

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: Specialist Counsel for Hashim Thaçi

Date: 3 November 2022

Language: English

Classification: Confidential

Thaçi Defence Request for Certification to Appeal the “Decision on Prosecution Rule 102(2) Submission and Related Requests” (F01057)

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I. INTRODUCTION

1. To date, the SPO has filed seven applications¹ to amend its Exhibit List² since the deadline for its filing expired on 17 December 2021. These requests have systematically been granted by the Pre-Trial Judge. In particular, the two most recent SPO applications, which related to the addition of four witnesses to the SPO Witness List,³ were granted by the Pre-Trial Judge on 27 October 2022.⁴

2. The present Defence request for certification relates to the Sixth Request, pursuant to which the SPO requested leave to add two witnesses, W01493 and W04043, and their associated material to its Witness List and Exhibit List, respectively.

3. The Defence submits that, in granting this request, the Pre-Trial Judge erred, for the reasons set out below. These errors warrant the intervention of the Court of Appeals Panel. Therefore, in accordance with Rule 77 of the Rules⁵ and Article 45 of

¹ (1) KSC-BC-2020-06/F00670/CONF/RED, Prosecution notice of Rule 102(1)(b) disclosure and related requests, 31 January 2022, Confidential; (2) KSC-BC-2020-06/F00708, Prosecution Rule 102(2) Submission and Related Requests, 24 February 2022, Confidential; (3) KSC-BC-2020-06/F00767/CONF, Prosecution request to amend the exhibit list and for protective measures, 13 April 2022, Confidential; (4) KSC-BC-2020-06/F00774/CONF/RED, Prosecution request to amend the exhibit list and for protective measures (KSC-BC-2020-05), 20 April 2022, Confidential; (5) KSC-BC-2020-06/F00891/CONF/RED, Prosecution request to amend the exhibit list and for protective measures, 21 July 2022, Confidential; (6) KSC-BC-2020-06/F00890/CONF/RED, Prosecution Rule 102(2) submission and related requests, 21 July 2022, Confidential (“SPO Sixth Request”); (7) KSC-BC-2020-06/F00947/CONF/RED, Prosecution request to add two witnesses and associated materials, 2 September 2022, Confidential (“SPO Seventh Request”).

² KSC-BC-2020-06/F00967/A02, Annex 2 - Prosecution Submission of amended Exhibit List, 13 September 2022, Confidential, superseded by KSC-BC-2020-06/F01078/A02, Annex 2 – Prosecution submission of amended witness and exhibit lists, 2 November 2022, Confidential (“SPO Exhibit List”).

³ KSC-BC-2020-06/F00948/A02, Annex 2 - Prosecution submissions of revised witness list, 2 September 2022, Confidential, superseded by KSC-BC-2020-06/F01078/A04, Annex 4 – Amended List of Witnesses, Confidential (“SPO Witness List”).

⁴ KSC-BC-2020-06/F01057/CONF/RED, Confidential Redacted Version of Decision on Prosecution Rule 102(2) Submission and Related Requests, 27 October 2022 (“Impugned Decision”); KSC-BC-2020-06/F01058/CONF/RED, Confidential Redacted Version of Decision on Prosecution Request to Add Two Witnesses and Associated Materials, 27 October 2022.

⁵ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (“Rules”).

the Law,⁶ the Defence applies for leave to appeal from the Impugned Decision on the issues detailed below.

II. APPLICABLE LAW

4. To appeal the Impugned Decision, certification is required.⁷

5. Article 45(2) of the Law provides, in the relevant part, that the Pre-Trial Judge shall grant certification where an appeal:

“involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.”

6. Rule 77(2) provides that:

“The Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by a Court of Appeals Panel may materially advance the proceedings.”

7. The following specific requirements, as confirmed by the jurisprudence of the Kosovo Specialist Chambers (“KSC”), therefore apply:

- (a) Whether the matter is an “appealable issue”;
- (b) Whether the issue at hand would significantly affect:
 - (i) The fair and expeditious conduct of the proceedings, or
 - (ii) The outcome of the trial; and
- (c) Whether, in the opinion of the Pre-Trial Judge, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.⁸

⁶ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”).

⁷ Rule 77(1), Rules; Article 45(2), Law.

⁸ KSC-BC-2020-06/F00534, Decision on Defence Applications for Leave to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment, 18 October 2021, para. 14; KSC-BC-2020-07/F00169, Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, 1 April 2021 (“Gucati and Haradinaj Decision on Leave to Appeal”), para. 6; KSC-BC-2020-06/F00172, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021 (“Thaçi Decision on Leave to Appeal”), para. 10.

8. An “issue” is “an identifiable topic or subject, the resolution of which is essential for determination of the matters arising in the judicial cause under examination, and not merely a question over which there is disagreement or conflicting opinion.”⁹ The applicant must articulate “clearly discrete issues for resolution by the Court of Appeals Panel that emanate from the ruling concerned and do not amount to abstract questions or hypothetical concerns.”¹⁰

9. Certification does not concern whether a decision is correctly reasoned, but whether the standard for certification is met.¹¹

III. THE PROPOSED ISSUES FOR APPEAL

10. The Pre-Trial Judge has adopted an erroneously lenient approach to the assessment of the ‘timely notice’ and ‘good cause’ of the SPO’s Sixth Request to amend its Witness and Exhibit Lists. The Pre-Trial Judge incorrectly applied the test set by Rule 118(2) of the Rules. More precisely, certification is sought to appeal the following issues (individually “Issue”, together “Issues”), which satisfy the requirements of Article 45(2) and Rule 77(2):

Issue 1: Whether the Pre-Trial Judge erred in setting the starting point for assessing the timeliness of SPO disclosure at the date of the SPO’s interview, being the point at which “the SPO could fully ascertain the relevance” of the new evidence to its case.¹²

⁹ Gucati and Haradinaj Decision on Leave to Appeal, para. 12; Thaçi Decision on Leave to Appeal, para. 11.

¹⁰ *Ibid.*

¹¹ Gucati and Haradinaj Decision on Leave to Appeal, para. 18; Thaçi Decision on Leave to Appeal, para. 17.

¹² Impugned Decision, paras. 23 and 32.

Issue 2: Whether the Pre-Trial Judge erred in his approach to the assessment of good cause by basing it, in part, on irrelevant factors, such as the Sixth Request being filed in the pre-trial stage or the ongoing Defence investigations.¹³

Issue 3: Whether the Pre-Trial Judge erred in basing the existence of good cause, in part, on the fact that the SPO applied to add the new witnesses and related material after having complied with an order to streamline the case and having withdrawn a limited number of witnesses from the SPO Witness List.¹⁴

Issue 4: Whether the Pre-Trial Judge erred in dismissing the Defence arguments that the proposed evidence of W01493 and the associated material do not advance the SPO case in a manner that justifies their late addition, on the basis that "whether the added witnesses and related material actually advances the SPO case **can only truly be assessed at trial**".¹⁵

IV. SUBMISSIONS: THE TEST FOR CERTIFICATION IS MET

A. THE ISSUES ARE APPEALABLE ISSUES

11. The four identified Issues are appealable as they arise from the Impugned Decision and contest specific findings made by the Pre-Trial Judge. In formulating the Issues, the Defence is not simply asserting that the Pre-Trial Judge should have decided differently on the question of the SPO's request to again expand its Witness List and Exhibit List, but rather, has identified specific errors that undermine his findings and warrant their reversal.

¹³ Impugned Decision, para. 28.

¹⁴ Impugned Decision, para. 29.

¹⁵ Impugned Decision, para. 30 (emphasis added).

12. Namely, with regard to **Issue 1**, the standard adopted by the Pre-Trial Judge retroactively forgives any delay or lack of diligence on the part of the SPO in finding and interviewing witnesses, and sets an overly-expansive precedent for future requests to add new witnesses to the Witness List. Pursuant to this approach, as long as the SPO discloses the interview and new material in a timeframe relatively proximate to the interview itself, any delay or lack of diligence on the part of the SPO in securing the interview in the first place is entirely circumvented. However, this is patently a relevant consideration as to whether the SPO request is timely. This constitutes an error warranting the reversal of the Impugned Decision.

13. Concerning **Issue 2**, the Pre-Trial Judge erred in giving undue weight to irrelevant factors. The fact that the case remains at the pre-trial stage does not justify the late additions of witnesses to the SPO Witness List, ten months past the deadline to file such a List. This additional later request is, again, indicative of the lack of effective organisation and control of the SPO over its evidence, which is one of the reasons the case has not yet been transferred to the Trial Panel. Similarly, the Defence is entitled to conduct investigations until the end of the case and this core right of the Accused cannot justify the addition of witnesses at any time during the pre-trial phase or trial phase.

14. Regarding **Issue 3**, the fact that the SPO has complied with a court order to streamline its case, by removing only a tiny percentage of its witnesses, cannot be used as a basis to find good cause for adding new witnesses to the Witness List. This not only defeats the purpose of streamlining the case but, importantly, there is no conceivable link between whether good cause for the late addition of a witness exists, and the fact that the SPO previously complied with an order and removed seven witnesses from its list. In addition, the SPO's Sixth Request was filed long before the

SPO notified the parties that it would be withdrawing seven witnesses,¹⁶ and, through the two decisions issued on 27 October 2022, the Pre-Trial Judge actually authorised the addition of four witnesses, rather than two. The Pre-Trial Judge's reasoning creates a system of reward for the SPO, pursuant to which it can add new witnesses whenever it removes others. This is the wrong legal standard. The Pre-Trial Judge also erred in relying on his assessment that the "material to-be-added is very limited, when compared to the material contained in the Amended Exhibit List".¹⁷ Every additional document expands the evidentiary basis of the case and gives rise to prejudice to the Defence who is required to review, analyse and investigate it. In addition, this practice rewards the inability of the SPO to reduce its case.

15. As for **Issue 4**, the Pre-Trial Judge dismissed Defence arguments that the proposed evidence of W01493 and the associated material do not advance the SPO case in a manner that justifies their late addition, on the basis that "whether the added witness and related material actually advances the SPO case **can only truly be assessed at trial**".¹⁸ This standard affords the SPO a *carte blanche* to add witnesses and materials on the basis that the assessment of their relevance can only be conducted at trial. This is an error. The Pre-Trial Judge is not entitled defer his assessment of whether the proposed evidence advances the SPO case, which is central to determining whether "exceptional circumstances" exist justifying the extremely late addition of this material to the SPO Witness and Exhibit Lists.

16. As such, these Issues are not mere disagreements with the Impugned Decision, but identify discrete topics, the resolution of which is essential for the determination of the matters arising in the judicial cause under examination.

¹⁶ The Sixth Request was dated 21 July 2022 and notified on 22 July 2022; the SPO notified the withdrawal of seven witnesses through a filing dated 2 September 2022 and notified on 5 September 2022: KSC-BC-2020-06/F00948, Prosecution submission of revised witness list, 2 September 2022, Public.

¹⁷ Impugned Decision, para. 29.

¹⁸ Impugned Decision, para. 30 (emphasis added).

17. Nor do the Issues amount to hypothetical concerns. The identified errors have an immediate and concrete impact on the ongoing conduct of the pre-trial phase, and more generally on the approach being taken to this central question of how and to what extent the SPO Witness and Exhibit Lists can be permitted to continually expand. Rather than being abstract questions, the Issues have a direct link to the conduct of the pre-trial proceedings, justifying their examination at this stage.

B. THE ISSUES WOULD SIGNIFICANTLY AFFECT 1) THE FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS OR 2) THE OUTCOME OF THE TRIAL

18. The criteria to be satisfied under these two prongs of the leave to appeal test are disjunctive. The Defence submits that the Issues satisfy the first criteria regarding the significant impact on the “fair and expeditious conduct of proceedings” which is generally understood as referencing the norms of a fair trial.¹⁹

19. For a trial to be considered fair, all accused are entitled to fundamental rights to have **adequate time and facilities** for the preparation of his defence,²⁰ and to be tried **within a reasonable time**.²¹ Rule 95(2) of the Rules enumerates the functions of the Pre-Trial Judge after confirmation of the indictment, who shall “ensure that the proceedings are **not unduly delayed** and shall take all necessary measures for the **expeditious** preparation of the case for trial.”

20. In identifying the Pre-Trial Judge’s erroneous approach to the assessment of a timely notice, **Issue 1** significantly affects the accused’s right to a fair trial, and the expeditious conduct of the proceedings. Namely, by considering that the starting point for assessing the timeliness of SPO disclosure is the date of the SPO’s interview,

¹⁹ Gucati and Haradinaj Decision on Leave to Appeal, para. 14.

²⁰ Article 30(3) of the Kosovo Constitution; Article 21(4)(c) of the Law; Article 6(3)(b) of the ECHR.

²¹ Article 31(2) of the Kosovo Constitution; Article 21(4)(d) of the Law; Article 6(1) of the ECHR.

the Pre-Trial Judge decides to erroneously ignore whether the SPO acted with due diligence in the conduct of its investigations, which contradict the requirement of expeditious conduct of the proceedings, particularly considering that the SPO started to investigate the crimes under its jurisdictions seven years ago.

21. **Issues 2, 3 and 4** arise from the Pre-Trial Judge's erroneous assessment of the 'good cause' requirement and significantly affect the accused's right to a fair trial and to be tried without undue delay. They highlight an overly-permissive approach adopted by the Pre-Trial Judge, and the setting of a standard that would justify the addition of **any** witnesses at this stage of the proceedings, provided that the case has not been transferred to the Trial Panel yet and the Defence continues its investigations. This is irreconcilable with the Pre-Trial Judge's duty to ensure that the proceedings are not unduly delayed and to protect the Defence's right to have adequate time for its preparation. Furthermore, the Pre-Trial Judge's reliance on the fact that the SPO applied to add the new witnesses after having complied with an order to streamline the case and withdrawn a limited number of witnesses from its Witness List is intrinsically incoherent. The addition of new witnesses defeats the purpose of streamlining the case and necessarily impacts the Defence's capacity to prepare for trial. Lastly, by considering that the relevance of the new witnesses "can only truly be assessed at trial", the Pre-Trial Judge erroneously refers the matter on to the Trial Panel, rather than saving the Court and parties' time and by properly assessing whether such material is relevant and whether "exceptional circumstances" exist justifying its late addition. In this way, the Impugned Decision directly affects the expeditious conduct of the proceedings.

C. AN IMMEDIATE RESOLUTION BY THE COURT OF APPEALS PANEL MAY MATERIALLY ADVANCE THE PROCEEDINGS

22. The Impugned Decision directly impacts on the expeditiousness of the proceedings. If the Defence is correct on any of the Issues, intervention by the Court

of Appeals Panel will help put an end to delays stemming from the expanding SPO Exhibit List, and contribute to streamlining the SPO case, thereby materially advancing the proceedings.

23. An immediate resolution by the Court of Appeals Panel of the Issues may also materially advance the proceedings by impacting the Pre-Trial Judge's finding that the SPO showed good cause for the requested amendments to the Witness and Exhibit Lists and, accordingly, affect the number of witnesses and the amount of material the SPO is permitted to rely on at trial.

V. RELIEF SOUGHT

24. For the above reasons, the Defence respectfully requests that the Pre-Trial Judge grant leave to appeal the Issues pursuant to Article 45(2) of the Law and Rule 77(2).

[Word count: 2,708 words]

Respectfully submitted,



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Thursday, 3 November 2022

At The Hague, The Netherlands