



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

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Prosecution reply to Thaçi response to 'Prosecution motion for admission of Accused's statements'

Specialist Prosecutor's Office

Alex Whiting

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. REPLY

1. The Specialist Prosecutor's Office ('SPO') hereby replies to the Response,¹ on the following issues: (i) Thaçi's claim that he did not make an informed waiver of rights in his SPO interviews, (ii) Thaçi's reliance on *Halilović* in seeking to exclude his ICTY interview, (iii) Thaçi's challenge to certain associated exhibits, and (iv) Thaçi's statement of intention to challenge to future use of statements of his Co-Accused.

2. At the outset, the SPO notes that Thaçi Defence does not oppose (i) the admission of any of the statements of his Co-Accused, or (ii) the admission of his SPRK statements,² save for the answer to one question in his November 2011 statement.³ The Defence submits that Thaçi corrected the answer in his July 2020 SPO interview.⁴ However, the Thaçi Defence simultaneously opposes the admission of this interview in full.⁵ The Defence cannot have it both ways. The better approach is that the entire content of each statement proposed for admission be available to the Panel for its consideration.

a. January and July 2020 SPO Interviews

3. In essence, the Defence complains that because Thaçi was not informed of *specific* charges that were being considered during the investigation phase, or the subject of the filed indictment, his rights were 'substantially affected' and violated.⁶

4. First, the SPO recalls that in both interviews, Thaçi was informed that he was suspected of committing crimes within the jurisdiction of the KSC, and that he had a right

¹ Thaçi Response to 'Prosecution motion for admission of Accused's statements', KSC-BC-2020-06/F01474, 24 April 2023 ('Response').

² 051716-051719-ET, 051716-051719 (Suspect interview, May 2016); SITF00009007-00009016 (witness statement, November 2011); and SPOE00213717-SPOE00213719-ET, SPOE00213717-SPOE00213719 (witness statement, July 2018).

³ Response, KSC-BC-2020-06/F01474, para.34, SITF00009007-00009016, p.4 (Question No. 27).

⁴ Response, KSC-BC-2020-06/F01474, para.34, referring to 076563-TR-ET, pp.6-12.

⁵ Response, KSC-BC-2020-06/F01474, paras 25-30.

⁶ Response, KSC-BC-2020-06/F01474, paras 9-30, referring to Article 38(a)-(c) of the Law, Article 30 of the Constitution, Article 6(3) of the ECHR and Article 14(3) of the ICCPR.

to counsel and to remain silent.⁷ Article 38(3) of the Law was therefore fully complied with. In an analogous scenario in the *Mustafa* case, the accused was interviewed by the SPO during the investigation phase. Like *Thaçi*, he was similarly informed of his rights under Article 38(3), including that there were grounds to believe he had committed a crime under the jurisdiction of the KSC. In that instance, Trial Panel I considered that the accused's rights as a suspect were fully respected.⁸ The same applies here.

5. The Appeals Panel in the *Shala* case has recently had occasion to rule on both the level of specificity required, and the trigger for that specificity, holding that the level of detail prior to issuance of an indictment and charging 'is generally not as high as the one expected to be provided when the person interviewed has been charged following the issuance of an indictment against him or her.'⁹

6. At the time of the *Thaçi* interviews no indictment had issued. In January 2020, no indictment had even been filed, while, in July 2020, an indictment had been submitted for confirmation, but had not yet been confirmed, and remained subject to the Pre-Trial Judge's review.¹⁰

7. With regard to Article 6(3) of the ECHR, the purpose of this provision is to protect a person's ability to prepare his or her defence at trial. That purpose does not require the prosecution to disclose its investigative focus to each suspect it interviews, or disclose the contents of what was then a strictly confidential filing which remained subject to review

⁷ See Prosecution motion for admission of Accused's statements, KSC-BC-2020-06/F01351, 8 March 2023 ('Motion'), paras.5-7 & 9-12.

⁸ Public redacted version of Decision on the admission of evidence collected prior to the establishment of the Specialist Chambers and other material, KSC-BC-2020-05/F00281, 13 December 2021, para.22.

⁹ *Specialist Prosecutor v. Shala*, Decision on Shala's Appeal Against Decision Concerning Prior Statements, KSC-BC-2020-04/IA006/F00007, 5 May 2023, para.43.

¹⁰ Rule 86(4). Indeed, at the time of the interview, the SPO had been order to re-submit a revised version of the indictment for consideration. See also ECtHR, *Kamasinski v Austria*, 1989, para.79 (noting that it is from service of an indictment that an accused is on formal notice of the factual and legal basis of the charges).

and confirmation.¹¹ Indeed, an Appeals Panel has recently confirmed with reference to the ECHR that ‘there is no general or standard requirement to notify a suspect of the time, location, and specific conduct he or she is suspected of.’¹² Yet, it is noted that at the time of the July 2020 interview, Thaçi and his Counsel were in fact aware both of the subject matters which had been addressed in the January 2020 interview, and certain additional subjects which the SPO had indicated during the January interview, that it wished to cover in any follow-up.¹³

8. Significantly, Thaçi was represented by experienced Counsel in preparation for, and throughout, the July 2020 interview.¹⁴ Moreover, (i) that interview was conducted voluntarily at the request of Thaçi,¹⁵ and (ii) both Thaçi and his Counsel were aware at that time that an indictment had been submitted against Thaçi.¹⁶ It was open to Thaçi’s counsel to request further information at that time. No such request was made.¹⁷ It was also open to Thaçi to decline to answer questions, but he chose to intelligently waive his

¹¹ The distinction between the investigative and trial stages has also been recognised by the UN Human Rights Committee in interpreting equivalent provisions contained in the ICCPR (HRC, *Khachatrian v. Armenia*, no. 1056/2002, 28 October 2005, para.6.4. See also HRC *Evelio Ramon Gimenez v. Paraguay*, no. 2372/2014, 25 July 2018, para.7.10; HRC *Kelly v Jamaica*, 253/1987, 10 April 1991, para.5.8. HRC, General Comment no. 32, Article 14: Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/CG/32, para.31). Trial Chambers at the ICTY have also consistently rejected attempts to rely upon the full scope of Article 14(3)(a) of the ICCPR in the context of investigative interviews (ICTY, *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4, Decision on Bajrush Morina’s Request for a Declaration of Inadmissibility and Exclusion of Evidence, IT-04-84-R77.4, 28 August 2008, para.30; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on the Admissibility of the Borovčanin Interview and the amendment of the Rule 65 *Ter* Exhibit List, 25 October 2007, para.35).

¹² *Specialist Prosecutor v. Shala*, Decision on Shala’s Appeal Against Decision Concerning Prior Statements, KSC-BC-2020-04/IA006/F00007, 5 May 2023, para.42.

¹³ 07076563-TR-ET Part 2, p.22, lns 7-16.

¹⁴ This is an important procedural safeguard to which ‘particular regard’ should be had in assessing whether there was an informed exercise of rights (ECtHR, *GC, Salduz v Turkey*, No.36391/02, para.54).

¹⁵ 076563-TR-ET Part 1, p.9, lns 9-11, p.12, lns 13-14, p.20, lns 3-9; Part 2, p.4, lns 10-12.

¹⁶ See 076563-TR-ET Part 1, pp.7-8 & 17.

¹⁷ Cf. *Specialist Prosecutor v. Shala*, Decision on Shala’s Appeal Against Decision Concerning Prior Statements, KSC-BC-2020-04/IA006/F00007, 5 May 2023, para.52 (reasonable to consider actions of suspect in determining any rights violation).

right to silence. Throughout the SPO interview process, Thaçi's rights were fully respected. No issues raised give rise to indicia of unreliability or possible damage to the integrity of the proceedings if the statements are admitted.¹⁸ As such, the standard for exclusion under Rule 138(2), has not been established.

b. Associated Exhibits of the January and July 2020 SPO Interviews

9. Thaçi claims that Exhibits 10, 12 and 14 were not referred to during the January 2020 interview.¹⁹ However, the record reveals that they were, in fact, discussed.²⁰

10. Further, Thaçi claims that Exhibits 2, 16, 19, 20, 21, 22, 23, 24 & 25 are inauthentic, while Exhibits 3, 4, 5 and 6 relate to matters outside of the temporal jurisdiction of the indictment.²¹ On its own, this does not justify their exclusion. The relevant test is whether the associated exhibits form an 'inseparable and indispensable' part of the record.²² All of the Associated Exhibits satisfy this test. Similarly, Thaçi claims he has no knowledge of Exhibits 3, 4, 5, 6 & 7.²³ Yet, Thaçi repeatedly offered his opinion on their content and the events they related to.²⁴ As such, the Panel should admit all of the Associated Exhibits.

c. May 2004 ICTY Interview

¹⁸ *Specialist Prosecutor v. Shala*, Decision on Shala's Appeal Against Decision Concerning Prior Statements, KSC-BC-2020-04/IA006/F00007, 5 May 2023, paras 79-81 (finding this to be the case even in a circumstance where certain errors in procedure were found to have occurred).

¹⁹ Response, KSC-BC-2020-06/F01474, para.23(i).

²⁰ For discussion of Exhibit 10, *see* 071840-TR-ET Part 6, pp 12-13. Exhibit 12 is Communiqué No. 52, bearing the ERN '071836'. Communiqué No. 52 was discussed at 071840-TR-ET Part 7, pp 1-5. For discussion of Exhibit 14, *see* 071840-TR-ET Part 7, p.10.

²¹ Response, KSC-BC-2020-06/F01474, para.23(ii)-(iii) & para.30.

²² Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, KSC-BC-2020-06/F01380, 16 March 2023, para.24.

²³ Response, KSC-BC-2020-06/F01474, para.23(iv).

²⁴ For Exhibit 3, *see* 071840-TR-ET Part 5, pp.11-13; For Exhibit 4, *see* 071840-TR-ET Part 5, pp.13-15; For Exhibit 5, *see* 071840-TR-ET Part 5, pp.15-17; For Exhibit 6, *see* 071840-TR-ET Part 5, pp.17-18; For Exhibit 7, *see* 071840-TR-ET Part 6, pp.5-8.

11. In relation to *Thaçi's* 2004 ICTY interview, the SPO refers to its primary submissions.²⁵ However, with regard to the *Halilović* decision relied upon by *Thaçi* to exclude his 2004 ICTY interview,²⁶ the facts are clearly distinguishable. In *Halilović*, the statement sought to be admitted emanated from an interview conducted across 7 days, over a period of 4 months, in circumstances where no audio/video recording or investigator's notes existed.²⁷ *Thaçi's* interview was completed in less than 4 hours,²⁸ with detailed investigator's notes reviewed and amended by *Thaçi* where appropriate.²⁹ As to the lack of an audio recording, and in contrast to *Halilović*,³⁰ because *Thaçi* was interviewed as a witness and not a suspect, the ICTY Rules did not strictly require it.³¹ There is no bar to its admission here.

d. The Statements of Co-Accused are Admissible without Limitation

10. The *Thaçi* submissions regarding its intention to challenge the 'future use'³² of the statements of his Co-Accused are premature, and should be summarily dismissed at this time. *Thaçi* is not challenging their admission,³³ which is what is currently at issue, and indeed acknowledges the Trial Panel's prior finding that the admission of a record or statement of an accused does not, without more, infringe upon the fundamental rights of

²⁵ Motion, KSC-BC-2020-06/F01351, paras.70-74.

²⁶ Response, KSC-BC-2020-06/F01474, para. 32, citing to ICTY, *Prosecutor v. Halilović*, IT-01-48-T, Decision on Motion for Exclusion of Statement of Accused, 8 July 2005 (*Halilović* Decision').

²⁷ *Halilović* Decision, para.2.

²⁸ U008-1957-U008-1957, recording that the time span of the interview was 11:00-14:50 on 5 May 2004.

²⁹ See e.g., U008-1957-U008-1960, para.42.

³⁰ *Halilović* Decision, paras.25-26.

³¹ ICTY, Rules of Procedure and Evidence, IT/32/Rev/50, 8 July 2015, Rule 43.

³² Response, KSC-BC-2020-06/F01474, para.36.

³³ Response, KSC-BC-2020-06/F01474, para.35.

his co-defendants.³⁴ The statements in question should be admitted without limitation. The Panel will be in a position to weigh them in light of the totality of the evidence, taking into account, in particular, and consistent with relevant jurisprudence,³⁵ the opportunity which the Defence had to challenge such evidence, and their degree of corroboration.³⁶

II. CONCLUSION

12. For the foregoing reasons, the SPO submits that Thaçi fails to demonstrate that the statements should not be admitted, and requests that they be admitted and made available for use against all parties.

Word Count: 2000



Alex Whiting

Acting Specialist Prosecutor

Monday, 8 May 2023

At The Hague, the Netherlands.

³⁴ Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, KSC-BC-2020-06/F01380, 16 March 2023 ('Bar Table Decision'), para.50 (and jurisprudence cited therein).

³⁵ The Thaçi Defence (i) repeats jurisprudence previously relied upon and addressed in KSC-BC-2020-06/F01380, and (ii) also incorporates by reference jurisprudence previously cited to by the Veseli Defence. In that regard, *see also* Prosecution reply to Veseli response to 'Prosecution motion for admission of Accused's statements', 8 May 2023, paras 2-3 (incorporated herein by reference). It is further noted that the Thaçi Defence attempts to formulate a 'use' test based on ICTY and ICTR Trial Chamber jurisprudence which precedes the more authoritative pronouncement of the ICTY Appeals Chamber.

³⁶ Statements Motion, KSC-BC-2020-06/F01351, paras 91-92.