

In: KSC-BC-2020-06
The 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: Defence Counsel for Jakup Krasniqi

Date: 14 June 2023

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Classification: Public

Public Redacted Version of
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, dated 22 May 2023

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I. INTRODUCTION

1. The Defence for Jakup Krasniqi (“Defence”) hereby joins the Thaçi Defence Request for Certification to Appeal the ‘Confidential Redacted Version of Decision on the Prosecution Request for Protective Measures (F01523)’.¹ The Defence is affected by the same issues, which arise from the Impugned Decision,² identified in the Thaçi Request and therefore joins the submissions and relief sought therein.

2. In addition, and in accordance with Article 45(2) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 77(2) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), the Defence respectfully seeks certification to appeal the following issue: -

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] (“Additional Issue”).

3. Pursuant to Rule 82(4) of the Rules, this filing is confidential because it refers to the content of filings with the same classification.

II. PROCEDURAL HISTORY

4. On 15 May 2023, the Specialist Prosecutor’s Office (“SPO”) filed the Urgent Confidential Redacted Version of ‘Request for Protective Measures for W03165’.³

¹ KSC-BC-2020-06, F01532, Thaçi Defence, *Thaçi Defence Request for Certification to Appeal the ‘Confidential Redacted Version of Decision on the Prosecution Request for Protective Measures (F01523)’* (“Thaçi Request”), 17 May 2023, confidential.

² KSC-BC-2020-06, F01528/CONF/RED, Trial Panel II, *Confidential Redacted Version of Decision on the Prosecution Request for Protective Measures (F01523)* (“Impugned Decision”), 16 May 2023, confidential.

³ KSC-BC-2020-06, F01523/CONF/RED, Specialist Prosecutor, *Urgent Confidential Redacted Version of ‘Request for Protective Measures for W03165’* (“SPO Request”), 15 May 2023, confidential.

5. On 16 May 2023, the Trial Panel ordered the Defence to respond to the SPO Request by the beginning of next hearing session that day.⁴ The Thaçi Defence and Selimi Defence filed their written responses to the SPO Request.⁵ The Defence orally joined the Thaçi Response.⁶ On the same day, the Trial Panel issued the Impugned Decision.

6. On 17 May 2023, the Thaçi Defence requested certification to appeal the Impugned Decision.⁷

III. APPLICABLE LAW

7. The Defence incorporates by reference the Thaçi Defence submissions on the applicable law.⁸

IV. SUBMISSIONS

8. As set out below, the Additional Issue satisfies the test for certification to appeal. It arises from the Impugned Decision, does not merely assert a difference of opinion with the Trial Panel, and in light of the significant impact of the Additional Issue on the fair and expeditious conduct of the trial and the Accused's fair trial rights, requires immediate resolution to move the proceedings along the right course.

⁴ KSC-BC-2020-06, Transcript of Hearing ("Transcript of Hearing 16 May 2023"), 16 May 2023, confidential, p. 3938, line 24 to p. 3939, lines 1, 10-11.

⁵ KSC-BC-2020-06, F01526, Thaçi Defence, *Thaçi Defence Response to 'Urgent Confidential Redacted Version of 'Request for Protective Measures for W03165'' (F01523) ('Thaçi Response')*, 16 May 2023, confidential, with Annex 1, confidential; F01527, Selimi Defence, *Selimi Defence Response to "Urgent Confidential Redacted Version of 'Request for Protective Measures for W03165' (F01523)" ('Selimi Response')*, 16 May 2023, confidential.

⁶ Transcript of Hearing 16 May 2023, p. 4059, lines 1-7. The Defence notes that due to the timing of the filing of the Selimi Response, it was not able to join the Selimi Defence submissions. However, the Defence fully agrees with the content therein.

⁷ Thaçi Request.

⁸ *Ibid.*, paras 7-9.

A. THE ADDITIONAL ISSUE IS AN APPEALABLE ISSUE

9. The proposed Additional Issue emanates from the Impugned Decision and constitutes an identifiable topic that was essential to the determination of the Impugned Decision. It is therefore an appealable issue.

10. The Additional Issue addresses the witness' [REDACTED] and was clearly outlined in the Thaçi and Selimi Responses. The Thaçi Defence submitted that: (i) W03165 [REDACTED]; (ii) [REDACTED]; and (iii) [REDACTED].⁹ The Selimi Defence submitted that: (i) W03165 [REDACTED]; and (ii) [REDACTED].¹⁰ Even the SPO took note of the fact that W03165 [REDACTED].¹¹ Furthermore, [REDACTED] "[REDACTED]",¹² [REDACTED].

11. In assessing the factors determining the existence of an objectively justified risk, the Trial Panel took into account: (i) the witness' ability to provide material evidence regarding the [REDACTED]; (ii) the witness' fears and concerns for his safety [REDACTED]; (iii) [REDACTED]; and (iv) the general climate of witness interference and intimidation prevailing in Kosovo.¹³ However, in reaching its finding, the Trial Panel failed to consider or give any weight to the submissions advanced by the Defence that W03165 [REDACTED].

12. Similarly, the Trial Panel only considered the aforementioned climate of witness intimidation and the witness' upcoming testimony to uphold the necessity of the

⁹ Thaçi Response, paras 2, 7.

¹⁰ Selimi Response, para. 9.

¹¹ SPO Request, fn. 8.

¹² KSC-BC-2020-06, Transcript of Hearing, 17 May 2023, confidential, p. 4323, lines 16-17.

¹³ Impugned Decision, paras 10-12.

protective measures.¹⁴ The Trial Panel again failed to provide any reasoning to justify the necessity of the requested protective measures, [REDACTED].

13. Finally, in striking the balance between the protection of the Accused's rights and the protection of the concerned witness,¹⁵ which is an essential component of the test for granting protective measures, the Trial Panel failed to take all relevant factors into consideration by overlooking the witness' [REDACTED].

14. Had the Trial Panel, in assessing whether the witness' identity may be withheld from the public, considered W03165's [REDACTED], the requested protective measures could not have been granted. Accordingly, the Defence submits that the Additional Issue was determinative of the outcome of the Impugned Decision.

B. THE ADDITIONAL ISSUE SIGNIFICANTLY AFFECTS THE FAIR AND EXPEDITIOUS CONDUCT OF PROCEEDINGS

15. The proposed Additional Issue satisfies the first prong of the second requirement; it significantly affects the fair and expeditious conduct of proceedings. The fair and expeditious conduct of proceedings refers to the norms of fair trial, including the fundamental rights of the Accused.¹⁶

16. As recognised by the Trial Panel, publicity of proceedings is a fundamental right of the Accused and a necessary component of a fair trial.¹⁷ The right of the Accused to a public hearing is enshrined in Articles 21(2), 39(6) and 40(2) of the Law, Rules 80(1) and 141(1) of the Rules, and Article 6(1) of the European Convention on Human

¹⁴ *Ibid.*, paras 13-14.

¹⁵ *Ibid.*, para. 15.

¹⁶ KSC-BC-2020-06, F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal* ("Thaçi Decision"), 11 January 2021, confidential, para. 13.

¹⁷ Impugned Decision, para. 9.

Rights. International courts have recognised that public hearings are the general rule and that any exception to the principle of publicity must be justified.¹⁸

17. The Trial Panel's concerns about the publicity of proceedings are reflected in the Impugned Decision, where it accepted that the likelihood that the witness's testimony would be held mainly in private session could compromise the overall publicity of these proceedings¹⁹ and in its order reminding the Parties and Participants to respect the public character of the proceedings, where it stressed the importance of the trial to remain public.²⁰ Yet, the Trial Panel failed to consider or give appropriate weight to all relevant factors when it granted the proposed in-court protective measures to W03165. The Defence submits that resolution of the Additional Issue has an impact on the right of the Accused to a public hearing – and hence on the fairness of the proceedings.

18. Furthermore, the Defence recalls that the Thaçi Defence has previously raised concerns about the number of witnesses whose identity would be withheld from the public and the consequent impact on the Accused's fundamental right to a public trial.²¹ The Pre-Trial Judge criticised the Thaçi Defence's submissions for being "speculative" because the final decision on in-court protective measures for the witnesses to be called at trial "lies with the Trial Panel".²² This situation has now reached an impasse. The Trial Panel's failure to take into consideration [REDACTED]

¹⁸ See ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-612-Red, Trial Chamber IX, *Decision on the Prosecution's Application for In-Court Protective and Special Measures*, 29 November 2016, para. 8; *Prosecutor v. Bemba*, ICC-01/05-01/08-1023, Trial Chamber III, *Decision on Directions for the Conduct of the Proceedings*, 19 November 2010, para. 23.

¹⁹ Impugned Decision, para. 16.

²⁰ KSC-BC-2020-06, In Court – Oral Order, Order Reminding the Parties and Participants to Respect the Public Character of the Proceedings ("Trial Panel Oral Order"), 17 May 2023, public.

²¹ KSC-BC-2020-06, F00156, Thaçi Defence, *Defence Request on behalf of Mr Thaçi for Certification to Appeal the "Confidential Redacted Version of Corrected Version of First Decision on Specialist Prosecutor's Request for Protective Measures"*, 21 December 2020, confidential, paras 16, 18.

²² Thaçi Decision, para. 26.

shows that the Thaçi Defence's concerns, shared by the Defence, are no longer 'hypothetical' and thus demand immediate resolution.

19. Lastly, resolution of the Additional Issue could also significantly affect the expeditiousness of proceedings for the same reasons as those advanced by the Thaçi Defence.²³ Moreover, it will avoid the need to resort to proposals of public redacted versions of the transcripts of private or closed session testimonies, which inevitably contravenes the expeditiousness of proceedings.²⁴

C. RESOLUTION OF THE ADDITIONAL ISSUE WILL MATERIALLY ADVANCE PROCEEDINGS

20. The third requirement is satisfied because resolution of the Additional Issue will materially advance proceedings. If the Impugned Decision is wrong and important factors such as the witness' [REDACTED] go unnoticed, proceedings will have taken the wrong path in that the Accused will be denied their right to a public trial.

21. Indeed, concerned about the trial becoming less public than it could (or should) be, the Trial Panel has ordered the parties to make submissions regarding concrete steps that could be taken by the parties and the Panel to ensure a greater degree of publicity of proceedings.²⁵ The Defence submits that resolution of the Additional Issue by the Court of Appeals Panel not only will materially advance proceedings, but it will also facilitate achieving greater publicity of these proceedings.

22. Whilst the Defence acknowledges that W03165 has completed his testimony before this certification is resolved, appellate intervention would still materially

²³ Thaçi Request, para. 21.

²⁴ See Trial Panel Oral Order.

²⁵ Trial Panel Oral Order.

advance proceedings. In relation to W03165, appellate intervention could advance proceedings by causing the transcripts of his testimony to be reclassified as public. Moreover, prompt resolution of the proposed Additional Issue will also assist in setting the correct threshold for future applications for protective measures, in circumstances where setting too low a threshold may otherwise result in a proliferation of requests for protective measures and a recurrence of the same hurdles to expeditiousness and transparency. It is thus more efficient to resolve this issue now in order to avoid constant litigation, and to ensure that proceedings can continue down the right path.

V. CONCLUSION AND RELIEF REQUESTED

23. The Defence joins the Thaçi Request and respectfully requests certification to appeal on the Additional Issue outlined above.

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