



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA 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: 3 December 2024

Language: English

Classification: Public

**Decision on the Thaçi Defence Request for Certification to Appeal the Second
Oral Order of 7 November 2024**

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 6 November 2024, during the testimony of W01453 (“Witness”),¹ the Defence for Hashim Thaçi (“Thaçi Defence”) sought to tender into evidence an extract of a document used with the Witness.² The Panel, after hearing submissions from the Parties,³ marked the document for identification as 1D00204 (“1D00204 MFI”).⁴
2. On 7 November 2024, the Panel rendered an oral order denying admission of 1D00204 MFI (“Impugned Decision”).⁵
3. On 14 November 2024, the Thaçi Defence filed a request for leave to appeal the Impugned Decision (“Request”).⁶
4. On 21 November 2024, the Specialist Prosecutor’s Office (“SPO”) responded to the Request (“Response”).⁷
5. On 25 November 2024, the Thaçi Defence replied to the Response (“Reply”).⁸

¹ See Transcripts of Hearings, 4-7 November 2024.

² Transcript of Hearing, 6 November 2024, p. 22100, line 7 to p. 22101, line 13, *referring to* DHT00177-DHT00492, p. DHT00403 (para. 580).

³ Transcript of Hearing, 6 November 2024, p. 22102, lines 2-22.

⁴ Transcript of Hearing, 6 November 2024, p. 22102, lines 23 to p. 22103, line 3.

⁵ Transcript of Hearing, 7 November 2024, p. 22153, line 21 to p. 22154, line 9.

⁶ F02719, Specialist Counsel, *Thaçi Defence Request for Certification to Appeal the Second Oral Order of 7 November 2024*, 14 November 2024.

⁷ F02742, Specialist Prosecutor, *Prosecution Response to ‘Thaçi Defence Request for Certification to Appeal the Second Oral Order of 7 November 2024’ (F02719)*, 21 November 2024.

⁸ F02748, Specialist Counsel, *Thaçi Defence Reply to ‘Prosecution Response to ‘Thaçi Defence Request for Certification to Appeal the Second Oral Order of 7 November 2024’ (F02719)’*, 25 November 2024. The Panel notes that the Reply was distributed on 26 November 2024.

II. SUBMISSIONS

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

- 1) Whether the Trial Panel erred in concluding that it cannot be assisted by the visual observations of the ICTY Trial Chamber in the *Limaj* case on the courtroom demeanour of W01453 (“First Issue”);
- 2) Whether the Trial Panel erred in failing to explain why 1D00204 MFI is not admissible under Rule 138 (“Second Issue”); and
- 3) Whether the Trial Panel erred by failing to conclude that the requirements for admission of 1D00204 MFI under Rule 138 have been satisfied (“Third Issue”).⁹

7. 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;¹⁰ (ii) significantly affect the fair and expeditious conduct of the proceedings;¹¹ and (iii) require immediate resolution by the Court of Appeals Panel in order to materially advance the proceedings.¹²

8. The SPO responds that the Request should be dismissed because it fails to meet the requirements set out in the Law and Rules.¹³ In particular, the SPO avers that the Issues are not appealable, as they merely disagree with the Impugned Decision, mischaracterise it, and ignore past findings of the Panel.¹⁴ The SPO further argues that the Defence fails to demonstrate that: (i) the Issues would 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.¹⁵

⁹ Request, para. 2. *See also* Request, paras 1, 24.

¹⁰ Request, paras 7-18.

¹¹ Request, paras 7, 19-20.

¹² Request, paras 7, 21-22.

¹³ Response, paras 1, 9.

¹⁴ Response, paras 1, 3-6.

¹⁵ Response, paras 7-8.

9. The Thaçi Defence replies that the Request should be granted, as the Response mischaracterises it and fails to engage with the arguments raised therein.¹⁶

III. APPLICABLE LAW

10. 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.

11. The Panel incorporates by reference the applicable law on the legal standard for certification to appeal set out in past decisions.¹⁷

IV. DISCUSSION

12. In the Impugned Decision, the Panel denied admission of 1D00204 MFI, an extract of the trial judgment pronounced in the case of *Limaj et al.* before the International Criminal Tribunal for the former Yugoslavia (respectively, “ICTY” and “*Limaj* Judgment”). 1D00204 MFI contains, in particular, an assessment by the ICTY Trial Chamber of W01453’s demeanour and of his credibility as a witness in the *Limaj et al.* case (“*Limaj* Testimony”).¹⁸

¹⁶ Reply, para. 1. See also Reply, paras 2-5.

¹⁷ 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.

¹⁸ 1D00204 MFI, para. 580.

13. More specifically, in the Impugned Decision, the Panel found that: (i) the responsibility to assess the credibility of a witness and the reliability of his evidence is exclusively that of the Panel, and any assessment of demeanour that might be relevant to the evaluation will be made by the Panel, not another court; (ii) the relevant parts of the *Limaj* Judgment had been put to the witness, who commented upon them in the course of his cross-examination; and (iii) the Panel is not bound by evidentiary findings made by other trial chambers.¹⁹

14. At the outset, the Panel recalls that triers of fact are afforded considerable discretion in deciding whether to admit evidence, and certification to appeal admissibility decisions will be granted only on an exceptional basis.²⁰ Such principles are reflected in the Court of Appeals Panel's holding that "appellate intervention in decisions relating to the admission of evidence is warranted only in very limited circumstances."²¹

A. FIRST ISSUE

15. The *Thaçi* Defence submits that the Panel erred in finding that it cannot be assisted by the visual observations on W01453's demeanour made by the ICTY Trial Chamber in 1D00204 MFI, considering that: (i) there are legitimate and well-founded concerns as to the reliability of the *Limaj* Testimony, which has been tendered into evidence by the SPO also in the form of audio-video recordings; and

¹⁹ Transcript of Hearing, 7 November 2024, p. 22153, line 23 to p. 22154, line 8.

²⁰ F02241, Panel, *Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P1046*, 15 April 2024, para. 10; F02157, Panel, *Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P959 and P960* ("29 February 2024 Decision"), 29 February 2024, para. 11 and footnote 26 (with further references). See also ICTR, *Nyiramasuhuko v. Prosecutor*, ICTR-98-42-AR73.2, Appeals Chamber, [Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence](#), 4 October 2004, para. 5.

²¹ KSC-CA-2022-01, F00114, Court of Appeals, *Appeal Judgment*, 2 February 2023, para. 35. See also 29 February 2024 Decision, para. 11; ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeals Chamber, [Judgement](#), 20 February 2001, para. 533.

(ii) the Panel is in no position to visually assess that testimony, as such recordings are of limited utility.²²

16. The SPO responds that the First Issue ignores the record and fails to identify any concrete error in the Impugned Decision.²³ The SPO further argues that the Panel will be able to adequately assess W01453's demeanour and credibility on the basis of his testimony in the present case and the tendered recordings of the *Limaj* Testimony.²⁴

17. The Thaçi Defence replies that, while the relevant portion of 1D00204 MFI was read into the record, its admission as substantive evidence would ensure that the Panel could rely upon it in its deliberations.²⁵ In addition, the Thaçi Defence reiterates the limited usefulness of the audio-video recordings of the *Limaj* Testimony to the Panel's assessment of W01453's demeanour.²⁶

18. First, the Panel notes that the First Issue merely repeats submissions made by the Thaçi Defence prior to the Impugned Decision. In particular, the Panel observes that the Thaçi Defence submitted that 1D00204 MFI should be admitted because it contains a factual element otherwise not available to the Panel, namely the ICTY Trial Chamber's observations on W01453's demeanour during the tendered *Limaj* Testimony.²⁷ These submissions were therefore already before the Panel when it rendered the Impugned Decision, and were therein considered, addressed, and rejected. In particular, in the Impugned Decision, the Panel did not find that it cannot be assisted at all by the information on the record. Rather, the Panel made findings consistent with its own jurisprudence²⁸ as to whether and in

²² Request, paras 8-10, referring to F02708, Specialist Prosecutor, *Prosecution Request for the Admission of W01453's Prior Statements pursuant to Rule 143(2)(c)*, 11 November 2024, with Annex 1.

²³ Response, para. 4.

²⁴ Response, para. 4.

²⁵ Reply, para. 2.

²⁶ Reply, para. 3. See also Reply, para. 4.

²⁷ Transcript of Hearing, 6 November 2024, p. 22102, lines 4-8. See also Request, para. 8.

²⁸ F02013, Panel, *Decision on Prosecution Third Motion for Admission of Evidence pursuant to Rule 155* ("Third Rule 155 Decision"), 15 November 2023, para. 50; F01603, Panel, *Decision on Prosecution Motion*

which way it could be assisted by admitting 1D00204 MFI into evidence in the specific circumstances of the case. Indeed, the Panel explicitly: (i) reiterated its responsibility to make its own credibility assessment and the non-binding nature of other courts' findings of the same nature;²⁹ and (ii) recalled that 1D00204 MFI had been read verbatim³⁰ to the witness and commented upon by him³¹ and, as such, and contrary to the Thaçi Defence's submissions,³² the tenor of the item was already part of the record.³³ The Panel is thus of the view that the First Issue mischaracterises the Impugned Decision and merely disagrees with the Panel's reasoning and outcome thereof.

19. As regards the issue of the utility of the audio-video recordings of the *Limaj* Testimony for the Panel's assessment, the Panel notes that these have not been admitted into evidence at this point in time, nor were they at the time of the Impugned Decision. Any related consideration is therefore mere speculation and irrelevant to the Panel's decision to deny admission of 1D00204 MFI, which, as mentioned above, considered all relevant elements before it, including the fact that 1D00204 MFI had been entirely read into the record and could be relied upon by the Panel in its deliberations at the end of the trial and in light of the totality of the evidence.

20. Moreover, the Panel considers that the First Issue does not meet the threshold warranted for granting certification to appeal decisions relating to admission of evidence,³⁴ especially considering, again, that the relevant portion of 1D00204 MFI is already on the record. In light of the above, the Panel finds that the Defence has

for Admission of Evidence pursuant to Rule 155 ("First Rule 155 Decision"), 14 June 2023, confidential, para. 49 (a public redacted version was filed on 8 September 2023, F01603/RED).

²⁹ Transcript of Hearing, 7 November 2024, p. 22153, line 23 to p. 22154, line 2; p. 22154, lines 6-7.

³⁰ Transcript of Hearing, 6 November 2024, p. 22100, lines 14-25.

³¹ Transcript of Hearing, 6 November 2024, p. 22101, lines 5-9.

³² Reply, para. 2.

³³ Transcript of Hearing, 7 November 2024, p. 22154, lines 3-5.

³⁴ See above para. 14.

failed to establish that the First 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 First Issue. The request for certification to appeal the First Issue is therefore rejected.

B. SECOND ISSUE

22. The Thaçi Defence contends that the Panel erred in rendering an insufficiently reasoned decision, insofar as it did not refer to the requirements for admission under Rule 138(1) and failed to articulate why 1D00204 MFI did not meet such requirements.³⁵

23. The SPO responds that the Thaçi Defence fails to demonstrate that the Second Issue is appealable, as it merely disagrees with the Impugned Decision.³⁶ In particular, the SPO avers that the Impugned Decision: (i) is reasoned and consistent with previous decisions of the Panel on credibility findings of other courts; and (ii) clearly considered and dismissed the arguments raised by the Thaçi Defence as to relevance and probative value of 1D00204 MFI.³⁷

24. The Thaçi Defence replies that it is not seeking admission of a credibility finding from another court, but rather evidence of W01453's demeanour while giving prior statements.³⁸

25. The Panel is of the view that, while the Impugned Decision did not explicitly mention Rule 138, it rejected admission of 1D00204 MFI because of considerations that are preliminary to the assessment of the Rule 138(1) requirements, namely: (i) the exclusive responsibility of this Panel to assess a witness's credibility and

³⁵ Request, paras 11-14.

³⁶ Response, para. 5.

³⁷ Response, para. 5.

³⁸ Reply, para. 5.

demeanour;³⁹ and (ii) the fact that, regardless of its nature, the relevant portion was already on the record⁴⁰ and thus available to the Panel should it deem appropriate to rely on it at the end of the trial, in light of the totality of the evidence. The Panel notes that it denied admission of 1D00204 in light of these preliminary considerations and, moreover, in accordance with its own jurisprudence regarding: (i) the Panel's exclusive responsibility in assessing a witness's demeanour and/or reliability, and its reliance on other courts' assessments of the same nature as the one contained in 1D00204 MFI;⁴¹ and (ii) the Panel's own assessment of a witness's reliability and potential inconsistencies between their statements to be made in light of the entire body of evidence admitted before it at trial.⁴² For these reasons, the Panel considers that the Second Issue mischaracterises and merely disagrees with the Impugned Decision and, especially, with the outcome of the Panel's consideration of all the relevant elements before it.

26. Moreover, the Panel considers that the Second Issue does not meet the threshold warranted for granting certification to appeal decisions relating to admission of evidence,⁴³ especially considering, again, that the relevant portion of 1D00204 MFI is already on the record. 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.

³⁹ Transcript of Hearing, 7 November 2024, p. 22153, line 23 to p. 22154, line 2; p. 22154, lines 6-7.

⁴⁰ Transcript of Hearing, 7 November 2024, p. 22154, lines 3-5.

⁴¹ See Third Rule 155 Decision, para. 50; First Rule 155 Decision, para. 49.

⁴² See e.g. First Rule 155 Decision, para. 50. See also F02328, Panel, *Decision on Prosecution Motion for Admission of Evidence of Witnesses W01511, W04260, W04305, W04410, W04744, W04752, and W04764 Pursuant to Rule 154 (F02204)*, 22 May 2024, confidential, para. 89 (a public redacted version was filed on the same day, F02328/RED); F01976, Panel, *Decision on Prosecution Motion for Admission of Evidence of Witnesses W00498, W01140, and W01763 pursuant to Rule 154*, 1 December 2023, confidential, para. 21 (a public redacted version was filed on the same day, F01976/RED).

⁴³ See above para. 14.

27. 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

28. The Taçi Defence submits that the Panel erred in determining that 1D00204 MFI did not meet the requirements for admissibility under Rule 138(1)⁴⁴ and that, moreover, such finding: (i) is inconsistent with the Panel's past jurisprudence;⁴⁵ and (ii) would be prejudicial for the Defence, as the SPO is relying on the *Limaj* Testimony for the truth of its contents.⁴⁶

29. The SPO responds that the Third Issue essentially rephrases the First Issue and similarly constitutes a mere disagreement with the Impugned Decision.⁴⁷ Further, the SPO argues that: (i) no prejudice would derive from denying admission to 1D00204 MFI, which is already part of the record; and (ii) the Third issue ignores previous findings of the Panel.⁴⁸

30. The Taçi Defence replies that it is not seeking admission of a credibility finding from another court, but rather evidence of W01453's demeanour while giving prior statements.⁴⁹

31. The Panel is of the view that similar considerations as those expressed above with regard to the Second Issue are applicable to the Third Issue.⁵⁰ In particular, as the Panel's findings in the Impugned Decision were based on considerations

⁴⁴ Request, para. 15.

⁴⁵ Request, para. 16, referring to F01733/RED, Panel, *Public Redacted Version of Decision on Veseli Defence Request Regarding Items Associated with [REDACTED]'s Testimony*, 1 November 2023), para. 14 (a confidential version was filed on 23 August 2023, F01733).

⁴⁶ Request, para. 17.

⁴⁷ Response, para. 6.

⁴⁸ Response, para. 6.

⁴⁹ Reply, para. 5.

⁵⁰ See above, paras 22-25.

consistent with past decisions of the Panel and preliminary to the admissibility test under Rule 138(1), the Panel is of the view that the Third Issue mischaracterises the Impugned Decision where it claims that the Panel erroneously applied that Rule. For the same reasons, the Panel is of the view that the Parties' submissions on relevance, probative value and prejudice⁵¹ are not pertinent to the issue at hand and need not be addressed. The Panel therefore considers that the Defence misapprehends the Impugned Decision and expresses mere disagreement with the findings therein.

32. Moreover, the Panel considers that the Third Issue does not meet the threshold warranted for granting certification to appeal decisions relating to admission of evidence,⁵² especially considering, again, that the relevant portion of 1D00204 MFI is already on the record. 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.

33. 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.

⁵¹ Request, paras 16-17; Response, paras 5-6; Reply, para. 5.

⁵² *See above* para. 14.

V. DISPOSITION

34. For the above-mentioned reasons, the Panel hereby **REJECTS** the Request.

A handwritten signature in black ink, reading "Charles L. Smith, III". The signature is written in a cursive style and is positioned above a horizontal line.

Judge Charles L. Smith, III

Presiding Judge

Dated this Tuesday, 3 December 2024

At The Hague, the Netherlands.