

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 Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Kadri Veseli
Specialist Counsel for Jakup Krasniqi

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Veseli and Krasniqi Reply to SPO Response to F02777 (F02825)

Specialist Prosecutor's Office
Kimberly P. West

Counsel for Hashim Thaçi
Luka Misić

Counsel for Kadri Veseli
Rodney Dixon KC

Counsel for Victims
Simon Laws

Counsel for Rexhep Selimi
Geoffrey Roberts

Counsel for Jakup Krasniqi
Venkateswari Alagendra

I. INTRODUCTION

1. The Defence for Mr Kadri Veseli and Mr. Jakup Krasniqi ("Defence") hereby file this Reply to the SPO Response¹ to the Defence's Request for leave Appeal² the Trial Panel's First Oral Order of 5 December 2024.³

II. SUBMISSIONS

2. The SPO's Response incorrectly characterises the Defence's request for leave to appeal as an attempt to "relitigate general Defence objections to the scope and manner of Judges' questioning".⁴ The Defence plainly acknowledged⁵ the decision of the Court of Appeals Chamber on judicial questioning⁶ in its Request for Certification and accepted that the decision affirmed that the Panel has a "broad discretionary power with respect to the subject or substance of questions put to witnesses."⁷
3. The issues raised on appeal arise from what is submitted to be a clear misinterpretation and misapplication by the Panel of the scope of the power afforded to it by the Court of Appeals Chamber. The decision of the Court of Appeals Chamber did not determine that there are *no* limits on the scope and manner of Judges' questions. Indeed, to the contrary the decision makes clear that, while broad, the discretion which applies to judicial questioning is subject to three fundamental and clear limitations, in that questioning must (a) not lead to the

¹ F02825, SPO, *Prosecution Consolidated Response to Defence requests for Leave to Appeal Oral Orders of 4 and 5 December 2024*, 13 January 2025, confidential ("SPO Response").

² F02777, Specialist Counsel, *Veseli and Krasniqi Defence Request for Certification to Appeal First Oral Order of 5 December 2024*, 12 December 2024, Confidential ("Defence Request for Certification")

³ KSC-BC-2020-06, Official Transcript of Proceedings, Thursday 5 December, starting on page 23434 ("Transcript of 5 December 2024") First Oral Order, p.23435 line 8.

⁴ SPO Response, para.7.

⁵ Defence Request for Certification, para.11.

⁶ IA028-F00011, Court of Appeal's Chamber, *Decision on Thaçi, Selimi and Krasniqi Appeal against Oral Order on Trial Panel Questioning*, 4 July 2023, confidential (a public redacted version was filed at IA028-F00011RED) ("Court of Appeal Decision").

⁷ *Ibid*, para.34.

apprehension of bias (b) not cause prejudice and (c) not otherwise encroach upon the rights of the accused.⁸ The impugned manner of judicial questioning breaches all three of these express limitations.

4. Firstly, the SPO is prohibited from putting to a live witness, and inviting them to comment upon, the inadmissible witness statements of another witness upon whom the SPO no longer rely. The reason this conduct is prohibited is because of the obvious and irreparable prejudicial impact upon the Defence; this is not in issue. It is therefore indisputable that, by engaging in the same conduct, the Panel equally causes the Defence the same obvious and irreparable prejudice which the law prohibits the SPO from causing. It is submitted that it cannot be right, fair or logical that the Defence would be afforded protection by the law from this prejudice when caused by the SPO, but not when caused by the Panel.
5. Secondly, where the Panel knowingly engages in conduct which causes obvious prejudice to the Defence there is an inevitable risk that a reasonable onlooker would apprehend bias. There is also a risk that the Panel would be seen as descending in to the fray as opposed to maintaining the role of neutral arbiters and fact finders.
6. Thirdly, the Defence's right to confront the evidence against the Accused is obviously infringed by the inability to challenge the original maker of the inadmissible witness statement. The suggestion that the Defence can cross examine a third party about the words of another witness clearly misunderstands and misstates nature of the prejudice suffered, as outlined in our original Defence Request for Certification.⁹
7. It is submitted that the Panel's interpretation of the Court of Appeals Chamber's decision set out in the First Oral Order of 5 December 2024 is incorrect, as the Panel

⁸ *Ibid* at para.32.

⁹ Defence Request for Certification, para. 24.

have sanctioned questioning which, for the reasons outlined above, clearly breaches all limitations put upon it by the Court of Appeals Chamber. This misinterpretation can only be addressed by way of appellate review.

8. In the ordinary course of events, when leave is sought to appeal a decision of the Panel, the underlying decision would concern a dispute between the parties, where, in coming to their decision, the Panel is acting as a neutral arbiter of the issues as between parties. However, in the context of a challenge to judicial questioning, the Panel is no longer a neutral arbiter of the issues, but a party to the dispute in question. Thus, it would be wrong for the Panel to be the final arbiters of the fairness or lawfulness of their own conduct, particularly in circumstances where the conduct is causing prejudice to the Defence. In these circumstances, appellate intervention is merited to prevent further prejudice from the breach of the Accused's fundamental rights.
9. An issue clearly arises as to whether the Panel are permitted to cause to the Defence prejudice given the unambiguous finding of the Court of Appeals Chamber that that the "the Panel finds 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 wording of the Court of Appeals Chamber's decision is unequivocal and does not permit questioning when *any* prejudice is caused, no matter how minor and no matter what additional steps could be taken to mitigate it, nor does it allow for any balancing act to be conducted in the weighing of the prejudice caused against any potential probative value, as is the case when the SPO see to admit evidence.
10. The Defence has a right to have this issue determined by an impartial tribunal. It is not a re-litigation of an issue, it is significant matter going to the heart of the

¹⁰ Court of Appeal Decision, para.32.


correct interpretation of the scope of judicial questioning. Notably, the Panel has previously certified issues related to judicial questioning for appeal thus recognising the importance of an impartial tribunal adjudicating these types of issues.¹¹

III. CONCLUSION

11. In light of the foregoing, the Defence requests that leave to appeal is granted in accordance with the relief sought in its original Request for Certification.

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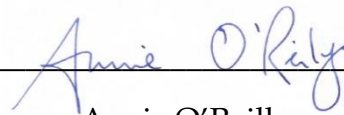
Rodney Dixon KC

Lead Counsel for Kadri Veseli



Kerrie Ann Rowan

Co-Counsel for Kadri Veseli



Annie O'Reilly

Co-Counsel for Kadri Veseli



Venkateswari Alagendra
Lead Counsel for Jakup Krasniqi

¹¹ F01531, *Decision on Thaçi, Selimi and Krasniqi Defence Request for Certification to Appeal the Oral Order on Trial Panel Questioning*, 17 May 2023.



Aidan Ellis
Co-Counsel for Jakup Krasniqi



Shyamala Alagendra Khan
Co-Counsel for Jakup Krasniqi



Viçtor Băieșu
Co-Counsel for Jakup Krasniqi