

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 Counsel for Kadri Veseli
Specialist Counsel for Rexhep Selimi
Specialist Counsel for Jakup Krasniqi

Date: 20 December 2024

Language: English

Classification: Public

**Veseli, Selimi, and Krasniqi Defence Request for Certification to Appeal
Decision F02787**

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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 Kadri Veseli, Rexhep Selimi and Jakup Krasniqi (“Defence”) hereby file this request for certification to appeal the Trial Panel’s Decision on the Prosecution Motion for Admission of Evidence of Witnesses W04826, W04874, and W04875 pursuant to Rules 138, 149, and 154 and Related Request (“Impugned Decision”).³
2. The Defence submits one issue for certification, namely, whether the Trial Panel erred in its finding that nothing in the Specialist Chambers’ (“SC”) legal framework or in the Order on the Conduct of Proceedings prohibits preparation sessions with expert witnesses, or prevents the calling Party from eliciting expert opinion from expert witnesses on documents not commented in an expert report.

II. PROCEDURAL BACKGROUND

3. On 7 October 2024, the Special Prosecutor’s Office (“SPO”) filed its Submission of List of Witnesses for 18 November 2024 to 30 January 2025 (F02620).⁴ On 11 October 2024, the SPO filed its motion for admission of evidence of W04826, W04874, and W04875 pursuant to Rules 138, 149, and 154 (F02633).⁵

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 F027887, Panel, *Decision on Prosecution Motion for Admission of Evidence of Witnesses W04826, W04874, and W04875 pursuant to Rules 138, 149, and 154 and Related Request*, 16 December 2024 (“The Panel’s Decision on the Admission of Expert Evidence”), confidential.

⁴ F02620, Specialist Prosecutor, *Prosecution submission of list of witnesses for 18 November 2024 to 30 January 2025 with confidential Annex 1*, 7 October 2024, confidential (public redacted version was filed on the same day).

⁵ F02633, Specialist Prosecutor, *Prosecution motion for admission of evidence of Witnesses W04826, W04874, and W04875 pursuant to Rules 138, 149, and 154 and related request with confidential Annexes 1-3*, 11 October 2024 (“SPO Expert Evidence Motion”), confidential (a public redacted version was subsequently filed).

4. On 11 October 2024, the Defence, together with the other Accused in the case, jointly requested an extension of time to respond to F02633 and the relevant Annexes to F02620 of documents proposed for use with W04875, W04874 and W04826 (the “Expert Witnesses”).⁶ On 14 October 2024, the Trial Panel granted the request.⁷
5. On 8 November 2024, the Defence jointly filed a consolidated response to F02620 and F02633.⁸ The SPO filed a reply to the Defence’s response on 18 November 2024,⁹ and the Defence jointly sought permission to file a *sur*-reply,¹⁰ which was refused by the Trial Panel.¹¹
6. The Trial Panel subsequently rendered the Impugned Decision on 16 December 2024.

III. APPLICABLE LAW

7. Pursuant to Article 45(2) and Rule 77(2),¹² a right to appeal only arises if the standard of certification set forth herein has been met.
8. 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

⁶ F02638, Specialist Counsel, *Joint Defence Request for an Extension of Time to Respond to F02620, F02625 and F02633*, 11 October 2024, confidential (a public redacted version was filed the same day).

⁷ F02648, Panel, *Decision on Joint Defence Request for an Extension of Time to Respond to F02620, F02625 and F02633*, 14 October 2024, public.

⁸ F02703, Specialist Counsel, *Joint Defence Consolidated Response to F02620 and F02633*, 8 November 2024, confidential.

⁹ F02732, Specialist Prosecutor, *Prosecution reply relating to request to admit expert witness evidence (F02633)*, 18 November 2024, public.

¹⁰ F02737, Specialist Counsel, *Joint Defence Request for Leave to Sur-Reply to “Prosecution reply relating to request to admit expert witness evidence (F02633)”*, 20 November 2024, public.

¹¹ Transcript of Hearing, 3 December 2024, p.23240, lines 4-23.

¹² Rules, Rule 77.

immediate resolution by the Court of Appeals Panel may materially advance the proceedings.¹³

9. 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.¹⁴

IV. SUBMISSIONS

10. The identified Issue satisfies the requirements for leave to appeal. It arises from the Impugned Decision, does not merely disagree with the Impugned Decision, is liable to significantly affect the fair and expeditious conduct of the proceedings and requires immediate resolution by the Appeals Chamber in order to materially advance the proceedings.

A. The Issue Arises from the Impugned Decision

11. The Impugned Decision erred in its finding that “nothing in the Specialist Chambers’ (“SC”) legal framework or in the Order on the Conduct of Proceedings prohibits preparation sessions with expert witnesses, or prevents the calling Party from eliciting expert opinion from expert witnesses on documents not commented in an expert report.”¹⁵
12. As the Panel has already recognised, Rule 149 is the *lex specialis* governing the admission of expert evidence.¹⁶ Rule 149 expressly provides that:

Evidence of Expert Witnesses

(1) The final report of any expert witness to be called by a Party shall be disclosed to the opposing Party and, where applicable, to Victims’ Counsel within the time limit set by the Pre-Trial Judge or the Panel pursuant to Rule 102(1)(b).

(2) Within seven (7) days of disclosure of the report of an expert witness, or as directed by the Panel, the opposing Party shall file a notice indicating whether:

¹³ Rules, Rule 77(2).

¹⁴ F02706, Specialist Counsel, *Joint Defence Request for Leave to Appeal Third Oral Order of 31 October 2024*, 11 November 2024, public, paras. 3-5.

¹⁵ The Panel’s Decision on the Admission of Expert Evidence, para.20

¹⁶ F01995, Panel, *Decision on Prosecution Request to Amend the Exhibit List (F01844)*, 8 December 2023, at para. 31, public.

- (a) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the expert witness report and, if so, which parts;
- (b) it accepts the expert witness report or parts thereof; or
- (c) it wishes to cross-examine the expert witness.

13. Rule 149 provides the only mechanism by which the calling party may elicit evidence from expert witnesses. It makes clear that the final report of the expert witness must be disclosed in accordance with Rule 149(1) as part of the pre-trial phase, and the Defence thereafter have seven days to respond. There is no permissible alternative means by which the SPO can serve an additional or supplementary report from a witness, whether in the form of a 'Preparatory Note 2' or otherwise.

14. The practice that has been permitted to develop in Case 06, despite Defence objections and unlike in other cases before the KSC,¹⁷ is for the Preparatory Sessions to go far beyond '*witness familiarisation*' and allowing a witness to re-read and/or clarify their previous statements. The SPO in Case 06, have been permitted to use Preparatory Sessions to gather voluminous fresh evidence from lay witnesses, reduced into a witness statement in the form of a 'Preparatory Note 2'.

15. It is clear from the Rule 95 summaries of the experts and the material proposed for use with the Expert Witnesses,¹⁸ that the SPO intend to ask the Experts to comment in Preparatory Sessions on fresh additional matters that are not within their original reports. If this exercise were to be permitted, this will result in the creation of an additional witness statement or 'report' in the form of a Preparatory Note 2. Service of an additional expert report shortly before

¹⁷ KSC-BC-2020-04, *The Specialist Prosecutor v Pjetër Shala*, Decision on witness familiarization, 24 February 2023, F00435; *See also*, KSC-BC-2020-05, *The Specialist Prosecutor v Salih Mustafa*, Decision on witness familiarization, 9 July 2021, F00150; *See also*, KSC-BC-2023-10, *the Specialist Prosecutor v. Sabit Januzi, Ismet Bahtijari and Haxhi Shala*, Decision on witness familiarization, 13 November 2024, F00595.

¹⁸ F02620, Specialist Prosecutor, *Annex 1 to Prosecution submission of list of witnesses for 18 November 2024 to 30 January 2025 with confidential Annex 1*, 7 October 2024, confidential (public redacted version was filed on the same day).

live evidence is not permitted under Rule 149 and, in fact, is directly contrary to the clear and strict provisions of Rule 149 governing the service of expert evidence. The rules of service governing expert evidence are distinct from lay witnesses for good reason: expert evidence requires additional and unique preparation.

16. Further, expert reports should be properly prepared following clear and disclosable letters of instruction from the calling party, and be reduced to the form of an expert report, *in the expert's own language*, as well as signed by the expert themselves. Experts should also be given the time and space required to consider new instructions and/or questions, and to consult any resources or notes they may require. It is wholly improper and prejudicial for fresh expert evidence to be reduced to writing by a lawyer, particularly by calling counsel, in their own words, rather than that of the expert themselves. This is particularly so in circumstances where the Defence and the Panel cannot know the instructions provided or questions asked, or decipher the basis upon which any additional conclusion or opinion was formed by the expert.

17. In the Impugned Decision, the Panel points to previous decisions of the KSC in which other Panels have noted that the calling party may have 'discussions' with their witnesses in advance of their live evidence.¹⁹ It is not disputed that the SPO may have 'discussions' with the experts about the content of the reports *they have already provided*. What is clearly impermissible under the Rules is for the calling Party to use a Preparatory Session to take a *new* witness statements or reports from an expert. None of the jurisprudence²⁰ cited by the Panel in their decision justifies or supports this approach.

¹⁹ The Panel's Decision on the Admission of Expert Evidence, para. 20.

²⁰ ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Trial Chamber I, Decision on the Prosecution Submissions on the Expert Statement of Prosecution Witness Teufika Ibrahimović Pursuant to Rule 94bis, 14 September 2012, paras. 6-8.

18. In fact, the decisions²¹ cited by the Panel in the Impugned Decision undermine the proposed expansive use of Preparatory Sessions, in that they limit the use of Preparatory Sessions to sessions with lay witnesses. This underlines that the Panel should take a cautionary, not expansive approach, when considering the use or misuse of Preparatory Sessions.
19. Finally, the Defence are entitled to time to seek their own expert opinion on any expert report. Expert opinions often take weeks to prepare. As a practical matter, the Defence would clearly have insufficient time to commission their own expert report on any additional opinions or findings provided in the short time between Preparatory Sessions and live evidence. This is a direct violation of the rights of the Defence to adequate time and facilities to prepare and as such cannot be permissible.
20. To say that the Defence was given notice since at least 11 October 2024 of the limited additional items to be discussed with the Expert Witnesses; and such items appear to be “similar in nature to the tendered Associated Source Material underlying the Expert Reports”²² fails to recognise the core issue. The question is not whether the Defence have notice of the underlying documents or not, it is that the Defence does not have notice of the relevant expert’s opinion, findings or conclusions on these documents – it is this evidence that the Defence must deal with in cross examine and which it cannot anticipate.
21. In terms of the purported purpose of the Preparatory Session for the experts identified by the panel as to “is help prepare the witness for testimony”; expert witnesses are professional witnesses and do not need help to prepare. Basic

²¹ KSC-BC-2020-05, *The Specialist Prosecutor v Salih Mustafa*, Decision on witness familiarization, 9 July 2021, F00150 at para. 20; *See also*, KSC-BC-2020-04, *The Specialist Prosecutor v Pjetër Shala*, Decision on witness familiarization, 24 February 2023, F00435 at para. 19; *See also*, KSC-BC-2023-10, *the Specialist Prosecutor v. Sabit Januzi, Ismet Bahtijari and Haxhi Shala*, Decision on witness familiarization, 13 November 2024, F00595 at para.32.

²² The Panel’s Decision on the Admission of Expert Evidence, para. 20.

witness familiarisation procedures are sufficient. In addition, two of the three Expert Witnesses have already given evidence in this court and are therefore clearly familiar with the procedures. Further, considering their status as experts, there is no suggestion of any need by the SPO to evaluate their “capacity to provide relevant and credible evidence in respect of facts or circumstances relevant to the case”. Therefore, the given justification for conducting the sessions – and even more so for eliciting new or additional opinions or conclusions – is simply not made out.

B. The Issue Significantly Affects the Fair and Expeditious Conduct of the Proceedings

22. The Impugned Decision significantly affects the fair and expeditious conduct of the proceedings. As outlined above, permitting Preparatory Sessions to be conducted with the witnesses undermines the express protections afforded to the Defence in the Rules concerning expert evidence, denies the Defence the ability to consult with experts of its own in a timely manner, and interferes with the rights of the Defence to adequate time and resources to prepare its defence case. This clearly causes identifiable prejudice to the Defence.

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

23. Immediate resolution of the Issue will materially advance the proceedings. Three expert witnesses are scheduled to testify in January 2025. Intervention by the Appeal Panel is imperative at this juncture to ensure that the Rules of the Court are properly interpreted and a consistent approach taken by all Panel’s at the KSC.

24. If the Defence is correct that there is an error in the Impugned Decision, Appellate intervention at this stage will ensure that that material prejudice is


avoided by the SPO eliciting fresh expert evidence by way of Preparatory Sessions without notice.

V. CONCLUSION

25. In light of the foregoing, the Defence respectfully seeks leave to appeal the issue identified above.

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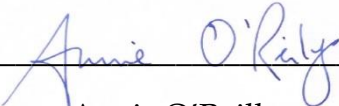
Respectfully submitted on Friday, 20 December 2024, at the Hague, the Netherlands.



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