



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

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

Date: 20 January 2023

Language: English

Classification: Public

**Prosecution response to Thaçi Defence request for certification to appeal
decision F01153**

Specialist Prosecutor's Office

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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 meet the strict threshold for certification.⁵

II. SUBMISSIONS

A. ISSUE 1 FAILS TO MEET THE CERTIFICATION TEST

2. In support of the first issue,⁶ the Defence mischaracterise the Decision and raises the same arguments already considered and rejected by the Pre-Trial Judge, without demonstrating any error and thereby expressing mere disagreement with the findings of the Pre-Trial Judge.

3. THAÇI argues that the Pre-Trial Judge (i) erred by considering that Rule 113(1) precluded a Panel from ordering the disclosure of victim application forms to the SPO and the Defence; and (ii) failed to consider that the KSC framework does not contain any specific provision regulating the status of victim-witness individuals. Yet, the Pre-Trial Judge explicitly discussed these two aspects and, following a correct application

¹ Thaçi Defence Request for Certification to Appeal the “Decision on Thaçi Defence’s Request for Disclosure of Dual Status Witnesses” (F01153), KSC-BC-2020-06/F01192, 9 January 2023 (‘THAÇI Request’).

² Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (‘Law’). Unless otherwise indicated, all references to ‘Article(s)’ are to the Law.

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 Decision on Thaçi Defence’s Request for Disclosure of Dual Status Witnesses, KSC-BC-2020-06/F01153, 13 December 2022 (‘Decision’).

⁵ The applicable law has been set out in prior decisions. *See, for example, 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 12, 14-15, 17.

⁶ THAÇI Request, KSC-BC-2020-06/F01192, para.13.

of the regulatory framework of the KSC, decided against the disclosure of victim application forms to the parties pursuant to Rule 113.⁷

4. That Rule 113(1) provides that such forms shall not be disclosed to the parties is an established practice across cases.⁸ In his Decision, the Pre-Trial Judge specifically recalled that he, first and foremost, applies the legal instruments of this court, which expressly provide in Rule 113(1) of the Rules that '[a]pplication forms shall not be disclosed to the Parties'. The Pre-Trial Judge went further and also considered the practice before the ICC of disclosure of the victim application forms, including those of dual status witnesses, to the parties and ruled that such precedent is not relevant at the KSC, as the non-disclosure of the application forms to the parties is expressly addressed by the Rules.⁹

5. THAÇI also argues that the victim application forms are materials, which may contain exculpatory information, and are necessary for the Defence preparation. By doing so, the THAÇI Defence attempts to revisit previous findings of the Pre-Trial Judge, which it had not appealed when they were made.¹⁰ The Pre-Trial Judge has indeed ruled in a previous decision that 'the information provided by victims is not subject to the same disclosure regime as the material and information in the SPO's possession. The SPO may be approached for – and indeed it is duty-bound to provide – exculpatory evidence, but the victims are not.'¹¹

⁷ Decision, KSC-BC-2020-06/F01153, paras 28-32.

⁸ See e.g. Public Redacted Version of Second Decision on Victims' Participation, KSC-BC-2020-06/F00611/ RED, 10 December 2021, paras 11, 49; Public Redacted Version of First Decision on Victims' Participation, KSC-BC-2020-06/F00257/RED, 21 April 2021, paras 16, 64. See also *Specialist Prosecutor v. Mustafa*, Public redacted version of Third decision on victims' participation, KSC-BC-2020-06/F00126/RED, 21 May 2021, para.28 (The Trial Panel noted that, under the Rules, victim applications shall not be disclosed to the parties).

⁹ Decision, KSC-BC-2020-06/F01153, para.28. See also Decision, KSC-BC-2020-06/F01153, footnotes 45, 47, 48, 50 and 55.

¹⁰ See Decision on Veseli's Appeal Against "Third Decision on Victims' Participation", KSC-BC-2020-06/IA023/F00006/COR, 15 September 2022, para.24 (acknowledging some merit in the argument that an issue should be raised when it first arises and/or an explanation for not doing so should be provided).

¹¹ Third Decision on Victims' Participation, KSC-BC-2020-06/F00817RED, 25 May 2022 ("Third Decision"), para.38, footnotes omitted.

6. THAÇI also attempts to justify the alleged error presented as the first issue by stating that non-disclosure would potentially affect its examination of dual status applicants during trial. Yet again, this concern was expressly considered and ruled upon by the Pre-Trial Judge. In his assessment, the Pre-Trial Judge explicitly considered the potential impact on the rights of the Accused¹² and stated in the context of the non-disclosure of the forms that it 'is also not prejudicial to or inconsistent with the rights of the Accused, as the Defence retains their right to examine and test Dual Status Witnesses at trial on the basis of the testimony and other material exchanged between the Parties'.¹³ The Defence has indeed already received, *inter alia*, the statements of the witnesses the SPO intends to call, including any with dual status.

7. The first issue therefore does not constitute an appealable issue emanating from the Decision. Rather, THAÇI expresses mere – and untimely – disagreement with the Pre-Trial Judge's findings.

B. ISSUE 2 FAILS TO MEET THE CERTIFICATION TEST

8. In relation to the second issue, THAÇI argues that 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, that they are mere "administrative documents" with a limited purpose, "excluded from the SPO's disclosure obligations"'.¹⁴

9. However, as correctly stated in the Decision,¹⁵ victim application forms before the KSC are not only non-disclosable to the parties, but they also have 'a limited purpose and, as administrative documents, are primarily intended to enable the Pre-Trial Judge or Trial Panel to assess whether victim applicants should be admitted to participate in the proceedings'.¹⁶ They are 'not intended to be used as evidence in the

¹² Decision, KSC-BC-2020-06/F01153, para.31.

¹³ Decision, KSC-BC-2020-06/F01153, para.31.

¹⁴ THAÇI Request, KSC-BC-2020-06/F01192, para.14 (footnotes omitted).

¹⁵ Decision, KSC-BC-2020-06/F01153, para.30.

¹⁶ Decision, KSC-BC-2020-06/F01153, para.30.

present case and are not intended to be used to gather information that may be important for the preparation of the Defence's case'¹⁷ either.

10. The Pre-Trial Judge had previously made such findings in May 2022, where he clarified the following:¹⁸

[t]hat there is a distinction between the role of victims and that of witnesses is evident from Rule 113(3) of the Rules which provides that the Parties may not challenge the admissibility of individual applicants or their credibility, they may only make submissions on legal grounds regarding admissibility and common representation. In addition, the information provided by victims is not subject to the same disclosure regime as the material and information in the SPO's possession. The SPO may be approached for – and indeed it is duty-bound to provide – exculpatory evidence, but the victims are not. Victim application forms have a limited purpose and are meant to enable the Pre-Trial Judge or Trial Panel to assess whether victim applicants should be admitted to participate in the proceedings. They are not intended to provide information on the guilt or innocence of the accused or the credibility of witnesses.

11. Neither THAÇI, nor any other Defence team, requested leave to appeal these findings at the time.¹⁹

12. THAÇI fails to show how this issue was essential to the Decision, considering that this 'addition[al]' consideration²⁰ does not impact on the Pre-Trial Judge's primary finding that victim application forms, under the Rules, are not disclosed to *either* the Defence or SPO, and are therefore outside the scope of the SPO's disclosure obligations.

13. Accordingly, as it is both untimely and not essential to the Decision, the Issue necessarily fails to meet the certification test.

C. THAÇI FAILS TO DEMONSTRATE THAT EITHER ISSUE WOULD AFFECT THE FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS OR THE OUTCOME OF THE TRIAL

14. THAÇI claims that non-disclosure of dual status witnesses' application forms is prejudicial to the Defence and may impact the fairness of the proceedings.²¹ However, as victim application forms are non-disclosable to the parties, there is in fact

¹⁷ Decision, KSC-BC-2020-06/F01153, para.30.

¹⁸ Third Decision, KSC-BC-2020-06/F00817RED, para.38 (footnotes omitted).

¹⁹ See fn.10 above.

²⁰ Decision, KSC-BC-2020-06/F01153, para.30.

²¹ THAÇI Request, KSC-BC-2020-06/F01192, para.18.


no prejudice or fairness issue. THAÇI does not address the Pre-Trial Judge's finding that the Decision does not affect the ability of the Defence to examine dual status witnesses at trial and test their evidence with disclosed material exchanged between the parties.²² For this reason, the Decision does not impact on fairness, expeditiousness, or outcome.

15. Finally, resolution by the Court of Appeals would not materially advance the proceedings, as the Constitutional Court has already found that Rule 113, which expressly provides that victim application forms shall not be disclosed, is not inconsistent with Chapter II of the Constitution.²³

III. CONCLUSION

16. For the foregoing reasons, the SPO requests that the Trial Panel reject the THAÇI Request.

Word count: 1550



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Friday, 20 January 2023

At The Hague, the Netherlands.

²² Decision, KSC-BC-2020-06/F01153, para.31.

²³ Specialist Chamber of the Constitutional Court, Judgment on the Referral of the Rules [...], KSC-CC-PR-2017-01/F00004, 26 April 2017, paras 184-185, p.57. While the Constitutional Court did not explicitly address the non-disclosure of victim applications, it reviewed it and had no comment to make. When addressing disclosure provisions relating to victims, it specifically referred to the SPO's disclosure obligations.