

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: 23 May 2022

Language: English

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Thaçi Defence Reply to 'Prosecution response to Thaçi Defence request for certification to appeal Decision F00779'

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I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“Defence”) replies to the ‘Prosecution response to Thaçi Defence request for certification to appeal Decision F00779’.¹

II. SUBMISSIONS

A. ISSUE ONE

2. The SPO Response is limited to addressing only the first half of Issue One: whether the Pre-Trial Judge erred in basing the finding of good cause, in part, on a purported absence of prejudice to the Defence. It does not address the Pre-Trial Judge’s failure to give sufficient consideration to the exceptional nature of late additions of evidence by the SPO.²

3. There is, in fact, no response that can justify or explain the absence of any consideration or acknowledgement by the Pre-Trial Judge of the exceptional nature of repeated additions to the Exhibit List, particularly when little or no explanation has been offered by the SPO. The late addition of evidentiary materials, long after the Exhibit List deadline, has consistently been considered exceptional, rather than routinely granted as a matter of course. Importantly, its exceptional nature has been acknowledged, and Prosecution requests have been assessed against this threshold.³ The requirement of good cause has been watered down in this case, and should be examined on appeal.

¹ KSC-BC-2020-06/F00803, Prosecution response to Thaçi Defence request for certification to appeal Decision F00779, 13 May 2022, Confidential (“SPO Response”).

² KSC-BC-2020-06/F00791, Thaçi Defence Request for Certification to Appeal the “Decision on Specialist Prosecutor’s Rule 102(2) and Related Requests”, 2 May 2022 (“Defence Request”), paras. 11, 12, 15 and 17.

³ Defence Request, para. 12.

4. As regards the Pre-Trial Judge's reliance on the absence of prejudice to the Defence, the SPO has mischaracterised the issue raised on appeal. The Defence never submitted that the Pre-Trial Judge was not entitled to consider whether amendments to the Exhibit List could impact on Defence trial preparation, as the SPO asserts.⁴ Of course, he must. However, while prejudice is a relevant consideration, it is distinct from good cause. As such, the issue on appeal is whether a purported lack of prejudice to the Defence should have been properly relied upon to find good cause. The Defence arguments are not "specious",⁵ they have been mischaracterised.

5. There is no dispute that the SPO failed to give the Pre-Trial Judge sufficient justification to include W04870's materials on the Exhibit List, months past the deadline, other than that it had not been ready to include them before. This does not mean, however, that a lack of prejudice to the Defence can be invoked to fill that gap. There must be something else to warrant a finding of good cause, and the circumvention of pre-trial time limits. This is an exceptional remedy, even if it is not acknowledged as such in the Impugned Decision.⁶

B. ISSUE TWO

6. The parties agree that the Pre-Trial Judge considered the relevance of W04870's materials, and their importance.⁷ Nor is there any doubt that Rule 118(2) of the Rules⁸ gives the Trial Panel the ability to authorise additions to an Exhibit List, upon timely notice and a showing of good cause.⁹ The issue raised on appeal arose from the Pre-Trial Judge declining to assess the **duplicative** nature of W04870's materials with the

⁴ SPO Response, paras. 3-5.

⁵ SPO Response, para. 4.

⁶ KSC-BC-2020-06/F00779, Pre-Trial Judge, Decision on Specialist Prosecutor's Rule 102(2) and Related Requests, 22 April 2022, Confidential ("Impugned Decision").

⁷ SPO Response, para. 14.

⁸ KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 ("Rules").

⁹ SPO Response, para. 14, citing Impugned Decision, para. 29.

proposed evidence of W04220, on the basis that “these matters can be raised with the Trial Panel”.¹⁰

7. The SPO appears to argue that because the Pre-Trial Judge “had already invited the Defence to make proposals on streamlining the evidence, so that he could present them to the Trial Panel when transferring the case to it”,¹¹ this means that there is no need for the duplicative filter to be applied when the materials itself are added to the Exhibit List before the Pre-Trial Judge. By this logic, the SPO’s position is that the Pre-Trial Judge is within his rights to permit wholly duplicative material onto the Exhibit List, on the basis that the Trial Panel will later weed it out.

8. The implications of this wasteful, purposeless and prejudicial approach to trial management are clear. Once the material forms part of the Exhibit List, the parties and Judges are obliged to read, analyse, and potentially investigate it, even though it will likely be culled by the Trial Panel for being duplicative, an exercise which in itself is another waste of the Court’s resources.

9. The SPO also argues that the Defence has not discharged its burden to demonstrate “how this issue would affect the expeditiousness of the trial proceedings given that no dates for the transmission of the case file or the start of the trial have been set...”.¹² Of course, the many extensions and variations of pre-trial timeframes, at the SPO’s request, have pushed the trial start date back by at least a year from the SPO’s own initial estimates.¹³ Any suggestion that this has no impact on the expeditiousness of the proceedings because a trial date has not yet been set is incorrect;

¹⁰ Impugned Decision, para. 29.

¹¹ SPO Response, para. 14, citing Impugned Decision, para. 30.

¹² SPO Response, para. 16.

¹³ See KSC-BC-2020-06/F00725, Thaçi Defence Response to Prosecution Rule 102(2) submission and related request, 7 March 2022, paras. 3-11.

the right to be tried without undue delay can obviously be undermined in the pre-trial phase.¹⁴

III. RELIEF SOUGHT

10. For the above reasons, and those set out in the Defence Request, the Defence respectfully requests that the Pre-Trial Judge grant leave to appeal the Issues.

[Word count: 976 words]

Respectfully submitted,



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Monday, 23 May 2022

At Tampa, United States

¹⁴ ECtHR, *Chiarello v. Germany*, 497/17, Fifth Section, Judgment, 20 June 2019, para. 46. See also ECtHR, *Mamič v. Slovenia (no. 2)*, 75778/01, Third Section, Judgment, 27 July 2006, para. 24.