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 Christoph Barthe
	Judge Guénaël Mettraux
	Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr. Fidelma Donlon
Filing Participant:	Defence Counsel for Jakup Krasniqi
Date:	13 May 2024
Language:	English
Classification:	Confidential

Krasniqi Defence Request

for Certification to Appeal the Decision on Prosecution Fourth Motion for Admission of Evidence pursuant to Rule 155

Specialist Prosecutor

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I. INTRODUCTION

1. On 3 May 2024, the Trial Panel issued its decision[1] on the "Prosecution fourth motion for admission of evidence pursuant to Rule 155" which admitted the evidence of W00067 in writing.[2]

2. The evidence of W00067 includes her purported identification of Jakup Krasniqi at a detention location in Malishevë/Mališevo. As the Panel accepted, this evidence may go to the acts and conduct of Mr. Krasniqi and might be relevant to establishing the alleged presence of Mr. Krasniqi at a relevant location.[3] The admission of this contested identification evidence in writing is highly prejudicial and contrary to Mr. Krasniqi's right to confront the evidence against him. Accordingly, the Defence for Jakup Krasniqi ("Defence") seeks certification to appeal the Decision insofar as it relates to this identification evidence.

3. The Defence seeks leave to appeal the following discrete issues arising from the Decision:

(i) **First Issue:** Whether the Trial Panel erred in finding that the probative value of the identification evidence was not outweighed by its prejudicial effect and the inability of the Defence to confront the witness;

(ii) **Second Issue:** Whether the Trial Panel erred in finding that the prejudice to the Defence was limited by the ability of the Defence to

[1] KSC-BC-2020-06, F02283, Trial Panel II, *Decision on Prosecution Fourth Motion for Admission of Evidence pursuant to Rule 155* ("Decision"), 3 May 2024, confidential.
[2] KSC-BC-2020-06, F02152, Specialist Prosecutor, *Prosecution Fourth Motion for Admission of Evidence pursuant to Rule 155* ("Motion"), 26 February 2024, confidential, with Annexes 1-7, confidential.
[3] Decision, para. 14.

confront other witnesses, where none of those witnesses corroborates the identification evidence.

4. Pursuant to Rule 82(4) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), this request is filed confidentially because it relates to the Decision which bears the same classification.

II. PROCEDURAL HISTORY

5. On 26 February 2024, the SPO filed the Motion.

6. On 11 March 2024, the Defence filed a joint response to the Motion.[4] The Defence challenged the reliability, probative value and prejudicial effect of the identification evidence in detail in the Defence Response,[5] and highlighted that the statements of other witnesses relied on by the SPO do not corroborate the identification evidence.[6]

7. On 19 March 2024, the SPO replied to the Defence Response.[7]

8. On 3 May 2024, the Trial Panel issued the Decision.

[4] KSC-BC-2020-06, F02173, Joint Defence, *Joint Defence Response to "Prosecution Fourth Motion for Admission of Evidence pursuant to Rule 155"* ("Defence Response"), 11 March 2024, confidential.
[5] *Idem*, paras 10-26.
[6] *Idem*, paras 16-17.
[7] KSC-BC-2020-06, F02188, Specialist Prosecutor, *Prosecution Reply to Joint Defence Response to Fourth Rule 155 Motion*, 19 March 2024, confidential.

III. APPLICABLE LAW

9. Article 45(2) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") provides:

> Interlocutory appeals shall lie as of right from decisions or orders relating to detention on remand or any preliminary motion challenging the jurisdiction of the Specialist Chambers. Any other interlocutory appeal must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel on the basis that it involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.[8]

10. Rule 77(2) of the Rules establishes 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".

11. The Trial Panel has previously elaborated on the necessary test required to reach the threshold for certification: -

a. The issue for which certification is sought must have significant repercussions for either the "fair and expeditious conduct" of the proceedings or "the outcome of the trial".[9] In this context, "fair and expeditious conduct of proceedings" refers to the general requirement of

[8] Emphasis added.
[9] KSC-BC-2020-07, F00423, Trial Panel II, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect* ("Decision on SPO Requests"), 8 November 2021, public, para. 17.

fairness, which includes that proceedings should be adversarial in nature and that there should be equality of arms between the parties. "Expeditiousness" is an attribute of fair trial and is closely linked to the requirement that proceedings should be conducted within a reasonable time.[10] Alternatively, the test for certification is met if the claimed error is likely to impact the outcome of the case; an exercise which involves a forecast of the consequence of such an occurrence.[11]

b. The second prong of the test for certification is that the immediate resolution of the appealable issue will materially advance proceedings, in the sense that "prompt referral of an issue to the Court of Appeals Panel will settle the matter and rid the 'judicial process of possible mistakes that might taint either the fairness of proceedings or mar the outcome of the trial' thereby moving the proceedings forward along the right course".[12]

c. Finally, the Party seeking clarification must identify issues which emanate from the ruling concerned and do not amount to abstract questions or hypothetical concerns.[13]

12. As the Trial Panel has recently reiterated, certification is not concerned with the correctness of the impugned decision,[14] and thus the Defence refrains from submitting arguments on the merits of the appeal at this stage.

[10] Decision on SPO Requests, para. 18.
[11] *Idem*, para. 19.
[12] *Idem*, para. 20.
[13] *Idem*, para. 16.
[14] KSC-BC-2020-06, F02259, Trial Panel II, *Decision on Veseli Request for Certification to Appeal the Decision to Admit P1064 and P1065*, 23 April 2024, public.

13. The two issues satisfy the test for certification. They originate from the Decision, do not amount to mere disagreements, affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and their immediate resolution by the Appeal Panel would materially advance the proceedings.

IV. SUBMISSIONS

A. THE ISSUES ARE APPEALABLE ISSUES

14. The **first issue** concerns the correct application of Rules 155(1) and (5) and 138(1) to contested identification evidence, which goes directly to the acts and conduct of the Accused. Having confirmed that W00067 was unavailable, the Decision went on to assess the contested identification evidence against the Rule 138(1) criteria of reliability, authenticity, and probative value which is not outweighed by prejudicial effect.[15] Having considered various factors, the Decision concluded that the probative value of the evidence was not outweighed by its prejudicial effect.[16] The **first issue** challenges this conclusion and therefore arises directly from the impugned decision.

15. The Defence challenge of the Decision is **not** a mere disagreement and dismissal of this request for certification on that basis would be erroneous. The terms of Rule 155(5), the low probative value of this particular identification and its highly prejudicial impact, together with Mr. Krasniqi's fundamental right to confront the evidence against him,[17] mean that there is a discreet issue of principle, suitable for appellate review, as to the admission of untested hearsay evidence which goes to the acts and conduct of the accused.

[15] Decision, paras 12-17.
[16] *Idem*, para. 18.
[17] Article 31(4) of the Constitution of the Republic of Kosovo, Article 21(4)(f) of the Law, and Article 6(3)(d) of the European Convention on Human Rights.

16. Moreover, in prior decisions, the Trial Panel recognised the insurmountable prejudice occasioned by admitting identification evidence of the accused pursuant to Rule 155 and declined to admit the evidence.[18] The **first issue** challenges why, as a matter of consistency, the same approach was not taken by the Trial Panel in relation to W00067.

17. The **second issue** concerns a central aspect of the Decision's reasoning. The Decision concluded that at least six other witnesses are scheduled to give evidence about the contents of W00067's evidence.[19] This was given by the Panel as one of three reasons for deciding to admit the evidence, despite the objections identified by the Defence.[20] However, the Decision did **not** address *the* Defence submission that **none** of these six witnesses actually corroborates the identification of Mr. Krasniqi; two of the witnesses merely repeat *what they claim to have* purportedly heard from W00067 and the others do not mention the identification of Mr. Krasniqi at all.[21] Properly considered, the absence of corroboration by six witnesses of the identification of Mr. Krasniqi is an additional essential factor against the admission of untested hearsay evidence which goes to the acts and conduct of the accused **not** a factor in favour of its admission. As a result, the **second issue** arises from the Decision because it challenges a fundamental flaw in the chain of reasoning which led the Panel to admit the contested identification evidence.

18. The Defence acknowledges that the Panel has held that corroboration is not necessarily required for the admission of evidence pursuant to Rule 155.[22] However,

[18] KSC-BC-2020-06, F01603, Trial Panel II, *Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155*, 14 June 2023, confidential, para. 107; F01864, Trial Panel II, *Decision on Prosecution Second Motion for Admission of Evidence pursuant to Rule 155*, 17 October 2023, confidential, para. 47.
[19] Decision, para. 14.
[20] *Ibid*.
[21] Defence Response, paras 13-15.
[22] Decision, para. 14.

the Decision expressly relies on the ability of the Defence to cross-examine other witnesses as a factor in support of admitting the evidence.[23] It is this reliance which the second issue seeks to address. The second issue is not a mere disagreement; it challenges the correct approach to the evaluation of prejudice on contested identification evidence which goes to the acts and conduct of the Accused.

B. THE ISSUES AFFECT THE FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS OR THE OUTCOME OF THE TRIAL

19. The **two issues** have immediate consequences on the fairness of the proceedings or the outcome of the trial, requiring immediate resolution by the Court of Appeals Panel.

20. **Both issues** have direct relevance to Mr. Krasniqi's right to a fair and public hearing[24] and to examine - or have examined - the witnesses against him.[25] Criminal proceedings at the KSC are modelled around the principle of orality,[26] which is meant to ensure that the evidence relied upon to determine the innocence or guilt of the Accused can be fairly challenged or confronted by the Accused through cross-examination.[27]

21. While Rule 155 provides a limited exception to this principle, the correct application of the stringent requirements allowing for the admission of such evidence without cross-examination is a crucial safeguard to protect the Accused's fair trial

[23] Decision, para. 14.
[24] Article 21(2) of the Law.
[25] Article 21(4)(f) of the Law.
[26] Article 37(2) of the Law. *See also* Articles 21(2) and 21(4)(f) of the Law, and Rule 141(1) of the Rules.
[27] ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-2635, Trial Chamber II, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, para. 42; ICTY, *Prosecutor v. Milosević*, IT-02-54-T, Trial Chamber, *Decision on Prosecution's Request to Have Written Statements Admitted under Rule 92bis*, 21 March 2002, para. 25; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Trial Chamber II, *Decision Denying Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 bis*, 13 September 2006, para. 6.

rights.[28] Both the International Criminal Court ("ICC") and the European Court of Human Rights ("ECtHR") have previously recognised that the admission of evidence without cross-examination, albeit possible on an exceptional basis, has the potential to infringe on the fair trial rights of the Accused.[29]

22. The **two issues** concern the correct application of the test applied by the Trial Panel to justify a departure from the principle of orality and allow the admission of untested identification evidence. The **first issue** directly relates to Mr. Krasniqi's right to examine the witnesses against him. The **second issue** relates to the reasoning employed in the Decision to justify admitting evidence without cross-examination. Both issues thus significantly affect the fair and expeditious conduct of proceedings.

23. Furthermore, **both issues** significantly affect the outcome of the trial. The Decision admits highly prejudicial and untested allegations against Mr. Krasniqi, which form the basis for an Indictment allegation of personal participation. Had admission been declined, the evidence in support of this Indictment allegation could not be relied upon in determining the outcome of trial.

C. IMMEDIATE RESOLUTION BY THE APPEALS PANEL MAY MATERIALLY ADVANCE THE PROCEEDINGS

24. Immediate resolution of the **two issues** would materially advance the proceedings. If the Defence is correct that the contested identification evidence should

[28] ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18-2222, Appeals Chamber, *Judgment on the appeal of the Prosecution against Trial Chamber X's "Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules"* ("Al Hassan Decision"), 13 May 2022, paras 81-84. *See also, Prosecutor v. Ntaganda*, ICC-01/04-02/06-2242-Red, Trial Chamber VI, *Public Redacted Version of 'Decision on Certain Requests Related to the Admission of the Prior Recorded Testimony of Witness D-0080'*, 22 February 2018, para. 54.
[29] Al Hassan Decision, paras 81-84; ECtHR, *Al-Khawaja and Tahery v. the United Kingdom*, nos. 26766/05 and 22228/06, *Judgment*, 15 December 2011, para. 118; *Hümmer v. Germany*, no. 26171/07, *Judgment*, 19 July 2012, para. 38; *Lucà v. Italy*, no. 33354/96, *Judgment*, 27 February 2001, para. 39.

not have been admitted, then the proceedings are currently moving down the wrong path – a wrong path which will require the parties, participants and ultimately the Panel to devote time and resources, including extensive cross-examination of any further witnesses, to addressing an allegation which could be brought to an end now. Immediate resolution would avert the waste of these resources and allow all parties to focus on the real issues in the case. Failing to address the issues at this stage will leave open appealable issues, which may need to be addressed in future appeals including by protection of legality or by the Constitutional Court.

25. There is a need for an immediate resolution of both issues by the Appeals Chamber as further Rule 155 applications are anticipated. Permission to appeal has not yet been granted on any Rule 155 Decision in this case. Guidance from the Appeals Chamber on the resolution of such issues will materially advance proceedings.

V. CONCLUSION

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

Word count: 2,403

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