 2021, Confidential.

¹² Decision on Motion Challenging the Form of the Indictment, KSC-BC-2020-04/F00089, 18 October 2021, Confidential (‘Decision’).

¹³ As ordered, the Corrected Indictment was filed on 1 November 2021. *See* Submission of corrected indictment, KSC-BC-2020-04/F00098, 1 November 2021, Confidential.

¹⁴ Request, KSC-BC-2020-04/F00094, para.2(i)-(iv).

¹⁵ *See* Article 45(2).

¹⁶ *Specialist Prosecutor v. Thaçi et al.*, Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021 (‘Thaçi Decision’), para.9.

¹⁷ Decision on Application for Leave to Appeal the Decision F00180, KSC-BC-2018-01/F00184, 24 August 2021 (‘August 2021 Decision’), para.11.

- 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.¹⁸

7. The burden is on the applicant to establish the existence of these requirements.¹⁹ Consistent with this burden, where an applicant materially misrepresents the challenged decision, the request will be denied.²⁰ Moreover, the prongs identified at (a) through (c) above are cumulative.²¹ An applicant's failure to substantiate any one of them will be fatal to the request.

8. 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.²² 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.²³

9. 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.²⁴ In considering whether an issue affects the outcome of proceedings, 'it must be considered whether a possible error in

¹⁸ See *Thaçi* Decision, KSC-BC-2020-06/F00172, para.10.

¹⁹ 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 Prosecutor's application for warrants of arrest under Article 58, ICC-02/04-01/05-20-US-Exp, 19 August 2005, paras 20-21.

²⁰ See, e.g., August 2021 Decision, KSC-BC-2018-01/F00184, para.24.

²¹ Prong (b) may be satisfied on either of the two bases indicated.

²² *Specialist Prosecutor v. Guçati and Haradinaj*, Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021 ('*Guçati* Decision'), para.12.

²³ *Thaçi* Decision, KSC-BC-2020-06/F00172, para.11.

²⁴ *Guçati* Decision, KSC-BC-2020-07/F00169, para.14.

interlocutory decision would impact the outcome of the case’.²⁵ Even where an issue satisfying either of these possibilities is present, if the impact is not ‘significant’ it will not qualify for interlocutory appeal.²⁶ Speculative, hypothetical, or unidentified impacts on fair trial rights will not be sufficient to meet this requirement.²⁷

10. 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.’²⁸

IV. SUBMISSIONS

11. As described below, none of the Issues the Accused raises meets these requirements. As a threshold matter, however, the SPO observes that the Accused’s arguments in support of his requests for leave to appeal are cursory, and only address the issues he raises and how they satisfy the Rule 77(2) criteria in broad, conclusory statements. For example, in two paragraphs, the Defence broadly asserts that all Issues – without any attempt at differentiation – would have a significant impact on, and appellate resolution would materially advance, proceedings.²⁹ It is patently insufficient to generally argue – as the Defence does – that any dispute with regard to alleged Indictment defects would satisfy the Rule 77(2) criteria. Such submissions ignore the clear wording and purpose of Rules 77(2) and 97(3).³⁰ To consider otherwise

²⁵ *Gucati* Decision, KSC-BC-2020-07/F00169, para.15.

²⁶ *Thaçi* Decision, KSC-BC-2020-06/F00172, para.11.

²⁷ *Thaçi* Decision, KSC-BC-2020-06/F00172, para.26.

²⁸ *Gucati* Decision, KSC-BC-2020-07/F00169, para.17 (internal quotations omitted).

²⁹ Request, KSC-BC-2020-04/F00094, paras 13-14.

³⁰ See, similarly, STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR90.2, Decision on Defence Appeals Against Trial Chamber’s “Decision on Alleged Defects in the Form of the Amended Indictment”, 5 August 2013, paras 6-11 (the Trial Chamber found that any dispute with regard to the indictment, in particular concerning its specificity, is so important that the certification criteria are met; the Appeals Chamber found this to be wholly insufficient reasoning to satisfy the leave to appeal criteria, as otherwise, the parties would be effectively granted an automatic right of appeal of decisions on such

would, in effect, create an automatic right of appeal of decisions on alleged indictment defects, contrary to the clear legal framework of the KSC.³¹

12. Although the SPO responds to each issue individually, it would be reasonable for the Pre-Trial Judge to summarily dismiss the Request, considering the Defence's deficient submissions.

A. THE ACCUSED HAS NOT CARRIED HIS BURDEN ON THE FIRST ISSUE

13. The first issue the Accused raises is: 'Whether the Impugned Decision erred by failing to consider whether the defects in the Indictment confirmation procedure violate the rights of Mr Shala as an accused that are guaranteed by Article 6 of the European Convention on Human Rights ('ECHR') and equivalent provisions of the Kosovo Constitution.'³²

14. This issue does not merit leave to appeal. Under Rule 86(7), challenges to a decision on the indictment are limited to those under Rule 97,³³ and, as confirmed by the Court of Appeals,³⁴ objections to the indictment confirmation procedure do not constitute challenges to the form of the indictment pursuant to Rule 97(1)(b).³⁵ Moreover, the Accused has failed to identify how the purported defects in the Indictment confirmation procedure would significantly affect the fair and expeditious

matters), citing, *inter alia*, ICTR, *Prosecutor v. Gatete*, ICTR-2000-61-I, Decision on Defence Application for Certification to Appeal the Chamber's Decision on Defects in the Indictment, 19 August 2009, para.8 (considering 'that the Defence cannot merely rely on the argument that since the Impugned Decision concerns issues of sufficient notice in the Indictment, the Accused's rights, and thus the fair and expeditious conduct of proceedings, are necessarily affected').

³¹ Pursuant to Rule 97(3), automatic right of appeal is only provided for jurisdictional challenges under Rule 97(1)(a), all other decisions under Rule 97(1) are subject to Rule 77.

³² Request, KSC-BC-2020-04/F00094, para.2(i).

³³ See Rule 86(7).

³⁴ *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on the Defence Appeals Against Decision on Preliminary Motions, KSC-BC-2020-07/IA004/F00007, 23 June 2021 ('Gucati Appeal Decision'), para.23.

³⁵ Decision, KSC-BC-2020-04/F00089, paras. 22-24; *Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Defence Motions Alleging Defects in the Form of the Indictment, KSC-BC-2020-06/F00413/RED, 22 July 2021, para.49.

conduct of the trial or the outcome of the trial, or how an immediate resolution by the Court of Appeals panel will materially advance the proceedings.

B. THE ACCUSED HAS NOT CARRIED HIS BURDEN ON THE SECOND ISSUE

15. The second issue the Accused raises is: 'Whether the Impugned Decision erred by failing to consider whether the cumulative charges in the Indictment against Mr Shala are compatible with Article 6 of the ECHR and the equivalent provisions of the Kosovo Constitution.'³⁶

16. This issue does not merit leave to appeal. As a preliminary matter, the issue misrepresents the Decision, and is therefore not appealable. The Accused incorrectly states that '[t]he Pre-Trial Judge did not address the impact of cumulative charging on the fairness of these proceedings' and that 'he did not assess the interference with Mr Shala's right to a fair trial.'³⁷ To the contrary, the Pre-Trial Judge expressly considered the argument that 'cumulative charging might have an impact on the fair trial rights of the Accused,' but found that the Accused had failed to substantiate these arguments in sufficient detail.³⁸

17. 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 the Accused fails to articulate how cumulative charging would affect the fair and expeditious conduct of the trial or the outcome of the trial in this case. Indeed, the specific concerns identified by the Accused are limited to concerns arising from cumulative convictions, rather than cumulative charging.³⁹ Such arguments are appropriately resolved at trial, where the Accused will have a sufficient opportunity to address any concerns in this regard.

³⁶ Request, KSC-BC-2020-04/F00094, para.2(ii).

³⁷ Request, KSC-BC-2020-04/F00094, para.8.

³⁸ Decision, KSC-BC-2020-04/F00089, para.48.

³⁹ Decision, KSC-BC-2020-04/F00089, paras. 49-50. *See also* Request, KSC-BC-2020-04/F00094, para.9.

C. THE ACCUSED HAS NOT CARRIED HIS BURDEN ON THE THIRD AND FOURTH ISSUES

18. The third and fourth issues the Accused raises are, respectively: 'Whether the Impugned Decision erred by failing to consider whether the lack of sufficient particulars as to the members of the alleged JCE is compatible with the Prosecution's obligation to give sufficient notice of its case as well as Article 6 of the ECHR and the equivalent provisions of the Kosovo Constitution';⁴⁰ and 'Whether the Impugned Decision erred by failing to consider whether the lack of sufficient particulars as to the victims of Mr Shala's alleged criminal activities, including their status at the moment of arrest, is compatible with the Prosecution's obligations to give sufficient notice of its case and Mr Shala's rights under Article 6 of the ECHR and the equivalent provisions of the Kosovo Constitution.'⁴¹

19. Neither of these issues merit leave to appeal because, given the 'extensive[]' information already contained in the Indictment,⁴² additional information on these points would not have a significant impact on the fairness of proceedings. The Accused 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. Further, the Court of Appeals has already had the opportunity to confirm the 'established principle' concerning the pleading of co-perpetrators and JCE members.⁴³ The Pre-Trial Judge applied this principle – which is substantially similar to the established standard for pleading of victims – in the Decision.⁴⁴ In the circumstances, granting leave to appeal at this time on these issues will only serve to delay proceedings.

⁴⁰ Request, KSC-BC-2020-04/F00094, para.2(iii).

⁴¹ Request, KSC-BC-2020-04/F00094, para.2(iv).

⁴² Decision, KSC-BC-2020-04/F00089, para.74 (finding that the co-perpetrators and victims were extensively named).

⁴³ *Gucati* Appeal Decision, KSC-BC-2020-07/IA004/F00007, para.45.

⁴⁴ Decision, KSC-BC-2020-04/F00089, paras 31-32, 55-57, 74, 109.

V. CLASSIFICATION

20. This filing is confidential pursuant to Rule 82(4). The SPO does not object to its reclassification as public.

VI. CONCLUSION AND RELIEF REQUESTED

21. For the foregoing reasons, the SPO respectfully requests that the Pre-Trial Judge reject the Request.

Word count: 2326



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Wednesday, 10 November 2021

At The Hague, the Netherlands.