



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA KOSOVA

**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

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

**Registrar:** Fidelma Donlon

**Date:** 6 June 2023

**Language:** English

**Classification:** Public

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**Public Redacted Version of  
Decision on Thaçi and Krasniqi Defence Requests for Certification to Appeal the  
Confidential Redacted Version of Decision on the Prosecution Request for  
Protective Measures**

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**TRIAL PANEL II** (“Panel”), pursuant to Articles 21 and 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 77 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 15 May 2023, the Specialist Prosecutor’s Office (“SPO”) filed the Urgent Confidential Redacted Version of ‘Request for Protective Measures for W03165 (“SPO Request”).<sup>1</sup>
2. On 16 May 2023, the Panel issued the Decision on the Prosecution Request for Protective Measures (“Impugned Decision”).<sup>2</sup>
3. On 17 May 2023, the Defence for Mr Thaçi (“Thaçi Defence”) filed a request for certification to appeal the Impugned Decision (“Thaçi Request”).<sup>3</sup>
4. On 22 May 2023, the Defence for Mr Krasniqi (“Krasniqi Defence”) joined the Thaçi Request and sought certification to appeal one additional issue (“Krasniqi Request”).<sup>4</sup>
5. On 30 May 2023, the SPO responded to the Thaçi Request and the Krasniqi Request (“SPO Response”).<sup>5</sup>

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<sup>1</sup> F01523/CONF/RED, Specialist Prosecutor, *Urgent Confidential Redacted Version of ‘Request for Protective Measures for W03165’* (“SPO Request”), 15 May 2023, confidential.

<sup>2</sup> F01528, Panel, *Decision on the Prosecution Request for Protective Measures (F01523)*, 16 May 2023, strictly confidential and *ex parte* (a confidential redacted version was filed the same day, F01528/CONF/RED).

<sup>3</sup> F01532, Specialist Counsel, *Thaçi Defence Request for Certification to Appeal the ‘Confidential Redacted Version of Decision on the Prosecution Request for Protective Measures (F01523)’*, 17 May 2023, confidential.

<sup>4</sup> F01542, Specialist Counsel, *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*, 22 May 2023, confidential.

<sup>5</sup> F01563, Specialist Prosecutor, *Consolidated Prosecution Response to Thaçi and Krasniqi Defence Requests for Certification to Appeal Decision F01528*, 30 May 2023, confidential.

## II. SUBMISSIONS

6. The Thaçi and Krasniqi Defence request certification to appeal the following three issues (collectively, “Issues”):

- (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” (“First 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 preference of their family and not wanting to be the first to testify in public, which would lead to a largely secret trial; (“Second Issue”); and
- (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” (“Third Issue”).<sup>6</sup>

7. In addition, the Krasniqi Defence requests certification to appeal the following additional issue:

- (4) Whether, in granting the proposed protective measures for W03165, the Trial Panel erred by failing to take into consideration or give sufficient weight to the witness’ previous testimony in open session and public statements (“Additional Issue”).<sup>7</sup>

8. The Thaçi and Krasniqi Defence submit that the four Issues satisfy the requirements of Article 45(2) and Rule 77(2) insofar as: (i) they are appealable issues; (ii) they would significantly affect the fair and expeditious conduct of the

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<sup>6</sup> Thaçi Request, para. 10; Krasniqi Request, para. 1.

<sup>7</sup> Krasniqi Request, para. 2.

proceedings or the outcome of the trial; and (iii) their immediate resolution by the Court of Appeals Panel may materially advance the proceedings.<sup>8</sup>

9. The SPO responds that the Thaçi and Krasniqi Requests should be rejected because they fail to meet the requirements for leave to appeal under Article 45(2) and Rule 77. The SPO argues that the issues alleging errors in the Decision are based on misrepresentations, mere disagreements with the Panel, and speculations.<sup>9</sup>

### III. APPLICABLE LAW

10. Pursuant to Article 45(2) and Rule 77(2), a right to appeal only arises if the standard of certification set forth therein has been met. The standard for certification of appeal under Rule 77(2) has been outlined in past decisions and will not be reiterated in full here.<sup>10</sup>

### IV. DISCUSSION

#### A. FIRST ISSUE

11. The Defence submits that whether the Panel erred in linking the granting of protective measures to the untimeliness of the SPO Request is an appealable issue as it emanates directly from the Impugned Decision.<sup>11</sup> The Defence argues that the

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<sup>8</sup> Thaçi Request, paras 11-24; Krasniqi Request, paras 9-22.

<sup>9</sup> SPO Response, para 1.

<sup>10</sup> F01237, Trial Panel II, *Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses*, 30 January 2023, paras 7-8; KSC-BC-2020-07, F00423, Trial Panel II, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect ("Gucati and Haradinaj Decision on Leave to Appeal")*, 8 November 2021, paras 13-21; F00372, Trial Panel II, *Decision on Haradinaj Defence's Application for Certification of F00328*, 15 October 2021, paras 15-17; F00484, Trial Panel II, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021, paras 4-14. *See also* F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, paras 6-7, 9-17.

<sup>11</sup> Thaçi Request, paras 12-13.

untimely nature of the SPO Request was the reason justifying the granting of the protective measures, and this risks signalling to the SPO that the later it files a request, the more likely it is to be granted.<sup>12</sup> The Defence also argues that the bar for granting protective measures has been set too low, and therefore immediate resolution by the Court of Appeals is necessary and will immediately advance the proceedings.<sup>13</sup>

12. The SPO responds that the First Issue fails to meet the certification test as: (i) it emanates from mischaracterisations of the Impugned Decision, as the timing of the witness's testimony was not an essential part of the Impugned Decision; (ii) the Defence merely disagrees with the Panel's conclusions and the weight given to the factors the Panel considered without identifying any error; and (iii) the Defence assertion that the Impugned Decision will encourage the SPO to file late requests is speculative, unsupported and ignores the Panel's instructions concerning future requests.<sup>14</sup>

13. The Panel observes that the Defence misrepresents the findings of the Impugned Decision as: (i) the timing of the SPO Request was treated separately from the merits of the request as an issue of timeliness consistent with the verification of compliance with the Panel's Order on the Conduct of Proceedings;<sup>15</sup> (ii) the Impugned Decision referred to several factors in determining the existence of an objective risk of interference or intimidation, the timing of the application not being one of those factors;<sup>16</sup> and (iii) the Panel's reference to the timing of the SPO Request, when assessing the necessity of the measure, was entirely proper as a contextual consideration relevant to verifying and establishing, in the absence of

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<sup>12</sup> Thaçi Request, para. 18.

<sup>13</sup> Thaçi Request, paras 22-24.

<sup>14</sup> SPO Response, paras 2-4.

<sup>15</sup> Impugned Decision, para. 8 and footnote 20.

<sup>16</sup> Impugned Decision, paras 10 and 13.

a motion to postpone the witness's testimony, the reasonable availability *in the circumstances* of alternatives to the granted protective measures.

14. The Panel accordingly finds that the Defence has failed to demonstrate that the First Issue is an appealable error which might significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial.

15. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for certification to appeal the First Issue is therefore rejected.

#### B. SECOND ISSUE

16. The Defence submits that the Panel did not address their submission that granting the SPO Request "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."<sup>17</sup> The Defence also argues that the Second Issue would have a significant impact on the fairness and expeditiousness of the proceedings, given that the Panel did not consider the risk that future witnesses will now also assert the need to testify outside of the public's gaze on the basis that no-one else has testified in public.<sup>18</sup> Further, the Defence submits that the Impugned Decision has set a low threshold for the granting of protective measures which cannot be reconciled with fair trial thereby impacting the fairness and expeditiousness of proceedings.<sup>19</sup> Lastly, the Defence claims that an immediate resolution of the Second Issue would materially advance the proceedings in the present case.<sup>20</sup>

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<sup>17</sup> Thaçi Request, para. 15.

<sup>18</sup> Thaçi Request, para. 19.

<sup>19</sup> Thaçi Request, paras 20-21.

<sup>20</sup> Thaçi Request, paras 22-24.

17. The SPO submits that the Second Issue fails to constitute an appealable issue and would have no impact on the proceedings.<sup>21</sup> The SPO argues that the Second Issue misrepresents the Impugned Decision and ignores the relevant legal framework.<sup>22</sup> In particular, the SPO argues that: (i) the Panel expressly considered the Defence submissions that, to grant the SPO Request, would “raise[] the likelihood that the trial would be held mainly in private session”;<sup>23</sup> and (ii) the Defence fails to show how the Second Issue was essential to the Impugned Decision.<sup>24</sup>

18. The Panel is of the view that the Defence again mischaracterises the Impugned Decision. The Panel notes that, in the Impugned Decision, it found that a party seeking protective measures for one or more of its witnesses 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.<sup>25</sup> The Panel said that it “agrees with the Defence’s submission that subjective fear (‘heightened pressure’) does not on its own meet the requisite threshold relevant and sufficient to granting protective measures”.<sup>26</sup> The Panel also stated that it “shares the Defence’s concern that granting [the SPO] Request raises the likelihood that the witness’s testimony would be held mainly in private session, thereby further undermining the overall publicity of these proceedings”.<sup>27</sup> The Impugned Decision therefore addressed the Defence submission that to grant the SPO Request, “would raise[] the likelihood that the trial would be held mainly in private session”. The Panel applied the standard relevant to this matter consistent both with the Rules and existing precedents. The Panel notes that the

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<sup>21</sup> SPO Response, para. 8.

<sup>22</sup> SPO Response, para. 5.

<sup>23</sup> SPO Response, para. 6.

<sup>24</sup> SPO Response, para. 7.

<sup>25</sup> Impugned Decision, para. 9.

<sup>26</sup> Impugned Decision, para. 10.

<sup>27</sup> Impugned Decision, para. 16.

Defence took no issue with this standard when applied by the Panel in earlier decisions.

19. The Panel also notes that much of the Defence's submissions on this issue, including in respect to the effect on other witnesses, are mere speculation with no verifiable basis. Those are insufficient for the purpose of granting leave to appeal pursuant to Rule 77(2).

20. The Panel accordingly finds that the Second Issue does not arise from the Impugned Decision and there is therefore not appealable error meeting the requirements of Rule 77(2).

21. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for certification to appeal the Second Issue is therefore rejected.

### C. THIRD ISSUE

22. The Defence submits that whether a reasonable Panel could grant a broad protective measure based on the discomfort of a witness's family is a discrete appealable issue requiring determination.<sup>28</sup> The Defence argues that this issue is directed at the reasonableness of the Impugned Decision, and specifically whether it can be viewed as reasonably balancing the competing interests of witness protection and the rights of the Accused.<sup>29</sup> The Defence claims that an immediate resolution by the Court of Appeals Panel would materially advance the proceedings.<sup>30</sup>

23. The SPO responds that the Third Issue fails to constitute an appealable issue and would have no impact on the proceedings.<sup>31</sup> The SPO argues that the Defence

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<sup>28</sup> Thaçi Response, para. 16.

<sup>29</sup> Thaçi Request, para. 19.

<sup>30</sup> Thaçi Request, paras 22-24.

<sup>31</sup> SPO Response, paras 11-12.



merely disagrees with the Impugned Decision, and relies on mischaracterisations.<sup>32</sup> The SPO argues that the Panel specifically addressed the concern underlying the Third Issue in the Impugned Decision.<sup>33</sup> The SPO submits that 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.<sup>34</sup>

24. The Panel is of the view that the Defence once again misrepresents the content of the Impugned Decision. As the Panel noted above, the protective measures were granted having taken into account several factors. These included the sensitive nature of the witness's evidence, fears and concerns of the witness for the safety of [REDACTED] family, the witness's particular circumstances and [REDACTED], and the prevailing climate of witness interference and intimidation in Kosovo.<sup>35</sup> Contrary to the assertion of the Defence, the "discomfort of the witness's family" and the fact that the witness would be the first to testify publicly, were not factors taken into consideration by the Panel when granting the protective measures sought by the SPO. The Panel notes, furthermore, that Rule 80(1) makes it clear that protective measures can be granted for the protection, safety, physical and psychological well-being, dignity and privacy of witnesses, but also victims participating in the proceedings and *others at risk on account of testimony given by witnesses*. That latter category would unquestionably include family members of the witness where their safety, well-being, dignity and privacy would be at stake as a result of their relative's testimony in this case.<sup>36</sup>

25. As noted, the Panel, in discussing the need to balance the rights of the Accused and the protection of victims and witness, said that it shared the

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<sup>32</sup> SPO Response, para. 9.

<sup>33</sup> SPO Response, para. 10.

<sup>34</sup> SPO Response, para. 11.

<sup>35</sup> Impugned Decision, paras 10-13.

<sup>36</sup> See also ICTY Rules of Procedure and Evidence, Rule 75(2); and Prosecutor v Karadzic, No. IT-95-5/18-T, Decision on Motion for Protective Measures for Witness KW456, 12 October 2012 (verifying whether the requirements for protective measures are met in relation to the witness and/or [REDACTED] family).

Defence's concern that granting the SPO Request would affect the publicity of the proceedings.<sup>37</sup> In this respect, and in order to preserve the right of the Accused to a public trial, the Panel instructed the Parties to conduct the examination of the witness as much as possible in public session and directed the SPO to review, after the conclusion of the W03165's testimony, the transcript to ascertain whether any part of the testimony can be reclassified as public and to file submissions on this by 1 June 2023.<sup>38</sup>

26. The Third Issue therefore distorts the Panel's findings and amounts to mere disagreement with the Impugned Decision.

27. The Panel accordingly finds that the Defence has failed to demonstrate that the Third Issue constitutes an appealable issue, which might significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial.

28. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for certification to appeal the Third Issue is therefore rejected.

#### D. ADDITIONAL ISSUE

29. The Krasniqi Defence submits that, the Additional Issue emanates from the Impugned Decision and constitutes an identifiable topic that was essential to its determination.<sup>39</sup> It argues that the Panel failed to consider or give any weight to the fact that W03165 has previously made public statements and has given testimony about the same incident [REDACTED].<sup>40</sup> The Krasniqi Defence also argues that resolution of the Additional Issue has an impact on the right of the

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<sup>37</sup> Impugned Decision, para. 16.

<sup>38</sup> Impugned Decision, paras. 16-17.

<sup>39</sup> Krasniqi Request, para. 9.

<sup>40</sup> Krasniqi Request, paras 11-13.

Accused to a public hearing thus affecting the fairness of the proceeding<sup>41</sup> and would significantly affect the expeditiousness of proceedings for the.<sup>42</sup> Lastly, the Krasniqi Defence claims appellate intervention could advance proceedings by causing the transcripts of [REDACTED] testimony to be reclassified as public.<sup>43</sup>

30. The SPO responds that the Additional Issue amounts to mere disagreement with the Panel's findings, is not an appealable issue and has neither significant nor material impact on the proceedings.<sup>44</sup> It argues that the Panel specifically considered the witness's prior public testimony and statements<sup>45</sup> and 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.<sup>46</sup>

31. The Krasniqi Defence's submissions amount to a mere disagreement with the Panel's findings. The Panel notes that, in the Impugned Decision, it acknowledged the fact that W03165 testified previously [REDACTED] before other courts.<sup>47</sup> Contrary to the Krasniqi Defence's submissions, the Panel therefore duly considered that issue.

32. The further submission that the Panel gave this consideration insufficient weight is also unsupported. First, while relevant, this consideration was not decisive. The level of threat or risk that might have existed in one case, in one trial, before one jurisdiction, is not to be assumed to be the same in a different time, context and jurisdiction. And the determination of the risk is to be made by the jurisdiction involved and in respect of circumstances as they exist at the time relevant to the case before it. Furthermore, protective measures were ordered to

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<sup>41</sup> Krasniqi Request, para. 17.

<sup>42</sup> Krasniqi Request, para. 19.

<sup>43</sup> Krasniqi Request, paras 20-22.

<sup>44</sup> SPO Response, para. 15.

<sup>45</sup> SPO Response, para. 13.

<sup>46</sup> SPO Response, para. 14.

<sup>47</sup> Impugned Decision, para. 6.

maintain the confidentiality of the identity of the witness in this case, not the fact that [REDACTED] testified ([REDACTED]) in another case.

33. The Panel accordingly finds that the Additional Issue amounts to mere disagreement with the Impugned Decision and no appealable error, as understood under Rule 77(2), arises therefrom.

34. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for certification to appeal the Additional Issue is therefore rejected.

## V. CLASSIFICATION

35. The Panel notes that the Thaçi Request, Krasniqi Request and the SPO Response have been filed confidentially. The Panel therefore, orders the Parties to file a public redacted version of their submissions by no later than Wednesday, 14 June 2023.

## VI. DISPOSITION

36. For these reasons, the Panel hereby:

- a) **DENIES** the Thaçi Request and the Krasniqi Request; and
- b) **ORDERS** the Parties to file a public redacted version of the Thaçi Request, Krasniqi Request and the SPO Response, by no later than Wednesday, 14 June 2023.



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**Judge Charles L. Smith, III**  
**Presiding Judge**

Dated this Tuesday, 6 June 2023

At The Hague, the Netherlands.