

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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**Public Redacted Version of ‘Veseli and Krasniqi Request for Certification to Appea
First Oral Order of 5 December 2024’**

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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 Messrs. Kadri Veseli and Jakup Krasniqi ("Defence") hereby file this request for certification to appeal the Trial Panel's First Oral Order of 5 December 2024, in which the Panel determined:

"[I]n the exercise of its broad discretionary power to ask witnesses any question, the Panel is not barred from using documents or statements pertaining to individuals that are not or are no longer on the parties' witness list, provided that no party suffers prejudice from the use of the relevant documents and that the rights of the accused are respected" (the "Impugned Decision").³

2. The Defence submits the following **two issues** for certification:
 - i. **First issue:** Whether the introduction of witness testimony that has been expressly excluded from the SPO's Case onto the record through judicial questioning improperly and unfairly usurps the role of the SPO.
 - ii. **Second issue:** Whether the Trial Panel erred by failing to consider the obvious and unavoidable prejudice which arises out of the Defences' inability to cross examine the maker of a witness statement who will not

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 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.

be called as a witness, but whose testimony (or a part thereof) forms part of the record as a result of its use in the course of judicial questions.

A. Background

3. Between 28 November 2024 and 5 December 2024, W04401 gave evidence as witness for the SPO. The Trial Panel exercised their right to put questions to W04401 over approximately 4.5 hours.
4. In the course of judicial questioning, the Trial Panel asked W04401 whether, “he kept contacts with the LPK abroad” while in Kosovo.⁴ W04401 responded “no.” The Trial Panel subsequently called up the transcript of an SPO interview [REDACTED] Witness Statement”).⁵ Portions of the [REDACTED] Witness Statement were read out and used by the Panel to impugn the witness.⁶ As a result, portions of [REDACTED]’s testimony were incorporated into the public evidential record.
5. On 16 September 2024, the SPO had filed a notice of witness changes informing the parties that the SPO no longer intends to rely on the evidence of [REDACTED].⁷ Therefore, the SPO made an express decision that the evidence of [REDACTED] would no longer form part of its case. The prior statements of [REDACTED] are thus inadmissible.
6. Counsel for Kadri Veseli objected to the Panel’s use of the [REDACTED] Witness Statement on the basis that, firstly, [REDACTED] is no longer a witness in the case and as such, the [REDACTED] Witness Statement is not evidence and cannot be relied by the SPO or the Panel and, secondly, its use violates the Accused’s rights given that the Accused will not have an opportunity to cross-

⁴ KSC-BC-2020-06, Official Transcript of Proceedings, 4 December 2024, starting at 23294 (“Transcript of 4 December 2024”) at T23411.10, 4 December 2024.

⁵ [REDACTED].

⁶ Transcript of 4 December 2024 at p.23412 line 10.

⁷ [REDACTED].

examine the maker of the statement on the issues put on record as a result of its use.⁸

7. On 5 December 2024, the Trial Panel rendered the Impugned Decision,⁹ finding that there are no legal limitations on the subject matter of the Trial Panel's questions to a witness,¹⁰ and that the [REDACTED] Witness Statement was in the possession of the Defence for a long time and still forms part of the SPO case.¹¹ The Panel further considered that the Defence's opportunity to conduct further cross-examination of W04401 on issues arising from the Panel's use of the [REDACTED] Witness Statement meant that no prejudice to the Defence would arise.

II. APPLICABLE LAW

8. Pursuant to Article 45(2) and Rule 77(2)¹² a right to appeal only arises if the standard of certification set forth therein has been met.
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.¹³

⁸ Transcript of 4 December 2024 at p.23431 line 16.

⁹ Transcript of 5 December 2024, at p.23437 line 3.

¹⁰ Citing, Rule 127(3) and 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).

¹¹ Transcript of 5 December 2024, at p.23436 line 11.

¹² Rules, Rule 77.

¹³ F01678, Panel, *Decision on Veseli and Krasniqi Defence Request for Certification to Appeal the Second Decision on Specialist Prosecutor's Bar Table Motion*, 17 July 2023, public, paras 9-11; F01237, Panel, *Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses*, 30 January 2023, paras 7-8; F00172, Panel, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, paras 6-7, 9-17. See also, KSC-BC-2020-07, F00423, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect*, 8 November 2021, paras 13-21; F00372, *Decision on Haradinaj Defence's Application for Certification of F00328*, 15 October 2021, paras 15-17; F00484, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021, paras 4-14.

III. SUBMISSIONS

10. The two issues satisfy the requirements for leave to appeal. They arise from the Impugned Decision, do not merely disagree with the Decision, are liable to significantly affect the fair and expeditious conduct of the proceedings and require immediate resolution by the Appeals Chamber in order to materially advance the proceedings.

B. The Issues Arise from the Impugned Decision

i. First issue

11. In the Impugned Decision, the Panel cited Rule 127(3) and a decision of the Court of Appeal's Chamber¹⁴ to support the conclusion that the KSC legal framework does not place any limitation on the subject matter of the Trial Panel's questions to witnesses. Firstly, the cited decision does place limits on Panel's questioning in so far as judicial questioning must "not lead to the apprehension of bias, suffering of prejudice, or otherwise encroach upon the rights of the accused."¹⁵ Secondly, the objections raised by the Veseli Defence related specifically to the use of inadmissible witness statements in the course of judicial questioning where such evidence has been expressly excluded from the SPO's case and not the subject matter of the questions.

12. Where the SPO has exercised its prosecutorial discretion by choosing not to rely upon specific witnesses, the statements of those witnesses are necessarily inadmissible whether introduced through use with another witness or otherwise tendered for admission. This stems from the undue prejudice that is

¹⁴ 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).

¹⁵ *Ibid* at para.32.

caused to the Defence if the SPO can re-introduce testimonial evidence which it has already chosen to exclude.

- i. The 're-introduction' of excluded witness testimony through another witness amounts to a serious breach of the Accused's fundamental constitutional and international human rights as protected by Article 32 of the Law, Article 31 of the Constitution of Kosovo, Article 6 of the European Convention on Human Rights and Article 14 of the International Convention on Civil and Political Rights.
 - ii. The Accused have a right to know the facts upon which the case against them rests,¹⁶ as well as a corollary right to prepare a Defence case on that basis – both of which are fundamental to ensuring the fairness of any adversarial proceedings.¹⁷ Any evidence, including a witness statement, which has been excluded by the SPO from its case is inadmissible on the basis that allowing such evidence would be fundamentally unfair.
13. By using the [REDACTED] Witness Statement of [REDACTED] with W04401, the Panel introduced into the record evidence that the SPO had chosen to exclude. The result being that untested, inadmissible witness testimony became part of the record.
14. The introduction of witness statements is governed by a distinct set of Rules (Rules 143, 153-155), compliance with which protects the rights of the Defence. If the Panel can circumvent these rules, the protections they afford are lost.
15. The Panel has previously determined that no rule or principle that "limits the Panel's ability to rely, for the purpose of fulfilling its fact-finding function, on

¹⁶ See, Article 21(4)(a) of the Law

¹⁷ European Convention on Human Rights ("ECHR"), Article 6(1).

any evidence that has been found to be admissible.”¹⁸ While it is not conceded that this reasoning is correct, in any event, it cannot be correct in principle that there is *no limit* on the power of the Panel to refer to disclosed material in the case. The use by the Panel of inadmissible evidence which the SPO has chosen to exclude from its case must be one such limit, as it evidently breaches fair trial principles and the Accused’s rights.

16. The use of witness testimony in particular is distinct from the use of other evidence, such as newspaper articles. Where the Defence will not have an opportunity to cross-examine the maker of a statement, the Rules make it clear that the introduction of witness testimony in written form must be limited.¹⁹

17. The SPO is required by the Law to act with impartiality and independence.²⁰ By re-introducing evidence that the SPO has excluded, the Trial Panel undermines the independent decision-making prerogatives of the SPO, and in particular, the SPO’s right to choose which witnesses form the factual basis of its case. In doing so, the Panel is inappropriately usurping the role of the SPO by going behind the express decision of the SPO not to rely on the evidence in question.

18. Introducing inadmissible testimonial evidence into the evidential matrix of the proceedings through judicial questioning and in disregard of the relevant Rules undermines the basic principle that evidence should be produced in the presence of the accused with a view to adversarial argument.²¹ It further gives the appearance of bias and undermines the impartiality of the Trial Panel

¹⁸ F02130, Trial Panel, *Decision on the Thaçi Defence’s Submissions Concerning Use of Prior Inconsistent Statements Pursuant to Rule 143(2)*, 15 February 2024, public, para.15.

¹⁹ See, Rules 153-155.

²⁰ Article 35(1) and 35(5) of the Law.

²¹ See generally, Article 6(3)(d) of the ECHR.

within adversarial proceedings²² and gives the impression the Panel is descending into the fray.

19. While the Panel can ask any question, the Panel should not be permitted to do that which the SPO would be prohibited from doing due to the prejudice that this would cause the Defence. Evidence is inadmissible where its admission would, by definition, cause undue prejudice to the Defence. The SPO would not be permitted to read inadmissible evidence to a witness, as it would prejudice the defence; the Panel likewise should not be permitted to cause such prejudice. A reasonable onlooker would not perceive this conduct by the Panel to be fair.²³

ii. *Second issue*

20. The Second Issue concerns the Panel's flawed assessment of the obvious prejudice which arises out of the Defences' inability to cross-examine the maker of a statement in circumstances where that person's evidence is read into the record and a third party has been asked to comment upon it.

21. The Impugned Decision determined that witness statements of individuals who are no longer part of the SPO's case can only be used by the Trial Panel in judicial questions "provided that no party suffers prejudice from the use of the relevant documents and the rights of the accused are respected."²⁴ The Panel erred by failing to apply their own reasoning to the circumstances in question and permitting documents to be put to a witness where a clear and incurable prejudice is caused to the Defence.

²² See F02718, *Specialist Counsel, Joint Defence Request for the Trial Panel to take Measures to Ensure the Appearance of Impartiality of the Proceedings and Avoid Prejudice to the Defence*, 13 November 2024, public.

²³ For the avoidance of doubt, the Defence's position is that plainly, the Defence, as a party to proceedings, *can* put statements to witnesses in the course of cross-examination. The appealable issue is whether it is appropriate for the Trial Panel, which is not a party, to use the statements of witnesses that the SPO have dropped.

²⁴ Transcript of 5 December 2024, First Oral Order, p.23436 line 19.

22. Firstly, the ordinary meaning of the words “no party suffers prejudice” is that a party must not suffer any prejudice as a result of the judges’ conduct. The Panel are not a party to the case, and in their role as the neutral arbitrators of fact, they should not engage in conduct which would cause a party prejudice.
23. The Panel’s ruling cannot be read as permitting circumstances to arise where the Accused does, in fact, suffer prejudice and that prejudice cannot be remedied. That cannot be consistent with the basic meaning of the words “provided no party suffers prejudice from the use of the relevant documents.” If prejudice results from the use of a document, the document cannot be used.
24. The Defence clearly suffer prejudice when the Panel introduces into the record the statement of a witness upon whom the SPO do not rely. The Defence is prejudiced by the inability to test the credibility of the person who made the statement, to explore the circumstances in which a particular answer was given, to invite the person who made the statement to provide context for any part of it, to put the Defence’s case to the maker of the statement, and to contest or challenge the accuracy of the person’s knowledge in relation to a particular issue.
25. Article 6(3)(d) of the ECHR provides that the accused has a fundamental right “to examine or have examined witnesses against him.” The Grand Chamber of the European Court of Human Rights has previously held that Article 6(3)(d)
- “[E]nshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the Defence, which, as a rule, require that the accused should be given an adequate

and proper opportunity to challenge and question a witness against him."²⁵

26. In the Impugned Decision, the Panel suggested that the Defence will have an opportunity to cross-examine W04401 on issues arising out of the Panel's use of [REDACTED]'s statement with W04401. This does not cure the prejudice caused to the Defence. The Defence remained unable to cross-examine [REDACTED] and to test the reliability, credibility and truthfulness of their statement. W04401 could not speak to the truthfulness, meaning, or intention behind a statement made by [REDACTED]. Any comment by W04401 on [REDACTED]'s evidence would be no more than impermissible speculation with no evidential value.

27. It is clear that the Defence suffers significant prejudice where it will not be afforded an opportunity to test testimony evidence which is introduced onto the record. Contrary to the Panel's reasoning, it is irrelevant how long the Defence has been in possession of the witness statement. This does not cure the prejudice which arises from the Defence's inability to cross-examine the maker of the statement.

B. The Issues Significantly Affect the Fair and Expeditious Conduct of the Proceedings

28. The Impugned Decision significantly affects the fair and expeditious conduct of the proceedings.

29. In relation to the First Issue, the SPO has deliberately chosen not to rely on the testimony of [REDACTED]. As a result, the SPO cannot tender [REDACTED] Witness Statement as a written testimony in lieu of oral testimony other than

²⁵ European Court of Human Rights, *Al Khawaja and Tahery v. The United Kingdom* [GC], no. 26766/05 and 22228/06, Judgment, 15 December 2011, para. 118.

in accordance with the requirements of Rules 153-155. However, a result of the Impugned Decision, the Trial Panel has introduced the [REDACTED] Witness Statement onto the record. This gives an appearance of bias in favour of the Prosecution case and has a serious impact on the fairness of the proceedings by usurping the role of the prosecution.

30. The Second Issue affects the fair conduct of the proceedings in that it undermines the minimum guarantee for the Defence to confront the case against them.²⁶ Where an Impugned Decision has failed to consider the prejudice caused to the Defence, this has a direct impact on the fair conduct of the proceedings. The prejudice is that the Defence is unable to confront the maker of the [REDACTED] Witness Statement because he is not a witness.

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

31. Immediate resolution of the Issues will materially advance the proceedings. Firstly, a resolution from the Appeals Chamber would obviate the risk of any prejudice caused to the Accused, thereby materially advancing the proceedings. Secondly, if the Defence is correct that there is an error in the Impugned Decision's approach to the Trial Panel's use of witness testimony of individuals who are no longer witnesses in the case, it should be corrected to ensure that this does not occur again.

IV. CLASSIFICATION

32. This filing is filed confidentially as it refers to confidential information heard in closed proceedings.

²⁶ See, Article 21(4)(f) of the Law.

V. CONCLUSION

33. In light of the foregoing, the Defence respectfully seeks leave to appeal the **two issues** identified above.

Word Count: 2,994

Thursday, 12 December 2024,

The Hague, The Netherlands



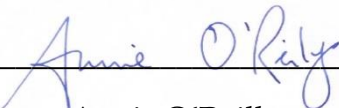
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