

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: Counsel for Kadri Veseli

Date: 25 March 2024

Language: English

Classification: Confidential

Veseli Defence Request for Leave to Appeal Decision to Admit P1046

Specialist Prosecutor's Office

Kimberly P. West

Counsel for Hashim Thaçi

Luka Misetić

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Victims

Simon Laws

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. In accordance with Article 45(2) of the Law¹ and Rule 77(2) of the Rules,² the Defence for Mr Kadri Veseli (“Defence”) hereby files this request for leave to appeal the Decision of 18 March 2024 admitting P1046 through W04811 (“Impugned Decision”).³
2. The Defence submits the following **issues** for certification:
 - a. **First issue:** Whether the Trial Panel erred in (a) determining admissibility before cross examination of W04811 and (b) refusing the defence adequate time to respond to SPO submissions on admissibility.
 - b. **Second Issue:** Whether the Trial Panel committed an error of reasoning in deciding to admit P1046.
 - c. **Third Issue:** Whether Trial Panel in erred failing to give reasons for the decision to admit P1046.

II. APPLICABLE LAW

3. 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.
4. Rule 77(2) states 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 the Court of Appeals Panel may materially advance the proceedings.

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (“Law”).

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (“Rules”).

³ Transcript of 18 March 2024, T.13183.11- T.13183.16 (“Impugned Decision”).

5. The Defence recalls the legal test set for certification of appeal under Rule 77(2) has been developed in prior decisions issued by this Court, which are incorporated herein by reference.⁴

III. SUBMISSIONS

6. The **Three Issues** satisfy the requirements for leave to appeal. They arise from the Impugned Decision, do not merely disagree with said Decision, are liable to significantly affect the fair and expeditious conduct of the proceedings and require immediate resolution by the Appeals Chamber in order to materially advance the proceedings.

A. The Issues Arise from the Impugned Decision

i. First Issue

7. The Trial Panel erred in (a) determining admissibility before cross examination of W04811 and (b) refusing the defence time to respond to SPO submissions on admissibility.
8. Objection was made to the admissibility of P1046 before the evidence of W04811 began. The Panel declined to hear the argument on admissibility at that stage, stating that the objection was “premature.”⁵
9. Upon conclusion of examination in chief, the SPO sought to tender P1046 for admission. Various submissions were made by the SPO in support of the document’s admissibility. Numerous witnesses and documents were referenced by

⁴ F01678, Decision on Veseli and Krasniqi Defence Request for Certification to Appeal the Second Decision on Specialist Prosecutor’s Bar Table Motion, 17 July 2023, public, paras 9-11; F01237, Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses, 30 January 2023, paras 7-8; F00172, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021, paras 6-7, 9-17. See also, KSC-BC-2020-07, F00423, Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect, 8 November 2021, paras 13-21; F00372, Decision on Haradinaj Defence’s Application for Certification of F00328, 15 October 2021, paras 15-17; F00484, Decision on Defence Request for Leave to Appeal F00470, 8 December 2021, paras 4-14.

⁵ Transcript of 18 March 2024, at T.13147.22

the SPO in support of their submissions.⁶ The Defence requested that they be allowed to respond to the submissions made by the SPO after cross examination of W04811 had taken place for two reasons:

- a. To enable exploration in submissions of any further evidence to be given on the document that may arise from cross-examination; and
- b. To enable the Defence to examine and respond to the references provided by the SPO.⁷

10. The request was declined without reasons and the Panel moved straight to a decision on admissibility.

11. In doing so, the Panel erred in two respects. Firstly, by refusing to wait until after cross examination on the document in question, the Panel closed their minds to the evidence that would arise from W04811 which undermined the authenticity of P1046. Therefore, the Panel willingly deprived itself of the ability to consider any further relevant evidence on the question of the authenticity of the exhibit.

12. It should be noted that in cross examination W04811, the witness did, in fact, give evidence undermining the authenticity of the document. Namely, her lack of acknowledge of its origin and authorship and her confirmation that within the one bullet point of the document which concerned her family, there were four fundamental errors of fact.⁸

13. Secondly, in refusing the Defence the time requested to deal with the points raised by the SPO, the Panel deprived the Defence of the ability to deal adequately, or at all, with the issue of corroboration raised by the SPO. The Accused are entitled to

⁶ Transcript of 18 March 2024, at T.13181.15- T.13182.23.

⁷ Transcript of 18 March 2024, at T.13183.1-8.

⁸ Transcript of 18 March 2024, at T.13222.4-7.

adequate time to prepare their defence and should not be arbitrarily deprived of that time by the Panel, without cause.

14. By choosing only to hear examination in chief in relation to the exhibit and by refusing to allow the Defence time to adequately respond to arguments raised, the Panel was refusing to hear relevant evidence and argument from the defence before making their determination on the P1046's admissibility. This is contrary to basic principles of fairness and, as such, the Panel fundamentally erred in its approach.

ii. Second Issue

15. The Trial Panel committed an error of reasoning in its decision to admit P1046 through W04811.

16. In admitting P1046, the Trial Panel found that "[i]ts authenticity is obvious."⁹ This reasoning is erroneous and defective. There was no evidence available to the Panel which would have supported a conclusion that the item's authenticity was "obvious".

17. Authenticity of an exhibit such as P1046 is far from obvious. P1046 appeared in an evidential vacuum. No evidence was presented by the SPO concerning: where or when it was seized or created; by whom it was authored or the item's chain of custody. The document was not capable of self-authenticating and the contents of the document were incorrect. There was therefore no evidence available from which the Panel could properly conclude authenticity was "obvious." W04811 gave no evidence in support of authenticity. The authenticity of the document could not be corroborated by evidence in the case. To the contrary, the paucity of

⁹ Transcript of 18 March 2024, at T.13183.11

evidence surrounding this document weighed heavily against any finding of authenticity.

18. As such, the Panel erred in their reasoning that authenticity, in this case, was, or could be, “obvious”.

iii. Third Issue

19. The Trial Panel failed to give reasons for the decision to admit P1046 and as such the decision was defective for want of reasons. The Trial Panel simply held:

091171 to 091173 is admitted. It is relevant. Its authenticity is obvious. Its probative value is not outweighed by any prejudicial material, and it will be admitted for that reason under 138.

20. The Panel did not engage in any way in the submissions made by the Parties. There was no discussion by the Panel as to their conclusions in relation to the objections raised or why the Panel determined the objections to be without merit. There was no explanation as to why the document was found to be “obviously” authentic or how the Panel was able to reconcile the evidential vacuum in which it appeared with the suggestion of authenticity. Further, the Panel did not provide reasons as to how the obvious and clear prejudice caused to the Defence by the admission of this exhibit could be mitigated against or dealt with in the trial. The Panel further failed to articulate the issues about which it found the document to be relevant or probative. As such, the Impugned Decision was defective.

B. The Issues Significantly Affect the Fair and Expeditious Conduct of the Proceedings

21. The **Three Issues** for which certification is sought significantly affect the fair conduct of the proceedings. As indicated above, the Impugned Decision contains manifest errors which affect the fairness of the trial process. It is crucial that these errors are addressed such that Mr Veseli’s fair trial rights are safeguarded. Specifically, leave to appeal should be granted to ensure that:

- a. The Panel is enjoined to determine admissibility at a stage in proceedings which is fair to all parties;
- b. Only those items which meet the requirements of Rule 138 are admitted into the record; and
- c. The Panel is enjoined to provide reasons for its decisions.

C. An Immediate Resolution by the Appeals Chambers Will Materially Advance the Proceedings

22. A positive resolution from the Appeals Chamber at this juncture would obviate the risk of any prejudice caused to the Accused, thereby materially advancing the proceedings. The Defence avers, in this regard, that an authoritative determination by the Appeals Panel will rectify the errors identified in the Impugned Decision and clarify (a) when and how the Panel should determine issues of admissibility; (b) the need for the Panel to give reasoned decisions; and (c) prevent further errors of reasoning in future decisions on Rule 138.

IV. CLASSIFICATION

23. Pursuant to Rule 82(3) of the Rules, these submissions are filed confidentially as reference is made to confidential information.

V. CONCLUSION

24. In light of the foregoing, the Defence respectfully seeks leave to appeal the **issues** identified above

Word Count: 1,600



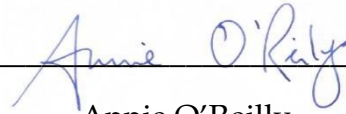
Ben Emmerson, CBE KC
Counsel for Kadri Veseli

Monday, 25 March 2024,
The Hague, The Netherlands



Kerrie Ann Rowan
Co-Counsel for Kadri Veseli

Monday, 25 March 2024,
The Hague, The Netherlands



Annie O'Reilly
Co-Counsel for Kadri Veseli

Monday, 25 March 2024,
The Hague, The Netherlands