

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 Kadri Veseli

Date: 19 July 2022

Language: English

Classification: Public

**Corrected Version of Veseli Defence Request for Leave to
Appeal Decision on Framework for the Handling of
Confidential Information and Contacts with Witnesses (F00854)
(F00887, dated 18 July 2022)**

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I. INTRODUCTION

1. Pursuant to Rule 77 of the Rules of Procedure and Evidence (“Rules”), the Defence for Mr Kadri Veseli (“Defence”) hereby files this request for leave 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”).¹
2. The Defence proposes the following Issues for certification:
 - **First Issue:** Whether the Pre-Trial Judge erred in his assessment of the legal basis to adopt the SPO Proposed Framework.
 - **Second Issue:** Whether the Framework violates the Accused’s right to a fair trial.
 - **Third Issue:** Whether the Pre-Trial Judge discriminated Mr Veseli and other accused in KSC-BC-2020-06 *vis-à-vis* other accused in similar situations before the KSC.

II. APPLICABLE LAW

3. The Defence recalls the legal test set out in filing F00172 which is hereby incorporated by reference.²

III. SUBMISSIONS

4. The three proposed issues are of crucial importance and satisfy all formal requirements for certification.

¹ F00854, 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, 24 June 2022.

² F00172, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021, paras 9-17.

A. The Issues are Appealable

5. The First Issue derives from paragraphs 115-136 of the Impugned Decision. In summary, the Pre-Trial Judge concluded that the Proposed Framework:

- a. is permitted by Articles 35(2)(f) and 39(1) and (11) of the Law;
- b. does not amount to a request for either additional or new protective measures or a blanket protective measure under Rule 80; and
- c. properly extends to all witnesses included in the SPO List of Witnesses and other notified witnesses and any Defence witnesses.³

6. As regards Article 39(11) of the Law, which provides for the Pre-Trial Judge's authority to order protective measures for victims and witnesses, it is held that:

[A]ny protective measures ordered pursuant to Rule 80 of the Rules do not exhaust the more general responsibility of the SPO and the function of the Pre-Trial Judge to ensure the protection of witnesses under Article 39(11) of the Law. This provision stipulates that the Pre-Trial Judge may provide for the protection and privacy of witnesses "where necessary", thus expressly establishing that this function involves the exercise of judicial discretion. As such, the Proposed Framework, is not an indirect request for additional or new measures pursuant to Rule 80 of the Rules.

7. While finding that protective measures need not be grounded in Rule 80, the decision fails to provide any criteria for determining when it is appropriate to operate outside the Rule 80 framework (and when it is not), or how the necessity of judicial intervention pursuant to Article 39(11) is to be assessed. The decision thereby (i) fails to establish that Article 39(11) provides an independent legal basis for the Protocol; and (ii) introduces an unacceptable open-endedness to the exercise of "judicial discretion" in Article 39(11).

8. Moreover, even if it is correct that Article 39(11) provides a degree of judicial discretion to operate outside the framework of Rule 80, the issue remains

³ F00854, paras 135-136.

whether the Pre-Trial Judge *de facto* legislated a normative act, which should be regulated exclusively by the Rules, considering (i) the significant amount of conduct regulated; (ii) the importance of the issues involved⁴ and (iii) the non-individualised nature of the Framework⁵ which applies to all witnesses included in the SPO List of Witnesses and other notified witnesses and any Defence witnesses.⁶

9. The Second Issue derives from paragraphs 137-177 of the Impugned Decision. For instance, regarding the potential infringement of the right to equality of arms, the Pre-Trial Judge held that the Defence misconstrued “the Law insofar as the responsibilities of the SPO and the Defence [were] concerned”, and that “it cannot be maintained that the Defence should have been afforded an opportunity to be present during interviews with witnesses in the context of the investigations of the SITF and/or SPO”.⁷ However, this was not the issue with which the Defence was concerned. It is plain from Defence submissions that the right to equality of arms would be infringed by denying the Defence the same “freedom in choosing the methodology of contacting and interviewing witnesses which included informal and non-recorded meetings”.⁸ Further, rather than pointing to any “hypothetical concerns”⁹ the

⁴ See, F00854, para. 130 “[I]t is of fundamental importance to ensure that the rights and obligations of the Parties and participants in relation to these matters are sufficiently well-defined given their importance”).

⁵ The Defence recalls that normative acts typically regulate important matters and are, by definition, applicable to a generic and general category of individuals (as opposed to individualised orders). The adopted Framework (which is, in effect, a protocol), is applicable to all witnesses irrespective of any objectively proven security risk; and it certainly regulates important matters.

⁶ F00854, para. 136.

⁷ F00854, para. 140.

⁸ F00628, Veseli Defence Response to Prosecution Submissions on Confidential Information and Contacts with Witnesses, 15 December 2021, para. 20. See also, para. 21 (“The proposed protocols take these important Defence methods off the table and, in doing so, place the Defence at an unfair disadvantage to the Prosecution”).

⁹ F00854, para. 143.

Defence referred to specific and objective instances which would provide the SPO with an unfair tactical advantage:

The SPO would therefore be privy to each Defence investigative step; it would learn which witnesses the Defence prioritised; and it would be granted insight to the Defence's assessment of the witnesses' credibility and likely lines of cross-examination well in advance of trial.¹⁰

10. As regards the submission that the Protocol is overbroad and unnecessary, considering that “dozens of witnesses that the SPO intends to call which (i) will testify publicly, (ii) have expressed no fear of testifying and (iii) who were initially interviewed as suspects”,¹¹ the Pre-Trial Judge disagreed, in holding that such fact “does not, as such establish that [a witness with an international profile and/or occupied a high ranking position] should not be allowed to request the protection under the terms of the Proposed Framework in light of the aforementioned considerations”.¹² Yet, again, the issue remains whether the Protocol is ‘necessary’ in the first place. The Defence recalls that any limitation to fair trial rights may be limited only when necessary and proportional to the rights of the accused. Such necessity must be real, specific and tangible, and not – as the Protocol appears – based on generic, theoretical concerns about a climate of witness intimidation which may have occurred some twenty years ago. This is even more so considering that the Defence submitted that the existing legal framework affords adequate protection and render the protocol unnecessary.¹³

¹⁰ F00628, para. 22.

¹¹ F00628, paras 27-28.

¹² F00854, para. 120.

¹³ The Defence notes the Pre-Trial Judge's reasoning at paragraph 130 of the Impugned Decision. It is not clear to the Defence what the Pre-Trial Judge meant when finding that “similar undertakings cannot *a fortiori* be invoked to deviate from the [Constitution, the Law and the Rules]” considering that no provision of the Code of Conduct has been found to be inconsistent with the Constitution, the Law or the Rules.

11. The Third Issue stems from paragraphs 11-12 of the Defence submissions¹⁴ and paragraph 131 of the Impugned Decision wherein the Pre-Trial Judge found that “the approaches adopted in other SC proceedings and/or other Tribunals are specific to the situations addressed before those Tribunals and do not, as such, invalidate the conclusion that the SC legal framework allows for the adoption of such a Framework”. Yet, the Pre-Trial Judge failed to adequately explain how the *Mustafa* or *Shala* cases differ from the *Thaci et al.* case,¹⁵ or why, even if “the SC legal framework allows for the adoption of such a Framework” the accused in the *Thaci et al.* case must be treated differently from other accused in substantially similar, if not identical situations.

B. The Issues Significantly Affect the Outcome or Fair and Expeditious Conduct of the Proceedings

12. It is plain and self-evident that all the proposed Issues directly affect outcome of the proceedings, by potentially infringing the right of Mr Veseli to a fair trial as protected by the Constitution and relevant international human rights instruments.¹⁶

C. An Immediate Resolution from the Court of Appeal Panel Will Materially Advance the Proceedings.

13. A positive resolution from the Court of Appeals Panel at this stage would obviate the risk of any prejudice caused to Mr Veseli. In addition, an authoritative determination from the Court of Appeals Panel would provide clarity on the legal basis of such a novel and important. An immediate resolution from the Court of Appeals Panel is, therefore, warranted.

¹⁴ F00628.

¹⁵ See, for instance, Defence submissions in F00628, para. 11.

¹⁶ See, for example, F00628, para. 23 and associated footnote.

IV. CONCLUSION

14. For the abovementioned reasons, the Defence for Mr Veseli respectfully requests the Pre-Trial Judge to grant the request and certify the proposed Issues.

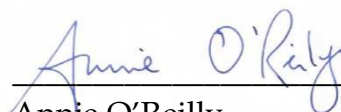
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