



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 Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

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Language: English

Classification: Public

**Prosecution response to KRASNIQI Defence request for certification to appeal the
'Order on the Conduct of Proceedings'**

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I. INTRODUCTION

1. The 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 KRASNIQI does not demonstrate that any of the issues alleging errors in the Order⁴ – which, *inter alia*, authorised witness preparation⁵ – meet the strict threshold for certification.⁶

2. At the outset, the SPO emphasises that witness preparation has been adopted in Kosovo courts and at a range of international and hybrid tribunals.⁷ Such courts have found that this practice facilitates the fair and expeditious conduct of proceedings, as well as the protection of witnesses. KRASNIQI is the only Party or Participant to assert any error in the relevant part of the Order. The fact that the SPO, Counsel for Victims, and three of four Defence teams have not objected to the widely accepted practice of witness preparation, while not determinative, is nevertheless highly relevant to a consideration of any potential impact on the proceedings or the outcome of the trial.

¹ Krasniqi Defence Request for Certification to Appeal the “Order on the Conduct of Proceedings”, KSC-BC-2020-06/F01246, 1 February 2023 (‘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 Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226, 25 January 2023 (‘Order’).

⁵ Annex 1 to Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226, para.85-99.

⁶ The applicable law has been set out in prior decisions. *See, for example*, Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses, KSC-BC-2020-06/F01237, 30 January 2023, paras 7-8 and the sources cited therein.

⁷ *See Specialist Prosecutor v. Mustafa*, Prosecution Submissions pursuant to KSC-BC-2020-05/F00123, KSC-BC-2020-05/F00130, 2 June 2021, paras 17-22. *See also* para.8 below.

II. SUBMISSIONS

(a) Issue 1⁸

3. The first issue challenges the Trial Panel's exercise of discretion without demonstrating any appealable issue arising from the Order. By arguing that the Trial Panel erred in not engaging with the Defence submissions, and by not addressing or giving reasons for rejecting the Defence requests, KRASNIQI misrepresents the Order.

4. The Trial Panel explicitly stated that it carefully considered the Parties' submissions and, where relevant, amended its Order.⁹ In this respect, the Panel is not obliged to provide specific and detailed reasoning in relation to every argument raised by the Parties.¹⁰ Further, the Trial Panel has considerable discretion in trial management.¹¹ In order to properly identify an appealable issue in this context, KRASNIQI must identify an error in the Order that it alleges was inconsistent with the fair and expeditious conduct of the proceedings and therefore an abuse of discretion. KRASNIQI does not identify such an error; merely arguing that the Panel failed to address his arguments is insufficient.

5. For the same reasons, KRASNIQI also fails to demonstrate any, let alone significant, impact on the fairness and expeditiousness of the proceedings. KRASNIQI's submission that the issue goes to the heart of his right to have a reasoned decision cannot, alone, meet the high threshold of significant impact. Further, as also discussed below, the argument that the Panel permitted witness preparation without 'additional safeguards'¹² ignores the safeguards that were, in fact, adopted.

6. Finally, KRASNIQI's submissions on whether an immediate resolution of the first issue may materially advance the proceedings are also inadequate.¹³ Given the

⁸ Issue 1: 'The Order does not engage with the Defence Submissions, and does not address or give reasons for rejecting the Defence requests'.

⁹ Order, KSC-BC-2020-06/F01226, para.8.

¹⁰ *Special Prosecutor v. Gucati and Haradinaj*, KSC-CA-2022-01/F00114, Appeal Judgment, para.33.

¹¹ Article 40; ICTR, *Prosecutor v. Setako*, IT-04-81-A, Judgement, 28 September 2011, para.19 and the sources cited therein.

¹² Request, KSC-BC-2020-06/F01246, para.22.

¹³ Request, KSC-BC-2020-06/F01246, para.21.

Trial Panel's wide discretionary powers and the fact that the Trial Panel addressed the Parties' submissions, including by incorporating certain proposed amendments in the Order, KRASNIQI's claim that his requests have not been addressed by the Trial Panel is wrong and insufficient to justify certification.

(b) Issue 2¹⁴

7. The second issue, much like the first, challenges the Trial Panel's exercise of its discretion without demonstrating any appealable issue, and instead merely disagrees with and misrepresents the Order. KRASNIQI's only specific submission substantiating the second issue is that the Trial Panel failed to address or consider KRASNIQI's submissions in relation to a number of risks associated with witness preparation.¹⁵ Contrary to KRASNIQI's assertion, the Trial Panel carefully considered his submissions and amended the Order where relevant.

8. By merely stating that inherent risks may lead to motions of adjournment and eventually delay the proceedings, KRASNIQI also fails to establish that the second issue significantly affects the fairness and expeditiousness of the proceedings. Witness preparation has been widely accepted in both Kosovo and before international courts as a means of enhancing the efficiency, fairness, and expeditiousness of the proceedings. Such practice demonstrates that any risks linked to witness preparation – including those raised by KRASNIQI – can be overcome by appropriate safeguards.¹⁶

¹⁴ Issue 2: 'By not engaging with the Defence submissions, the Trial Panel failed to address or consider a number of inherent risks associated with the witness preparation regime proposed in the Draft Order'.

¹⁵ Request, KSC-BC-2020-06/F01246, para.23.

¹⁶ ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Decision on Defence Motion on Prosecution Practice of 'Proofing' Witness, 10 December 2004; SCSL, *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, 26 October 2005, para.33; ICTY, *Prosecutor v. Milutinovic, et al.*, IT-05-87-T, Decision on Ojdanic Motion to Prohibit Witness Proofing, 12 December 2006, para.16; ICTR, *Prosecutor v. Karamera et al.*, Decision on Defence Motions to Prohibit Witness Proofing: Rule 73 of the Rules of Procedure and Evidence, ICTR-98-44-T, 15 December 2006, para.10; ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-524, Decision on witness preparation, 2 January 2013, paras 31, 35; *Prosecutor v. Muthaura and Kenyatta*, ICC-01/09-02/11-588, Decision on witness preparation, 2 January 2013, paras 35, 39; *Prosecutor v. Al Hassan*, ICC-01/12-01/18, Decision on witness preparation and familiarisation, 17 March 2020, para.11, 15, 50; ICC, *Prosecutor v. Yekatom and Ngaissona*, ICC-01/14-01/18-677, Decision on Protocols at Trial, 8 October 2020, para.9.

9. The witness preparation section of the Order includes numerous safeguards and explicitly instructs the Parties to act in good faith and keep with the applicable standards of professional conduct and ethics. This demonstrates that, contrary to KRASNIQI's claims, the risks associated with witness preparation were duly considered by the Panel. As a result, KRASNIQI's arguments amount to mere disagreements with the Trial Panel's exercise of discretion when adopting safeguards.

10. Finally, KRASNIQI fails to demonstrate how an immediate resolution by the Court of Appeals will materially advance the proceedings. The Trial Panel considered KRASNIQI's submissions and adopted safeguards to address risks linked to witness preparation. KRASNIQI's generalised speculations about potential 'problems' in future¹⁷ are insufficient to demonstrate that immediate appellate resolution – which would also pre-date any such future events – would advance the proceedings.

(c) Issue 3¹⁸

11. The third issue, again, challenges the Trial Panel's exercise of its discretion without demonstrating any appealable issue, and instead merely disagrees with the Order. KRASNIQI's claim that the Trial Panel concluded that counterbalancing measures were not necessary despite the potential risks arising from witness preparation is a misrepresentation.¹⁹ The Order includes numerous counterbalancing measures, including safeguards similar to those proposed by KRASNIQI.

12. Moreover, KRASNIQI has not established that the second issue significantly affects the fairness and expeditiousness of the proceedings. Much like with his second issue, KRASNIQI completely ignores the existence of the safeguards adopted by the Trial Panel in the Order and essentially argues that by not adopting his preferred safeguards, the fairness of proceedings will be significantly affected. KRASNIQI goes further by arguing that the preparation sessions will significantly affect the

¹⁷ Request, KSC-BC-2020-06/F01246, para.23.

¹⁸ Issue 3: '[...] the Trial Panel concluded that counterbalancing measures were not necessary despite the potential risks arising from witness preparation measures'.

¹⁹ Request, KSC-BC-2020-06/F01246, paras 25-27.

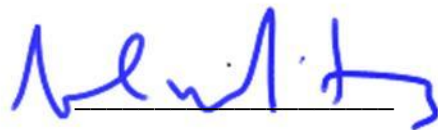
expeditious conduct of proceedings by putting forward claims that are speculative and hypothetical at best.²⁰

13. Finally, for the same reasons given above, KRASNIQI also fails to explain why immediate appellate resolution of the third issue is necessary. His arguments are based on abstract questions, hypotheticals, and speculations and should be dismissed.

III. RELIEF REQUESTED

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

Word count: 1432



Alex Whiting

Acting Specialist Prosecutor

Monday, 13 February 2023

At The Hague, the Netherlands.

²⁰ Request, KSC-BC-2020-06/F01246, para.26.