



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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

Date: 7 April 2022

Language: English

Classification: Public

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

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 45(2) 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 30 October 2020, further to the Pre-Trial Judge's decision confirming the indictment against Hashim Thaçi ("Mr Thaçi"), Kadri Veseli, Rexhep Selimi and Jakup Krasniqi (collectively "Accused"),² the Specialist Prosecutor's Office ("SPO") submitted the indictment as confirmed ("Indictment" or "Confirmed Indictment"), with redactions as authorised by the Pre-Trial Judge.³
2. On 17 December 2021, the SPO filed its pre-trial brief and related material, including a list of exhibits ("Exhibit List").⁴
3. On 8 March 2022, the Pre-Trial Judge issued the "Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective

¹ KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

² KSC-BC-2020-06, F00026/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 26 October 2020, confidential. A public redacted version was filed on 30 November 2020, F00026/RED.

³ KSC-BC-2020-06, F00034, Specialist Prosecutor, *Submission of Confirmed Indictment and Related Requests*, 30 October 2020, confidential, with Annex 1, strictly confidential and *ex parte*, and Annexes 2-3, confidential. A further corrected confirmed indictment, correcting certain clerical errors, was submitted on 4 November 2020, strictly confidential and *ex parte* (F00045/A01), with confidential redacted (F00045/A02) and public redacted (F00045/A03) versions. A lesser confidential redacted version was submitted on 11 December 2020 (F00134). Subsequent to the Decision on Defects in the Form of the Indictment, a further corrected confirmed indictment was submitted on 3 September 2021, strictly confidential and *ex parte* (F00455/A01), with confidential redacted (F00455/CONF/RED) and public redacted (F00455/RED) versions. A confidential further lesser redacted version of the confirmed indictment was filed on 17 January 2022, F00647/A01.

⁴ KSC-BC-2020-06, F00631, Specialist Prosecutor, *Submission of Pre-Trial Brief with Witness and Exhibit Lists*, 17 December 2021, confidential, with Annexes 1-3, strictly confidential and *ex parte*. A public redacted version with confidential redacted Annexes 1-3 was filed on 21 December 2021, F00631/RED. A corrigendum with two strictly confidential and *ex parte* Annexes and one confidential Annex was submitted on 24 February 2022, F00709.

Measures” (“Impugned Decision”), in which he, *inter alia*, authorised the SPO to amend its Exhibit List and add a certain number of materials (“Further Materials”).⁵

4. On 15 March 2022, the Defence for Mr Thaçi (“Defence”) requested leave to appeal the Impugned Decision (“Request”).⁶

5. On 18 March 2022, following the Impugned Decision, the SPO submitted an amended Exhibit List.⁷

6. On 25 March 2022, the SPO responded to the Request (“Response”).⁸

7. On 4 April 2022, the Defence replied to the Response (“Reply”).⁹

II. SUBMISSIONS

8. The Thaçi Defence requests leave to appeal the Impugned Decision on the following three issues (collectively, “Three Issues”):

- (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 (“First 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 (“Second Issue”); and
- (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

⁵ KSC-BC-2020-06, F00727, Pre-Trial Judge, *Decision on Specialist Prosecutor’s Request to Amend its Exhibit List and to Authorise Related Protective Measures*, 8 March 2022, strictly confidential and *ex parte*. A confidential redacted version was filed on the same day, F00727/CONF/RED.

⁶ KSC-BC-2020-06, F00733, Defence for Mr Thaçi, *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”*, 15 March 2022, public.

⁷ KSC-BC-2020-06, Specialist Prosecutor, *Prosecution submission of amended exhibit list*, 18 March 2022, public, with one strictly confidential and *ex parte* Annex and one confidential Annex.

⁸ KSC-BC-2020-06, F00752, Specialist Prosecutor, *Prosecution Response to Thaçi Defence Request for Certification to Appeal Decision F00727*, 25 March 2022 (notified on 28 March 2022), public.

⁹ KSC-BC-2020-06, F00759, Defence for Mr Thaçi, *Thaçi Defence Reply to Prosecution Response to Thaçi Defence Request for Certification to Appeal Decision F00727*, 4 April 2022, public.

obligations which varies with the size of the case, which has no basis in the KSC's statutory framework or practice ("Third Issue").¹⁰

9. The SPO submits that the Request should be rejected as it fails to meet the requirements for leave to appeal under Article 45 of the Law and Rule 77 of the Rules.¹¹

10. The Defence replies that the SPO distorts the proper procedure for the certification process and reiterates its request to the Pre-Trial Judge to grant leave to appeal the Three Issues.¹²

III. APPLICABLE LAW

11. Pursuant to Article 45 of the Law, a Court of Appeals Panel shall hear interlocutory appeals from an accused or from the SPO 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 they involve 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.

12. 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.

¹⁰ Request, para. 11.

¹¹ Response, paras 1, 23.

¹² Reply, paras 2, 12.

IV. DISCUSSION

13. A right to appeal arises only if the Pre-Trial Judge 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.¹³ The Pre-Trial Judge recalls the interpretation of these provisions as set out in detail previously.¹⁴

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

1. Whether the matter is an “appealable issue”;
2. Whether the issue at hand would significantly affect:
 - (1) The fair and expeditious conduct of the proceedings, or
 - (2) The outcome of the trial; and
3. Whether, in the opinion of the Pre-Trial Judge, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.¹⁵

A. FIRST ISSUE

15. The Defence argues that the First Issue arises from the Impugned Decision and it is neither a mere disagreement with the Impugned Decision nor does it amount to a hypothetical concern.¹⁶ Recalling that Mr Thaçi remains in detention, the Defence submits that the First Issue significantly affects Mr Thaçi’s right to a fair trial and the expeditious conduct of the proceedings, in particular the right to adequate time and

¹³ KSC-BC-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.

¹⁴ Thaçi Decision on Leave to Appeal, paras 9-17.

¹⁵ Thaçi Decision on Leave to Appeal, para. 10.

¹⁶ Request, paras 12-13.

facilities to prepare and the right to be tried within a reasonable time. According to the Defence, despite having been anticipated in the filings underlying the Impugned Decision, these arguments have been disregarded by the Pre-Trial Judge.¹⁷ Lastly, the Defence argues that intervention by the Court of Appeals Panel would materially advance proceedings by helping to put an end to delays stemming from disclosure. In the view of the Defence, it 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.¹⁸

16. The SPO responds that the First Issue represents a mere disagreement with the relevant findings in the Impugned Decision.¹⁹ In particular, the SPO avers that the Defence did not identify which specific submissions were not considered or indicate how the Pre-Trial Judge erred in assigning them weight.²⁰ Lastly, the SPO submits that to argue that the fairness and expeditiousness of proceedings is impacted by failure to consider the consequences of a purported disclosure violation misrepresents the findings of the Impugned Decision, which did not find any disclosure breach.²¹

17. The Defence replies that has, by reference to previous filings, set out the factors the Pre-Trial Judge did not address.²² The Defence further specifies that the Pre-Trial Judge's error was to conclude that there was no prejudice despite the Defence's submissions to the contrary which feature nowhere in the reasoning of the Impugned Decision.²³

18. The Pre-Trial Judge notes at the outset that the First Issue arises from the Impugned Decision as it concerns the Pre-Trial Judge's finding that, having weighed the arguments of the Defence, no prejudice arose to the Defence from the addition of

¹⁷ Request, para. 16.

¹⁸ Request, paras 20-21.

¹⁹ Response, para. 4.

²⁰ Response, para. 6.

²¹ Response, para. 8.

²² Reply, para. 4.

²³ Reply, para. 5.

the Further Materials to the SPO's Exhibit List.²⁴ The Pre-Trial Judge is therefore satisfied that the First Issue is not a mere disagreement with the Impugned Decision, but a discrete topic emanating from it.

19. The Pre-Trial Judge further finds that the First Issue directly concerns the expeditiousness and fair trial rights of Mr Thaçi, in particular the right to have adequate time to prepare his defence. Therefore, the Pre-Trial Judge finds that the First Issue significantly affects the fair and expeditious conduct of the proceedings.

20. Lastly, the Pre-Trial Judge considers that an immediate resolution by the Court of Appeals Panel of the First Issue may materially advance the proceedings as it could impact the Pre-Trial Judge's finding that the SPO showed good cause for the requested amendments to the Exhibit List and, accordingly, affect the amount of material the SPO is permitted to rely on at trial.

21. In light of the above, the Pre-Trial Judge grants leave to appeal the First Issue.

B. SECOND AND THIRD ISSUES

22. The Defence argues that the Second and Third Issues arise from the Impugned Decision and they are neither a mere disagreement with the Impugned Decision nor do they amount to hypothetical concerns.²⁵

23. With regard to the Second Issue, the Defence argues that being required to conduct follow-up investigations because of the SPO's failure to meet its disclosure obligations is prejudicial, and it impacts Mr Thaçi's rights to adequate time and facilities for defence preparation, and to be tried within a reasonable time. The Defence submits that such an approach, whereby any prejudice caused by late disclosure is

²⁴ Impugned Decision, para. 28.

²⁵ Request, paras 12-13.

compensated by the possibility to conduct follow-up investigations, is incompatible with either expeditious or fair proceedings.²⁶

24. With regard to the Third Issue, the Defence avers that it has a significant impact on the fair and expeditious conduct of the proceedings, insofar as an approach whereby the necessity of complying with deadlines is linked to the size of the case is incompatible with the Specialist Chambers' statutory framework.²⁷

25. For both Issues, the Defence contends, based on the same arguments underlying the First Issue, that intervention by the Court of Appeals Panel would materially advance proceedings.²⁸

26. The SPO responds, with regard to the Second Issue, that it does not arise from, and in fact mischaracterises, the Impugned Decision, as the Pre-Trial Judge did not find that there had been a disclosure breach by the SPO.²⁹ Insofar as the Defence argues that it will be required to re-conduct investigations, the SPO argues that such submissions are hypothetical as the Defence failed to demonstrate any impact on the proceedings or their outcome.³⁰

27. Insofar as the Third Issue is concerned, the SPO argues that the Defence misrepresents the Impugned Decision. In particular, the SPO avers that it does not arise from the Impugned Decision that the SPO is immune from the consequences of disclosure violations because of the size of the case, nor that the necessity of complying with deadlines is linked to the size of the case.³¹

28. The Defence replies, with regard to the Second Issue, that the SPO failed to respond to the question whether the Pre-Trial Judge erred in shifting the burden of

²⁶ Request, para. 17.

²⁷ Request, para. 18.

²⁸ Request, paras 20-21.

²⁹ Response, para. 10.

³⁰ Response, paras 11-12.

³¹ Response, paras 14-18.

the SPO's failures back to the Defence.³² With regard to the Third Issue, the Defence replies that the dispute as to the size of the SPO's failure does not assist in resolving the issue at stake.³³ Lastly, it replies that it never submitted that the Pre-Trial Judge's linking of the prejudice arising from the late disclosure to the overall size of the case was the only factor relied on by the Pre-Trial Judge, but it was indeed erroneously relied on.³⁴

29. Before all else, the Defence's claim that the Pre-Trial Judge identified in the Impugned Decision an SPO disclosure breach underlies both the Second and Third Issues. The Pre-Trial Judge recalls at the outset that in the Impugned Decision it was held that amendments to the Exhibit List are possible subject to the showing of good cause.³⁵ In the particular circumstances of the case, the Pre-Trial Judge took into account a series of factors, including: (i) the fact that the request for the amendment had been filed within the deadline set for the disclosure of Rule 102(1)(b) Material; and (ii) the fact that the deadline for filing the original Exhibit List had fallen before the final deadline for outstanding Rule 102(1)(b) material and that it was therefore understandable that some limited amendments be necessary at that stage, and concluded that the SPO had shown good cause for the requested amendments.³⁶ Against this backdrop, the Pre-Trial Judge finds that any reference by the Defence to an alleged finding of a "disclosure breach" by the SPO misrepresents the Impugned Decision.

30. With regard to the Second Issue, the Pre-Trial Judge recalls having found in the Impugned Decision, *inter alia*, that with regard to the fact that the Defence had just started its investigations, the Defence would have sufficient time to analyse the Further Materials related to the relevant witnesses and to proceed with follow-up

³² Reply, paras 7-8.

³³ Reply, paras 10-11.

³⁴ Reply, para. 11.

³⁵ Impugned Decision, paras 23-24.

³⁶ Impugned Decision, paras 27-29.

investigations, if necessary.³⁷ Accordingly, the Second Issue stems from the Impugned Decision.

31. However, the Defence fails to demonstrate that the Second Issue affects the fair and expeditious conduct of the proceedings, let alone significantly. In particular, the Pre-Trial Judge finds that the Defence does not substantiate how having the ability to conduct follow-up investigations in relation to the Further Materials, if necessary, affects the fair trial rights of Mr Thaçi, noting that the amended Exhibit List first and foremost enables Mr Thaçi to know the evidence on which the SPO intends to rely and to prepare accordingly for trial. Equally, the Defence does not substantiate how the ability to conduct follow-up investigations in relation to the Further Materials, if necessary, affects the expeditious conduct of the proceedings, noting that no date for the transmission of the case file or the start of the trial have been set.

32. Rather, the essence of the Defence's argumentation rests on the assumption that any future request for amendment of the Exhibit List would be automatically granted on account of the Defence's ability to conduct follow-up investigations.³⁸ As demonstrated in the Impugned Decision, such a determination would have to be carried out on a case-by-case basis, including the question whether the request disproportionately interferes with the Accused's fair trial rights. Accordingly, the outcome of the balancing exercise made in the instant case is not determinative of any future litigation.

33. Therefore, insofar as the Second Issue relates to the Further Materials, the Pre-Trial Judge finds that it does not significantly affect the fair and expeditious conduct of the proceedings. Insofar as the Second Issue relates to future requests, the

³⁷ Impugned Decision, para. 28.

³⁸ Request, para. 17 ("If the solution to ongoing disclosure violations is to be that 'the Defence can just reinvestigate', 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" emphasis added).

purported impact on the fair and expeditious conduct of the proceedings is merely hypothetical.

34. Lastly, the Pre-Trial Judge notes that the Defence did not argue that the Second Issue affects the outcome of the trial.

35. With regard to the Third Issue, the Pre-Trial Judge confirms that in the Impugned Decision he took into account, *inter alia*, the limited amount of Further Materials as compared to the overall extent of the Rule 102(1)(b) disclosure, and concluded that their addition to the Exhibit List, in the particular circumstances of the case, would not disproportionately impinge upon the Accused's fair trial rights.³⁹ Accordingly, the Third Issue stems from the Impugned Decision.

36. However, the Defence fails to demonstrate that the Third Issue affects the fair and expeditious conduct of the proceedings, let alone significantly. In particular, the Pre-Trial Judge finds that the Defence does not substantiate at all how, when deciding on the specific SPO request for amending the Exhibit List,⁴⁰ taking note of the number of Further Materials vis-à-vis the overall extent of the Rule 102(1)(b) material, affects the fair trial rights of Mr Thaçi, seeing as the Further Materials relate to witnesses whose other statements and associated exhibits have already been disclosed. Equally, the Defence does not substantiate how, when deciding on the specific SPO request for amending the Exhibit List, taking note of the number of Further Materials vis-à-vis the overall extent of the Rule 102(1)(b) material, affects the expeditious conduct of the proceedings, noting that no date for the transmission of the case file or the start of the trial have been set.

³⁹ Impugned Decision, para. 27.

⁴⁰ KSC-BC-2020-06, F00670, Specialist Prosecutor, *Prosecution Notice of Rule 102(1)(b) Disclosure and Related Requests*, 31 January 2022 (notified on 1 February 2022), strictly confidential and *ex parte*, with Annexes 1-9, strictly confidential and *ex parte*. A confidential redacted version of the Request was filed on the same day (notified on 1 February 2022), F00670/CONF/RED.

37. Therefore, the Pre-Trial Judge finds that the Third Issue does not significantly affect the fair and expeditious conduct of the proceedings.

38. Lastly, the Pre-Trial Judge notes that the Defence did not argue that the Third Issue affects the outcome of the trial.

39. In light of the above, the Pre-Trial Judge considers that the Second and Third Issues do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. As a result, it is not necessary to address the remaining requirement of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules. Leave to appeal these issues is therefore rejected.

V. DISPOSITION

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

- a. **GRANTS** leave to appeal the First Issue; and
- b. **REJECTS** leave to appeal the Second and Third Issues.



Judge Nicolas Guillou

Pre-Trial Judge

Dated this Thursday, 7 April 2022

At The Hague, the Netherlands.