



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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

Before: **Pre-Trial Judge**
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 29 November 2021

Language: English

Classification: **Public**

**Decision on Application for Leave to Appeal “Decision on Motion Challenging
the Form of the Indictment”**

Specialist Prosecutor

Jack Smith

Counsel for the Accused

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 45 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 77 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 19 June 2020, further to a decision by the Pre-Trial Judge ("Confirmation Decision"),² the Specialist Prosecutor's Office ("SPO") submitted the Confirmed Indictment.³

2. On 18 October 2021, the Pre-Trial Judge issued, subsequent to a preliminary motion challenging the form of the indictment ("Indictment Motion") lodged by the Defence for Pjetër Shala ("Defence" and "Mr Shala"),⁴ the "Decision on Motion Challenging the Form of the Indictment" ("Impugned Decision").⁵

¹ KSC-BC-2020-04, F00001, President, *Decision Assigning a Pre-Trial Judge*, 14 February 2020, public.

² KSC-BC-2020-04, F00007, Pre-Trial Judge, *Decision on the Confirmation of the Indictment against Pjetër Shala*, 12 June 2020, strictly confidential and *ex parte*. A confidential redacted version and a public redacted version were issued on 6 May 2021, F00007/CONF/RED and F00007/RED.

³ KSC-BC-2020-04, F00010, Specialist Prosecutor, *Submission of Confirmed Indictment*, 19 June 2020, public, with Annex 1, strictly confidential and *ex parte*, and Annex 2, confidential. A confidential, lesser redacted version and a public, further redacted version of the Confirmed Indictment were submitted on 31 March 2021, F00016/A01, confidential, and F00016/A02, public. A further lesser redacted, confidential version of the Confirmed Indictment was submitted on 25 May 2021, F00038/A01. Following the Pre-Trial Judge's decision on the Defence's motion challenging the form of the Confirmed Indictment, a corrected confirmed indictment was submitted on 1 November 2021, F00098/A01, confidential. A public redacted version of the latter was submitted on 16 November 2021, F00107/A01, public.

⁴ KSC-BC-2020-04, F00055, Specialist Counsel, *Preliminary Motion by the Defence of Pjetër Shala Challenging the Form of the Indictment* ("Indictment Motion"), 13 July 2021, confidential (a corrected version was submitted on 15 July 2021, F00055/COR and a public redacted version on 9 September 2021, F00055/COR/RED).

⁵ KSC-BC-2020-04, F00089, Pre-Trial Judge, *Decision on Motion Challenging the Form of the Indictment*, 18 October 2021, confidential. A public redacted version was filed on the same day, F00089/RED.

3. On 26 October 2021, the Defence submitted an application seeking certification to appeal certain issues in relation to the Impugned Decision (“Application”).⁶
4. On 5 November 2021, the Pre-Trial Judge varied, *proprio motu*, the time limits of the briefing schedule in view of the number of issues arising from, *inter alia*, the Application and determined to issue his decision by no later than Monday, 29 November 2021.⁷
5. On 10 November 2021, the SPO responded to the Application (“Response”).⁸ No reply was submitted by the Defence.

II. SUBMISSIONS

6. The Defence seeks leave to appeal the Impugned Decision on the following four issues (collectively “Four Issues”):

(i) 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 (“First Issue”);

(ii) 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 (“Second Issue”);

(iii) 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 (“Third Issue”); and

⁶ KSC-BC-2020-04, F00094, Specialist Counsel, *Defence Application for Leave to Appeal the Decision on Motion Challenging the Form of the Indictment*, 26 October 2021, confidential.

⁷ KSC-BC-2020-04, F00101, Pre-Trial Judge, *Order Varying Time Limits for Certification Requests and Setting the Date for the Fourth Status Conference and for Submissions*, 5 November 2021, public, paras 14, 19(a).

⁸ KSC-BC-2020-04, F00103, Specialist Prosecutor, *Prosecution Response to the Defence Application for Leave to Appeal the Decision on Motion Challenging the Form of the Indictment*, 10 November 2021, confidential.

(iv) 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 obligation 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 ("Fourth Issue").⁹

7. The Defence argues that the Four Issues are precise, specific and arise directly from the Impugned Decision.¹⁰ The Defence is further of the view that: (i) the Four Issues significantly affect the fair conduct of the proceedings as well as the outcome of the trial as they go to the core of the guarantees of fair trial protected in the Kosovo Constitution ("Constitution") and in the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR");¹¹ and (ii) an immediate resolution by the Court of Appeals will materially advance the proceedings as it would provide certainty on whether the proceedings are continuing in compliance with fundamental guarantees of fairness and legality, in particular by ensuring that the trial can proceed in a narrow and effective way that respects the rights of Mr Shala.¹²

8. The SPO responds that the Application should be rejected because it fails to meet the requirements for leave to appeal and the Defence has not carried the burden to show that any of the Four Issues merit appeal at this stage of the litigation.¹³ More specifically, the SPO argues that the Accused's arguments in support of his application 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.¹⁴

⁹ Application, para. 2.

¹⁰ Application, para. 5.

¹¹ Application, para. 13.

¹² Application, para. 14.

¹³ Response, paras 1, 21.

¹⁴ Response, para. 11.

III. APPLICABLE LAW

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

10. 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

11. 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.¹⁵ The Pre-Trial Judge sets forth below key aspects of the interpretation of the law and incorporates by reference findings on the interpretation of these provisions as set out in detail previously.¹⁶

¹⁵ 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.

¹⁶ See *Thaçi Decision on Leave to Appeal*, paras 9-17.

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

- (i) Whether the matter is an “appealable issue”;
- (ii) Whether the issue at hand would significantly affect:
 - (a) The fair and expeditious conduct of the proceedings, or
 - (b) The outcome of the trial; and
- (iii) Whether, in the opinion of the Panel, an immediate resolution by the Appeals Chamber may materially advance the proceedings.¹⁷

13. An “issue” has been described as 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.¹⁸ Hypothetical or abstract questions or the argument that the Pre-Trial Judge’s entire reasoning is erroneous equally do not meet the test.¹⁹ The first prong of the certification test, as set out in (ii), contains two alternatives: The issue must have significant repercussions on either (a) “the fair and expeditious conduct of proceedings” or (b) “the outcome of the trial”.²⁰ The second prong of the test for certification, as set out in (iii), 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.²¹ Failure to establish the first prong, exempts the Pre-Trial Judge from assessing the second prong.²² Lastly, where necessary, the Pre-Trial Judge will provide clarifications if it is clear that a misrepresentation of the decision so warrants.²³

¹⁷ See *Thaçi* Decision on Leave to Appeal, para. 10.

¹⁸ See *Thaçi* Decision on Leave to Appeal, para. 11.

¹⁹ See *Thaçi* Decision on Leave to Appeal, para. 11.

²⁰ See *Thaçi* Decision on Leave to Appeal, para. 12.

²¹ See *Thaçi* Decision on Leave to Appeal, para. 16.

²² See *Thaçi* Decision on Leave to Appeal, para. 15.

²³ See *Thaçi* Decision on Leave to Appeal, para. 17.

A. FIRST ISSUE

14. The Defence claims that the Pre-Trial Judge failed to examine whether the application of a different legal regime with weaker procedural guarantees than those applicable under the Kosovo Criminal Procedure Code (“KCPC”) is justified and compatible with the fair trial guarantees that are binding on proceedings before the Specialist Chambers (“SC”).²⁴

15. The SPO responds that the First Issue does not merit leave to appeal insofar as objections to the indictment confirmation procedure do not constitute challenges to the form of the indictment pursuant to Rule 97(1)(b) of the Rules. Equally, the Accused has failed to identify how the purported defects in the Indictment confirmation procedure would significantly affect the fair and expeditious conduct of the trial or its outcome, or how an immediate resolution by the Court of Appeals panel will materially advance the proceedings.²⁵

16. The Pre-Trial Judge recalls that, in the Indictment Motion, the Defence had argued that the indictment confirmation procedure before the SC stood in stark contrast with the procedures laid down in Articles 242 and 245 of the KCPC.²⁶ For these reasons, it had asked the Pre-Trial Judge to be rigorous in the assessment of the motion²⁷ and to remedy the prejudice allegedly suffered by Mr Shala by reconsidering the findings made in the Confirmation Decision against him.²⁸ In the Impugned Decision, the Pre-Trial Judge found that the assessment of the Indictment Motion was

²⁴ Application, para. 6.

²⁵ Response, para. 14.

²⁶ Indictment Motion, para. 12.

²⁷ Indictment Motion, para. 13 (“[...] The Defence submits that, as a prerequisite for making the trial adversarial and upholding the principle of equality of arms, the Pre-Trial Judge's assessment of this Motion must be rigorous and open to conclusions different to the ones adopted in his Confirmation Decision of 12 June 2020”).

²⁸ KSC-BC-2020-04, F00083, Defence for Mr Shala, *Defence Reply to the Prosecution Response to the Preliminary Motion of Pjetër Shala Challenging the Form of the Indictment*, 24 September 2021, confidential, para. 4 (“[...] The Defence invited the Judge to remedy such prejudice by reconsidering, where appropriate, his previous findings on these matters”).

independent of the nature of the procedure relating to the confirmation of the indictment, and that, in any case, the articles of the KCPC invoked by the Defence had not been expressly incorporated into the Law, and could not, therefore, be relied upon to allege any unfairness of the indictment confirmation procedure.²⁹ In these circumstances, it is evident from the Indictment Motion itself that the Defence did not request the Pre-Trial Judge, at the time, to make a finding whether the alleged defects in the indictment confirmation procedure violated the rights of Mr Shala as protected by the Constitution and the ECHR.

17. Accordingly, while in the Impugned Decision the Pre-Trial Judge duly considered and addressed all the Defence's arguments, as presented in the Indictment Motion, he did not make a finding on the compatibility of the indictment confirmation procedure with the Constitution and the ECHR as it is now framed by the Defence in the First Issue, because he had not been requested to do so.

18. In light of the above, and insofar as the Pre-Trial Judge did not have a duty to assess *proprio motu* the compatibility of the indictment confirmation procedure with the Constitution and the ECHR in the context of a decision on a motion challenging the form of the indictment, the Pre-Trial Judge considers that the First Issue misrepresents the Impugned Decision and, accordingly, it does not constitute an appealable issue. As a result, it is not necessary to address the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules.

B. SECOND ISSUE

19. The Defence avers that the Pre-Trial Judge failed to address the impact of cumulative charging on the fairness of these proceedings and, in general, with Mr Shala's right to a fair trial.³⁰ The Defence further claims that the Pre-Trial Judge

²⁹ Impugned Decision, para. 23.

³⁰ Application, para. 8.

misinterpreted the Defence's reference to Article 4 of Protocol No. 7 to the ECHR, as he failed to consider the prejudice suffered by Mr Shala for being prosecuted for multiple offences in relation to the same conduct and its impact in light of the limited resources available to the Defence.³¹

20. The SPO responds that the Second Issue misrepresents the Impugned Decision and is therefore not appealable, since the Pre-Trial Judge expressly considered the impact of cumulative charging on the fair trial rights of the Accused.³² In any case, the SPO avers that the Accused has failed to articulate how cumulative charging would affect the fair and expeditious conduct of the trial or the outcome of the trial in this case, as the concerns raised by the Accused are limited to those stemming from cumulative convictions, rather than cumulative charging.³³

21. The Pre-Trial Judge finds that, in the Impugned Decision, he noted that he was aware that cumulative charging might have an impact on the fair trial rights of the Accused, such as the right to have adequate time and resources to prepare his defence or the right to a trial within reasonable time, and might place a burden on the Defence in terms of workload.³⁴ He further found that that the Defence had not substantiated these arguments in detail, but had simply averred, in general terms, that the practice of inappropriate cumulative charging had been shown to have an adverse impact on a range of rights of the Accused and placed an undue burden on the Defence.³⁵ It is clear from the Impugned Decision that the arguments of the Defence had been contemplated, to the extent they had been made in the Indictment Motion. Insofar as the Defence claims, in the Application, that the Pre-Trial Judge allegedly failed 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

³¹ Application, para. 9.

³² Response, para. 15.

³³ Response, para. 16.

³⁴ Impugned Decision, para. 48.

³⁵ Impugned Decision, para. 48.

Constitution, the Pre-Trial Judge finds that the Defence misrepresents the Impugned Decision. Lastly, insofar as the Defence alleges that the Pre-Trial Judge misinterpreted in the Impugned Decision the Defence's reference to Article 4 of Protocol 7 to the ECHR and "failed to consider the prejudice suffered", the Pre-Trial Judge notes that the rationale of said provision was taken into account and assessed in the context of the present stage of the proceedings.³⁶ More specifically, the Pre-Trial Judge found that, while Article 4 of Protocol 7 to the ECHR prohibits the repetition of criminal proceedings for an offence for which an individual has already been finally acquitted or convicted, it does not address the problem of a set of facts possibly constituting various offences in the same criminal proceedings.³⁷ Accordingly, the Pre-Trial Judge found that assigning different legal qualifications in relation to the same acts in an indictment does not inherently threaten the *ne bis in idem* principle, as it does not involve the actual assignment of liability or punishment. Lastly, the Pre-Trial Judge found that the alleged risk of prejudice to the Accused uniquely pertained to the different concept of cumulative convictions.³⁸ In the Application, the Defence misrepresents the abovementioned findings.

22. Accordingly, the Pre-Trial Judge considers that the Second Issue does not constitute an appealable issue. As a result, it is not necessary to address the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules.

³⁶ Impugned Decision, para. 50.

³⁷ Impugned Decision, para. 50.

³⁸ Impugned Decision, para. 49.

C. THIRD AND FOURTH ISSUES

23. In respect of the Third Issue, the Defence submits that Mr Shala is entitled to be provided with better particulars of the SPO's case in order to ensure his right to adequate time and facilities to present his answer to the SPO's case.³⁹

24. In respect of the Fourth Issue, the Defence submits that the Pre-Trial Judge failed to consider the adverse impact on the preparation of the defence case caused by the lack of clarity on the particulars of the victims of his alleged criminal activities.⁴⁰

25. The SPO responds that neither of these issues merit leave to appeal because, having regard to the extensive information already contained in the Confirmed Indictment, additional information on these points would not have a significant impact on the fairness of proceedings and would, on the contrary, only serve to delay proceedings.⁴¹

26. At the outset, and to ensure more clarity which could assist the Court of Appeals Panel, the Pre-Trial Judge reformulates the Third and Fourth Issues as follows:

(iii) Whether the **Pre-Trial Judge erred in finding that the level of detail** 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 ("Third Issue"); and

(iv) Whether the **Pre-Trial Judge erred in finding that the level of detail** 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 obligation 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

27. *Appealable Issues.* The Pre-Trial Judge considers that the Third and the Fourth Issues arise from the Impugned Decision as they concern the Pre-Trial Judge's findings that the pleading of the members of the alleged Joint Criminal Enterprise and the alleged victims of Mr Shala's criminal activities is not defective.⁴² The Pre-Trial

³⁹ Application, para. 10.

⁴⁰ Application, para. 11.

⁴¹ Response, para. 19.

⁴² Impugned Decision, paras 55-57, 103 and 109.

Judge is satisfied that the Third and Fourth Issues are not mere disagreements with the Impugned Decision, but discrete topics for resolution by the Court of Appeals.

28. *Fairness and expeditiousness.* The Pre-Trial Judge notes that the Third and Fourth Issues concern the specificity and clarity of the charges contained in the Confirmed Indictment and, as such, they relate to the Accused's right under Article 21(4)(a) of the Law and Article 6(3)(a) of the ECHR to be informed promptly and in detail of the nature and cause of the charges against him. Further, the Pre-Trial Judge considers that it is important to resolve issues related to the specificity and clarity of the charges early on, in order for the Accused to have adequate time and facilities to prepare his defence, as provided in Article 21(4)(c) of the Law and Article 6(3)(b) of the ECHR. Early resolution of the issues would also streamline the proceedings and advance the Accused's right to be tried within a reasonable time, as provided in Article 21(4)(d) of the Law.⁴³

29. *Materially advance the proceedings.* The Pre-Trial Judge considers that matters regarding the specificity and clarity of an indictment may benefit from an authoritative determination by the Court of Appeals at the earliest opportunity as this would (a) provide legal certainty regarding the interpretation and application of the legal standards on specificity and clarity of the indictment, and (b) minimise delays and the diverting of resources at subsequent stages of the proceeding to address claims regarding inadequate notice of the charges.⁴⁴ Accordingly, the Pre-Trial Judge finds that an immediate resolution by the Court of Appeals of the Third and Fourth issues may materially advance the proceedings.

30. In light of the above, the Pre-Trial Judge grants leave to appeal the Third and Fourth Issues.

⁴³ See also KSC-BC-2020-06, F00534, Pre-Trial Judge, *Decision on Defence Applications for Leave to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment* ("*Thaçi et al. Decision on Indictment Motion*"), 18 October 2021, public, para. 18, with further references.

⁴⁴ *Thaçi et al. Decision on Indictment Motion*, para. 20, with further references.

V. DISPOSITION

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

- (a) **GRANTS**, in part, the Application;
- (b) **CERTIFIES** the Third and Fourth Issues, as formulated in paragraph 26 above;
- (c) **DENIES** the First and Second Issues; and
- (d) **ORDERS** the Registry to reclassify the Application and the Response as public.



Judge Nicolas Guillou

Pre-Trial Judge

Dated this Monday, 29 November 2021

At the Hague, the Netherlands.