

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: Counsel for Rexhep Selimi

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**Selimi Defence Request for Certification to Appeal the Decision on
Framework for the Handling of Confidential Information during
Investigations and Contact between a Party or Participant and Witnesses of
the Opposing Party or of a Participant**

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I. INTRODUCTION

1. Pursuant to Article 45 of the Law (“Law”)¹ and Rules 77 and 97(3) of the Rule of Procedure and Evidence (“RPE”),² the Selimi Defence respectfully requests certification to appeal the Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant (“Impugned Decision”),³ in relation to the following issues:

- (i) **Issue 1:** Whether the Pre-Trial Judge erred in finding that Articles 35(2)(f), 39(1) and (11) provide a legal basis for the Proposed Framework which doesn’t require that each witness justify its application according to their individual circumstances.⁴
- (ii) **Issue 2:** Whether the Pre-Trial Judge made a factual error in setting out, in his view, the counterbalancing “safeguards” relating to the scope of the Proposed Framework’s application, namely judicial overview of the witness’ preference.⁵
- (iii) **Issue 3:** Whether Section II.n.ii and o. of the Proposed Framework, relating to the mandatory submission of audio-visual records of witness interviews to the Panel and the opposing Party, and their potential to be

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (‘Law’). All references to ‘Article’ or ‘Articles’ herein refer to articles of the Law, unless otherwise specified.

² 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.

³ KSC-BC-2020-06/F00854, Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Part or of a Participant, 24 June 2022.

⁴ Impugned Decision, paras. 115, 116, 117, 135.

⁵ Impugned Decision, paras. 119, 120.

entered onto the record, exceeds the functions of the Pre-Trial Judge as set out in Article 39 (11).⁶

(iv) **Issue 4:** Whether the provisions under Section II.n.ii and o. of the Proposed Framework, relating to the mandatory submission of audio-visual records of witness interviews to the Panel and the opposing Party, and their potential to be entered onto the record, are disproportionate to the stated aims of witness protection and the preservation of evidence, and that less restrictive measures should have been considered to mitigate the stated risk.⁷

2. Each of the above issues are raised only with regard the Impugned Decision affecting the provisions of the Proposed Framework set out in Section II. “Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant”.
3. Considering the nature and scope of requests for certification to appeal, the Defence does not include arguments at this stage as to whether or not the Pre-Trial Judge was correct in relation to any of the Four Issues. Submissions are instead limited to whether each Issue fulfils the criteria of Rule 77.

II. APPLICABLE LAW

4. Certification is required to appeal the Impugned Decision.⁸
5. Article 45(2) of the Law provides that the Pre-Trial Judge shall grant certification to appeal a decision where the appeal:

“involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

⁶ Impugned Decision, paras. 115, 124, 212.II.n.ii, o.

⁷ Impugned Decision, paras. 115, 124, 212.II.n.ii, o.

⁸ Rule 77(1), Article 45(2), Law.

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.”

6. This is reflected in Rule 77(2), which provides that certification shall be granted 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 a Court of Appeals Panel may materially advance the proceedings”

7. The jurisprudence of the Kosovo Specialist Chambers (“KSC”) sets out specific requirements which apply to the certification procedure:

- (a) Whether the matter is an “appealable issue”;
- (b) Whether the issue at hand would significantly affect:
 - (i) The fair and expeditious conduct of proceedings, or
 - (ii) The outcome of the trial; and
- (c) Whether, in the opinion of the Pre-Trial Judge, an immediate resolution by the Court of Appeals Panel may materially advance proceedings.⁹

8. As held by the ICC Appeals Chamber, and endorsed by the Pre-Trial Judge:¹⁰

“Only an “issue” may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or

⁹ KSC-BC-2020-06/F00534, Decision on Defence Applications for Leave to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment, 18 October 2021 (“Thaçi Decision on Leave to Appeal Defects Decision”), para. 14; KSC-BC-2020-07/F00169, Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, 1 April 2021, (“Gucati and Haradinaj Decision on Leave to Appeal”) para. 6; KSC-BC-2020-06/F00172, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021 (“Thaçi Decision on Leave to Appeal”), para. 10.

¹⁰ Gucati and Haradinaj Decision on Leave to Appeal, para. 12 (“Gucati and Haradinaj Decision”).

conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one¹¹

Further, 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 questions or hypothetical concerns”.¹²

III. SUBMISSIONS

a. The listed issues are appealable

9. All Four Issues are appealable as they arise from the Impugned Decision, are not mere assertions that the Pre-Trial Judge should have ruled differently on the matters contained therein and contest specific findings made by the Pre-Trial Judge in deciding to adopt the Proposed Framework. These discrete issues therefore emanate from the Impugned Decision and ruling and do not amount to abstract questions or hypothetical concerns.
10. Issue 1 relates to arguments made by the Defence that witnesses wishing to avail of protective measures must first satisfy certain conditions, namely an individual objective risk assessment, justified on a case-by-case basis.¹³ This issue will assert that whether protection is applied pursuant to Rule 80 or

¹¹ ICC, Situation in the Democratic Republic of the Congo, ICC-01/04-168, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 9 (“Judgment on Extraordinary Review”).

¹² Thaçi Decision on Leave to Appeal, para. 11.

¹³ KSC-BC-2020-06, Transcript, 22 February 2022, public, p. 1017. The Defence notes that the Impugned Decision at para. 120 misstates the arguments of the Defence on this matter as being opposed to a witness at any point seeking protection based solely on “the mere fact that a witness has not expressed any fear so far he or she has an international profile and/or occupied a high-ranking position”, when the oral submissions made clear that the Defence did not oppose any witness, regardless of status, being granted protective measures, provided they met the requirements of justifying those protections.

deemed to be “necessary” under Article 39(11); at a very minimum, a nexus between a risk and the witness in question must be justified.

11. Issue 2 overlaps with Issue 1 and the Defence arguments about unfettered application of protective measures in that it concerns a factual error made by the Pre-Trial Judge regarding safeguards on the scope of application by satisfying himself that “the protection provided by the Proposed Framework will exclusively be extended to those who themselves wish to invoke it”.¹⁴ This statement implies that the Proposed Framework as a whole is applied only on an “opt-in” basis, when in fact any interview with all concerned witnesses *must* take place under its provisions, with the sole (potential) exception being the presence of the opposing party during an interview.
12. Issues 3 and 4 relate to a specific provision of the Proposed Framework concerning the mandatory audio-visual recording of an interview with SPO listed or notified witnesses, the subsequent handing over of that record to the Panel and opposing Party and the allowance for this recording to then make it onto the evidential record in the case brought by the SPO against the Accused. Issue 3 asserts that the operation of Article 39(11) is limited to measures shown to be necessary solely for the preservation of evidence, as opposed to the gathering of evidence and Issue 4 overlaps with Issue 3 in that it asserts that if the application of protective measures is deemed necessary, regardless of the legal basis, the least restrictive or proportionate measures to that aim must be chosen
13. Although there is a relationship and potential overlap between these separate issues, each individual issue is sufficient to warrant the intervention of the Appeals Chamber.

¹⁴ Impugned Decision, para. 119.

b. Impact on fair and expeditious conduct of proceedings or outcome of the trial

14. Each of the Four Issues is likely to have significant repercussions on the fair and expeditious conduct of the trial and pre-trial proceedings, or the outcome of the trial.
15. Regarding **Issue 1**, the Pre-Trial Judge held that the combined effects of Articles 35(2)(f) and 39(1) and (11) of the Law provide the legal basis for the adoption of the Proposed Framework and that it should be available to all witnesses in the case.¹⁵ In making this finding, the Pre-Trial Judge focused specifically on discretionary powers afforded to him under Article 39(11) through the phrase “where necessary”.¹⁶ The Pre-Trial Judge rejected Defence arguments that the Proposed Framework is an indirect request for additional or new measures pursuant to Rule 80,¹⁷ thus implicitly rejecting that the application of the Proposed Framework should require an objectively justified risk assessment for each witness on a case-by-case basis.
16. This issue does not challenge whether the Proposed Framework should, in theory, be available to all witnesses, but whether the phrase “where necessary” contained in Article 39(11) permits the Pre-Trial Judge, in making discretionary provision for the protection of witnesses and their privacy, to dispense with the need to establish, at the very least, a nexus between a broadly stated risk¹⁸ and the individual circumstances of a witnesses necessitating those provisions. To be clear, this issue does not concern witnesses already subject to individualised protective measures, where, absent any future change in circumstances, the

¹⁵ Impugned Decision, para. 135.

¹⁶ Impugned Decision, para. 117.

¹⁷ Impugned Decision, para. 117.

¹⁸ Impugned Decision, paras 118, 169, 173, 198.

nexus between this risk and the witnesses in question is self-evident.¹⁹ Rather, this issue focuses on the automatic application of the Proposed Framework to every “international witnesses [and] those not otherwise at risk”.²⁰

17. This issue significantly affects the fair and expeditious conduct of trial, as a decision based on an abuse of discretion which affects the conduct of Defence well into the trial phase would raise serious questions as to the fairness of the proceedings as a whole. Furthermore, an unnecessarily broad application of the Proposed Framework will have a real impact on how the Defence conducts its interviews and whether it in fact conducts interviews, as well as causing unnecessary delay to the investigation, taking into account that Defence investigations will be ongoing during the trial phase resulting at least in part from the delaying effect of redactions to the charging document and delayed disclosure of evidence.
18. **Issue 2** is interconnected with the first, third and fourth issues, relates to the scope of application, and concerns the Pre-Trial Judge’s erroneous understanding that “the Proposed Framework only applies upon the witness’s request”, and that “the possibility of the SPO overriding the witness’s preference is subject to judicial oversight”,²¹ thus constituting an “appropriate [counterbalancing] safeguard”.²² This finding in fact relates solely to the presence of the opposing party during an interview and not to the application of the Proposed Framework as a whole, including the measures which are the subject of Issues 3 and 4, thus making every other provision of the Proposed Framework the *sine qua non* of any interview with each witness in the case.

¹⁹ Impugned Decision, para. 118.

²⁰ Impugned Decision, para. 120.

²¹ Impugned Decision, para. 119.

²² Impugned Decision, para. 120.

19. This issue significantly affects the fair and expeditious conduct of trial, since the Pre-Trial Judge placed “particular importance”²³ on these purported safeguards. If the Pre-Trial Judge’s understanding of these safeguards is deficient, or incorrect, then the Proposed Framework is unfairly broad in scope, thus unlawfully preventing the Defence from potentially interviewing any of the concerned witnesses outside of the Proposed Framework (excepting the provision mentioned above), potentially unfairly limiting the content of those interviews and unnecessarily delaying Defence investigations.
20. **Issue 3** concerns the inclusion of Section II.n.ii and o in the Proposed Framework, based on the Pre-Trial Judge’s finding related to the preservation of evidence.²⁴ As with Issue 1, the legal basis for this stems from the discretionary power under Article 39(11) related to the Pre-Trial Judge’s function to preserve evidence “where necessary”. This issue would challenge whether ordering these provisions exceeds the Article 39(11) discretionary function and the stated aims of the Proposed Framework to preserve evidence by allowing the possibility for the audio-visual/transcript record of the interviews to be entered onto the record. Further, this issue would challenge the sufficiency of the “judicial safeguards” within those provisions.
21. This issue significantly affects the fair and expeditious conduct of trial, as the provisions are implemented through an abuse of judicial discretion which would result in the discretion of the Defence in carrying out its investigations being unfairly fettered. Furthermore, if the Pre-Trial judge has exercised his judicial discretion in a manner which goes beyond the evidence *preservation* envisaged by Article 39(11) into unlawfully mandating that the Defence engage in evidence *gathering* on behalf the SPO and the Panel, this would raise

²³ Impugned Decision, para. 119

²⁴ Impugned Decision, para. 124.

profound questions as to the safeness of any potential conviction resulting from these proceedings.

22. **Issue 4:** Bearing in mind that the Pre-Trial Judge explicitly stated that generally the SPO shall act in good faith subject to a reasoned and substantiated challenge,²⁵ and that “the Defence’s assertions regarding mistrust against Defence counsel [...] are misplaced”, with there being no implication “that counsel have engaged or would engage in such activities in the absence of any specific indications to the contrary”,²⁶ this issue focuses on whether Section II.n.ii and o as formulated is disproportionate to the aims of mitigating what in the Pre-Trial Judge’s view are the risks to the preservation of evidence.
23. Specifically, whether the need to establish a “transparent and accessible record in relation to [witness] interviews”, which would assist “in assessing any allegations of interference”²⁷ would be more fairly addressed by making the Registry custodians of the interview records under seal, to be accessed by an opposing party and the Panel only upon “concrete and substantial”²⁸ “specific indications”²⁹ to the contrary.
24. This issue significantly affects the fair and expeditious conduct of trial, as the provisions as currently formulated would amount to an unnecessary and continuous monitoring of Defence investigations concerning the witnesses in question by both the Panel and the SPO without specific cause and to a degree, would defeat the purpose of the judicial safeguards concerning the presence of

²⁵ Impugned Decision, para. 159. See also paras 151, 143

²⁶ Impugned Decision, para. 170.

²⁷ Impugned Decision, para. 124.

²⁸ Impugned Decision, para. 142.

²⁹ Impugned Decision, para. 170.

the opposing party during an interview, contrary to that witness' expressed preference.

c. Immediate resolution by the Appeals Chamber

25. Immediate intervention by the Appeals Chamber will settle the Four Issues 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 along the right course”.³⁰ All Four Issues directly impact the fairness of the proceedings as they relate to Defence investigations, as well as the evidence to be submitted at trial.
26. Protective measures, whether they are implemented under Rule 80 or Article 39(11), necessarily entail some degree of curtailment of the Accused’s rights and as such, should be the applied in a proportionate and lawful manner.
27. In this regard, it is noted that the Pre-Trial Judge offers suggestions to the Defence to “define” its investigative strategy to balance the mandatory conditions of the Proposed Framework with the best interests of the Accused and to otherwise limit its investigation to not reveal sensitive matters with SPO witnesses, or to not interview these witnesses at all or to pursue alternative means in its investigations other than interviewing these witnesses.³¹ In addition, in relation to Issues 3 and 4, the Pre-Trial Judge fails to consider that the Defence is only in control of the questions posed to the witness, and not the answers to those questions.
28. If the Defence is correct on all Four Issues, the obligation on the Defence to limit its investigative strategy in order to accommodate the Proposed Framework for

³⁰ Gucati and Haradinaj Decision, para. 17, referring to Judgment on Extraordinary Review, paras 14-16, 18-19.

³¹ Impugned Decision para. 150.

every witness for whom no nexus to the stated risk has been established, as well as the potential prejudice to the accused through the evidence gathering nature of Section II.n.ii, is based on an abuse of discretion, and as such, would taint the fairness of the proceedings and potentially the outcome of the trial.

IV. CONCLUSION & RELIEF REQUESTED

29. For the abovementioned reasons, the Defence respectfully requests the Pre-Trial Judge to GRANT certification to appeal the Impugned Decision in relation to the Four Issues set out herein.

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Respectfully submitted on 18 July 2022,



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