

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: 15 August 2022

Language: English

Classification: Confidential

**Veseli Defence Reply to Prosecution Response to Request
for Certification to Appeal Decision F00854 (F00906)**

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I. INTRODUCTION

1. The Defence for Mr Kadri Veseli (“Defence”) files this Reply to the SPO’s Response¹ to its Request for leave to appeal Decision F00854.²

II. SUBMISSIONS

A. **First Issue: Legal Basis**

2. The SPO claims that “the first issue seeks to simply indiscriminately challenge every facet of the legal basis of the Decision”.³ However, the SPO fails to note that the legal basis for adopting the proposed framework already constituted a central “issue” during the litigation phase leading to the Impugned Decision.⁴ At the 22 February 2022 Hearing, the SPO submitted *inter alia* that “the Proposed Framework can be ordered pursuant to Article 23 of the Law and Rule 80 [...] which is not time-barred in this case only because previously a deadline was imposed in the specific context of disclosure [...]”.⁵ Based on these submissions, it appears that the SPO agrees – at least in part – with the Defence, that the Framework amounts to additional or new protective measures under Rule 80. Therefore, an authoritative holding by the Court of Appeals on the issue should be beneficial to all parties, including the SPO.

¹ F00906, Prosecution response to Veseli Defence request for certification to appeal Decision F00854, 1 August 2022, (“Response”).

² F00887/COR, Corrected Version of Veseli Defence Request for Leave to Appeal Decision on Framework for the Handling of Confidential Information and Contacts with Witnesses (F00854) (F00887, dated 18 July 2022), 19 July 2022 (“Request”).

³ F00906, para. 2.

⁴ F00698, Decision on Request for Hearing, 16 February 2022, para. 11(i) (wherein the Pre-Trial Judge ordered the parties to address the specific legal basis for the proposals set forth in the SPO Submissions and, in particular, are these proposals exclusively based on Rule 80 of the Rules).

⁵ F00854, 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, 24 July 2022, para. 66.

3. As to the claim that the “sub-issues”⁶ are broadly framed and not “intrinsicly linked” to the issue,⁷ the Defence also notes that the SPO fails to substantiate how the “sub-issues” are not intrinsicly linked to the First Issue.
4. As regards the relationship between Rule 80 and Article 39(11), the passage of the Pre-Trial Judge’s decision⁸ that the SPO accuses the Defence of overlooking is in fact quoted in full at paragraph 6 of the Request. As regards the argument that the issue “cannot succeed in light of the hierarchy of sources”,⁹ the Defence notes that this argument (i) concerns the merit of the Appeal and therefore falls outside the scope of proceedings concerning leave to appeal; and (ii) misinterprets Defence submissions, which do not frame the issue in terms of hierarchy of sources or any conflict thereof.
5. Finally, contrary to SPO submissions,¹⁰ the Defence provided adequate reasons as to why the Framework is *de facto* a normative act which should be regulated exclusively by the Rules.¹¹ Similarly to above considerations, such concerns relate to the merits of the issue, rather than its appealability.

B. Second Issue: Rights of Accused

6. The SPO’s generic challenge to the “discreteness” of the second issue¹² is unsubstantiated and factually incorrect. The issue and rights infringed are easily identifiable from both Defence submissions,¹³ as well as from simply

⁶ F00906, paras 2-3.

⁷ F00906, fn. 8.

⁸ F00906, para. 3.

⁹ *Ibid.*

¹⁰ F00906, para.4.

¹¹ *See*, F00887, para. 8.

¹² F00906, para. 6.

¹³ F00887, paras 9-10.

reading the relevant passages highlighted in the Impugned Decision.¹⁴ The risk of rendering judicial oversight meaningless¹⁵ is therefore inexistent.

7. As regards the right to equality of arms, the SPO accused the Defence of misrepresentating the Impugned Decision. Leaving aside whether 326 witnesses can be properly considered as a “narrow scope of individuals to whom the Framework applies,”¹⁶ the SPO offers fatuously irrelevant examples to describe certain differences between prosecution and defence,¹⁷ and fails to engage with the specific concerns identified in the second issue.¹⁸
8. As regards the claim alleging failure to specify how the limitations imposed on the Defence are unnecessary,¹⁹ the Defence recalls requests for leave to appeal need not entertain the merits of the appeal. In any event, the Defence did answer SPO concerns at paragraph 10 of its Request.²⁰

C. Third Issue: Discrimination

9. The claim that the issue does not arise from the Impugned Decision is patently false,²¹ even by the SPO’s own submissions.²² By claiming that the Pre-Trial Judge was only required to consider the legal basis for issuing the Framework,²³

¹⁴ *Contra*, F00906, para. 8. *See*, F00854, discussion concerning the right to equality of arms (paras 138-145); privilege against self-incrimination and related rights (paras 146-163); the right to be tried within a reasonable time (paras 164-165); presumption of innocence (paras 166-170); and the right to have adequate time and facilities for the preparation of the defence (paras 171-176).

¹⁵ F00906, para. 6.

¹⁶ F00906, para. 7.

¹⁷ *Ibid.*, referring to its power to directly summons a person, order the arrest of a person, or conduct search and seizure operations.

¹⁸ *See*, F00887, para. 9.

¹⁹ F00906, para. 8.

²⁰ Wherein it argued that the Protocol appears to be based on generic, theoretical concerns about a climate of witness intimidation which may have occurred some twenty years ago.

²¹ *See*, F00887, para. 11 (“The Third Issue stems from paragraphs 11-12 of the Defence submissions and paragraph 141 of the Impugned Decision wherein the Pre-Trial Judge found that [...]”); *contra*, F00906, para. 10.

²² F00906, para. 10 (citing a passage from F00854 in which the Pre-Trial Judge “gave careful reasons why he judges the Framework to be necessary in the present case”).

²³ *Ibid.*

the SPO misunderstands the concept of discrimination. The issue at stake is not whether the Pre-Trial Judge may lawfully issue the impugned act, but whether Mr Veseli is unlawfully discriminated against by being denied the same freedom in contacting witnesses in the SPO list enjoyed by these other accused in similar circumstances.


III. CONCLUSION

10. For the aforementioned reasons, the Court of Appeals Panel should grant the appeal.

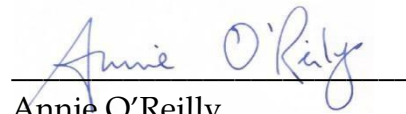
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