



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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: Specialist Prosecutor

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**Prosecution response to Krasniqi Defence request for certification to appeal
Decision F00854**

Specialist Prosecutor's Office

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. The Krasniqi Request¹ should be rejected because it fails to meet the requirements for leave to appeal under Article 45 of the Law² and Rule 77 of the Rules.³ Krasniqi does not demonstrate that any of the issues alleging errors in the Decision⁴ meet the strict threshold for certification.⁵ The purported issues are insufficiently discrete and/or misrepresent the Decision, and Krasniqi also fails to meet his burden in respect of the second and third prongs of the certification test.

II. SUBMISSIONS

A. EACH OF THE ISSUES FAILS TO MEET THE CERTIFICATION TEST

(a) Issue 1

2. The first issue Krasniqi raises is whether the Pre-Trial Judge failed to apply the requirement of ‘necessity’ in Articles 35(2)(f), 39(1) and 39(11).⁶ This issue does not merit leave to appeal because it ignores relevant findings in the Decision. The Pre-Trial Judge set out the statutory basis for the Framework in detail, including the explicit language referred to by the Defence, and was thus clearly cognisant that the Law empowers him to take measures ‘where necessary’.⁷ The Pre-Trial Judge also

¹ Krasniqi 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”, KSC-BC-2020-06/F00886, 18 July 2022 (‘Request’).

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (‘Law’).

³ 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.

⁴ 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, KSC-BC-2020-06/F00854, 24 June 2022 (‘Decision’).

⁵ The applicable law has been set out in prior decisions. *See, for example*, Decision on the Krasniqi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00479, 20 September 2021, para.14; *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021 (‘Case 7 Decision’), paras 12, 14-15, 17.

⁶ Request, KSC-BC-2020-06/F00886, paras 2, 16-18.

⁷ Decision, KSC-BC-2020-06/F00854, paras 115, 117.

gave detailed reasons why he considered the adoption of the Framework necessary,⁸ and even explicitly stated that one of the measures opposed by the Defence, namely the SPO's attendance at Defence interviews, was 'an appropriate and necessary measure'.⁹ In light of this, the Defence's claim that the Pre-Trial Judge failed to apply the statutory test misrepresents the Decision and should be rejected on that basis.¹⁰

(b) Issues 2 & 5

3. The second and fifth issues do not merit leave to appeal because neither is an appealable issue.

4. Although the second issue, as phrased, asks generally whether the Pre-Trial Judge 'erred in fact or law in finding that it was necessary to impose a framework', Krasniqi provides no detail as to the specific factual or legal error alleged.¹¹ The Request merely states, in broad terms, that the second issue arises from the Decision and 'goes to the core legal reasoning underpinning' the Decision.¹² It is thus utterly unclear what the alleged error in the Decision is purported to be.

5. Similarly, the fifth issue raises whether 'the Framework was justified to protect the privacy of witnesses or preserve evidence or the expeditious conduct of proceedings', but again does not substantiate any discrete issue.¹³

6. The second and fifth issues are therefore not adequately specific or discrete to be appealable issues, and should be rejected accordingly. Indeed, the purported issues are so broadly and non-specifically drawn as to leave entirely open the actual issues to be litigated on appeal, and to render meaningless judicial oversight of the strict appeals requirements set out in the Law and Rules. Instead, they represent mere disagreements with Pre-Trial Judge's overall conclusions.

⁸ Decision, KSC-BC-2020-06/F00854, para.118.

⁹ Decision, KSC-BC-2020-06/F00854, para.198.

¹⁰ See Decision on Application for Leave to Appeal the Decision F00180, KSC, KSC-BC-2018-01/F00184, para.24; Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para.23.

¹¹ Request, KSC-BC-2020-06/F00886, paras 2, 19-20.

¹² Request, KSC-BC-2020-06/F00886, para.19.

¹³ Request, KSC-BC-2020-06/F00886, paras 2, 26-28.

(c) Issue 3

7. The third issue Krasniqi raises is whether the Pre-Trial Judge erred in law and fact in imposing a framework that does not distinguish between witnesses.¹⁴ Other than expressing mere disagreement with the Pre-Trial Judge's conclusion, Krasniqi does not identify which legal or factual error he alleges. Krasniqi therefore fails to adequately define a discrete issue and consequently fails the certification test for the third issue.

8. Moreover, the issue ignores (i) that the Pre-Trial Judge made a necessity finding which in fact took into account, *inter alia*, the circumstances of relevant witnesses in determining that the degree of protection provided under the Framework is 'commensurate to the established security issues in the present case',¹⁵ and (ii) the counterbalancing safeguards built into the Framework, which tailor its application to the specific circumstances of different witnesses.¹⁶

9. The third issue also fails because Krasniqi has not established that the issue would significantly impact the fair and expeditious conduct of the proceedings or the outcome of the trial. On the issue of a fair trial, Krasniqi offers no specific arguments other than a blanket assertion that: 'a framework which places limits on the ability of the Defence to contact witnesses, inherently has significant repercussions for the fair conduct of proceedings'.¹⁷

10. Importantly, Krasniqi does not specify the legal basis for the argument that he has an unfettered right to conduct pre-trial witness interviews. Nor does Krasniqi challenge the Pre-Trial Judge's finding that neither the KSC's legal framework nor international human rights law provide a right to conduct pre-trial interviews with witnesses.¹⁸

¹⁴ Request, KSC-BC-2020-06/F00886, paras 2, 21-22.

¹⁵ Decision, KSC-BC-2020-06/F00854, para.120.

¹⁶ Decision, KSC-BC-2020-06/F00854, para.119.

¹⁷ Request, KSC-BC-2020-06/F00886, para.17.

¹⁸ Decision, KSC-BC-2020-06/F00854, para.163.

11. In regard to expeditiousness, Krasniqi offers equally insufficient substantiation, merely claiming that: ‘the additional steps that the Framework will require each defence team to take will affect the expeditious conduct of proceedings’.¹⁹ Consequently, Krasniqi has not substantiated his submission that the third issue would significantly impact the fair and expeditious conduct of proceedings or the outcome of the trial. Such broad and speculative submissions are insufficient to meet the certification test.

(d) Issues 4 & 6

12. The fourth issue raises: ‘[w]hether the Impugned Decision erred in finding that “[g]iven that the Accused assert their rights of defence through counsel, the Proposed Framework must necessarily ensure that counsel act in accordance with the aforementioned findings regarding the risks faced by specified individuals and the climate of interference’.

This is not an appealable issue because the above wording makes it unclear what precise issue Krasniqi raises. The most convincing interpretation is whether the Pre-Trial Judge erred in finding that Defence counsel must act in accordance with the Framework. This is akin to challenging the Decision as a whole and thus does not constitute an appealable issue.

13. In the body of the Request, the Defence raise a number of issues under the umbrella of the fourth issue, which in itself disqualifies the fourth issue from meeting the certification test.²⁰

14. Krasniqi misrepresents the Decision when he claims that the Pre-Trial Judge failed to distinguish between Defence counsel and the Accused. As Krasniqi partly acknowledges,²¹ in the sentence following that quoted by the Defence, the Pre-Trial Judge states: ‘[t]his does not imply or presume that counsel have engaged or would engage in such activities in the absence of any specific indications to the contrary’.²²

¹⁹ Request, KSC-BC-2020-06/F00886, para.17.

²⁰ Request, KSC-BC-2020-06/F00886, paras 23-25.

²¹ Request, KSC-BC-2020-06/F00886, para.23.

²² Decision, KSC-BC-2020-06/F00854, para.170.

Moreover, one of the primary imports of the Decision is in fact in seeking to ensure that contacts with witnesses are conducted through a regulated framework involving counsel on either side, and are properly recorded, thereby assisting in identifying and distinguishing other potentially problematic approaches to known witnesses.

15. Next, in arguing the second prong of the certification test, Krasniqi claims that the Pre-Trial Judge's finding goes to equality of arms by presuming good faith on the part of the SPO without extending the same presumption to the Defence. Krasniqi again misrepresents the Decision. As the Pre-Trial Judge explained:

The present decision addresses the Proposed Framework particularly in relation to the Defence. However, as the protection of witnesses concerns, in principle, all witnesses, this Proposed Framework will apply to all witnesses in this case and their contacts with the non-calling Parties and participants.²³

16. It follows that the requirement to act in good faith equally applies to the Defence in situations where the SPO requests to interview Defence witnesses. The submission that the Pre-Trial Judge applied a double standard by not extending the presumption of good faith to Defence counsel is therefore misguided.

17. The fourth and sixth issues also raise the Framework's impact on several fair trial rights, including the right to adequate facilities to prepare a defence under Article 21(4)(c) of the Law (issue 4),²⁴ the right against self-incrimination (issue 6),²⁵ and the right to equality of arms (issue 6).²⁶ As discussed above, Krasniqi does not demonstrate that the KSC's legal framework or international human rights law provide a right to conduct pre-trial interviews with witnesses.²⁷ Once again Krasniqi fails to give any legal basis for the claim that these fair trial rights are impacted by the Framework and therefore fails to present an appealable issue that would have a significant impact on the fair and expeditious conduct of proceedings or the outcome of the trial.

²³ Decision, KSC-BC-2020-06/F00854, para.116.

²⁴ Request, KSC-BC-2020-06/F00886, paras 2, 23-25.

²⁵ Request, KSC-BC-2020-06/F00886, paras 2, 29-31.

²⁶ Request, KSC-BC-2020-06/F00886, paras 2, 29-31.

²⁷ See Decision, KSC-BC-2020-06/F00854, para.163.

18. Further, in respect of the sixth issue in particular, the same failure to identify any specific error - as indicated in respect of the second and fifth issues above – also applies. Krasniqi simply indicates entire findings and expresses disagreement with them, without identifying any error.²⁸ This is insufficient, and the purported issue should be rejected accordingly.

III. RELIEF REQUESTED

19. For the foregoing reasons, the SPO requests that the Pre-Trial Judge reject the Request.

Word count: 1683



Jack Smith

Specialist Prosecutor

Monday, 1 August 2022

At The Hague, the Netherlands.

²⁸ Request, KSC-BC-2020-06/F00886, para.29.