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

Date: 13 November 2024

Language: English

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Joint Defence Request

for the Trial Panel to take Measures to Ensure the Appearance of Impartiality of the Proceedings and Avoid Prejudice to the Defence

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I. INTRODUCTION

1. It is fundamental that a Trial Panel must not only exercise its functions impartially but must also ensure the appearance of impartiality.[1] The unconstrained judicial questioning of witnesses, throughout these proceedings and in particular during the evidentiary block 21 October 2024 – 7 November 2024, is imperilling the appearance of impartiality in these proceedings and causing identifiable prejudice to the Defence. As explained below, judicial questioning is advancing the Prosecution case or a judicial case akin to it, taking the role that would normally be played by Prosecution re-examination and failing to clarify or explore any exculpatory information. The Defence for Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi ("Defence") request the Trial Panel to take steps to ensure the appearance of impartiality and to limit prejudice to the Defence during judicial questioning.

2. 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 refers to decisions which bear the same classification. A public redacted version will be filed.

II. PROCEDURAL HISTORY

3. On 30 November 2022, the President assigned this case to Trial Panel II.

4. Trial commenced on 3 April 2023 and the first witness was called on 11 April 2023. Issues about the nature and scope of judicial questioning were raised promptly

[1] Article 4(1) of the Code of Judicial Ethics for Judges Appointed to the Roster of International Judges of the Kosovo Specialist Chambers.

by the Defence and, on 20 April 2023, the Trial Panel gave an oral ruling which asserted a 'broad and unconstrained' scope for judicial questioning.[2]

5. On 5 July 2023, the Appeals Chamber dismissed the Defence appeal against this oral ruling, holding, as developed below, that Judges may put any question at any time "provided that such questioning does not lead to the apprehension of bias, suffering of prejudice, or otherwise encroach upon the rights of the Accused."[3]

6. On 19 March 2024, ruling upon an objection from the Defence concerning the Judges' use of Rule 102(3) documents, the Trial Panel held that it would "endeavour to give notice of that fact to the parties prior to the commencement of questioning" when it puts documents to a witness that are from the public domain or disclosed to the Defence pursuant to Rule 102(3).[4] On 5 June 2024, the Trial Panel extended this ruling to Rule 103 material also.

7. On 8 May 2024, upon the Prosecution's request, the Trial Panel admitted four documents which had only been used during judicial questioning[5] and rejected the Defence submission that allowing the Prosecution to tender documents used during judicial questioning affected the appearance of impartiality.[6] The Trial Panel also admitted another document on 27 November 2023 that was tendered by the SPO following the conclusion of W04769's testimony, yet that document was used only during judicial questioning of that witness.[7]

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[2] KSC-BC-2020-06, Transcript of Hearing, 20 April 2023, pp. 3263-3269.
[3] KSC-BC-2020-06, IA028/F00011, Appeals Panel, *Decision on Thaçi, Selimi and Krasniqi Appeal against Oral Order on Trial Panel Questioning* ("Appeal Decision"), 4 July 2023, confidential, para. 32 ("Decision of 4 July 2023").
[4] KSC-BC-2020-06, In Court – Oral Order, *Order on Defence Objection to the Use by Judges of Documents Disclosed to Defence Pursuant to Rule 102(3)*, 19 March 2024, public.
[5] KSC-BC-2020-06, F02293, Trial Panel, *Decision on Prosecution Request for Admission of Documents Shown to W04739*, confidential, 8 May 2024.
[6] Ibid., para. 11.
[7] KSC-BC-2020-06, F01963, Trial Panel, *Decision on Admission of Documents Shown to W04769*, public, 27 November 2023.

8. On 1st July 2024, following Defence objections about specific judicial questions, the Trial Panel emphasised that speaking objections to questions put by other parties and the Judges are not permitted.[8]

III. APPLICABLE LAW

9. Article 21(2) of the Law provides that the Accused "shall be entitled to a fair and public hearing". Article 40(2) of the Law provides in part that "the Trial Panel shall ensure that a trial is fair and expeditious […]".

10. Further, Article 3(2) of the Law provides that the Specialist Chambers "shall adjudicate and function in accordance with (a) the Constitution of the Republic of Kosovo […] (e) international human rights law which sets criminal justice standards including the European Convention on Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, as given superiority over domestic laws by Article 22 of the Constitution."

11. Article 6(1) of the European Convention on Human Rights provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

12. Article 4(1) of the Code of Judicial Ethics for Judges appointed to the roster of international judges of the Kosovo Specialist Chambers provides that "Judges shall exercise their functions impartially and ensure the appearance of impartiality."

[8] KSC-BC-2020-06, Transcript of Hearing, 1 July 2024, p. 17326, lines 19-21.

13. Rule 127(3) of the Rules provides in part that "A Judge may at any stage put any question to the witness." The Appeal Decision held that a Trial Panel has "broad discretionary power to put to witnesses any questions […], provided that such questioning does not lead to the apprehension of bias, suffering of prejudice, or otherwise encroach upon the rights of the accused".[9] It continued that "the Trial Panel is not constrained to questioning witnesses on facts and issues already examined by the parties, provided that no party suffers prejudice and that the rights of the Accused are respected, in accordance with Article 21 of the Law".[10] The Appeal Decision thus recognised limitations on judicial questioning, specifically that it should not lead to the apprehension of bias, suffering of prejudice or encroach on the rights of the accused. This is not an exhaustive list of the limits on judicial questioning. Additionally, the Panel is bound by over-arching principles, including that questioning that is argumentative, misleading, offensive, irrelevant or constitutes a misstatement of fact or evidence are not permitted.

14. The apprehension of bias has been elucidated in other international and national cases. International courts have consistently held that an unacceptable appearance of bias exists where the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[11] The European Court of Human Rights ("ECtHR") distinguishes between the subjective and objective approach to judicial impartiality. The subjective test concerns the personal conviction and behaviour of a particular judge,[12] whereas the objective test asks whether there are ascertainable facts which may raise doubts as to their impartiality. In this respect, even

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[9] Appeal Decision, para. 32.

[10] Ibid.

[11] KSC-BC-2020-07, F00272, President of the Specialist Chambers, *Decision on the Application for Recusal or Disqualification* ("Decision of 6 August 2021"), 6 August 2021, public, para. 31.

[12] *See, for example*, ECtHR, *Kyprianou v. Cyprus*, no. 73797/01, *Judgment (Merits and Just Satisfaction)*, 15 December 2005, para. 118; *Micallef v. Malta*, no. 17056/06, *Judgment (Merits and Just Satisfaction)*, 15 October 2009, para. 93; *Morice v. France*, no. 29369/10, *Judgment (Merits and Just Satisfaction)*, 23 April 2015, paras 73-78.

appearances may be of a certain importance,[13] since the confidence which the courts in a democratic society must inspire in the public and in the accused are at stake.[14]

15. The nature of judicial questioning can give rise to an appearance of bias. The ICTY has recognised that it is a well-established law that a Trial Chamber cannot act as both investigator/prosecutor and adjudicator.[15] Further, it is not the duty of the Trial Judge "to engage in the prosecutorial investigation of the case"; the duty of a Trial Chamber to discover the truth is strictly confined to the evidence as presented to the Chamber.[16] To similar effect, the Trial Chamber of the Special Tribunal for Lebanon has determined that it is neither a fact-finding institution, nor a truth and reconciliation commission, rather its statutory role is to determine, based solely on the evidence on the trial record, whether the Accused have been proved guilty of any crime charged in the indictment.[17] Prosecutorial investigation thus goes beyond the proper role of a judge during trial proceedings.

16. Further, in *Rutaganda* and *Hadžihasanović*, the Appeals Chambers considered appeals against the fairness of trial on the basis of judicial questioning. The *Rutaganda* Appeals Chamber determined that judges are permitted to question witnesses provided that such questioning does not lead to the apprehension of bias, suffering of prejudice, or otherwise encroach upon the rights of the accused.[18] The Appeals Chamber in *Hadžihasanović* held, with respect to the test for determining bias, that a

[13] ECtHR, *Hauschildt v. Denmark*, no. 10486/83, *Judgment (Merits and Just Satisfaction)* ("*Hauschildt v. Denmark*"), 24 May 1989, para. 46; *Revtyuk v. Russia*, no. 31796/10, *Judgment (Merits and Just Satisfaction),* 9 April 2018, para. 22.
[14] *Hauschildt v. Denmark,* para. 48.
[15] ICTY, *Case against Florence Hartmann*, IT-02-54-R77.5, Report of Decision on Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer, 27 March 2009, para. 46.
[16] ICTY, *Prosecutor v. Blagojević et al.*, IT -02-60-AR 73 IT-02-60- AR73.2, IT-02- 60-AR73.3, Appeals Chamber, *Decision* ("*Blagojević* Appeal Decision"), 8 April 2003, paras 21-22.
[17] STL, *Prosecutor v. Ayyash et al*., STL-11-01/T/TC, Trial Chamber, *Judgment*, 18 August 2020, para. 395.
[18] ICTR, *Rutaganda v. Prosecutor*, ICTR-96-3-A, Appeals Chamber, *Judgement*, 26 May 2003, para. 111.

judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias.[19] Although these appeals failed on their facts, they clearly establish that judicial questioning must avoid the appearance of bias.

17. The ECtHR has also held that judicial questioning may compromise impartiality. In *Karelin*, the ECtHR emphasised that it is normally the task of a public authority (not the Judge) to present and substantiate criminal charges with a view to adversarial argument with the other party or parties.[20] In *Krivoshapkin*, the ECtHR determined that the trial court had confused the functions of prosecutor and judge and compromised its impartiality, where a judge questioned witnesses in the absence of a prosecutor and relied upon that evidence in finding against the accused.[21] Similarly, in *Ozerov*, the ECtHR held the roles of prosecutor and judge had been confused and legitimate doubts as to impartiality had arisen, where the body of evidence on which the applicant's conviction was based had changed when new incriminating evidence had been taken by the judge of his own motion.[22]

18. In national law, it has been held that "[a] judge's part […] is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevances

[19] ICTY, *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-A, Appeals Chamber, *Judgement*, 22 April 2008, para. 78. *See also* ICTY, *Prosecutor v. Brjanin and Talic*, IT-99-36-PT, Trial Chamber II, *Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge*, 18 May 2000, para. 15, where it was found that the test on this prong is "whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the actual circumstances to make a reasonable judgement) would be that [the Judge in question] … might not bring an impartial and unprejudiced mind".
[20] ECtHR, *Karelin v. Russia*, no. 926/08, *Judgment (Merits and Just Satisfaction)*, 6 March 2017, para. 77.
[21] ECtHR, *Krivoshapkin v. Russia*, no. 42224/02, *Judgment (Merits and Just Satisfaction)*, 27 April 2011, paras 44-45.
[22] ECtHR, *Ozerov v. Russia*, no. 64962/01, *Judgment (Merits and Just Satisfaction)*, 18 August 2010, paras. 53-54.

and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate".[23] More pithily, the Court of Appeal for England and Wales recognised in relation to defence witnesses "it is for the prosecution to cross-examine, not the judge".[24] Further, the High Court has held that "[w]here a judge insists on a person answering a question where the parties, and in particular the prosecution, which has the responsibility for the conduct of the case against a defendant, do not consider the issue relevant, it does give the impression that the judge has descended into the fray in an inappropriate way".[25]

IV. SUBMISSIONS

19. It is respectfully submitted that measures are now required to ensure the appearance of impartiality in the proceedings and to avoid irreparable prejudice to the Defence. The impact of judicial questioning is evident from the periodic time reports prepared by the Registry. As of 11 November 2024, judicial questioning had taken 71 hours 36 minutes and 34 seconds. That amounts to 13 days of court time, more than one entire evidentiary block, even without taking into account the time required for additional cross-examination following judicial questioning. The time used for judicial questioning <u>exceeds</u> the time used by three of the four Defence teams. By any measure, the time being spent on judicial questioning is very substantial and is affecting the expeditious conduct of these proceedings. That is surprising since any gaps in the evidence should be addressed by the parties through re-examination,

[23] *Jones v. National Coal Board*, [1957] EWCA Civ 3, Court of Appeal, *Judgment*, 25 March 1957, para. 64, cited with approval in *R. v. Mitchell*, [2009] UKPC 41, Court of Appeal of Jersey, *Judgment*, 4 November 2009, para. 31
[24] *R. v. Perren*, [2009] EWCA Cr. App. 348, Court Of Appeal Criminal Division, *Judgment*, 29 January 2009, para. 34.
[25] *Barnard v. DPP*, [2011] EWHC (Admin) 1648, High Court of Justice, *Judgment*, 24 May 2011, para. 30.

whilst judicial questioning, which is ordinarily to clarify aspects of the evidence, should not take longer than that of a party to the proceedings.

20. More concerning than the time taken, however, is the way in which this judicial questioning would be perceived by any reasonable onlooker. This too can be measured by the periodic time reports. As of 11 November 2024, the Defence collectively required **31 hours and 23 minutes** for further questions after judicial questioning; the Prosecution has used **12 minutes**. The Defence have thus needed to use more than **100x** the amount of time in further questioning than the Prosecution. The gross disparity in these figures makes it obvious that judicial questioning could not be perceived by a reasonable onlooker to be even handed. Plainly, the perception of the Defence has been that there was a need to respond to judicial questioning, whereas the perception of the Prosecution has that there was no such need.

21. Moreover, these statistics demonstrate that the Prosecution does not perceive the judges' questions to be challenging the Prosecution case in any way, while the Defence overwhelmingly perceives the judges' questions to be undermining the presumption of innocence of the Accused. This gross imbalance is inconsistent with the fundamental right of the Accused to an independent and impartial Tribunal, as well as with the ethical obligation of each member of the Panel not only to be impartial subjectively when asking questions, but also to be making a good faith effort to create the appearance of impartiality when asking questions, as is clear from Article 4 of the KSC's Code of Judicial Ethics.

22. Proceedings have advanced considerably since the Appeal Decision. On 30 May 2023, when the three Defence teams submitted their appeal, only four witnesses had testified, less than 2 hours had been spent on judicial questioning (with the longest judicial questioning of any witness lasting 51 minutes and 44 seconds), and the Defence had spent less than an hour in additional cross-examination. The Appeal

Decision was founded on the evidence about the prejudice to the Defence at that time.[26] In contrast, at this present point, much more time has been spent on judicial questions, around nine witnesses being questioned by the Panel for more than 2 hours, whilst the Defence collectively have now spent more than 29 hours in additional cross-examination. The situation has changed since the Appeal Decision, and the new relief sought herein is justified by the situation which has now arisen.

23. Judicial questioning is creating the impression that the Panel does not challenge the Prosecution case but instead is using the bulk of its time and directing the majority of its questions towards inculpatory topics, leading to the clear impression that the presumption of innocence of the Accused is not being respected. The overwhelmingly one-sided manner in which judicial questioning has been conducted in this trial has created the very "apprehension of bias" that the Appeals Panel expressly cited as a limitation on judicial questioning, and has violated the rights of the Accused to an independent and impartial tribunal. All four Accused hereby formally note their objection to the manner in which judicial questioning has been conducted throughout this trial, and assert that their fair trial rights and right to an independent an impartial tribunal have been violated.

24. The Accused respectfully request that the Panel take note of these objections and take all necessary steps to ensure that each member of the Panel will not only act impartially, but will make a good faith effort to create the appearance of impartiality in the manner in which they conduct judicial questioning. Such steps should include:

- Asking questions that test the Prosecution case;

[26] Decision of 4 July 2023, paras. 33, 46, 50, 51, 52, 54.

- Limiting the practice of suggesting answers to witnesses, including by prefacing questions with the caveat, "I don't mean to put words in your mouth," and then proceeding to put words in a witness's mouth. It is exceptionally dangerous for judges to suggest testimony to witnesses, given that witnesses inevitably tend to view judges as authorities whose suggestions should be followed;

- Avoiding use of judicial questioning as a means of eliciting evidence against the Accused that is beyond the scope of the Prosecution's direct examination. The Presiding Judge stated it correctly prior to the start of the trial: "*One of the beauties of the adversarial system is that for a prosecution to be successful, they have to present something that is coherent, that is understandable to these four people. And if it isn't, it won't be successful.*"[27] The Defence agrees with this principle. It is not the proper role of the judges, in this adversarial system, to pursue a case beyond what is being presented by the Prosecution. Unless the Panel is going to start going beyond the Prosecution direct and the Accused's cross-examinations to test the Prosecution case (which the Panel has shown no inclination to do in the first nineteen months of trial), it should not go beyond the Prosecution direct examination to test the presumption of innocence of the Accused either.

Word count: 3,148

[27] KSC-BC-2020-06, Transcript of Hearing, 18 January 2023, T.1827

Respectfully submitted on Wednesday, 13 November 2024, at The Hague, the Netherlands.

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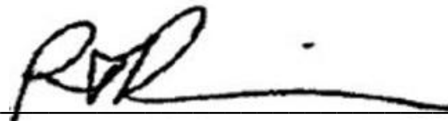

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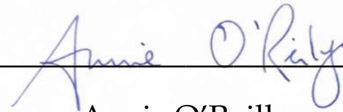

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