



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

**Prosecution response to Thaçi Defence request for certification to appeal Decision
F01058**

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I. INTRODUCTION

1. The Thaçi Request¹ should be rejected because it fails to meet the requirements for leave to appeal under Article 45 of the Law² and Rule 77 of the Rules.³ Thaçi does not demonstrate that any of the issues alleging errors in the Decision⁴ – which, *inter alia*, authorised the Specialist Prosecutor’s Office (‘SPO’) to amend the witness list and exhibit list to add two witnesses and associated material⁵ – meet the strict threshold for certification.⁶

II. SUBMISSIONS

A. THAÇI FAILS TO SATISFY THE FIRST PRONG OF THE CERTIFICATION TEST

(a) Issue 1⁷

2. Thaçi complains that the Pre-Trial Judge made contradictory findings as part of his assessment that the SPO’s request was timely.⁸

¹ Thaçi Defence Request for Certification to Appeal the “Decision on Prosecution Request to Add Two Witnesses and Associated Materials” (F01058), KSC-BC-2020-06/F01085, 3 November 2022, Confidential (‘Request’).

² 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.

³ 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.

⁴ Confidential Redacted Version of Decision on Prosecution Request to Add Two Witnesses and Associated Materials, KSC-BC-2020-06/F01058/CONF/RED, 27 October 2022 (‘Decision’).

⁵ Confidential Redacted Version of Prosecution Request to Add Two Witnesses and Associated Materials, KSC-BC-2020-06/F00947/CONF/RED, 2 September 2022 (‘SPO Request’).

⁶ 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, para.14; *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 (‘Case 7 Decision’), paras 12, 14-15, 17.

⁷ Issue 1: ‘Whether the Pre-Trial Judge erred in finding that the SPO provided timely notice for its Seventh Request because the necessity of adding W04846 and W04669 and their associated material “became apparent to the SPO when recently preparing its Revised Witness List” in compliance with the Pre-Trial Judge’s order to this effect, in contradiction with his own finding that the SPO “should” have made the Request at an earlier stage.’

⁸ Request, KSC-BC-2020-06/F01085, paras 12-14.

3. The Pre-Trial Judge held that the SPO only became aware of the necessity to add W04846 and W04669 and associated materials during the preparation of the updated witness list, which had been ordered by the Pre-Trial Judge.⁹ The Pre-Trial Judge concluded that the SPO Request was timely because it was filed ‘in the context and within the timing of this streamlining exercise’, which also resulted in the withdrawal of seven witnesses.¹⁰

4. Thaçi fails to explain why this finding is logically inconsistent with the Pre-Trial Judge’s comment that the SPO should have made its request earlier.¹¹ In applying the timely notice requirement, the Pre-Trial Judge weighed up the relevant factors for and against the conclusion that the SPO had given timely notice. The mere fact that some of these considerations pull in opposite directions is an ordinary feature of discretionary decision making. The first issue therefore does not constitute an appealable issue emanating from the Decision. Rather, Thaçi expresses mere disagreement with the Pre-Trial Judge’s exercise of his discretion.

5. Thaçi also raises additional issues under the umbrella of the first issue.¹² Since Thaçi does not substantiate these as discrete appealable issues, they necessarily fail the first prong of the certification test.

(b) Issue 2¹³

6. The second issue challenges the Pre-Trial Judge’s finding that:

[...] in complex multi-accused trials in which a considerable amount of evidence is presented by the prosecution, a certain level of flexibility must be maintained with respect to amendments of witness and exhibit lists, provided that adequate protection of the accused’s rights is guaranteed.¹⁴

⁹ Decision, KSC-BC-2020-06/F01058/CONF/RED, paras 25, 29.

¹⁰ Decision, KSC-BC-2020-06/F01058/CONF/RED, paras 25, 29.

¹¹ Decision, KSC-BC-2020-06/F01058/CONF/RED, paras 24, 29.

¹² Request, KSC-BC-2020-06/F01085, paras 13-14.

¹³ Issue 2: ‘Whether the Pre-Trial Judge erred in basing the existence of good cause, in part, on the fact that a certain level of flexibility must be maintained with respect to amendments of witness and exhibit lists “in complex multiaccused trials in which a considerable amount of evidence is presented by the prosecution”.’

¹⁴ Decision, KSC-BC-2020-06/F01058/CONF/RED, paras 26, 30.

Thaçi fails to acknowledge that this is a restatement of a recent finding of the Appeals Panel, expressed in the context of an appeal of a decision to amend the exhibit list.¹⁵ The Appeals Panel's finding is an expression of established jurisprudence from other international tribunals.¹⁶ Thaçi does not offer any explanation for why the application of this appellate jurisprudence is an error.

(c) Issue 3¹⁷

7. The third issue complains that the Pre-Trial Judge based his assessment of good cause partly on irrelevant factors, but without identifying with any precision what those supposedly irrelevant factors are.¹⁸ Instead, Thaçi only gives one example of an alleged irrelevant factor, namely that the case remains at the pre-trial stage.¹⁹ This alone means that Thaçi fails to identify a discrete appealable issue and thus fails the first prong of the certification test.

8. Moreover, Thaçi disingenuously claims that the authorised amendments of the witness and exhibit lists lengthen the pre-trial phase yet fails entirely to substantiate this submission. The date for transfer of the case file to the Trial Panel was primarily contingent on the completion of the remaining mandatory steps under Rule 95, including the filing of defence pre-trial briefs. These steps have been progressing independently – and in parallel to – the SPO's requests to amend the witness and exhibit lists. Indeed, the present SPO Request arose out of the broader streamlining exercise and was filed within the same timeframe.

9. The baseless nature of Thaçi's submissions is further illustrated by the fact that, only eight days after the Decision, the Pre-Trial Judge confirmed that he intends to

¹⁵ 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.21.

¹⁶ See 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, fn.46; Decision, KSC-BC-2020-06/F01058/CONF/RED, fn.62.

¹⁷ Issue 3: '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 Seventh Request being filed in the pre-trial stage.'

¹⁸ Request, KSC-BC-2020-06/F01085, para.16.

¹⁹ Request, KSC-BC-2020-06/F01085, para.16.

transfer the case file to the Trial Panel before the end of the year.²⁰ Given that defence investigations will likely continue after the transmission of the case file to the Trial Panel, Thaçi's submission that the Decision will delay the pre-trial phase is unfounded.²¹

(d) Issue 4²²

10. The fourth issue complains that the Pre-Trial Judge relied on irrelevant factors in assessing the impact of the amendments on the Accused's preparation for trial. Once again, Thaçi fails to identify the alleged factors with precision, and instead only gives examples.²³ The fourth issue, as framed, would leave entirely open the actual issues to be litigated on appeal, since Thaçi could add further 'examples' of alleged irrelevant factors under the broad umbrella of the fourth issue. This is antithetical to Thaçi's burden to identify discrete issues for certification.

11. Thaçi does no more than express mere disagreement and therefore fails to satisfy the first prong of the certification test.

B. THAÇI FAILS TO SATISFY THE SECOND PRONG OF THE CERTIFICATION TEST

12. Thaçi also fails to explain how the issues would significantly affect the fair and expeditious conduct of proceedings (second prong).²⁴

13. Regarding the first issue, Thaçi's only relevant submission is that 'the addition of new witnesses [...] necessarily impacts the Defence's capacity to prepare for trial'.²⁵ Instead of elaborating on this bare assertion, Thaçi repeats arguments that could only

²⁰ Transcript, 4 November 2022, p.1587.

²¹ Transcript, 4 November 2022, p.1642.

²² Issue 4: 'Whether the Pre-Trial Judge erred in its assessment of the impact of the late addition of W04846 and W04669 on the Accused's preparation for trial, by relying on irrelevant factors, such as the fact that part of their associated material had already been disclosed to the Defence under Rule 103 or Rule 102(3) or that much of W04669's evidence was already accessible in his public testimony in Case 5.'

²³ Namely: (i) that part of the material related to W04846 and W04669 had already been disclosed to the Defence; and (ii) that W04669's public evidence in Case 5 was already accessible to the Defence. Request, KSC-BC-2020-06/F01085, paras 10, 17.

²⁴ Thaçi does not submit that any of the issues would significantly affect the outcome of the trial.

²⁵ Request, KSC-BC-2020-06/F01085, para.22.

be relevant to the first prong, if at all. Thaçi's submissions are therefore manifestly inadequate for satisfying the second prong of the certification test.

14. In relation to the remaining issues, Thaçi misrepresents the Decision by claiming that the Pre-Trial Judge set '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'.²⁶ In addition, Thaçi repeats his baseless assertion that the Decision delays the proceedings.²⁷ Finally, Thaçi's general submissions that the addition of any witness and associated material at this stage of the pre-trial phase causes prejudice falls far short of the requirements of the certification test.²⁸

C. THAÇI FAILS TO SATISFY THE THIRD PRONG OF THE CERTIFICATION TEST

15. Thaçi's cursory submissions also fail to demonstrate how an immediate resolution by the Appeals Panel will materially advance the proceedings (third prong). Thaçi repeats his unsubstantiated and erroneous submission that the amendments authorised in the Decision cause delay to the proceedings,²⁹ and argues immediate resolution by the Appeals Panel would 'affect the number of witnesses and the amount of material the SPO is permitted to rely on at trial'.³⁰ The latter submission is implausible, given the Appeals Panel's observation in July 2022 that requests to amend the exhibit list in multi-accused trials in which a considerable amount of evidence is presented by the prosecution should be met with a greater level of flexibility during the pre-trial phase.³¹ Consequently, there is no need for appellate intervention.

²⁶ Request, KSC-BC-2020-06/F01085, para.23.

²⁷ Request, KSC-BC-2020-06/F01085, para.23.

²⁸ Request, KSC-BC-2020-06/F01085, para.23.

²⁹ Request, KSC-BC-2020-06/F01085, para.24.

³⁰ Request, KSC-BC-2020-06/F01085, para.25.

³¹ 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.21; Decision, paras 26, 30.

III. CLASSIFICATION

16. This response is confidential pursuant to Rule 82(4). The SPO does not object to its reclassification as public.

IV. RELIEF REQUESTED

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

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At The Hague, the Netherlands.