

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

Before: Trial Panel II
Judge Charles L. Smith, III, Presiding
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi
Specialist Counsel for Rexhep Selimi
Specialist Counsel for Jakup Krasniqi

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Classification: Confidential

**Thaçi, Selimi & Krasniqi Defence Request for Certification to Appeal the Oral
Order on Trial Panel Questioning**

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I. INTRODUCTION

1. On 19 April 2023, members of the Trial Panel questioned a witness on matters falling outside the scope of the examination conducted by any of the parties, and in relation to material not admitted into evidence.¹

2. Counsel for Mr Hashim Thaçi and Mr Kadri Veseli raised issues with this questioning, including its impact on the fairness and expeditiousness of the proceedings.² Counsel for Mr Veseli asked for the opportunity to file written submissions, and was told by the Trial Panel that “the submissions can be filed and we'll deal with them”.³ This request to make further submissions was reiterated by Counsel for Mr Thaçi the following morning, citing the extreme importance of the issue, its impact on virtually all SPO witnesses, and its effect on all four accused.⁴

3. The Trial Panel responded that it would “not wait for briefing” from the parties, on the basis that it “fully understood the circumstances yesterday”,⁵ and issued an oral order dismissing the arguments raised by the Defence, finding that the scope of judicial questioning is broad and unconstrained by considerations of subject or substance, and that the proposed procedure would not give rise to any prejudice to the accused.⁶

¹ KSC-BC-2020-06, Transcript of Hearing (Testimony of W02652), 19 April 2023 (“Hearing on 19 April 2023”), pp. 3233-3238 (Judge Barthe), 3242-3247 (Judge Mettraux).

² Hearing on 19 April 2023, pp. 3253-3260.

³ Hearing on 19 April 2023, pp. 3253, 3255, 3260.

⁴ KSC-BC-2020-06, Transcript of Hearing, 20 April 2023 (“Hearing on 20 April 2023”), pp. 3262-3263.

⁵ Hearing on 20 April 2023, pp. 3263.

⁶ Hearing on 20 April 2023, pp. 3263-3269 (“Oral Order”).

II. APPLICABLE LAW

4. To appeal the Impugned Decision, certification is required.⁷ Article 45(2) of the KSC Law provides, in the relevant part, that the Trial Panel shall grant certification where an 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.

5. Rule 77(2) provides that:

The Panel shall grant certification 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.

6. An “issue” is “an identifiable topic or subject, the resolution of which is essential for determination of the matters arising in the judicial cause under examination, and not merely a question over which there is disagreement or conflicting opinion.” 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.”⁸

III. THE PROPOSED ISSUES FOR APPEAL

7. Certification is sought to appeal the following issues, which satisfy the requirements of Article 45(2) and Rule 77(2):

⁷ Rule 77(1) KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 (“Rules”); Article 45(2) Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“KSC Law”).

⁸ *Prosecutor v. Gucati & Haradinaj*, KSC-BC-2020-07/F00169, Pre-Trial Judge, Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, 1 April 2021, para. 12; KSC-BC-2020-06/F00172, Pre-Trial Judge, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021, para. 11.

Issue 1: Whether the Trial Panel erred in rendering the Oral Order without hearing the parties;

Issue 2: Whether the procedure for Trial Panel questioning as set out in the Oral Order is inconsistent with the statutory framework of the KSC;

Issue 3: Whether the Trial Panel erred in invoking Rules 132 and 137 to use “additional evidence not called by the parties” in questioning witnesses, with no intention of admitting the relevant documents into the record, when these Rules contemplate a different regime, being the calling and admission of additional evidence by the Trial Panel; and

Issue 4: Whether the procedure for Trial Panel questioning set in the Oral Order is inconsistent with the rights of the accused to fair and expeditious proceedings, and to adequate time and resources to defend themselves.

IV. SUBMISSIONS: THE TEST FOR CERTIFICATION IS MET

A. THE ISSUES ARE APPEALABLE ISSUES

8. Before decisions are made which affect their rights, parties have a right to be heard.⁹ The fact that a Trial Panel may decide a question *proprio motu*, does not relieve it of the “normal duty of a judicial body to first hear a party whose rights can be affected by the decision to be made”. This is because the “failure to hear a party against whom a Trial Chamber is provisionally inclined is inconsistent with the right to a fair trial”.¹⁰

9. The Defence informed the Trial Panel that the question decided in the Oral Order affected the rights of the Defence.¹¹ Counsel for Mr Veseli asked for an

⁹ See, e.g., ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-A15bis, Decision in the Matter of Proceedings Under Rule 15(B), 21 June 2004, para. 9; ICTY, *Prosecutor v. Šešelj*, IT-03-67-AR15.bis, Decision on Appeal Against Decision on Continuation of the Proceedings, 6 June 2014, para. 51.

¹⁰ ICTY, *Prosecutor v. Jelisić*, IT-95-10-3A, Appeals Chamber, Judgment, 5 July 2001, para. 27.

¹¹ Hearing on 19 April 2023, p. 3253.

opportunity to make submissions.¹² The Presiding Judge replied that “we will certainly will understand if you wish to file a submission, and there is no reason to go through it now and then to go through it again in your submission. I understand your request. The submissions can be filed and we’ll deal with them”.¹³ This was a statement on which the four Defence teams were entitled to rely. The next morning, Counsel for Mr Thaçi reiterated the request to “brief this completely and then ask for oral argument with the Court before any decision is rendered”, noting that it was an issue “that involves virtually all the witnesses” and was “an extremely important issue for all Defence teams”.¹⁴

10. In that context, whether the Trial Panel erred in stating that it would “not wait for briefing” from the parties, on the basis that it “fully understood the circumstances yesterday”,¹⁵ is an appealable issue. It arises directly from the decision, warranting certification of **Issue 1**. The Defence has identified a discrete issue that is at the heart of the Oral Order, and which the Appeals Panel should resolve; namely, was the Defence deprived of the right to be heard?

11. Regarding **Issue 2**, the Defence submits that the Trial Panel misinterpreted and/or misapplied the relevant statutory framework. Specifically, the Trial Panel erred by grounding its apparently unlimited right to question witnesses on its powers under Rules 132 and 137 of the Rules,¹⁶ without considering or failing to give sufficient consideration to:

- (i) the operation of Rule 127(2), which provides that the trial “shall” be presented in a particular sequence; which the Trial Panel may “otherwise direct”. Specifically, whether the Trial Panel erred in

¹² Hearing on 19 April 2023, p. 3253.

¹³ Hearing on 19 April 2023, p. 3255.

¹⁴ Hearing on 20 April 2023, pp. 3262-3263.

¹⁵ Hearing on 20 April 2023, p. 3263.

¹⁶ Hearing on 20 April 2023, p. 3266.

simply declaring that the order prescribed in Rule 127(2) would not apply to it, without explanation or reasoning as to why it was “otherwise directing” a revised sequence;

- (ii) the explicit requirement in Rule 132 that the Trial Panel must first have “heard the parties”, which is a reference to the order of presentation of evidence in Rule 127, which limits the Trial Panel’s calling of evidence to after hearing the Prosecution and Defence cases; and
- (iii) the operation of Rule 137(1) which places the primary responsibility **on the parties** for submitting evidence relevant to the case, in a manner consistent with the adversarial and party-driven procedure before the KSC.

12. The alleged erroneous application of the applicable law is a discrete appealable issue. The Defence is not simply disagreeing with the outcome reached, but rather has identified a subject which is essential for determination of the matters arising in the judicial cause under examination; namely, has the Trial Panel correctly applied the relevant law?

13. **Issue 3**, is also a discrete appealable issue arising directly from the Oral Order. This issue has at its centre the Trial Panel’s reliance on Rules 132 and 137 to use “additional evidence not produced by the parties” in questioning witnesses, in circumstances where the Judges did not intend to admit these documents into evidence. Rules 132 and 137 contemplate the power of the Trial Panel to “invite the submission of evidence... not produced by the Parties,” after which this submitted evidence becomes part of the record of the case. By not seeking to admit these documents, the Trial Panel appears to be rightly recognising that it was restrained from doing so at this stage of the proceedings. The same considerations should have similarly limited its ability to use this additional evidence to question SPO witnesses.

As such, in Issue 3, the Defence has again identified a subject which is essential for the determination of the question under examination, and warrants the consideration of the Court of Appeals Panel.

14. Similarly, **Issue 4** also arises directly from the Oral Order, and is a discrete issue requiring determination, as opposed to an abstract question or hypothetical concern. The current proceedings are objectively complex. 312 SPO witnesses will be called over a period of 2 years.¹⁷ Importantly, many SPO witnesses have been examined and/or testified numerous times already. It is not unusual for the disclosure in relation to a particular SPO witness to run to hundreds or thousands of pages.

15. Within those thousands of pages will be numerous topics and even direct accusations against the accused themselves, that were not charged in the Indictment, are not contained in the SPO Pre-Trial Brief, or the SPO witness summaries. The Defence is transparent about the fact that it has not investigated **all aspects of all prior statements or documents** associated with **all SPO witnesses**. This would have been both illogical, and impossible. Rather, Defence teams were entitled to focus their investigations and their cross-examination preparation, on the accusations contained within the four corners of the Indictment, the SPO Pre-Trial Brief, and the SPO witness summaries.

16. At the heart of the Oral Order is the Trial Panel's reasoning that:¹⁸

Furthermore, the Panel put questions to the witness on a document which was also listed in the SPO's presentation queue. The Defence was therefore, **on clear notice of the relevance of these documents to the evidence of the witness concerned and knew that such documents might be discussed with the witness**. No prejudice was caused, and the defendants were in a position well before the witness even started testifying to prepare for questions on the basis of those documents if they had any questions for this witness.

¹⁷ KSC-BC-2020-06, Transcript of SPO Preparation Conference, 15 February 2023, pp. 1923, 2039.

¹⁸ Hearing on 20 April 2023, p. 3266.

17. The Defence was on no such notice. With a case of this size, both the Pre-Trial Judge and Trial Panel have understandably and repeatedly urged the SPO to limit and refine the scope of its case, including through reducing or narrowing the number of charges in the Indictment, shortening the length of intended direct examination of witnesses and, importantly, circulating witness summaries, detailing the areas to be addressed by the SPO during examination-in-chief.¹⁹ The Defence was entitled to understand that accusations and topics that the SPO had deliberately excluded from the charging documents and witness summaries, would not be addressed during the witness' testimony.

18. The practical outcome of the Trial Panel's position is that the Defence must be prepared to challenge and test any aspect of any document related to an SPO witness, regardless of whether this aspect forms part of the SPO Indictment, SPO Pre-Trial Brief, or witness summaries, which now themselves are rendered redundant as a means of providing the Defence with meaningful notice as to what will be happen in the courtroom. Anything buried in the millions of pages of disclosure is now fair game, as long as the document features in the SPO's presentation queue. This is manifestly unfair, particularly given that the Defence only receives the SPO presentation queue 24 hours before the start of the witness' evidence,²⁰ even if that falls on a weekend or other non-working day.²¹ If the SPO presentation queue becomes the primary means through which the Defence is notified about what issues might be raised with an SPO witness in court, this does not give Defence sufficient time to react to, let alone investigate, new allegations or documents which do not feature in the Indictment, SPO Pre-Trial Brief, or witness summaries.

¹⁹ KSC-BC-2020-06/F01227, Trial Panel II, Agenda for Specialist Prosecutor's Preparation Conference, 26 January 2023, para. 7.

²⁰ KSC-BC-2020-06/F01226/A01, Order on the Conduct of Proceedings, 25 January 2023, para. 79.

²¹ KSC-BC-2020-06, Transcript of Hearing, 5 April 2023, p. 2436.

19. Moreover, in a case of this scale, a 24-hour deadline for Defence receipt of the SPO presentation queue and the timing of the Trial Panel questioning – namely, immediately after the last Defence team’s cross-examination – imposes on the Defence an almost unsurmountable burden to properly prepare all potential topics and issues arising from any of the documents on the SPO presentation queues. Essentially, the Defence will now be required to defend their clients against a moving target.

20. In this way, the procedure set out in the Oral Order is a violation to the right of an accused to adequate time and resources to prepare, and the right to an expeditious trial. It gives rise to an appealable issue.

B. THE ISSUES WOULD SIGNIFICANTLY AFFECT 1) THE FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS OR 2) THE OUTCOME OF THE TRIAL

21. All four issues overwhelmingly and significantly affect the fair and expeditious conduct of the proceedings. The right to be heard, raised in **Issue 1**, has been recognised by the Appeals Chambers of the ICTY and ICTR as being a fair trial issue.²² Failure to hear the parties and understand the practical impact of the Judges’ questioning on both the accused’s rights and the Defence preparedness also significantly impacts the proceedings’ expeditiousness. The Transcend timestamps demonstrate by how long the Trial Panel’s questions and the subsequent Defence re-cross-examination prolonged the witness’ evidence. It is a simple exercise to extrapolate these figures to determine how many more weeks this procedure adds to the presentation of the SPO case. The real threat to expeditiousness, however, lies in the reality that the Defence will undoubtedly need to investigate and prepare to challenge allegations that were previously thought to fall outside the SPO case.

²² See sources cited in footnotes 9 and 10 above.

22. The resolution of **Issues 2 and 3** would similarly have a significant impact on fairness and expeditiousness, given that the mistaken application of law identified in these issues directly causes an unfair procedure, which deprives the Defence of the notice it needs to prepare for the examination of SPO witnesses, impacts Defence preparedness and will undoubtedly prolong the trial process. Similarly, **Issue 4** centres exclusively on the significant practical impact the Oral Order will have on the fairness and expeditiousness of the proceedings, and undoubtedly fulfils this criteria.

C. AN IMMEDIATE RESOLUTION BY THE COURT OF APPEALS PANEL MAY MATERIALLY ADVANCE THE PROCEEDINGS

23. Procedures adopted for the questioning of witnesses will affect the evidence of potentially every witness in the case, and will undoubtedly impact the evolution and progress of the proceedings. It is therefore unsurprising that issues concerning the scope, modes, and order of questioning of witnesses have regularly been certified for appeal.²³ Appellate oversight has been considered appropriate, given the overall impact that an erroneous procedure for witness' questioning can have on the entire evidentiary record of the case. For the same reason, an immediately resolution by the Court of Appeals Panel would materially advance the proceedings in the present case.

24. In addition to providing welcome clarity on a central procedural question, once a witness has completed their testimony, the scope for a meaningful remedy for the erroneous introduction of incriminating subject matter or documents is extremely limited. A final ruling on this issue will also preclude the parties from objecting on every occasion that the Trial Panel seeks to introduce incriminating elements that fall

²³ ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on Certification to Appeal the Decision on the Mode of Interrogating Witnesses, 28 June 2007; *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on Praljak Request for Certification to Appeal, 23 July 2008; *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Motion on Behalf of Milan Gvero Seeking Reconsideration and, in the Alternative, Certification, 26 June 2009.

outside the scope of the parties' questioning. The immediate resolution by the Court of Appeals Panel is pressing, and will materially advance the proceedings.

V. CONCLUSION AND RELIEF SOUGHT

25. The parties in this case have limited their requests for certification to those issues which are directly linked to fairness and expeditiousness, and which require an immediate course correction to avoid future prejudice that will be impossible to address. This is one such case.

26. The impact of Judges introducing additional and new incriminating allegations, particularly that concern the acts and conduct of the accused and which are not charged in the Indictment, are absent from the SPO Pre-Trial Brief, and are not contained in the witness summaries, is immense. The issues arising from the decision fulfil the criteria for certification, and their resolution by the Court of Appeals Panel is warranted. As such, the Defence respectfully requests that the Trial Panel grant leave to appeal the Issues pursuant to Article 45(2) and Rule 77(2).

[Word count: 2993 words]

Respectfully submitted on 1 May 2023,

A handwritten signature in blue ink, appearing to read 'G. W. Kehoe', is written over a white rectangular box.

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