

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

Filing Participant: Specialist Counsel for Hashim Thaçi

Date: 15 March 2022

Language: English

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**Thaçi Defence Request for Certification to Appeal the “Decision on Specialist
Prosecutor’s Request to Amend its Exhibit List and to Authorise Related
Protective Measures”**

Specialist Prosecutor

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I. INTRODUCTION

1. The present litigation stems from the SPO's admitted breach of its disclosure obligations, and the deadline for submission of its Exhibit List.

2. The SPO has demonstrated that it is incapable of consistently meeting deadlines set by itself, and by the Pre-Trial Judge.¹ Timeframes are unilaterally dispensed with, retroactively amended, and continue to shift backwards for months at a time, justifying the Defence observation that deadlines have stopped having meaning to the SPO.² In this most recent case, the SPO has submitted, and the Pre-Trial Judge has accepted, that no prejudice arises from the late disclosure of further material and proposed amendments to the SPO Exhibit List, weeks after the SPO's 17 December 2021 deadline. The further material in question comprises 132 documents falling under Rule 102(1)(b), which had not been included in prior disclosure packages ("Further Material").³

3. For much of the material concerned, the SPO does not even attempt to offer a justification for the delay to the Court. As the Pre-Trial Judge noted, "the SPO does not: (i) explain why some of the documents have been obtained only at this stage; or (ii) justify the alleged administrative oversights that caused the non-identification of the Further Materials that should have been included in the Exhibit List filed on 17 December 2021".⁴

¹ KSC-BC-2020-06/F00688, Thaçi Defence Response to Prosecution notice of Rule 102(1)(b) disclosure and related requests, 11 February 2022 ("Defence Response"), paras. 2-6.

² KSC-BC-2020-06, Transcript of Tenth Status Conference, 4 February 2022 ("Tenth Status Conference"), p. 872.

³ KSC-BC-2020-06, F00670, Prosecution Notice of Rule 102(1)(b) Disclosure and Related Requests, 31 January 2022 ("SPO Request"), para. 1.

⁴ KSC-BC-2020-06/F00727, Confidential Redacted Version of Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures, 8 March 2022 ("Impugned Decision"), para. 25.

4. Despite this, in the Impugned Decision, Pre-Trial Judge provides no remedy for the SPO's breaches, and imposes no consequences for its conduct. In doing so, he committed the errors set out below, which warrant the intervention of the Court of Appeals Panel. Therefore, in accordance with Rule 77 of the Rules⁵ and Article 45 of the Law,⁶ the Defence applies for leave to appeal from the Impugned Decision on the issues detailed below.

II. APPLICABLE LAW

5. To appeal the Impugned Decision, certification is required.⁷

6. Article 45(2) of the Law provides, in the relevant part, that the Pre-Trial Judge shall grant certification where an appeal:

“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.”

7. Rule 77(2) 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 a Court of Appeals Panel may materially advance the proceedings.”

8. The following specific requirements, as confirmed by the jurisprudence of the Kosovo Specialist Chambers (“KSC”), therefore apply:

- (a) Whether the matter is an “appealable issue”;
- (b) Whether the issue at hand would significantly affect:
 - (i) The fair and expeditious conduct of the proceedings, or

⁵ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”).

⁶ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”).

⁷ Rule 77(1), Rules; Article 45(2), Law.

- (ii) The outcome of the trial; and
- (c) Whether, in the opinion of the Pre-Trial Judge, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.⁸

9. An “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.”⁹ The applicant must 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.”¹⁰

10. Certification does not concern whether a decision is correctly reasoned, but whether the standard for certification is met.¹¹

III. THE PROPOSED ISSUES FOR APPEAL

11. Certification is sought to appeal the following three issues (individually “Issue”, together “Issues”), all of which satisfy the requirements of Article 45(2) and Rule 77(2):

⁸ KSC-BC-2020-06/F00534, Decision on Defence Applications for Leave to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment, 18 October 2021 (“Thaçi Decision on Leave to Appeal Defects Decision”), para. 14; KSC-BC-2020-07/F00169, Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, 1 April 2021, (“Gucati and Haradinaj Decision on Leave to Appeal”) para. 6; KSC-BC-2020-06/F00172, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021 (“Thaçi Decision on Leave to Appeal”), para. 10.

⁹ Gucati and Haradinaj Decision on Leave to Appeal, para. 12; Thaçi Decision on Leave to Appeal, para. 11.

¹⁰ *Ibid.*

¹¹ Gucati and Haradinaj Decision on Leave to Appeal, para. 18; Thaçi Decision on Leave to Appeal, para. 17.

Issue 1: Whether the Pre-Trial Judge erred in concluding that “no prejudice to the Defence arises”, having failed to consider or give adequate weight to the prejudice raised by the Defence;¹²

Issue 2: Whether the Pre-Trial Judge erred in relying on the Defence’s ability to conduct “follow up investigations” in relation to the Further Material, thereby erroneously placing the burden on the Defence to remedy the SPO’s breaches; and

Issue 3: Whether, by relying on the purported volume of late disclosure compared to the scope of material already disclosed, the Pre-Trial Judge erred by creating a sliding scale of SPO compliance with its disclosure obligations which varies with the size of the case, which has no basis in the KSC’s statutory framework or practice.

IV. SUBMISSIONS: THE TEST FOR CERTIFICATION IS MET

A. THE ISSUES ARE APPEALABLE ISSUES

12. The three identified Issues are appealable as they arise from the Impugned Decision and contest specific findings made by the Pre-Trial Judge. In formulating these issues, the Defence is not simply asserting that the Pre-Trial Judge should have decided differently on the question of an appropriate remedy for the SPO’s disclosure violations, but rather, has identified specific errors that undermine his findings and warrant their reversal. As such, they are not mere disagreements with the Impugned Decision, but identify discrete topics, the resolution of which is essential for the determination of the matters arising in the judicial cause under examination.

¹² Defence Response, paras. 17-18.

13. Nor do they amount to hypothetical concerns. The identified errors have an immediate and concrete impact on the ongoing conduct of the pre-trial phase, and more generally on the approach being taken to this central question of pre-trial disclosure. Rather than being abstract questions, the Issues have a direct link to the conduct of the pre-trial proceedings, justifying their examination at this stage.

B. THE ISSUES WOULD SIGNIFICANTLY AFFECT 1) THE FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS OR 2) THE OUTCOME OF THE TRIAL

14. The criteria to be satisfied under these two prongs of the leave to appeal test are disjunctive. The Defence submits that the Issues satisfy the first criteria regarding the significant impact on the “fair and expeditious conduct of proceedings” which is generally understood as referencing the norms of a fair trial.¹³

15. As a starting point, for a trial to be considered fair, all accused are entitled to fundamental rights to have **adequate time and facilities** for the preparation of his defence,¹⁴ and to be tried **within a reasonable time**.¹⁵ Rule 95(2) of the Rules enumerates the functions of the Pre-Trial Judge after confirmation of the indictment, who shall “ensure that the proceedings are **not unduly delayed** and shall take all necessary measures for the **expeditious** preparation of the case for trial.”¹⁶

16. In identifying the Pre-Trial Judge’s failure to consider or give sufficient weight to the concrete prejudice raised by the Defence, **Issue 1** significantly affects the accused’s right to a fair trial, and the expeditious conduct of the proceedings. The Defence had identified for the Pre-Trial Judge the concrete knock-on effects of late SPO disclosure on its organisation and trial preparation, including having to review

¹³ Gucati and Haradinaj Decision on Leave to Appeal, para. 14.

¹⁴ Article 30(3) of the Kosovo Constitution; Article 21(4)(c) of the Law; Article 6(3)(b) of the ECHR.

¹⁵ Article 31(2) of the Kosovo Constitution; Article 21(4)(d) of the Law; Article 6(1) of the ECHR.

¹⁶ See *further*, Defence Response, paras. 7-8.

again all the material previously disclosed for the witnesses in question.¹⁷ Some aspects of these Defence submissions are referenced in the Impugned Decision,¹⁸ and others are not. None of them are given sufficient weight in his consideration of prejudice.¹⁹ Therefore, Issue 1 has an immediate and significant impact on both fairness and expeditiousness of the trial, as disclosure issues are being decided without the Pre-Trial Judge considering the consequences of SPO violations in practice. In terms of fairness, this raises particular prejudice given that all the while, Mr Thaçi remains in detention at the SPO's request. This was another factor raised by the Defence,²⁰ which features nowhere in the Impugned Decision.

17. **Issue 2** arises from the Pre-Trial Judge's position that the Defence suffers no prejudice if the Defence can take steps to remedy the prejudice itself. Concretely, if the Defence has conducted investigations into a particular witness, the Pre-Trial Judge considers that no prejudice arises from the Defence in receiving additional material about that witness, because it can proceed with "follow up investigations".²¹ Being required to re-conduct investigations because of the SPO's failure to meet its obligations is prejudicial, particularly in the context of a case with 326 proposed SPO witnesses. More importantly, the Pre-Trial Judge's perception that this burden shift is acceptable, has a significant impact on an accused's right to adequate time and facilities for defence preparation, and to be tried within a reasonable time. If the solution to ongoing disclosure violations is to be that "the Defence can just re-investigate", then the SPO's own untimely disclosure and undue delays will simply be passed to the Defence to correct, which is incompatible with either expeditious or fair proceedings. Issue 2 therefore also fulfils the requirements for certification.

¹⁷ Defence Response, paras. 17-18.

¹⁸ Impugned Decision, para. 21.

¹⁹ Impugned Decision, paras. 27-28.

²⁰ Defence Response, para. 18.

²¹ Impugned Decision, para. 28.

18. **Issue 3** addresses the Pre-Trial Judge's reliance on the purportedly relatively small volume of late disclosure "when compared to the overall extent" of SPO disclosure in this case,²² thereby accepting the SPO's submission that this case is now so big that violations in the order of 132 documents will not cause prejudice.²³ Following this logic, the SPO's own decision to charge this case in the broadest of terms, means that it is now immune from the consequences of disclosure violations, because the Further Material represents a drop in the bucket of the overall volume disclosed. An approach whereby the necessity of complying with deadlines is somehow linked to the size of the case is not only incompatible with the KSC's statutory framework, but means this Issue has a significant impact on the fair and expeditious conduct of the proceedings, warranting certification.

C. AN IMMEDIATE RESOLUTION BY THE COURT OF APPEALS PANEL MAY MATERIALLY ADVANCE THE PROCEEDINGS

19. The present litigation concerns the SPO breach of the 17 December 2021 deadline for its Exhibit List and the late disclosure of Further Materials. However, in the Impugned Decision, the Pre-Trial Judge himself anticipates future violations by the SPO, noting that when they happen, they "will be subject to greater scrutiny".²⁴

20. Against this backdrop, the Impugned Decision directly impacts on the expeditiousness of the proceedings by providing no incentive for the SPO to dedicate further resources to meeting its deadlines, and ensuring that the case file can be properly transmitted to the Trial Panel without further delay.²⁵ Notably, on 24 February 2022, the SPO made **another** request to add further documents to the Exhibit

²² Impugned Decision, para. 27.

²³ SPO Request, paras. 3-4.

²⁴ Impugned Decision, para. 30.

²⁵ See Tenth Status Conference, p. 930.

List,²⁶ now confident in the coverage provided by the Impugned Decision that its continued breach of these deadlines will have no consequences. If the Defence is correct on any of the Issues, intervention by the Court of Appeals Panel will draw a line in the sand, and help put an end to delays stemming from disclosure, thereby materially advancing the proceedings.

21. Immediate resolution by the Court of Appeals Panel would also provide legal certainty as regards who bears the burden of remedying future disclosure violations, and preserve the right of the accused to be tried in a reasonable time. These are issues that should be determined immediately, at the pre-trial phase, minimising subsequent delays at trial and on appeal, and to address claims which will certainly continue should the current approach to disclosure be maintained.

V. RELIEF SOUGHT

22. For the above reasons, the Defence respectfully requests that the Pre-Trial Judge grant leave to appeal the Issues pursuant to Article 45(2) of the Law and Rule 77(2).

[Word count: 2,235 words]

Respectfully submitted,



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Tuesday, 15 March 2022

At Tampa, United States

²⁶ KSC-BC-2020-06/F00708, Prosecution Rule 102(2) submission and related requests with confidential Annexes 1 and 2 and strictly confidential ex parte Annex 3, 24 February 2022.