

**In:** KSC-BC-2020-06  
**The 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 Guénaél Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Hashim Thaçi

**Date:** 17 May 2023

**Language:** English

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**Public Redacted Version of Thaçi Defence Request for Certification to Appeal the  
‘Confidential Redacted Version of Decision on the Prosecution Request for  
Protective Measures (F01523)’**

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**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**

David Young

**Counsel for Jakup Krasniqi**

Venkateswari Alagendra

## I. INTRODUCTION

1. After four weeks of evidence in the *Thaçi et al.* trial, the emblematic feature of the proceedings is that they are being held behind closed doors. Mr Thaçi is entitled to a public trial.<sup>1</sup> The affected community and international observers are entitled to understand the accusations being levelled against Mr Thaçi, and whether the evidence supporting these accusations is capable of reliance. So far, this is impossible.

2. The public nature of trials “protects litigants against the administration of justice in secret with no public scrutiny”. It is the means by which “confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial.”<sup>2</sup>

3. On 15 May 2023, the SPO filed an urgent ‘Request for protective measures for W03165’, requesting substantial in-court protective measures for W03165 who is due to start testifying imminently.<sup>3</sup> Despite objections from all four defence teams,<sup>4</sup> on 16 May 2023, the Trial Panel issued a decision granting the requested protective measures.<sup>5</sup>

4. Whether to limit the public nature of the trial by granting protective measures is a question which falls squarely within the Trial Panel’s discretion. The present

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<sup>1</sup> Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“KSC Law”), Article 21(2), Article 39(6) and Article 40(2); KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 (“Rules”), Rule 80(1) and Rule 141(1).

<sup>2</sup> ECtHR, *Werner v. Austria*, 21835/93, Chamber, Judgement, 24 November 1997, para. 45.

<sup>3</sup> KSC-BC-2020-06/F01523/CONF/RED, URGENT Confidential Redacted Version of ‘Request for protective measures for W03165’, 15 May 2023 (“SPO Request”).

<sup>4</sup> KSC-BC-2020-06/F01526, Thaçi Defence Response to ‘URGENT Confidential Redacted Version of ‘Request for protective measures for W03165’ (F01523) (“Defence Response”), 16 May 2023; KSC-BC-2020-06/F01527, Selimi Defence Response to “URGENT Confidential Redacted Version of ‘Request for protective measures for W03165’ (F01523)”, 16 May 2023. The Veseli and Krasniqi teams joined these submissions orally, see: KSC-BC-2020-06, Transcript of Hearing, 16 May 2023, pp. 4058-4059.

<sup>5</sup> KSC-BC-2020-06/F01528/CONF/RED, Confidential Redacted Version of Decision on the Prosecution Request for Protective Measures (F01523), 16 May 2023 (“Decision”).

request for certification is brought because, in this case, Mr Thaçi's right to public proceedings has been curtailed to accommodate the preference of W03165's family, and [REDACTED]. This is manifestly insufficient, particularly given that W03165 [REDACTED].<sup>6</sup> As such, the justifications advanced for broad-ranging protective measures come **nowhere near** demonstrating a real likelihood that W03165 may be in danger, or at risk of being interfered with or intimidated because of [REDACTED] upcoming testimony, as required.

5. The bar for obtaining protective measures has been set far too low, and in doing so, the Trial Panel committed appealable errors, as set out below.

6. As regards timing, the present request was filed as soon as practicable after the Decision. However, given the untimeliness of the original SPO request, the Defence is aware that the present request for certification will likely be adjudicated during the course of W03165's testimony, if not after its completion. This does not justify its dismissal as moot. Rather, should certification be granted, the Defence will request reclassification of W03165's testimony as public, making the issues raised worthy of consideration on the merits.

## II. APPLICABLE LAW

7. To appeal the Impugned Decision, certification is required.<sup>7</sup> Article 45(2) of the KSC Law provides, in the relevant part, that the Trial Panel shall grant certification where an appeal:

involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.

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<sup>6</sup> Defence Request, para. 7.

<sup>7</sup> Rule 77(1) Rules; Article 45(2) KSC Law.

8. Rule 77(2) provides that:

The Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by a Court of Appeals Panel may materially advance the proceedings.

9. An “issue” is “an identifiable topic or subject, the resolution of which is essential for determination of the matters arising in the judicial cause under examination, and not merely a question over which there is disagreement or conflicting opinion.” The applicant must articulate “clearly discrete issues for resolution by the Court of Appeals Panel that emanate from the ruling concerned and do not amount to abstract questions or hypothetical concerns.”<sup>8</sup>

### III. THE PROPOSED ISSUES FOR APPEAL

10. Certification is sought to appeal the following issues, which satisfy the requirements of Article 45(2) and Rule 77(2):

**Issue 1:** Whether the Trial Panel erred in linking the granting of protective measures to the untimeliness of the SPO Request, finding that “the witness is just about to start testifying and that no other measure would be capable, at this stage, to provide the necessary level of protection”;<sup>9</sup>

**Issue 2:** Whether 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

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<sup>8</sup> *Prosecutor v. Gucati & Haradinaj*, KSC-BC-2020-07/F00169, Pre-Trial Judge, Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, 1 April 2021, para. 12; KSC-BC-2020-06/F00172, Pre-Trial Judge, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021, para. 11.

<sup>9</sup> Decision, para. 13.

preference of their family and not wanting to be the first to testify in public, which would lead to a largely secret trial;<sup>10</sup> and

**Issue 3:** 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”.<sup>11</sup>

#### IV. SUBMISSIONS: THE TEST FOR CERTIFICATION IS MET

##### A. THE ISSUES ARE APPEALABLE ISSUES

11. As regards **Issue 1**, the SPO Request was filed less than 48 hours before W03165’s testimony was predicted to start. The Order on the Conduct of Proceedings instructs the parties to file applications for protective measures sufficiently early, to allow for meaningful responses.<sup>12</sup>

12. While acknowledging this abridged timing, and the constraints imposed by the Conduct Order, the Trial Panel then stated in general terms that “late requests not only compromise the Parties’ ability to meaningfully respond, but also disrupt the efficient functioning of trial”, before ordering the SPO to do better in future.<sup>13</sup> Significantly, the Trial Panel did not find that there had been any violation of the Conduct Order, or that there should be any repercussions for the SPO. Rather, the untimeliness of the SPO’s Request was relied on as a reason to decide in its favour, with the Trial Panel finding that “the witness is just about to start testifying and that no other measure would be capable, at this stage, to provide the necessary level of

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<sup>10</sup> Defence Response, para. 10.

<sup>11</sup> Article 40(2) KSC Law.

<sup>12</sup> KSC-BC-2020-06/F01226/A01, Annex 1 - Order on the Conduct of Proceedings, 25 January 2023 (“Conduct Order”), para. 63.

<sup>13</sup> Decision, para. 8.

protection”.<sup>14</sup> In other words, the Trial Panel concluded that the SPO had filed its request so late, it had no choice but to grant it.

13. Whether it was proper for the Trial Panel to do so is an appealable issue; an identifiable topic the resolution of which is essential for the determination of the overall question on appeal, and which emanates directly from the Decision. Can 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?

14. As regards **Issue 2**, the Defence submitted to the Trial Panel as follows:<sup>15</sup>

To grant such a request would set a precedent which would encourage other witnesses to request anonymity from the public for the same reasons, i.e. they are uncomfortable about testifying in public and don’t want to be the first ones to testify without protective measures. This raises the likelihood that the trial would be held mainly in private session, which would be prejudicial to the rights of the Accused and contrary to the fundamental principle of an opened and transparent process so that the public can have confidence in the outcome of the trial.

15. The Trial Panel did not address this central submission. It did not consider, or gave no reasoning in response to, the Defence’s stated concern that the granting of protective measures to W03165 would prompt requests from all SPO witnesses on precisely the same basis; their families are uncomfortable and they don’t want to be the first, which would effectively lead to a secret trial. This is a discrete issue warranting resolution by the Court of Appeals Panel; namely, did the Trial Panel err in granting protective measures to W03165 without taking into account or giving any reasons regarding relevant considerations raised by the Defence.

16. **Issue 3** also amounts to an appealable issue. Rather than being a disagreement or conflicting opinion as regards the Trial Panel’s approach, the Defence seeks the Court of Appeal Panel’s adjudication of whether a reasonable Trial Panel could grant

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<sup>14</sup> Decision, para. 13.

<sup>15</sup> Defence Response, para. 10.

such broad-ranging protective measures, where neither the witness nor the SPO has even alleged that the witness is in danger, or at risk of being interfered with or intimidated because of [REDACTED] upcoming testimony. The issue is therefore whether the discomfort of a witness' family, combined with the fact that the proceedings have largely been hidden from the public, could reasonably be considered sufficient to tip the balance towards further curtailment of the accused's rights, particularly in circumstances where [REDACTED]. This is a discrete issue, coming directly from the decision, which is neither an abstract question nor a hypothetical concern. The Court of Appeals Panel should be invited to resolve it.

B. THE ISSUES WOULD SIGNIFICANTLY AFFECT 1) THE FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS OR 2) THE OUTCOME OF THE TRIAL

17. The three appealable issues significantly affect the fair and expeditious conduct of the proceedings.

18. As regards **Issue 1**, the Trial Panel itself has drawn a direct link between the timing of the SPO Request and the expeditious conduct of the trial, finding that late requests "not only compromise the Parties' ability to meaningfully respond, but also disrupt the efficient functioning of trial."<sup>16</sup> At the centre of the Defence complaint however, is the fact that the untimely nature of the SPO Request was then harnessed as a reason to justify the granting of the protective measures sought. The late filing of the SPO Request held the Trial Panel hostage, given that "no other measure would be capable, at this stage, to provide the necessary level of protection".<sup>17</sup> It is this reasoning which significantly impacts the fairness of the proceedings, as it risks signalling to the SPO that the later they file their requests, the more likely they are to be granted, given the evaporation of all other available options.

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<sup>16</sup> Decision, para. 8.

<sup>17</sup> Decision, para. 13.



19. **Issues 2 and 3** also have at their centre the fairness and expeditiousness of the proceedings. Even accepting the oft-cited “climate of witness interference and intimidation prevailing in Kosovo”,<sup>18</sup> the Trial Panel found that what tipped the balance for W03165 was the preference of [REDACTED] family that [REDACTED] testimony not be public, and the fact that W03165 would be the first to [REDACTED]. In failing to take into account the Defence submission about the precedent-setting nature of the Decision, as raised in **Issue 2**, the Trial Panel did not consider the risk that future witnesses will also now have a basis to testify outside of the public’s gaze, on the basis that no-one else has. Similarly, **Issue 3** is directed at the reasonableness of this decision, and whether it can be viewed as reasonably balancing the competing rights of witness protection against the requirement that the Trial Panel 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”.<sup>19</sup>

20. In this way, both **Issues 2 and 3** significantly impact on the fairness and expeditiousness of the proceedings. There is a recognised link between the publicity of the proceedings and the fairness of the trial. The European Court of Human Rights has consistently made this connection, noting that “[b]y rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial.”<sup>20</sup> The Trial Panel characterised the publicity of the proceedings as “a necessary component of a fair trial”,<sup>21</sup> echoing the position at the other international criminal courts and tribunals that publicity in the context of criminal proceedings contributes to the realisation of a fair trial for the accused.<sup>22</sup> As

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<sup>18</sup> Decision, para. 11.

<sup>19</sup> Article 40(2)

<sup>20</sup> ECtHR, *Werner v. Austria*, 21835/93, Chamber, Judgement, 24 November 1997, para. 45.

<sup>21</sup> Decision, para. 9.

<sup>22</sup> See, e.g., ICC, *Prosecutor v. Gbagbo & Blé Goudé*, ICC-02/11-01/15-1430, Trial Chamber VII, Decision on the Defence for Mr. Gbagbo’s Requests for the Record of the Case to be Made Public, the Creation of a Public Database and for Email Decisions to be Placed on the Record of the Case, 13 April 2022, para. 13.



has been often repeated, “[j]ustice should not only be done, but should manifestly and undoubtedly be seen to be done”.<sup>23</sup> The outcome of the Decision is not only to curtail the publicity of the proceedings in relation to the testimony of W03165, but also to set an unreasonably low threshold for the granting of protective measures in this case more generally, which cannot be reconciled with the imperatives of a fair trial.

21. In terms of expeditiousness, there is no doubt that the use of protective measures complicates and lengthens the proceedings, through the litigation around the granting of protective measures; the technical side of implementing and testing the various mechanisms for protective measures in the courtroom; the courtroom time spent explaining the use of pseudonyms and codes, and the consequent impact on the legibility of the transcripts; the frequent recourse to redaction orders to correct inevitable errors; and the corollary need to file confidential and public redacted versions of associated filings, briefs, and ultimately the Judgment. The overuse of protective measures when not justified by an objective and real likelihood of danger, interference or intimidation, has a significant impact on expeditiousness, warranting appellate review.

C. AN IMMEDIATE RESOLUTION BY THE COURT OF APPEALS PANEL MAY MATERIALLY ADVANCE THE PROCEEDINGS

22. The Defence position, as outlined above, is that the bar for protective measures has now been set far too low. The pendulum has swung too far in favour of witness protection, over the right of the accused to a fair and public trial. Relying on the extent

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<sup>23</sup> *R v. Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259 (Lord Chief Justice Hewart). This statement has been cited with approval by the *ad hoc* international tribunals, see, for example: ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-A, Appeals Chamber, Judgement, 21 July 2000, para. 95; SCSL, *Prosecutor v. Sesay*, SCSL-2004-15-AR15, Appeals Chamber, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004, para. 16; ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, The Bureau, Decision on Joseph Nziroroka's Motion for Disqualification of Judges Byron, Kam and Joensen, 7 March 2008, para. 5.

of closed session testimony thus far, to justify more closed session testimony, is erroneously circular reasoning which will lead – and is already leading – to a largely secret trial. This cycle should be broken.

23. If the threshold for the provision of broad and intrusive protective measures is left as set in the Decision, the proceedings will be fundamentally unbalanced. As regards W03165's testimony, the Defence is seeking the *post-facto* reclassification of the transcripts as a remedy, due to the exceptional circumstances and the timing of W03165's testimony. However, this is not a remedy that can be implemented at scale, at the end of the case. The point of public trials is not only to increase the perceived legitimacy of the proceedings by keeping them in full view of the public, but to encourage truthful testimony on the part of witnesses, with lies and half-truths being much easier to spin behind closed doors. Should the Court of Appeals Panel decide at the end of the case that the threshold for protective measures was erroneously low, the possibility of holding a public trial in this case will have been lost, and the pressure felt by witnesses to tell the truth in front of their neighbours, the community, and the accused, will be impossible to recreate through the *post-facto* reclassification of their evidence.

24. On this basis, an immediate resolution by the Court of Appeals Panel is necessary, and will materially advance the proceedings.

## V. CONCLUSION AND RELIEF SOUGHT

25. The issues arising from the decision fulfil the criteria for certification, and their resolution by the Court of Appeals Panel is warranted. The Defence respectfully requests that the Trial Panel grant leave to appeal the Issues pursuant to Article 45(2) and Rule 77(2).

[Word count: 2,888 words]

Respectfully submitted,



**Gregory W. Kehoe**

**Counsel for Hashim Thaçi**

Wednesday, 17 May 2023

At The Hague, The Netherlands