

In: KSC-BC-2020-06
**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi
and Jakup Krasniqi**

Before: **Trial Panel II**
Judge Charles L. Smith, III, Presiding Judge
Judge Christoph Barthe
Judge Guénaél Mettreaux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

Date: 9 January 2023

Language: English

Classification: Public

**Thaçi Defence Request for Certification to Appeal the “Decision on Thaçi Defence’s
Request for Disclosure of Dual Status Witnesses” (F01153)**

Specialist Prosecutor’s Office

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I. INTRODUCTION

1. On 21 February 2022, the Defence for Hashim Thaçi (the “Defence”) filed a motion for disclosure of witnesses with dual status, requesting the Pre-Trial Judge to order the disclosure to the Defence of the witness number and application forms of dual status witnesses and more precisely to:

“(i) Order the Prosecutor, the Registry and the Victims’ Counsel to liaise without delay to identify the dual status victim-witness individuals;
(ii) Order the Registry to transmit to the Prosecutor all victim application forms of dual status victim-witness individuals, together with the supporting documents, in an unredacted format; and
(iii) Order the Prosecutor to apply redactions, if need be, in accordance with the redaction regime defined by the Framework Decision on Disclosure of Evidence and Related Matters, and to disclose the said application forms and supporting documents to the Defence.”¹

2. The SPO and the Victims’ Counsel responded on 3 March 2022² and the Defence replied on 8 March 2022.³

3. On 13 December 2022, the Pre-Trial Judge issued its Decision on Thaçi Defence’s Request for Disclosure of Dual Status Witnesses.⁴ He “reject[ed] in part the Request, namely the request for the victim application forms and supporting material, as well as the request for redactions”; and “grant[ed] the Request to the extent that Victims’ Counsel liaise with the SPO and identify the Dual Status Witnesses and file a list of Dual Status Witnesses”.⁵

¹ KSC-BC-2020-06-F00706, Thaçi Defence Motion for Disclosure of Witnesses with Dual Status, 21 February 2022, public (“Request”), paras 1, 16.

² KSC-BC-2020-06-F00722, Prosecution Response to “Thaçi Defence Motion for Disclosure of Witnesses with Dual Status”, 3 March 2022, public; KSC-BC-2020-06-F00723, Victims’ Counsel Response to Thaçi Defence Motion for Disclosure of Witnesses with Dual Status, 3 March 2022, public.

³ KSC-BC-2020-06-F00728, Thaçi Defence Consolidated Reply to Prosecution and Victims’ Counsel Responses to “Thaçi Defence Motion for Disclosure of Witnesses with Dual Status”, 8 March 2022, public.

⁴ KSC-BC-2020-06/F01153, 13 December 2022, public.

⁵ *Ibid.*, para. 46.

4. The Defence submits that, in dismissing the Defence request to be disclosed the application forms of dual status witnesses, 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 Rules⁶ and Article 45 of the Law,⁷ the Defence applies for leave to appeal from the Impugned Decision on the issues detailed below.

II. APPLICABLE LAW

5. To appeal the Impugned Decision, certification is required.⁸

6. 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.”

7. 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.”

8. 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

⁶ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”).

⁷ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”).

⁸ Rule 77(1), Rules; Article 45(2), Law.

(c) Whether, in the opinion of the Pre-Trial Judge, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.⁹

9. 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.”¹⁰ 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.”¹¹

10. Certification does not concern whether a decision is correctly reasoned, but whether the standard for certification is met.¹²

III. THE PROPOSED ISSUES FOR APPEAL

11. 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 victims applications forms shall not be disclosed to the SPO, or the Defence”, while the disclosure of the application forms of dual status witnesses to the Defence and the SPO is justified to ensure the fairness of the proceedings for the accused

⁹ 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.

¹⁰ Guçati and Haradinaj Decision on Leave to Appeal, para. 12; Thaçi Decision on Leave to Appeal, para. 11.

¹¹ *Ibid.*

¹² Guçati and Haradinaj Decision on Leave to Appeal, para. 18; Thaçi Decision on Leave to Appeal, para. 17.

pursuant to Articles 21(2), 21(4), and 22(6) of the Law, and Rule 80(1), 102 and 103 of the Rules.

Issue 2: Whether the Pre-Trial Judge erred in considering that the application forms of dual status witnesses do not constitute “prior statements” disclosable to the Defence under Rules 102 and 103 of the Rules.

IV. SUBMISSIONS: THE TEST FOR CERTIFICATION IS MET

A. THE ISSUES ARE APPEALABLE ISSUES

12. The two 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 Defence Request, but rather, has identified specific errors that undermine his findings and warrant their reversal.

13. Namely, with regard to **Issue 1**, the Pre-Trial Judge erred by considering that Rule 113(1) precluded a Panel from ordering the disclosure of victim application forms to the SPO or the Defence, in *any* circumstances.¹³ By resorting to a strict interpretation of Rule 113, which only regulates the ‘Admission of Victims for Participation in the Proceedings’, the Pre-Trial Judge failed to strike a proper balance between, on the one hand, the safety, physical and psychological well-being, dignity and privacy of victims and, on the other hand, the rights and interests of the Defence.¹⁴ The Pre-Trial Judge failed to consider that the KSC framework does not contain any specific provision regulating the status of victim-witness individuals, which renders necessary a certain flexibility or adaptation of the said framework for these individuals, in order to protect the rights of the Accused. Indeed, pursuant to Article 22(6) of the Law, the

¹³ Impugned Decision, paras 28-32.

¹⁴ KSC-BC-2020-06/IA023/F00006/COR, Decision on Veseli’s Appeal Against “Third Decision on Victims’ Participation”, 15 September 2022, para. 45.

participation of victims must neither be prejudicial to, nor inconsistent with, the rights of the Accused. Similarly, pursuant to Rule 80(1) of the Rules, any protective measure applied for victims participating in the proceedings must be “consistent with the rights of the Accused”. Thus, the disclosure of victim application forms to the Defence and SPO is justified in the circumstances where a victim is also a witness called by the SPO, who may testify, *inter alia*, about the act and conduct of the accused. Such material, which may contain exculpatory information, is necessary for the defence preparation, in particular to prepare the cross-examination of dual status witnesses. These witnesses are not put at risk by the disclosure of their application forms to the Parties since the Rule 80 measures for Participating Victims, who are also SPO witnesses, would merely be aligned with the protective measures authorised to them as SPO witnesses.

14. Concerning **Issue 2**, the Pre-Trial Judge erred in considering that the application forms of dual status witnesses do not constitute “prior statements” disclosable to the Defence under Rules 102 and 103 of the Rules,¹⁵ that they are mere “administrative documents” with a limited purpose,¹⁶ “excluded from the SPO’s disclosure obligations”.¹⁷ The Pre-Trial Judge failed to take into account the fact that application forms contain information relevant to the charges against the accused and not simply administrative information. Indeed, these forms, pursuant to Rule 113, are deemed to specify how the applicants qualify as a victim and provide the location and date of alleged crimes giving rise to harm. They are further relevant to identify potential inconsistencies in a witness’ testimony and may contain exculpatory information, since they may affect the credibility or reliability of the SPO’s evidence. Therefore, they are disclosable to the Defence pursuant to Rules 102 and 103 of the Rules.

¹⁵ Impugned Decision, paras 29-32.

¹⁶ *Ibid.*, para. 30.

¹⁷ *Ibid.*, para. 29.

15. 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. Nor do the Issues amount to hypothetical concerns. The identified errors have an immediate and concrete impact on the ongoing conduct of the trial phase, and more generally, on the regime applicable to dual status witnesses, whose number is likely to increase. The Issues therefore have a direct link to the conduct of the 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

17. The criteria to be satisfied under these two prongs of the leave to appeal test are disjunctive. The Defence submits that the Issues satisfy both criteria.

18. **Issues 1 and 2** significantly affects the accused's right to a fair trial and the expeditious conduct of the proceedings. The lack of disclosure of the application form of dual status witnesses is prejudicial to the Defence and may impact the fairness of the proceedings. At stake are the Defence rights to be disclosed material necessary for its preparation, potentially exculpatory, to prepare for trial, and to cross-examine witnesses against the Accused. A clarification, by the Court of Appeal Panel, as to the disclosable nature, or not, of the application forms of dual status witnesses will bring certainty for Parties and Participants and limit the need for the Defence to file similar requests in the future. It will thus contribute to a fair and expeditious conduct of the proceedings.

19. In addition, **Issues 1 and 2** could significantly affect the outcome of the trial. The material whose disclosure is requested, containing information relating to the charges against the Accused, may affect the credibility of dual status witnesses, and, eventually, may have an impact on the reliance, or not, on such witnesses by the Trial Panel in the Rule 159 Trial Judgement.

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

20. An immediate resolution by the Court of Appeals Panel of the Issues would materially advance the proceedings. The Registry continues to be notified new victim application forms and additional victims are punctually admitted to participate in the proceedings. A ruling of the Court of Appeals Panel on the Issues at the beginning of the trial phase would clarify once and for all the status of the material associated with dual status witnesses and ensure foreseeability for both victims and the Defence.

V. RELIEF SOUGHT

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

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Respectfully submitted,

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

Gregory W. Kehoe

Counsel for Hashim Thaçi

Monday, 9 January 2023

At Tampa, United States