

In: KSC-BC-2020-06
Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Court of Appeals Panel
Judge Michèle Picard
Judge Emilio Gatti
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Rexhep Selimi

Date: 26 April 2023

Language: English

Classification: Public

**Public Redacted Version of Selimi Defence Appeal against “Decision on Prosecution Request to Add Two Witnesses and Associated Material”,
KSC-BC-2020-06/F01058, dated 27 October 2022**

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I. INTRODUCTION

1. Pursuant to Article 45(1) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 170(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), the Defence for Mr. Selimi ("Defence") hereby submits its appeal against the "Decision on Prosecution Request to Add Two Witnesses and Associated Material", KSC-BC-2020-06/F01058, 27 October 2022 ("Impugned Decision"),¹ which *inter alia*, granted, the Specialist Prosecutor's Office's ("SPO") request to add two witnesses to the Rule 95 list ("SPO Request").²
2. On 3 November 2022, the Defence filed its request for leave to appeal the Impugned Decision.³ On 23 November 2022, the Pre-Trial Judge issued his decision on the Request for Certification,⁴ in which he granted leave for the Selimi Defence to appeal the following issue arising from the Impugned Decision:
 - (i) Whether the Pre-Trial Judge erred in finding that he was empowered to decide upon the [SPO's Second] Request to add witnesses to its [w]itness [l]ist at this stage rather than deferring the matter to the Trial Panel.
3. This Appeal will show in relation to this issue that the Pre-Trial Judge committed an error of law in deciding that he was empowered to decide upon the [SPO's

¹ KSC-BC-2020-06/F01058, Decision on Prosecution Request to Add Two Witnesses and Associated Material, 27 October 2022.

² 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.

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

⁴ KSC-BC-2020-06/F01118, Decision on Requests for Certification to Appeal F01057 and F01058 ("Certification Decision"), 23 November 2022.

Second] Request to add witnesses to its [w]itness [l]ist at this stage rather than deferring the matter to the Trial Panel.

II. APPLICABLE LAW

4. It is established in KSC jurisprudence that the Court of Appeals Panel will apply *mutatis mutandis* to interlocutory appeals the standard of review provided for appeals against judgments under Article 46(1) of the Law,⁵ which specifies, in relevant part, the following grounds of appeal:

- (i) An error on a question of law invalidating the judgment;
- (ii) An error of fact which has occasioned a miscarriage of justice; or
- (iii) [...]

5. In relation to errors of law, the Law states that:

“When the Court of Appeals Panel determines that a Trial Panel has made an error of law in a judgement arising from the application of an incorrect legal standard, the Court of Appeals Chamber shall articulate the correct legal standard and apply that standard to the evidence contained in the trial record to determine whether to sustain, enter or overturn a finding of guilty on appeal. Alternatively, if the Trial Panel is available and could more efficiently address the matter, the Court of Appeals Panel may return the case to the Trial Panel to review its findings and the evidence based on the correct legal standard.”⁶

6. KSC jurisprudence further establishes that:

“A party alleging an error of law must identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision. An allegation of an error of law

⁵ KSC-BC-2020-07/ IA001-F00005, Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention (“*Gucati* Appeal Decision”), 9 December 2020, paras 4-13; KSC-BC-2020-07/IA002-F00005, Decision on Nasim Haradinaj’s Appeal Against Decision Reviewing Detention (“*Haradinaj* Appeal Decision”), 9 February 2021, paras 11-13.

⁶ Article 46(4) of the Law.

that has no chance of changing the outcome of a decision may be rejected on that ground. However, even if the party's arguments are insufficient to support the contention of an error, the Panel may find for other reasons that there is an error of law."⁷

III. SCOPE OF APPEAL

7. The Defence notes that in the Certification Decision, the Pre-Trial Judge only certified the First Issue in the Request for Certification, relating to his legal authority to decide upon requests to add witnesses to the SPO Rule 95(4) witness list rather than deferring such decisions to the Trial Panel, while the Second Issue, which related solely to the addition of [REDACTED] to the SPO Witness List, was not certified by the Pre-Trial Judge.
8. In the interest of clarity, this Appeal relates to the general authority of the Pre-Trial Judge to authorise the addition of *any* witnesses to the SPO Rule 95 list, and thus is not limited to the addition of [REDACTED] alone.
9. Further, the Defence recalls that in the Certification Decision, the Pre-Trial Judge recognised that the Appeals Panel had previously made general findings regarding the level of flexibility for amending witness and exhibit lists at the pre-trial stage.⁸ However, as the Pre-Trial Judge properly recognised, in making those general findings, the Appeals Panel "was not seised with the more specific question regarding the legal basis for the Pre-Trial Judge to decide upon requests for addition of witnesses at this stage of the proceedings."⁹ Indeed, to the knowledge of the Defence the Pre-Trial Judge's authority in this regard has never

⁷ *Gucati* Appeal Decision, para. 14.

⁸ KSC-BC-2020-06, IA019/F00006, Court of Appeals, Decision on Thaci's Appeal against "Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures" ("12 July 2022 Decision"), 12 July 2022, para. 21 referring to IRMCT, *Prosecutor v. Kabuga*, MICT-13-38-PT, Decision on Prosecution Motions to Amend its Witness and Exhibits Lists, 10 May 2022, p. 3; ICTY, *Prosecutor v. Dordjević*, IT-05-87/1-T, Decision on Prosecution's Motion to Amend the Rule 65ter Exhibit List with Annexes A and B, 4 March 2009, paras 20, 22.

⁹ Certification Decision, para. 48.

previously been directly challenged, either before the Pre-Trial Judge or Appeals Panel.

IV. SUBMISSIONS

A. Rule 118(2) creates a specific procedure for adjudicating requests to amend SPO Witness Lists and is limited to the Trial Panel

10. Rule 118(2) provides as follows:

(2) The Panel may permit, upon timely notice and a showing of good cause, the amendment of the lists of witnesses and exhibits filed pursuant to Rule 95(4)(b).

11. It is the sole provision within the procedural framework of the KSC which specifically refers to amendments to a Rule 95(4) witness list.

12. There is no direct equivalent to Rule 118(2) in the procedural framework of any other international court. In this regard, the KSC is unique amongst these institutions, in that it is the only international court whose Rules, in explicit terms, regulate and limit the power to allow the late amendment of the Prosecution witness list. Thus, while it may have been the case at other institutions that a Pre-Trial Judge was free to exercise an “inherent discretion”¹⁰ and decide himself upon such late applications, the deliberate inclusion of Rule 118(2) at the KSC militates against such expansive reasoning.

13. Further, while the Pre-Trial Judge noted that “international criminal jurisprudence has generally treated the addition of witnesses and exhibits at the

¹⁰ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Decision on the Prosecution’s Second Submission Pursuant to Rule 91(G)(II) and (III), para. 14, cited in F01058, fn. 15. See also ICTY, *Prosecutor v. Đorđević*, IT-05-87/1-T, Decision on Prosecution’s Motion to Amend the Rule 65ter Exhibit List with Annexes A and B, 4 March 2009, paras 20, 22 cited by the Pre-Trial Judge in F01058, fn. 15, which considered similar factors, and further noteworthy in that although the Pre-Trial Judge cites this authority with approval for the flexibility of varying witness lists at pre-trial stage, this Decision was taken by the Trial Chamber following the commencement of Trial Phase.

pre-trial stage with flexibility,”¹¹ this finding ignores this clear decision by the drafters of the Rules to limit such flexibility. Indeed, while some circumstances may call for interpreting KSC Rules by reference to the practice before other international courts with similar legal frameworks, the jurisprudence relied upon in this instance is inapposite due to the divergent manner in which those other courts regulate late applications for admission to the Prosecution witness list in comparison with the KSC.

14. Rule 118 is Contained in Chapter 9 of the Rules, which explicitly governs “Trial Proceedings”, this provision is located in Section I of that chapter, providing for “Trial Preparation and Trial Management”. Rule 118 itself regulates the “Specialist Prosecutor’s Preparation Conference”, a procedure which takes place only after the transmission of the case file to the Trial Panel pursuant to Rule 98, the subsequent appointment of a Trial Panel pursuant to Rule 115 and then thirty days (or as directed by the Panel) after the Rule 117 Trial Preparation Conference.
15. Rule 118(2) is immediately preceded by the Rule 118(1) provisions granting the Trial Panel the authority to issue orders and invitations to streamline the Prosecution’s case in substance, number of witnesses and time spent in presentation of evidence/direct examination of witnesses.
16. Based on how and where it is placed within the Rules, Rule 118(2) is therefore limited exclusively to the Trial Panel once assigned, following the transmission of the case file and after the appropriate supporting submissions are made.
17. While the Defence recognises that Rule 2 defines a “Panel” as “Any panel or individual judge assigned in accordance with Articles 25(1) and 33 of the Law, unless otherwise specified”, the reference to “Panel” in Rule 118(2) could only be interpreted to include the Pre-Trial Judge if it was completely removed from

¹¹ Impugned Decision, para. 14.

the context in which it was deliberately placed. In other terms, “Panel” for the purpose of Rule 118(2) is indeed specified to mean the Trial Panel alone, by its inclusion in Chapter 9, in the context of the Specialist Prosecutor’s Preparation Conference. To hold otherwise would logically mean that the authority of “the Panel” under Rules 118(1), or 118(3), for example, would also extend to the Pre-Trial Judge.

18. The KSC Legal framework clearly does not envisage such a usurping of the Trial Panel’s authority by the Pre-Trial Judge. There is neither a provision specifically granting the Pre-Trial Judge such authority, nor is there a provision allowing for these powers to apply to the Pre-Trial Judge *mutatis mutandis*.
19. In these circumstances, the Pre-Trial Judge committed an error of law in deciding that he could implicitly issue a decision on amending the SPO Witness List pursuant to Rule 118(2) as this authority is exclusively reserved for the Trial Chamber. For the reasons outlined above, the Pre-Trial Judge should have deferred it for consideration by the Trial Chamber on this basis alone.
 - B. Rules 95(2), 95(4) and 102 may not be used to interpret Rule 118 to grant the Pre-Trial Judge with the authority to authorise the amendment of the SPO Witness List or as an independent basis for the Impugned Decision**
20. In the Impugned Decision, the Pre-Trial Judge recalled that “Rule 118(2) of the Rules empowers a Panel, during trial preparation, upon timely notice and a showing of good cause, to permit the amendment of the list of witnesses and exhibits filed pursuant to Rule 95(4)(b) of the Rules”¹² and further than “he is empowered to rule on the Request pursuant to Rule 95(2)(b) of the Rules, seeing as the Request ultimately concerns disclosure under Rule 102(1)(b) of the Rules

¹² Impugned Decision, para. 18.

and how such disclosure has been memorialised through the Revised Witness List and Amended Exhibit List.”¹³

21. Thus, it is apparent that the Pre-Trial Judge, rather than read Rule 118(2) in its plain meaning and context, erroneously considered that he could interpret Rule 118 in a circuitous manner via Rules 95(2), 95(4) and 102 to stretch its application to include granting him the powers of the Trial Panel. A thorough analysis of the object and purpose of Rule 118 provisions demonstrates that this is not the case.
22. At the outset, it is recalled that only in cases of ambiguity should recourse be necessary to additional methods of interpretation of the Rules. Considering the clear textual limitation of Rule 118 to the Trial Panel during the SPPC, as outlined above, the Pre-Trial Judge was not called upon to resolve an ambiguity in the Rules. Further, the Defence recalls that the SPO conspicuously avoided referring to Rule 118(2) of the Rules in the SPO Request, even though this is the only specific Rule addressing amendments of the witness list¹⁴ further supporting the argument that the Pre-Trial Judge was not empowered to rely upon Rule 118.
23. However, even if the Appeals Panel accepts that it was appropriate for the Pre-Trial Judge to look beyond the text of Rule 118 to interpret this provision, neither the Pre-Trial Judge’s expressed nor implied reasoning for extending the authority provided by Rule 118 to authorise amendments to the witness list is convincing.

¹³ Ibid. *See also* KSC-BC-2020-06/F00876, Confidential Redacted Version of Decision on Specialist Prosecutor’s Request to Amend its Exhibit List and to Authorise Related Protective Measures, 8 July 2022, para. 25.

¹⁴ SPO Request, para. 1 referring to Articles 21(6), 23, 35(2)(f), and 39 and Rules 80, 81, 95(2), 95(4)(b) and (c), 102(1)(a) and (b), 102(2), 108, and 112.

24. First, the Pre-Trial Judge's finding that the SPO Request ultimately concerns disclosure wholly misunderstands the relationship between the list of witnesses on the SPO list and the disclosure of their evidence.
25. Rule 95(2)(b) through the Revised Witness List and Amended Exhibit List authorises the Pre-Trial Judge to "set time limits for disclosure in accordance with Chapter 7, take any measures to ensure timely disclosure, and prepare a disclosure report for the Trial Panel." Rule 102(2) provides that statements of additional SPO witnesses, which have not been disclosed in the time period prescribed under Rule 102(1)(b) of the Rules, shall be made available to the Defence as soon as possible and shall be accompanied by reasons for the late disclosure.
26. These provisions authorise the Pre-Trial Judge to therefore set time limits for when specific statements of witnesses must be disclosed to the Defence. That is however a separate question to whether the individuals concerned may be added to the SPO Rule 95(4) witness list. Disclosure is, at most, a potential consequence of the decision to add two witnesses but is not the actual relief sought in the SPO Request or indeed the purpose behind it.
27. In this regard, the Pre-Trial Judge appears to suggest that it is only if the SPO Request was granted and these witnesses added to the SPO Witness List that the SPO would have to disclose their statements to the Defence. Indeed, the Pre-Trial Judge considered that refusing to adjudicate the motion "would prevent the Defence from receiving such statements as soon as possible as applications such as the present one would have to be put on hold and addressed by Trial Panel at some unknown date after the transfer of the case to the Trial Panel."¹⁵

¹⁵ Impugned Decision, para. 18.

28. This is entirely mistaken. In general terms, adding witnesses to a witness list is not a pre-requisite for their statements to be disclosed to the Defence. A diligent Prosecutor would see that such statements were material to the preparation of the Defence and disclose them immediately to the Defence pursuant to Rule 102(3) regardless whether they had been given authorisation to add them to the SPO Witness list. No delay would thus have occurred.
29. In the specific circumstances of the SPO Request, a screening note of [REDACTED] evidence had already been disclosed pursuant to Rule 103.¹⁶ The subsequent transcript of [REDACTED] interview would also have been presumably disclosable pursuant to the same rule. This therefore provides a secondary basis for disclosure entirely separate from Rule 102(1)(b).
30. In these circumstances, the Pre-Trial Judge erroneously transformed the SPO Request to add two witnesses to its Witness List into a request exclusively relating to disclosure in order to broaden the interpretation of Rule 118 to grant himself authority not envisaged by Rules.
31. Second, based on reasoning employed in relation to a prior request, the Pre-Trial Judge appears to implicitly consider that in relation to requests to add witnesses, while the Rules “do not explicitly provide for such an amendment”,¹⁷ since the Trial Panel has the authority to rule upon such requests “at a later stage of the proceedings”¹⁸ pursuant to Rule 118(2), he must also be endowed with the power to do so. This interpretation is entirely misplaced.

¹⁶ SPO Request, para. 7.

¹⁷ KSC-BC-2020-06/F00727, Confidential Redacted Version of Decision on Specialist Prosecutor’s Request to Amend its Exhibit List and to Authorise Related Protective Measures, 8 March 2022, para. 24.

¹⁸ Ibid.

32. The Rules explicitly separate obligations between different judicial organs of the KSC as explained above.¹⁹ No presumption exists under the Rules that if the Trial Panel has the authority to decide upon specific issues later in proceedings, this can be automatically translated to the Pre-Trial Judge.
33. The SPO and the Defence have both argued forcefully that the division of responsibilities between the Trial Panel and Pre-Trial Judge needs to be respected and the latter may not exercise competences which are accorded to the Trial Chamber, such as streamlining the case or deciding upon the admissibility of evidence.²⁰ Incidentally, this division appears to be shared by the Pre-Trial Judge, even when powers are specifically granted to him pursuant to Rules 99 and 100, in recently holding that “the assessment of the relevance, importance, necessity and scheduling of the testimony of the Witnesses is a matter that is best decided by the trial panel.”²¹
34. Yet on the Pre-Trial Judge’s interpretation of Rule 118, this distinction between the Pre-Trial Judge and Trial Panel would collapse.
35. Finally, two other provisions were referred to by the Pre-Trial Judge in the Impugned Decision as being relevant for deciding upon the SPO Request, namely Rules 95(2) and 95(4).²² Neither Rule provides the requisite authority for the Pre-Trial Judge to consider additions to SPO witness list, either directly or to provide for an expansive interpretation of Rule 118.
36. Rule 95(2) authorises the Pre-Trial Judge to “ensure that the proceedings are not unduly delayed and shall take all necessary measures for the expeditious preparation of the case for trial.” Indeed, this was the basis for the Pre-Trial

¹⁹ See above, paras 14-18.

²⁰ KSC-BC-2020-06, Transcript of Status Conference, 22 March 2022, p. 1151-1152.

²¹ KSC-BC-2020-06/F01125, Decision on Thaçi Defence Motion Justifying Request for Unique Investigative Opportunities, 28 November 2022, para. 29.

²² Impugned Decision, para. 18.

Judge's assessment of the purported effect of deferring the matter to the Trial Panel, rather than deciding upon the SPO Request.

37. However, Rule 95(2) is, at most, a general provision, envisaged to endow the Pre-Trial Judge with a residual authority when the rules do not specifically address a topic which Rule 118(2) clearly does. Consequently, the Pre-Trial Judge cannot rely upon this general and limited provision as the legal basis to expand the authority granted to the Trial Panel under Rule 118(2).
38. Similarly, Rule 95(4), which requires the Pre-Trial Judge to order SPO to file the list of witnesses it intends to call within a specific time limit, along with specific accompanying information for each witness that it intends to call does not grant the Pre-Trial Judge the inherent power to authorise the addition of witnesses to that list, where Rule 118(2) specifically regulates that power as addressed above.
39. The test of Rule 95(4) does not envisage the list of witnesses being amended and makes no reference to this as a function of the Rule, nor does it cross-reference Rule 118(2). It simply requires the Pre-Trial Judge to set a limit for the filing of the Rule 95(4) witness list.
40. For these reasons, the Pre-Trial Judge erred in law in holding that he was empowered to decide upon the SPO Request by reliance on other provisions of the Rules, either to widen the interpretation of Rule 118, or as an independent legal basis for the Impugned Decision.

V. RELIEF REQUESTED

41. For the abovementioned reasons, the Defence respectfully requests the Appeals Panel to **GRANT** the Appeal and Reverse the Impugned Decision.

Word count: 3,335

Respectfully submitted on 26 April 2023,



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