



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

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Language: English

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**Prosecution response to Thaçi Defence request for certification to appeal Decision
F00727**

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I. INTRODUCTION

1. The THAÇI 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 THAÇI Defence does not demonstrate that any of the issues alleging errors in the Impugned Decision⁴ – which, *inter alia*, authorised the Specialist Prosecutor’s Office (‘SPO’) to amend the exhibit list to add the Further Materials⁵ – meet the strict threshold for certification.⁶

II. SUBMISSIONS

2. The three issues raised by the Defence do not merit leave to appeal. The first,⁷ second,⁸ and third⁹ issues are not appealable issues and are based on disagreements

¹ 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”, KSC-BC-2020-06/F00733, 15 March 2022 (‘THAÇI Request’).

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

⁵ Confidential Redacted Version of ‘Prosecution notice of Rule 102(1)(b) disclosure and related requests’, KSC-BC-2020-06/F00670 (‘SPO Request’), 31 January 2022, para.1 (‘The Further Materials comprise 55 items comprising prior statements of witnesses and exhibits associated with prior statements, as well as five other exhibits’).

⁶ 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.

⁷ THAÇI Request, KSC-BC-2020-06/F00733, para.11 (‘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’).

⁸ THAÇI Request, KSC-BC-2020-06/F00733, para.11 (‘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’).

⁹ THAÇI Request, KSC-BC-2020-06/F00733, para.11 (‘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.’).

with and mischaracterisations of the Pre-Trial Judge's findings in the Impugned Decision. Such deficient submissions and related hypothetical and speculative concerns are also incapable of satisfying the second and third prongs of the leave to appeal standard.

3. Below, the SPO addresses the first and second certification requirements for each issue and, consistent with the THAÇI Request, addresses the third prong together for all three issues. In this regard, the Defence necessarily fails to meet its burden, insofar as it impermissibly addresses all issues together in relation to the first and third prongs of the certification test,¹⁰ without differentiation or explanation.¹¹

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

4. In support of the First Issue,¹² the Defence raises the same arguments already considered and rejected by the Pre-Trial Judge, without demonstrating any error and thereby expressing mere disagreement with the findings of the Pre-Trial Judge. As set out below, on the basis of the same defective submissions, the Defence also fails to demonstrate any significant impact on the proceedings or their outcome.

5. Regarding the Defence claim that some aspects of the Defence submissions¹³ were referenced in the Impugned Decision, whereas others were not,¹⁴ the Defence only specifically identifies one factor allegedly not addressed, namely, the fact that the Accused are in detention. However, not only did the Impugned Decision explicitly reference this Defence submission,¹⁵ the Accused's detention is subject of separate, periodic reviews.

¹⁰ THAÇI Request, KSC-BC-2020-06/F00733, Sections IV(A), (C).

¹¹ Each issue must satisfy the three prong test. *See* Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, Confidential, paras 11-12.

¹² THAÇI Request, KSC-BC-2020-06/F00733, para.16.

¹³ Thaçi Defence Response to Prosecution notice of Rule 102(1)(b) disclosure and related requests, KSC-BC-2020-06/F00688, Confidential, paras 17-18.

¹⁴ THAÇI Request, KSC-BC-2020-06/F00733, para.16.

¹⁵ Impugned Decision, KSC-BC-2020-06/F00727, para.21.

6. Other than mentioning detention, the Defence does not identify which specific submissions were not considered or indicate how the Pre-Trial Judge erred in assigning them weight. In any event, the Pre-Trial Judge expressly considered the potential impact on Defence investigations and the rights of the Accused.¹⁶ Even assuming that there were certain underlying arguments not expressly addressed in the Impugned Decision, there is no obligation on the Pre-Trial Judge to explicitly address and provide separate reasoning on every supporting argument.¹⁷

7. Furthermore, the Defence claim that it must review again all the material previously disclosed for the five witnesses impacted by the Further Materials clearly demonstrates the exaggerated character of their submissions. In the present case, the time necessary to review and analyse the material previously disclosed in relation to the witnesses which the Further Materials impacted is at best minimal in light of the current stage of the proceedings and the limited amount of such materials.¹⁸

8. Finally, contrary to Defence submissions, the Pre-Trial Judge did not find any disclosure breach; rather, he noted that the SPO Request concerning the Further Materials had been made by the Rule 102(1)(b) deadline.¹⁹ Thus, for the Defence to argue that the fairness and expeditiousness of the proceedings is impacted by the Pre-Trial Judge's failure to consider the consequences of purported disclosure violations²⁰ is not only contradictory, but a misrepresentation of the findings in the Impugned Decision.

9. Thus, the first issue raised by the Defence does not meet the certification test.

¹⁶ Impugned Decision, KSC-BC-2020-06/F00727, paras 26-29.

¹⁷ Impugned Decision, KSC-BC-2020-06/F00727, para.20.

¹⁸ Impugned Decision, KSC-BC-2020-06/F00727, para.28 (considering that the Defence teams only recently started their investigations and would have sufficient time to analyse the Further Materials).

¹⁹ Impugned Decision, KSC-BC-2020-06/F00727, para.27.

²⁰ THAÇI Request, KSC-BC-2020-06/F00733, para.16.

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

10. The second issue rests on a misreading of the Impugned Decision. The Defence formulates the language of the second issue and, as with the first issue,²¹ premises its arguments on the existence of a disclosure breach by the SPO.²² No such finding was made by the Pre-Trial Judge. On the contrary, the Pre-Trial Judge considered that the SPO Request concerning the Further Materials was made within the deadline set for Rule 102(1)(b) disclosure and considered that, in light of the sequence of the applicable deadlines for filing the exhibit list and the outstanding Rule 102(1)(b) material, it was understandable that some limited amendments to the exhibit list might be necessary.²³ Accordingly, the second issue does not arise from, and in fact mischaracterises, the Impugned Decision. It should be denied on this basis alone.²⁴

11. Moreover, the Defence submission that it will be required to ‘re-conduct’ investigations ‘because of the SPO’s failure to meet its obligations’²⁵ is inaccurate and speculative. In this regard, the Defence submissions are framed as hypotheticals.²⁶ The Defence fails to substantiate its claim that additional investigations were or are required in light of the Further Materials and makes no attempt to provide concrete examples of steps it had to take to remedy the purported prejudice.

12. Even assuming *arguendo* that additional investigations were or are required, Defence submissions fail to demonstrate any colourable impact on the proceedings or their outcome. The Pre-Trial Judge considered that the Defence investigation had just commenced and that, as noted above, the SPO Request was made within the Rule 102(1)(b) deadline. Further, the proceedings are still at the pre-trial stage, and no date

²¹ See above para.9.

²² THAÇI Request, KSC-BC-2020-06/F00733, para.17.

²³ Impugned Decision, KSC-BC-2020-06/F00727, para.29.

²⁴ See, e.g., Decision on Application for Leave to Appeal the Decision F00180, KSC-BC-2018-01/F00184, 24 August 2021, para.24.

²⁵ THAÇI Request, KSC-BC-2020-06/F00733, para.17.

²⁶ THAÇI Request, KSC-BC-2020-06/F00733, para.17.

has set yet been set for the filing of the Defence's Rule 95(5) materials, for the transfer of the case file to the Trial Panel, or the start of the trial.

13. Thus, the second issue raised by the Defence does not meet the certification test.

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

14. The third issue raised relates to the Pre-Trial Judge's reliance on the volume of purported late disclosure in comparison to the scope of material already disclosed.²⁷ The Defence's representations in relation to the third issue are fundamentally flawed and inflated.

15. To begin with, the Defence wrongly asserts that, because of the size of the case, the SPO is immune from the consequences of disclosure violations.²⁸ This assertion finds no support in the Pre-Trial Judge's findings in the Impugned Decision. Nor does the Defence demonstrate how disclosing the Further Materials within the deadline for Rule 102(1)(b) materials impacted the fair and expeditious conduct of proceedings.

16. Contrary to the THAÇI Defence's extravagant and inflated numbers, the Further Materials consisted of 60 items, with accompanying translations, not the 132 documents cited in the Response. The deliberate choice to present a hyperbolic picture once again, counting translations, rather than acknowledge the actual number – including after clarification from the SPO at the last Status Conference²⁹ – demonstrates the Defence's infinite efforts to distract from the seriousness of the charges in this case and discredit the SPO through inaccurate representations.

17. The Defence once again misrepresents the Impugned Decision, which took into account not only (i) the limited amount of Further Materials when compared to the overall extent of the SPO disclosure in this case, but also (ii) the overall scope of the case; (iii) the fact that the Further Materials relate to witnesses whose other statements

²⁷ THAÇI Request, KSC-BC-2020-06/F00733, para.18.

²⁸ THAÇI Request, KSC-BC-2020-06/F00733, para.18.

²⁹ Compare THAÇI Request, KSC-BC-2020-06/F00733, para.18 with SPO Request, KSC-BC-2020-06/F00670, para.1 and Transcript of Status Conference dated 4 February 2022, p. 876.

and associated exhibits have already been disclosed; (iv) the fact that the SPO Request was filed on 31 January 2022, *i.e.* within the deadline set for the disclosure of Rule 102(1)(b) material; and (v) the fact that the SPO Request was filed shortly after the SPO discovered or identified the documents.³⁰

18. Lastly, the Defence seems to imply a finding of the Pre-Trial Judge in the Impugned Decision, according to which the necessity of complying with deadlines is linked to the size of the case.³¹ The Pre-Trial Judge made no such finding. The size of the case is one of many factors considered by the Pre-Trial Judge in finding that the SPO has shown good cause for the requested amendments.³²

19. Therefore, the Defence has not demonstrated that the third issue meets the test for certification.

D. THAÇI FAILS TO SATISFY THE THIRD PRONG OF THE CERTIFICATION TEST

20. Turning to the last requirement of the certification test, the Defence fails to demonstrate how an immediate resolution by the Court of Appeals will materially advance the proceedings. The only argument advanced by the Defence – which is, by its very nature, speculative – is that appellate intervention would provide legal certainty regarding the burden of remedying future disclosure violations. Again, the Defence misrepresents the Impugned Decision, which did not find any violations of disclosure obligations, and thus no remedy was warranted.

21. The Defence also misconstrues the Pre-Trial Judge's finding that any further request for amendments to the Exhibit List, after the expiration of the 31 January 2022 deadline, will be subject to greater scrutiny,³³ by alleging that the Pre-Trial Judge himself anticipates future violations by the SPO.³⁴ The fact that the Pre-Trial Judge has indicated that greater scrutiny will be applied to future exhibit list amendments

³⁰ Impugned Decision, KSC-BC-2020-06/F00727, para.27.

³¹ THAÇI Request, KSC-BC-2020-06/F00733, para.18.

³² Impugned Decision, KSC-BC-2020-06/F00727, paras 27-29.

³³ Impugned Decision, KSC-BC-2020-06/F00727, para.30.

³⁴ THAÇI Request, KSC-BC-2020-06/F00733, para.19.

demonstrates that appellate intervention concerning the Impugned Decision would not provide any certainty regarding future exhibit list amendments, let alone disclosure violations, as asserted by the Defence.

22. Furthermore, turning to the remainder of the Defence's submissions, the Defence disingenuously argues that, allegedly confident in the coverage provided by the Impugned Decision that its continued breach of deadlines will have no consequences, the SPO proceeded to make another request to add further documents to the exhibit list.³⁵ The Impugned Decision is dated 8 March 2022, whereas the additional request the Defence mentions in their filing is dated 24 February 2022.³⁶ Unless the SPO had clairvoyant abilities regarding the outcome of the Impugned Decision, it is impossible to understand how the SPO relied on any purported coverage provided by the Impugned Decision when filing its additional request, twelve days prior to the issuing of the Impugned Decision.

III. RELIEF REQUESTED

23. For the foregoing reasons, the SPO requests that the Pre-Trial Judge reject the THAÇI Request.

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Friday, 25 March 2022

At The Hague, the Netherlands.

³⁵ THAÇI Request, KSC-BC-2020-06/F00733, para.20.

³⁶ THAÇI Request, KSC-BC-2020-06/F00733, para.20, *citing* KSC-BC-2020-06/F00708.