



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: **KSC-CA-2023-02**

Before: **A Panel of the Court of Appeals Chamber**
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Fidelma Donlon

Date: 21 March 2023

Original language: English

Classification: **Public**

**Decision on Defence Request for Certification to Appeal the “Decision on
Modalities of Victim Participation in Appellate Proceedings”**

Specialist Prosecutor’s Office:
Alex Whiting

Counsel for Salih Mustafa:
Julius von Bóné

Counsel for Victims:
Anni Pues

THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively),¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 172 of the Rules of Procedure and Evidence (“Rules”), is seised of a motion filed by Mr Salih Mustafa (“Mustafa” or “Accused”) requesting that the Panel grant certification to appeal its Decision on Modalities of Victim Participation in Appellate Proceedings (“Decision on Victim Participation”) pursuant to Article 45(2) of the Law and Rule 77(2) of the Rules (“Request”).² Counsel for Victims and the Specialist Prosecutor’s Office (“SPO”) responded on 3 March 2023 and 6 March 2023, respectively, that the Request should be dismissed.³

I. BACKGROUND

1. On 16 December 2022, the Trial Panel issued its judgment in case KSC-BC-2020-05 (“Trial Judgment”).⁴ On 2 February 2023, Mustafa filed his notice of appeal against the Trial Judgment.⁵

2. On 9 February 2023, the Presiding Judge of the Appeals Panel scheduled a Pre-Appeal Conference for 16 February 2023 and instructed the Parties and Counsel for

¹ F00007, Decision Assigning a Court of Appeals Panel, 7 February 2023 (confidential, reclassified as public on 7 February 2023).

² F00013, Defence Request for Certification to Appeal the Decision on Modalities of Victim Participation in Appellate Proceedings, 22 February 2023 (“Request”). See F00011, Decision on Modalities of Victim Participation in Appellate Proceedings, 15 February 2023 (“Decision on Victim Participation”).

³ F00014, Victims’ Counsel Response to Defence request for certification to Appeal the Decision on Modalities of Victim Participation in Appellate Proceedings (F00013), 3 March 2023 (“Victims Response”); F00015, Prosecution response to ‘Defence Request for Certification to Appeal the Decision on Modalities of Victim Participation in Appellate Proceedings’, 6 March 2023 (“SPO Response”).

⁴ KSC-BC-2020-05, F00494/RED/COR, Corrected version of Public redacted version of Trial Judgment, 24 January 2023 (confidential version filed on 16 December 2022, uncorrected public redacted version filed on 19 January 2023).

⁵ F00006/RED2, Public Redacted Version of Defence Notice of Appeal pursuant to Rule 176 (of Rules of Procedure and Evidence) against the Judgment of the Trial Panel I of 16 December 2022, 13 February 2023 (confidential version filed on 2 February 2023).

Victims to inform her of any issues they wished to raise during the hearing.⁶ On 13 February 2023, Mustafa filed a motion, *ex parte* Counsel for Victims, arguing that there was no legal basis for Counsel for Victims to participate in the Pre-Appeal Conference or the appellate proceedings more generally (“Motion on Victim Participation”).⁷

3. On 15 February 2023, the Appeals Panel issued the Decision on Victim Participation, dismissing the Motion on Victim Participation and finding *inter alia* that victim participation in the appellate proceedings is permissible as long as it complies with the Law and the Rules, is limited to issues impacting the victims’ personal interests, and is not prejudicial to or inconsistent with the rights of the Accused.⁸

II. DISCUSSION

A. SUBMISSIONS OF THE PARTIES

4. Mustafa seeks certification to appeal to the Supreme Court Chamber of the Specialist Chambers (“Supreme Court”) the Decision on Victim Participation according to Article 45(2) of the Law and Rule 77(2) of the Rules.⁹ Mustafa argues, *inter alia*, that pursuant to Rule 173(3) of the Rules, the Rules and Articles of the Law governing trial proceedings shall apply *mutatis mutandis* to proceedings before the Appeals Panel.¹⁰ He submits that the discrete issue for resolution by the Supreme Court is whether the Appeals Panel “erred in finding that the combination of [A]rticle 22 (6) [of the Law] and [R]ules 114 and 173 (3) [of the Rules] permit the

⁶ F00008, Order Scheduling a Pre-Appeal Conference, 9 February 2023, para. 11.

⁷ F00009, Motion regarding Victims’ Counsel participating in the Pre-Appeal Conference and further Appeal proceedings, 13 February 2023 (confidential and *ex parte*, reclassified as public on 15 February 2023), paras 7-17.

⁸ See Decision on Victim Participation, para. 6. See also Decision on Victim Participation, paras 5, 7-13.

⁹ Request, paras 4-13, 24. See also Request, paras 14-23.

¹⁰ Request, paras 4, 8.

participation of victims counsel in appeal proceedings before it other than in an appeal under [A]rticle 46 (9) [of the Law]”.¹¹

5. Counsel for Victims and the SPO respond that neither the Law nor the Rules provide for interlocutory appeals to the Supreme Court against decisions by an Appeals Panel.¹² In particular, they argue that, contrary to Mustafa’s submission, the interlocutory appeal procedure provided for in Article 45(2) of the Law does not apply to the appeal stage through Rule 173(3) of the Rules.¹³

6. Counsel for Victims also submits that Mustafa failed to comply with the Practice Direction on Files and Filings before the Kosovo Specialist Chambers (“Practice Direction on Filings”) by omitting Counsel for Victims from the cover page of the Request, which determines to whom a filing is distributed, and asks that the Panel remind the Defence to comply with the legal framework and the Practice Direction on Filings.¹⁴

B. ASSESSMENT OF THE COURT OF APPEALS PANEL

7. The Appeals Panel recalls that Article 45(2) of the Law governs interlocutory appeals, either as of right – from decisions relating to detention on remand or any preliminary motion challenging the jurisdiction of the Specialist Chambers – or against decisions where leave to appeal through certification is required from the Pre-Trial Judge or Trial Panel.¹⁵ The Panel considers that Article 45 of the Law does not

¹¹ Request, para. 12.

¹² Victims Response, paras 5-13; SPO Response, paras 2-4.

¹³ Victims Response, para. 10; SPO Response, para. 3.

¹⁴ Victims Response, paras 25-26, 27(b), referring to KSC-BD-15, Registry Practice Direction, Files and Filings before the Kosovo Specialist Chambers, 17 May 2019 (“Practice Direction on Filings”), Article 29(2)(j).

¹⁵ See also Rule 77 of the Rules.

provide for any possibility of interlocutory appeals against decisions of the Court of Appeals Panel.¹⁶

8. Moreover, with regard to possible avenues of appeal against decisions of the Court of Appeals Panel, the Panel recalls that Article 47 of the Law limits appeals heard by the Supreme Court to appeals against judgment of a Court of Appeals Panel where either the latter has modified an acquittal and has instead entered a conviction, or where a sentence of life imprisonment has been imposed. The Panel further recalls that according to Article 48(6) of the Law, a party may request protection of legality before the Supreme Court against final decisions ordering or extending detention on remand. None of these scenarios are present in the Request.

9. The Panel considers that the Law is unambiguous with respect to the possible avenues of appeal and that while Rule 173(3) of the Rules provides that the rules governing the trial proceedings shall apply *mutatis mutandis* to appellate proceedings, the Panel finds that this provision clearly does not allow for the possibility that an interlocutory appeal under Rule 77(2) of the Rules be filed against an Appeals Panel decision. As rightly pointed out by the SPO and Counsel for Victims, the stated purpose of Rule 77(2) of the Rules is to safeguard the fair and expeditious conduct of the proceedings or outcome of the trial.¹⁷ The changes necessary to adjust Rule 77(2) of the Rules to the appeal proceedings would render the provision unrecognisable and incompatible with the nature of appeal proceedings, which are limited in scope.¹⁸

¹⁶ See also IRMCT, *Prosecutor v. Mladić*, MICT-13-56-A, Public Redacted Version of the “Decision on a Motion for Reconsideration and Certification to Appeal Decision on a Request for Provisional Release” filed on 22 May 2018, 8 June 2018, pp. 2-3; ICTY, *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Decision on Naletilić’s Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence, 7 July 2005, para. 20; ICTR, *Kajelijeli v. Prosecutor*, ICTR-98-44A-A, Judgement, 23 May 2005, para. 202.

¹⁷ Victims Response, paras 8-9; SPO Response, para. 5.

¹⁸ See Article 46(1)-(2) of the Law. See also Victims Response, para. 9; SPO Response, para. 5.

Therefore, there is no legal basis to grant certification to appeal the Decision on Victim Participation to the Supreme Court.

10. The Panel moreover recalls that it did not define the modalities of victim participation for the entire ambit of situations which may occur in these appellate proceedings, and that it may further specify such modalities in the future, either based on specific submissions by the Parties or participants in the proceedings, or *proprio motu*.¹⁹

11. Finally, the Panel notes that Mustafa failed to include Counsel for Victims on the cover page of the Request, which determines to whom a filing is distributed, despite the Panel's finding in the Decision on Victim Participation that the Counsel for Victims shall "continue to be notified of all disclosed and/or distributed items in the case file, including all public, confidential and strictly confidential filings, transcripts and evidentiary material, but excluding any items which are *ex parte* the Counsel for Victims".²⁰ The Panel therefore reminds Mustafa of its decision and the Practice Direction on Filings, in particular Article 29(2)(j), which requires that participants to which a filing is to be distributed must be listed on the cover page of the filing.²¹

III. DISPOSITION

12. For these reasons, the Court of Appeals Panel:

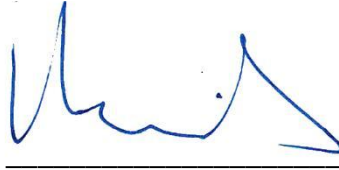
DENIES the Request; and

¹⁹ See Decision on Victim Participation, para. 14.

²⁰ Decision on Victim Participation, para. 11. The Panel also held that Counsel for Victims shall continue to keep the participating victims informed of relevant developments in the case in a manner which does not reveal any non-public information. See Decision on Victim Participation, para. 11.

²¹ See Practice Direction on Filings, Article 29(2)(j).

INSTRUCTS Mustafa to comply with the Decision on Victim Participation and the Practice Direction on Filings, as indicated above at paragraph 11.



**Judge Michèle Picard,
Presiding Judge**

Dated this Tuesday, 21 March 2023

At The Hague, the Netherlands