

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: Victims' Counsel

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**Victims' Counsel's Response to Veseli Defence Request for Leave to Appeal
Third Decision on Victims' Participation**

Specialist Prosecutor
Jack Smith

Counsel for Victims
Simon Laws

Counsel for Hashim Thaçi
Gregory Kehoe

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Rexhep Selimi
David Young

Counsel for Jakup Krasniqi
Venkateswari Alagenda

I. INTRODUCTION

1. Pursuant to Article 22(6) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law"), Rule 114(4)(a) and Rule 76 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("RPE"), and Pre-Trial Judge's Decisions on Victims' Participation,¹ Victims' Counsel responds to the Veseli Defence Request for Leave to Appeal Third Decision on Victims' Participation ("Veseli Defence Request" or "Request").²
2. Victims' Counsel opposes the Veseli Defence Request on the basis that it does not meet the requirements of Article 45 of the Law and Rule 77 RPE, having failed to show that any of its four proposed issues are "appealable issues" or that any of them would either:
 - a) "significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial",or
 - b) involve a matter for which an immediate resolution by the Court of Appeals Panel could materially advance the proceedings, as required under Rule 77(2) RPE.

II. CLASSIFICATION OF FILING

3. Pursuant to Rule 82(4) RPE, this filing is classified as public as it responds to a previous filing that is public, and does not contain any confidential information.

¹ *Prosecutor v. Thaçi et al.*, KSC-BC-2020-06/F00257, Public Redacted Version of the First Decision on Victims' Participation, 21 April 2021 ("First Decision on Victims' Participation"), paras 84 and 85(d)(vi); KSC-BC-2020-06/F00611, Second Decision on Victims' Participation, 10 December 2021 ("Second Decision on Victims' Participation"), para. 60; KSC-BC-2020-06/F00817, Public Redacted Version of Third Decision on Victims' Participation, 25 May 2022 ("Third Decision on Victims' Participation").

² *Prosecutor v. Thaçi et al.*, KSC-BC-2020-06/F00828, Veseli Defence Request for Leave to Appeal Third Decision on Victims' Participation, 1 June 2022.

III. PROCEDURAL HISTORY

4. On 21 April 2021, the Pre-Trial Judge admitted nine applicants as VPPs and determined the modalities of their participation in pre-trial proceedings.³ On 10 December 2021, a further 12 victims were admitted.⁴
5. On 18 November 2021, the Victims' Participation Office ("VPO") filed its third report on victims' applications, transmitting 12 applications ("Third Registry Report").⁵
6. On 10 December 2021, the Defence for Kadri Veseli responded to the Third Registry Report.⁶
7. On 25 May 2022, the Pre-Trial Judge issued his Third Decision on Victims' Participation and admitted 12 victims as participants in the *Thaçi et al.* case.⁷
8. On 1 June 2022, the Veseli Defence submitted its Request for Leave to Appeal the Third Decision on Victims' Participation.⁸

IV. SUBMISSIONS

i. THE REQUIREMENTS OF RULE 77(2) RPE ARE NOT MET

9. In order for certification to appeal to be granted, the requirements of Rule 77(2) RPE must be fulfilled:

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,

³ First Decision on Victims' Participation, para. 85(a).

⁴ Second Decision on Victims' Participation, para. 70(a)-(c).

⁵ KSC-BC-2020-06, F00572, VPO, *Third Registry Report to the Pre-Trial Judge on Victims' Applications for Participation in the Proceedings* ("Third Registry Report"), 18 November 2021, public, with Annexes 1-13, strictly confidential and *ex parte*.

⁶ KSC-BC-2020-06, F00612, Veseli Defence, *Veseli Defence Response to Third Registry Report to the Pre-Trial Judge on Victims' Applications for Participation in the Proceedings (F00572)* ("Veseli Defence Response"), 10 December 2021, public.

⁷ Third Decision on Victims' Participation, para. 50(a).

⁸ Veseli Defence Request.

and for which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

10. In the Decision on the Thaçi Defence Application for Leave to Appeal, the Pre-Trial Judge identified the “two prongs” of the certification test.⁹

11. With regard to the first:

The issue must have significant repercussions on either (i) “the fair and expeditious conduct of proceedings” or (ii) “the outcome of the trial”. Use of the term “significantly” in the wording of the first prong of the certification test indicates that an applicant must not only show how the issue affects (i) the fair and expeditious conduct of proceedings, or (ii) the outcome of the trial, but must also demonstrate the (significant) degree to which these factors are affected. The issue must be one likely to have repercussions on either of the above two elements.¹⁰

12. Expanding further on the second element, the Pre-Trial Judge held that:

Thus, it must be considered whether a possible error in an interlocutory decision would impact the outcome of the case. The exercise involves a forecast of the consequence of such an occurrence.¹¹

13. Finally, noting the cumulative nature of the test, the Pre-Trial Judge further held that:

The second prong of the test for certification requires a determination that prompt referral of an issue to the Court of Appeals Panel will settle the matter and rid the “judicial process of possible mistakes that might taint either the fairness of proceedings or mar the outcome of the trial” thereby moving the proceedings forward along the right course.¹²

14. It is respectfully submitted that the Veseli Defence has failed to show how any aspect of the test for certification has been met at this stage of the proceedings in respect of any of its four proposed Issues.

⁹ KSC-BC-2020-06, F00172 Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021 (“Thaçi Decision on Leave to Appeal”), paras 9-17.

¹⁰ Thaçi Decision on Leave to Appeal, para. 12.

¹¹ Thaçi Decision on Leave to Appeal, para. 14.

¹² Thaçi Decision on Leave to Appeal, para. 16.

15. The Impugned Decision is expressed as being without prejudice to any future ruling by the relevant Trial Panel and without prejudice to any additional measures stemming from the victims' potential dual status.¹³
16. The orders made by the Pre-Trial Judge will therefore apply for the Pre-Trial stage and will be subject to review by the Trial Panel in due course.
17. In order to succeed in the application for certification, the Veseli Defence would need to show that the alleged errors by the Pre-Trial Judge had significant repercussions *now* for the fair and expeditious conduct of the proceedings, or the outcome of the case, and that a prompt referral would rid the judicial process of a mistake that might taint the fairness of proceedings or mar the outcome of the trial.
18. In addressing the first "prong" of the test, the Veseli Request suggests that "the proposed Issues directly affect the right of Mr Veseli to a fair trial, and more specifically to the right of an adversarial trial".¹⁴
19. This is unsustainable in light of the fact that anonymity has been granted on an interim basis at the Pre-Trial stage during which participation of the VPPs is of a minimal degree. It is not suggested how Mr Veseli's right to an adversarial trial is in any way compromised, at this Pre-Trial stage, by not knowing the identity of the VPPs.
20. It is to be noted that the decision from the Appeals Chamber at the Special Tribunal for Lebanon ("STL") (which is an outlier in the jurisprudence of international courts and tribunals, was applying different Rules and is contradicted by a substantial body of jurisprudence at the ICC¹⁵) was considering

¹³ Third Decision on Victims' Participation, paras 30, 45.

¹⁴ Veseli Defence Request, para. 9.

¹⁵ ICC, *The Prosecutor v. Dominic Ongwen*, Decision on Disclosure of Victims' Identities, 17 June 2016, ICC-02/04-01/15-471, para. 11; ICC, *The Prosecutor v. Abdullah Banda Abakaer Nourain*, Decision on the participation of victims in the trial proceedings, 20 March 2014, ICC-02/05-03/09-545, para. 19; ICC, Appeals Chamber, *The Prosecutor v. Mathieu Ngudjolo Chui*, Decision on the participation of anonymous victims in the appeal and on the maintenance of deceased victims on the list of participating victims, 23 September 2013, ICC-01/04-02/12-140, paras 16-17; ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, 22 January 2011, ICC01/04-

the issue of the anonymity of VPPs at trial and was not concerned with other measure for the protection of VPPs, such as withholding of their identities from the parties on an interim basis:

The Pre-Trial Judge defined total anonymity as the non-disclosure of the identity of VPPs vis-a-vis the parties for the duration of the proceedings. This Appeal is therefore not concerned with other measures for the protection of VPPs, such as anonymity vis-a-vis the public or the withholding of their identities from the parties on an interim basis, or with matters related to the general disclosure of information in the possession of the VPPs.¹⁶

21. Therefore, if the STL Decision has any application or relevance at the Kosovo Specialist Chambers (and that is not accepted on behalf of the VPPs), it could only be considered in relation to the issue of anonymity throughout the proceedings and not interim protective measures. The STL Decision is therefore no authority at all for the proposition that leave should be granted to appeal the Impugned Decision.
22. In addressing the “second prong”, it is suggested by the Veseli Defence that a ruling in its favour by the Court of Appeals Panel “would obviate the risk of any prejudice caused to Mr Veseli from potentially maintaining the full anonymity of victims throughout the proceedings”.¹⁷ It is self-evident that an interim measure of this kind, expressly stated to be without prejudice to the decision of the Trial Panel, cannot be read as applying throughout the proceedings. It will be reviewed in due course, and it follows that it cannot, on its own, have the

04/07-1788-tENG, paras 92-93; ICC, *The Prosecutor v. Jean Pierre Bemba Gombo*, Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of Victims, 21 December 2011, ICC-01/05-01/08-2027, para. 19; ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the applications by victims to participate in the proceedings, Annex 1, 13 January 2009, ICC-01/04-01/06-1556-Corr-Anx1, para. 131, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, paras 130-131; ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 22 September 2006, pp. 6-7.

¹⁶ STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/AC/AR126.3, Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures, 10 April 2013 (“STL Decision”), para.22.

¹⁷ Veseli Defence Request, para. 10.

deleterious effect contended for by the Veseli Defence. This means in turn that the Request must fail, as, if the Impugned Decision is incorrect, its flaws cannot taint the fairness of the proceedings or mar the outcome of the trial.

23. In relation to the second prong, the Veseli Request suggests that an authoritative determination from the Court of Appeals Panel would “provide clarity” in relation to the rules pertaining to protective measures for VPPs.¹⁸ The provision of clarity, desirable though it may be, is not a proper basis for seeking certification.
24. At this juncture, as the Pre-Trial Judge noted, the granting of “adequate protective measures are often the only means available to safeguard the victims’ safety and well-being and to secure their participation in the proceedings.”¹⁹
25. The fact is that, at this stage, not knowing the identities of the VPPs is not a matter that disadvantages the Accused. As rightly noted by the Pre-Trial Judge, the role of a VPP is distinct to the one of a witness and victims’ application forms are not evidence and information therein is “not intended to provide information on the guilt or innocence of the accused or the credibility of witnesses”.²⁰
26. If a VPP is also a witness, the SPO has disclosure obligations in relation to him/her. Knowing that they were also VPPs could not advance the interests of the Defence even to a marginal degree, especially in the Pre-Trial stage. VPPs who are not witnesses are taking no active part in the proceedings at this stage. Again, it is wholly unclear how knowing their identity could materially assist the Defence.

¹⁸ Ibidem.

¹⁹ Third Decision on Victims’ Participation, para. 39 (citing: First Decision on Victims’ Participation, para. 68).

²⁰ Ibid., para. 38.

ii. ISSUES IDENTIFIED BY THE VESELI DEFENCE ARE NOT APPEALABLE AND DO NOT MEET THE TEST FOR CERTIFICATION

27. For an issue to be appealable 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 question nor hypothetical concerns”.²¹ Victims Counsel submits that none of the issues identified by the Veseli Defence are appealable, nor do they meet the test for certification.

a. ISSUE 1

28. The Veseli Defence argues that “total anonymity” of victims participating in the proceedings is not a protective measure foreseen by Articles 22-23 of the Law and Rule 80 of the Rules.²² This repeats the arguments raised in the Veseli Defence Response and constitutes a mere disagreement with the Pre-Trial Judge’s assessment.²³ Moreover, the Request misstates the Pre-Trial Judge’s reasoning and ignores some of its elements, for example the reference to Rule 113(5) RPE. Therefore, the issue is not appealable.
29. Even if the Veseli Defence were right on the appealability of this issue (and it is not agreed that it is), there is no suggestion that the interim anonymity of the VPPs at this stage could affect the fair and expeditious conduct of the proceedings, still less the outcome of the trial, nor that an immediate resolution would materially advance the proceedings.

b. ISSUE 2

30. The Veseli Defence submits that total anonymity of VPPs could potentially violate constitutional and international human rights of the Accused. It cites Article 32 of the Law, Article 31 of the Constitution, Article 6 of ECHR and

²¹ Thaçi Decision on Leave to Appeal, para. 11.

²² Veseli Defence Request, paras 2 and 5.

²³ Veseli Defence Response, paras 4-8; Veseli Defence Request, para. 5.

Article 14 of ICCPR.²⁴ Victims' Counsel submits that the Request fails to justify the appealability of the second issue. The Veseli Defence does not explain how the anonymity of VPPs at this point in the proceedings, and as an interim measure, could potentially violate the accused's rights under the provisions cited.

31. Further, the Veseli Defence's argument that the Pre-Trial Judge "simply disregard[ed]" the STL Appeals Chamber Decision is incorrect. Contrary to the Veseli Defence's submission, the Pre-Trial Judge did refer to the STL Appeals Chamber Decision, correctly holding that "the Pre-Trial Judge at the Specialist Chambers is guided, first and foremost, by the legal instruments of this court, which expressly foresee anonymity for victims, and is not bound by the STL case-law."²⁵

c. ISSUE 3

32. The Veseli Defence argues that the Pre-Trial Judge failed to address its argument that total anonymity of VPPs is inconsistent with Article 22(9) of the Law and eliminates the possibility of civil proceedings before other Kosovo courts.²⁶ This issue is purely hypothetical, of no relevance for protective measures and therefore not appealable.
33. The issues of relevance in this regard are those pertaining to the safety, physical and psychological well-being, dignity and privacy of individual VPPs.
34. Should the issue of referral to civil litigation pursuant to Article 22(9) of the Law arise in the future, the VPPs will be in the best position to assess the consequences of such referral, and specifically so in relation to a possible need to waive their anonymity. It will be also up to the VPPs to decide whether to accept these consequences and pursue civil litigation or not. At this juncture any such

²⁴ Veseli Defence Request, para. 2, see also para. 6.

²⁵ Third Decision on Victims' Participation, fn. 50.

²⁶ Veseli Defence Request, para. 2.

considerations are premature and irrelevant and do not amount to a basis for certification as a result.

d. ISSUE 4

35. The Veseli Defence submits in the alternative that “in light of the fact that all admitted victims to date have been granted total anonymity, the Pre-Trial Judge erred in finding that exceptional circumstances justify such measure”.²⁷ However, the Request fails to justify the appealability of this issue. Apart from an erroneous quantitative argument which is imbedded in the First and Second Decision on Victims’ Participation, the Request fails to identify any actual error in the Pre-Trial Judge’s assessment.
36. This proposed issue also fails to meet the test for certification on the same grounds as the other proposed Issues: there is no prejudice to the Defence at this stage occasioned by these interim measures and Rule 77 (2) is not engaged.

V. THE MERITS

37. This Response does not address the merits of the Veseli argument which are not a relevant consideration in a decision on certification.²⁸ For the avoidance of doubt however, the submissions made above should not be understood as expressing any measure of agreement with the arguments advanced by the Veseli Defence. On the contrary, the position of Victims’ Counsel is that the Impugned Decision was not only correct, but also that anonymity for the remainder of the proceedings is the appropriate order in respect of the VPPs in this case.

²⁷ Veseli Defence Request, para. 2.

²⁸ See Thaçi Decision on Appeal, para 17.

VI. CONCLUSION

38. Victims' Counsel submits that none of the issues identified in the Veseli Defence Request are appealable. None of them could significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Neither do they involve a matter for which an immediate resolution by the Court of Appeals Panel could materially advance the proceedings.
39. For those reasons, the test for certification is not met and the Request should be denied.

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Simon Laws QC
Counsel for Victims
13 June 2022
The Hague, the Netherlands



Maria Radziejowska
Co-Counsel for Victims
13 June 2022
Warsaw, Poland