



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 Guénaël Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 23 April 2024

Language: English

Classification: Public

Decision on Veseli Defence Request for Certification to Appeal the Decision to Admit P1064 and P1065

Specialist Prosecutor
Kimberly P. West

Counsel for Victims
Simon Laws

Counsel for Hashim Thaçi
Luka Mišetić

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Rexhep Selimi
Geoffrey Roberts

Counsel for Jakup Krasniqi
Venkateswari Alagendra

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 19 March 2024, the Panel heard the testimony of W04571 and the Specialist Prosecutor’s Office (“SPO”) questioned the witness on two documents containing notes from an unknown source. The SPO offered the documents for admission, the Defence objected, and the Panel instructed the Registry to mark them for identification pending the Panel’s decision on admission.¹

2. On 25 March 2024, after the Defence had the opportunity to cross-examine W04571,² and after hearing submissions from the Parties on the admissibility of the two documents,³ the Panel issued an oral order admitting the documents into evidence (“Impugned Decision”).⁴ The Registry assigned the documents exhibit numbers P01064 and P01065, respectively.

3. On 2 April 2024, the Defence for Kadri Veseli (“Veseli Defence”) filed a request for certification to appeal the Impugned Decision (“Request”).⁵

4. On 15 April 2024, the Specialist Prosecutor’s Office (“SPO”) responded to the Request, opposing it (“Response”).⁶ The Veseli Defence did not file a reply.

¹ Transcript of Hearing, 19 March 2024, pp. 13412-13421, 13422-13424.

² See Transcript of Hearing, 20 March 2024, p. 13434, lines 13-17.

³ See Transcript of Hearing, 20 March 2024, p. 13434, line 18 – p. 13435, line 22; Transcript of Hearing, 20 March 2024, pp. 13498-13516.

⁴ Transcript of Hearing, Oral Order on Admission of MFI P01064 and MFI P01065, 25 March 2024, pp. 13519-13522.

⁵ F02216, Specialist Counsel, *Veseli Defence Request for Leave to Appeal Decision to Admit P1064 and P1065*, 2 April 2024.

⁶ F02244, Specialist Prosecutor, *Prosecution Response to “Veseli Defence Request for Leave to Appeal Decision to Admit P1064 and P1065”*, confidential, 15 April 2024. A public redacted version was filed the same day (F02244/RED).

II. SUBMISSIONS

5. The Veseli Defence requests leave to appeal the Impugned Decision on the following two issues relating to the Panel's decision to admit P01064 and P01065:

1. Whether the Trial Panel erred in the Impugned Decision by improperly reversing the burden of proof; and
2. Whether the Trial Panel erred in the Impugned Decision by making findings of fact not based upon evidence or reasonable inference.⁷

6. The SPO responds that neither issue is appealable. The first issue misrepresents the Impugned Decision and merely disagrees with the Panel's findings.⁸ The second issue is not discrete and identifiable, and it impermissibly advances new arguments for the admission of one of the documents.⁹ Finally, the SPO submits that the Veseli Defence fails to demonstrate any concrete prejudice and does not even address how a resolution of either issue would have an impact on the proceedings.¹⁰

III. APPLICABLE LAW

7. 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.

⁷ Request, para. 2.

⁸ Response, paras 3-5.

⁹ Response, paras 6-10.

¹⁰ Response, paras 11-12.

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

IV. DISCUSSION

8. In the relevant part of the Impugned Decision, the Panel addressed the criteria for the admission of evidence under Rule 138 and found, first, that P01064 and P01065 were relevant to the SPO's case in part because they refer to a number of alleged victims of the crimes charged.

9. Regarding these documents' *prima facie* authenticity, the Panel observed that both documents, which had been seized by Serbian authorities, appeared to refer to Kosovo Liberation Army ("KLA") members, meetings, and operations, thereby supporting the suggestion that these were KLA documents. The Panel also considered the fact that Witness W04571 gave testimony that was consistent with notes contained in the documents, and the documents are corroborated by other handwritten notes in evidence. In that context, the Panel considered the Defence's arguments that these documents were or might be fabrications or documents that had been tampered with. The Panel found no indication that the records were anything other than records of intelligence and counter-intelligence gathering conducted by unknown individuals in respect of individuals suspected of collaboration with Serbs. Nor was there any indication before this Panel that the documents had been created or tampered with by Serbian state agents. On that basis, the Panel found that the two documents were *prima facie* authentic.

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, F00484, Panel, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021, paras 4-14; F00423, Panel, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect ("Case 07 Leave to Appeal Decision")*, 8 November 2021, paras 13-21; F00372, Panel, *Decision on Haradinaj Defence's Application for Certification of F00328*, 15 October 2021, paras 15-17. See also KSC-BC-2020-06, F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, paras 6-7, 9-17.

10. In respect of the Request now before the Panel, the Panel observes at the outset that the Veseli Defence has devoted several pages of its Request to arguing the merits of the prospective appeal,¹² under the guise of a heading entitled “The Issues Arise from the Impugned Decision”.¹³ The Veseli Defence goes so far as to offer new arguments about the provenance of P01064.¹⁴ Insofar as this constitutes an implied motion for reconsideration, the Panel notes that those arguments fulfil none of the requirements of Rule 79.

11. The Panel also reiterates that a decision on certification under Rule 77(2) is not concerned with whether an impugned decision is correct or not.¹⁵ When an applicant identifies an issue arising from the decision for which leave to appeal is sought, it must articulate the issue only so that it is clear and discrete, as opposed to abstract or hypothetical.¹⁶ And that issue must arise from the decision which it seeks to appeal, not from new arguments or considerations not raised nor addressed in the impugned decision. The Panel is not charged with ruling on the merits of the potential appeal in a decision under Article 45(2) and Rule 77(2). Arguments regarding the merit of the impugned decision are thus beyond the scope of what the Panel must decide here. The Panel will, therefore, disregard as

¹² Request, paras 7-22.

¹³ Request, p. 2; *see also* Request, paras 23 (alleging “manifest errors”), 24 (alleging “errors of reasoning”).

¹⁴ *See* Request, para. 21; Response, para. 8, referring to ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, [Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries](#), 21 July 2005, para. 5.

¹⁵ Case 07 Leave to Appeal Decision, para. 21; KSC-BC-2020-06, F00172, Pre-Trial Judge, *Decision on the Thiçi Defence Application for Leave to Appeal*, 11 January 2021, para. 17; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, [Decision Denying Certification to Appeal Decision under Rule 167 not to Acquit Hussein Hassan Oneissi and to Stay the Trial – with a Short Separate Opinion of Judge David Re](#), 14 May 2018, para. 8; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, [Decision on Accused’s Application for Certification to Appeal Denial of Motion for Judgement of Acquittal Under Rule 98 Bis](#), 18 July 2012, para. 6; ICTR, *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, [Decision on Defence Motion for Leave to Appeal the Trial Chamber’ Decision on the Defence Request to Call Prosecution Investigators](#), 10 May 2011, para. 12.

¹⁶ Case 07 Leave to Appeal Decision, para. 16; ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-75, [Decision on the Prosecutor’s Application for Leave to Appeal Pre-Trial Chamber III’s Decision on Disclosure](#), 25 August 2008, para. 11.

¹⁶ Request, paras 7-22.

irrelevant those submissions that purport to address the merit of the Impugned Decision.

12. As for the criteria under Rule 77(2), the Panel recalls that it is the responsibility of the Party seeking leave to appeal an issue to establish that the requirements for certification are met.¹⁷ It is not for the Panel to substitute itself for the Party seeking leave to appeal, and Rule 77(2) applications that fail to articulate clearly the requirements of that provision will be dealt with summarily. In respect of the first criterion under Rule 77(2), an applicant must not only show how the issue affects either the fair and expeditious conduct of proceedings or the outcome of the trial, but must also demonstrate that either of these factors would be significantly affected.¹⁸

13. Here, the Panel notes that the Veseli Defence merely asserts, without explanation, that it is “crucial that these errors are addressed such that Mr Veseli’s fair trial rights are safeguarded”.¹⁹ The Veseli Defence then reiterates that leave to appeal should be granted to ensure that: (i) “the burden of proof is respected”, and (ii) “the Panel are enjoined to make decisions based on evidence and reasonable inference”.²⁰ The Veseli Defence has offered no explanation as to how the decision to admit P01064 and P01065 could significantly affect the fairness of the proceedings or the outcome of the trial. Moreover, the Panel notes that a Court of Appeals Panel would still possess the tools to adopt an appropriate remedy should it find that the Panel improperly relied upon P01064 and P01065 in the final judgment.²¹

¹⁷ Case 07 Leave to Appeal Decision, para. 13.

¹⁸ Case 07 Leave to Appeal Decision, para. 17.

¹⁹ Request, para. 23.

²⁰ Request, para.23.

²¹ See Rule 77(2): “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 [...]” (emphasis added).

14. In respect of the second criterion, the Veseli Defence argues only that 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”.²² The Veseli Defence then reiterates that an appellate determination would clarify (i) “the burden of proof”, and (ii) “that the Panel must base their decisions on evidence within the record and may not speculate”.²³ Again, the Panel finds that the Veseli Defence’s arguments do not meet the threshold required by Rule 77(2). The Veseli Defence does not explain the alleged “risk of [...] prejudice” with any specificity, nor the reason why an immediate pronouncement of the Court of Appeals Panel on the issues presented would materially advance the proceedings. Such generic and unspecific allegations are incapable of meeting the threshold expected by the Rules.

15. Therefore, the Panel finds that the Veseli Defence has not satisfied the criteria for certification set out in Article 45(2) and Rule 77(2).

V. CLASSIFICATION

16. The Panel notes that the Request is filed only in a confidential version, and the Veseli Defence explains that reference is made therein to confidential information. The Panel orders the Veseli Defence, pursuant to Rule 82(5), to file a public redacted version of the Request or seek its reclassification as public by Tuesday, 30 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 of principle, to: (i) file simultaneously a public redacted version of any confidential filing; and (ii) when there are compelling reasons not to do so, to indicate in the classification section

²² Request, para. 24.

²³ Request, para. 24.

of the filing reasons why a public redacted version could not be provided at the same time.²⁴

VI. DISPOSITION

17. 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 seek its reclassification as public by Tuesday, 30 April 2024.



Judge Charles L. Smith, III
Presiding Judge

Dated this Tuesday, 23 April 2024

At The Hague, the Netherlands.

²⁴ Transcript of Hearing, 7 November 2023, p. 9446, lines 13-20. See also F02241, Panel, *Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P1046*, 15 April 2024, para. 29; F02157, Panel, *Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P959 and P960*, 29 February 2024, para. 18; F02067, Panel, *Decision on Joint Defence Request for Certification to Appeal Decision F01693*, 19 January 2024, para. 37.