



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 Veseli Defence request for certification to appeal**  
**Decision F00854**

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## I. INTRODUCTION

1. The Veseli 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> Veseli 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> None of the issues raised constitute appealable issues within the meaning of Article 45 and Rule 77, and Veseli also manifestly fails to meet his burden in respect of the second and third prongs of the test.

## II. SUBMISSIONS

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

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

2. Under the rubric of the first issue, Veseli raises a whole raft of purported legal questions and disagreements,<sup>7</sup> and, as framed, the first issue seeks to simply indiscriminately challenge every facet of the legal basis of the Decision. This alone means that Veseli fails to advance a sufficiently discrete issue and thus fails to meet the certification test. Indeed, the broad framing of the first issue would leave entirely

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<sup>1</sup> Corrected Version of Veseli Defence Request for Leave to Appeal Decision on Framework for the Handling of Confidential Information and Contacts with Witnesses (F00854), KSC-BC-2020-06/F00887/COR, 19 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 his assessment of the legal basis to adopt the SPO Proposed Framework'.

<sup>7</sup> Request, KSC-BC-2020-06/F00887/COR, paras 2, 5-8.

open the actual issues to be litigated on appeal, and thereby attempts to evade judicial oversight of compliance with the strict certification requirements set out in the Law and Rules. Such an approach subverts the Pre-Trial Judge's task to determine the scope of any appeal and should therefore be rejected.<sup>8</sup>

3. Even taken individually, none of the sub-issues are appealable issues. For instance, contrary to Veseli's assertion that the Pre-Trial Judge failed to delineate the relationship between Rule 80 and Article 39(11),<sup>9</sup> the Pre-Trial Judge carefully explained the different purviews of Rule 80 and Article 39(11). In particular, the Pre-Trial Judge held that Rule 80 does 'not exhaust the more general [...] function of the Pre-Trial Judge to ensure the protection of witnesses under Article 39(11) of the Law', which grants a degree of judicial discretion to the Pre-Trial Judge.<sup>10</sup> Moreover, Veseli's attempt to limit the effect of Article 39(11) by reference to Rule 80 cannot succeed in light of the hierarchy of sources in Article 3 of the Law and Rule 4, which clearly states that the Law prevails over the Rules in the event of conflict.<sup>11</sup>

4. As to the question of whether the Pre-Trial Judge exceeded his authority by *de facto* legislating a normative act,<sup>12</sup> Veseli fails to articulate why the well-established practice of regulating proceedings through judicially ordered frameworks exceeds the Pre-Trial Judge's powers under Articles 35(2)(f), 39(1) and 39(11) of the Law.

5. For these reasons, the first issue is not an appealable issue and is based on disagreements with and mischaracterisations of the Pre-Trial Judge's findings in the Decision.

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<sup>8</sup> Public Redacted Version of Decision on the Appeals Against Disclosure Decision, KSC-BC-2020-07/IA005/F00008/RED, 29 July 2021, para.17; Decision on Defence Appeals Against Decision on Motions Challenging the Legality of the Specialist Chambers and the Specialist Prosecutor's Office and Alleging Violations of Certain Constitutional Rights of the Accused, KSC-BC-2020-06/IA013/F00012, 20 May 2022, paras 34-35. Given that any grounds 'intrinsically linked' to a certified issue may be considered on appeal, such broadly drawn issues leave entirely open the grounds which would ultimately be litigated.

<sup>9</sup> Request, KSC-BC-2020-06/F00887/COR, para.7.

<sup>10</sup> Decision, KSC-BC-2020-06/F00854, para.117.

<sup>11</sup> Rule 4(b).

<sup>12</sup> Decision, KSC-BC-2020-06/F00854, para.8.

**(b) Issue 2**

6. The second issue raises the question '[w]hether the Framework violates the Accused's right to a fair trial' and thus presents a general challenge to 41 paragraphs in the Decision, which contain findings on a range of issues, without adequately identifying the findings being challenged.<sup>13</sup> This is insufficiently discrete to constitute an appealable issue.<sup>14</sup> The purported issue is, again, so broadly and indiscriminately drawn as to render meaningless judicial oversight of the strict appeals requirements set out in the Law and Rules. It should be rejected on this basis alone.

7. Concerns regarding the scope of what Veseli is seeking, or may seek, to bring within this issue are substantiated by Veseli's supporting submissions. In seeking to elaborate examples of purported errors, Veseli simply repeats prior submissions, expresses mere disagreement with the Pre-Trial Judge's findings in relation to them, and simultaneously misrepresents the Decision in claiming that such submissions were not addressed or that issues arising from them remain open.<sup>15</sup> For example, Veseli alleges, *inter alia*, a violation of equality of arms because the Framework denies the Defence the same freedom in contacting and interviewing witnesses as the SPO. However, these submissions ignore (i) the narrow scope of individuals to whom the Framework applies, being those notified as witnesses; and (ii) the fact that the Decision devotes an entire section to equality of arms considerations, addressing *inter alia* these very concerns. In particular, the Pre-Trial Judge did so by correctly defining the equality of arms principle, which is concerned with affording each party 'a reasonable opportunity to present its case under conditions that do not place it at a disadvantage vis-à-vis his opponent'.<sup>16</sup> The Defence submissions are premised on a distortion of that principle. It is axiomatic that equality of arms does not entail that

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<sup>13</sup> Request, KSC-BC-2020-06/F00887/COR, paras 2, 9-10.

<sup>14</sup> To the extent that the underlying submissions attempt to identify alleged errors they are indicated as being only illustrative (Request, KSC-BC-2020-06/F00887/COR, para.9 ('For instance'), thereby again impermissibly leaving entirely open the actual issues to be litigated on appeal.

<sup>15</sup> Request, KSC-BC-2020-06/F00887/COR, paras 9-10.

<sup>16</sup> Decision, KSC-BC-2020-06/F00854, para.138.

defence and prosecution be given identical functions, responsibilities and powers. To illustrate, the equality of arms principle does not prescribe that the Defence must have the power to directly summons a person,<sup>17</sup> order the arrest of a person,<sup>18</sup> or conduct search and seizure operations.<sup>19</sup> As such, the Defence misrepresents the Decision.

8. Veseli also argues that any limitation to a fair trial right must be necessary and proportional, but does not specify which fair trial rights he claims are limited by the Framework or how those alleged limitations are unnecessary and/or disproportionate. Notably, Veseli does not challenge the Pre-Trial Judge's finding 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>20</sup> Moreover, Veseli ignores, or merely disagree with, the necessity and proportionality findings made throughout the Decision.

9. Such deficient submissions, expressing no more than undefined and speculative concerns and disagreements, are incapable of satisfying the leave to appeal standard.

### (c) Issue 3

10. The third issue raises whether the Framework discriminates against Veseli, compared to accused persons in other cases before the KSC.<sup>21</sup> Veseli submits that 'the Pre-Trial Judge failed to adequately explain how the *Mustafa* or *Shala* cases differ from the *Thaci et al.* [sic] case'.<sup>22</sup> The issue does not arise from the Decision. The Pre-Trial Judge was required only to consider the legal basis for, and appropriateness of, the Framework to the present case. The question of what measures are necessary in other cases is irrelevant to the question of whether the Framework complies with the Law and the Rules. Indeed, consideration of the Framework's applicability or relevance to

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<sup>17</sup> Article 35(2)(a).

<sup>18</sup> Article 35(2)(h).

<sup>19</sup> Article 35; Rule 38(1).

<sup>20</sup> Decision, KSC-BC-2020-06/F00854, para.163.

<sup>21</sup> Request, KSC-BC-2020-06/F00887/COR, paras 2,11.

<sup>22</sup> Request, KSC-BC-2020-06/F00887/COR, para.11.

other cases would have been plainly inappropriate in the circumstances. Moreover, contrary to the Defence's submission, the Pre-Trial Judge gave careful reasons why he judged the Framework to be necessary in the present case, including: (i) 'that the Accused in the present case, who were high-ranking members of the KLA and occupied other influential positions, continue to exercise significant influence'; and (ii) that 'individualised protective measures [...] have been ordered for a significant number of witnesses in the present proceedings'.<sup>23</sup>

11. Veseli therefore fails to define any discrete issue emanating from the Decision and thus fails to meet the certification test.

12. Finally, Veseli completely fails to meet his burden on any of the issues in respect of the second and third prongs of the certification test. In respect of the second prong, Veseli makes no submissions whatsoever in relation to expeditiousness. Moreover, it is simply incorrect that any potential infringement of fair trial rights would necessarily affect the outcome of proceedings, which is the only argumentation Veseli puts forward.<sup>24</sup> The blunt assertion that the impact is 'self-evident'<sup>25</sup> manifestly fails to meet the relevant burden which falls on Veseli in seeking leave to appeal.

13. Equally, in respect of the third prong of the test, the purported novelty or general importance of an issue - which Veseli asserts<sup>26</sup> - is not a sufficient basis for granting leave to appeal.<sup>27</sup>

### III. RELIEF REQUESTED

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

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<sup>23</sup> Decision, KSC-BC-2020-06/F00854, para.118.

<sup>24</sup> Request, KSC-BC-2020-06/F00887/COR, para.12.

<sup>25</sup> Request, KSC-BC-2020-06/F00887/COR, para.12.

<sup>26</sup> Request, KSC-BC-2020-06/F00887/COR, para.13.

<sup>27</sup> See ICC, ICC, Situation in Uganda, Decision on Prosecutor's application for leave to appeal in part Pre-Trial Chamber II's decision on Prosecutors application for warrants of arrest under Article 58, ICC02/04-01/05-20-US-Exp, 19 August 2005, para.21.

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**Jack Smith**

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Monday, 1 August 2022

At The Hague, the Netherlands.