



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

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
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

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Language: English

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Prosecution response to joint Defence request F02718

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Request¹ for Trial Panel II to take measures to ensure the appearance of impartiality of the proceedings and avoid prejudice to the Defence should be rejected.
2. The Request seeks to impermissibly restrict the right of the Judges to question witnesses on any issue² – a right that was affirmed by the Court of Appeals.³ As such, the Defence attempts to relitigate an appellate ruling, seeking the same relief which has already been rejected⁴ without adequate explanation as to why it is necessary.
3. Moreover, the Defence submissions of bias and/or prejudice are not only procedurally misplaced, but wholly unsubstantiated. The relief sought is vague and imprecise,⁵ and warrants summary dismissal for this reason alone. Apart from rejection, no further action is required of the Panel.

¹ 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, KSC-BC-2020-06/F02718, 13 November 2024 ('Request'). The Request was reclassified as public on 21 November 2024.

² See Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'), Rule 127(3) (providing that a Judge may at any stage put any question to a witness). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

³ Public Redacted Version of Decision on Thaçi, Selimi and Krasniqi Appeal against Oral Order on Trial Panel Questioning, KSC-BC-2020-06/IA028/F00011/RED, 4 July 2023 ('Appeal Decision').

⁴ Compare Request, KSC-BC-2020-06/F02718, para.24 (requesting the Panel to take seps, including, '[a]sking questions that test the Prosecution's case', '[l]imiting the practice of suggesting answers to witnesses', and '[a]voiding use of judicial questioning as a means of eliciting evidence against the Accused that is beyond the scope of the Prosecution's direct examination') with Thaçi, Selimi and Krasniqi Defence Appeal against Oral Order on Trial Panel Questioning, KSC-BC-2020-06/IA028/F00002, 30 May 2023, Confidential, p.19 (requesting the Court of Appeals to 'REVERSE the Impugned Decision, insofar as it purports to grant the Trial Panel the authority to ask questions without any consideration of subject or substance; and find that the Trial Panel cannot ask leading questions, directed at eliciting new evidence, on incidents and allegations which have not been addressed by the parties, and which concern the acts and conduct of the accused, relying on documents which are not part of the record').

⁵ Request, KSC-BC-2020-06/F02718, para.24.

II. SUBMISSIONS

A. THE REQUEST RE-LITIGATES THE ISSUE OF JUDICIAL QUESTIONING WITHOUT JUSTIFICATION

4. At the outset, the Defence concedes that the Panel has broad discretion to question witnesses as provided for in Rule 127(3).⁶ The extent to which this right may be exercised was the subject of an interlocutory appeal, with the Court of Appeals rejecting the same general arguments that the Defence advances in the present Request.

5. The Court of Appeals confirmed, *inter alia*, that the Panel may ask questions at any stage of the proceedings, on any issue, provided that no prejudice or apprehension of bias arises when doing so.⁷ Furthermore, the Court of Appeals underscored that the Trial Panel is vested with the fundamental duty to determine the truth, which necessarily includes the questioning of witnesses in order to make factual determinations on the relevance, credibility, and reliability of testimony.⁸ In essence, the Defence Request seeks to impede this truth-finding function.

6. The Defence raises no new legal argument that was not advanced or considered in prior litigation on this issue.⁹ Moreover, to the extent that the Request might be considered a *de facto* reconsideration request, the Rule 79 test is not addressed, much less satisfied by the Defence submissions. The propriety of judicial questioning was

⁶ Request, KSC-BC-2020-06/F02718, para.13.

⁷ Appeal Decision, KSC-BC-2020-06/IA028/F00011/RED, paras 28-32.

⁸ Appeal Decision, KSC-BC-2020-06/IA028/F00011/RED, para.34.

⁹ While Defence submissions on the applicable law include citations to and discussion of additional jurisprudence, it is cumulative of jurisprudence previously considered by the Court of Appeals, irrelevant, or taken out of context. For example, the European Court of Human Rights ('ECtHR') decisions cited concerned proceedings where no prosecution authority was present at the trial, taking part in the examination of evidence and making submissions. It was in these circumstances – not present in this case – that the ECtHR found grounds for legitimate doubts about impartiality. See Request, KSC-BC-2020-06/F02718, para.17 (and sources cited therein).

litigated and comprehensively addressed by the Court of Appeals and the allegations of judicial bias – as before – are baseless and unsubstantiated.

7. The only point offered in support of allegations of judicial bias is the amount of time taken by the Panel to ask questions of witnesses, when compared with the time spent on further examination following judicial questioning.¹⁰ Yet, there is no analysis, no context, and no attempt by the Defence to measure the actual questions asked by Trial Panel II during this trial, against the legal test for judicial bias.¹¹

8. Further, the Request uses questioning times in a misleading and inapt manner. For example, the Request fails to acknowledge that parts of further Defence cross-examination have been repetitive and/or concerned matters beyond the scope of judicial questioning,¹² which has prompted the Panel to take remedial measures.¹³ Moreover, as indicated in the periodic time report relied upon by the Defence, the Panel's questioning, if any, is generally well under an hour, often a matter of minutes, with the exceptions primarily being witnesses whose combined direct, initial cross, and redirect examinations lasted five or (significantly) more hours.¹⁴

9. In any event, any comparison of examination times is meaningless without consideration of the specific circumstances of each witness, their position and the

¹⁰ Request, KSC-BC-2020-06/F02718, para.20.

¹¹ See e.g., ICTY, Appeals Chamber, *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-A, Judgement, 22 April 2008, para.78; ICTR, Appeals Chamber, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Judgement, 26 May 2003, paras 39-42.

¹² See e.g. Transcript, 11 September 2023, pp.7638, 7670; Transcript, 13 September 2023, pp.7926-7927; Transcript, 17 October 2023, pp.9066, 9074, 9077, 9091; Transcript, 17 January 2024, pp.11311, 11329, 11331, 11334-11336; Transcript, 25 January 2024, pp.11807-11809; Transcript, 22 April 2024, pp.14519-14520, 14547; Transcript, 17 July 2024, pp.18488, 18504-18505; Transcript, 18 July 2024, p.18541; Transcript, 25 September 2024, pp.20323-20324; Transcript, 23 October 2024, pp.20987-20988; Transcript, 29 October 2024, pp.21429-21430.

¹³ For example, the Panel has required the Party examining a witness after judicial questioning to indicate the judicial question that the further examination relates to. See Transcript, 17 January 2024, p.1135; Transcript, 25 January 2024, p.11794.

¹⁴ For example: W04746, W04769, W04765, W02161, W01493, W04489, W04576, W04147, W04739, W04741, W02144, W04744, W04752, W01511, W04737, W04240, W04758, W01453.

scope of their evidence, the questions put, and answers given.¹⁵ Without such information – which is absent from the Request – the overall time taken by the Panel to ask questions is wholly insufficient to mount any claim for judicial bias or request judicial relief. No legal authority or precedent is offered for such a proposition. Equally, no meaningful imputation can be drawn from the fact that the Specialist Prosecutor’s Office largely refrains from further examination after judicial questioning. Contrary to Defence submissions, such decisions are not solely based on whether incriminatory or exculpatory evidence has been elicited, but rather on the usefulness and appropriateness of such a course of action – following what has often already been extensive questioning of a witness on a particular topic.

B. THE RELIEF SOUGHT IS VAGUE AND OTHERWISE UNWARRANTED

10. When parsed, the relief sought in the Request is vague, imprecise, and ultimately requires no action from the Panel.

11. First, the Defence asks the Trial Panel to ‘take note’ of its objections,¹⁶ a request that is inherently redundant, as no actual relief is sought in this regard.¹⁷

12. Second, the Defence requests the Panel to take ‘the necessary steps’¹⁸ to:

- ask questions in an impartial manner (without providing any example where it purportedly did not);
- ask questions that test the Prosecution case (thereby seeking to impermissibly regulate the Panel’s approach to questioning in general,

¹⁵ Appeal Decision, KSC-BC-2020-06/IA028/F00011/RED, para.52 (‘the appropriate manner of questioning a witness will necessarily depend on the circumstances of that witness’s testimony, and is a matter for judicial determination’).

¹⁶ Request, KSC-BC-2020-06/F02718, para.24.

¹⁷ See, similarly, ICTR, *Prosecutor v. Nizeyimana*, Case No. ICTR-00-55C-T, *Proprio Motu* Decision on Defence Submissions of Bias, 15 March 2012, paras 7-8.

¹⁸ Request, KSC-BC-2020-06/F02718, para.24.

while ignoring the fact that the Panel already asks truth-seeking questions, which could result in either incriminatory or exculpatory evidence);

- refrain from suggesting testimony to a witness (even though no concrete example is cited); and
- avoid eliciting further evidence that is not favourable to the accused (again, impermissibly seeking to regulate the truth-seeking function and offering no concrete example).

These submissions are wholly lacking in substance, detail, and merit. The moving party bears the burden of showing that relief is justified, and the Defence fails in this respect.¹⁹

13. Trial Panel II is composed of independent professional judges who are entitled to a presumption of impartiality.²⁰ As occurred in prior litigation on this issue,²¹ the Request does not point to any instance that could rebut this presumption or justify any relief. Sweeping, abstract allegations are insufficient to do so.²² To adopt the suggested Defence ‘steps’ by circumscribing its own questioning would, as the Court of Appeals noted, ‘seriously interfere with the Trial Panel’s role as neutral fact-finder.’²³ The Panel should not countenance such an outcome by acceding to these

¹⁹ The Request’s procedural history refers to the admission of a total of five documents by Trial Panel II that were used during judicial questioning, and two examples where the Defence objected to the manner of judicial questioning, one of which was then reviewed by the Court of Appeals, which found no prejudice. *See* Request, KSC-BC-2020-06/F02718, paras 3-8. Yet none of these procedural events are tied to any substantive bias submissions in the Request itself, which simply alleges bias in a broad stroke manner. Similarly, at the outset of the Request, the Defence express concern ‘in particular’ about judicial questioning during the 21 October 2024 – 7 November 2024 evidentiary block. However, in the remainder of the Request, no example of a judicial question from this block is either described or cited. *See* Request, KSC-BC-2020-06/F02718, para.1.

²⁰ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015, Article 27(1).

²¹ Appeal Decision, KSC-BC-2020-06/IA028/F00011/RED, para.52.

²² Such lack of substantiation also resulted in dismissal of similar arguments by the Court of Appeals. *See* Appeal Decision, KSC-BC-2020-06/IA028/F00011/RED, paras 51-52, 54.

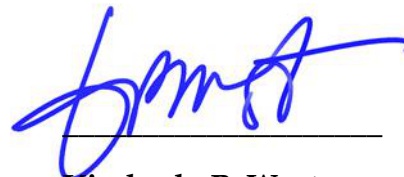
²³ Appeal Decision, KSC-BC-2020-06/IA028/F00011/RED, para.54.

improper suggestions, as that would have the inevitable effect of undermining the Panel's ability to determine the truth in this case.

III. CONCLUSION

14. For the above reasons, the Request should be rejected.

Word count: 1753



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Monday, 25 November 2024

At The Hague, the Netherlands.