



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: 12 June 2023

Language: English

Classification: Public

Public Redacted Version of 'Consolidated Prosecution response to Thaçi and Krasniqi Defence requests for certification to appeal decision F01528', KSC-BC-2020-06/F01563, dated 30 May 2023

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. INTRODUCTION

1. The THAÇI and KRASNIQI Requests¹ should be rejected because they fail to meet the requirements for leave to appeal under Article 45 of the Law² and Rule 77 of the Rules.³ THAÇI and KRASNIQI do not demonstrate that any of the issues⁴ alleging errors in the Decision⁵ meet the strict threshold for certification.⁶ Rather, such issues are based on misrepresentations, mere disagreements, and speculations.

II. SUBMISSIONS

A. ISSUE 1 FAILS TO MEET THE CERTIFICATION TEST

2. The question put by THAÇI under Issue 1 – namely, ‘[c]an a Trial Panel properly rely on a party’s non-compliance with the Conduct Order to accept it has no choice but to grant the request in question?’⁷ – amounts to a mere disagreement with the Trial Panel’s findings and emanates from mischaracterisations of the Decision.

¹ Thaçi Defence Request for Certification to Appeal the “Confidential Redacted Version of Decision on the prosecution Request for Protective Measures (F01523)”, KSC-BC-2020-06/F01532, 17 May 2023, Confidential (‘THAÇI Request’); Krasniqi Defence Joinder to Thaçi Defence Request for Certification to Appeal the “Confidential Redacted Version of Decision on the prosecution Request for Protective Measures (F01523)” and Request for Certification to Appeal One Additional Issue, KSC-BC-2020-06/F01542, 22 May 2023, Confidential (‘KRASNIQI Request’; collectively, the ‘THAÇI and KRASNIQI Requests’).

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 The issues proposed for appeal are referred to herein as Issues 1-4. Issues 1 to 3 are common to the THAÇI and KRASNIQI Requests. Issue 4 (referred to in the KRASNIQI Request as the ‘Additional Issue’) is only brought by the KRASNIQI Defence.

⁵ Decision on the Prosecution Request for Protective Measures (F01523), KSC-BC-2020-06/F01528/CONF/RED, 16 May 2023, Confidential (‘Decision’).

⁶ 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. *See also* Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses, KSC-BC-2020-06/F01237, 30 January 2023, para.8 and the sources cited therein.

⁷ Issue 1 was set out at paragraph 10 of the THAÇI Request, as follows: ‘Whether the Trial Panel erred in linking the granting of protective measures to the untimeliness of the SPO Request [...]’.

3. First, the Trial Panel did not find that the timing of the SPO Request⁸ amounted to a violation of the Conduct of Proceedings Order,⁹ as conceded by the THAÇI Defence itself.¹⁰ Moreover, the timing of the witness's testimony was one of several factors considered by the Panel when assessing the necessity of the requested protective measures,¹¹ but was not considered by the Panel when finding an objective risk of interference or intimidation justifying such measures.¹² Timing was therefore not an essential part of the Decision on the SPO Request and THAÇI's assertion that the Panel concluded that it 'had no choice but to grant [the request]'¹³ misrepresents the Decision. THAÇI merely disagrees with the Panel's conclusions and the weight given to the multiple factors considered, without identifying any error. Finally, THAÇI's submissions that the Decision will encourage the SPO to file late requests¹⁴ are not only speculative and unsupported, but ignore the Panel's express instructions concerning future requests.¹⁵

4. For all these reasons, Issue 1 not only fails to constitute an appealable issue, but also would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and appellate intervention would not materially advance the proceedings.

B. ISSUE 2 FAILS TO MEET THE CERTIFICATION TEST

5. In relation to Issue 2, THAÇI argues that the Trial Panel 'erred in failing to address the Defence submission that granting protective measures for W03165 would encourage other witnesses to request anonymity for the same reasons, being the

⁸ URGENT Confidential Redacted Version of 'Request for protective measures for W03165', KSC-BC-2020-06/F01523/CONF/RED, 15 May 2023 ('SPO Request').

⁹ Annex 1 to Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023 ('Conduct of Proceedings Order').

¹⁰ THAÇI Request, KSC-BC-2020-06/F01532, para.12.

¹¹ Decision, KSC-BC-2020-06/F01528/CONF/RED, para.13.

¹² Decision, KSC-BC-2020-06/F01528/CONF/RED, paras 9-12.

¹³ THAÇI Request, KSC-BC-2020-06/F01532, para.12.

¹⁴ THAÇI Request, KSC-BC-2020-06/F01532, para.18.

¹⁵ Decision, KSC-BC-2020-06/F01528/CONF/RED, para.8.

preference of their family and not wanting to be the first to testify in public, which would lead to a largely secret trial'.¹⁶ This issue misrepresents the Decision and ignores the relevant legal framework, with which the Defence does not take issue.

6. First, contrary to Defence assertions otherwise, the Panel noted the Defence submissions that, to grant the SPO Request, would 'raise[] the likelihood that the trial would be held mainly in private session'.¹⁷ Accordingly, contrary to Defence assertions that this issue was not considered or taken into account,¹⁸ this submission was, in fact, expressly considered. After noting this speculative argument, the Trial Panel correctly addressed the issues at the core of the SPO Request, which were confined to W03165's need for protective measures and the particular circumstances of this witness.¹⁹ As stated in the Decision, a party seeking protecting measures for its witness 'must demonstrate that there is a real likelihood that *the person for whom the protective measures are sought* may be in danger or at risk of being interfered with or intimidated. This requires proof of some objective basis underlying the claim that the safety or security of *the individual concerned* is at risk'.²⁰ The Trial Panel therefore correctly focused on the individual for whom the measures were sought and did not engage in speculation as to what the future might hold for other witnesses or persons at risk.

7. THAÇI fails to show how Issue 2 was essential to the Decision, considering that it does not impact on the Trial Panel's primary findings concerning the necessity and proportionality of protective measures for W03165. It further ignores the KSC legal framework on protective measures²¹ and is based on entirely speculative and hypothetical concerns about potential future requests. In this respect, the Panel took action to safeguard the overall publicity of the proceedings.²²

¹⁶ THAÇI Request, KSC-BC-2020-06/F01532, paras 10, 15.

¹⁷ Decision, KSC-BC-2020-06/F01528/CONF/RED, para.6.

¹⁸ THAÇI Request, KSC-BC-2020-06/F01532, paras 15, 19.

¹⁹ Decision, KSC-BC-2020-06/F01528/CONF/RED, para.10.

²⁰ Decision, KSC-BC-2020-06/F01528/CONF/RED, para.9 (emphasis added).

²¹ See, *inter alia*, Articles 21(2), 23.

²² Decision, KSC-BC-2020-06/F01528/CONF/RED, para.16. See also para.18 below.

8. Accordingly, Issue 2 fails to constitute an appealable issue and would have no impact on the proceedings.

C. ISSUE 3 FAILS TO MEET THE CERTIFICATION TEST

9. In relation to Issue 3, THAÇI questions ‘whether a reasonable Trial Panel could find that the granting of protective measures on this basis could be viewed as striking a proper balance between the duty to ensure that the trial is conducted “with full respect for the rights of the accused, and due regard for the protection of victims and witnesses”’.²³ Again, the Defence merely disagrees with the Decision, relying on mischaracterisations.

10. The Trial Panel specifically addressed the concern underlying Issue 3 in its Decision. Following an assessment based on a non-exhaustive list of objectively justified risks applicable to W03165,²⁴ it found that the requested protective measures for W03165 were necessary and ‘consistent with the effective protection of the Accused’s rights and proportionate in light of the demonstrated need for protection of the concerned witness’.²⁵ The Trial Panel also reminded the Parties that the principle of publicity of the proceedings is ‘not absolute but subject to exceptions, including those associated with the protection of victims and witnesses’.²⁶ Issue 3 therefore amounts once again to a mere disagreement with the Trial Panel’s findings.

11. Moreover, insofar as the Defence claims that the Decision turned on family ‘preference’ and the fact that the witness would be the first to testify publicly,²⁷ such submissions misstate the Panel’s reasoning. Indeed, the Panel’s conclusion that the witness faced objective risks was based on a number of factors, none of which included those cited by the Defence. Rather, such factors included the sensitive nature of the witness’s evidence, fears and concerns of the witness and his family, the

²³ THAÇI Request, KSC-BC-2020-06/F01532, paras 10, 16.

²⁴ Decision, KSC-BC-2020-06/F01528/CONF/RED, para.10.

²⁵ Decision, KSC-BC-2020-06/F01528/CONF/RED, paras 9-15.

²⁶ Decision, KSC-BC-2020-06/F01528/CONF/RED, para.9.

²⁷ THAÇI Request, KSC-BC-2020-06/F01532, paras 16, 19.

witness's particular circumstances [REDACTED], and the prevailing climate of witness interference and intimidation.²⁸

12. Accordingly, Issue 3 fails to constitute an appealable issue and would have no, let alone significant or material, impact on the proceedings.

D. ISSUE 4 FAILS TO MEET THE CERTIFICATION TEST

13. In relation to Issue 4, KRASNIQI argues that the Trial Panel failed to take all relevant factors into consideration by allegedly overlooking [REDACTED].²⁹ However, as clearly stated in the Decision, the Trial Panel specifically considered this argument³⁰ and relied on several factors that demonstrated the necessity and proportionality of the requested measures in the specific circumstances of this witness and this case.³¹

14. Variation of protective measures regularly occurs during legal proceedings and is foreseen in the legal framework. [REDACTED]. Likewise, measures may be varied within the same trial, based on specific circumstances at any given time. In this case, the Panel [REDACTED] rightly considered the need for protective measures for W03165 at the time at which they were requested and in the specific circumstances of this case.

15. Issue 4 therefore amounts to a mere disagreement with the Trial Panel's findings and is not an appealable issue. For the same reasons and as also set out below, Issue 4 does not have any, let alone significant or material, impact on the proceedings.

²⁸ Decision, KSC-BC-2020-06/F01528/CONF/RED, para.10.

²⁹ KRASNIQI Request, KSC-BC-2020-06/F01542, para.2 ('Whether, in granting the proposed protective measures for W03165, the Trial Panel erred by failing to take into consideration or give sufficient weight to [REDACTED]').

³⁰ Decision, KSC-BC-2020-06/F01528/CONF/RED, paras 6, 10.

³¹ Decision, KSC-BC-2020-06/F01528/CONF/RED, paras 10-12.

E. THAÇI AND KRASNIQI FAIL TO DEMONSTRATE THAT ANY ISSUE WOULD HAVE AN IMPACT ON THE PROCEEDINGS

16. THAÇI and KRASNIQI both fail to demonstrate that the issues would significantly affect the fairness and expeditiousness of the proceedings or outcome of the trial, and that appellate resolution would materially advance the proceedings. In addition to the specific submissions made for each issue, as addressed above, general Defence submissions concerning impact also fail.

17. In terms of expeditiousness, the THAÇI Defence challenges in general terms the application of protective measures ‘when not justified by an objective and real likelihood of danger, interference or intimidation’. It fails to articulate how the specific proposed issues impact expeditiousness and fails to provide a concrete example of unjustified or ‘overuse[d]’³² measures. In any event, such issues transcend the specific issues addressed in the Decision. Insofar as the Defence challenge other protective measures decisions, avenues other than certification of this Decision are available to them.

18. The publicity and fairness of the proceedings, which are generally invoked by both THAÇI and KRASNIQI, are safeguarded by the legal framework. This legal framework – which is not challenged by the Defence and was applied in the Decision – is tailored to guarantee publicity and fairness and ensure that any limitation thereon is necessary and proportional. The Panel has actively taken steps to ensure the greatest degree of publicity possible, both in the Decision and after. Both Defence teams acknowledge that remedial measures do exist,³³ which would appropriately balance the publicity of the proceedings with the safety and security of witnesses. The parties have been instructed to engage *inter partes* and provide submissions on possible solutions to ensure greater publicity of these proceedings.³⁴ Accordingly, even if

³² THAÇI Request, KSC-BC-2020-06/F01532, para.21.

³³ KRASNIQI Request, KSC-BC-2020-06/F01542, para.19; THAÇI Request, KSC-BC-2020-06/F01532, para.21.

³⁴ Oral Order, Transcript, 17 May 2023, pp.4207-4209.

Defence submissions concerning the overall publicity of the proceedings were properly raised in the context of a request for leave to appeal the Decision on the specific measures necessary to protect W03165, steps are currently underway to address such concerns. Submissions in relation to publicity – both concerning W03165’s testimony,³⁵ which has now concluded, and more generally – will be filed in the coming days. In these circumstances, considering that, the issues are, in addition to being unfounded, also speculative, hypothetical, and premature.

III. CLASSIFICATION

19. This filing is submitted as confidential in accordance with Rule 82(4).

IV. CONCLUSION

20. For the foregoing reasons, the Trial Panel should reject both the THAÇI and KRASNIQI Requests.

Word count: 2064



Alex Whiting

Acting Specialist Prosecutor

Monday, 12 June 2023

At The Hague, the Netherlands.

³⁵ Decision, KSC-BC-2020-06/F01528, paras 16-17.