



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:** 16 November 2022

**Language:** English

**Classification:** Confidential

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**Prosecution response to Thaçi Defence request for certification to appeal Decision  
F01057**

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## I. INTRODUCTION

1. The Thaçi 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> Thaçi 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>

## II. SUBMISSIONS

2. Thaçi carries the burden to articulate clearly discrete issues for resolution (first prong) and explain how each issue has significant repercussions on the proceedings (second prong).<sup>6</sup> Even then, the Pre-Trial Judge will not certify issues unless immediate resolution by the Appeals Panel may materially advance the proceedings (third prong).<sup>7</sup> Moreover, where a party requesting leave to appeal claims error in a decision but does not identify what should have been done differently, the issue will not be considered sufficiently discrete and specific to merit appeal.<sup>8</sup>

3. As set out below, each of the issues raised by the Defence fails to meet the certification test.

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<sup>1</sup> Thaçi Defence Request for Certification to Appeal the 'Decision on Prosecution Rule 102(2) Submission and Related Requests', KSC-BC-2020-06/F01080, 3 November 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 Prosecution Rule 102(2) Submission and Related Requests, KSC-BC-2020-06/F01057, 27 October 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, paras 10-11; *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, paras 10-18.

<sup>6</sup> Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, paras 11-15.

<sup>7</sup> Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para.16.

<sup>8</sup> Decision on the Krasniqi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00479, 20 September 2021, para.14.

A. ISSUE 1 FAILS TO MEET THE CERTIFICATION TEST

4. The first issue raises 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’.<sup>9</sup>

5. Thaçi does not explain how the Pre-Trial Judge should have assessed the timeliness of the SPO disclosure or applied the principle of ‘timely notice’ and ‘good cause’ differently in the case at hand. Nor does he substantiate why the alleged error is ‘essential’ for the determination of the matter,<sup>10</sup> but simply states that the standard adopted by the Pre-Trial Judge constituted ‘an error’, without going into further details.<sup>11</sup> In this respect, the Pre-Trial Judge also considered the SPO’s diligence in obtaining the evidence of the relevant witnesses, including before the SPO interview.<sup>12</sup> The Request ignores this part of the Decision and does not explain what other considerations should have been taken into account. Thaçi thus fails to fulfill the requirements of the first prong.

6. Insofar as the first issue complains about delay and lack of diligence on the part of the SPO and does not engage with the Pre-Trial Judge’s considerations concerning prejudice,<sup>13</sup> Thaçi fails to explain how this would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial (second prong). The Defence limits itself to reiterating that the SPO had been investigating the circumstances of the case for seven years and therefore could have selected its witnesses at an earlier stage.<sup>14</sup> Thaçi does not provide any further detail and thus, in

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<sup>9</sup> Request, KSC-BC-2020-06/F01080, para.10.

<sup>10</sup> Regarding this requirement, *see* Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, Confidential, 11 January 2021, para.11.

<sup>11</sup> Request, KSC-BC-2020-06/F01080, para.12.

<sup>12</sup> *See, for example*, Decision, KSC-BC-2020-06/F01057, para.24.

<sup>13</sup> *See* Decision, KSC-BC-2020-06/F01057, paras 28-30, 37-38.

<sup>14</sup> Request, KSC-BC-2020-06/F01080, para.20. This argument has already been made by the Thaçi Defence. *See* Thaçi Defence Response to Prosecution Rule 102(2) submission and related requests (F00890), KSC-BC-2020-06/F00909, 3 August 2022, Confidential, para.43.

addition to failing to clearly articulate any specific error, also fails to substantiate any significant impact on the fair and expeditious conduct of the proceedings. Indeed, as noted by the Pre-Trial Judge, the pre-trial phase is ongoing, the Defence continues its investigations, and the case has not yet been transferred to the trial panel.<sup>15</sup> Further, the proceedings progressed in parallel to litigation on the request to amend the witness and exhibit lists and transfer was not impacted by it.

7. Regarding the third prong of the test, Thaçi argues that the intervention of the Appeals Panel would ‘put an end to delays stemming from the expanding SPO exhibit list’ and thereby materially advance the proceedings.<sup>16</sup> No examples of actual delays resulting from past amendments are given, the argument thus remains broad, speculative and unsubstantiated.<sup>17</sup>

8. Thaçi further argues that an immediate resolution by the Court of Appeals Panel may have an impact on the Pre-Trial Judge’s finding that the SPO showed good cause for the requested amendments to the witness and exhibit lists and thereby ‘affect the number of witnesses and the amount of materials the SPO is permitted to rely on at trial’.<sup>18</sup> The Defence has appealed a decision granting an SPO request to add items to the exhibit list before.<sup>19</sup> In that context, the Court of Appeals upheld the Pre-Trial Judge’s decision and confirmed the jurisprudence developed by the Pre-Trial Chamber on the matter.<sup>20</sup> Through the current request for certification, the Defence is

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<sup>15</sup> Decision, KSC-BC-2020-06/F01057, para.28.

<sup>16</sup> Request, KSC-BC-2020-06/F01080, para.22.

<sup>17</sup> The Defence’s broad criticism is similar for all four issues. *See* Request, KSC-BC-2020-06/F01080, paras 22-23. It will therefore not be addressed again for Issues 2-4.

<sup>18</sup> Request, KSC-BC-2020-06/F01080, para.23.

<sup>19</sup> Thaçi Defence Appeal against “Decision on Specialist Prosecutor’s Request to Amend its Exhibit List and to Authorise Related Protective Measures”, KSC-BC-2020-06/IA019/F00002, 20 April 2022. The issues raised in the request for certification to appeal encompassed the question whether the Pre-Trial Judge erred when assessing that the addition of further materials would have no detrimental impact on the Defence’s ability to prepare for trial, as well as its ability to conduct ‘follow up investigations’. *See* Thaçi Defence Request for Certification to Appeal the “Decision on Specialist Prosecutor’s Request to Amend its Exhibit List and to Authorise Related Protective Measures”, KSC-BC-2020-06/F00733, 15 March 2022, para.11.

<sup>20</sup> Decision on Thaçi’s Appeal against “Decision on Specialist Prosecutor’s Request to Amend its Exhibit List and to Authorise Related Protective Measures”, KSC-BC-2020-06/IA019/F00006, 12 July 2022.

raising similar issues, such as the detrimental impact on the Defence's capacity to prepare for trial<sup>21</sup> or its ability to conduct its investigations.<sup>22</sup> Consequently, the Defence is seeking permission to relitigate a standard and issues that have already been addressed on appeal. Immediate appellate resolution would therefore not advance the proceedings. These same considerations apply equally to Issues 2-4 and likewise demonstrate that the third prong of the certification test has not been met for those issues. Accordingly, these submissions will not be repeated below.

#### B. ISSUE 2 FAILS TO MEET THE CERTIFICATION TEST

9. In support of the second issue, Thaçi argues that 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 Request<sup>23</sup> being filed in the pre-trial stage or the ongoing Defence investigations'.<sup>24</sup>

10. As to the first prong, Thaçi fails to identify a discrete issue and instead expresses mere disagreement with the Pre-Trial Judge's overall exercise of his discretion. He claims that the Pre-Trial Judge has erred in giving undue weight to irrelevant factors,<sup>25</sup> without substantiating exactly why they are irrelevant. The Pre-Trial judge has clearly defined the legal requirements for amending the witness and exhibit lists pursuant to Rules 95(4)(b) and 118(2).<sup>26</sup> Thaçi does not raise any discrete issue arising out of the Pre-Trial Judge's reasoning or even acknowledge that the relevant standards, including concerning amendment at the pre-trial stage, have been addressed on appeal.<sup>27</sup> Instead, he merely states that the pre-trial stage of the case does

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<sup>21</sup> Request, KSC-BC-2020-06/F01080, para.21.

<sup>22</sup> Request, KSC-BC-2020-06/F01080, para.13.

<sup>23</sup> Prosecution Rule 102(2) submission and related requests, KSC-BC-2020-06/F00890, 20 July 2022, Strictly Confidential and *Ex Parte* ('Request').

<sup>24</sup> Request, KSC-BC-2020-06/F01080, para.10.

<sup>25</sup> Request, KSC-BC-2020-06/F01080, para.13.

<sup>26</sup> Decision, KSC-BC-2020-06/F00157, para.22, re-stating findings from previous, undisputed decisions: Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures, KSC-BC-2020-06/F00957, 7 September 2022, Confidential, para.27; Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures, KSC-BC-2020-06/F00876, 8 July 2022, Confidential, para.25.

<sup>27</sup> See also para.8 above and the sources cited therein.

not *per se* allow the SPO to add witnesses to its list.<sup>28</sup> Such broad and unsubstantiated assertions are insufficient to meet the certification test. They also misrepresent the Decision, as the stage of the proceedings was one of several factors considered in relation to the impact of the proposed amendments on Defence preparations.<sup>29</sup>

11. Thaçi also fails to satisfy the second prong concerning the fairness and expeditiousness of the proceedings. He only offers a bare assertion that the Pre-Trial Judge's 'overly-permissive approach' and the 'setting of standards that would justify the addition of **any** witnesses at this stage' are irreconcilable with his duty to avoid undue delay and to protect the Defence's right to have adequate time for its preparation.<sup>30</sup> There is nothing in the carefully balanced Decision that supports such arguments. Consequently, Thaçi has not substantiated his submissions and thus has not carried his burden on the second issue.

#### C. ISSUE 3 FAILS TO MEET THE CERTIFICATION TEST

12. The third issue claims that 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'.<sup>31</sup>

13. Thaçi fails to identify an appealable issue, since it is not essential to the Decision. The contested argument, which allegedly constitutes an appealable issue,<sup>32</sup> was a response to Defence criticism expressed in an earlier submission<sup>33</sup> and does not qualify as a basis for the Pre-Trial Judge's findings on good cause.<sup>34</sup>

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<sup>28</sup> Request, KSC-BC-2020-06/F01080, para.13.

<sup>29</sup> Decision, KSC-BC-2020-06/F00157, paras 28, 37.

<sup>30</sup> Request, KSC-BC-2020-06/F01080, para.21.

<sup>31</sup> Request, KSC-BC-2020-06/F01080, para.10.

<sup>32</sup> Decision, KSC-BC-2020-06/F00157, para.29.

<sup>33</sup> Thaçi Defence Response to Prosecution Rule 102(2) submission and related requests (F00890), KSC-BC-2020-06/F00909, 3 August 2022, Confidential, paras 2, 40.

<sup>34</sup> See Decision, KSC-BC-2020-06/F00157, paras 27, 36 (addressing good cause in connection with the relevance and importance of the evidence).



14. Thaçi claims that by adding witnesses, the SPO expands the case to the detriment of the Defence,<sup>35</sup> without demonstrating to what extent its capacity to prepare for trial is affected. Furthermore, the Defence's argument regarding the creation of a reward system<sup>36</sup> is misleading, inflated and blatantly ignores the legal framework and factual reality of the case. In the context of a multi-accused trial such as the present one, the addition of exhibits at the pre-trial stage of the proceedings must be treated with flexibility.<sup>37</sup>

15. The Defence further fails to demonstrate how the addition of material would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. As noted above, the Pre-Trial Judge carefully considered whether, and ultimately found that, the Defence would be afforded a meaningful opportunity to process the witnesses' evidence and prepare for trial.<sup>38</sup> The Defence does not specifically engage with such reasoning. Thus, the third issue raised by the Defence does not meet the certification test.

#### D. ISSUE 4 FAILS TO MEET THE CERTIFICATION TEST

16. The fourth issue claims that '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 this can only truly be assessed at trial.<sup>39</sup> The fourth issue fails the first prong of the certification test as it is not essential to the Decision and consequently does not constitute an appealable issue. The decisive criterion for authorising the addition of the witness and his associated material was the Pre-Trial judge's finding that W01493's evidence is *prima*

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<sup>35</sup> 'The addition of new witnesses defeats the purpose of streamlining the case and necessarily impacts the Defence's capacity to prepare for trial.' See Request, KSC-BC-2020-06/F01080, para.21.

<sup>36</sup> '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.' See Request, KSC-BC-2020-06/F01080, para.14.

<sup>37</sup> Decision on Thaçi's Appeal against "Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures", KSC-BC-2020-06/IA019/F00006, 12 July 2022, para.22 and the sources cited therein.

<sup>38</sup> Decision, KSC-BC-2020-06/F00157, paras 28, 37.

<sup>39</sup> Request, KSC-BC-2020-06/F01080, para.10.

*facie* relevant and of sufficient importance.<sup>40</sup> Consequently, Thaci fails to identify an appealable issue.

17. Even if the issue raised qualified as an appealable issue, the Defence still fails to specify to what extent a different approach would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.<sup>41</sup> Issue 4 should be rejected accordingly.

### III. CLASSIFICATION

18. The filing is confidential pursuant to Rule 82(4). The SPO does not object to its reclassification as public.

### IV. RELIEF REQUESTED

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

**Word count: 2280**



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**Jack Smith**  
**Specialist Prosecutor**

Wednesday, 16 November 2022

At The Hague, the Netherlands.

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<sup>40</sup> Decision, KSC-BC-2020-06/F00157, para.30.

<sup>41</sup> The Defence argues that the Pre-Trial Judge could have saved the Court and parties time by 'properly assessing' the requirements justifying the 'late addition' of the materials. *See* Request, KSC-BC-2020-06/F01080, para.21.