



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: Public

**Prosecution Response to the Defence application for leave to appeal the Decision
on Motion Challenging the Establishment and Jurisdiction of the Specialist
Chambers**

Specialist Prosecutor
Jack Smith

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

3. On 12 July 2021, the Accused filed a preliminary motion seeking to dismiss the Indictment due to lack of jurisdiction, raising challenges to the legality of the Kosovo

¹ Defence Application for Leave to Appeal the Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, KSC-BC-2020-04/F00095, 26 October 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 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 to Submission of Further Lesser Redacted Version of Confirmed Indictment, KSC-BC-2020-04/F00038/A01, 25 May 2021.

Specialist Chambers ('KSC').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 rejecting the Defence Motion.

5. On 26 October 2021, the Accused filed the Request, raising the four Issues addressed below.¹³

III. APPLICABLE LAW

6. Outside of the limited circumstances – not applicable here – where interlocutory appeals are of right,¹⁴ '[i]nterlocutory appeals, interrupting the continuity of the proceedings, are the exception.'¹⁵ Indeed, a recent decision observed the 'restrictive nature of this remedy.'¹⁶ 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.¹⁷

⁹ Preliminary Motion of the Defence of Pjetër Shala to Challenge the Jurisdiction of the KSC, KSC-BC-2020-04/F00054, 12 July 2021 ('Motion').

¹⁰ Prosecution Response to Shala Defence Preliminary Motion Challenging the Jurisdiction of the KSC, KSC-BC-2020-04/F00071, 6 September 2021.

¹¹ Defence Reply to the Prosecution Response to the Preliminary Motion of Pjetër Shala Challenging the Jurisdiction of the KSC, KSC-BC-2020-04/F00084, Public, 24 September 2021 ('Reply').

¹² Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, KSC-BC-2020-04/F00088, Public, 18 October 2021, para.104 ('Decision').

¹³ Request, KSC-BC-2020-04/F00095, para.2(i)-(iv).

¹⁴ See Article 45(2).

¹⁵ *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.

¹⁶ Decision on Application for Leave to Appeal the Decision F00180, KSC-BC-2018-01/F00184, 24 August 2021 ('August 2021 Decision'), para.11.

¹⁷ See Thaçi Decision, KSC-BC-2020-06/F00172, para.10.

7. The burden is on the applicant to establish the existence of these requirements.¹⁸ Consistent with this burden, where an applicant materially misrepresents the challenged decision, the request will be denied.¹⁹ Moreover, the prongs identified at (a) through (c) above are cumulative.²⁰ 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.²¹ 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.²²

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.²³ In considering whether an issue affects the outcome of proceedings, 'it must be considered whether a possible error in interlocutory decision would impact the outcome of the case'.²⁴ Even where an issue satisfying either of these possibilities is present, if the impact is not 'significant' it will not qualify for interlocutory appeal.²⁵ Speculative, hypothetical, or unidentified impacts on fair trial rights will not be sufficient to meet this requirement.²⁶

¹⁸ 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.

¹⁹ See, e.g., August 2021 Decision, KSC-BC-2018-01/F00184, para.24.

²⁰ Prong (b) may be satisfied on either of the two bases indicated.

²¹ *Specialist Prosecutor v. Gucati 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 ('Gucati Decision'), para.12.

²² *Thaçi* Decision, KSC-BC-2020-06/F00172, para.11.

²³ *Gucati* Decision, KSC-BC-2020-07/F00169, para.14.

²⁴ *Gucati* Decision, KSC-BC-2020-07/F00169, para.15.

²⁵ *Gucati* Decision, KSC-BC-2020-07/F00169, para.17 (internal quotations omitted).

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

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.’²⁷

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 applicable 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.²⁸ It is patently insufficient to generally argue – as the Defence does – that any challenge arising under the European Convention on Human Rights (‘ECHR’) or Kosovo Constitution would satisfy the Rule 77(2) criteria. Such submissions ignore the clear wording and purpose of Rules 77(2) and 97(3).²⁹ To consider otherwise would, in effect, create an automatic

²⁷ Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, Public, 1 April 2021, para.17 (internal quotations omitted).

²⁸ Request, KSC-BC-2020-04/F00095, paras 12-13.

²⁹ 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 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’).

right of appeal in instances extending beyond jurisdictional challenges, contrary to the clear legal framework of the KSC.³⁰

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 Law and procedure applicable to the KSC offer weaker procedural guarantees for the rights of an accused in breach of Articles 6 and 7 of the ECHR and the equivalent provisions of the Kosovo Constitution.'³¹

14. The first issue does not merit leave to appeal. First, this is not an appealable issue because it is not sufficiently precise or specific. It expresses concerns about 'the Law and procedure applicable to the KSC' without identifying the specific provisions it challenges, and it complains of 'weaker procedural guarantees' without specifying what they are purportedly weaker than. Thus, the issue as phrased is too nebulous to meet the Accused's burden of demonstrating an appealable issue or otherwise satisfy the applicable criteria.

15. Moreover, this issue should not be certified for appeal because it was not properly raised before the Pre-Trial Judge and the arguments in support misrepresent the procedural history. As the Pre-Trial Judge noted, the Accused did not raise the issue of procedural guarantees for the rights of an accused until his Reply.³² Even then, the Accused's challenge was framed entirely around how such guarantees purportedly fell short of the protections in the Kosovo Code of Criminal Procedure,

³⁰ 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.

³¹ Request, KSC-BC-2020-04/F00095, para.2(i).

³² Decision, KSC-BC-2020-04/F00088, para.74.

rather than the ECHR or Kosovo Constitution.³³ The Accused now relies on a selective quotation³⁴ to claim that this issue was raised in the Motion. However, the full quote makes clear that the original issue did not address procedural guarantees but rather the establishment of the KSC and its primacy over other courts in Kosovo.³⁵ To certify an appeal under these circumstances, on an issue that was not properly raised or briefed before the Pre-Trial Judge, would violate principles of fundamental fairness and judicial economy and unnecessarily delay the proceedings.³⁶

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

16. The second issue the Accused raises is: 'Whether the Impugned Decision erred by failing to consider whether the KSC has been established in accordance with the law as an impartial and independent tribunal as required by Article 6 of the ECHR and the equivalent provisions of the Kosovo Constitution.'³⁷

17. This issue does not merit leave to appeal. First, the issue misrepresents the Decision, and is therefore not appealable. The Accused incorrectly states that the Decision 'fail[ed] to consider' this issue.³⁸ In fact, as acknowledged in the Request,³⁹ the Pre-Trial Judge expressly considered the parties' arguments about independence

³³ Reply, KSC-BC-2020-04/F00084, para.13 ('The KSC procedure does not follow the Kosovo Code of Criminal Procedure and offers weaker procedural guarantees for the rights of an accused. For instance, the procedural guarantees made available to an accused under Articles 242, 244 and 245 of the Kosovo Code of Criminal Procedure are not available to accused before the KSC, while the equivalent provisions of the Law provide for a significantly weaker protection.')

³⁴ Request, KSC-BC-2020-04/F00095, para.6 ('[t]he Law ... deviates from the Constitution of Kosovo and the domestic Code of Criminal Procedure and breaches the overriding principle of legality').

³⁵ Motion, KSC-BC-2020-04/F00054, para.2 ('The Law purports to grant primacy to the KSC over all other courts in Kosovo and it has been interpreted in a manner that substantially deviates from the Constitution of Kosovo and the domestic Code of Criminal Procedure and breaches the overriding principle of legality that is guaranteed therein.') (emphasis added).

³⁶ In this respect, the Court of Appeals has found that summary dismissal is warranted where arguments were not properly raised at first instance and are first made on appeal. See *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Defence Appeals Against Decision on Preliminary Motions, KSC-BC-2020-06/IA004-F00007, 23 June 2021, para.15.

³⁷ Request, KSC-BC-2020-04/F00095, para.2(ii).

³⁸ Request, KSC-BC-2020-04/F00095, para.2(ii).

³⁹ Request, KSC-BC-2020-04/F00095, para.8.

and impartiality,⁴⁰ including in the context of Article 6(1) of the ECHR,⁴¹ and concluded that the KSC is independent and impartial.⁴² Submissions in support of this Issue do nothing more than summarise the Impugned Decision and make generalised submissions allegedly applicable to all Issues,⁴³ without identifying any discrete error or any concrete impact of this particular issue. This issue therefore represents a general disagreement with the Pre-Trial Judge's conclusion and does not constitute an appealable issue or otherwise satisfy the applicable criteria.

18. This issue is also not appealable because it is not sufficiently precise. The Accused states in a conclusory way that the Decision 'fail[ed] to consider' and 'fail[ed] to assess properly' the Defence submissions on this issue,⁴⁴ but the Accused does not identify any discrete error, any specific arguments not considered, or state concretely whether his claim is that the Pre-Trial Judge did not engage with the arguments sufficiently or that he did not do so at all.

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

19. The third issue the Accused raises is: 'Whether the Impugned Decision erred by failing to consider whether the purported primacy granted by the Law to Customary International Law ('CIL') violates Article 7 of the ECHR and the equivalent provisions of the Kosovo Constitution.'⁴⁵

20. This issue does not merit leave to appeal. First, the issue misrepresents the Decision, and is therefore not appealable. The Accused incorrectly states that the Decision 'fail[ed] to consider' this issue.⁴⁶ In fact, the Pre-Trial Judge expressly

⁴⁰ See, e.g., Decision, KSC-BC-2020-04/F00088, paras 11, 17, 20-21.

⁴¹ See, e.g., Decision, KSC-BC-2020-04/F00088, para.17.

⁴² Decision, KSC-BC-2020-04/F00088, para.15. See also para.76 (citing 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, paras 100-110).

⁴³ Request, KSC-BC-2020-04/F00095, para.8.

⁴⁴ Request, KSC-BC-2020-04/F00095, paras 2(ii), 11.

⁴⁵ Request, KSC-BC-2020-04/F00095, para.2(iii).

⁴⁶ Request, KSC-BC-2020-04/F00095, para.2(iii).

considered the parties' arguments about customary international law,⁴⁷ including in the context of Article 7 of the ECHR and Article 33 of the Constitution,⁴⁸ and rejected the Defence arguments on this issue.⁴⁹

21. The third issue is also not appealable because, for the same reasons given above in relation to the second issue, it (and submissions in support) is not sufficiently precise and represents a mere disagreement with the Decision.⁵⁰

22. Moreover, this issue should not be certified for appeal because, as the Pre-Trial Judge noted, the Accused failed to raise certain arguments about the application of the Law and the request for a referral to the Specialist Chamber of the Kosovo Constitutional Court until its Reply.⁵¹ As a result, these arguments were appropriately dismissed *in limine* pursuant to Rule 76.⁵² To certify an appeal under these circumstances, on arguments that were not properly raised or briefed before the Pre-Trial Judge, would violate principles of fundamental fairness and judicial economy and unnecessarily delay the proceedings.⁵³

D. THE ACCUSED HAS NOT CARRIED HIS BURDEN ON THE FOURTH ISSUE

23. The fourth issue is: 'Whether the Impugned Decision erred by failing to consider that the charges against the Accused (a) for the crime of arbitrary detention and (b) that rely on the doctrine of Joint Criminal Enterprise violate Article 7 of the ECHR and the equivalent guarantees of the Kosovo Constitution.'⁵⁴

24. This issue does not merit leave to appeal. First, the issue misrepresents the Decision, and is therefore not appealable. The Accused incorrectly states that the Decision 'fail[ed] to consider' this issue.⁵⁵ In fact, the Pre-Trial Judge expressly

⁴⁷ Decision, KSC-BC-2020-04/F00088, paras 22-32.

⁴⁸ Decision, KSC-BC-2020-04/F00088, paras 23, 85-86

⁴⁹ Decision, KSC-BC-2020-04/F00088, paras 82-86.

⁵⁰ See paras 17-18 above.

⁵¹ Decision, KSC-BC-2020-04/F00088, para.81.

⁵² Decision, KSC-BC-2020-04/F00088, para.81.

⁵³ See also fn.36 above.

⁵⁴ Request, KSC-BC-2020-04/F00095, para.2(iv).

⁵⁵ Request, KSC-BC-2020-04/F00095, para.2(v).

considered the parties' arguments about joint criminal enterprise⁵⁶ and arbitrary detention,⁵⁷ including in the context of Article 7 of the ECHR and Article 33 of the Constitution,⁵⁸ and rejected the Accused's arguments on these issues.⁵⁹

25. This issue is also not appealable for the same reasons given above in relation to the second and third issues. Namely, the fourth issue and submissions in support are not sufficiently precise and represent a mere disagreement with the Decision.⁶⁰

V. CONCLUSION AND RELIEF REQUESTED

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

Word count: 2821



Jack Smith
Specialist Prosecutor

Wednesday, 10 November 2021

At The Hague, the Netherlands.

⁵⁶ Decision, KSC-BC-2020-04/F00088, paras 33-45.

⁵⁷ Decision, KSC-BC-2020-04/F00088, paras 46-58.

⁵⁸ *See, e.g.*, Decision, KSC-BC-2020-04/F00088, paras 35, 48, 91.

⁵⁹ Decision, KSC-BC-2020-04/F00088, paras 90-103.

⁶⁰ *See* paras 17-18, 21 above.