



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 October 2024

Language: English

Classification: Public

**Corrected Version of Decision on Joint Defence Request for Leave to Appeal
Decision of 18 September 2024 (F02598)**

Specialist Prosecutor

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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 September 2024, after hearing submissions from the Parties,¹ the Panel rendered an oral order allowing a certain line of questioning in the direct examination of W01129 (“Impugned Decision”).²
2. On 25 September 2024, the Defence teams for Hashim Thaçi, Kadri Veseli and Jakup Krasniqi (collectively, “Defence” and “Accused”), jointly filed a request for leave to appeal the Impugned Decision (“Request”).³
3. On 7 October 2024, the Specialist Prosecutor’s Office (“SPO”) responded to the Request (“Response”).⁴
4. On 14 October 2024, the Defence jointly replied to the Response (“Reply”).⁵

¹ Transcript of Hearing, 18 September 2024, p. 19970, line 13 to p. 19980, line 19, confidential.

² Transcript of Hearing, 18 September 2024, p. 19981, line 11 to p. 19983, line 3, confidential.

³ F02598, Specialist Counsel, *Joint Defence Request for Leave to Appeal Decision of 18 September 2024*, 25 September 2024, confidential (a public redacted version was filed on 4 October 2024, F02598/RED).

⁴ F02623, Specialist Prosecutor, *Prosecution Response to ‘Joint Defence Request for Leave to Appeal Decision of 18 September 2024’ (F02598)*, 7 October 2024, confidential (a public redacted version was filed on the same day, F02623/RED).

⁵ F02650, Specialist Counsel, *Joint Defence Reply to Prosecution Response to ‘Joint Defence Request for Leave to Appeal Decision of 18 September 2024’ (F02623)*, 14 October 2024, confidential.

II. SUBMISSIONS

5. The Defence requests leave to appeal the Impugned Decision in respect of the following four issues (collectively, “Issues”):

- 1) Whether the Trial Panel erred by rendering a decision that was inconsistent with a previous ruling when there had been no change in circumstance justifying a departure from the previous decision (“First Issue”);
- 2) Whether the Trial Panel erred in its Decision by conflating two separate evidential issues, resulting in errors of reasoning (“Second Issue”);
- 3) Whether the Trial Panel erred in its reasoning as to the purpose for which this evidence was admitted, affecting the safety of, and basis for, the Decision (“Third Issue”); and
- 4) Whether the Trial Panel erred in its Decision by incorrectly balancing the prejudice caused by the admission of the evidence in question (“Fourth Issue”).⁶

6. The Defence submits that the Issues satisfy the requirements for leave to appeal, as they: (i) arise from the Impugned Decision and do not merely disagree with it;⁷ (ii) are liable to significantly affect the fair and expeditious conduct of the proceedings;⁸ and (iii) require immediate resolution by the Court of Appeals Panel in order to materially advance proceedings.⁹

7. The SPO responds that the Request should be dismissed because it fails to meet the requirements set out in the Law and Rules.¹⁰ In particular, the SPO avers that the Issues are not appealable issues, as they merely disagree with the Impugned Decision.¹¹ In the alternative, the SPO argues that the Defence fails to

⁶ Request, paras 1-2, 28.

⁷ Request, paras 6, 7-24.

⁸ Request, paras 6, 25.

⁹ Request, paras 6, 26.

¹⁰ Response, paras 1, 22, 24.

¹¹ Response, paras 2, 4-18.

demonstrate that: (i) the Issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (ii) an immediate resolution by the Court of Appeals Panel would materially advance the proceedings.¹²

8. The Defence replies that the SPO misrepresents the Request and fails to substantiate its assertion that the Request merely disagrees with the Impugned Decision.¹³ In addition, the Defence: (i) reiterates that the Issues are appealable and should be certified;¹⁴ and (ii) avers that the prejudice arising from the Impugned Decision is clear and constitutes a significant impact on the proceedings.¹⁵

III. APPLICABLE LAW

9. 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.

10. The Panel incorporates by reference the applicable law on the legal standard for certification to appeal set out in past decisions.¹⁶

¹² Response, paras 2, 19-21.

¹³ Reply, para. 2.

¹⁴ Reply, paras 2, 6, 11, 15, 18, 22.

¹⁵ Reply, paras 19-20.

¹⁶ See 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, F00423, Panel, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect*, 8 November 2021, paras 13-21; F00372, Panel, *Decision on Haradinaj Defence's Application for Certification of F00328*, 15 October 2021, paras 15-17; 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.

IV. DISCUSSION

11. In the Impugned Decision, the Panel authorised the SPO to lead evidence from W01129 on uncharged allegations of the abduction of employees of a particular enterprise in 1998, including in respect of a named Serbian individual. In particular, the Panel found that the proposed line of questioning: (i) was relevant for the purpose of clarifying a given context and demonstrating a deliberate pattern of conduct; and (ii) would not cause undue prejudice to the Defence.¹⁷

A. FIRST ISSUE

12. The Defence submits that, by allowing evidence of a certain nature to be led with W01129 for the truth of its content, the Panel departed from one of its previous decisions without any justifiable or identifiable change in circumstances. In particular, the Defence argues that the Panel had, in the past, refused admission of evidence of the same nature for the truth of its content.¹⁸

13. The SPO responds that the Defence does not identify a clear and distinct issue arising from the Decision, as it: (i) reiterates arguments already raised before the Panel; (ii) mischaracterises the Impugned Decision as departing from a previous ruling of the Panel; and (iii) merely disagrees with its findings.¹⁹

14. The Defence replies that it is precisely the issue of the Panel's departure from its previous ruling in a materially similar situation that constitutes a discrete issue arising from the Impugned Decision, and reiterates the submissions made in the Request.²⁰

¹⁷ Transcript of Hearing, 18 September 2024, p. 19981, line 11 to p. 19983, line 3, confidential.

¹⁸ Request, para. 7.

¹⁹ Response, paras 4-7.

²⁰ Reply, paras 3-6.

15. The Panel recalls that, in the Impugned Decision, it explicitly considered whether the SPO should be allowed to elicit evidence from W01129 or tender documents related to the alleged incident to prove the truth of the facts asserted therein,²¹ precisely in light of the Defence's submissions on this point.²² The Panel was ultimately satisfied that, considering the specific circumstances before it and recalling its findings in another previous decision,²³ the SPO's proposed line of questioning was relevant for the purposes of clarifying a given context and demonstrating a deliberate pattern of conduct.²⁴ Therefore, the Panel is of the view that the First Issue merely disagrees with the outcome of the Panel's reasoning as illustrated above, by reiterating the same arguments made prior to the Impugned Decision.²⁵ In light of the above, the Panel finds that the Defence has failed to establish that the First Issue constitutes an issue emanating from the Impugned Decision.

16. Accordingly, the remaining requirements 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 therefore rejected.

²¹ Transcript of Hearing, 18 September 2024, p. 19981, lines 17-21, confidential.

²² See, e.g., Transcript of Hearing, 18 September 2024, p. 19971, lines 2-7; p. 19973, line 11 to p. 19974, line 5, confidential.

²³ Compare Transcript of Hearing, 18 September 2024, p. 19982, lines 2-5, confidential *with wording nearly identical to* F02393, Panel, *Decision on Selimi Defence Motion to Exclude Evidence of W04846* ("Decision on Exclusion of Evidence"), 19 June 2024, confidential, para. 16 (a public redacted version was filed on the same day, F02393/RED). See similarly F02464, Panel, *Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W00686, W02765, W04491, W04694, W04782, W04788, W04820, and W04837 pursuant to Rule 153*, 22 July 2024, confidential (a public redacted version was filed on the same day, F02464/RED), para. 57.

²⁴ Transcript of Hearing, 18 September 2024, p. 19982, lines 6-9, confidential.

²⁵ Compare Transcript of Hearing, 18 September 2024, p. 19971, lines 2-7; p. 19973, lines 13-24, confidential *with* Request, para. 7.

B. SECOND ISSUE

17. The Defence contends that, in the Impugned Decision, the Panel conflated two separate evidential issues, namely: (i) the abduction of a Serbian individual (“First Incident”); and (ii) the abduction of employees of a certain company (“Second Incident”).²⁶ The Defence avers that, by approaching the First Incident as forming part of the Second one, the Panel failed to consider the specific evidential nature and procedural history of the Second Incident, as well as the distinct objections raised by the Defence.²⁷

18. The SPO responds that the Impugned Decision clearly shows its consideration of both incidents and, therefore, the Defence: (i) mischaracterises the Impugned Decision; (ii) does not identify any specific errors in the Panel’s reasoning; and (iii) fails to identify a concrete and distinct appealable issue.²⁸

19. The Defence replies that, contrary to the SPO’s submissions, there is no reasoning in the Impugned Decision showing consideration of both incidents. In addition, the Defence argues that the Panel, when authorising the eliciting of evidence on uncharged incidents, should exercise special caution and consider the specifics of the allegations sought to be adduced.²⁹

20. The Panel recalls that, in the Impugned Decision, it considered the SPO’s proposed line of questioning on “the abduction of [employees of a company] in 1998, including [a named Serbian individual]”,³⁰ encompassing both the First and the Second Incident in a broader context. In doing so, the Panel assessed all the relevant elements surrounding each and both incidents. The Panel is therefore of the view that the Second Issue misrepresents the Impugned Decision where it states that the Panel approached the First Incident as forming part of the Second

²⁶ Request, para. 8.

²⁷ Request, paras 9-13.

²⁸ Response, paras 8-11.

²⁹ Reply, paras 8-10.

³⁰ Transcript of Hearing, 18 September 2024, p. 19981, lines 11-13 and p. 19983, lines 1-2, confidential.

Incident, thus failing to consider their distinct circumstances. The Panel further considers that the Second Issue merely disagrees with the Impugned Decision and, especially, with the outcome of the Panel's consideration of the issues and objections already before it. In light of the above, the Panel finds that the Defence has failed to establish that the Second Issue constitutes an issue emanating from the Impugned Decision.

21. Accordingly, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed in relation to the Second Issue. The request for certification to appeal the Second Issue is therefore rejected.

C. THIRD ISSUE

22. The Defence submits that the Panel erred in its reasoning as to the admission of evidence led from W01129 for the purpose of clarifying a given context or to demonstrate a deliberate pattern of conduct.³¹ The Defence contests, in particular, that: (i) the Panel failed to specify which context required clarifying;³² and (ii) the evidence led provides no reliable evidence as to who was responsible for the incidents and, therefore, it cannot be used to demonstrate a deliberate pattern of conduct and establish relevance.³³

23. The SPO responds that the Third Issue is does not constitute an appealable issue, as the Defence's claims are baseless, speculative and premature.³⁴

24. The Defence replies that the Response fails to address the core of the issue raised in the Request, and reiterates the submissions made therein.³⁵

³¹ Request, para. 14.

³² Request, para. 15.

³³ Request, paras 18-20.

³⁴ Response, paras 12-14.

³⁵ Reply, paras 12-14.

25. The Panel recalls that the Impugned Decision agreed with the Defence that the abductions of the individuals concerned are not facts pleaded in the Indictment, and therefore found that any evidence led in relation to them cannot be relied upon directly as a basis to establish the Accused's guilt in relation to these incidents.³⁶ Indeed, the Panel, in allowing the SPO to lead evidence from W01129 on that incident narrowed the permissible use of the evidence to clarifying a given context or demonstrating a deliberate pattern of conduct.³⁷ The Panel is of the view that the Defence misrepresents the Impugned Decision. First, the Panel considers that, from the Impugned Decision and from the procedural and evidential history of the relevant incidents also noted by the Parties in their submissions,³⁸ it is clear that the Panel was referring to the context in which the alleged crimes pleaded in the Indictment are said to have occurred. Second, insofar as the Defence asserts that the Panel's finding of relevance was flawed because no reliable evidence was tendered on who was responsible for these incidents, the Panel considers that these factors could not be taken into consideration for the purpose of allowing the evidence to be led and will be matters for the Panel to assess at the end of these proceedings in light of all relevant evidence. The Panel therefore considers that the Defence misapprehends the Impugned Decision and expresses mere disagreement with the findings therein. In light of the above, the Panel finds that the Defence has failed to establish that the Third Issue constitutes an issue emanating from the Impugned Decision.

26. Accordingly, the remaining requirements 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 therefore rejected.

³⁶ Transcript of Hearing, 18 September 2024, p. 19981, line 22 to p. 19982, line 1, confidential.

³⁷ Transcript of Hearing, 18 September 2024, p. 19982, lines 6-9; p. 19983, lines 1-2, confidential.

³⁸ See, e.g., Transcript of Hearing, 18 September 2024, p. 19971, lines 2-7; p. 19973, lines 11-24; p. 19977, line 15 to p. 19978, line 15, confidential.

D. FOURTH ISSUE

27. The Defence argues that the Impugned Decision incorrectly balanced the prejudice caused by admitting evidence of the Second Incident,³⁹ as the Panel, in its assessment, failed to consider: (i) the nature and substance of the evidence that the SPO sought to lead, which amounted to multiple hearsay; (ii) that the Defence was unable to effectively cross-examine the witness;⁴⁰ (iii) that the Defence cannot be fairly required or expected to investigate an incident of which it had no notice and lacking proper evidential foundation and factual clarity.⁴¹

28. The SPO responds that the Fourth Issue does not constitute an appealable issue, as the Defence merely expresses disagreement with the Panel's assessment of prejudicial effect and mischaracterises the Impugned Decision.⁴²

29. The Defence replies that the Response mischaracterises the Request, which identifies clear errors in the Panel's assessment of prejudice. The Defence further reiterates that the Impugned Decision impermissibly shifted the burden of investigating the relevant incidents on the Defence.⁴³

30. In the Impugned Decision, the Panel assessed whether allowing the SPO to lead evidence on the abductions would be unduly prejudicial to the Defence.⁴⁴ Therein, the Panel considered: (i) whether the Defence was on notice of the proposed line of questioning;⁴⁵ and (ii) whether the Defence would have a full and fair opportunity to cross-examine the witness on the relevant incidents.⁴⁶ In finding that no undue prejudice would be caused to the Defence by allowing the evidence to be led, the Panel noted that the Defence could conduct additional

³⁹ Request, para. 21.

⁴⁰ Request, paras 22-23.

⁴¹ Request, para. 24.

⁴² Response, paras 15-17.

⁴³ Reply, paras 16-17.

⁴⁴ Transcript of Hearing, 18 September 2024, p. 19982, lines 10-25, confidential.

⁴⁵ Transcript of Hearing, 18 September 2024, p. 19982, lines 10-14, confidential.

⁴⁶ Transcript of Hearing, 18 September 2024, p. 19982, lines 15-17, confidential.

investigations and seek to re-call W01129, if necessary.⁴⁷ The Panel is of the view that the Fourth Issue misrepresents the Impugned Decision where it claims that the Panel: (i) failed to consider any of the above-mentioned factors in its assessment of prejudice; and (ii) required or expected the Defence to investigate the incidents. On the matter of investigations, the Panel notes that it merely stated that the Defence was entitled to conduct such investigations if it so wishes and to seek to recall the witness should it come in possession of new, relevant, material. The Fourth Issue merely disagrees with the outcome of the Panel's assessment and attempts to re-litigate the issue of prejudice, by reiterating the same objections made prior to the Impugned Decision.⁴⁸ In light of the above, the Panel finds that the Defence has failed to establish that the Fourth Issue constitutes an issue emanating from the Impugned Decision.

31. Accordingly, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed in relation to the Fourth Issue. The request for certification to appeal the Fourth Issue is therefore rejected.

V. CLASSIFICATION

32. The Panel notes that the Reply was filed confidentially. The Panel directs the Defence to file a public redacted version of the Reply, or request reclassification thereof, by **Tuesday, 22 October 2024**.

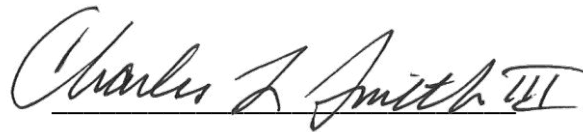
⁴⁷ Transcript of Hearing, 18 September 2024, p. 19982, lines 21-25, confidential.

⁴⁸ *Compare* Transcript of Hearing, 18 September 2024, p. 19970, line 19 to p. 19971, line 1; p. 19972, lines 3-11, line 14 to p. 19973, line 9; p. 19974, line 6 to p. 19975, line 11, confidential *with* Request, paras 21-24.

VI. DISPOSITION

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

- a) **REJECTS** the Request; and
- b) **DIRECTS** the Defence to file a public redacted version of the Reply, or request reclassification thereof, by **Tuesday, 22 October 2024**.



Judge Charles L. Smith, III

Presiding Judge

Dated this Tuesday, 15 October 2024

At The Hague, the Netherlands.

Explanatory note:

In paragraph 2, the reference to “Rexhep Selimi” has been deleted.