



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

In: KSC-CA-2023-02
Before: A Panel of the Court of Appeals Chamber
Judge Michèle Picard, Presiding Judge
Judge Kai Ambos
Judge Nina Jørgensen
Registrar: Dr Fidelma Donlon
Filing Participant: Acting Specialist Prosecutor
Date: 6 March 2023
Language: English
Classification: Public

**Prosecution response to 'Defence Request for Certification to Appeal the 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

1. The Request,¹ which concerns the participation of Victims' Counsel in the appellate stage of the proceeding, does not directly bear upon the Specialist Prosecutor's Office's ('SPO') mandate as a party to the appeal. Nevertheless, in accordance with Article 35² and Rules 62, 76 and 77,³ the SPO considers it necessary to address a question of law arising from the Request, namely the availability of interlocutory appeals from a decision of the Appeals Panel.⁴

2. As a legal basis for the Request, MUSTAFA attempts to rely on Article 45(2), Rule 77(2) and Rule 173(3).⁵

3. Article 45(2) requires the Pre-Trial Judge or the Trial Panel to certify requests for leave to appeal interlocutory decisions, unless an appeal lies as of right. Rule 173(3) applies the rules governing trial proceedings *mutatis mutandis* to proceedings before the Appeals Panel. MUSTAFA wrongly argues that Rule 173(3) thereby incorporates the interlocutory appeal procedure under Article 45(2) to the appeal stage, with the necessary modification that the Appeals Panel may certify leave to appeal an interlocutory decision.⁶

4. The statutory regime governing avenues of appeal under the Law is unambiguous.⁷ Article 47 limits appeals to a Supreme Court Panel of the Specialist Chambers to instances where either (i) the Appeals Panel has modified an acquittal and has instead entered a conviction; or (ii) a sentence of life-long imprisonment has been imposed.⁸

¹ Defence Request for Certification to Appeal the Decision on Modalities of Victim Participation in Appellate Proceedings, KSC-CA-2023-02/F00013, 22 February 2023 ('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'). All references to 'Rule' or 'Rules' are to the Rules, unless otherwise specified.

⁴ See also Victims' Counsel Response to Defence request for certification to Appeal the Decision on Modalities of Victim Participation in Appellate Proceedings (F00013), KSC-CA-2023-02/F00014, 3 March 2023 ('Victims Response'), paras 5-13.

⁵ Request, KSC-CA-2023-02/F00013, paras 6-8.

⁶ Request, KSC-CA-2023-02/F00013, para.8.

⁷ See Articles 45-47.

⁸ See also Article 48.

5. A plain reading of Rule 77(2), obliquely relied on by MUSTAFA,⁹ also militates against its application after the conclusion of the trial. While Rule 173(3) may import certain rules governing trial proceedings in appropriate circumstances and with necessary modifications, the modifications necessary to adapt Rule 77 to the appeal stage would make that provision unrecognisable, in light of its stated purpose to safeguard the fair and expeditious conduct of the proceedings or the outcome of the trial,¹⁰ and in the context of the provisions of the Law governing appeals.

6. Moreover, the Request ignores the qualitative difference between questions of standing, for which a clear statutory basis may not always be necessary,¹¹ and the creation of a separate appeal procedure in conflict with the statutory regime established by the Law.¹² Tellingly, MUSTAFA offers no precedent from any international or national court or tribunal applying interlocutory appeals during an appeal proceeding.¹³

7. Finally, MUSTAFA misrepresents the Decision by claiming that the Appeals Panel ‘appeared to regard Rule 173(3) as having the effect of applying’ Article 22(6) to proceedings before the Appeals Panel.¹⁴ In the Decision, the Appeals Panel mentioned Rule 173(3) in the context of Rule 114, which ‘provides further details on the modalities of victim participation’.¹⁵ The Appeals Panel stressed in particular that Rule 114(1) refers to Victim participation ‘during all stages of the proceedings’.

⁹ Request, KSC-CA-2023-02/F00013, para.7.

¹⁰ Article 45(2) includes the same stated purpose.

¹¹ See, for example, ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.11, Decision on Appeal Against the Decision on the Accused’s Motion to Subpoena Zdravko Tolimir, 13 November 2013, para.10 (and the sources cited therein).

¹² Article 3(2), Article 19(3) and Rules 4 and 5 give primacy to the Law over the Rules.

¹³ Cf. IRMCT, *Prosecutor v. Mladić*, MICT-13-56-A, Public Redacted Version of the “Decision on a Motion for Reconsideration and Certification to Appeal Decision on a Request for Provisional Release” filed on 22 May 2018, 8 June 2018, pp.2-3 (considering there is no legal basis for appealing an order or decision of the appeals chamber). See also Victims Response, KSC-CA-2023-02/F00014, para.11 (and the sources cited therein).

¹⁴ Request, KSC-CA-2023-02/F00013, para.8.

¹⁵ Decision on Modalities of Victim Participation in Appellate Proceedings, KSC-CA-2023-02/F00011, 15 February 2023, para.5. See also *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Defence Requests to Interview Witnesses, to Order an Updated Rule 102(3) Notice and to Adjourn the Appeal Hearing,

8. For these reasons, the Request lacks any legal basis and should be summarily dismissed.

Word count: 811



Alex Whiting

Acting Specialist Prosecutor

Monday, 6 March 2023

At The Hague, the Netherlands.

KSC-CA-2022-01/F00094, 28 November 2022, paras 17-18 (where the Appeals Panel held that the disclosure rules governing trial proceedings must be adapted to the specific nature of an appeals proceeding); *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Haradinaj Request to Order the SPO to Disclose Material under Rule 102(3) or Rule 103 of the Rules, KSC-CA-2022-01/F00105, 16 January 2023, para.28 (applying Rule 173(3) to the briefing schedule in Rule 76).