



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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**Prosecution response to 'Joint Defence Request for Leave to Appeal Rule 153
Decision (F02765)'**

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Request¹ should be denied because the issue articulated by the Defence fails to meet the criteria for certification² under Article 45 of the Law³ and Rule 77 of the Rules.⁴ As recalled multiple times by the Panel and confirmed by the Court of Appeals, a panel has broad discretion in deciding on the presentation and admission of evidence, and certification to appeal such decisions will be granted only in exceptional circumstances⁵ – none of which exist here.

II. SUBMISSIONS

A. THE ISSUE IS NOT APPEALABLE

2. The issue is not appealable because it does not arise from the Decision,⁶ is hypothetical in nature, and merely represents a disagreement with the Panel's ruling.

3. The Request initially frames the issue as whether the Panel erred in its determination that the Defence Response⁷ to a Specialist Prosecutor's Office ('SPO')

¹ Joint Defence Request for Leave to Appeal Rule 153 Decision (F02765), KSC-BC-2020-06/F02796, 18 December 2024, Confidential ('Request').

² The applicable law has been set out in prior decisions. *See e.g.* Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, Confidential, paras 6-17 ('Thaçi Decision'); *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021 ('Gucati Decision'), paras 8-18.

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

⁴ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

⁵ Decision on the Thaçi Defence Request for Certification to Appeal the Second Oral Order of 7 November 2024, KSC-BC-2020-06/F02757, 3 December 2024, para.14; Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P959 and P960, KSC-BC-2020-06/F02157, 29 February 2024, para.11; *Specialist Prosecutor v. Gucati and Haradinaj*, Appeal Judgment, KSC-CA-2022-01/F00114, 2 February 2023, paras 34-35. *See also* Law, Arts 40(2),(6)(h); Rules, Rules 116(1),(4) and 127.

⁶ Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W01234, W01338, W01743, W04423, W04570, W04696, W04812, W04859, and W04860 Pursuant to Rule 153 and Related Defence Motion to Exclude Evidence, KSC-BC-2020-06/F02765, 11 December 2024, Confidential ('Decision').

⁷ Joint Defence Response to Prosecution Rule 153 Motions F02465 and F02469, KSC-BC-2020-06/F02523, 30 August 2024, Confidential ('Response').

Rule 153 Motion⁸ was not the correct procedural vehicle for the Defence to tender additional statements of witnesses to whom it objected.⁹ However, in attempting to explain how this issue arises from the Decision, the Defence relies on mischaracterisations of the Panel's ruling as both a refusal to admit,¹⁰ and a denial of the Defence's ability to tender,¹¹ the evidence in question. These misrepresentations ignore the Panel's explicit holdings that it was *not* deciding on admission, that the Defence was free to tender the additional evidence in accordance with the relevant Rules, and that the Panel would duly consider any such request.¹² For these reasons alone, the Request should be dismissed as having failed to identify an appealable issue emanating from the Decision. That the Panel has previously exercised its discretion to exceptionally admit certain, unopposed evidence improperly tendered through a response does not create any binding precedent or the 'law of this Court'¹³ – admissibility decisions take into account the specific circumstances of the evidence and related record. That the Panel reached a different conclusion in this instance does not demonstrate any error, as claimed by the Defence.

4. Moreover, as a definitive ruling on admission has not yet been made, the arguments put forward by the Defence are entirely speculative in nature. As clearly stated by the Panel, nothing prevents the Defence from tendering the evidence in question in accordance with the Rules, thereby seeking appropriate relief at trial. The real issue complained of by the Defence – that it has been prejudiced by an inability to confront SPO evidence¹⁴ – therefore amounts to a hypothetical concern which does not arise from the Decision.

⁸ Prosecution motion for the admission of the evidence of witnesses W01234, W01338, W01743, W04423, W04570, W04696, W04812, W04859, and W04860 pursuant to Rule 153, KSC-BC-2020-06/F02469, 24 July 2024, Confidential ('Rule 153 Motion').

⁹ See Request, paras 2-5 (citing Decision, KSC-BC-2020-06/F02765, paras 48, 64).

¹⁰ Request, KSC-BC-2020-06/F02675, paras 7, 9, 24.

¹¹ Request, KSC-BC-2020-06/F02675, paras 21, 24.

¹² Decision, KSC-BC-2020-06/F02765, paras 48, 64.

¹³ *Contra* Request, KSC-BC-2020-06/F02675, paras 14-17.

¹⁴ Request, KSC-BC-2020-06/F02675, paras 20, 25, 27.

5. Additionally, the Defence arguments as to why the Panel's reasoning was supposedly in error are outside the scope of a request for certification to appeal, and do not demonstrate how the issue is appealable.¹⁵ The Defence also repeats to a large extent the arguments contained in the Response and a related motion to exclude the evidence in question,¹⁶ all of which were before the Panel when it issued its Decision. The Panel has explicitly considered, addressed, and rejected these submissions. The Request therefore attempts to relitigate these matters, expressing mere disagreement with the Panel's reasoning and outcome thereof.

6. Finally, Defence arguments alleging an appearance of bias¹⁷ are unsubstantiated, based on misrepresentations, and should be summarily dismissed. In the circumstances outlined above, where the Defence is free to present evidence in accordance with the procedures outlined in the Rules, it is neither possible, nor appropriate, to argue that the Panel 'closed its mind' to improperly tendered evidence. When a Party seeks relief, it should file a motion, thereby triggering the briefing schedule for responses and replies,¹⁸ and ensuring that its request is given due consideration.

7. For all these reasons, the Request should be denied as it fails to present an appealable issue that stems from the Decision.

¹⁵ See Request, KSC-BC-2020-06/F02675, paras 13-24 (arguing that the Panel erred by unjustifiably departing from precedent, issuing a decision which is 'wrong in principle and contrary to fairness,' and which jeopardizes the Panel's neutrality and truth-seeking function.). See also *Thaçi* Decision, KSC-BC-2020-06/F00172, para.17 ('certification is not concerned with whether a decision is correctly reasoned, but whether the standard for certification has been met.')

¹⁶ Compare e.g. Request, KSC-BC-2020-06/F02675, paras 6, 8, 20-24 with Response, KSC-BC-2020-06/F02523, paras 4-9, 12-13 and Joint Defence Motion to Exclude the Evidence of W01234, W04859, W04860 and W04570, KSC-BC-2020-06/F02478, 30 July 2024, Confidential, paras 27-33.

¹⁷ Request, KSC-BC-2020-06/F02675, para.24.

¹⁸ Rules 75-76.

B. THE ISSUE WOULD HAVE NO IMPACT JUSTIFYING CERTIFICATION

8. Should the Panel find however that the Defence has identified an appealable issue emanating from the Decision, the Request should nonetheless be denied as it fails to establish how this issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, or how an immediate resolution by a Court of Appeals Panel would materially advance the proceedings.

9. The Defence argument that the issue significantly affects the fair and expeditious conduct of the proceedings is baseless primarily because there is nothing unfair or unexpeditious about requiring the Parties to follow the Rules. The Decision, which makes it clear that the Panel will consider a request for admission made in accordance with the Rules,¹⁹ neither denies admission of nor curtails the Defence's ability to tender the evidence in question. The fairness of the proceedings is therefore preserved because the Defence retains a genuine opportunity to present its case and to be apprised of and comment on the observations and evidence submitted to the Panel which might influence its judgement.²⁰ Indeed, the Decision ensures fairness by putting the Defence in the same procedural position as the SPO, thereby preserving the adversarial nature of the proceedings and ensuring equality of arms between the Parties.²¹ Similarly, there can be no effect on the speediness of the trial because requiring the Defence to tender evidence through a motion, rather than a response to an SPO motion, neither delays the trial, nor uses any additional court time. For these reasons, the Request has failed to demonstrate how the Decision would have any negative effect – let alone a significant one – on the fairness or expeditiousness of the proceedings.

¹⁹ Decision, KSC-BC-2020-06/F02765, paras 48, 64.

²⁰ *Gucati* Decision, KSC-BC-2020-07/F00169, para.14.

²¹ *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Defence Request for Leave to Appeal F00470, KSC-BC-2020-07/F00484, 8 December 2021, para.11.

10. Finally, an immediate resolution by a Court of Appeals Panel would not materially advance the proceedings. Any prejudice alleged by the Defence as a result of the Decision could be remedied at trial, in particular, as a first step, by filing a motion requesting admission of the evidence at issue. In this respect, even an interlocutory appeal decision in the Defence's favour would have no impact on the proceedings because the Defence would be left in the same procedural position as it is now.


III. CLASSIFICATION

11. This filing is confidential pursuant to Rule 82(4) and considering that no public version of the Request has been filed. As it does not contain any information requiring confidential classification at this time and in light of the Defence's classification submissions,²² the SPO requests that this response be reclassified as public.

IV. RELIEF REQUESTED

12. For the foregoing reasons, the Request fails to meet the leave to appeal standard and should be rejected.

Word count: **1501**



Kimberly P. West

Specialist Prosecutor

Monday, 13 January 2025

At The Hague, the Netherlands.

²² Request, KSC-BC-2020-06/F02675, para.22.