



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

In: KSC-BC-2020-06
Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 27 January 2022

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Classification: Confidential

Consolidated Prosecution response to Defence requests for certification to appeal the 'Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)'

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I. INTRODUCTION

1. The Requests¹ should be rejected because they respectively fail to meet the requirements for leave to appeal under Article 45 of the Law² and Rule 77 of the Rules.³ The THAÇI Defence and VESELI Defence (collectively, 'Defence') fail to demonstrate that any of the issues they raise meet the strict and high threshold for certification.⁴

2. As a preliminary matter, the SPO notes that the THAÇI Request, which was filed publicly, contains confidential information⁵ and relates to the confidential Decision.⁶ Pursuant to Rule 82(4), the THAÇI Request should therefore be reclassified as confidential.

II. SUBMISSIONS

3. The issues raised by the Defence significantly overlap and have been addressed below in three categories: (a) issues related to redactions; (b) issues related to the nature of the proposed amendments; and (c) issues related to prejudice.

4. At the outset, the SPO notes that the THAÇI Defence addresses all four of its issues together, in a generic manner, simply stating – without demonstrating – that

¹ Thaçi Defence Request for Certification to Appeal the "Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)", KSC-BC-2020-06/F00645, 17 January 2022 ('THAÇI Request'); Veseli Defence Application for Leave to Appeal Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), KSC-BC-2020-06/F00646, 17 January 2022, Confidential ('VESELI Request', together with the THAÇI Request, 'Requests').

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

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 applicable law has been set out in prior decisions. *See, for example*, Decision on the Krasniqi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00479, 20 September 2021, para.14; *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 ('Case 7 Decision'), paras 12, 14-15, 17.

⁵ Certain information in paragraph 1 of the THAÇI Request (KSC-BC-2020-06/F00645) was redacted from the public redacted version of the Amendment Request. *See* Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), KSC-BC-2020-06/F00455, 3 September 2021, Strictly Confidential and *Ex Parte* ('Amendment Request'); KSC-BC-2020-06/F00455/RED.

⁶ Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), KSC-BC-2020-06/F00635, 23 December 2021, Confidential ('Decision').

the issues meet the necessary requirements.⁷ On this basis alone, the THAÇI Request should be dismissed.

A. THE DEFENCE FAIL TO CARRY THEIR BURDEN ON ISSUES RELATED TO REDACTIONS

5. The Defence raise four issues relating to redaction matters that are addressed together in this section against the three cumulative certification requirements.

6. The THAÇI Defence raises the following issue in relation to redactions:

Issue 1: Whether the PTJ erred in granting leave to amend the Indictment in respect of proposed new paragraph 42 and amended paragraph 141 of Annex 2 of the Submission of Corrected Indictment and Request to Amend (part of the Third Category of allegations) before the Accused has received a lesser redacted version of the Indictment and Outlines, having found that the Defence was able to provide meaningful challenges to the Proposed Amendments ('THAÇI's First Issue').⁸

7. The VESELI Defence raises the following issues in relation to redactions:

First Issue: Whether the Pre-Trial Judge erred in law by failing to find a violation of the right to be heard in article 39(8) of the Law and rule 90(1)(b) of the Rules, in relation to allegations contained in paragraph 42 of the Proposed (now Amended) Indictment that are entirely redacted ('VESELI's First Issue').⁹

Second Issue: Whether the redactions applied to paragraph 42 of the Amended Indictment violate the right of Mr Veseli to be informed promptly of the nature and cause of the charges against him, as guaranteed by Article 30(1) of the Constitution, Article 6 of the ECHR, as well as Article 21(4)(a) of the Law' ('VESELI's Second Issue').¹⁰

Fifth Issue: Whether the Pre-Trial Judge erred in law by failing to consider appropriate measures to counterbalance the redactions applied to paragraph 42 of the Amended Indictment ('VESELI's Fifth Issue').¹¹

8. First, neither of the Defence teams explain precisely how these issues satisfy the first criterion, namely that each of the issues constitutes an 'appealable issue'.

⁷ THAÇI Request, KSC-BC-2020-06/F00645, para.11.

⁸ THAÇI Request, KSC-BC-2020-06/F00645, para.10.

⁹ VESELI Request, KSC-BC-2020-06/F00646, para.2.

¹⁰ VESELI Request, KSC-BC-2020-06/F00646, para.2.

¹¹ VESELI Request, KSC-BC-2020-06/F00646, para.2.

9. THAÇI's First Issue amounts to a mere disagreement – it contests the general outcome of the Decision itself, rather than a specific and discrete finding.¹² THAÇI's submissions fail to identify an appealable issue in the context of the Pre-Trial Judge's reasoning, who explained that he had scrutinised the redactions, noted they stemmed from previously granted protective measures, and found them necessary and proportionate to protect the identities of witnesses and victims.¹³ VESELI's First and Second Issues suffer from the same flaw, they do not merit leave to appeal because they are framed too broadly and amount to mere disagreements with the Pre-Trial Judge's conclusions.¹⁴

10. In addition, relating to THAÇI's First Issue, the SPO has now filed lesser redacted versions of both the Indictment and Rule 86(3)(b) outline.¹⁵ However, the redactions relating to the relevant amendments and the corresponding evidentiary outlines¹⁶ remain necessary. Accordingly, the fact that the Pre-Trial Judge granted leave to amend the Indictment prior to the filing of a lesser redacted version is irrelevant and THAÇI's First Issue is moot.

11. Regarding VESELI's Fifth Issue, this is not an appealable issue because the VESELI Defence does not identify any 'counterbalancing measures' that the Pre-Trial Judge should have considered and did not. Moreover, the Defence's submissions misrepresent the Decision in several aspects.¹⁷ The VESELI Defence wrongly states that the Pre-Trial Judge conducted no discussion on counterbalancing measures¹⁸ and that neither the SPO nor the Decision indicates decisions which constitute the basis for the concerned redactions.¹⁹ To the contrary, the Pre-Trial Judge adequately recalled the

¹² THAÇI Request, KSC-BC-2020-06/F00645, para.11.

¹³ Decision, KSC-BC-2020-06/F00635, para.47.

¹⁴ VESELI Request, KSC-BC-2020-06/F00646, paras 4-5, 7-8.

¹⁵ Prosecution submission of lesser redacted versions of Indictment and Rule 86(3)(b) outline with confidential redacted Annexes 1-2, KSC-BC-2020-06/F00647, 17 January 2022, Confidential.

¹⁶ See KSC-BC-2020-06/F00455/CONF/RED/A02; ; KSC-BC-2020-06/F00455/CONF/RED/A05.

¹⁷ Where an applicant materially misrepresents the challenged decision, the request will be denied. See, for example, Decision on Application for Leave to Appeal the Decision F00180, KSC-BC-2018-01/F00184, 24 August 2021, para.24.

¹⁸ VESELI Request, KSC-BC-2020-06/F00646, para.16.

¹⁹ VESELI Request, KSC-BC-2020-06/F00646, para.17.

source of the court-ordered redactions, namely previously granted protective measures, which were also referenced by the SPO in the Amendment Request.²⁰ In addition, as reflected in the conclusory and unsupported statement by the Defence that ‘the rights of the accused must prevail’ over the safety of witnesses,²¹ the Fifth Issue amounts to a mere disagreement with the outcome of the Pre-Trial Judge’s assessment.

12. Second, while the Defence’s failure to carry their burden on the first requirement to grant certification alone should lead to rejection of leave to appeal, these issues would also not *significantly* affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The loose and unsupported claims by the Defence that the right to be heard is being infringed are misguided and insufficient to trigger appellate review.²² The THAÇI and VESELI Defence in essence attempt to litigate the power of the Pre-Trial Judge to approve redactions in the Indictment.²³ In addition, the alleged impact of the redactions on the Accused’s right to prepare a defence is highly speculative at this stage.²⁴ As found by the Pre-Trial Judge, (i) considering the stage of proceedings and the limited nature of the proposed amendments, the Accused would not be deprived of adequate time; and (ii) as necessary, schedules may be adjusted.²⁵

13. Third, the THAÇI Defence unpersuasively argues that THAÇI’s First Issue satisfies the last prong of the certification test. The THAÇI Defence again makes only generalised arguments for all four issues as a group.²⁶ None of the general, unsubstantiated claims show concretely that granting appeal is necessary to move

²⁰ Decision, KSC-BC-2020-06/F00635, para.47, fn.124, *referring to* Amendment Request, KSC-BC-2020-06/F00455, para.12, fn.25.

²¹ VESELI Request, KSC-BC-2020-06/F00646, para.16.

²² THAÇI Request, KSC-BC-2020-06/F00645, para.13; VESELI Request, KSC-BC-2020-06/F00646, para.5.

²³ THAÇI Request, KSC-BC-2020-06/F00645, para.13; VESELI Request, KSC-BC-2020-06/F00646, paras 8, 17.

²⁴ THAÇI Request, KSC-BC-2020-06/F00645, para.17.

²⁵ Decision, KSC-BC-2020-06/F00635, para.36.

²⁶ THAÇI Request, KSC-BC-2020-06/F00645, para.13.

proceedings forward along the right course.²⁷ Indeed, as noted above, the Defence have now received the lesser redacted version of the Indictment and Rule 86(3)(b) outlines that they seek, and the redactions in the relevant paragraphs remain necessary. Therefore, granting appeal now would only serve to unnecessarily delay proceedings.

14. Similarly, the VESELI Defence also fails to demonstrate how an immediate resolution of VESELI's First, Second, and Fifth Issues may materially advance the proceedings. Regarding VESELI's First Issue, offering 'clarity on the interpretation' of a provision²⁸ is not sufficient to trigger the exceptional intervention of the Court of Appeals. Indeed, it is generally understood that 'certification is not a method by which a party may obtain an advisory opinion or judicial guidance'.²⁹ In addition, contrary to Defence submissions, an immediate resolution is not warranted *per se* each time an applicant claims there is 'a potential violation of constitutional and human rights of the Accused'.³⁰ The VESELI Defence's argument that because the issue concerns the right to a fair trial, it affects the outcome of the trial and therefore warrants the immediate resolution by a Court of Appeals Panel, is fundamentally flawed.³¹ The applicant must satisfy *three* cumulative requirements to be granted leave to appeal. Here, the VESELI Defence essentially argues that the third prong is satisfied by an argument which mirrors the substance of the second prong. This is wrong and demonstrates the inability of the Defence to show that this third requirement is met.

15. Regarding VESELI's Second Issue, the VESELI Defence concedes that the Court of Appeals is currently seized with a ground of appeal similar to VESELI's Second

²⁷ Case 7 Decision, KSC-BC-2020-07/F00169, para.17.

²⁸ VESELI Request, KSC-BC-2020-06/F00646, para.6.

²⁹ STL, STL-18-10/PT/PTC, Decision on Defence request for certification for appeal of Trial Chamber II's Decision on Defence request for reconsideration of the Decision to hold trial in absentia, 8 December 2020, para.9.

³⁰ VESELI Request, KSC-BC-2020-06/F00646, paras 6, 9, 18.

³¹ VESELI Request, KSC-BC-2020-06/F00646, para.6, 9, 18.

Issue.³² Immediate resolution of this issue would therefore not materially advance the proceedings.³³

16. Regarding VESELI's Fifth Issue, as this is in effect a challenge to the propriety of redactions with regard to the Defence's fair trial rights, and since this issue has been thoroughly litigated, there is no reasonable argument that re-litigating it in this context would settle an unsettled matter or move proceedings forward.

B. THE DEFENCE FAIL TO CARRY THEIR BURDEN ON ISSUES RELATED TO THE NATURE OF THE AMENDMENTS

17. The second issue raised by the THAÇI Defence ('THAÇI's Second Issue') and the third and fourth issues raised by the VESELI Defence ('VESELI's Third Issue' and 'VESELI's Fourth Issue', respectively) all concern the nature of the Third Category of amendments.³⁴

18. THAÇI's Second Issue is: 'Whether the PTJ erred in finding that the Third Category of amendments did not amount to new charges within the meaning of Rule 90(2) of the Rules'.³⁵ As explained above, the THAÇI Defence addresses all four issues together for the first criterion and thus fails to substantiate properly why the Second Issue qualifies as appealable.³⁶ Further, this issue is impermissibly broad and constitutes a mere disagreement with the Pre-Trial Judge's finding that the Third Category amendments are not new charges. The THAÇI Defence falls short on identifying precisely what the Pre-Trial Judge should have done differently, and does not take issue with the reasoning in support of the Pre-Trial Judge's ruling.

19. VESELI's Second Issue is: 'Whether the new allegations of personal participation could constitute an independent basis for conviction, *i.e.*, a new charge,

³² VESELI Request, KSC-BC-2020-06/F00646, para.8.

³³ *See, similarly*, Decision on Defence Applications for Leave to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment, KSC-BC-2020-06/F00534, 18 October 2021, paras 73-74.

³⁴ *See* Decision, KSC-BC-2020-06/F00635, para.9 (defining the 'Third Category').

³⁵ THAÇI Request, KSC-BC-2020-06/F00645, para.10.

³⁶ THAÇI Request, KSC-BC-2020-06/F00645, para.11.

by virtue of being re-characterised by a Court of Appeals Panel acting pursuant to Article 46(6).³⁷ This issue does not merit leave to appeal because it concerns a speculative and hypothetical scenario of possible future actions by a Court of Appeals panel. The VESELI Defence fails to demonstrate that this is an appealable issue – to the contrary, it amounts to both an abstract question and hypothetical concern. For these same reasons, this issue cannot satisfy the second or third prongs of the analysis.

20. VESELI's Fourth Issue is: 'Whether the Pre-Trial Judge erred by finding that the redacted allegation of personal participation of the Accused, referred to in paragraph 42 of the Amended Indictment does not carry an additional risk of conviction'.³⁸ As a preliminary matter, the Defence's submissions that, due to relevant redactions, the VESELI Defence is essentially entitled to an automatic right to appeal are unsupported and without merit.³⁹ As such, they should be summarily dismissed on that basis alone. In any event, the VESELI Defence has not demonstrated that VESELI's Fourth Issue qualifies as an appealable issue. The Fourth Issue amounts to a mere disagreement with the Pre-Trial Judge's conclusion, and misrepresents the Decision. In particular, the VESELI Defence's argument that the jurisprudence cited by the Pre-Trial Judge does not support its finding is based on the VESELI Defence's own unsupported position that the Third Category of amendments are 'new JCE allegations'.⁴⁰ To the contrary, the Pre-Trial Judge explicitly stated that the two additional incidents further underpin the allegation already pleaded in the Indictment that the Accused personally participated 'in the intimidation, interrogation, mistreatment and detention of Opponents'.⁴¹ As a logical consequence, the Pre-Trial Judge explained that 'the Third Category [of amendments] does not allege a new type of participation in the alleged JCE, but rather adds further precision to a form of participation already pleaded'.⁴²

³⁷ VESELI Request, KSC-BC-2020-06/F00646, para.2.

³⁸ VESELI Request, KSC-BC-2020-06/F00646, para.2.

³⁹ VESELI Request, KSC-BC-2020-06/F00646, para.13.

⁴⁰ VESELI Request, KSC-BC-2020-06/F00646, para.14.

⁴¹ Decision, KSC-BC-2020-06/F00635, para.26

⁴² Decision, KSC-BC-2020-06/F00635, para.26.

Also for these reasons, the VESELI Defence will have adequate opportunity to raise arguments challenging these charges at trial, and so this issue does not require a referral to an Appeals Panel at this time.

C. THE DEFENCE FAIL TO CARRY THEIR BURDEN ON THE ISSUES RELATED TO THE PREJUDICE TO THE ACCUSED

21. Both the third and fourth issues raised by the THAÇI Defence ('THAÇI's Third Issue' and 'THAÇI's Fourth Issue', respectively) and the sixth issue raised by the VESELI Defence ('VESELI's Sixth Issue') concern allegations of prejudice.

22. THAÇI's Third Issue is: 'Whether the PTJ erred in finding that the Proposed Amendments were not prejudicial to or inconsistent with the rights of the Accused, in particular to be tried in a reasonable time'.⁴³ THAÇI's Fourth Issue is: 'Whether the PTJ erred in finding that there was no lack of diligence on the part of the SPO in bringing the Proposed Amendments and thus that the Proposed Amendments were not prejudicial or inconsistent with the rights of the Accused'.⁴⁴

23. For the same reasons developed above, the THAÇI Defence has not demonstrated that either THAÇI's Third Issue or Fourth Issue are appealable issues. By not engaging with the reasoning of the Pre-Trial Judge and instead simply taking issue with his conclusion, the THAÇI Defence demonstrates that these issues are mere disagreements with the outcome of the Decision. Thus, neither of these issues meet the first prong of the certification test.

24. On the second certification requirement, the THAÇI Defence's claim that granting the proposed amendments would significantly affect the fair and expeditious conduct of the proceedings is unsupported.⁴⁵ THAÇI's assertion that 'there is a real likelihood of delay to the start of the trial' is purely speculative.⁴⁶ In particular, the

⁴³ THAÇI Request, KSC-BC-2020-06/F00645, para.10.

⁴⁴ THAÇI Request, KSC-BC-2020-06/F00645, para.10.

⁴⁵ THAÇI Request, KSC-BC-2020-06/F00645, para.15.

⁴⁶ THAÇI Request, KSC-BC-2020-06/F00645, para.15.

Defence omits the Pre-Trial Judge's finding that the additional steps required for the First and Second Category of amendments⁴⁷ can be carried out in parallel with the remaining pre-trial phase.⁴⁸ Indeed, it is granting appeal, and the additional time and uncertainty occasioned by that, that would delay proceedings. In this respect, no decision has even been reached on whether to grant leave for the First and Second Category of amendments.⁴⁹

25. The same considerations apply to VESELI's Sixth Issue, which is: 'Whether prosecutorial "diligence" must be assessed against the conduct of the SPO, as opposed to the stage of the proceedings; whether the proposed amendments are inconsistent with the right to be tried within a reasonable time; whether the scope of the amendments infringe the right to have adequate time to prepare the defence; and taken together, whether the amendments are prejudicial to, and inconsistent with the rights of the Accused'.⁵⁰

26. The sweeping approach taken by the Defence when 'framing' VESELI's Sixth Issue as composite and multilayered demonstrates that this issue is not adequately specific and fails to satisfy the first criterion of the certification test. In addition, for the reasons outlined above,⁵¹ VESELI's Sixth Issue – supported by general statements about rights infringements⁵² – is purely speculative and premature and therefore cannot satisfy the second or third certification requirements. Thus, the VESELI Defence has not met its burden and granting leave to appeal would unduly delay the proceedings.

⁴⁷ See Decision, KSC-BC-2020-06/F00635, para.9 (defining the 'First Category' and 'Second Category').

⁴⁸ Decision, KSC-BC-2020-06/F00635, para.35.

⁴⁹ Decision, KSC-BC-2020-06/F00635, para.48.

⁵⁰ VESELI Request, KSC-BC-2020-06/F00646, para.2.

⁵¹ See, for example, paras 12, 14-16, 24 above.

⁵² VESELI Request, KSC-BC-2020-06/F00646, para.25.

III. CLASSIFICATION

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

IV. RELIEF REQUESTED

28. For the foregoing reasons, the SPO requests that the Pre-Trial Judge:
- a. reclassify the THAÇI Request as confidential; and
 - b. reject both Requests.

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Thursday, 27 January 2022

At The Hague, the Netherlands.