



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 15 April 2024

Language: English

Classification: Public

Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P1046

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TRIAL PANEL II (“Panel”), pursuant to Article 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 18 March 2024, after hearing submissions from the Parties,¹ the Panel rendered an oral order admitting P1046 into evidence (“Impugned Decision”).²
2. On 25 March 2024, the Defence for Kadri Veseli (“Veseli Defence”) filed a request for leave to appeal the Impugned Decision (“Request”).³
3. On 4 April 2024, the Specialist Prosecutor’s Office (“SPO”) responded to the Request (“Response”).⁴
4. The Veseli Defence did not reply to the Response.

II. SUBMISSIONS

5. The Veseli Defence requests leave to appeal the Impugned Decision in respect of the following issues (collectively, “Issues”):
 - 1) Whether the Panel erred in: (i) determining admissibility before cross-examination of W04811; and (ii) refusing the Veseli Defence adequate time to respond to SPO submissions on admissibility (“First Issue”);

¹ Transcript of Hearing, 18 March 2024 (“18 March 2024 Transcript”), p. 13143, line 1 to p. 13147, line 24 and p. 13181, line 15 to p. 13183, line 8, confidential.

² 18 March 2024 Transcript, p. 13183, lines 10-16. *See also* 18 March 2024 Transcript, p. 13184, lines 5-6.

³ F02198, Specialist Counsel, *Veseli Defence Request for Leave to Appeal Decision to Admit P1046*, 25 March 2024, confidential.

⁴ F02222, Specialist Prosecutor, *Prosecution Repose to ‘Veseli Defence Request for Leave to Appeal Decision to Admit P1046’ (F02198)*, 4 April 2024, confidential (a public redacted version was filed on 5 April 2024, F02222/RED).

- 2) Whether the Panel committed an error of reasoning in deciding to admit P1046 (“Second Issue”); and
- 3) Whether the Panel erred in failing to give reasons for the decision to admit P1046 (“Third Issue”).⁵

6. The Veseli Defence submits that the Issues satisfy the requirements for leave to appeal as: (i) they arise from the Impugned Decision and do not merely disagree with it;⁶ (ii) are liable to significantly affect the fair and expeditious conduct of the proceedings;⁷ and (iii) require immediate resolution by the Court of Appeals in order to materially advance the proceedings.⁸

7. The SPO responds that the Request should be rejected as the Issues fail to meet the standard set forth in Article 45(2) and Rule 77(2).⁹ It submits that granting leave to appeal in relation to admissibility decisions should be an absolute exception and that the Veseli Defence has failed to demonstrate any reasons that warrant exceptional relief.¹⁰

III. APPLICABLE LAW

8. 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. 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 the Court of Appeals Panel may materially advance the proceedings.

⁵ Request, paras 1-2, 24.

⁶ Request, paras 6, 7-20.

⁷ Request, paras 6, 21.

⁸ Request, paras 6, 22.

⁹ Response, paras 1, 11.

¹⁰ Response, paras 1, 9.

9. The Panel incorporates by reference the applicable law on the legal standard for certification to appeal set out in past decisions.¹¹

IV. DISCUSSION

10. At the outset, the Panel recalls that triers of fact are afforded considerable discretion in deciding whether to admit evidence, and certification to appeal admissibility decisions will be granted only on an exceptional basis.¹² Such principles are reflected in the Court of Appeals Panel's holding that "appellate intervention in decisions relating to the admission of evidence is warranted only in very limited circumstances."¹³

A. FIRST ISSUE

11. The Veseli Defence submits that by choosing only to hear examination-in-chief in relation to P1046 and by refusing to allow the Veseli Defence time to adequately respond to arguments raised by the SPO, the Panel was refusing to hear relevant evidence from the witness and arguments from the Veseli Defence before making its determination on P1046's admissibility.¹⁴ According to the Veseli Defence, this is contrary to basic principles of fairness.¹⁵

¹¹ F01237, Panel, *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, F00372, Panel, *Decision on Haradinaj Defence's Application for Certification of F00328*, 15 October 2021, paras 15-17; F00423, Panel, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect*, 8 November 2021, paras 13-21; F00484, Panel, *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.

¹² F02157, Panel, *Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P959 and P960* ("29 February 2024 Decision"), 29 February 2024, para. 11 and fn. 26 (with further references). *See also* ICTR, *Nyiramasuhuko v. Prosecutor*, ICTR-98-42-AR73.2, Appeals Chamber, [Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence](#), 4 October 2004, para. 5.

¹³ KSC-CA-2022-01, F00114, Court of Appeals, *Appeal Judgment*, 2 February 2023, para. 35. *See also* 29 February 2024 Decision, para. 11; ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeals Chamber, [Judgement](#), 20 February 2001, para. 533.

¹⁴ Request, para. 14. *See also* Request, paras 7-13.

¹⁵ Request, para. 14.

12. The SPO responds that the first prong of the First Issue is not appealable as it merely disagrees with the Panel's decision and is based, in part, on the already-considered argument that evidence of factual errors in the document undermines its authenticity.¹⁶ It further argues that, as no prejudice is shown, the Veseli Defence failed to demonstrate that the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.¹⁷ With respect to the second prong, the SPO responds that: (i) the Veseli Defence had the opportunity to, and did, make submissions on the admissibility of P1046; and (ii) thereafter, the Panel exercised its discretion and determined that the *prima facie* threshold had been satisfied.¹⁸

13. At the outset, the Panel recalls that it issued the Impugned Decision upon the tendering of the document by the SPO and after having heard the Parties on the admissibility of the document.¹⁹ The Veseli Defence was given the opportunity to make oral submissions on *two* separate occasions in respect of the admissibility of this document.²⁰ The Panel also heard extensive evidence on P1046 by W04811 during examination-in-chief before ruling on the admission of the exhibit.²¹

14. With the First Issue, the Veseli Defence, in essence, takes issue with the timing of the Impugned Decision, arguing that the Panel should have deferred its decision on P1046's admissibility until it had heard more evidence from the witness during cross-examination, and the Veseli Defence had more time to prepare for further oral submissions on the item's admissibility. As such, and although partially overlapping with arguments already raised orally by the Veseli Defence and, at least implicitly, rejected by the Panel, the Panel considers that the

¹⁶ Response, para. 2.

¹⁷ Response, para. 2.

¹⁸ Response, paras 3-4.

¹⁹ 18 March 2024 Transcript, p. 13143, line 1 to p. 13147, line 24; p. 13181, line 15 to p. 13183, line 8.

²⁰ 18 March 2024 Transcript, p. 13143, line 1 to p. 13146, line 19; p. 13182, line 23 to p. 13183, line 8.

²¹ 18 March 2024 Transcript, p. 13173, line 1 to p. 13181, line 14.

First Issue is not merely a disagreement with the Impugned Decision but constitutes a specific issue arising from that decision.

15. As concerns the significant effect on the fair and expeditious conduct of the proceedings or the outcome of the trial, the Panel recalls that when rendering the Impugned Decision, it had already heard the Parties' oral submissions in relation to the item's admissibility, including two sets of submissions from the Veseli Defence.²² Furthermore, the presence of alleged inaccuracies in the document had already been brought to the Panel's attention, and they were further explored during examination-in-chief.²³ Thus, the Panel was aware of the issues concerning the document and was satisfied that the admissibility criteria of Rule 138 were nevertheless fulfilled in respect of that document.²⁴ Having been satisfied at that point that the requirements of Rule 138 had been met, there was no compelling reason for the Panel to delay ruling on its admission until a later point. The Rules do not require that admission of proposed evidence should be postponed until after cross-examination, although the Panel could, in the exercise of its discretion, decide to do so.²⁵ In fact, ruling on the admission of a document at the time it is tendered, fully conforms with the principle set out in paragraph 119 of the Order on the Conduct of Proceedings.²⁶ It is also consistent with the Panel's general approach thus far. The Veseli Defence put forth no authority in support of its contention that the Panel should have deferred its decision to admit P1046 until after cross-examination or that it abused its discretion when deciding upon this item's admissibility at that point in time.

²² See above, para. 13.

²³ See e.g. 18 March 2024 Transcript, p. 13145, line 24 to p. 13146, line 2; p. 13175, lines 5-10; p. 13175, line 24 to p. 13176, line 15; p. 13177, lines 1-8.

²⁴ Impugned Decision, p. 13183, lines 11-13.

²⁵ See, in particular, F01226/A01, Panel, *Annex 1 to Order on the Conduct of Proceedings* ("Order on the Conduct of Proceedings"), 25 January 2023, para. 119, which reads as follows: "The Trial Panel will generally hear and rule upon submissions from the Parties and participants about the admissibility of each exhibit at the time that the exhibit is tendered in evidence. Where it is more practical to do so, the Trial Panel might also decide to postpone decisions on admission until the end of a witness's testimony."

²⁶ See above, fn. 25.

16. The Defence has also failed to establish any unfairness arising from the course taken. The Panel notes in this regard that the Veseli Defence was able to cross-examine the witness in respect of P1046²⁷ and that the evidence given by the witness in this context will also be taken into account by the Panel when deciding what weight to assign to this exhibit. Furthermore, the Parties will have a full and fair opportunity to make submissions in respect of the weight that should be attached to this document at the relevant point in these proceedings.

17. Based on the above considerations, the Panel finds that the Veseli Defence has not demonstrated how the First Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Accordingly, the remaining requirement of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed in relation to the First Issue. The request for certification to appeal the First Issue is rejected.

B. SECOND ISSUE

18. The Veseli Defence submits that the Panel erred in finding that P1046's authenticity is obvious, when no evidence supporting such conclusion was available to the Panel.²⁸ In particular, the Veseli Defence contends that: (i) no evidence was presented by the SPO in relation to the item's authorship and chain of custody; (ii) the contents of the document were incorrect; and (iii) W04811 gave no evidence in support of the item's authenticity, and its authenticity could not be corroborated by evidence in the case.²⁹

19. The SPO responds that the Veseli Defence fails to: (i) identify a concrete or identifiable issue; or (ii) show that the issue has significant repercussions on either the fair and expeditious conduct of proceedings or the outcome of the trial.³⁰ It also

²⁷ 18 March 2024 Transcript, p. 13217, line 24 to p. 13222, line 7.

²⁸ Request, paras 15-18.

²⁹ Request, para. 17.

³⁰ Response, para. 5.

submits that the Veseli Defence expresses mere disagreement with the Impugned Decision without identifying any appealable error.³¹ Furthermore, it argues that the Veseli Defence's claim that appellate intervention at this juncture would obviate the risk of any prejudice caused to the Accused is based on speculation, as the Panel has not yet determined what weight it will ultimately assign to P1046.³²

20. The Panel notes that with the Second Issue, the Veseli Defence argues that the Panel "committed an error of reasoning in deciding to admit P1046".³³ The Panel is of the view that, in its formulation of the Second Issue, the Veseli Defence failed to clearly identify the error for which it seeks leave to appeal. The Panel therefore finds that the Second Issue, as formulated by the Veseli Defence, is not specific, discrete, or identifiable.³⁴ For these reasons, the Second Issue could be dismissed *in limine*. However, the Panel takes into consideration that through the Veseli Defence's submissions on the Second Issue, it becomes clear that this issue relates to the Panel's finding on authenticity and, more specifically, the Panel's determination that P1046's authenticity was "obvious".³⁵ The Panel will therefore exceptionally entertain the merit of the arguments set forth by the Veseli Defence in relation to the Second Issue.

21. It is apparent from the Impugned Decision that the Panel assessed the admissibility criteria in relation to P1046 as prescribed by Rule 138(1).³⁶ When ruling on P1046's admissibility, including its *prima facie* authenticity, the Panel had already heard extensive oral submissions from the Parties on the item's admissibility, including in relation to authenticity.³⁷ In its oral submissions, the SPO also addressed the (purported) authorship, provenance and chain of custody,

³¹ Response, para. 6.

³² Response, para. 7.

³³ Request, para. 2(b).

³⁴ See also e.g. 29 February 2024 Decision, para. 13 and fn. 34 (with further references).

³⁵ Request, paras 16-18.

³⁶ Impugned Decision, p. 13183, lines 11-13.

³⁷ 18 March 2024 Transcript, p. 13143, line 1 to p. 13146, line 19 (Veseli Defence); p. 13181, line 15 to p. 13182, line 20 (SPO).

mentioned examples of corroborating evidence, and referred to its pending bar table motion containing further details on the document's purported admissibility.³⁸

22. Rule 138(1) only requires, for the purpose of admission, that *prima facie* authenticity be established by the tendering Party. In other words, it does not require definite proof of the document's authenticity, but only a determination based on the appearance and content of the said document as well as any other relevant considerations relevant to that assessment that are validly before the Panel at the time of its decision on admissibility. The Panel was satisfied of the *prima facie* authenticity of P1046 at the time when it was offered.³⁹ As explained above, there was therefore no reason to postpone admission until a later point, to hear additional submissions from the Parties, or to seek additional evidence from this witness before deciding upon the admission of this item.⁴⁰ The Panel is of the view that the Second Issue simply repeats the Veseli Defence's challenge to authenticity whereof the Panel was already aware when rendering the Impugned Decision,⁴¹ and its arguments misapprehend the standard pursuant to which admissibility of exhibits is decided under the Rules.

23. Based on the above, the Panel considers that the Second Issue constitutes a mere disagreement with the Impugned Decision, and more specifically, the Panel's finding in relation to the item's *prima facie* authenticity, without identifying an appealable error. Accordingly, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed in relation to

³⁸ F02178/A01, Specialist Prosecutor, *Annex 1 to Prosecution Motion for Admission of Llap Zone Documents and Related Request*, 14 March 2024, confidential (item 107). *See* 18 March 2024 Transcript, p. 13147, lines 15-19; p. 13181, line 17 to p. 13182, line 19.

³⁹ *See* Impugned Decision, p. 13183, lines 11-13. *See also* above, para. 15.

⁴⁰ *See* above, para. 15.

⁴¹ *See* 18 March 2024 Transcript, p. 13143, line 1 to p. 13146, line 19.

the Second Issue. The request for certification to appeal the Second Issue is rejected.

C. THIRD ISSUE

24. The Veseli Defence submits that the decision to admit P1046 was defective for want of reasons.⁴² It argues that the Panel failed to: (i) engage with the Parties' submissions and, in particular, the objections raised; (ii) provide reasons as to how the (alleged) prejudice caused to the Veseli Defence by the admission of the document could be mitigated against or dealt with in the trial; and (iii) articulate the issues about which it found the document to be relevant or probative.⁴³

25. The SPO responds that none of the leave to appeal criteria are met for the Third Issue.⁴⁴ It submits that: (i) the Impugned Decision shows that the Panel considered all relevant factors, correctly applying the criteria of Rule 138; and (ii) it was within the Panel's discretion not to articulate every detail supporting its decision to admit the document.⁴⁵

26. The Impugned Decision demonstrates that the Panel considered all relevant factors for deciding on P1046's admissibility pursuant to Rule 138.⁴⁶ Nevertheless, the Panel considers that the Third Issue, which claims that when issuing the Impugned Decision, the Panel erred in failing to render a (sufficiently) reasoned decision, constitutes a specific issue arising from the Impugned Decision and does not merely disagree with that decision.

27. As concerns the significant effect on the fair and expeditious conduct of the proceedings or the outcome of the trial, the Panel recalls that it issued the Impugned Decision after having heard: (i) extensive oral submissions by the

⁴² Request, para. 19.

⁴³ Request, para. 20.

⁴⁴ Response, para. 8.

⁴⁵ Response, para. 8.

⁴⁶ Impugned Decision, p. 13183, lines 11-13. *See also* above, para. 21.

Parties on the admissibility of P1046; and (ii) evidence on that document provided by W04811 during examination-in-chief.⁴⁷ As noted above, the Veseli Defence was able to cross-examine the witness in respect of P1046.⁴⁸ Furthermore, the Parties will have a full and fair opportunity to make submissions in respect of the weight that should be attached to this document at the relevant point in these proceedings. Factors and considerations relevant to the Panel's decision to admit this item were plainly apparent from its ruling, which only required it to determine whether the conditions of Rule 138(1) were met in relation to that document. All of the Parties' arguments had been accounted for when reaching that decision. The suggestion that the right of the Accused to a reasoned opinion entitled Mr Veseli to more than what was provided in the context of a ruling on admission of evidence, is unsupported.

28. Based on the above, the Panel finds that the Veseli Defence has not demonstrated how the Third Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Accordingly, the remaining requirement of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed in relation to the Third Issue. The request for certification to appeal the Third Issue is rejected.

V. CLASSIFICATION

29. The Panel notes that the Request was filed confidentially and that no public redacted version has been filed thus far. The Panel therefore orders the Veseli Defence to file a public redacted version of the Request, or request its reclassification as public, by Monday, 22 April 2024. The Panel reminds the Veseli Defence once again of the Panel's oral order regarding the publicity of proceedings, wherein the Panel ordered the Parties and participants, as a matter

⁴⁷ See above, paras 13, 15.

⁴⁸ See above, para. 16.

of principle, to: (i) file simultaneously a public redacted version of their confidential filing; and (ii) when there are compelling reasons not to do so, to indicate in the classification section of the filing the reasons why a public redacted version thereof cannot be provided at the same time.⁴⁹

VI. DISPOSITION

30. For the above-mentioned reasons, the Panel hereby:

- (a) **REJECTS** the Request; and
- (b) **ORDERS** the Veseli Defence to file a public redacted version of the Request, or request its reclassification as public, by **Monday, 22 April 2024**.



Judge Charles L. Smith, III
Presiding Judge

Dated this Monday, 15 April 2024

At The Hague, the Netherlands.

⁴⁹ Transcript of Hearing, 7 November 2023, p. 9446, lines 13-20. See also 29 February 2024 Decision, para. 18; F02067, Panel, *Decision on Joint Defence Request for Certification to Appeal Decision F01693*, 19 January 2024, para. 37.