

In: KSC-BC-2020-06

**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi
and Jakup Krasniqi**

Before: Court of Appeals Panel

Judge Michèle Picard

Judge Emilio Gatti

Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

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**Public Redacted Version of Thaçi Defence Reply to ‘Consolidated Prosecution
response to Thaçi and Selimi Defence appeals of Decisions F01057 and F01058’**

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I. INTRODUCTION

1. The SPO characterises the arguments made by the Defence for Mr Hashim Thaçi (“Defence”) on appeal as “alarmist”¹ and “scare-mongering”,² and submits that the Defence misapprehends the legal test for requests to amend the witness and exhibit lists.³ None of these criticisms are warranted or accurate.

2. The issues raised in the Defence Appeal⁴ stem directly from the rolling expansion of the SPO Exhibit and Witness Lists, and the reasoning relied on by the Pre-Trial Judge to justify what should be an exceptional procedure. The SPO Response does not resolve the errors identified on appeal, which warrant correction by the Court of Appeals Panel.

II. SUBMISSIONS

A. FIRST ISSUE

3. The Pre-Trial Judge’s approach to assessing the timeliness of these late SPO requests was erroneous. By considering the relevant timeframe to be that between the (eventual) SPO witness interview and the request to add the witness – even where the SPO has known about the relevance of the witness’ evidence for years⁵ – the Pre-Trial Judge essentially granted the SPO unlimited scope to interview new witnesses and add them to the witness list.

¹ KSC-BC-2020-06/IA025/F00004, Consolidated Prosecution response to Thaçi and Selimi Defence appeals of Decisions F01057 and F01058, 15 December 2022 (“SPO Response”), para. 11.

² SPO Response, para. 15.

³ SPO Response, para. 17.

⁴ KSC-BC-2020-06/IA025/F00003, Thaçi Defence Appeal of F01057 and F01058, 5 December 2022 (“Defence Appeal”).

⁵ Defence Appeal, para. 17.

4. The SPO contends that unless the relevant timeframe is considered as the period between the eventual SPO witness interview and the subsequent request, the SPO would be forced to include on the SPO Witness List “a large number of individuals that the SPO will not ultimately call at trial”, which would itself undermine Defence investigations and efficiency.⁶

5. The SPO thereby reveals the problem at the heart of its approach to the pre-trial phase. At issue here, is the extraordinary and exceptional procedure of **adding** witnesses and exhibits to the SPO Witness and Exhibit Lists which were filed a year earlier. The fact that the SPO is talking about “a large number of individuals” being interviewed **after** the filing of its witness and exhibits is indicative of its problematic approach to the pre-trial phase, and to the present appeal.

6. There should not be a “large number of witnesses” to be interviewed after the filing of the SPO Witness and Exhibit Lists. The process of giving “careful consideration” to their evidence, and “gather[ing] a fuller understanding of witnesses’ knowledge”⁷ was required to have been completed, absent exceptional circumstances, before 17 December 2021. Rather, the SPO demonstrates what has been clear throughout; that it feels utterly unconstrained by the procedural deadlines that are intended to limit and regulate the pre-trial phase. With this mindset, it is entirely unsurprising that the pre-trial phase ran for over two years. An organised, efficient and capable SPO would never have needed years to move a case to trial.

B. SECOND AND THIRD ISSUES

⁶ SPO Response, para. 14.

⁷ SPO Response, para. 14.

7. The Defence did not ask the Pre-Trial Judge to ignore that the SPO request to amend was being made in the pre-trial phase, as the SPO submits.⁸ The issue being raised on appeal is the fact that the Pre-Trial Judge **relied** on the fact that the proceedings remained in the pre-trial phase as a factor justifying the rolling expansion of the SPO Witness and Exhibit Lists. The protracted length of the pre-trial proceedings cannot play in the SPO's favour and count as contributing to a finding of "good cause". This is circular reasoning: the pre-trial phase runs for over two years as the SPO continually seeks delays, extensions, and additions, which are granted on the basis that the pre-trial phase continues, which itself is blocked by the SPO's inability to finalise the requisite procedural steps. This reasoning is erroneous and warrants the intervention of the Court of Appeal Panel.

8. The Pre-Trial Judge was also wrong to rely on ongoing Defence investigations as a factor justifying the expansion of the SPO Exhibit and Witness Lists. The SPO submits that "it stands to reason that adjusting for new witnesses is easier when investigations are already underway, than to do so when such processes have ceased".⁹ Defence investigations do not cease. Defence investigations will continue until the pronouncement of the final judgment, either at trial or on appeal. Relying on the existence of Defence investigations as a factor supporting a finding of "good cause" to expand the SPO Exhibit and Witness Lists prejudices the Defence and impedes the diligent exercise of its duties. Since Defence investigations run in the background of the entire proceedings, this is a non-factor.

C. FOURTH ISSUE

9. The Pre-Trial Judge also dismissed the Defence's concerns as to prejudice, on the basis that part of [REDACTED] and [REDACTED]'s associated material had

⁸ SPO Response, para. 17.

⁹ SPO Response, para. 18.

already been disclosed to the Defence, and that much of [REDACTED]'s evidence was already accessible in [REDACTED].¹⁰

10. The SPO asserts that it is “patently relevant” to an assessment of the impact of the additional evidence and witnesses, that the Defence had already received much of the additional material.¹¹ And that “while the Defence is, of course, entitled to prepare however it deems best, it is certainly appropriate to assume that the Defence is reviewing the documents that it receives”.¹²

11. The Defence is happy to reveal that it does indeed review the documents it receives. However, the entire point of the SPO being required to file an Exhibit List and a Witness List, is so the Defence can focus its investigation and preparation on the witnesses and proposed exhibits that the SPO has indicated it would present at trial. The fact that the new exhibits and witnesses can be found among the millions of pages of disclosure does not mitigate the prejudice to the Defence in having to “refocus its investigations”.¹³

12. Moreover, there can be no justification for the Pre-Trial Judge relying on the fact that other parts of the material are publicly available, and the SPO does not attempt to provide one.

III. CONCLUSION & RELIEF SOUGHT

13. The Defence has set out in prior filings the number of extensions and delays sought by the SPO to accommodate its repeated inability to complete disclosure

¹⁰ KSC-BC-2020-06/F01058, Pre-Trial Judge, Decision on Prosecution Request to Add Two Witnesses and Associated Materials, 27 October 2022 (“F01058”), paras. 17-28, 31-32.

¹¹ SPO Response, para. 21.

¹² SPO Response, para. 22.

¹³ F01058, paras. 27, 31.

within set deadlines.¹⁴ The SPO now asserts that the Defence concerns and complaints about this protracted pre-trial phase which ran for over two years have been “firmly rebutted by the imminent transfer of the case to the Trial Panel as well.”¹⁵ The ending of the pre-trial phase in no way circumvents or corrects the errors in reasoning which are challenged in the present appeal, or the importance of correcting the SPO’s erroneous approach to the finality of its Exhibit and Witness Lists.

[Word count: 1,185 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

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Tuesday, 27 December 2022

At Tampa, United States

¹⁴ See, e.g., KSC-BC-2020-06/F01050, Pre-Trial Brief of Mr Hashim Thaçi, 21 October 2022, paras. 168-174; Defence Appeal, paras. 8-9, 24.

¹⁵ SPO Response, para. 11.