



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2023-10
Specialist Prosecutor v. Sabit Januzi, Ismet Bahtijari and Haxhi Shala

Before: Trial Panel I
Judge Mappie Veldt-Foglia, Presiding Judge
Judge Roland Dekkers
Judge Gilbert Bitti
Judge Vladimir Mikula, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

Date: 8 November 2024

Language: English

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Prosecution request for reconsideration of Decision F00580

Specialist Prosecutor's Office

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Toby Cadman

I. INTRODUCTION

1. Pursuant to Rule 79 of the Rules,¹ the Specialist Prosecutor's Office ('SPO') requests that the Panel reconsider the Decision² dismissing its Request³ as being out of time. The Decision noted that the SPO had made no submissions regarding the timing of the filing and, on that basis, determined that good cause for extension of the time limit had not been shown.⁴ The reason that no submissions on timing had been made was because the SPO did not, in good faith, consider the 15 October 2024 deadline to have applied to the Request. As outlined below, the standard for re-consideration is met in this instance.

II. SUBMISSIONS

A. THE TEST FOR RECONSIDERATION IS MET

2. Rule 79 permits reconsideration where there has been a clear error of reasoning or reconsideration is necessary to avoid injustice. Both of these limbs are met.

3. As a preliminary matter, the SPO fully accepts the Panel's discretionary authority to dismiss submissions which are filed out of time. However, this discretion should be exercised in a manner which takes account of relevant context and does not result in prejudice or unfairness.

4. Relevant in this instance are *inter alia* the facts that: (i) as outlined below, the SPO's failure to file the Request by 15 October 2024 was a good faith misunderstanding

¹ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

² Decision on the Specialist Prosecutor's motion for admission of evidence of Witness 1 and W04891 pursuant to Rule 154, KSC-BC-2023-10/F00580, 5 November 2024 ('Decision').

³ Prosecution motion for admission of evidence of Witness 1 and W04891 pursuant to Rule 154, KSC-BC-2023-10/F00540, 18 October 2024 ('Request').

⁴ See Decision, KSC-BC-2023-10/F00580, para.16.

regarding the scope of the Oral Order;⁵ (ii) at no time previously in these proceedings has the Trial Panel had cause to caution the SPO regarding the timeliness of submissions, nor has the SPO made a late filing; (iii) the Request was unopposed by two Accused, and the one Accused who did oppose it did not do so on the basis of timeliness; (iv) no prejudice arises from the timing of the Request, noting that the testimony of the relevant witnesses is not scheduled to take place until 9 December 2024 at the earliest (that is, more than 7 weeks after the filing of the Request);⁶ and (v) testifying fully *viva voce*, as opposed to pursuant to Rule 154, elongates the proceedings and places a greater burden and strain on the two witnesses in question.

i. The SPO's understanding of the scope of the Oral Order was reasonable and in good faith

5. Prior to the Decision, there had been no indication in these proceedings which would have led the SPO to conclude that the intended scope of the Oral Order encompassed any request to be made pursuant to Rule 154. On the contrary, as set out below, in every relevant submission, discussion, or decision, the Rule 154 applications had either been treated as connected to witness testimony or been treated as a distinct *sui generis* matter.⁷

6. While it may be considered a limited exception to the principle of orality, Rule 154 itself is intrinsically tied to, dependent upon, and forms part of the oral testimony of a witness. The admission of any statement tendered pursuant to Rule 154 is pre-

⁵ Transcript (Trial Preparation Conference), 8 October 2024, p.370, lines 11-22 ('Oral Order').

⁶ At the time the Request was submitted no formal decision had been taken on the commencement date of trial. Nonetheless, having regard to the then likely imminent start of trial and while not understanding there to be any set deadline in place, the SPO's intention in filing the Request when it did was in fact to do so in a sufficiently timely manner so as to facilitate adjudication.

⁷ It is noted in this regard that the Decision on the submission and admissibility on non-oral evidence, KSC-BC-2023-10/F00583, 6 November 2024 ('Non-Oral Evidence Decision') in these proceedings was only issued *after* both the Request and even the Decision had been filed. Even in the Non-Oral Evidence Decision a separate deadline for Rules 153-155 motions is provided for from any motion for admission of documentary evidence, thereby treating them as a separate category for deadline purposes.

conditioned upon a witness's confirmation under oath that the statement reflects what the witness would still say if questioned.

7. Consistent with this, in the Trial Preparation Decision, in the section entitled '(iii) Presentation of (Witness) Evidence by the Parties', the Panel expressly encouraged the Parties to consider making use of Rule 154, noting its usefulness in expediting and streamlining the proceedings.⁸ In the section of the Trial Preparation Decision entitled 'Non-Oral Evidence', there was no mention of Rule 154 applications.⁹

8. Based on the structure of and distinctions drawn in the Trial Preparation Decision, the SPO, in its own Trial Preparation Submissions, noticed its intention to request admission of its witnesses' SPO and/or other prior statements, pursuant to Rule 154, under the heading entitled 'PRESENTATION OF (WITNESS) EVIDENCE'.¹⁰ No reference to Rule 154 applications was made in the section of the SPO's Trial Preparation Submissions entitled 'PRESENTATION OF DOCUMENTARY EVIDENCE'.¹¹

9. This distinction was reinforced by the Panel during the 8 October Trial Preparation Conference.¹² Further, during the discussion of the agenda item referred to by the Panel as 'non-oral evidence',¹³ the SPO forecast the two separate motions that it would¹⁴ and eventually did make in that regard. The SPO then expressly differentiated its planned Rule 154 filing, noting, for planning purposes only, that it would file an additional motion which was not 'directly responsive' to the issue of non-oral evidence. This was fully

⁸ Decision setting the dates for trial preparation conferences, requesting submissions and on related matters, KSC-BC-2023-10/F00479, 24 September 2024 ('Trial Preparation Decision'), para.17.

⁹ Trial Preparation Decision, KSC-BC-2023-10/F00479, para.19

¹⁰ Prosecution submissions in advance of trial preparation conferences, KSC-BC-2023-10/F00491, 1 October 2024, Confidential ('Trial Preparation Submissions'), para.17.

¹¹ Trial Preparation Submissions, KSC-BC-2023-10/F00491, paras 29-33.

¹² Transcript (Trial Preparation Conference), 8 October 2024, p.332.

¹³ Transcript (Trial Preparation Conference), 8 October 2024, p.346.

¹⁴ Transcript (Trial Preparation Conference), 8 October 2024, p.347.

consistent with the treatment of Rule 154 in the Trial Preparation Submissions. There was no further correction, clarification or discussion on this point.¹⁵

10. The Oral Order made no mention of Rule 154 applications, and – despite the fact that Rule 154 had, so far in the proceedings, only been discussed outside of the framework of ‘non-oral evidence’ – did not in any manner indicate that this ruling on non-oral evidence was intended to encompass any such Rule 154 applications.

11. Moreover, (i) in the email direction from the Panel received through the Court Management Unit on 23 October 2024 entitled ‘[Case 10] Order shortening time limits re F00540’, there was no indication that the Panel considered the Request to be made out of time; and (ii) the Defence, in their responses to the Request, did not raise the 15 October deadline or the question of timeliness as being a relevant consideration.

12. As such, it was an error of reasoning for the Panel not to take the context outlined above into consideration. In particular, in circumstances where the Trial Preparation Decision itself, and all subsequent relevant submissions, had specifically addressed Rule 154 applications outside of the framework on ‘non-oral evidence’, it was both an error of reasoning and results in injustice for the Panel to find in the Decision, as it implicitly did, that (i) the SPO should – despite all indications to the contrary – have understood the Oral Order to encompass Rule 154 applications, and/or (ii) had deliberately chosen, without explanation, to disregard a Panel deadline.

13. Moreover, in these circumstances, and having regard to the lack of any possible prejudice arising from the timing of the Request, it was both disproportionate and unjust to dismiss it as untimely. The Panel should not both put the victim witnesses concerned through an elongated ordeal of fully *viva voce* testimony,¹⁶ and deprive these proceedings

¹⁵ Transcript (Trial Preparation Conference), 8 October 2024, p.348.

¹⁶ The Decision made no reference to the consequences of such an action on the witnesses.

of the recognised benefits associated with Rule 154 evidence, without having first considered the Request on its merits.

III. CONCLUSION

14. For the foregoing reasons, the SPO respectfully submits that the Panel reconsider the Decision, and consider the merits of the Request.

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Kimberly P. West

Specialist Prosecutor

Friday, 8 November 2024

At The Hague, the Netherlands