



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: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 16 November 2022

Language: English

Classification: Confidential

Prosecution response to Selimi Defence request for certification to appeal
Decision F01058

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I. INTRODUCTION

1. The Selimi Request¹ should be rejected because it fails to meet the requirements for leave to appeal under Article 45 of the Law² and Rule 77 of the Rules.³ Selimi does not demonstrate that any of the issues alleging errors in the Decision⁴ – which, *inter alia*, authorised the Specialist Prosecutor’s Office (‘SPO’) to amend the witness list and exhibit list to add two witnesses and associated material⁵ – meet the strict threshold for certification.⁶

II. SUBMISSIONS

A. EACH OF THE ISSUES FAIL TO MEET THE CERTIFICATION TEST

(a) Issue 1⁷

2. The first issue, which challenges the Pre-Trial Judge’s authority to decide the SPO Request under Rule 95(2)(b), Rule 95(4)(b), Rule 102(1)(b) and Rule 102(2), fails all three prongs of the certification test.⁸

¹ Selimi Defence Request for Certification to Appeal the Decision on Prosecution Request to Add Two Witnesses and Associated Materials, KSC-BC-2020-06/F01084, 3 November 2022 (‘Request’).

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (‘Law’). All references to ‘Article’ or ‘Articles’ herein refer to articles of the Law, unless otherwise specified.

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (‘Rules’). All references to ‘Rule’ or ‘Rules’ herein refer to the Rules, unless otherwise specified.

⁴ Confidential Redacted Version of Decision on Prosecution Request to Add Two Witnesses and Associated Materials, KSC-BC-2020-06/F01058/CONF/RED, 27 October 2022 (‘Decision’).

⁵ Confidential Redacted Version of Prosecution Request to Add Two Witnesses and Associated Materials, KSC-BC-2020-06/F00947/CONF/RED, 2 September 2022 (‘SPO Request’).

⁶ The applicable law has been set out in prior decisions. *See, for example*, Decision on the Krasniqi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00479, 20 September 2021, para.14; *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021 (‘Case 7 Decision’), paras 12, 14-15, 17.

⁷ Issue 1: ‘Whether the Pre-Trial Judge erred in finding that he was empowered to decide upon the SPO Request to add witnesses to its Witness List at this stage rather than deferring the matter to the Trial Panel’.

⁸ Request, KSC-BC-2020-06/F01084, paras 8-9, 15-25.

3. First, Selimi mischaracterises the Decision by claiming that the Pre-Trial Judge transformed ‘the SPO Request into a question of disclosure’.⁹ Contrary to Selimi’s assertion, the Pre-Trial Judge relied on several Rules that confer broad powers to manage pre-trial proceedings, including the authority under Rule 95 to ‘take all necessary measures for the expeditious preparation of the case for trial’.¹⁰ The Pre-Trial Judge merely highlighted the self-evident reality that questions of disclosure are inextricably linked to any amendments to the SPO’s witness and exhibit lists. Consequently, the first issue does not emanate from the Decision.

4. The first issue also fails the second prong of the certification test. In essence, Selimi submits that the Pre-Trial Judge has no authority to decide requests to amend the witness and exhibits lists, whereas the trial panel does have such authority under Rule 118(2). The logical consequence of this interpretation of the Rules is that any decision on the SPO’s request would be delayed until the case is before the trial panel, which could only exacerbate any alleged impact on the fair and expeditious conduct of proceedings. Selimi attempts to circumvent this inconvenience by arguing that the Decision as a whole affects the fair and expeditious conduct of proceedings.¹¹ However, the applicable test requires him to establish the second prong for each specific issue.¹²

5. Selimi’s illogical argumentation is evident when he refers to the Pre-Trial Judge’s finding that a strict application of Rule 118(2) would be contrary to the Pre-Trial Judge’s obligation to take all necessary measures for the expeditious preparation of the case for trial under Rule 95(2).¹³ According to Selimi, this finding demonstrates that the first issue impacts the expeditiousness of proceedings. Selimi, however, fails

⁹ Request, KSC-BC-2020-06/F01084, para.9.

¹⁰ Decision, KSC-BC-2020-06/F01058/CONF/RED, para.18.

¹¹ Request, KSC-BC-2020-06/F01084, paras 15-22. Selimi does not submit that the first issue would significantly affect the outcome of the trial.

¹² Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021, para.12.

¹³ Request, KSC-BC-2020-06/F01084, para.17, citing Decision, KSC-BC-2020-06/F01058/CONF/RED, para.18.

to acknowledge that any successful appeal of the first issue can only have adverse impacts on the expeditiousness of proceedings. Therefore, Selimi's reasoning militates against certification. Moreover, Selimi does not even attempt to establish that the first issue affects the fair and expeditious conduct of proceedings to a significant degree.

6. Selimi also fails to demonstrate how an immediate resolution by the Appeals Panel will materially advance the proceedings (third prong), given that the Appeals Panel has previously affirmed the Pre-Trial Judge's authority to authorise amendments to the SPO exhibit list, which necessarily involves the same powers and analogous principles.¹⁴ Indeed, the Appeals Panel afforded 'a certain level of flexibility' for such amendments during the pre-trial stage, 'in the context of a complex multi-accused trial in which a considerable amount of evidence is presented by the prosecution',¹⁵ and considered the relationship between Rule 118 and the rules applicable to the pre-trial stage. As a result, there is no danger of possible mistakes which may taint the judicial process and thus necessitate the exceptional intervention of the Appeals Panel.

7. In light of the restrictive nature of the certification test, Selimi's attempt to re-litigate established appellate jurisprudence would therefore not materially advance the proceedings.

(b) Issue 2¹⁶

8. The second issue challenges the Pre-Trial Judge's exercise of his discretion without demonstrating any appealable issue (first prong), and instead merely disagrees with the Decision.¹⁷ Selimi's only specific submissions substantiating the

¹⁴ Decision on Thaçi's Appeal against "Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures", KSC-BC-2020-06/IA019/F00006, 12 July 2022.

¹⁵ Decision on Thaçi's Appeal against "Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures", KSC-BC-2020-06/IA019/F00006, 12 July 2022, para.21.

¹⁶ Issue 2: 'Whether the Pre-Trial Judge erred, or otherwise abused his discretion, in authorizing the addition of W4846 to the witness list when this witness' testimony does not relate to charges in the Indictment and without assessing either the prejudicial impact of the evidence of this witness or its effect on Defence preparation in the full context of this case.'

¹⁷ Request, KSC-BC-2020-06/F01084, paras 10-14, 15-25.

second issue are that: (i) the Pre-Trial Judge failed to specify how W04846's evidence relates to the underlying policy of the JCE;¹⁸ and (ii) the Pre-Trial Judge 'failed to assess any prejudicial impact caused by the addition of this evidence'.¹⁹ Both of these submissions misrepresent the Decision.

9. As regards (i), the Pre-Trial Judge was not required to provide a detailed relevance assessment for the purpose of the Decision, but nonetheless explained that W04846 'personally witnessed uncharged events which may [...] be relevant to establish Rexhep Selimi's and Sylejman Selimi's commitment to the policy underlying the joint criminal enterprise'.²⁰ As for (ii), the Pre-Trial Judge noted Selimi's concerns about prejudice and gave detailed reasons for his conclusion that 'the Defence will be afforded meaningful time to process W04846's evidence, refocus its investigations, if needed, and prepare for trial'.²¹ The second issue therefore does not emanate from the Decision and should be denied on this basis alone.²²

10. Moreover, Selimi has not established that the second issue significantly affects the fairness and expeditiousness of the proceedings (second prong). As the Pre-Trial Judge noted, the relevant materials had already been disclosed to the defence, the additions to the witness and exhibit lists are limited, and the pre-trial phase is still ongoing.²³ In these circumstances, Selimi's bare assertion that the addition of W04846 will require additional investigation and court time does not meet the high bar of significant impact on the fair and expeditious conduct of proceedings.

11. Finally, Selimi's submissions on whether immediate resolution of the second issue may materially advance the proceedings (third prong) are manifestly inadequate.²⁴ Selimi fails entirely to explain why the Pre-Trial Judge's discretionary

¹⁸ Request, KSC-BC-2020-06/F01084, para.13.

¹⁹ Request, KSC-BC-2020-06/F01084, para.14.

²⁰ Decision, KSC-BC-2020-06/F01058/CONF/RED, para.26.

²¹ Decision, KSC-BC-2020-06/F01058/CONF/RED, para.27.

²² See, e.g., Decision on Application for Leave to Appeal the Decision F00180, KSC-BC-2018-01/F00184, 24 August 2021, para.24.

²³ Decision, KSC-BC-2020-06/F01058/CONF/RED, para.27.

²⁴ Request, KSC-BC-2020-06/F01084, paras 19-25.

decision to add W04846 to the witness list requires prompt resolution by the Appeals Panel in order to correct an error that may taint the judicial process. Given the early stages of the defence's investigations, Selimi's claim that the addition of W04846 risks the Defence 'wasting time and resources on investigating and potentially presenting evidence relevant to this witness' is both unconvincing and insufficient to satisfy the requirements of the third prong of the certification test.²⁵

III. CLASSIFICATION

12. This response is confidential pursuant to Rule 82(4). The SPO does not object to its reclassification as public.

IV. RELIEF REQUESTED

13. For the foregoing reasons, the SPO requests that the Pre-Trial Judge reject the Request.

Word count: 1465



Jack Smith

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Wednesday, 16 November 2022

At The Hague, the Netherlands.

²⁵ Request, KSC-BC-2020-06/F01084, para.25.