

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: Counsel for Rexhep Selimi

Date: 8 December 2022

Language: English

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Public Redacted Version of Selimi Defence Request for Certification to Appeal the Decision on Prosecution Request to Add Two Witnesses and Associated Materials

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I. INTRODUCTION

1. Pursuant to Article 45 of the Law¹ and Rules 77 and 97(3) of the Rule of Procedure and Evidence,² the Selimi Defence respectfully requests certification to appeal the Confidential Redacted Version of Decision on Prosecution Request to Add Two Witnesses and Associated Materials (“Impugned Decision”),³ in relation to the following issues:

- (i) **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;⁴ and,
- (ii) **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 Indictment⁵ 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.

II. LAW

2. Certification is required to appeal the Impugned Decision.⁶

¹ 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.

² 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.

³ KSC-BC-2020-06, F01058, Confidential Redacted Version of Decision on Prosecution Request to Add Two Witnesses and Associated Materials, 27 October 2022.

⁴ Impugned Decision, para. 18.

⁵ Impugned Decision, para. 26.

⁶ Rule 77(1), Article 45(2), Law.

3. Article 45(2) of the Law provides that the Pre-Trial Judge shall grant certification to appeal a decision where the appeal:

“involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.”

4. This is reflected in Rule 77(2), which provides that certification shall be granted if:

“the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by a Court of Appeals Panel may materially advance the proceedings”

5. The jurisprudence of the Kosovo Specialist Chambers (“KSC”) sets out specific requirements which apply to the certification procedure:

- (a) Whether the matter is an “appealable issue”;
- (b) Whether the issue at hand would significantly affect:
 - (i) The fair and expeditious conduct of proceedings, or
 - (ii) The outcome of the trial; and
- (c) Whether, in the opinion of the Pre-Trial Judge, an immediate resolution by the Court of Appeals Panel may materially advance proceedings.⁷

⁷ KSC-BC-2020-06, F00534, Decision on Defence Applications for Leave to Appeal the Decision on Defence Motions Alleging Defects in the Form of the Indictment, 18 October 2021 (“Thaçi Decision on Leave to Appeal Defects Decision”), para. 14; KSC-BC-2020-07, F00169, Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, 1 April 2021, (“Gucati and Haradinaj Decision on Leave to Appeal”) para. 6; KSC-BC-2020-06/F00172, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021 (“Thaçi Decision on Leave to Appeal”), para. 10.

6. As held by the ICC Appeals Chamber, and endorsed by the Pre-Trial Judge:⁸

“Only an "issue" may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one⁹

Further, the applicant must articulate “clearly discrete issues for resolution by the Court of Appeals Panel that emanate from the ruling concerned and do not amount to abstract questions or hypothetical concerns”.¹⁰

III. SUBMISSIONS

A. The Issues are Appealable

7. Both Issues derive from the Impugned Decision.
8. In relation to the First Issue, the Pre-Trial Judge was required to determine that he had authority over the request pursuant to the Rules in order to issue the Impugned Decision. Although Rule 118 appears in “Chapter 9 Trial Proceedings” of the Rules, and refers specifically to the “Specialist Prosecutor’s Preparation Conference” held before the Trial Panel, which grants the Panel the authority to “permit the amendment of the lists of witnesses and exhibits filed”, the Pre-Trial Judge held that “he is empowered to rule on the Request pursuant

⁸ Gucati and Haradinaj Decision on Leave to Appeal, para. 12.

⁹ ICC, Situation in the Democratic Republic of the Congo, ICC-01/04-168, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006 (“Judgment on Extraordinary Review”), para. 9.

¹⁰ Thaçi Decision on Leave to Appeal, para. 11.

to Rule 95(2)(b) of the Rules, seeing as the Request ultimately concerns disclosure under Rule 102(1)(b) of the Rules.”¹¹ The Pre-Trial Judge also relied upon Rules 95(4)(b) and 102(2) in support of this interpretation.¹²

9. There is no equivalent provision to Rule 118(2) which specifically relates to the Pre-Trial Judge. Therefore, it was only by transforming the SPO Request into a question of disclosure, rather than a request to add witnesses to the SPO list, that the Pre-Trial Judge was able to decide upon the request. Without this transformation, a clear reading of Rule 118(2) would limit the authority to decide upon such requests to the Trial Panel and the Pre-Trial Judge would not have been able to do so.
10. In relation to the Second Issue, the Pre-Trial Judge held that “W04846’s prior statements and associated materials are *prima facie* relevant and of sufficient importance as W04846 personally witnessed uncharged events which may nonetheless be relevant to establish Rexhep Selimi’s and Sylejman Selimi’s commitment to the policy underlying the joint criminal enterprise (“JCE”) in the Confirmed Indictment.”¹³ The Pre-Trial Judge therefore predicated his decision to grant the SPO Request upon the importance of W04846’s evidence as well as its relevance to the Confirmed Indictment and would not have authorised the addition of such witnesses and their evidence if it was “obviously irrelevant.”¹⁴
11. Consequently, while the SPO was largely free to include any witnesses it considered relevant to prove its case when filing its witness list together with the

¹¹ Impugned Decision, para. 18. See also, para. 26.

¹² Impugned Decision, para. 18.

¹³ Impugned Decision, para. 26.

¹⁴ *Ibid.*

SPO Pre-Trial Brief on 17 December 2021,¹⁵ any requests to add witnesses to its list after that date are subject to judicial control and scrutiny.

12. The Pre-Trial Judge's failure to exercise that control thoroughly and effectively was crucial in determining whether to grant the SPO's request to add W04846 to its witness list.
13. First, the Pre-Trial Judge determined that W04846's evidence does not relate to charged events but could still be relevant to the underlying policy of the JCE¹⁶ without specifying how that was the case.
14. Secondly, he respectfully failed to assess any prejudicial impact caused by the addition of this evidence, namely whether it outweighs any limited probative value that could accrue notwithstanding the relevance of this assessment to the admission of W04846's evidence.

B. The Issues Affect the Fair and Expeditious Conduct of Proceedings or the Outcome of the Trial

15. The authority of the Pre-Trial Judge to decide upon requests to add witnesses to its list, rather than the Trial Panel, is of direct relevance to the fairness and expeditiousness of proceedings.
16. Rule 118(2) limits such requests to the "Specialist Prosecutor's Preparation Conference" which occurs before the Trial Panel. This excludes requests from being filed before or after that date, either during pre-trial proceedings or even during trial. The intention behind this provision is clear, namely to reduce the repeated amendments to the SPO's list of proceedings to its list of witnesses. It

¹⁵ KSC-BC-2020-06, F00631, Submission of Pre-Trial Brief, with witness and exhibit lists with strictly confidential and *ex parte* Annexes 1-3, 17 December 2021.

¹⁶ Impugned Decision, para. 26.

also requires such requests to be raised when the Trial Panel is also, *inter alia*, determining the number of witnesses the SPO may call,¹⁷ inviting the SPO to reduce or narrow the number of charges in the indictment¹⁸ and determining the time available to the Specialist Prosecutor for presenting evidence.¹⁹ All of these factors are directly relevant to determining the impact of adding witnesses to the SPO list, and crucially the right of the defence to adequate time to prepare a defence to the additional evidence with the SPO seeks to present. Ignoring this provision and allowing the Pre-Trial Judge to decide upon such requests, directly and negatively impacts upon this right.

17. The expeditiousness of proceedings is also directly impacted by the First Issue, as admitted by the Pre-Trial Judge's finding that strictly applying Rule 118(2) would be "contrary to the Pre-Trial Judge's obligation under Rule 95(2) of the Rules to take all necessary measures for the expeditious preparation of the case for trial if a request to amend a witness or exhibit list could not be entertained before the start of trial."²⁰
18. Further, in this regard, the Pre-Trial Judge misunderstands the impact of deferring the decision to the Trial Panel as requested by the Defence. It would not "prevent the Defence from receiving such statements as soon as possible"²¹ as disclosure of W04846's statement could be ordered pursuant to Rule 102(3) regardless whether the SPO was allowed to add these witnesses to its list. Indeed, the screening note describing his evidence was initially disclosed pursuant to Rule 103.²² The screening note of this witness as well as his identity

¹⁷ Rule 118(1)(a).

¹⁸ Rule 118(1)(b).

¹⁹ Rule 118(1)(d).

²⁰ Impugned Decision, para. 18.

²¹ *Ibid.*

²² KSC-BC-2020-06, F00947, Confidential redacted version of Prosecution request to add two witnesses and associated materials with strictly confidential and *ex parte* Annexes 1-2, 2 September 2022, para. 7.

has already been disclosed. Redactions would likely be requested by the SPO regardless of the nature of disclosure.

19. The specific authorisation granted to the SPO to add W04846's statement to the SPO list, will also undoubtedly affect both the fairness and expeditiousness of proceedings.
20. W04846's evidence relates to a serious allegation of Mr. Selimi's [REDACTED], neither of which are charged in the Indictment or referred to the SPO PTB. Given that this allegation relates to the acts and conduct of Mr. Selimi, this witness will be required to give evidence in examination-in chief and cross-examination in person, thereby potentially using substantial court time.
21. The Defence will therefore be required to investigate and then address these allegations, notwithstanding their irrelevance to the charged events in the Indictment. Even if the SPO does not rely on all the allegations included in W04846's interview, the credibility of W04846's evidence will need to be investigated and potentially raised during court proceedings in order for the Trial Panel to properly assess his credibility and reliability. Other SPO witnesses will also be questioned about the events described by this witness. All of this will significantly increase court time, as well as the time taken to investigate this allegation thoroughly.
22. Furthermore, the limited probative value of this evidence will be more than outweighed by its prejudicial effect. To the knowledge of the Defence, W04846 is the only witness who provides any evidence in support of his allegations, and relies to a degree on hearsay evidence which is corroborated neither by any other witness nor documentary evidence. Allowing the SPO to present such evidence in these circumstances would be highly prejudicial to Mr. Selimi without providing any useful assistance to the SPO's case.

C. Immediate Resolution may Materially Advance Proceedings

23. Resolution of both issues at this stage would materially advance these proceedings.
24. Clarification as to the authority of the Pre-Trial Judge to adjudicate upon requests to amend its witness list would inform the SPO when and how this request, and indeed any other request to amend its witness list, could be adjudicated and the context in which this would occur. The SPO would therefore be obliged to assess the importance of all witnesses it seeks to add in light of the 319 witnesses already appearing on its list at the SPO Preparation Conference and the Trial Panel would properly be able to decide upon any request to add witnesses at that time rather than on a piecemeal basis. The Defence in turn would be able to proceed with certainty regarding the witness list filed ten months ago, subject to any withdrawals by the SPO of witnesses without the threat of witnesses being added to the list at this stage of proceedings.
25. If the Appeals Panel decides that the Pre-Trial Judge is indeed empowered to requests to add witnesses to the SPO witness list, resolving the Second Issue, namely whether W04846 can be added to the witness list at this stage, would avoid the risk of the Defence wasting time and resources on investigating and potentially presenting evidence relevant to this witness if the Pre-Trial Judge had indeed erred in allowing his addition to the witness list. It would also avoid the prejudicial impact caused by the evidence of this witness.

D. Confidentiality

26. This filing is submitted as confidential pursuant to Rule 82(4). A public redacted version will be filed in due course.

IV. CONCLUSION & RELIEF SOUGHT

27. For the reasons set out herein, the Defence requests the Pre-Trial Judge to certify the two issues set out in paragraph 1.

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Respectfully submitted on 8 December 2022,



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