

**In:** KSC-BC-2020-06  
**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi  
and Jakup Krasniqi**

**Before:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Defence Counsel for Jakup Krasniqi

**Date:** 15 August 2022

**Language:** English

**Classification:** Public

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**Krasniqi Defence Reply**

**to Prosecution Response to Krasniqi Defence Request**

**for Certification to Appeal Decision F00854**

**with public Annex 1**

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**Specialist Prosecutor**

Jack Smith

**Counsel for Victims**

Simon Laws QC

**Counsel for Hashim Thaçi**

Gregory Kehoe

**Counsel for Kadri Veseli**

Ben Emmerson QC

**Counsel for Rexhep Selimi**

David Young

**Counsel for Jakup Krasniqi**

Venkateswari Alagendra, Aidan Ellis

## I. INTRODUCTION

1. The Defence for Jakup Krasniqi (“Defence”) hereby replies to the Specialist Prosecutor’s Office (“SPO”) Response to its Request for Certification to Appeal<sup>1</sup> the Pre-Trial Judge’s 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.<sup>2</sup>

2. The Defence submits that its Request reaches the appropriate level for certification by: identifying discreet topics for resolution by the Court of Appeals Chamber (“Appeals Chamber”); highlighting the Impugned Decision’s significant repercussions on the fair and expeditious conduct of proceedings, and the outcome of the trial; and identifying that resolution by the Appeals Chamber will materially advance proceedings.

## II. SUBMISSIONS

3. The Defence notes that over the course of the pre-trial proceedings, there have been 18 occasions on which the Defence Teams have requested leave to appeal.<sup>3</sup> On all of those occasions, the SPO opposed the Defence requests. The SPO opposed equally those requests which were granted and those requests which were rejected. The Response thus reflects an indiscriminate policy of opposing all Defence requests

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<sup>1</sup> KSC-BC-2020-06, F00903, Specialist Prosecutor, *Prosecution Response to Krasniqi Defence Request for Certification to Appeal Decision F00854* (“Response”), 1 August 2022, public.

<sup>2</sup> KSC-BC-2020-06, F00854, Pre-Trial Judge, *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* (“Impugned Decision”), 24 June 2022, public.

<sup>3</sup> See Annex 1.

for leave to appeal, rather than any reasoned or principled response to the merit of the Request.<sup>4</sup>

4. The Defence has identified six appealable issues. The test for leave to appeal does require more than a mere disagreement with the decision taken.<sup>5</sup> An issue is elevated above the level of a mere disagreement if it identifies a discreet topic for resolution by the Appeals Chamber, which arises from the decision.<sup>6</sup> The issues identified by the Defence meet that threshold.

5. In evaluating that test, the Defence emphasises that the merits of the appeal fall outside the scope of the assessment of leave to appeal for certification.<sup>7</sup> As a result, there is a critical difference between the level of detail offered in a request for leave to appeal and that required of an appeal itself. The Response, however, repeatedly submits arguments on the merits of the Appeal under the guise of challenging whether an issue has been identified.<sup>8</sup> For instance, regarding the First Issue, the Defence sought leave to appeal on whether the Impugned Decision applied the correct test of necessity.<sup>9</sup> In its Response, the SPO ignores the well-established test for granting leave to appeal and instead argues that the application of the correct test can be implied from the quotation of the applicable law and certain discreet findings.<sup>10</sup> Whether the correct test was applied or not goes to the merit of the appeal itself and hence is outside the scope of the test for granting leave to appeal.

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<sup>4</sup> KSC-BC-2020-06, F00904, Specialist Prosecutor, *Prosecution Response to Selimi Defence Request for Certification to Appeal Decision F00854*, 1 August 2022, public; F00905, Specialist Prosecutor, *Prosecution Response to Thaçi Defence Request for Certification to Appeal Decision F00854*, 1 August 2022, public; F00906, Specialist Prosecutor, *Prosecution Response to Veseli Defence Request for Certification to Appeal Decision F00854*, 1 August 2022, public.

<sup>5</sup> KSC-BC-2020-06, F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, public, para. 11.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, para. 17.

<sup>8</sup> Response, paras 2, 7-8, 14-15.

<sup>9</sup> Request, para. 16.

<sup>10</sup> Response, para. 2.

6. The Second Issue is not too broadly or non-specifically drawn.<sup>11</sup> Indeed, the Defence notes that, in the same Response, the SPO inconsistently opposes both leaving open an issue to be litigated on appeal<sup>12</sup> and identifying several issues under an umbrella issue.<sup>13</sup> Moreover, the Response overlooks the specific nature of the issues. The Second Issue is necessarily broader since (as set out in the First Issue) no express determination of necessity was made.<sup>14</sup>

7. Further, insofar as the Response submits that the Fourth Issue is “unclear”,<sup>15</sup> the Defence observes that the wording of this Issue is quoted directly from the Impugned Decision.<sup>16</sup> In those circumstance, any lack of clarity alleged in the Response only highlights the need for leave to appeal the underlying finding in the Impugned Decision.

8. Due to the nature of the Framework, all issues related to it obviously and inherently have a significant impact on the fairness and expeditiousness of proceedings.<sup>17</sup> Similarly, the application of the Adopted Framework creates considerable logistical complexities for the Defence that are neither hypothetical nor expeditious and that require resolution by the Appeals Chamber to materially advance proceedings in this case.<sup>18</sup>

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<sup>11</sup> Response, para. 6.

<sup>12</sup> *Contra* Response, para. 6.

<sup>13</sup> Response, para. 13.

<sup>14</sup> Request, para. 16.

<sup>15</sup> Response, para. 12.

<sup>16</sup> Impugned Decision, paras 118, 124, 170.

<sup>17</sup> Analogous reasoning was previously accepted by the Pre-Trial Judge in relation to defects in the Indictment: KSC-BC-2020-06, F00534, Pre-Trial Judge, *Decision on Defence Applications for Leave to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment*, 18 October 2021, public, paras 18-19.

<sup>18</sup> Request, paras 17-18.

9. At issue is not whether the Defence has an unfettered right to conduct pre-trial witness interviews,<sup>19</sup> but whether the specific and concrete restrictions imposed by the Adopted Framework significantly impact the fairness and expeditiousness of the proceedings. Limitations on the ability of the Defence to conduct unencumbered interviews with witnesses (as was granted to the SPO<sup>20</sup>) and to be allowed “more than a blind confrontation in the courtroom”<sup>21</sup> go to the heart of equality of arms – a recognised norm of a fair trial.

### III. CONCLUSION

10. The Defence maintains its initial request for the reasons outlined above.<sup>22</sup>

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<sup>19</sup> *Contra*, Response, para.10.

<sup>20</sup> Impugned Decision, para. 139.

<sup>21</sup> ICTY, *Prosecutor v. Delalić et al.*, IT-96-21, Trial Chamber, *Decision on the Defence Motion to Compel the Discovery of Identity and Location of Witnesses*, 18 March 1997, para. 19.

<sup>22</sup> Request, para. 2.

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Monday, 15 August 2022

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