



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: 30 May 2022

Language: English

Classification: Public

**Decision on Thaçi Defence Request for Leave to Appeal the “Decision on
Specialist Prosecutor’s Rule 102(2) and Related Requests”**

Specialist Prosecutor

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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, 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

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

² KSC-BC-2020-06, F00026, Pre-Trial Judge, *Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 26 October 2020, strictly confidential and *ex parte*. A confidential redacted version was filed on the same day, F00026/CONF/RED. 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. A confirmed amended indictment was filed on 29 April 2022, strictly confidential and *ex parte* (F00789/A01), with confidential redacted (F00789/A02) and public redacted (F00789/A05) versions.

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 Annex 1 and 3, strictly confidential and *ex parte*, and Annex 2, confidential, was submitted on 24 February 2022, F00709. A confidential, corrected amended version of the exhibit list was submitted on 14 April 2022 (F00768/A01).

3. On 22 April 2022, the Pre-Trial Judge issued the “Decision on Specialist Prosecutor’s Rule 102(2) and Related Requests” (“Impugned Decision”), in which he, *inter alia*, authorised the SPO to amend its Exhibit List and add material related to two witnesses.⁵
4. On 29 April 2022, following the Impugned Decision, the SPO submitted an amended Exhibit List.⁶
5. On 2 May 2022, the Defence for Mr Thaçi (“Defence”) requested leave to appeal the Impugned Decision (“Request”).⁷
6. On 13 May 2022, the SPO responded to the Request (“Response”).⁸
7. On 23 May 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 two issues (collectively, “Two Issues”):
 - (1) Whether the Pre-Trial Judge erred in his approach to the assessment of good cause by basing it, in part, on a purported absence of prejudice to the Defence, and without sufficient consideration of its exceptional nature (“First Issue”); and
 - (2) Whether the Pre-Trial Judge erred in basing the existence of good cause, in part, on the purported ability of a future Trial Panel to streamline the

⁵ KSC-BC-2020-06, F00779, Pre-Trial Judge, *Decision on Specialist Prosecutor’s Rule 102(2) and Related Requests*, 22 April 2022, confidential.

⁶ KSC-BC-2020-06, F00788, Specialist Prosecutor, *Prosecution Submission of Amended Exhibit List*, 29 April 2022, confidential, with Annex 1, strictly confidential and *ex parte*, and Annex 2, confidential.

⁷ KSC-BC-2020-06, F00791, Specialist Counsel, *Thaçi Defence Request for Certification to Appeal the “Decision on Specialist Prosecutor’s Rule 102(2) and Related Requests”*, 2 May 2022, confidential.

⁸ KSC-BC-2020-06, F00803, Specialist Prosecutor, *Prosecution Response to Thaçi Defence Request for Certification to Appeal Decision F00779*, 13 May 2022, confidential.

⁹ KSC-BC-2020-06, F00812, Specialist Counsel, *Thaçi Defence Reply to ‘Prosecution Response to Thaçi Defence Request for Certification to Appeal Decision F00779’*, 23 May 2022, confidential.

SPO evidence, and without assessing its duplicative nature (“Second Issue”).¹⁰

9. The SPO responds 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, with respect to the First Issue, that the SPO fails to respond to half its submissions and mischaracterises the remainder.¹² As concerns the Second Issue, the Defence replies that the SPO’s position permits a wasteful and prejudicial approach to trial management and fails to recognise that the right to undue delay can be undermined in the pre-trial phase.¹³ The Defence reiterates its request for leave to appeal.¹⁴

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

¹⁰ Request, para. 15.

¹¹ Response, paras 1, 20.

¹² Reply, paras 2-5.

¹³ Reply, paras 6-9.

¹⁴ Reply, para. 10.

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.

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.¹⁵ The Pre-Trial Judge recalls the interpretation of these provisions as set out in detail previously.¹⁶

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.¹⁷

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

¹⁵ 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.

¹⁶ *Thaçi Decision on Leave to Appeal*, paras 10-17.

¹⁷ *Thaçi Decision on Leave to Appeal*, para. 10.

hypothetical concern.¹⁸ The Defence argues that, having partially based his assessment of good cause on the purported lack of prejudice to the Defence, the Pre-Trial Judge has set a precedent for an overly permissive approach to post-deadline additions which ignores its exceptional nature.¹⁹ The Defence asserts that the consequence of this approach is that hundreds of pages of documents have been added to the Exhibit List which directly concerns the expeditiousness and fair trial rights of the Accused, in particular the right to have adequate time to prepare a defence.²⁰ Lastly, the Defence argues that intervention by the Court of Appeals Panel would materially advance proceedings by impacting the Pre-Trial Judge's finding of good cause and affecting the amount of material the SPO is permitted to rely on at trial.²¹

16. The SPO responds that the First Issue does not amount to an appealable issue.²² In particular, the SPO avers that Defence submissions do not show that the Pre-Trial Judge improperly conflated or weighed the factors considered.²³ The SPO further argues that determinations relating to the amendment of the Exhibit List are carried out on a case-by-case basis and therefore the impact on future requests is merely hypothetical and speculative.²⁴ The SPO submits that, as the Pre-Trial Judge found that the Defence would have ample and meaningful time to process the evidence and prepare for trial, Defence arguments regarding any impact on the Accused's right to adequate time and facilities to prepare for trial constitutes mere disagreement with the Impugned Decision.²⁵ Lastly, the SPO submits that the Court of Appeals is already considering alleged prejudice in relation to previous Exhibit List amendments and therefore certifying this issue would not materially advance proceedings.²⁶

¹⁸ Request, paras 16-18.

¹⁹ Request, paras 11-13, 17, 21.

²⁰ Request, para. 21.

²¹ Request, paras 23-24.

²² Response, paras 2-5, 8.

²³ Response, paras 3-5.

²⁴ Response, paras 6-7.

²⁵ Response, para. 8.

²⁶ Response, para. 9.

17. The Defence replies that the SPO failed to address its argument that the Pre-Trial Judge gave insufficient consideration to the exceptional nature of late additions to the Exhibit List, which has resulted in a watered down assessment of good cause.²⁷ The Defence further replies that the Specialist Prosecutor mischaracterises defence submissions and that the issue on appeal is whether a purported lack of prejudice to the Defence should have been relied upon to find good cause.²⁸

18. The Pre-Trial Judge notes that the issue of prejudice to the Defence was considered along with other factors supporting a finding of good cause to determine that amendment of the Exhibit List was permissible.²⁹ The Pre-Trial Judge accordingly finds that this aspect of the First Issue does not amount to mere disagreement, but constitutes a discrete topic emanating from the Impugned Decision. The remaining requirements of the certification test will be addressed below with respect to this aspect of the First Issue.

19. As regards the second aspect of the First Issue, namely the failure to give sufficient consideration to the exceptional nature of additions to the Exhibit List, the Pre-Trial Judge considers that this amounts to mere disagreement with the established standard³⁰ applied in the Impugned Decision. This second aspect of the First Issue therefore does not amount to an appealable issue. As a result, the remaining requirements of the certification test need not be addressed with respect to this aspect of the First Issue.

20. As concerns the significant effect on the fair and expeditious conduct of proceedings, the Defence has not demonstrated how this prong of the test for leave to appeal would be satisfied. In particular, the Defence does not demonstrate how assessing the issue of prejudice to the Defence subsequent to the existence of good cause would have prevented the late addition of the relevant documents to the Exhibit List or even set a precedent for an “overly permissive approach” in relation to future

²⁷ Reply, paras 2-3.

²⁸ Reply, paras 4-5.

²⁹ Impugned Decision, paras 28, 31.

³⁰ Rule 118 of the Rules.

requests to amend the Exhibit List. This is particularly the case as the Impugned Decision, when addressing “good cause”, enumerates a number of factors upon which the late addition to the Exhibit List was found to be permissible. These factors include, besides the impact of the late addition to the Accused’s preparation for trial, the consideration that evidence was already in the Defence’s possession, the stage of the proceedings, and the *prima facie* relevance and importance of the material.³¹ Similarly, with regard to the Defence claim that the Impugned Decision establishes any kind of precedent for any future requests to amend the Exhibit List, the Defence has not demonstrated how such determinations, which are carried out on a case-by-case basis, would be impacted by separating the analysis of good cause from the analysis of prejudice. In addition, the Defence’s submissions centre on the assumption that late additions to the Exhibit List necessarily significantly impact the expeditious conduct of proceedings and the fair trial rights of the Accused. However, this assumption ignores the Pre-Trial Judge’s finding that, in light of the current stage of proceedings, *inter alia*, the Defence would have ample and meaningful time to process the relevant material.³² The Pre-Trial Judge accordingly finds that the First Issue does not significantly affect the fair and expeditious conduct of proceedings. Lastly, the Pre-Trial Judge notes that the Defence did not argue that the First Issue affects the outcome of the trial.

21. In light of the above, the Pre-Trial Judge considers that the First Issue does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. As a result, the remaining requirement of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules need not be addressed. Leave to appeal the First Issue is therefore rejected.

³¹ Impugned Decision, para. 29.

³² Impugned Decision, paras 28-30.

B. SECOND ISSUE

22. The Defence argues that the Second 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.³³ The Defence further argues that placing the issue of the duplicative nature of the evidence in the hands of the Trial Chamber will waste Defence resources as such material must still be read, analysed and investigated by the Defence and therefore directly impacts the expeditiousness and fair trial rights of the Accused, in particular the right to have adequate time to prepare a defence.³⁴ The Defence also submits that intervention by the Court of Appeals Panel will put an end to delays stemming from the expanding Exhibit List and *ex post facto* streamlining of SPO evidence, as well as ultimately affect the amount of material the SPO is permitted to rely on at trial.³⁵

23. The SPO responds that the Second Issue does not amount to an appealable issue as the Defence mischaracterises the Impugned Decision and merely expresses disagreement with it.³⁶ The SPO argues that the Second Issue does not arise from the Impugned Decision as the Pre-Trial Judge found that the test for amending the Exhibit List was satisfied and matters of alleged similarities or duplications between the evidence were for the Trial Chamber to consider.³⁷ The SPO further argues that the Pre-Trial Judge found that the Defence would have ample time to process the evidence and prepare for trial and therefore any claim of impact on adequate preparation time is unsubstantiated.³⁸ The SPO further argues that the Defence has not demonstrated how this issue would affect the expeditiousness of proceedings given that no dates for the transmission of the case to trial have been set yet.³⁹ Finally, as regards the material

³³ Request, paras 16-18.

³⁴ Request, para. 22.

³⁵ Request, paras 23-24.

³⁶ Response, paras 11-14.

³⁷ Response, paras 14-15.

³⁸ Response, para. 16.

³⁹ Response, para. 16.

advancement of proceedings, the SPO reiterates its arguments with respect to the First Issue.⁴⁰

24. The Defence replies that the SPO position is a waste of the court's resources as it stands for the proposition that the Pre-Trial Judge may permit wholly duplicative material onto the Exhibit List on the basis that the Trial Panel will later weed it out.⁴¹ The Defence further replies that any suggestion that additions to the Exhibit List have no impact on the expeditiousness of proceedings because a trial start date has yet to be set ignores the fact that the right to undue delay can be undermined during pre-trial proceedings.⁴²

25. The Pre-Trial Judge recalls that, having found that the relevant material was *prima facie* relevant and of sufficient importance,⁴³ it was determined that any issues relating to the alleged duplication of evidence could be dealt with at trial where the totality of the evidence to be presented at trial could be accessed to determine where it may be streamlined.⁴⁴ It was thus determined that any alleged duplications or similarities between the evidence were beyond the scope of the assessment for amendments to the Exhibit List. The Pre-Trial Judge accordingly finds that the Second Issue does not arise from the Impugned Decision and therefore does not amount to an appealable issue.

26. In light of the above, the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules need not be addressed. Leave to appeal the Second Issue is therefore rejected.

⁴⁰ Response, para. 17.

⁴¹ Reply, paras 6-8.

⁴² Reply, para. 9.

⁴³ Impugned Decision, para. 29.

⁴⁴ Impugned Decision, para. 30.

V. DISPOSITION

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

REJECTS leave to appeal the Two Issues.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Monday, 30 May 2022
At The Hague, the Netherlands.