

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 Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Victims' Counsel

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**Victims' Counsel's Response to Thaçi Defence Request for Certification to Appeal
the "Decision on Thaçi Defence's Request for Disclosure of Dual Status
Witnesses" (F01153)**

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I. INTRODUCTION

1. Pursuant to Article 22(6) of the Law on Specialist Chambers and Specialist Prosecutor's Office (Law No. 05/L-053) ("Law"), and Rule 114(4)(a) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), Victims' Counsel provides his response to *Thaçi Defence Request for Certification to Appeal the "Decision on Taçi Defence's Request for Disclosure of Dual Status Witnesses" (F01153)* ("Defence Request").¹
2. Victims' Counsel submits that the Defence Request should be rejected as it fails to meet the requirements for leave to appeal under Article 45 of the Law and Rule 77 of the Rules. The issues raised by the Defence are based on mere disagreements with and mischaracterisations of the Pre-Trial Judge's Decision ("Impugned Decision").²

II. PROCEDURAL HISTORY

3. On 21 February 2022, the Taçi Defence filed its Motion for Disclosure of Witnesses with Dual Status,³ requesting the Pre-Trial Judge to order the disclosure to the Defence of the witness number and application forms of dual status witnesses.
4. On 3 March 2022, Victims' Counsel and the Specialist Prosecutor Office ("SPO") responded,⁴ and on 8 March 2022, the Defence replied to these responses.⁵

¹ *Prosecutor v. Taçi et al.*, KSC-BC-2020-06/F01192, Taçi Defence Request for Certification to Appeal the "Decision on Taçi Defence's Request for Disclosure of Dual Status Witnesses" (F01153), 9 January 2023.

² KSC-BC-2020-06/F01153, Decision on Taçi Defence's Request for Disclosure of Dual Status Witnesses, 13 December 2022.

³ KSC-BC-2020-06/F00257, Taçi Defence Motion for Disclosure of Witnesses with Dual Status, 21 February 2022.

⁴ KSC-BC-2020-06/F00722, Prosecution Response to "Taçi Defence Motion for Disclosure of Witnesses with Dual Status", 3 March 2022; KSC-BC-2020-06-F00723, Victims' Counsel Response to Taçi Defence Motion for Disclosure of Witnesses with Dual Status, 3 March 2022.

⁵ KSC-BC-2020-06/F00728, Taçi Defence Consolidated Reply to Prosecution and Victims' Counsel Responses to "Taçi Defence Motion for Disclosure of Witnesses with Dual Status", 8 March 2022.

5. The Pre-Trial Judge issued the Impugned Decision on 13 December 2022 and on 9 January 2023, the Defence Request was filed.

III. SUBMISSIONS

a. Defence fails to show that the Issues are appealable

6. The two issues raised in the Defence Request were thoroughly addressed and reasoned by the Pre-Trial Judge in paragraphs 28-32 of the Impugned Decision.
7. With regard to the first issue identified by the Defence, it is submitted that it constitutes a mere disagreement with the Pre-Trial Judge's interpretation and application of Rule 113(1) of the Rules.
8. The Thaçi Defence criticise the PTJ for "resorting to a strict interpretation of Rule 113", in order to found its suggestion that there is an appealable issue. This is not arguably the basis for an appealable issue. Rule 113 (1) is crystal clear and incapable of any reading other than that apparent on its face: "Application forms shall not be disclosed to the Parties".
9. In seeking to argue, in effect, that the Rule should be read down to: "Application forms may be disclosed to the Parties", the Thaçi Defence demonstrates that its proposed appeal involves a mere disagreement not only with the Pre-Trial Judge's decision but ultimately with the Rule itself. That cannot amount to an appealable issue.
10. The Impugned Decision has correctly referred to and interpreted the framework of the Kosovo Specialist Chambers ("KSC"). Contrary to the Defence's submissions,⁶ the fact that Rule 113 regulates the "Admission of Victims for Participation in the Proceedings" does not render the provision pertaining to non-disclosure of victims' application forms to the Parties ineffective after victims are admitted to participate as VPPs in the proceedings, be it in relation

⁶ Defence Request, para. 13.

to single or dual status VPPs. The key provision prohibiting disclosure cannot be read as being limited in time. Nor does Rule 113 “only”⁷ regulate the admission process itself. Rule 113(9), for example, looks prospectively to the final trial judgment. The Rule is therefore not limited in its scope to the modalities of admission as the Thaçi Defence wish to suggest.

11. As noted in the Impugned Decision, victims’ application forms are “primarily intended to enable the Pre-Trial Judge to assess whether victim applicants should be admitted to participate in the proceedings”.⁸
12. It is submitted further that application forms also enable the Victims’ Participation Office to “register and assess the applications and file them before the Panel” (Rule 113(2)), to provide information to the Panel so that it can decide:
(i) “whether the applicant has provided *prima facie* evidence of the harm suffered as a direct result of a crime in the indictment” (Rule 113(4)), (ii) whether admitted VPPs should be granted protective measures (Rule 113(2) and (5) and Rule 80), (iii) and to assist the process of assignment of counsel to VPPs.
13. The Defence submits that the Pre-Trial Judge “failed to consider that the KSC framework does not contain any specific provision regulating the status of victim-witness individuals”.⁹ However, it is clear that the KSC framework provides for dual-status witnesses. For example, Article 22(1) of the Law provides that: “Participation by a Victim by the Specialist Chambers shall not be a bar to providing testimony as a witness before the Specialist Chambers”. Similarly, Article 42(2) of the Law provides that a Victim may be examined as a witness. In those circumstances, it must be assumed that had the drafters intended to provide for disclosure of application forms of dual status victims to the Parties, they would have explicitly done so.

⁷ Defence Request para. 13.

⁸ Impugned Decision, para. 30.

⁹ Defence Request, para. 13.

14. Furthermore, the Pre-Trial Judge rightly noted that Rule 113(1) is in clear contrast with the legal framework of the ICC which does not include a corresponding provision providing for non-disclosure of victims' application forms (see rule 89(1) of the Rules of Procedure and Evidence of the ICC).¹⁰ Therefore, the practice of the ICC Chambers in relation to disclosure of application forms of dual status victims to the Defence cannot be of assistance in the decision-making process on this matter before the KSC.
15. In relation to the Second Issue, the Defence submits that the Pre-Trial Judge did not take into consideration that "application forms contain information relevant to the charges against the accused and not simply administrative information. [...] 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."¹¹
16. However, the Pre-Trial Judge duly considered these arguments, which were raised by the Defence already in the Request for Disclosure of Dual Status Witnesses. In doing so the Pre-Trial Judge reasoned that victims' application form are not disclosed to the Prosecutor and therefore, as material not in his possession, cannot be subject to disclosure pursuant to Rules 102 or 103.¹² Furthermore, the Pre-Trial Judge explained that victims' application forms cannot be used to gather information that may be important for the preparation of the Defence's case;¹³ neither can they be equated with 'prior statements' or 'evidence' due to the purpose of the application forms and the process and circumstances in which they were obtained.¹⁴

¹⁰ Impugned Decision, para. 28.

¹¹ Defence Request, para. 14.

¹² Impugned Decision, para. 29.

¹³ Impugned Decision, para. 30.

¹⁴ Impugned Decision, para. 30.

17. The application forms are not to be used as evidence in the trial. Importantly, as the Pre-Trial Judge noted, “unlike a witness, a victim applicant is not informed of his or her rights and that his or her application form, including supporting documentation, may be used as evidence in criminal proceedings.”¹⁵ It follows, naturally, that the application forms are not distributed to any other party, including the Specialist Prosecutor’s Office.
18. It is therefore submitted that the two issues identified in the Defence Request are based on a mere disagreement with the Pre-Trial Judge’s interpretation and application of the Law and Rules. Therefore, the Defence Request should be denied.
- b. Defence fails to show how the Issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial*
19. For all the reasons set out at paragraphs 11, 12 and 16 above, the weight to be attached to the application forms, if disclosed, is very limited. The victims’ expectation of confidentiality in the process of making the application must also be weighed in the balance in deciding on their disclosure.
20. Taking those factors together, there is nothing unfair about Rule 113, and the Defence fail to show that there will be any significant effect on the fairness of the proceedings by the application at face value of this Rule by the Pre-Trial Judge.
- c. Defence fails to show how an immediate resolution by the Court of Appeals Panel may materially advance the proceedings*
21. As the Pre-Trial Judge has held, the Defence retains their right to examine and test dual-status witnesses at trial through various means. The Defence Request

¹⁵ Impugned Decision, para. 30.

fails to show how an immediate resolution of the two issues by the Court of Appeals Panel at this juncture may materially advance the proceedings.

IV. RELIEF REQUESTED

22. For the reasons discussed above, Victims' Counsel respectfully submits that the Defence Request should be dismissed.

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