

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: 25 November 2022

Language: English

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**Public Redacted Version of Thaçi Defence Request for Certification to Appeal the
“Decision on Prosecution Request to Add Two Witnesses and Associated
Materials” (F01058)**

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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 Seventh Request, pursuant to which the SPO requested leave to add two witnesses, W04846 and W04669, and their associated material, to its Witness and Exhibit Lists, while it had been in possession of the relevant information for years – W04669 was interviewed by the SPO on [REDACTED] and [REDACTED], while W04846 was the object of a detailed SPO screening note as early as [REDACTED].

3. The Defence submits that, in again granting this request, the Pre-Trial Judge erred, for the reasons set out below. These errors warrant the intervention of the Court

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; 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 (“Impugned Decision”).

of Appeals Panel. Therefore, in accordance with Rule 77 of the Rules⁵ and Article 45 of 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

⁵ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”).

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-

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 Seventh 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 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

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.

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.

Judge's order to this effect, in contradiction with his own finding that the SPO “should” have made the Request at an earlier stage.¹²

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 multi-accused trials in which a considerable amount of evidence is presented by the prosecution”.¹³

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.¹⁴

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 5.¹⁵

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

¹² Impugned Decision, paras 24-25, 29.

¹³ Impugned Decision, paras 26-27, 30.

¹⁴ Impugned Decision, para. 27.

¹⁵ Impugned Decision, para. 27, 31.

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.

12. Namely, with regard to **Issue 1**, the PTJ took into account irrelevant considerations in finding that the SPO Seventh Request was timely 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 an order to streamline the case. The Pre-Trial Judge's reasoning is intrinsically inconsistent and flawed. He cannot acknowledge that the SPO **should** have made the Seventh Request at an earlier date, and, at the same time, find the Request is timely because the SPO determined the relevance of such evidence while updating its Witness List pursuant to an order to streamline its case. In fact, the addition of four witnesses to the SPO Witness List,¹⁶ at such a late stage of the pre-trial proceedings, defeats the purpose of streamlining the case.

13. Further, there is no link between the fact that this SPO oversight was discovered during "streamlining" activities ordered by the Pre-Trial Judge, and whether the Request was timely. How or why the SPO discovered its own failings and inadvertence is irrelevant to the question of timely notice. The SPO complying with an order to streamline, when they should have been undertaking continuous reviews, cannot retroactively open the door to an expansion of the Witness List.

14. In addition, the Pre-Trial Judge gave undue weight to the fact that the SPO withdrew seven witnesses; this is an irrelevant consideration. 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.

¹⁶ As per the two decisions issued by the Pre-Trial Judge on 27 October 2022.

15. Concerning **Issue 2**, the Pre-Trial Judge's reliance on the need for "flexibility" in multi-accused trials must have limits. The accused have been in prison for 24 months, and the SPO was ordered to produce its Witness List ten months ago after having claimed that it was ready for trial in mid-2021. There must be a point at which flexibility must give way to certainty about the SPO case, otherwise this violates the Accused's right to know the case against him and to have adequate time and facilities to prepare for trial. In addition, the fact that the size of the SPO Witness and Exhibit Lists is already 'considerable' should warrant further scrutiny from the Pre-Trial Judge in his assessment of the merits of the SPO late request to add such material, not more flexibility. Indeed, 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. Again, this practice rewards the inability of the SPO to reduce its case.

16. Regarding **Issue 3**, the fact that the case remains at the pre-trial stage does not justify the late addition of witnesses to the SPO Witness List, ten months past the deadline to file such a List. This is circular and erroneous reasoning; it is these inadvertent errors by the SPO that keep the Witness List and Exhibit List as moving targets, generate extra litigation on these issues, and serve to lengthen the pre-trial phase. The fact that the case has not been transferred cannot be a justification for the addition of witnesses, otherwise the dates set for the provision of these lists are rendered meaningless. This Seventh Request is, again, indicative of the lack of effective organisation and control of the SPO over its evidence, which has lengthened the pre-trial phase.

17. Regarding **Issue 4**, the Pre-Trial Judge erred in giving undue weight to irrelevant factors in its assessment of the prejudice caused to the Defence by the late

addition of witnesses and material. The reliance on the fact that part of the witnesses' evidence has already been disclosed under another Rule, or that it is otherwise publicly available, represents an impermissible burden shift. It cannot be the case that the Defence should consider that any item disclosed to it may be added at a later stage to the Exhibit List. Similarly, the Defence cannot be required to look at publicly available evidence or testimonies and anticipate that such material will be added - late - to the SPO case. Such late additions are necessarily prejudicial given that they expand the evidentiary scope of the case and require the Defence to devote further time to its review, analyse and investigation, including through the different lens of being related to an SPO witness. The Pre-Trial Judge further fails to take into account the fact that, at least for W04846, his evidence relates to completely new incidents which are outside the scope of the indictment; the Defence will have to refocus already limited resources to investigate this from scratch. Therefore, the fact that part of such material may have already been disclosed under a different rule does not counterbalance the prejudice caused by its late addition to the SPO Exhibit List.

18. 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.

19. 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. The Issues therefore have a direct link to the conduct of the pre-trial proceedings, justifying their examination at this stage.

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

20. 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.¹⁷

21. 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,¹⁸ and to be tried **within a reasonable time**.¹⁹ 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.”

22. 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. 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 having withdrawn 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. Further, by putting aside the fact that the SPO could and should have filed its Seventh Request earlier, the Pre-Trial-Judge decided to erroneously ignore whether the SPO acted with due diligence in the conduct of its investigations and the presentation of its case, which contradicts the requirement of expeditious conduct of the proceedings, particularly considering that the SPO started to investigate the crimes under its jurisdictions seven years ago and applied for an Indictment against the Accused in April 2020.

¹⁷ Gucati and Haradinaj Decision on Leave to Appeal, para. 14.

¹⁸ Article 30(3) of the Kosovo Constitution; Article 21(4)(c) of the Law; Article 6(3)(b) of the ECHR.

¹⁹ Article 31(2) of the Kosovo Constitution; Article 21(4)(d) of the Law; Article 6(1) of the ECHR.

23. **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 considering that some flexibility would be required in a multi-accused case involving a significant amount of evidence. 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. In addition, by considering that the Defence would have sufficient time to prepare for trial because part of the witnesses' evidence has already been disclosed under another Rule or is in the public domain, the Pre-Trial Judge fails to assess properly the extent of the prejudice caused by the late addition of any witness and associated material to the SPO Witness List and Exhibit List at such an advanced stage of the pre-trial phase. In this way, the Impugned Decision directly affects the Accused's right to a fair trial and to have adequate time and facilities for his preparation.

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

24. 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 Witness List and Exhibit List, and contribute to streamlining the SPO case, thereby materially advancing the proceedings.

25. 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

26. 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: 2979 words]

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'G. W. Kehoe', is written over a white rectangular redaction box.

Gregory W. Kehoe

Counsel for Hashim Thaçi

Friday, 25 November 2022

At The Hague, The Netherlands