



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-04
Specialist Prosecutor v. Pjetër Shala

Before: Trial Panel I
Judge Mappie Veldt-Foglia, Presiding Judge
Judge Roland Dekkers
Judge Gilbert Bitti
Judge Vladimir Mikula, Reserve

Registrar: Dr Fidelma Donlon

Filing Party: Acting Specialist Prosecutor

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**Prosecution response to defence request for leave to appeal the decision
concerning the prior statements of the Accused**

Specialist Prosecutor's Office
Alex Whiting

Counsel for Pjetër Shala
Jean-Louis Gilissen

Counsel for Victims
Simon Laws

I. INTRODUCTION

1. The Request¹ should be denied because it fails to meet the certification requirements under Article 45(2) of the Law² and Rule 77(2) of the Rules.³
2. The Request fails to meet all prongs of the certification test.⁴ First, by extensively mischaracterising or ignoring the findings of the Trial Panel ('Panel'), the Defence has failed to identify any appealable issue that is 'essential' for the determination of the Decision.⁵ Second, none of the proposed issues would have significant repercussions on the fair and expeditious conduct of the proceedings or the outcome of the trial. The impact of the use of the Accused's statements on the fairness of the proceedings is not to be assessed in isolation, but in the context of the proceedings as a whole. Thus, any assessment of the proposed issues' ability to significantly affect the fairness of the proceedings or the outcome of trial would be premature at this stage. Finally, because they are premature, their resolution would not materially advance the proceedings.

II. SUBMISSIONS

A. NONE OF THE PROPOSED ISSUES ARE ESSENTIAL TO THE DETERMINATION OF THE DECISION NOR WOULD THEY SIGNIFICANTLY AFFECT THE FAIRNESS OF THE PROCEEDINGS OR THE OUTCOME OF TRIAL

3. None of the ten issues proposed by the Defence meet the threshold for certification. They mostly amount to mischaracterisations of the Decision, or to a

¹ Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala, KSC-BC-2020-04/F00369, 13 December 2022, confidential ('Request').

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

⁴ Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021 ('Thaçi Appeal Decision'), paras 9-10.

⁵ Corrected version of Decision concerning prior statements given by Pjetër Shala, KSC-BC-2020-04/F00364COR, 8 December 2022, confidential ('Decision').

selective reading of it. At other times, they are merely a manifestation of the Defence's disagreement with the Decision. The Specialist Prosecutor's Office ('SPO') will address the proposed issues individually, in the order they appear in the Request.

1. Whether the Panel erred in law in failing to acknowledge that the guarantees of Article 6 of the European Convention become applicable once a person is suspected of having committed an offence and not when such person is charged with an offence

4. This proposed issue is premised on a plain misreading of the Decision. The Panel did not exclude suspects from the applicability of Article 6 of the European Convention of Human Rights ('ECHR').⁶ To the contrary, it recalled that 'a person "charged with an offence", such as a suspect questioned about his involvement in acts constituting a criminal offence, can claim the protection of Article 6' of the ECHR.⁷

5. The Panel clearly reasoned that, as a suspect at the time of the interviews, the Accused was entitled to the rights set forth in Article 6 of the ECHR, including the right to counsel.⁸ This is evident from the examination of the factual circumstances surrounding the Accused's interviews, and from the legal conclusion drawn by the Panel.⁹

6. In interpreting the notion of a 'criminal charge' as a prerequisite for the applicability of Article 6, the Panel explicitly followed established jurisprudence of the European Court of Human Rights ('ECtHR').¹⁰ The Decision is thus not affected by any 'erroneous understanding' of the applicable law.¹¹ By mischaracterising the Panel's reasoning and findings, the Defence has failed to identify any appealable issue.

⁶ *Contra*, Request, KSC-BC-2020-04/F00369, paras 9-11.

⁷ Decision, KSC-BC-2020-04/F00364COR, para.24.

⁸ Decision, KSC-BC-2020-04/F00364COR, para.26. *See contra* Request, KSC-BC-2020-04/F00369, para.10.

⁹ *See e.g.*, KSC-BC-2020-04/F00364COR, paras 33-39, 73-74, 81-94, 100-109.

¹⁰ *See* Decision, KSC-BC-2020-04/F00364COR, para.26, *citing* *Beuze v. Belgium*, Judgement, 9 November 2018, para.119.

¹¹ *Contra*, Request, KSC-BC-2020-04/F00369, para.11.

2. Whether the Panel erred in law by interpreting Rule 138(2) of the Rules inconsistently with the ECHR by requiring the existence of a causal link between the violation of a suspect's rights and the gathering of evidence

7. The Defence failed to demonstrate that the Panel's interpretation of Rule 138(2) amounts to an issue warranting certification. The Defence, in fact, mischaracterised the Decision by selectively quoting the relevant reasoning of the Panel.

8. In finding that the 2016 Belgian interview was not obtained by means of a violation of the Accused's rights, the Panel did not rely 'solely' on the Accused's interview of 2019,¹² but considered multiple factual circumstances.¹³

9. The Defence has thus failed to identify an appealable issue, because the concrete application of the 'causal link' requirement it selectively identified is not essential for the determination of the matter at hand. Nor did the Defence explain how the Panel's interpretation of Rule 138(2) would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

3. Whether the Panel erred in fact and in law by considering that the Accused was sufficiently informed of the nature and cause of the suspicions against him as well as of his rights as a suspect prior to each interview

10. This proposed issue does not meet the requirements for certification. The Defence's arguments are in fact either unsubstantiated in law, or ignore specific findings made by the Panel.

11. The Defence contends that 'the rights of a suspect' require more detailed information than what was considered sufficient by the Panel,¹⁴ arguing the existence of a more stringent 'test' in support of which it provides no authority.¹⁵

¹² See *contra* Request, KSC-BC-2020-04/F00369, para.14.

¹³ Decision, KSC-BC-2020-04/F00364COR, para.77.

¹⁴ Decision, KSC-BC-2020-04/F00364COR, paras 32,42,58,64-65,73,103.

¹⁵ Request, KSC-BC-2020-04/F00369, paras 18,19,21.

12. With regard to the 2016 and 2019 Belgian interviews, the Defence repeats arguments already dismissed in the Decision and ignores specific, relevant findings of the Panel. For instance, with respect to the 2016 interview, the Defence submits that the Panel ‘failed to consider’ whether the Accused had been sufficiently informed of his right to be assisted by a lawyer free of charge during the interview, and whether he could thus be said to have properly waived that right.¹⁶ On the contrary, the Panel specifically considered the information provided to the Accused, the effects on the lawfulness of the interview, and the compatibility of the 2016 interview with ECtHR jurisprudence.¹⁷ Instead of explaining why the Panel’s analysis of and reliance on ECtHR jurisprudence may significantly affect the fairness of the proceedings or the outcome of the trial, the Defence simply ignored it, making reference to a general positive obligation to inform a suspect of his rights with reference to a case which, unlike the case at hand, concerned a detained suspect.¹⁸

13. The Defence also chose to ignore the Panel’s findings with regard to other issues. For instance, the Defence states that the Accused was informed of his right to a lawyer only after the interview had started,¹⁹ choosing to ignore the Panel’s finding that he had received ‘comprehensive information about his rights’ through his summons, and had confirmed having received the declaration of rights, which explicitly stated it was given to the Accused ‘prior to the commencement of the interview’.²⁰

14. By selectively quoting the Decision and ignoring specific findings of the Panel that go to the core of this proposed issue, the Defence has failed to demonstrate that

¹⁶ Request, KSC-BC-2020-04/F00369, para.19.

¹⁷ Decision, KSC-BC-2020-04/F00364COR, paras 77-80.

¹⁸ Request, KSC-BC-2020-04/F00369, para.20, fn.21. In paragraph 77, footnote 127 of the Decision, the Panel specifically addressed the difference in ECtHR jurisprudence between detained suspects and suspects who were interviewed in state of liberty, but the Defence failed to acknowledge and address that reasoning.

¹⁹ Request, KSC-BC-2020-04/F00369, para.20.

²⁰ Decision, KSC-BC-2020-04/F00364COR, para.70.

these alleged errors were essential for the determination of the Decision, and to identify any issue that significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial.

4. Whether the Panel erred in fact and in law by considering that the Accused's rights as a suspect were not violated in the context of each interview and by finding the records related to each interview admissible

15. Under this heading, the Defence makes general submissions on the violation of the Accused's rights during the ICTY and Belgian interviews.²¹

16. It also repeats arguments, already considered by the Panel,²² on the voluntariness of the Accused's participation in the interviews, citing again the 'evident inequality' between the Accused and the interviewing teams. The Defence fails to explain how the Panel's findings in this regard are essential to the Decision or significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. No appealable issue has been identified.

5. Whether the Panel erred in law and in fact by considering that the KSC framework is inapplicable with respect to the interviews

17. The Defence has failed to explain how the application of international human rights law by the Panel, *in lieu* of the Kosovo Specialist Chambers ('KSC') legal framework, was essential to the outcome of the Decision. It has also failed to provide any explanation as to why the application of international human rights law by the Panel is an issue that significantly affects the fair and expeditious conduct of the proceedings and the outcome of the trial. This failure is particularly conspicuous considering the Defence's extensive reliance on European human rights jurisprudence

²¹ Request, KSC-BC-2020-04/F00369, paras 23-27.

²² Decision, KSC-BC-2020-04/F00364COR, paras 35, 38, 46, 49, 76, 106, 108.

in its submissions,²³ and its explicit applicability before the Specialist Chambers pursuant to Article 3(2)(e) of the Law.

6. Whether the Panel erred in fact and in law by considering that the Accused had provided a well-informed and unequivocal waiver of his rights as a suspect with regard to each interview

18. In proposing this issue for certification, the Defence misconstrued the Decision by selectively quoting parts of the Panel's reasoning.

19. The Defence submits that in deciding whether the Accused was sufficiently informed of his rights to express a valid waiver in 2016, the Panel engaged in 'circular reasoning' by, essentially, solely relying on his 2019 interview.²⁴ This is incorrect. While the Panel did consider the similarity of certain statements made in the two interviews,²⁵ it did so after having extensively assessed the level of information provided to the Accused before and on the day of his 2016 interview with respect to every specific right he was entitled to.²⁶

20. The Defence adopted the same selective approach with regard to the 2019 interview,²⁷ failing to consider the Panel's extensive reasoning with regard to the information received by the Accused and its adequacy.²⁸

21. By misconstruing the Panel's reasoning and selectively quoting its findings, the Defence has failed to identify an issue which was essential to the determination of the Decision and may significantly affect the fairness of the proceedings.

²³ See e.g. Motion to Exclude Evidence from the Case File to be Transmitted to the Trial Panel with Confidential Annexes 1-3, KSC-BC-2020-04/F00281, 20 September 2022, paras 29-34 and Defence Response to Prosecution Motion for Admission of Accused's Statements, KSC-BC-2020-04/F00358, 24 November 2022, paras 46-50.

²⁴ Request, KSC-BC-2020-04/F00369, paras 31, 33.

²⁵ Decision, KSC-BC-2020-04/F00364COR, para.78.

²⁶ Decision, KSC-BC-2020-04/F00364COR, paras 70-76.

²⁷ Request, KSC-BC-2020-04/F00369, para.33.

²⁸ Decision, KSC-BC-2020-04/F00364COR, paras 81-94, 100-109.

7. Whether the Panel erred in law in imposing the burden to show voluntariness or absence of oppressive conduct on the Defence

22. The Defence submits that ‘whether the Panel correctly set out and applied the law on this point merits appellate consideration’.²⁹ The Defence, however, has failed to demonstrate how this proposed issue is essential to the determination of the Decision. On this basis only, this proposed issue does not meet the threshold for certification.

23. In addition, the Defence mischaracterised the Decision in claiming that the Panel reversed the burden of proof with regard to the voluntariness of the interviews. The SPO made extensive submissions on this issue, with which the Panel agreed.³⁰ In noting that the Defence had not made submissions casting doubt on that finding, the Panel did not reverse the burden of proof. Rather, it concluded that available records demonstrated the voluntariness of the interviews, adding that the Defence had not provided any evidence to the contrary.³¹

24. By misconstruing the Panel’s reasoning, the Defence has failed to identify an issue that can significantly affect the fairness of the proceedings or the outcome of the trial.

8. Whether the Panel erred in law in applying an objective test as to whether the Accused was sufficiently notified of his rights prior to each interview

25. In articulating this issue, the Defence has again mischaracterised the Decision. While a discussion on whether the Decision was correctly reasoned does not belong to a certification request,³² an appealable issue must be correctly identified. This requirement cannot be satisfied if the Defence fails to acknowledge portions of the Panel’s reasoning that affect the very premise underlying the proposed issue.

²⁹ Request, KSC-BC-2020-04/F00369, para.35.

³⁰ See Decision, KSC-BC-2020-04/F00364COR, paras 31, 35, 41, 46, 64, 75, 83, 106.

³¹ Decision, KSC-BC-2020-04/F00364COR, paras 75, 106.

³² Thaçi Appeal Decision, KSC-BC-2020-06/F00172, para.17.

26. The Panel explicitly (i) considered several subjective circumstances of the Accused, including statements that he understood his rights,³³ and his past experience with suspect interviews;³⁴ (ii) compared statements given by the Accused at different times to assess his understanding of his rights;³⁵ and (iii) considered his level of French as it emerged from the records.³⁶ The Defence's failure to acknowledge these portions of the Decision render its submissions concerning the alleged 'objective test' meritless.

27. The very premise underlying this proposed issue is thus incorrect, and the Defence has failed to identify an issue that can significantly affect the fair conduct of the proceedings or the outcome of the trial.

9. Whether the Panel erred in failing to consider or by applying an objective test in evaluating whether the Accused could have foreseen the consequences of his conduct with respect to each interview

28. Contrary to the Defence submissions,³⁷ the Panel did consider whether the Accused could have foreseen the consequences of his participation in each of the interviews.³⁸ The Defence failed altogether to substantiate its claim that the Panel should have applied a higher standard.³⁹ This empty claim does not amount to an appealable issue.

29. The Defence also repeats that the Panel failed to consider the subjective circumstances of the Accused.⁴⁰ As discussed above, this claim is factually incorrect, and cannot form the basis for an appealable issue.

³³ Decision, KSC-BC-2020-04/F00364COR, paras 36, 90-91.

³⁴ Decision, KSC-BC-2020-04/F00364COR, para.104.

³⁵ Decision, KSC-BC-2020-04/F00364COR, paras 78-79.

³⁶ Decision, KSC-BC-2020-04/F00364COR, paras 95-99.

³⁷ Request, KSC-BC-2020-04/F00369, paras 37-43.

³⁸ Decision, KSC-BC-2020-04/F00364COR, paras 33, 48, 74, 105.

³⁹ Request, KSC-BC-2020-04/F00369, para.41.

⁴⁰ Request, KSC-BC-2020-04/F00369, paras 42, 43.

10. Whether the Panel erred by not examining the Defence Exclusion Motion and failing to give a sufficiently reasoned decision dismissing it

30. This last proposed issue, too, falls short of meeting the test for certification. The Defence provides no explanation of how this alleged failure can significantly affect the fair conduct of the proceedings or the outcome of trial, or how its resolution is essential for the determination of any of the matters involved in the Decision.⁴¹

B. INTERNATIONAL HUMAN RIGHTS JURISPRUDENCE DISQUALIFIES THE PROPOSED ISSUES FROM CERTIFICATION FOR INTERLOCUTORY APPEAL

31. In addition to, and independently from the reasons explained above, it would be premature at this stage to consider whether any of the issues proposed by the Defence, either individually or considered together, are capable of significantly affecting the fairness of the proceedings or the outcome of the trial. Indeed, at this stage, the statements have been admitted, but no decision has yet been made about their weight, if any.

32. According to the ECtHR, the impact of any alleged pre-trial procedural failure on the fairness of the proceedings, including an unjustified restriction of the right to counsel during a suspect interview, must be assessed considering the proceedings as a whole, and not on just one particular aspect of them.⁴²

33. In *Ibrahim and Others v. United Kingdom*, in examining the impact that a restriction of the right to counsel had on the fairness of the proceedings, the Court carefully considered it in the context of the applicants' overall ability to exercise, at different stages of the proceedings, their rights under Article 6(3) ECHR, including by calling witnesses and presenting evidence as to the circumstances of their questioning.⁴³ It also considered the weight given to the applicants' statements,

⁴¹ Request, KSC-BC-2020-04/F00369, para.44.

⁴² *Beuze v. Belgium*, Judgment, 9 November 2018, paras 121-122,150; *Ibrahim and Others v. United Kingdom*, Judgment, 13 September 2016, paras 250-251,274.

⁴³ *Ibrahim and Others v. United Kingdom*, Judgment, 13 September 2016, para.283.

concluding that they were ‘merely one element of a substantial prosecution case against [them]’.⁴⁴ Based on these and other considerations, it concluded that the restrictions on the right to counsel had not impacted the overall fairness of the proceedings.⁴⁵

34. Such a holistic assessment is clearly premature at this stage. Only at the end of the trial, once all the evidence has been presented and weight assigned by the Panel, will it be appropriate to assess the impact of the statements on the fairness of the proceedings and outcome of the trial.⁴⁶

35. Thus, for this reason alone, none of the issues proposed by the Defence meets the threshold for certification.

36. Following the same principle, a resolution of the proposed issues at this stage would not materially advance the proceedings,⁴⁷ as none of them is capable of tainting the fairness of proceedings or marring the outcome of trial.⁴⁸

III. CLASSIFICATION

37. This filing is classified as confidential pursuant to Rule 82(4). The SPO does not object to reclassification as public.

IV. RELIEF REQUESTED

38. For the foregoing reasons, the SPO requests the Panel to deny the Request.

⁴⁴ *Ibrahim and Others v. United Kingdom*, Judgment, 13 September 2016, para.288; *Beuze v. Belgium*, Judgment, 9 November 2018, para.150(g).

⁴⁵ *Ibrahim and Others v. United Kingdom*, Judgment, 13 September 2016, para.294.

⁴⁶ *See, similarly*, ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18, Decision on Defence requests for leave to appeal two decisions related to the submission into evidence of Mr Al Hassan’s statements, 24 June 2021, para.26.

⁴⁷ Thaçi Appeal Decision, KSC-BC-2020-06/F00172, para.9.

⁴⁸ Thaçi Appeal Decision, KSC-BC-2020-06/F00172, para.16.

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Alex Whiting

Acting Specialist Prosecutor

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At The Hague, the Netherlands.