

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: 4 August 2022

Language: English

Classification: Public

**Veseli Defence Response to Fifth Registry Report on Victims’
Applications for Participation in the Proceedings (F00894)**

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I. INTRODUCTION

1. The Defence for Mr Kadri Veseli (“Defence”), hereby, responds to the Fifth Registry Report on Victims’ Participation.¹ The Defence does not, exceptionally, oppose the admissibility of the recommended victims for participation in the proceedings,² but requests the Pre-Trial Judge to deny anonymity to all victims, and limit protective measures according to the legal instruments of the KSC.

II. PROCEDURAL BACKGROUND

2. On 21 April 2021, the Pre-Trial Judge issued the First Decision on Victims’ Participation (‘First Decision’).³
3. On 25 May 2022, the Pre-Trial Judge issued the Third Decision on Victims’ Participation (‘Third Decision’).⁴
4. On 12 July 2022, the Defence filed its appeal against the Third Decision.⁵ The SPO and Victims’ Counsel responded on 25 July 2022.⁶ The Defence submitted a consolidated reply on 1 August 2022.⁷ The Decision from the Court of Appeals Panel is pending.

¹ F00894, Fifth Registry Report to the Pre-Trial Judge on Victims’ Applications for Participation in the Proceedings with strictly confidential and *ex parte* Annexes 1-26, 22 July 2022, (“Fifth Registry Report”).

² This is mostly due to the limited information provided in the Registry submissions. However, the Defence understands that the Pre-Trial Judge will apply the necessary judicial oversight.

³ F00257, First Decision on Victims’ Participation, 21 April 2021.

⁴ F00817, Third Decision on Victims’ Participation, 25 May 2022.

⁵ IA023-F00002, Veseli Defence Interlocutory Appeal Against Third Decision on Victims’ Participation, 12 July 2022.

⁶ IA023/F00003, Prosecution response to Veseli Defence Interlocutory Appeal Against Third Decision on Victims’ Participation with Public Annex 1, 25 July 2022; IA023/F00004, Victims’ Counsel Response to Veseli Defence Interlocutory Appeal Against Third Decision on Victims’ Participation, 25 July 2022.

⁷ IA023-F00005, Veseli Defence Consolidated Reply to SPO and Victims’ Counsel Response to Interlocutory Appeal Against Third Decision on Victims’ Participation, With Public Annexes 1 and 2, 1 August 2022.

III. SUBMISSIONS

A. **The Pre-Trial Judge Should Defer Decision until the Court of Appeals Issues a Ruling on the Defence Interlocutory Appeal Concerning the Victims Participating in the Proceedings (VPPs)**

5. While the Defence reiterates its previous submissions concerning the illegality of total anonymity as a valid protective measure for VPPs, it notes that the issue is currently under deliberation before the Court of Appeals. For this reason, the Defence respectfully requests the Pre-Trial Judge to defer his decision on the matter until the Court of Appeal Panel issues its decision regarding the Veseli Defence Interlocutory Appeal Against Third Decision on Victims' Participation.⁸

B. **Protective Measures**

6. Should the Court of Appeals find that total anonymity of VPPs is foreseen by the Rules or the Law, and it not inherently prejudicial to the accused, the Defence makes the following submissions regarding what the Registry considers "adequate and proportionate protective measures for the current stage of the proceedings".⁹

i. Failure to Provide Individual Recommendations in Respect of Each Applicant

7. The Defence notes that the Victims' Participation Office ("VPO") is required to conduct a detailed risk assessment in respect of each individual applicant to determine whether to recommend any protective measures, and if so, to identify the most appropriate protective measure provided by Rule 80 and the respective provisions of the Criminal Procedure Code ("CPC") provisions referred to by Article 23(1) KSC Law. Here, it appears that the VPO confined itself in asking the applicants to 'tick a box' whether they would like to be

⁸ IA023-F00002.

⁹ F00894, para. 69.

granted any protective measure. There does not appear to be any thorough and objective risk assessment, based on the specific circumstances of each individual applicant. The lack of information is glaring and stands in contrast to previous SPO requests for protective measures vis-à-vis witnesses all of which have alleged security risks faced by each applicant.

8. The lack of any supporting risk assessment is significant for two reasons. First, the legal test applicable for protective measures in relation to victims and witnesses is the same;¹⁰ and second, the Pre-Trial Judge is required to assess protective measures in respect of each applicant and issue, if necessary and proportionate, individual decisions on a case by case basis. Without any information detailing the objective risk, it is impossible for the Pre-Trial Judge to assess the level of risk an individual faces. The Defence therefore submits that the Pre-Trial Judge should either dismiss the Registry's recommendation on this basis alone; or in the alternative remand the matter back to the Registry and order to provide information concerning security issues faced by each individual applicant.

ii. The Recommendation to Grant Total Anonymity for all Applicants is Extreme and Unsupported by the Facts

9. The Defence notes that the protective measures requested by the applicants was summarised as follows:

- two applicants requested non-disclosure of identifying information to the public;
- two applicants requested non-disclosure to the public and the Accused;
- nineteen applicants requested non-disclosure to the public, the Accused, and Defence Counsel;
- one applicant did not request any protective measure; and
- one applicant requested the VPO to make a recommendation.¹¹

10. First, the Defence notes that subjective fears of individual victims or generic safety concerns are entirely insufficient to outweigh fair trial rights of the

¹⁰ F00159, Framework Decision on Victims' Applications, 4 January 2021, para. 47.

¹¹ F00894, para. 67.

accused, such as the principle of publicity of trials and the right to confront witnesses in an adverse proceeding. Specific reference is made to Article 224(3) CPC. The Defence is confident that both the SPO and Victims' Counsel will agree that reference to the CPC is "crucial" –¹² which bars the court from ordering total anonymity if the request is based on a general description of the risks faced by witnesses (in this case, victims) in similar cases.¹³ Moreover, pursuant to Article 224(4) CPC the Panel is obliged to order a (closed) hearing with the prospective applicants and make sure that the request for anonymity is necessary, considering the existence of a "serious risk" to the life or wellbeing of the VPP.

11. Second, the Defence notes that the Registry has recommended anonymity for all applicants where several of the applicants have not themselves requested total anonymity. One applicant does not even request any protective measures. The Defence submits that this is not an appropriate recommendation in this case. Clearly, if one applicant is willing to reveal his/her identity and has not requested any protective measures at all, then that contradicts the Registry's submission that "all the applicants [...] express fears or concerns for their safety or their family members, should their identities become known".¹⁴ Moreover, the Registry must show deference to the will of the victims themselves and refrain from recommending measures that go beyond their stated preferences.
12. Third, the Registry submissions fail entirely to show any 'exceptional circumstances' which would warrant the recommendation of the measure which maximally infringes upon the basic fair trial rights of the accused. Despite that the legal test applicable for protective measures in relation to

¹² See, IA023/F00004, para. 11; KSC-BC-2020-06/IA023/F00003, paras 4-5.

¹³ Article 224(3): A court shall not issue an order under this Article based on a request under paragraph 2 of this Article which is based on a general description of danger to witnesses in similar cases.

¹⁴ F00894, para. 68.

victims is the same as witness, the current practice reveals an entirely different reality. In this respect the Defence notes that only 2 of the 326 SPO witnesses have been granted this exceptional measure.

13. Finally, the Defence submits that such recommendation is utterly disproportional to the rights of the accused and no counterbalancing measure is offered. The fact that any protective measure ordered at this stage may be without prejudice to their variation at a later stage¹⁵ is not – and should not be – considered as a counterbalancing measure for the simple fact that even if the Pre-Trial Judge were to order any protective measure with prejudice, such ruling would be clearly in violation of the KSC legal framework, *ultra vires*, and usurp the prerogatives of the Trial Panel (or other appellate Panels).

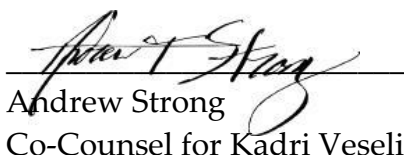
C. CONCLUSION

14. For the foregoing reasons, the Defence respectfully requests the Pre-Trial Judge to defer his decision until the Court of Appeals issues a ruling on the legal basis of total anonymity as a valid protective measure for VPPs; and ultimately reject the request for protective measures as unfounded in law and facts.

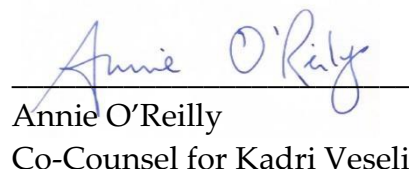
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¹⁵ See, F00817/RED, Public Redacted Version of Third Decision on Victims' Participation, 25 May 2022, para. 45.