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In:	**KSC-BC-2020-06**
	Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Court of Appeals Panel**
	Judge Michèle Picard
	Judge Kai Ambos
	Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Kadri Veseli
	Counsel for Jakup Krasniqi
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Public Redacted Version of Veseli and Krasniqi Appeal Against First Oral Order of 5 December 2024, With Confidential Annex 1 and Public Annex 2

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I. INTRODUCTION

1. On 4 December 2024, His Honour Judge Mettraux, with the clear purpose of impugning the witness, put questions to Sokol Bashota by reading into the record the witness statement of a 'dropped' SPO witness [REDACTED]. The Defence objected. In rejecting that objection, the Trial Panel ruled that "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".[1] The Trial Panel determined that "no prejudice" arose because the Defence could further cross-examine Sokol Bashota on issues arising from the Panel's use of [REDACTED]'s statement.[2]

2. This Appeal raises two related issues: the first issue is whether it is appropriate, during judicial questioning of one witness, to introduce onto the record a prior statement from another witness who has been dropped by the SPO; the second issue is whether the Trial Panel erred by failing to recognise or duly consider the prejudice to the Defence which necessarily arises from the introduction of a witness statement, in circumstances where the Defence cannot cross-examine the maker of the statement.

3. The Appeal's Panel has previously ruled on the nature of judicial questioning in this case. In July 2023, the Appeals Panel held that the Defence had failed to demonstrate that the procedure adopted by the Panel for judicial questioning was inconsistent with the legal framework of the Specialist Chambers or that the procedure for judicial questioning was inconsistent with the rights of the

[1] KSC-BC-2020-06, Transcript, 5 December 2024, p. 23436, lines 16-20.
[2] KSC-BC-2020-06, Transcript, 5 December 2024, p. 23436, line 21 – p. 23437, line 2.

Accused to fair and expeditious proceedings, and to adequate time and resources to defend themselves ("First Appeal Decision").[3]

4. It is important to emphasise that the Appeal's Panel did not find that there are no limitations on the Trial Panel's ability to put questions to witnesses. Quite the reverse. The First Appeal Decision made it clear that, while broad, the discretion which applies to judicial questioning is subject to three clear limitations. Namely, that questioning must (a) not lead to the apprehension of bias (b) not cause prejudice and (c) not otherwise encroach upon the rights of the accused.[4]

5. It was critical to the First Appeal Decision that the Accused had failed to sufficiently demonstrate identifiable prejudice at that time.[5] Thus, the Panel observed that the "[Accused] must demonstrate that he has suffered actual prejudice from the violation, and not merely raise a speculative or hypothetical risk of prejudice."[6] Moreover, on the facts then before the Appeal's Panel, it concluded that:

> In the examples cited by the Defence, the Trial Panel's questions to witnesses were limited in number, did not take excessive time, and, for the most part, the Defence did not exercise its right to re-examine the witnesses on those matters. Accordingly, the Appeals Panel is not persuaded that the Trial Panel's questions unduly prolonged the proceedings or constituted an error prejudicing the rights of the Accused.[7]

6. Accordingly, the Defence are not inviting the Appeal's Panel to reconsider or reverse the First Appeal Decision. The Defence contends that the Trial Panel erred in law by misapplying the First Appeal Decision in that the Impugned conduct does lead to the apprehension of bias (the first issue) and does cause prejudice and encroach on the rights of the Accused (the second issue). In other

[3] KSC-BC-2020-06, IA028/F00011, *Decision on Thaçi, Selimi and Krasniqi Appeal against Oral Order on Trial Panel Questioning*, 4 July 2023, confidential.
[4] KSC-BC-2020-06, IA028/F00011, para. 32.
[5] KSC-BC-2020-06, IA028/F00011, para. 55.
[6] KSC-BC-2020-06, IA028/F00011, para. 51.
[7] KSC-BC-2020-06, IA028/F00011, para. 51.

words, this is no longer a situation where "[judicial questions] may raise issues that are "problematic" for the Accused."[8] The Impugned Order has demonstrably prejudiced the Accused and, in accordance with the correct interpretation of the First Appeal Decision, the Appeal's Panel must correct this error.

7. The issue of prejudice is at the heart of both certified issues. Actual prejudice has resulted from the use of [REDACTED]'s statement in judicial questioning of Sokol Bashota because the Defence were prevented from cross-examining [REDACTED] and were not on notice that his statement remained part of the SPO's case. It is, in part, the occurrence of prejudice to the Defence which gives rise to the apprehension of bias, as that prejudice was caused by the Panel. Accordingly, it is convenient in these grounds to address the second issue (see paragraphs 43-56) before turning to the first issue (see paragraphs 27-42).

II. CONTEXT

8. In assessing this Appeal, the Appeal's Panel should also be aware of the broader context that the nature and scope of judicial questioning in Case 06 has fundamentally altered the course of trial, and had a corrosive effect on the rights of the Accused.

9. Nonetheless, the Appeal's Panel will be aware that the nature and scope of judicial questioning has continued to raise issues throughout trial. The manner of judicial questioning has been the subject of repeated objections by the Defence.[9]

10. An objective measure of the impact of this protracted judicial intervention, is that as of 30 January 2025, the Trial Panel had spent 84:08:18 hours on judicial

[8] KSC-BC-2020-06, IA028/F00011, para. 53.
[9] *See* KSC-BC-2020-06, Transcript– 25 June 2024, p. 17195, line 20 – p. 17196, line 5; Transcript - 26 June 2024, p. 17220, lines 21-25.

questioning. This is more time than both the Veseli defence (71:31:57 hours) and the Krasniqi Defence (53:41:02 hours). Furthermore, as a result of the Panel's questioning, an additional 35:37:56 of questioning by parties was required,[10] only 00:13:58 of which were used by the SPO. The Defence have challenged the broader appearance of partiality which obviously arises from this disparity in the "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."[11] At the time of filing, this Request remains pending.

11. Moreover, the highly unusual scope and manner of judicial questioning has reached the level where it is attracting media interest in Kosovo. In a recent press conference, in response to a direct question from a journalist about the appropriateness of judicial questioning in this case, President Trendafilova responded that, "leading questions are absolutely forbidden" and "we do not tolerate, we do not allow leading questions or guiding questions."[12] This exchange reveals not only that the appropriateness of judicial questioning has become a matter of public interest in Kosovo, but also that the First Appeal Decision, which permitted the use of leading questions *where they don't cause prejudice*, is being misunderstood.

III. PROCEDURAL HISTORY

12. The issues that are the subject of the appeal arose during judicial questioning of Sokol Bashota (W04401). Sokol Bashota is a central witness for the SPO. He is one of only two core members of the KLA General Staff being called to give

[10] *See* Annex 1 to this Appeal.
[11] *See* generally, KSC-BC-2020-06, F02718, *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.
[12] *See* the press conference of 12 November 2024, at https://scpks.app.box.com/s/pbs3rviwpflxg8odwqp7gdb2z1p9gvbh, 1:05:38 and 1:07:04. *See* also, Annex 2.

evidence in this trial.[13] The Accused were members of the General Staff. Central allegations in the case relate to the General Staff, including the alleged existence of a common criminal purpose at General Staff level and the knowledge and intent of General Staff members including the Accused. By virtue of his position and interactions, Sokol Bashota was uniquely placed to testify about the role of each Accused within the General Staff and the structure of the General Staff. His importance is underlined by the fact that Sokol Bashota's evidence was cited regularly in the SPO's Pre-Trial Brief in support of some of its key allegations.[14]

13. During 03:46:04 of judicial questioning,[15] His Honour Judge Mettraux asked Sokol Bashota whether "he kept contacts with the LPK abroad" whilst he was in Kosovo. Sokol Bashota answered "no."[16] In response to that denial, His Honour Judge Mettraux referred him to the transcript of an SPO interview with [REDACTED].[17] Portions of [REDACTED]'s statement were read into the record, specifically that "another group of persons, such as Xheladin Gashi, Sokol Bashota, and [Naim] Hasani, who were the direct link or communication with the LPK abroad".[18]

14. This line of questioning is significant because the SPO's case that early communiques published by the LPK abroad demonstrate the existence of a common criminal purpose[19] depends, as a minimum, on establishing a direct

[13] *See*, KSC-BC-2020-06, F01594/A02, *Confidential Redacted Version of 'Amended List of Witnesses*,' 9 June 2023, pp. 298-299.
[14] *See*, KSC-BC-2020-06, F01594/A03, *Lesser Redacted Version of 'Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief'* 9 June 2023, confidential, paras 96-113 (i.e. the LPK, creation of the KLA and the General Staff), 146 and 704 (i.e. cooperation between intelligence, military police and special units to discover and take measures against collaborators), 710 (i.e. development of operation zones by May 1998), 706 (i.e. the condoning of measures against collaborators in public statements),
[15] Annex 1, p. 3, no. 109.
[16] KSC-BC-2020-06, Transcript of 4 December 2024, p. 23411, lines 10-13.
[17] *Specifically*, 078019-TR-ET Part 3.
[18] KSC-BC-2020-06, Transcript of 4 December 2024 at p. 23412, line 10 *et seq*.
[19] KSC-BC-2020-06, F01594/A03, para. 47.

connection between the LPK abroad and the Central Staff in Kosovo. The statement of [REDACTED] was thus read onto the record during judicial questioning in order to (a) impugn the credibility of the exculpatory answer given by W04401 and/or (b) support the inculpatory suggestion that W04401 and the Central Staff in Kosovo had a direct link or communication with the LPK abroad.

15. [REDACTED] was a [REDACTED] member of the LPK and the KLA and was interviewed by the SPO on issues including the early formation of the KLA General Staff and the functioning of the KLA in 1998. [REDACTED] was due to be one of the only witnesses being called by the SPO to speak to the early period of the KLA's formation and the creation of the original Central Staff, the alleged precursor to the General Staff.[20]

16. [REDACTED], [REDACTED], the SPO filed a notice of witness changes informing the parties that it no longer intended to rely on the evidence of [REDACTED].[21] In so doing, the SPO made an express decision that the evidence of [REDACTED] would no longer form part of its case. On 27 September 2024, the Thaci Defence submitted its Motion to Compel the Specialist Prosecutor to Call Witnesses [REDACTED].[22] The SPO opposed this motion on the basis of the SPO's independence and right to decide which witnesses to call to prove its case.[23] The Thaci Defence Motion remains pending, which means that as matters stand [REDACTED] will not be called by the SPO.

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[20] KSC-BC-2020-06, F00885/A02, *'Submission of Corrected and Lesser Redacted versions of Witness List'*, 18 July 2022, confidential, pp. 363-364.
[21] KSC-BC-2020-06, F02576, *Prosecution notice of witness changes*, 16 September 2024, confidential, para. 2. The Defence notes that the Thaçi Defence has filed a motion to compel the Specialist Prosecutor to call [REDACTED] – *see*, F02602, *Thaçi Defence Motion to Compel the Specialist Prosecutor to Call Witnesses [REDACTED]*, 26 September 2024, confidential. A Decision has not yet been rendered.
[22] KSC-BC-2020-06, F02602, *Thaci Defence, Thaci Defence Motion to Compel the Specialist Prosecutor to Call Witnesses [REDACTED]*, 27 September 2024, confidential.
[23] KSC-BC-2020-06, F022629, *Prosecution Response to Thaci Defence Motion to Compel the Specialist Prosecutor to Call Two Witnesses*, 9 October 2024, confidential, para. 2.

17. The consequence of the SPO's decision not to rely on [REDACTED] is that [REDACTED]'s statement is inadmissible. It is inadmissible because statements are only admissible pursuant to Rule 153-155 of the Rules.[24] Rule 154 is inapplicable because [REDACTED] is not being called to be cross-examined. There is no evidence that the conditions of Rule 155 are met. Further, Rule 153 does not apply inter alia because the SPO has not sought to tender [REDACTED]'s evidence through Rule 153 and because [REDACTED]'s statement goes to the acts and conduct of the Accused. The statement of [REDACTED] is therefore inadmissible.

18. Counsel for Mr Veseli objected to the use of [REDACTED]'s statement with Sokol Bashota on two grounds: first, that [REDACTED] was no longer a witness in the case and as such, his witness statement was inadmissible evidence that could not be relied upon by the SPO or the Panel; and, second, that its use violated the Accused's rights given that the Accused would not have an opportunity to cross-examine the maker of the statement (i.e. [REDACTED]) on the issues being raised.[25]

19. On 5 December 2024, the Trial Panel rendered the Oral Order ("Impugned Order"),[26] finding that there are **no legal limitations** on the subject matter of the Trial Panel's questions to a witness,[27] and that [REDACTED]'s statement was in the possession of the Defence for a long time and still formed part of the SPO case.[28] The Panel further considered that the Defence's opportunity to conduct further cross-examination of Sokol Bashota on issues arising from the

[24] KSC-BC-2020-06, F02130, *Trial Panel Decision on Thaci Defence Submissions Concerning use of Prior Inconsistent Statements*, 15 February 2024, public, paras 14 and 15.
[25] KSC-BC-2020-06, Transcript of 4 December 2024 at p. 23431, line 16.
[26] KSC-BC-2020-06, Transcript of 5 December 2024, at p. 23437, line 3.
[27] *Citing* Rule 127(3) and KSC-BC-2020-06, IA028/F00011.
[28] KSC-BC-2020-06, Transcript of 5 December 2024, at p. 23436, line 11.

Panel's use of [REDACTED]'s Witness Statement meant that no prejudice to the Defence would arise.[29]

20. This was not the first occasion on which the Panel used a witness interview or statement of an SPO witness who no longer formed part of the SPO case in judicial questioning.[30] Further, the Panel has also used, in questioning, the testimony and witness statements of persons who have *never* been on the SPO witness list and, therefore, their prior statements were never intended to form any part of the evidential matrix of the case, nor are they admissible.[31] The Panel thus regularly puts inadmissible witness statements to witnesses, in circumstances where the makers of those statements cannot be questioned; a practice that would be impermissible should the SPO seek to do so.

21. On 12 December 2024, the Veseli and Krasniqi defence filed a Request for Certification to Appeal the Impugned Order, raising two distinct issues.[32]

22. On 13 January 2025 the SPO filed a consolidated response to the Defence requests for leave to appeal Oral Orders of 4 and 5 December 2024.[33]

23. On 20 January 2025 the Veseli and Krasniqi defence replied.[34] On 27 January 2025, the Trial Panel granted Certification to Appeal on both issues.[35]

24. In so doing, the Panel have misunderstood and gone beyond the broad latitude afforded to them by the First Appeal Decision and abused their discretionary

[29] KSC-BC-2020-06, Transcript of 5 December 2024, p. 23436, line 25 – p. 23437, line 2.
[30] *See for example,* KSC-BC-2020-06, Transcript of 18 November 2024, p..22338, line 10 – p. 22339, line 22.
[31] *See for example*, KSC-BC-2020-06, Transcript of 24 April 2024, p. 14847, line 5 – p. 14849, line 18.
[32] KSC-BC-2020-06, F02777, *Veseli and Krasniqi Request for Certification to Appeal First Oral Order of 5 December 2024*, 12 December 2024, confidential.
[33] KSC-BC-2020-06, F02825, *Prosecution consolidated response to Defence requests for leave to appeal Oral Orders of 4 and 5 December 2024*, public.
[34] KSC-BC-2020-06, F02841, *Veseli and Krasniqi Reply to SPO Response to F02777 (F02825*), confidential.
[35] KSC-BC-2020-06, F02866, *Decision on Veseli and Krasniqi Request for Certification to Appeal First Oral Order of 5 December 2024*, public.

power, usurped the role of the SPO and have done so to the obvious, ongoing and incurable prejudice of the defence.

IV. STANDARD OF REVIEW

25. The standard of review applicable to interlocutory appeals is the standard provided for appeals against judgments, as specified in the Law No. 05/L-053 on the Specialist Chambers and Specialist Prosecutor's Office ("KSC Law")[36]

26. In relation to an error of law, a party "must identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision."[37] In relation to a discretionary decision, a party must demonstrate that the lower level panel has committed a discernible error, in that the exercise of discretion is based on an erroneous interpretation of the law; it is exercised on a patently incorrect conclusion of fact; or where the decision is so unfair and unreasonable as to constitute an abuse of discretion.[38]

V. SUBMISSIONS

A. SECOND CERTIFIED ISSUE

27. The second issue is whether the Trial Panel erred by failing to consider the obvious and unavoidable prejudice which arises out of the Defence's inability to cross examine the maker of a witness statement who will not 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.

28. The First Appeal Decision was unequivocal:

> [T]he 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**

[36] KSC-BC-2020-07/IA001/F00005, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, 9 December 2020, para. 10.
[37] KSC-BC-2020-07/IA001/F00005, para. 12.
[38] KSC-BC-2020-07/IA001/F00005, para. 14.

> **prejudice and that the rights of the Accused are respected**, in accordance with Article 21 of the Law.[39]

29. Further, the Appeals Panel also found that judicial questioning must (a) not lead to the apprehension of bias (b) not cause prejudice and (c) not otherwise encroach upon the rights of the accused.[40]

30. The only suitable reading of the First Appeal Decision is that it is not permissible for judicial questioning to cause any prejudice to any party, irrespective of how minor and/or what additional steps could be taken to mitigate it. Where judicial questioning is concerned, there is no balancing exercise in which the prejudice caused is weighed against any purported potential probative value of the questioning or factors which might mitigate prejudice.

31. The reasoning behind the First Appeal Decision is clear and correct. The SPO, by the very nature of the role it plays in adversarial proceedings, must inevitably, on occasion act in a way which may prejudice the Defence. When this occurs, it is the role of the Trial Panel, as a neutral arbiter, to balance the rights of both Parties and ensure no undue prejudice is caused to the Defence and their rights are protected. However, the Trial Panel, as a neutral arbiter, cannot itself act in a way which prejudices the Defence. The moment the Trial Panel prejudices either party, it improperly descends into the fray and takes on a partisan role. This is why the First Appeal Decision makes it clear – no party must suffer *any* prejudice as a result of the Panel's questioning.

32. The Impugned Order erred in law by determining, wrongly, that there was *no prejudice* caused to the Defence.[41] In fact, there was an obvious and incurable prejudice caused to the Defence by the Panel's conduct. Indeed, the Impugned

[39] KSC-BC-2020-06, IA028-F00011, para.32.
[40] KSC-BC-2020-06, IA028-F00011, para. 32.
[41] KSC-BC-2020-06, Transcript, 5 December 2024, p. 23436, line 25 – p. 23437, line 2.

Order appears to acknowledge the existence of prejudice, by referring to the possibility of further cross-examining Sokol Bashota as a way of eliminating the prejudice.[42] However, as set out below, such a measure cannot alleviate the prejudice to the Defence.

33. In accordance with the First Appeal Decision, a Trial Panel must first determine whether or not *any* prejudice arises from the course of questioning.

34. There can be no genuine dispute that questioning a live witness about the inadmissible prior statement of another person, who is no longer being relied on by the SPO, causes prejudice to the Defence. In simple terms:

    a. the most obvious prejudice is that the Defence is prevented from cross-examining the maker of the inadmissible statement because they will not be called as a witness. As a result, placing that statement on the record, absent any possibility for the Defence to confront that witness, violates Article 21(3)(f) of the Law, Article 31(4) of the Constitution of Kosovo, Article 6(3)(d) of the ECHR and Article 14(3)(e) of the International Convention on Civil and Political Rights ("ICCPR");

    b. Additionally, the Defence are entitled to adequate notice of the SPO's case, in order that the Defence have adequate time and facilities to prepare the defence.[43] Where the SPO has complied with its obligation to notify the Defence that it no longer relies on (or does not rely on) a witness, the SPO, in so doing, puts the Defence on notice that the evidence of that witness will **not** be relied upon against the Accused. The introduction of that evidence in judicial questioning, without proper

[42] *Ibid.*
[43] *See*, Article 21(4)(a) and (b) of the Law, Article 30(1) and (3) of the Constitution of Kosovo, Article 6(3)(a) and (b) of the ECHR and Article 14(3)(a) and (b) of the ICCPR.

notice to the Defence, is prejudicial because it denies the Defence adequate time and facilities to prepare for that material.

35. This prejudice actually arose in this instance. Judicial questioning read [REDACTED]'s statement onto the record. The Defence's right to confront the evidence against the Accused has therefore been infringed because the Defence cannot cross-examine [REDACTED].

36. The result is that the Defence are left in a worse position than they would be if [REDACTED]'s statement had been relied on by the SPO. Rule 154(c) requires the witness to attest that the statement accurately reflects his or her declaration and what he or she would say if examined. This provides a safeguard in that witnesses have the opportunity to correct or clarify their prior statements. Numerous witnesses in these proceedings have corrected prior statements during preparation sessions, sometimes extensively.[44] By reading [REDACTED]'s inculpatory prior statement into the record, the Panel deprived the Defence of both the opportunity to cross-examine [REDACTED] and the opportunity for [REDACTED] himself to clarify or correct the prior statement.

37. Moreover, the Defence were not on notice that [REDACTED]'s statement would still form part of the case against the Accused. 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 caused to the Defence were the SPO allowed to re-introduce testimonial evidence which it has already chosen to exclude. Accordingly, the SPO would not be permitted to put these statements to its witnesses in direct examination or re-direct. They are prohibited from doing so because of the obvious and irreparable prejudicial

[44] *See, inter alia*, P00714, P01969, P01756.

impact upon the Defence – this is not in issue and throughout these proceedings, the SPO has rightly not put inadmissible witness statements to its own witnesses in preparations sessions, direct examination or re-examination. Since the SPO had notified the Defence that it was no longer relying on [REDACTED], the Defence was not on notice that his inadmissible statement could or would be relied on in judicial questioning.

38. It is therefore indisputable that, by engaging in conduct that the law rightfully prohibits the SPO from engaging in, the Panel caused the Defence obvious and irreparable prejudice. It is submitted that it cannot be just, fair, or logical to afford the Defence legal protection from such prejudice when caused by the SPO, but not when it is caused by the Panel itself.

39. Contrary to the Impugned Order, this prejudice cannot be cured by further cross-examination of Sokol Bashota about [REDACTED]'s statement; the Defence remains unable to cross-examine [REDACTED] and to test the reliability, credibility and truthfulness of their statement. Sokol Bashota cannot speak to the truthfulness, meaning, or intention behind a statement made by [REDACTED]. Indeed, any comment by Sokol Bashota on [REDACTED]'s statement would be no more than impermissible speculation with no evidential value. It is [REDACTED] that the Defence had the right to confront about his statement, not Sokol Bashota.

40. To the extent that the Impugned Order also relied upon the fact that [REDACTED]'s statement had been in possession of the Defence for a long time,[45] this too fails to remove the prejudice to the Accused. First, how long the Defence has been in possession of [REDACTED]'s statement is irrelevant. The primary prejudice is that the Defence is prevented from cross-examining [REDACTED]; this prejudice remains however long the Defence have

[45] KSC-BC-2020-06, Transcript of 5 December 2024, at p. 23436, lines 10-14.

possessed the statement for. Second, reliance on possession of [REDACTED]'s statement disregards the fact that the SPO had given notice that it was dropping [REDACTED] as a witness, with the necessary consequence that his statement became inadmissible and was no longer part of the SPO's case. The Defence are entitled to assume and prepare their case on the basis that inadmissible evidence will not be introduced. These are the very basic pillars of a criminal trial. Any suggestion the Defence should be preparing to deal with inadmissible evidence is entirely misguided and untenable.

41. In any event, even if further cross-examination of Sokol Bashota or long possession of [REDACTED]'s statement were capable of reducing the prejudice to the Defence, they are not capable of removing it to a sufficient degree to render the impugned conduct fair. The Defence's inability to confront [REDACTED] cannot be remedied in the manner suggested. Accordingly, the Impugned Order erred in law in finding that there was "no prejudice" to the Defence.

42. Accordingly, the Appeal's Panel should correct this error and find that there was prejudice to the Defence in use of [REDACTED]'s statement in the judicial questioning of Sokol Bashota. In accordance with the First Appeal Decision, that is the end of the matter; once it is demonstrated that prejudice arises from a judicial question, the question cannot properly be put. In order to protect the rights of the Accused, the Defence respectfully submit that the Appeal's Panel should overturn the Impugned Order and find that the relevant question and answer may not be relied upon.

B. FIRST CERTIFIED ISSUE

43. The first issue is 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.

44. The Defence recalls at the outset that it is a mis-reading of the First Appeal Decision to find that it does not place *any limitation* on the subject matter of the Trial Panel's questions to witnesses. The First Appeal Decision did not determine that there are no limits on the scope and manner of Judges' questions. Quite the reverse. The First Appeal Decision made clear that, while broad, the discretion which applies to judicial questioning is subject to **three clear limitations**. Namely, that questioning must (a) not lead to the apprehension of bias (b) not cause prejudice and (c) not otherwise encroach upon the rights of the accused.[46] The impugned manner of judicial questioning breaches all three of these express limitations.

45. In addition to these three limitations expressly set out in the First Appeal Decision, there are also additional obvious and fundamental limits on judicial questioning, which apply to all parties and from which the Panel are not immune. For example, the Panel, like the parties, cannot ask irrelevant questions, badger or insult a witness, or misrepresent evidence in their question. It is simply not correct, and the First Appeal Decision did not determine, that there are no limits on judicial questioning.

46. The first issue arises from the first limitation identified in the First Appeal Decision, that judicial questioning must not lead to the apprehension of bias. Simply, by introducing inculpatory evidence onto the record in the form of an inadmissible witness statement, the Trial Panel is usurping the role of the SPO and creating a clear apprehension of bias.

47. As set out above, when the Trial Panel uses the inadmissible statement of a third party in questioning a witness, it is usually done to (a) impugn the witness, by relying on the inadmissible statement for truth, and/or (b) read the inadmissible statement into the record and invite the witness to agree with the

[46] KSC-BC-2020-06, IA028/F00011, para. 32.

contents, or confirm awareness of them, thereby seeking to make the content of the inadmissible statement part of the live witness's evidence, when it otherwise would not be. In the instance at hand, it was used to impugn.

48. It is fundamental that the SPO bring the case, the SPO must prove the case and the SPO have prosecutorial discretion as to what evidence to call and/or rely upon. Article 35(1) of the Law emphasises the SPO's independence and responsibility for investigations and prosecutions. As the Trial Panel itself recognised, the SPO has the right to conduct their case as the SPO sees fit.[47] When the SPO decide to no longer rely upon a witness, it means that a reasoned decision has been taken that the evidence of that witness will not form part of the case against the Accused. The statement of that witness then becomes inadmissible. It is inadmissible because Rules 153-155, which are the *lex specialis* for the admission of statements, are not satisfied.

49. Once the Defence are notified that the SPO no longer relies on a witness, the Defence are entitled to rely upon that undertaking and to prepare on the legitimate expectation that the evidence will not form part of the case against the Accused. Likewise, in circumstances where the SPO has never included a witness on its witness list, the Defence legitimately expects that the inadmissible prior testimony of that witness will form no part of the case against the Accused. The SPO's witness list thus serves the fundamental purpose of putting the Defence on notice of the SPO's case, and giving the Defence adequate time and facilities to prepare to meet that case.

50. It is axiomatic that the Trial Panel is required to act with impartiality and independence.[48] By re-introducing inculpatory evidence that the SPO has

[47] *See*, KSC-BC-2020-06, Transcript of 18 January 2023, p.1818, lines 13-15 "this is an adversarial proceeding and they should present the case that they think they should present."
[48] *See*, Articles 3(2)(a) and (e), 27(1), 31(1) and (4) of the KSC Law; Article 4 of the Code of Judicial Ethics for Judges Appointed to the Roster of International Judges of The Kosovo Specialist Chambers.

expressly excluded, the Trial Panel undermines the independent decision-making prerogatives of the SPO, and in particular, the SPO's right to choose which witnesses and what evidence forms the factual basis of its case.[49] In doing so, the Trial 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. Further, by introducing inculpatory evidence which the SPO could not, the Trial Panel steps into the shoes of a prosecutor.

51. First, for the reasons outlined above in relation to the second issue, it is irrefutable that this form of questioning causes prejudice to the defence. Where the Panel repeatedly engages in conduct which causes obvious and irreparable prejudice to the Defence, there is an inevitable risk that a reasonable onlooker would apprehend bias. The Panel should at all times maintain the role of neutral arbiters and fact finders.

52. Second, by seeking to shoehorn the evidence of a dropped witness into the record or rely upon it to impugn witnesses, there is also a clear risk that the Panel would be seen as descending into the fray. It is the prerogative of the SPO to decide not to call or rely upon certain witnesses. The Trial Panel usurped the role of the SPO by asking questions which relied on the evidence of a witness that the SPO had elected not to call. The question was inculpatory, targeted at bolstering the SPO case on a contested issue or at undermining an exculpatory answer given by the live witness. This abuses the Panel's broad discretionary power to ask questions by stepping into the role of a second prosecutor, so clearly breaching the first limitation imposed by the Appeals Chamber on judicial questioning, namely that it must not create an "apprehension of bias".

[49] As recently asserted by the SPO: KSC-BC-2020-06, F022629, *Prosecution Response to Thaci Defence Motion to Compel the Specialist Prosecutor to Call Two Witnesses*, 9 October 2024, confidential, para. 2.

53. Third, introducing inadmissible testimonial evidence into the evidential matrix of these proceedings through judicial questioning, and in disregard of the relevant Rules,[50] undermines the basic principle that evidence should be produced with proper notice and in the presence of the Accused with a view to adversarial argument.[51] This further gives the appearance of bias and undermines the impartiality of the Trial Panel within adversarial proceedings.[52]

54. While the Trial Panel can, in principle, "ask any question," this remains subject to the limits outlined above. The Panel clearly should not be permitted to introduce inculpatory evidence in a manner which the SPO would be prohibited from doing, due to the obvious prejudice that this would cause the Defence. The SPO would not be permitted to read inadmissible testimonial evidence to a witness, as it would *unduly prejudice* the Defence. Likewise, the Trial Panel should not be permitted to cause such undue prejudice. A reasonable onlooker would not perceive this conduct by the Trial Panel to be fair and it is likely to lead to an apprehension of bias.

55. The prejudicial use by the Trial Panel of inadmissible evidence which the SPO has chosen to exclude from its case must be a further identifiable limit on the scope of judicial questioning, as it evidently breaches fair trial principles and the Accused's rights, as enumerated in the First Appeal Decision and the Law.

56. Finally, the First Issue is clearly distinguishable from those raised on the First Appeal. The First Appeal concerned whether the Panel could question witnesses on matters not elicited during direct and cross-examination by the parties, but which were founded on admissible evidence relied upon by the

[50] Rules 153, 154, 155 and 138.
[51] *See* generally, Article 6(3)(d) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").
[52] *See,* F02718, para. 23.

SPO. The First Issue goes beyond that, and challenges the use of inadmissible evidence not relied upon by the SPO in judicial questioning.

VI. REQUEST FOR ORAL HEARING

57. The Defence respectfully requests that the Appeal's Panel exercise its direction to convene an oral hearing. Judicial questioning in this trial is a highly controversial issue, which is the subject of a prior appeal and other filings related to the preservation of the impartiality of the proceedings. It is also, as set out above, an issue which is attracting public scrutiny in Kosovo. In view of the importance of the issue, the Defence respectfully submit that a public hearing is justified.

VII. CONCLUSION

58. In the event the Panel decline to convene an oral hearing for the reasons outlined above, the Panel should grant the appeal in full.

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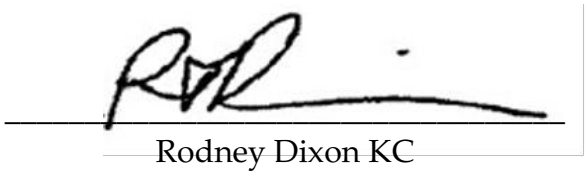

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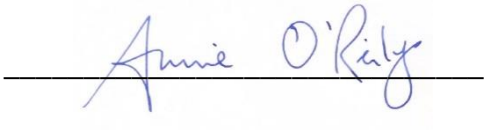

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