



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

**Date:** 1 August 2022

**Language:** English

**Classification:** Public

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

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## I. INTRODUCTION

1. The Selimi Request<sup>1</sup> should be rejected because it fails to meet the requirements for leave to appeal under Article 45 of the Law<sup>2</sup> and Rule 77 of the Rules.<sup>3</sup> Selimi does not demonstrate that any of the issues alleging errors in the Decision<sup>4</sup> meet the strict threshold for certification.<sup>5</sup>

## II. SUBMISSIONS

### A. EACH OF THE ISSUES FAIL TO MEET THE CERTIFICATION TEST

#### (a) Issue 1<sup>6</sup>

2. The first issue challenges the legal basis for the Framework<sup>7</sup> under Articles 35(2)(f), 39(1) and 39(11), and in particular whether the words ‘where necessary’ in Article 39(11) require a nexus between a risk and the relevant witness.<sup>8</sup>

3. The first issue misrepresents the Decision by ignoring (i) that the Pre-Trial Judge made a necessity finding which in fact took into account, *inter alia*, the

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<sup>1</sup> 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, KSC-BC-2020-06/F00884, 18 July 2022 (‘Request’).

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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’).

<sup>5</sup> 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.

<sup>6</sup> Issue 1: ‘Whether the Pre-Trial Judge erred in finding that Articles 35(2)(f), 39(1) and 39(11) provide a legal basis for the Proposed Framework which doesn’t require that each witness justify its application according to their individual circumstances’.

<sup>7</sup> ‘Framework’ refers to the Framework for the Handling of Confidential Information during Investigations and Contacts between a Party or Participant and Witnesses of the Opposing Party or of a Participant as set out at para.212 of the Decision.

<sup>8</sup> Request, KSC-BC-2020-06/F00884, paras 1, 10.

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',<sup>9</sup> and (ii) the counterbalancing safeguards built into the Framework, which tailor its application to the specific circumstances of different witnesses.<sup>10</sup> Moreover, noting that protection is just one of four basis upon which the Decision rests - the others being considerations of privacy, preservation of evidence and the expeditious conduct of proceedings<sup>11</sup> - the protection component of the Decision cannot in itself be considered as 'essential' to the Decision within the meaning of Article 45 and Rule 77.<sup>12</sup> The first issue could be dismissed on these bases alone.

4. However, the first issue also fails because Selimi has not established that the issue would significantly impact the fair and expeditious conduct of the proceedings or the outcome of the trial.

5. On the issue of a fair trial, Selimi offers no specific arguments other than bare assertions that a broad application of the Framework will 'raise serious questions as to the fairness of the proceedings as a whole' and 'will have a real impact on how the Defence conducts its interviews and whether it in fact conducts interviews'.<sup>13</sup> Importantly, Selimi does not specify the legal basis for the argument that Selimi has an unfettered right to conduct pre-trial witness interviews. Nor does Selimi 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.<sup>14</sup> In regard to expeditiousness, Selimi offers even less substantiation, merely claiming that the Framework will cause unnecessary delay to the Defence's investigation. Consequently, Selimi has not substantiated his submission that the first issue would significantly impact the fair and expeditious conduct of proceedings or the outcome

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<sup>9</sup> Decision, KSC-BC-2020-06/F00854, para.120.

<sup>10</sup> Decision, KSC-BC-2020-06/F00854, para.119.

<sup>11</sup> Decision, KSC-BC-2020-06/F00854, paras 114-125.

<sup>12</sup> Case 07 Decision, KSC-BC-2020-07/F00169, para.12.

<sup>13</sup> Request, KSC-BC-2020-06/F00884, para.17.

<sup>14</sup> Decision, KSC-BC-2020-06/F00854, para.163.

of the trial. On the contrary, as identified by the Pre-Trial Judge,<sup>15</sup> ensuring clarity and regulation of the circumstances and manner in which contacts with witnesses of an opposing party take place will promote both the fairness and expeditiousness of proceedings.

6. Such broad and speculative submissions are insufficient to meet the certification test.

**(b) Issue 2<sup>16</sup>**

7. In support of the second issue, Selimi argues that the Pre-Trial Judge made a factual error by stating that the ‘protection provided by the Proposed Framework will exclusively be extended to those who themselves wish to invoke it’.<sup>17</sup> Selimi claims that this statement ‘implies that the Proposed Framework as a whole is applied only on an ‘opt-in’ basis’ when in fact it applies to all witness interviews.<sup>18</sup> The purported issue misrepresents the Decision. Even on a plain reading of the text quoted by Selimi, it is evident that the Pre-Trial Judge only referred to the Framework’s protections, which witnesses may opt to avail themselves of or not.<sup>19</sup> Selimi fails to show why that finding is factually incorrect.

8. Moreover, Selimi mischaracterises the Framework by stating that ‘the sole (possible) exception’ to the application of the Framework is ‘the presence of the opposing party during an interview’.<sup>20</sup> In fact, under Article II.(b) of the Framework, witnesses may choose not to consent to being interviewed at all and may elect to have either a representative of the calling party, a legal representative of the witness, Victim’s Counsel and/or a WPSO representative present.

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<sup>15</sup> Decision, KSC-BC-2020-06/F00854, paras 124-125.

<sup>16</sup> 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.’

<sup>17</sup> Request, KSC-BC-2020-06/F00884, paras 1, 11.

<sup>18</sup> Request, KSC-BC-2020-06/F00884, para.11.

<sup>19</sup> The paragraph in question further fell under the ‘Protection’ sub-heading of the Decision.

<sup>20</sup> Request, KSC-BC-2020-06/F00884, para.11.

9. The second issue should be denied on this basis.<sup>21</sup>

10. However, in addition, Selimi's submissions regarding this issue's impact on the fair and expeditious conduct of proceedings are manifestly inadequate. They rest entirely on an unfounded fear that – notwithstanding the Pre-Trial Judge's clear discussion and elucidation of the Framework throughout the Decision – the Pre-Trial Judge's understanding of the provisions of a framework which he himself is setting forth is somehow 'deficient, or incorrect'.<sup>22</sup> This is utterly baseless. Moreover, the leap to then assuming that the Framework would automatically be 'overly broad' with 'unlawful[...]' consequences does not logically follow.<sup>23</sup> Issue 2 should be rejected accordingly.

**(c) Issue 3<sup>24</sup>**

11. In support of the third issue, Selimi submits that the mandatory submission of interview recordings to the Panel and the SPO may exceed the Pre-Trial Judge's discretion under Article 39(11), as that provision applies only to the preservation of evidence and not the gathering of evidence.<sup>25</sup> Selimi asserts that the Pre-Trial Judge abused his discretion by 'unlawfully mandating that the Defence engage in evidence *gathering* on behalf of the SPO and the Panel'.<sup>26</sup>

12. The third issue rests on a mischaracterisation of the Decision and the Framework, which only mandates the recording of Defence interviews with SPO witnesses and the disclosure of those recordings and associated materials to the SPO and the Panel. Nothing in the Decision or the Framework mandates the Defence to gather evidence on behalf of the SPO or the Panel. Indeed, if Selimi's argument was

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<sup>21</sup> See, e.g., Decision on Application for Leave to Appeal the Decision F00180, KSC-BC-2018-01/F00184, 24 August 2021, para.24.

<sup>22</sup> Request, KSC-BC-2020-06/F00884, para.19.

<sup>23</sup> Request, KSC-BC-2020-06/F00884, para.19.

<sup>24</sup> 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.'

<sup>25</sup> Request, KSC-BC-2020-06/F00884, paras 1, 12, 20-21.

<sup>26</sup> Request, KSC-BC-2020-06/F00884, para.21, emphasis in the original.

accepted, then the same concerns would apply to the recording and subsequent use of the Defence's cross-examination of SPO witnesses at trial, or evidence elicited from Defence witnesses in chief at trial.

13. Moreover, with respect to the possibility for admission of such recordings at trial, the Decision in fact expressly provides that such recordings shall *not* become part of the record in the case, without meeting admissibility criteria and being tendered in the normal fashion.<sup>27</sup>

14. The Defence's submissions regarding alleged impact on the fairness and expeditiousness of the proceedings fail for these same reasons.

**(d) Issue 4<sup>28</sup>**

15. The fourth issue also concerns the recording of witness interviews, and submission of those recordings to the Panel and the SPO. Selimi posits that 'less restrictive measures should have been considered to mitigate the stated risk',<sup>29</sup> and suggests that the Registry be entrusted with custody over the recordings.<sup>30</sup> The fourth issue challenges the Pre-Trial Judge's exercise of his discretion - which was based not only on considerations of protection but also those of evidence preservation - without demonstrating any error, and thus merely disagrees with the Decision. It should be rejected accordingly.

**III. RELIEF REQUESTED**

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

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<sup>27</sup> Decision, KSC-BC-2020-06/F00854, para.212(II)(o).

<sup>28</sup> 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.'

<sup>29</sup> Request, KSC-BC-2020-06/F00884, paras 1, 12, 22-24.

<sup>30</sup> Request, KSC-BC-2020-06/F00884, para.23.

**Word count: 1646**



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**Jack Smith**

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Monday, 1 August 2022

At The Hague, the Netherlands.