



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 Guénaël Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 30 January 2025

Language: English

Classification: Confidential and *Ex Parte*

**Decision on Registrar Referral Pursuant to Section 12(5) of the
Directive on Counsel**

Specialist Prosecutor
Kimberly P. West

Counsel for Rexhep Selimi
Geoffrey Roberts

Participant
David Young

TRIAL PANEL II ("Panel"), pursuant to Articles 21(4)(e) and 40(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), Rule 26(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), Article 28(3)(b) and (c) and (4)(b)(1) and (2) of the Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers ("Code of Conduct"),¹ and Section 12(5) of the Directive on Counsel ("Directive on Counsel"),² hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 12 November 2020, the Registrar assigned David Young ("Mr Young") as Counsel for Rexhep Selimi ("Mr Selimi") in Case KSC-BC-2020-06 ("Case 06").³
2. On 1 May 2023, the Panel approved Mr Young's withdrawal as Counsel to Mr Selimi.⁴
3. On 3 May 2023, the Registrar approved Mr Young as Co-Counsel for Mr Selimi.⁵
4. On 13 February 2024, the Registrar confirmed the termination of Mr Young's contract as Co-Counsel for Mr Selimi.⁶

¹ KSC-BD-07/Rev1/2021, Registrar, *Registry Practice Direction: Code of Professional Conduct for Counsel and Prosecutors before the Kosovo Specialist Chambers*, 28 April 2021.

² KSC-BD-04/Rev2/2024, Registrar, *Registry Practice Direction: Directive on Counsel*, 22 February 2024.

³ F00075, Registrar, *Notification of the Appointment of Counsel to Rexhep Selimi*, 12 November 2020, with Annex 1, confidential.

⁴ F01493, Panel, *Decision Approving the Withdrawal of Counsel for Rexhep Selimi*, 1 May 2023.

⁵ F01502, Registrar, *Notification of Approval of Co-Counsel for Mr Rexhep Selimi*, 4 May 2023, with Annex 1, confidential, para. 4.

⁶ F02132, Registrar, *Notification of Termination of Contract of Co-Counsel for Mr Rexhep Selimi*, 16 February 2024, with Annexes 1-2, confidential, para. 3.

5. On 29 November 2024, the Pre-Trial Judge in Case KSC-BC-2023-12 (“Case 12”) confirmed the indictment against, among other persons, Fadil Fazliu (“Mr Fazliu”).⁷
6. On 5 December 2024, the Registrar assigned Michiel Pestman (“Mr Pestman”) as Duty Counsel for Mr Fazliu.⁸
7. On 18 December 2024, following a request by Mr Fazliu that Mr Young be assigned as his Counsel, the Registrar referred to the Panel the issue of the existence of an actual or potential conflict of interest pursuant to Section 12(5) of the Directive on Counsel (“Referral”), given Mr Young’s prior representation of Mr Selimi in Case 06.⁹
8. On 15 January 2025, upon authorisation from the Panel,¹⁰ the Specialist Prosecutor’s Office (“SPO”) filed submissions on the Referral (“SPO Submissions”).¹¹
9. On 22 January 2025, upon authorisation from the Panel,¹² Mr Young responded to the Referral (“Response”).¹³ On the same day, Mr Young filed a supplemental response to the Referral (“Supplemental Response”).¹⁴

⁷ See KSC-BC-2023-12, F00055, Specialist Prosecutor, *Submission of Public Redacted Version of Confirmed Indictment* (“Case 12 Indictment”), 6 December 2024, with Annex 1, para. 1.

⁸ KSC-BC-2023-12, F00051, *Notification of Assignment of Duty Counsel to Fadil Fazliu*, 6 December 2024, with Annex 1, confidential, para. 2.

⁹ F02799, Registrar, *Referral Pursuant to Section 12(5) of the Directive on Counsel*, 18 December 2024, confidential and *ex parte*.

¹⁰ CRSPD692, *Ex Parte Status of F02799*, 19 December 2024, confidential.

¹¹ F02835, Specialist Prosecutor, *Prosecution Submissions on ‘Referral Pursuant to Section 12(5) of the Directive on Counsel’*, 15 January 2025, confidential and *ex parte*.

¹² CRSPD692, *Ex Parte Status of F02799*, 19 December 2024, confidential.

¹³ F02847, Mr Young, *Response to the Registrar’s Referral to Trial Panel II Pursuant to Section 12[5] of the Directive on Counsel*, 22 January 2025, confidential and *ex parte*.

¹⁴ F02848, Mr Young, *Supplemental Response to the Registrar’s Referral to Trial Panel II Pursuant to Section 12[5] of the Directive on Counsel*, 22 January 2025, confidential and *ex parte*, with Annex 1, confidential and *ex parte*.

II. SUBMISSIONS

10. The Registrar requests a determination on whether an actual or potential conflict of interest would arise if Mr Young were to represent Mr Fazliu in Case 12 given Mr Young's prior representation of Mr Selimi in Case 06.¹⁵ The Registrar submits that a referral to the Panel is required in the present circumstances and that she may exercise her discretion in referring this matter for judicial determination pursuant to Section 12(5) of the Directive on Counsel.¹⁶ Moreover, the Registrar avers that there are concrete reasons to suggest that Case 12 is substantially related to Case 06 and recalls the Panel's findings that conflicts of interests should not only be removed, but also prevented before they arise, in order to safeguard the interests of justice.¹⁷ Finally, the Registrar notifies the Panel that she has filed a corresponding referral pursuant to Section 12(5) of the Directive on Counsel before the Pre-Trial Judge in Case 12.¹⁸

11. The SPO submits that Case 06 and Case 12 are substantially related and a potential conflict of interest exists, considering that Mr Young, while representing Mr Selimi in Case 06, may have had access to confidential information relating to the same material that has been and/or will be disclosed to Mr Fazliu in Case 12.¹⁹ Moreover, the SPO submits that there is no evidence that Mr Young has obtained the informed consent of each potentially affected client, which he must provide before his appointment as Counsel for Mr Fazliu.²⁰

12. Mr Young submits that there is no actual or potential conflict of interest and requests the Panel to make such a determination.²¹ In particular, Mr Young avers that: (i) the Indictment in Case 12 does not allege any involvement of Mr Selimi in

¹⁵ Referral, para. 13.

¹⁶ Referral, paras 14-15.

¹⁷ Referral, paras 16-19.

¹⁸ Referral, para. 20.

¹⁹ SPO Submissions, para. 2.

²⁰ SPO Submissions, para. 3.

²¹ Response, paras 2, 32.

the charges against Mr Fazliu;²² (ii) the matters are not substantially related, nor are the interests of Mr Selimi and Mr Fazliu materially adverse, and both of these elements need to be established for a conflict of interest to exist;²³ (iii) Mr Young has no recollection of ever obtaining any confidential information relating to the same material relevant to Case 12;²⁴ (iv) Mr Fazliu has expressly sought representation by Mr Young, whose appointment is supported also by Mr Pestman;²⁵ and (v) Mr Young does not seek to represent two Accused simultaneously and has not been Lead Counsel for Mr Selimi since 2023.²⁶ In addition, Mr Young submits the informed consent of Mr Selimi,²⁷ should the Panel determine that the cases are substantially related.²⁸

III. APPLICABLE LAW

13. Pursuant to Article 21(4)(e) of the Law, in the determination of any charge against the accused pursuant to the Law, the accused shall be entitled to defend himself or herself through Specialist Counsel of his or her own choosing.²⁹

14. Pursuant to Article 40(2) of the Law, the Trial Panel shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules, with full respect for the rights of the accused.

15. Pursuant to Article 28(3)(b) and (c) of the Code of Conduct, except as provided in Article 28(4), Counsel shall not advise, represent or act on behalf of a Client in a matter before the Specialist Chambers if: (i) Counsel is advising, representing or

²² Response, paras 13-15.

²³ Response, paras 16-25.

²⁴ Response, para. 26.

²⁵ Response, paras 29-30.

²⁶ Response, para. 31.

²⁷ Annex 1 to the Supplemental Response.

²⁸ Response, para. 28.

²⁹ See also Article 30(5) of the Constitution of the Republic Kosovo; Article 6(3)(c) of the European Convention on Human Rights; Article 14(3)(d) of the International Covenant on Civil and Political Rights.

acting or has advised, represented or acted on behalf of a Client in a substantially related matter before the Specialist Chambers; or (ii) Counsel has advised, represented or acted on behalf of a former Client and the interests of the prospective or new Client are materially adverse to the interests of the former Client.

16. Pursuant to Article 28(4)(b)(1) of the Code of Conduct, where an actual or potential conflict of interest arises pursuant to Article 28(3)(b), at any stage of proceedings, Counsel shall notify the Registrar in writing and obtain the informed consent of each potentially affected Client and notify the relevant Panel(s), which shall determine whether a conflict of interest exists.

17. Pursuant to Article 28(4)(b)(2) of the Code of Conduct, where an actual or potential conflict of interest arises pursuant to Article 28(3)(c), at any stage of proceedings, Counsel shall notify the Registrar in writing and obtain the informed consent of each potentially affected Client and assess whether such consent is likely to irreversibly prejudice the fair and proper administration of justice, including the Client's right to a fair trial. Before giving such consent, each potentially affected Client shall receive independent advice from the Head of the Defence Office or the Head of the Victims' Participation Office, as applicable. Counsel shall make a written record of the consent as well as his or her assessment. When in doubt as to the assessment, Counsel shall seek advice from the Independent Representative Body of Specialist Counsel. If this advice contradicts Counsel's assessment, Counsel shall notify the relevant Panel, which shall determine whether a conflict of interest exists.

18. Pursuant to Section 12(5) of the Directive on Counsel, the Registrar shall not appoint or assign Counsel if he or she is advising, representing or acting or has advised, represented or acted on behalf of another client in the same matter before the Specialist Chambers, in accordance with Article 28(3)(a) and (4)(a) of the Code of Conduct. In relation to any other potential conflict of interest referred to in

Article 28(3)(b)-(e) of the Code of Conduct, the Registrar may, before appointing or assigning Counsel, refer the issue to the relevant Panel for its decision. Pending the Panel's decision, the Registrar may take interim measures to ensure representation when the interests of justice so require.

IV. DISCUSSION

19. According to relevant case law, a conflict of interest arises where, by reason of certain circumstances, representation by Counsel prejudices, or could prejudice, the interests of the client and the wider interests of justice. Conflicts of interest have, for instance, been found to exist where, due to Counsel's duty of loyalty, representation of two clients would limit the choice of defence strategies of one or both clients. A conflict of interest might be more readily identified where Counsel is seeking to represent two accused who are, at least in part, charged with the same criminal acts, committed during the same period of time and in the same area.³⁰ The fact that cases are factually overlapping is not, in and of itself, ground to find that such a conflict exists. What is prohibited is representation of multiple defendants that will or may reasonably be expected to adversely affect the representation of a defendant.³¹

20. The Panel observes that Article 28(3) of the Code of Conduct seeks to prevent both an actual and a potential conflict of interest. Turning to the specificities of this case, the Panel notes that Mr Selimi and Mr Fazliu are charged with crimes of an entirely different nature, allegedly committed in different contexts, places and

³⁰ F02112, Panel, *Decision on Defence Counsel Request for Determination Pursuant to Article 28(4)(b)(i) of the Code of Professional Conduct for Counsel and Prosecutors (Conflict of Interest)* ("Decision on Conflict of Interest"), 8 February 2024, para. 22, and references cited therein. See also ICTY, *Prosecutor v. Tolimir et al.*, IT-05-88-PT, Trial Chamber II, [Decision on Appointment of Co-Counsel for Radivoje Miletić](#), 28 September 2005, paras 29, 34; *Prosecutor v. Martić*, IT-95-11-PT, Trial Chamber, [Decision on Appeal against Decision of Registry](#), 2 August 2002, p. 7.

³¹ ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-AR73.2, Appeals Chamber, [Decision on Ivan Čermak's Interlocutory Appeal Against Trial Chamber's Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković](#), 29 June 2007, para. 24.

times.³² The Panel acknowledges that the Case 12 Indictment alleges interference or unlawful contact with Case 06 witnesses, and the witnesses in the two cases may therefore partly overlap. This being said, the Panel considers that: (i) the Case 12 Indictment does not allege any involvement of Mr Selimi in the charges against Mr Fazliu,³³ and (ii) Mr Young does not seek to represent two Accused simultaneously and has not been Lead Counsel for Mr Selimi since 2023.³⁴ The Panel is of the view that the possibility that Mr Selimi's and Mr Young's lines of defence could conflict is therefore remote at best or inexistent. There is no indication that Mr Young's prior representation of Mr Selimi will or may reasonably be expected to adversely affect the representation of Mr Fazliu. The Panel is therefore satisfied that: (i) the matters involving Mr Selimi and Mr Fazliu are not substantially related; and (ii) the interests of Mr Selimi and Mr Fazliu are not materially adverse.

21. Regarding the SPO's argument that, while representing Mr Selimi in Case 06, Mr Young may have had access to confidential information relating to the same material that has been and/or will be disclosed to Mr Fazliu in Case 12,³⁵ the Panel notes that the SPO has failed to clearly identify any such material. The Panel has not identified material that would create a credible concern in that regard. The Panel further notes that should such material exist, the Code of Conduct already provides that Counsel is required to notify the Registrar in writing of the existence of an actual or potential conflict of interests and obtain the informed consent of each potentially affected Client.

22. In light of the above, the Panel finds that the potential for a conflict of interest to arise in relation to Mr Young's assignment as Counsel for Mr Fazliu is remote

³² See F00999/A01, Specialist Prosecutor, *Annex 1 to Submission of Confirmed Amended Indictment* ("Case 06 Indictment"), 30 September 2022, confidential (a public lesser redacted version was filed on 27 February 2023, F01323/A01); Case 12 Indictment.

³³ Case 12 Indictment.

³⁴ Response, para. 31.

³⁵ SPO Submissions, para. 2.

and merely theoretical, and there is no indication, at this stage, of a credible risk that such a conflict would materialize. In this regard, the Panel notes that, pursuant to Article 28(4) of the Code of Conduct, Counsel's duty to assess whether an actual or potential conflict of interest arises is an ongoing obligation which continues to apply throughout the proceedings.

23. In addition, the Panel recalls that the duty to inform promptly and fully each potentially affected client and to take all steps to remove a (potential) conflict of interest and/or to obtain the full and informed consent of the concerned individuals lies squarely upon Counsel.³⁶ Consent provided should generally be regarded as being fully informed in the absence of an indication to the contrary.³⁷ In this regard, the Panel notes that Mr Selimi has given his informed consent to Mr Young representing Mr Fazliu.³⁸ Regarding Mr Fazliu, while no written consent has been submitted before the Panel, the Panel considers Mr Young's submissions that: (i) Mr Fazliu has expressly sought his representation with knowledge that he had represented Mr Selimi in the past; and (ii) his appointment is supported also by Mr Fazliu's Duty Counsel, Mr Pestman.³⁹ The Panel is therefore satisfied that Mr Fazliu made an informed choice by requesting that Mr Young be assigned as his Counsel.

24. In light of the above, the Panel finds that, on the basis of the information available to this Panel, there is no indication of an actual or potential conflict of interest if Mr Young were to represent Mr Fazliu in Case 12.

³⁶ Decision on Conflict of Interest, para. 27, and references cited therein.

³⁷ Decision on Conflict of Interest, para. 27, and references cited therein.

³⁸ See above para. 12.

³⁹ Response, paras 29-30, referring to KSC-BC-2023-12, F00123, Specialist Counsel, *Fadil Fazliu Submissions on Referral Pursuant to Section 12(5) Direction of Counsel & Request for Extension of Time to Respond to Pending Motions*, 20 January 2025, para. 14.

V. CLASSIFICATION

25. The Panel notes that the Referral, the SPO Submissions, the Response and the Supplemental Response were filed confidentially and *ex parte*. The Panel also notes that the SPO submits that it does not object to the reclassification of the SPO Submissions as public.⁴⁰ The Panel therefore: (i) orders the Registry and Mr Young to submit public redacted versions of the Referral, the Response and the Supplemental Response, or request their reclassification, by **Friday, 7 February 2025**; and (ii) directs the Registry to reclassify the SPO Submissions as public.

VI. DISPOSITION

26. For the above-mentioned reasons, the Panel hereby:

- a) **FINDS** that, at this stage, there is no indication that an actual or potential conflict of interest would arise if Mr Young were to represent Mr Fazliu in Case 12;
- b) **ORDERS** the Registry and Mr Young to submit public redacted versions of the Referral, the Response and the Supplemental Response, or request their reclassification, by **Friday, 7 February 2025**; and
- c) **DIRECTS** the Registry to reclassify the SPO Submissions as public.



Judge Charles L. Smith, III

Presiding Judge

Dated this Thursday, 30 January 2025

At The Hague, the Netherlands.

⁴⁰ SPO Submissions, para. 4.