

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 Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi
Specialist Counsel for Kadri Veseli
Specialist Counsel for Rexhep Selimi
Specialist Counsel for Jakup Krasniqi

Date: 11 November 2024

Language: English

Classification: Public

Joint Defence Request for Leave to Appeal Third Oral Order of 31 October 2024

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I. INTRODUCTION

1. In accordance with Article 45(2) of the Law¹ and Rule 77(2) of the Rules,² the Defence for Messrs. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi (“Defence”) hereby files this request for leave to appeal the Third Oral Order of 31 October 2024 to admit Exhibit V00008 (Extract of KSC-BC-2020-06-U008-1602-U008-1636)³ (“Impugned Decision”).
2. The Defence submits the following **two issues** for certification, each of which contributed to the Impugned Decision being fundamentally flawed:
 - a. **First issue:** Whether the Trial Panel erred by rendering a decision that was inconsistent with a previous ruling when there had been no change in circumstances justifying the departure from the previous decision.
 - b. **Second Issue:** Whether the Trial Panel erred in its Decision by determining that V00008 satisfied the authenticity and probative value requirements of Rule 138(1) to the requisite *prima facie standard*.

II. APPLICABLE LAW

3. Pursuant to Article 45(2) and Rule 77(2), a right to appeal only arises if the standard of certification set forth herein has been met.
4. Rule 77(2) states 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.⁴

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (“Law”).

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (“Rules”).

³ KSC-BC-2020-06, Official Transcript of Proceedings, Thursday 31 October 2024, starting on page 21611 (“31 October 2024 Transcript”) Third Oral Order, p.21627 line 7 to p.21628 line 19.

⁴ Rules, Rule 77.

5. The Defence recalls the legal test set for certification of appeal under Rule 77(2) has been developed in prior decisions issued by this Court, which are incorporated herein by reference.⁵

III. SUBMISSIONS

6. The two issues satisfy the requirements for leave to appeal. They arise from the Impugned Decision, do not merely disagree with said Decision, are liable to significantly affect the fair and expeditious conduct of the proceedings and require immediate resolution by the Appeals Chamber in order to materially advance the proceedings.

A. The Issue Arises from the Impugned Decision

i. First issue

7. The SPO originally sought to tender evidence about the KLA's policy of arresting and detaining people considered as spies, collaborators or traitors to the KLA cause by way of media article (U008-1602-U008-1636, p.U008-1625 and its translation U008-1625-ET), (the "Media Article") through a Bar Table Motion.⁶
8. The Media Article has no author but cites its source of information as the "KLA Information Directorate."⁷ The Defence objected to the admission of the Media Article on the basis that the document has no indication of authorship, and

⁵ F01678, Panel, *Decision on Veseli and Krasniqi Defence Request for Certification to Appeal the Second Decision on Specialist Prosecutor's Bar Table Motion*, 17 July 2023, public, paras 9-11; F01237, Panel, *Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses*, 30 January 2023, paras 7-8; F00172, Panel, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, paras 6-7, 9-17. See also, KSC-BC-2020-07, F00423, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect*, 8 November 2021, paras 13-21; F00372, *Decision on Haradinaj Defence's Application for Certification of F00328*, 15 October 2021, paras 15-17; F00484, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021, paras 4-14.

⁶ F01268, Specialist Prosecutor, *Prosecution Application for Admission of Material through the Bar Table*, 8 February 2023, with Annexes 1-4, 6, 7, confidential, and with Annexes 5, 8.

⁷ U008-1625-U008-1625 ET (V00008).

argued that the Media Article should be properly tendered through a witness related to the Llap zone,⁸ who would be able to speak to the source of the information contained in the Media Article.

9. In its Third Decision on Specialist Prosecutor's Bar Table Motion on 27 July 2023, (the "27 July 2023 Decision"),⁹ the Panel refused admission of the Media Article on the basis that it was not satisfied that the SPO had not established the *prima facie* probative value of the Media Article. The reason being that "it is unclear from where the information in this item originates and it would therefore benefit from further contextualisation by a witness."¹⁰
10. On 24 October 2024, W04758 was subject to cross-examination and questioning from Counsel for the Victims, during which victims counsel sought the admission of the Media Article.¹¹ Counsel for the Victims made it clear that the reason he was tendering the Media Article for admission was:

"[T]he fact that an organisation called the information directorate of the KLA was on my case – putting out very serious lies about [the victim named in the Media Article] and there is a proper basis for saying that they were misrepresenting the position because as [W04758] has testified, the internal process of the KLA had given [the victim] a clean bill of health. So I'm interested not in the source of it. I'm interested in the fact that it was being put into the public domain."¹²

⁸ F01387, Specialist Defence Counsel, *Joint Defence Response to Prosecution Application for Admission of Material through the Bar Table*, 21 March 2023, with Annexs 1-8, at Annex 1, row 2U, p.75.

⁹ F01705, Panel, *Third Decision on Specialist Prosecutor's Bar Table Motion*, 27 July 2023 ("27 July 2023 Decision").

¹⁰ 27 July 2023 Decision, at para. 33.

¹¹ KSC-BC-2020-06, Official Transcript of Proceedings, Thursday 24 October 2024, starting on page 21076 ("24 October 2024 Transcript"), p.22104 line 8 to p.21122 line 9.

¹² 24 October 2024 Transcript, p.21121 lines 3-14.

11. Counsel for Messrs Hashim Thaçi and Kadri Veseli objected on the basis, *inter alia*, that W04758 made it clear in his evidence that he had no knowledge of the origins of the information contained in the media article. W04758 is quoted in the transcript as saying, “first of all, there was no information directorate as it is mentioned here”¹³ and “it is specified here in the title [of the Media Article] the subzone of the Llap operative zone. We did not have such a directorate within the Kosovo Liberation Army.”¹⁴ W04758 made it clear that he cannot comment on where the press release referred to in the Media Article originated from.¹⁵
12. The item was marked for identification as V00008.¹⁶ A week later, on 31 October 2024, it was admitted into evidence by the Panel.
13. The Panel considered that it was relevant that “a press release by an organisation purporting to be the information directorate of the KLA published information about a victim allegedly detained at a crime site named in the indictment shortly after his alleged detention.”¹⁷ The Panel went on to determine that it was satisfied of the authenticity of the Media Article as it is “dated, it was originally published in *Bujku*, and bears all relevant markings of its origin.”¹⁸ The Panel further determined, regarding probative value, that since its decision of 27 July 2023, the person named in the Media Article “has been identified as allegedly being a victim participating in the proceedings,” and W04758 confirmed that “a person with a similar name as the person mentioned in the document was detained by the KLA.”¹⁹

¹³ 24 October 2024 Transcript, p.21110 lines 16-17.

¹⁴ 24 October 2024 Transcript, p.21112 lines 16-25 and p.21113 lines 1-9.

¹⁵ 24 October 2024 Transcript, p. 21110 lines 14 -25, lines 1-5.

¹⁶ 24 October 2024 Transcript, p.21122 line 7 to line 9.

¹⁷ 31 October 2024 Transcript, p.21627 lines 14-19.

¹⁸ 31 October 2024 Transcript, p.21627 lines 20-22.

¹⁹ 31 October 2024 Transcript, p.21628 lines 1-12.

14. The Panel departed from its decision of 27 July 2023 without any justifiable change in circumstances justifying a departure from the previous decision. The fact that W04758 confirmed that a person with a similar name as the person mentioned in the Media Article was detained by the KLA does not cure the deficiency identified by the panel in its decision of 27 July 2023, namely that the source and author of the information in the Media Article has not been established.
15. Further, despite being subjected to a series of clear and repeated questions by Counsel for the Victims, W04758 was unable to contextualise the information contained in the Media Article. Accordingly, there has not been any meaningful change in the evidence as to the source of information contained in the Media Article.
16. The Trial Panel fell into error by departing from an earlier decision without any change in circumstances justifying such departure.

i. Second Issue

17. The Panel erred in determining that the Media Article satisfied the authenticity and probative value requirements of Rule 138(1) to the requisite *prima facie* standard.
18. The *prima facie* standard for admission is set out in the Panel's Decision on Specialist Prosecutor's Bar Table Motion dated 31 March 2023:²⁰
 - a. *Relevance*. Evidence is deemed to be relevant if it is connected, directly or indirectly, to elements of the offence(s) or mode(s) of liability pleaded in the indictment or other facts or circumstances material to the case of the Parties.

²⁰ F01409, Panel, *Decision on Specialist Prosecutor's Bar Table Motion*, 31 March 2023, paras. 9-13.

- b. *Authenticity*. Evidence is deemed to be authentic if it is what it professes to be in origin or authorship. Absolute proof of authenticity is not required for admissibility, but is a matter for the weight of the evidence to be given by the Panel in its deliberations. It is for the tendering Party to provide indicators of a proposed exhibit's authenticity, where that document does not, on its face, contain sufficient indicators of authenticity. A *prima facie* case of authenticity must be made out in order for evidence to be deemed reliable and so that it can be admitted.
 - c. *Probative Value*. Evidence has probative value when it tends to prove or disprove an issue which is relevant to the case. Probative value is determined by two primary factors: (i) the *prima facie* reliability of the tendered evidence and (ii) the measure by which that evidence is likely to influence the determination of a particular issue in dispute [...] It is for the tendering Party to ensure that the evidence placed before the Panel is capable of supporting a reasonable belief regarding the purpose for which it is being offered.
 - d. *Prejudice*. Evidence may be excluded at any stage of the proceedings if its probative value is outweighed by its prejudicial effect. The Panel notes that Rule 138(1) does not require that the prejudicial effect substantially outweighs the probative value.
19. The Panel erred in assessment of authenticity. The Media Article was tendered and admitted on the basis that it is relevant to the "fact" that an organisation purporting to be the information directorate of the KLA published information about a victim. However, the tendering party did not make out a *prima facie* case of authenticity in relation to the existence (or lack thereof) of any press release.

20. In the Impugned Decision, the Panel focused on markers of authenticity which relate to the document itself, which may normally be sufficient. However, in the case of this Media Article, where it is being admitted as proof of the existence of an underlying press release, the Panel rightly raised previous concerns regarding the authenticity of the press release itself. It is not sufficient for the purposes of *prima facie* reliability that this Media Article was published in a newspaper.
 21. Additionally, and for all these reasons, the Media Article (V00008) has no probative value. It cannot be relied on to prove or disprove the issue of whether the underlying press release existed or whether it was authored or published by the KLA information directorate.
 22. More concerning, Counsel for Victims asserted in his submissions, and the Panel accepted, that it is his case that the authors of the Media Article – purported to be the information directorate of the KLA – was “publishing” lies about a victim. This is a serious accusation and it is obvious that those Accused in this trial should be able to confront this case against them by challenging the source of the purported information.
 23. Critically, however, no evidence has been put before the court which would tend to prove the authorship of this Media Article, or the alleged press release that the Media Article claims it was re-printing.
 24. Where the foundational sources of a Media Article which purports to be re-printing a press release from the KLA has not been established by the party tendering it as evidence, it does not meet the *prima facie* standard for admission or probative value and should not be admitted for its facts.
- B. The Issues Significantly Affects the Fair and Expeditious Conduct of the Proceedings**

25. The Impugned Decision departs from the established standard set by the Panel in respect of admissibility pursuant to Rule 138(1).
26. The parties are entitled to rely on previous reasoning in respect of *prima facie* authenticity and probative value. The Impugned Decision overturns a previous decision of the Panel in circumstances where no witness has given any additional evidence as to the authenticity or probative value of the information contained in the Media Article.
27. Given the relevance of media articles in general within this trial, and the specific allegations which have been made in relation to the information contained in this Media Article, it is critical to the fairness of the trial process that there is a clear ruling on the minimum standards of authenticity and probative value which should be applied when information within a media article is being relied on to prove a fact.

C. An Immediate Resolution by the Appeals Chambers Will Materially Advance the Proceedings

28. It follows 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. Moreover, an authoritative determination from the Court of Appeals Panel would provide clarity in respect of the test according to which evidence may be admitted and used against the Accused in deliberations.

IV. CLASSIFICATION

29. This filing is filed confidentially as it refers to confidential information heard in closed proceedings.

V. CONCLUSION

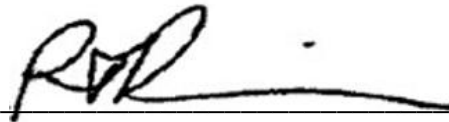
30. In light of the foregoing, the Defence respectfully seeks leave to appeal the **two issues** identified above.

Word Count: 2408

Monday, 11 November 2024,
The Hague, The Netherlands



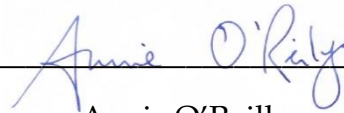
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