



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

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

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## I. INTRODUCTION

1. The Thaçi 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> Thaçi 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. THE REQUEST IS INSUFFICIENTLY REASONED

2. The cursory and general submissions in the Request fail to discharge Thaçi's burden to establish each of the requirements for certification. It is worth recalling that interlocutory appeals are an exceptional avenue. Thaçi carries the burden to articulate clearly discrete issues for resolution ('first prong') and explain how each issue has significant repercussions on the proceedings ('second prong').<sup>6</sup> Even then, the Pre-Trial Judge will not certify issues unless immediate resolution by the Appeals Panel may materially advance the proceedings ('third prong').<sup>7</sup> Moreover, where a party requesting leave to appeal claims error in a decision but does not identify what should

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<sup>1</sup> Thaçi 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/F00883, 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> Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, paras 11-15.

<sup>7</sup> Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para.16.

have been done differently, the issue will not be considered sufficiently discrete and specific to merit appeal.<sup>8</sup> Despite the extension of time granted to facilitate the Defence in formulating the Request,<sup>9</sup> Thaçi does not even attempt to hurdle the cumulative bars of the certification test and instead expects the Pre-Trial Judge to fill in the gaps in his defective reasoning. This insufficient argumentation is also not cured by Thaçi's blanket submissions addressing the Framework as a whole, which necessarily lack the required specificity.<sup>10</sup>

## B. EACH OF THE ISSUES FAILS TO MEET THE CERTIFICATION TEST

### (a) Issue 1

3. The first issue raises whether 'the recording and disclosure of witness interviews represents an erroneous invasion of attorney-client privilege and compromises the right of the accused to investigate the case against him'.<sup>11</sup>

4. Thaçi entirely fails to engage with the Decision, failing to even cite to any relevant portion of the Decision - which devoted an entire section to addressing questions related to privilege<sup>12</sup> - let alone identify an alleged error within it. In his submissions in support of the first issue, Thaçi merely restates the alleged issue while noting that it 'also significantly impacts the expeditious conduct of proceedings, as the additional logistics and parties involved will [...] take further time'.<sup>13</sup> Thaçi does not provide any further detail and thus, in addition to failing to clearly articulate any specific error, also fails to substantiate any significant impact on the expeditious conduct of proceedings.

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<sup>8</sup> Decision on the Krasniqi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00479, 20 September 2021, para.14.

<sup>9</sup> Decision on the Joint Defence Request for Variation of Time Limit for Leave to Appeal Decision KSC-BSC-2020-06/F00854 (Decision on Confidential Information and Contact with Witnesses), KSC-BC-2020-06/F00864, 1 July 2022.

<sup>10</sup> Request, KSC-BC-2020-06/F00883, paras 1-5, 12, 17.

<sup>11</sup> Request, KSC-BC-2020-06/F00883, paras 6, 8, 13.

<sup>12</sup> Decision, KSC-BC-2020-06/F00854, paras 155-160.

<sup>13</sup> Request, KSC-BC-2020-06/F00883, para.13.

5. Insofar as the first issue complains about an invasion of attorney-client privilege, Thaçi fails to explain how this would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial. As the Decision makes clear, ‘any information Thaçi elects to reveal during the interviews with witnesses [...] does not become part of the record [without] judicial authorization’.<sup>14</sup> Thaçi will therefore be able to raise any concerns about specific violations of client-attorney privilege with the Trial Panel. The Pre-Trial Judge has in the past refused to certify issues where the party could raise them with the Trial Panel instead.<sup>15</sup> Moreover, any disclosure of privileged information to third parties, including witnesses, voids the protection of privilege, with or without the Framework.<sup>16</sup>

6. With regard to Thaçi’s claim that the Framework ‘compromises the right of the accused to investigate the case against him’, the Pre-Trial Judge correctly noted that ‘no right to conduct pre-trial interviews with witnesses [...] is reflected in the legal framework of the SC or international human rights law’.<sup>17</sup> Thaçi simply ignores each of these findings in asserting error and impact on the proceedings, and thereby does no more than express mere disagreement.

#### **(b) Issues 2 and 4**

7. The second and fourth issues concern solely the interpretation of Article 39(11) and fail to acknowledge that the legal basis for the Framework is to be found, in addition to Article 39(11), also in Articles 35(2)(f) and 39(1).<sup>18</sup> In respect of the second issue, in particular, the Request misrepresents the Decision to the extent it presumes that the Framework needed to fall within Article 39(11) alone. The interpretation of Article 39(11) of the Law is thus an abstract exercise that fails to meet the certification test. The fourth issue also ignores the counterbalancing safeguards built into the

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<sup>14</sup> Decision, KSC-BC-2020-06/F00854, para.152.

<sup>15</sup> Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para.26.

<sup>16</sup> Decision, KSC-BC-2020-06/F00854, para.157; Rule 111(1)(b).

<sup>17</sup> Decision, KSC-BC-2020-06/F00854, para.163.

<sup>18</sup> Decision, KSC-BC-2020-06/F00854, para.115.

Framework, which in fact tailor its application to the specific circumstances of different witnesses,<sup>19</sup> thereby also misrepresenting the Decision.

8. Even if Thaçi had presented appealable issues, the Request would fail because Thaçi has not established that the issues would significantly impact the fair and expeditious conduct of the proceedings or the outcome of the trial.

9. On the issue of a fair trial, Thaçi offers no specific arguments tied to the second and fourth issues, other than claiming that the issues impact ‘the rights of the accused to adequate time and facilities, and to be tried within a reasonable time’.<sup>20</sup> Importantly, Thaçi does not substantiate the legal or factual basis for this argument or 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>21</sup> Consequently, Thaçi has not substantiate his submission that the second and fourth issues would significantly impact the fair conduct of proceedings or the outcome of the trial.

10. In regard to expeditiousness, Thaçi only offers a bare assertion that the second and fourth issues would ‘undoubtedly significantly impact the expeditiousness of proceedings’.<sup>22</sup> Such broad, unsubstantiated and speculative assertions are insufficient to meet the certification test.

### **(c) Issue 3**

11. The third issue concerns the Pre-Trial Judge’s summary dismissal of Thaçi’s unauthorised supplemental submissions.<sup>23</sup> Thaçi does not raise any legal issue arising out of the Pre-Trial Judge’s refusal to entertain submissions that were filed in disregard of the Rules and the Pre-Trial Judge’s schedule for submissions. Instead, Thaçi merely restates the arguments in the rejected submissions. This tangential issue

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<sup>19</sup> Decision, KSC-BC-2020-06/F00854, para.119.

<sup>20</sup> Request, KSC-BC-2020-06/F00883, para.13.

<sup>21</sup> Decision, KSC-BC-2020-06/F00854, para.163.

<sup>22</sup> Request, KSC-BC-2020-06/F00883, para.13.

<sup>23</sup> Request, KSC-BC-2020-06/F00883, paras 6, 13, 18; Decision, paras 109-110.

also falls far short of the requirement to significantly impact the fair and expeditious conduct of proceedings or outcome of the trial.

**(d) Issues 5 and 6**

12. The fifth issue complains that the recording and disclosure of witness interviews ‘violates the presumption that Defence Counsel act in good faith’.<sup>24</sup>

13. Similarly, in regard to the sixth issue, Thaçi states that the Pre-Trial Judge’s reliance on the risk of disclosing information creates a double standard, under which the SPO is presumed to act in good faith.<sup>25</sup>

14. Both of these issues mischaracterise the Decision and should be denied on this basis.<sup>26</sup> The requirement to act in good faith emanates from the Framework and applies to any calling party when seeking the consent of witnesses to be interviewed. The Pre-Trial Judge merely discussed the presumption that the SPO act in good faith in the context of specific Defence challenges to the SPO’s involvement in seeking the consent of witnesses.<sup>27</sup> In fact, in direct contradiction to Thaçi’s attempt to read some imputation of bad faith into it, the Decision expressly addresses and rejects submissions relating to ‘mistrust’ of the Defence and indicates that it is not implied or presumed that counsel would engage in wrongdoing.<sup>28</sup> The Defence therefore misrepresents the Decision.

**(e) Issue 7**

15. The seventh issue raises whether ‘the Pre-Trial Judge adopted an erroneously narrow definition of “compulsion” in finding that [...] the information revealed during Defence interviews has not been compelled’.<sup>29</sup> Once again, Thaçi fails to properly articulate how this finding significantly impacts the fair and expeditious

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<sup>24</sup> Request, KSC-BC-2020-06/F00883, para.6.

<sup>25</sup> Request, KSC-BC-2020-06/F00883, para.6.

<sup>26</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>27</sup> Decision, KSC-BC-2020-06/F00854, para.143.

<sup>28</sup> Decision, KSC-BC-2020-06/F00854, para.170.

<sup>29</sup> Request, KSC-BC-2020-06/F00883, paras 6, 9, 14, 18.

conduct of proceedings or outcome of the trial. Thaçi's bare assertion that this issue 'addresses the legal interpretation of 'compulsion', which arises directly from the Pre-Trial Judge's decision' is insufficient to properly articulate a discrete issue, the resolution of which is essential for the future conduct of proceedings.<sup>30</sup> Thaçi therefore fails to discharge his burden in that regard and consequently the seventh issue fails the certification test.

**(f) Issue 8**

16. Issue eight poses a general question of the Framework's compliance with Rules 104 to 111 (covering a wide array of provisions, including many Rules exclusively addressing the disclosure obligations of the SPO) and thus fails to identify a discrete issue or specific alleged error. Thaçi's cursory submissions supporting this issue only serve to highlight its failure to comply with relevant requirements in simply stating, even more broadly, that it raises the issue of compliance of the Framework with the 'Court's statutory framework'.<sup>31</sup> As with the first issue, Thaçi also fails to explain how information revealed during interviews conducted with SPO witnesses is privileged or could constitute work product.<sup>32</sup>

**(g) Issue 9<sup>33</sup>**

17. In support of the ninth issue, Thaçi argues that the Pre-Trial Judge failed to 'consider or give sufficient weight to Defence submissions as to other practical risks to the accused'.<sup>34</sup> Other than giving two examples of such submissions, namely the risk of 'creating an adverse record' and 'revealing investigatory avenues that assist the

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<sup>30</sup> Request, KSC-BC-2020-06/F00883, paras 9, 14.

<sup>31</sup> Request, KSC-BC-2020-06/F00883, paras 6, 9.

<sup>32</sup> Request, KSC-BC-2020-06/F00883, para.14.

<sup>33</sup> Issue 9: 'Whether the Pre-Trial Judge's reliance on the fact that the interview recordings do not automatically become part of the case record, fails to consider or give sufficient weight to the Defence submissions as to other practical risks to the accused, including creating an adverse record, and revealing investigatory avenues that assist the SPO'.

<sup>34</sup> Request, KSC-BC-2020-06/F00883, para.6.



SPO',<sup>35</sup> Thaçi does not specify which submissions the Pre-Trial Judge allegedly disregarded or indicate how the Pre-Trial Judge erred in assigning them weight. On this basis alone, the ninth issue fails to meet the certification test.

18. In any event, while there is no obligation on the Pre-Trial Judge to explicitly address and provide separate reasoning on every supporting argument, the Pre-Trial Judge did in fact summarise Thaçi's submissions in detail and addressed the concerns highlighted by Thaçi.<sup>36</sup> The ninth issue therefore misrepresents the Decision.

#### **(h) Issue 10**

19. The tenth issue complains in general terms that the Pre-Trial Judge framed the question of witness privacy only in relation to SPO witnesses, without referencing Defence witnesses.<sup>37</sup> Thaçi vaguely clarifies that the tenth issue 'asks for resolution of the legal impact' of the Pre-Trial Judge's approach to witness privacy,<sup>38</sup> and further states that the tenth issue impacts the right to adequate time and resources, as well as the right to equality.<sup>39</sup>

20. These abstract or hypothetical concerns cannot qualify as an appealable issue as Thaçi: (i) does not adequately identify the findings being challenged; (ii) invites the Pre-Trial Judge to speculate over the precise impact on Thaçi's fair trial rights; and (iii) does not identify in concrete terms why the resolution of the tenth issue is essential for the determination of matters arising in the judicial cause. In particular, noting that the Framework applies equally to the witnesses of all parties and participants, the tenth issue is immaterial to the findings. It also misrepresents the Decision, noting that from the outset paragraph 121 of the Decision refers to all 'other notified witnesses' without distinction as to the party of participant which has notified them. Thaçi thus fails to substantiate the elements of the certification test.

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<sup>35</sup> Request, KSC-BC-2020-06/F00883, para.6.

<sup>36</sup> Decision, KSC-BC-2020-06/F00854, paras 22, 79, 147-148.

<sup>37</sup> Request, KSC-BC-2020-06/F00883, para.6.

<sup>38</sup> Request, KSC-BC-2020-06/F00883, para.10.

<sup>39</sup> Request, KSC-BC-2020-06/F00883, para.15.



**(i) Issue 11**

21. The eleventh issue misrepresents the Decision and should be denied on this basis.<sup>40</sup> Contrary to Thaçi's submission,<sup>41</sup> the Pre-Trial Judge did not rely on witness privacy to justify the recording and disclosure of Defence interviews.<sup>42</sup> Rather, the Pre-Trial Judge relied on witness privacy to justify the requirement that the SPO initiates contact with the witnesses on its own list, and that the Framework defines the SPO's subsequent involvement.<sup>43</sup>

**(j) Issue 12**

22. The twelfth issue complains that SPO interviews before 24 June 2022 were conducted in the absence of the Defence, in contravention of the procedural framework in Kosovo.<sup>44</sup> Thaçi fails to explain why any other 'procedural framework in Kosovo' takes precedence over the Law adopted by Kosovo and the Rules, which govern the procedure before the KSC. Moreover, the twelfth issue simply does not arise from the Decision, noting that the Framework regulates only contacts with notified witnesses of a party or participant, and applies equally thereto, not investigations or interviews more generally. Consequently, the twelfth issue is not an appealable issue emanating from the Decision.

**(k) Issue 13**

23. Thaçi once again misrepresents the Decision by arguing that the Pre-Trial Judge rejected his claim to be entitled to participate in SPO interviews for the sole reason that the interviews related to the Council of Europe report taken as a whole.<sup>45</sup> The Pre-Trial Judge merely referred to the investigation concerning the Council of Europe

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<sup>40</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>41</sup> Request, KSC-BC-2020-06/F00883, para.6.

<sup>42</sup> Decision, KSC-BC-2020-06/F00854, paras 121-123.

<sup>43</sup> Decision, KSC-BC-2020-06/F00854, para.123.

<sup>44</sup> Request, KSC-BC-2020-06/F00883, para.6.

<sup>45</sup> Request, KSC-BC-2020-06/F00883, para.6.

Report to illustrate the different responsibilities of Thaçi and the SPO under the Law and the Rules.<sup>46</sup>

**(l) Issue 14**

24. The fourteenth issue seeks to call into question the Pre-Trial Judge's conclusion that the Framework contributes to the expeditious conduct of proceedings.<sup>47</sup> This finding is only one of many considerations which support the Pre-Trial Judge's finding that the Framework is a necessary measure for regulating, *inter alia*, the handling of confidential information and the contact between witnesses and opposing parties.<sup>48</sup> Thaçi fails to explain how the Pre-Trial Judge's finding impacts his overall conclusion that the Framework is necessary.

**(m) Issue 15<sup>49</sup>**

25. Thaçi's erroneous claim that the Pre-Trial Judge did not take into account certain Defence objections to possible options for implementing the Framework masks a mere disagreement with the Pre-Trial Judge's conclusions.<sup>50</sup> The fifteenth issue also fails for three additional reasons: first, Thaçi fails to identify any specific objections in the Request; second, the Pre-Trial Judge explicitly addressed logistical challenges which Thaçi had raised;<sup>51</sup> and third, Thaçi neglects to substantiate his deficient submissions on the specific criteria for certification.<sup>52</sup>

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<sup>46</sup> Decision, KSC-BC-2020-06/F00854, para.140.

<sup>47</sup> Request, KSC-BC-2020-06/F00883, paras 6, 11, 16, 18.

<sup>48</sup> See Decision, KSC-BC-2020-06/F00854, paras 116-135.

<sup>49</sup> Issue 15: 'Whether the impact on the right of an accused to adequate time and facilities under Article 21(4)(c) of the Law can be considered mitigated through measures such as joint Defence interviews of SPO witnesses, or remote interviews of SPO witnesses, when the Defence objections to these measures were not taken into account.'

<sup>50</sup> Request, KSC-BC-2020-06/F00883, para.6.

<sup>51</sup> Decision, KSC-BC-2020-06/F00854, paras 172, 175.

<sup>52</sup> Request, KSC-BC-2020-06/F00883, paras 6, 11, 16, 18

III. RELIEF REQUESTED

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

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**Jack Smith**

**Specialist Prosecutor**

Monday, 1 August 2022

At The Hague, the Netherlands.