



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: **KSC-CA-2023-02**

Before: **A Panel of the Court of Appeals Chamber**
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Fidelma Donlon

Date: 15 February 2023

Original language: English

Classification: **Public**

Decision on Modalities of Victim Participation in Appellate Proceedings

Specialist Prosecutor's Office:

Alex Whiting

Counsel for Salih Mustafa:

Julius von Bóné

Counsel for Victims:

Anni Pues

THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively),¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 172 of the Rules of Procedure and Evidence (“Rules”), is seised of a motion filed by Mr Salih Mustafa (“Mustafa” or “Accused”) on 13 February 2023 seeking the exclusion of Counsel for Victims from participating in the upcoming Pre-Appeal Conference and from the appellate proceedings more generally (“Motion”).²

I. BACKGROUND

1. On 30 April 2021, the Pre-Trial Judge admitted five victims to the proceedings in case KSC-BC-2020-05 and set out the provisions applicable to the victims’ participation in pre-trial proceedings.³ On 21 May 2021, the Trial Panel admitted four additional victims to the proceedings and set out the participating victims’ procedural rights at trial.⁴ On 12 July 2021, the Trial Panel issued its “Decision on victims’ procedural rights during trial”, expanding on its 21 May 2021 decision.⁵ On 16 December 2022, the Trial Panel issued its judgment in the case (“Trial Judgment”), noting *inter alia* that, ultimately, eight victims had participated in the proceedings.⁶

¹ F00007, Decision Assigning a Court of Appeals Panel, 7 February 2023 (confidential, reclassified as public on 7 February 2023).

² F00009, Motion regarding Victims’ Counsel participating in the Pre-Appeal Conference and further Appeal proceedings, 13 February 2023 (confidential and *ex parte*) (“Motion”).

³ KSC-BC-2020-05, F00105/RED, Public Redacted Version of Second Decision on Victims’ Participation, 30 April 2021 (confidential version filed on 30 April 2021), paras 50-54.

⁴ KSC-BC-2020-05, F00126/RED, Public redacted version of Third decision on victims’ participation, 21 May 2021 (confidential version filed on 21 May 2021), paras 37-40, 42.

⁵ KSC-BC-2020-05, F00152, Decision on victims’ procedural rights during trial, 12 July 2021 (“Decision on Victims’ Procedural Rights at Trial”).

⁶ KSC-BC-2020-05, F00494/RED/COR, Corrected version of Public redacted version of Trial Judgment, 24 January 2023 (confidential version filed on 16 December 2022, uncorrected public redacted version filed on 19 January 2023), para. 6.

2. On 2 February 2023, Mustafa filed his notice of appeal against the Trial Judgment.⁷ On 9 February 2023, the Presiding Judge of the Appeals Panel (“Presiding Judge”) scheduled the Pre-Appeal Conference to take place on 16 February 2023, at 10:00, and instructed the Parties and Counsel for Victims to notify her in advance of any issues they would like to raise during the hearing (“Scheduling Order”).⁸ On the same day, Counsel for Victims informed the Presiding Judge and the Parties via email that she would like to discuss during the Pre-Appeal Conference the scope of the submissions that she may make during the appellate proceedings, and in particular her ability to respond to grounds of appeal raised by Mustafa.⁹

3. On 13 February 2023, Mustafa filed the Motion *ex parte* Counsel for Victims. In it, Mustafa argues that the Scheduling Order erroneously, and without legal basis, presupposes that Counsel for Victims can participate in the Pre-Appeal Conference and the appellate proceedings more generally. Mustafa submits that the Law and Rules provide no legal basis for such participation, since Counsel for Victims has not filed an appeal or an application to participate in the proceedings and Rule 114(1) of the Rules limits her participation to the circumstances identified in Articles 22(6) and 46(9) of the Law, which are not applicable here.¹⁰

II. DISCUSSION

4. The Panel notes that, by seeking the reversal of certain aspects of the Scheduling Order, Mustafa is in effect, without explicitly saying so, seeking its reconsideration under Rule 79(1) of the Rules. The latter allows for a Panel to reconsider its own decisions “[i]n exceptional circumstances and where a clear error

⁷ F00006/RED2, Public Redacted Version of Defence Notice of Appeal pursuant to Rule 176 (of the Rules of Procedure and Evidence) against the Judgment of the Trial Panel I of 16 December 2022, 13 February 2023 (confidential version filed on 2 February 2023).

⁸ F00008, Order Scheduling a Pre-Appeal Conference, 9 February 2023, para. 11.

⁹ CRSPD2, Email from Victims’ Counsel to CMU regarding Order Scheduling a Pre-Appeal Conference, 9 February 2023.

¹⁰ Motion, paras 7-17.

of reasoning has been demonstrated or where reconsideration is necessary to avoid injustice". For the reasons set out below, the Panel considers that Mustafa has failed to demonstrate a clear error in the Appeals Panel's reasoning, or that reconsideration of the Scheduling Order would be necessary to avoid injustice. In particular, when arguing that the Presiding Judge erroneously invited, *inter alia*, Counsel for Victims to make submissions on certain topics during the upcoming Pre-Appeal Conference,¹¹ Mustafa disregards the fact that the Presiding Judge used the phrase "as the case may be" and included in the list of topics "[a]ny other issue that the Presiding Judge may wish to raise".¹² In the Panel's view, the phrasing clearly signalled the self-evident fact that a Party or participant's scope to address the Presiding Judge on the various issues would be dependent on their rights as prescribed in the Specialist Chambers' legal framework – which the Appeals Panel will expand on below – and did not mean to grant Counsel for Victims the right to, for example, make submissions on the Accused's detention.¹³ As such, the Motion is dismissed insofar as it seeks reconsideration of the Scheduling Order. In addition, the Motion seeks the exclusion of Counsel for Victims from these appellate proceedings more generally, which the Panel also dismisses for the reasons set out below.

5. At the outset, the Appeals Panel notes that Article 46(9) of the Law limits Counsel for Victims' ability to file an appeal against a trial judgment only to challenges to a decision on victim status or to a reparation order. However, Article 22(6) of the Law states more generally that the Specialist Chambers may permit representation by Counsel for Victims during pre-trial and trial proceedings as provided for in the Rules, when the participating victims' personal interests are impacted and only when it is not prejudicial to or inconsistent with the rights of the Accused. Most notably, Rule 114 of the Rules provides further details on the modalities of victim participation,

¹¹ Motion, para. 8. Cf. Motion, para. 6, in which Mustafa does initially note the phrase "as the case may be".

¹² Scheduling Order, para. 8.

¹³ Scheduling Order, para. 8.

including stating that they shall exercise their rights through an assigned Counsel for Victims “during all stages of the proceedings pursuant to Articles 22(6) and 46(9) of the Law”.¹⁴ Finally, under Rule 173(3) of the Rules, the rules governing trial proceedings shall apply *mutatis mutandis* to proceedings before the Appeals Panel.

6. Therefore, contrary to Mustafa’s submissions, the Panel finds that there is, in fact, a legal basis for the participation of victims, through Counsel for Victims, in these appellate proceedings. The Panel considers that regardless of whether Counsel for Victims has filed an appeal under Article 46(9) of the Law, victim participation is permissible as long as it complies with the Law and the Rules, is limited to issues impacting their personal interests and is not prejudicial to or inconsistent with the rights of the Accused.¹⁵ Moreover, the Panel notes that victim participation in appellate proceedings is also permitted at other international courts and tribunals, subject to their specific legal frameworks.¹⁶ For the benefit of the Parties and Counsel for Victims, the Appeals Panel will explicitly clarify below how the Specialist Chamber’s legal provisions regarding victim participation apply in these appellate proceedings.

7. In this regard, the Appeals Panel notes the Trial Panel’s analysis of the participating victims’ personal interests, rights and modalities of participation at trial, based on the Specialist Chambers’ legal framework – namely Articles 22(3), (5)-(6) and 23 of the Law and Rules 80, 114 and 132 of the Rules, and notes in particular that they were permitted to attend all non-*ex parte* trial hearings, including the trial

¹⁴ See Rule 114(1) of the Rules.

¹⁵ See Article 22(6) of the Law.

¹⁶ See e.g. STL, *Prosecutor v. Ayyash et al.*, STL-11-01/A-1/AC and STL-11-01/A-2/AC, Decision on the Admissibility of the LRV Appeal Against Sentence and Modalities of Victim Participation, 24 February 2021; ICC, *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-1290, Decision on victim participation, 26 November 2019 (“*Gbagbo and Blé Goudé Appeal Decision*”); ICC, *Prosecutor v. Ongwen*, ICC-0/04-01/15-1859, Decision on the modalities of victim participation, 11 June 2021. For further discussion and references, see Cattin, D., in Ambos, K. (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Fourth Edition), C. H. Beck, Hart, Nomos 2022, Article 68, mn. 3 et seq.

preparation conference and status conferences.¹⁷ Consequently, keeping in mind the fact that the rules governing trial proceedings shall apply *mutatis mutandis* to proceedings before the Appeals Panel,¹⁸ as well as the need for procedural coherence in this case, the Panel considers that it is in the interests of justice that a similar regime of victim participation be applied during these appellate proceedings, with the necessary adjustments.¹⁹

8. The Appeals Panel first considers that participating victims' rights during appellate proceedings are necessarily confined to the issues the Appeals Panel has been seised of, and therefore must be exercised within the limits of the issues arising from the grounds of appeal.²⁰

9. The Appeals Panel recalls that, according to Article 22(3) of the Law, the participating victims' personal interest and rights in the proceedings are notification, acknowledgement and reparation, and agrees with the Trial Panel's conclusion that, in light of Article 23 of the Law, the protection of victims' safety, physical and psychological well-being, dignity and privacy is a fourth personal interest and right that participating victims have in the proceedings.²¹

10. Turning to the modalities of victim participation in these appellate proceedings, the Panel recalls at the outset that they can only participate through Counsel for Victims and can therefore not represent themselves.²² In addition, the Panel considers that it shall retain control of the modalities of victim participation, at

¹⁷ Decision on Victims' Procedural Rights at Trial, paras 8-43. See KSC-BC-2020-05, Transcript 9 June 2021, p. 208; KSC-BC-2020-05, Transcript, 8 March 2022, pp. 2459-2460; KSC-BC-2020-05, Transcript, 9 March 2022, pp. 2507-2508.

¹⁸ See Rule 173(3) of the Rules.

¹⁹ See Rule 114(4) of the Rules. See also Decision on Victims' Procedural Rights at Trial, para. 22.

²⁰ See Article 46(1) of the Law; Rules 113(1)-(4), 175, 176(2), 182(2)-(3) of the Rules. See also Decision on Victims' Procedural Rights at Trial, para. 8.

²¹ See Decision on Victims' Procedural Rights at Trial, paras 9-11. See also Decision on Victims' Procedural Rights at Trial, paras 12-19.

²² Articles 22(5)-(6), 46(9) of the Law; Rule 114(1) of the Rules. See also Decision on Victims' Procedural Rights at Trial, para. 20.

all times, and that they may be amended and/or supplemented in certain instances, so long as the victims' personal interests are not adversely affected by such amendments or supplementations.²³ The Panel shall also ensure that the victims' participation in the appellate proceedings is neither prejudicial to nor inconsistent with the Accused's rights.²⁴

11. Specifically, Counsel for Victims shall continue to have access to the entire case file, including all public, confidential and strictly confidential filings, transcripts and evidentiary material, but excluding any items which are *ex parte* the Counsel for Victims.²⁵ It follows that Counsel for Victims shall also continue to be notified of all disclosed and/or distributed items in the case file, including all public, confidential and strictly confidential filings, transcripts and evidentiary material, but excluding any items which are *ex parte* the Counsel for Victims.²⁶ Counsel for Victims shall continue to keep the participating victims informed of relevant developments in the case in a manner which does not reveal any non-public information.²⁷

12. In addition, in order to ensure that the participating victims' personal interests are appropriately represented at all times, Counsel for Victims shall continue to be notified of and be present at all appellate hearings, whether held in public, private or closed session, but excluding any hearings which are *ex parte* the Counsel for Victims.²⁸ Counsel for Victims may request to address the Panel in an *ex parte* hearing.²⁹

²³ See Decision on Victims' Procedural Rights at Trial, para. 23.

²⁴ Article 22(6) of the Law. See Decision on Victims' Procedural Rights at Trial, para. 23. On the overall fairness in this context, see also ECtHR, *Schatschaschwili v. Germany*, no. 9154/10, Judgment, 15 December 2015, para. 101; ECtHR, *Perez v. France*, no. 47287/99, Judgment, 12 February 2004, para. 72; on the ensuing tension, see also Ambos, K., *Treatise on International Criminal Law: Volume III: International Criminal Procedure*, Oxford University Press 2016, p. 170 with further references in fn. 694.

²⁵ Rule 114(3) of the Rules; Decision on Victims' Procedural Rights at Trial, paras 21, 25.

²⁶ See Decision on Victims' Procedural Rights at Trial, para. 25.

²⁷ Rule 114(3) of the Rules; Decision on Victims' Procedural Rights at Trial, para. 25.

²⁸ Article 22(6) of the Law; Rule 114(2) of the Rules; Decision on Victims' Procedural Rights at Trial, paras 21, 26.

²⁹ Decision on Victims' Procedural Rights at Trial, para. 26.

13. Moreover, Counsel for Victims may continue, within the limits set forth in Article 22(6) of the Law and Rule 114(4) of the Rules, without seeking prior leave from the Panel, to make oral and written submissions on any point of law or fact, and to file responses and replies, as the case may be, to any submissions made before the Panel, including appellate briefs.³⁰ However, the Panel stresses that Counsel for Victims must explicitly set out how the submissions are related to the participating victims' personal interests.³¹ Failure to satisfy the Panel of this relationship may therefore lead to the summary dismissal of the submissions. In addition, when filing written submissions, Counsel for Victims shall of course respect the applicable time and word limits, as well as other formal requirements set out in the Rules and the Practice Direction on Files and Filings.³²

14. Finally, the Appeals Panel notes that the present Decision does not set out modalities of victim participation for the entire ambit of situations which may occur in these appellate proceedings. Should the need arise to further specify the modalities of victim participation in these proceedings, the Appeals Panel will give further direction, either at the request of the Parties or participants in the proceedings, or on its own motion.³³

15. In light of these findings, the Panel dismisses the Motion. Moreover, the Panel considers that Counsel for Victims' request to discuss at the Pre-Appeal Conference the scope of the submissions she may make during the appellate proceedings, including her ability to respond to Mustafa's grounds of appeal, is moot.

16. The Panel moreover recalls that the Motion was filed confidentially and *ex parte* Counsel for Victims, but provides no reasons for its non-public classification, as

³⁰ Article 22(6) of the Law; Rule 114(4) of the Rules; Decision on Victims' Procedural Rights at Trial, paras 21, 27.

³¹ Article 22(3), (6) of the Law. See also Decision on Victims' Procedural Rights at Trial, para. 27.

³² KSC-BD-15, Registry Practice Direction, Files and Filings before the Kosovo Specialist Chambers, 17 May 2019.

³³ See e.g. *Gbagbo and Blé Goudé* Appeal Decision, para. 10.

required under Rule 82(3) of the Rules. Consequently, since the Panel sees no reason why the Motion's contents should not be disclosed to Counsel for Victims or indeed be made public, the Panel instructs the Registry to reclassify the Motion as public.

III. DISPOSITION

17. For these reasons, the Court of Appeals Panel:

DISMISSES the Motion;

ADOPTS the modalities for victim participation in appellate proceedings set out in this Decision; and

INSTRUCTS the Registry to reclassify the Motion as public.



**Judge Michèle Picard,
Presiding Judge**

Dated this Wednesday, 15 February 2023

At The Hague, the Netherlands