



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

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

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

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

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Prosecution reply to Selimi response to 'Prosecution motion for admission of Accused's statements'

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I. REPLY

1. The Specialist Prosecutor's Office ('SPO') hereby replies to the Selimi Response.¹ Selimi's arguments opposing the admission of his statements lack merit. The SPO notes that in relation to the probative value of the statements, Selimi does not contest the authenticity or veracity of their content.

a. SPO Transcripts

i. SPO Fulfilled Applicable Obligations

2. Selimi attempts to manufacture error by claiming a failure to inform Selimi that he 'was a suspect according to Rule 2'.² But what the Law³ and Rules⁴ require is that Selimi be 'informed that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Specialist Chambers.'⁵

3. In both of the SPO interviews,⁶ the respective rights forms that Selimi signed,⁷ and in his summons, the SPO fulfilled Article 38 and Rule 43 by informing Selimi that there were grounds to believe that he had been involved in the commission of a crime within the jurisdiction of the Specialist Chambers.⁸ Neither the Law nor the Rules require use of the term 'suspect', and there can be no reasonable argument that Selimi was not aware of the status under which he was being questioned. There was no confusion created by referring to Selimi colloquially as a 'witness', and indeed Selimi did not express any

¹ Selimi Defence Response to SPO Motion for Admission of Accused's Statements, KSC-BC-2020-06/F01473, 24 April 2023 ('Response').

² Response, KSC-BC-2020-06/F01473, para.11.

³ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

⁴ 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' herein refer to the Rules, unless otherwise specified.

⁵ Article 38(3)(a).

⁶ 068933-TR-ET Part 1, Ins 16-19; 074459-TR-ET Part 1, Ins 13-16.

⁷ 068932-068932; 074439-074439.

⁸ 068933-TR-ET Part 1, p.2, Ins 16-19; 074459-TR-ET Part 1, p.2, Ins 13-16.

confusion during the interview,⁹ and in the Response does not claim that he did not understand his status.

4. Further, the information provided regarding the areas of interest of the SPO were commensurate with the investigation at the time, and there was no requirement to provide additional information.¹⁰

ii. Selimi Waived Right to Counsel

5. The transcripts show that Selimi voluntarily and intelligently waived his right to counsel.¹¹ Selimi's 2019 SPO Interview clearly shows Selimi's unequivocal waiver:

[SPO:] You have the right to be assisted by an attorney and to have the attorney present during this questioning.

So I'll ask you now, Mr. Selimi, can you please acknowledge for the record that you understand this right and that you've chosen to waive it and that you do not have an attorney with you today?

[Selimi:] I do understand my rights and obligations. I didn't consider that I needed to have my lawyer with me here today.¹²

6. At the beginning of his 2020 SPO Interview, Selimi again waived his right to an attorney:

[SPO:] You have the right to be assisted by an attorney and to have the attorney present during this questioning. We note that you do not have an attorney with you today, and so we ask, Mr. Selimi, that you please acknowledge for the record that you understand your right to an attorney and that you have chosen to waive it for today.

[Selimi:] Yes, that's correct.¹³

7. In addition, Selimi signed waivers prior to both of his SPO interviews stating: 'I hereby voluntarily waive my right to an attorney.'¹⁴ These waivers also contained Selimi's acknowledgement that 'I understand that I may revoke this waiver and request the

⁹ See *Prosecutor v. Shala*, Decision on Shala's Appeal Against Decision Concerning Prior Statements, KSC-BC-2020-04/IA006/F00007, 5 May 2023, para.89 (assumed reasonable person comprehension) ('Shala Appeal Decision').

¹⁰ *Contra* Response, KSC-BC-2020-06/F01473, para.18; see *Shala Appeal Decision*, KSC-BC-2020-04/IA006/F00007, para.42.

¹¹ *Contra* Response, paras 31-42.

¹² 068933-TR-ET Part 1, lns 6-12.

¹³ 074459-TR-ET Part 1, p.2, line 25, p.3, lns 1-7.

¹⁴ 068932-068932; 074439-074439.

assistance of an attorney at any time.’ Selimi’s claim that he was not informed of his right to revoke his waiver¹⁵ is therefore demonstrably untrue.

8. Selimi expressed no confusion at any time as to whether he was waiving his right to an attorney, and makes no such assertion in the Response. Selimi fails to identify a single concrete consequence of waiver that was not made sufficiently clear. Moreover, Selimi is an educated individual who has given prior testimony, and held senior government positions, and would have understood the consequences of proceeding without an attorney.¹⁶

iii. Selimi Waived Right to Silence

9. In both his 2019 and 2020 SPO interviews, Selimi was informed of his right to remain silent in no uncertain terms: ‘You do not have to answer any questions and you have the right to remain silent. Such silence will not be considered in any assessment of guilt or innocence.’¹⁷

10. Selimi then confirmed that he understood his rights and obligations:

- 2019: ‘Have you understood the rights an obligations that I’ve just read to you? A. Yes, I did. I did understand my rights and obligations.’¹⁸
- 2020: ‘Do you, sir, confirm that you have understood the rights and obligations that I have read to you? A. I confirm.’¹⁹

11. Selimi was also informed of his right to silence in both of his rights notifications that he signed.²⁰ At no time did he express confusion regarding his right to silence.²¹ There is also no further requirement to ‘seek to verify whether Mr. Selimi wanted to revoke this

¹⁵ Response, KSC-BC-2020-06/F01473, para.42.

¹⁶ See Shala Appeal Decision, KSC-BC-2020-04/IA006/F00007, paras 51, 95.

¹⁷ 068933-TR-ET Part 1, lns 20-22; see also 074459-TR-ET Part 1, lns 16-19.

¹⁸ 068933-TR-ET Part 1, lns 17-19.

¹⁹ 074459-TR-ET Part 1, lns 12-14.

²⁰ 068932-068932; 074439-074439.

²¹ See Shala Appeal Decision, KSC-BC-2020-04/IA006/F00007, para.52.

right and exercise his right to silence.’²² Regardless, he could have done so at any time by refusing to answer a question.

12. The *Karemera et al* decision referenced²³ is factually distinct. In *Karemera*, the suspect expressed confusion ‘as to the conditions for the exercise of his rights to counsel and to silence’,²⁴ and repeatedly attempted to invoke his right to counsel and to remain silent, while the interviewer ignored or attempted to overcome those objections.²⁵ Here, on the other hand, Selimi did not express any confusion and did not attempt to invoke his right to silence or to counsel. In fact, he waived both.

b. Non-SPO Statements

13. Selimi argues that his non-SPO statements should not be admitted because he was not afforded the rights of a suspect at the time they were made. The reason Selimi was not informed of the rights of a suspect at those times is straightforward: he was not a suspect. Rather, he was a witness, and he was afforded rights commensurate with that status. Moreover, Selimi was an adult when he provided these statements, was not detained, is educated, and is not vulnerable, further diminishing any concerns regarding coercion. His counsel was present when he was providing some of his information.²⁶ There is no reason to exclude these statements.

14. Selimi relies on two ICTY Trial Chamber decisions to support his argument.²⁷ As an initial matter, whatever the approach applied at the ICTY in cases where the same prosecution office was involved, the applicable standard of admissibility before the Trial

²² Response, KSC-BC-2020-06/F01473, para.46.

²³ Response, KSC-BC-2020-06/F01473, para.48.

²⁴ ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse, 2 November 2007, para.27 (*‘Karemera Decision’*).

²⁵ *Karemera Decision*, paras 27-29.

²⁶ T000-2344-T000-2345.

²⁷ Response, KSC-BC-2020-06/F01473, paras 50-52.

Panel here are the standards of the KSC Law and Rules, and any concerns can go to weight.

15. However, even if the standard contained in those decisions were applicable here, Selimi's statements would be admissible. In the *Prlić* Decision, the Trial Chamber did not hold that Praljak had to be afforded all of the rights of a suspect—including, *e.g.*, the right to counsel²⁸—at the time he was interviewed as a witness. Instead, the Chamber held that he had to be afforded the rights of a witness, and was aware of those rights, particularly the right not to self-incriminate.²⁹ Applying that standard here, as long as the Trial Panel is satisfied that Selimi was sufficiently knowledgeable of the applicable rights that adhered at the time he provided the earlier statements, there is no tension with the *Prlić* Decision.³⁰

16. All but two of Selimi's non-SPO statements informed him of his right against self-incrimination.³¹ The two that do not were from the ICTY, where there was no requirement that witnesses be informed of their right against self-incrimination.³² Moreover, in his ICTY Witness Statement,³³ Selimi was accompanied by counsel.³⁴ While there is no notification contained in the transcript of Selimi's ICTY Witness Testimony, he appeared there as a defence witness, not as a prosecution witness. Moreover, he provided the testimony in open session, before judges and counsel. In addition, Selimi's multiple

²⁸ See ICTY, *Prosecutor v. Prlić et al*, It-04-74-T, Decision on the Admission into Evidence of Slobodan Praljak's Evidence in the Case of Naletelić and Martinović, 5 September 2007, para.15 ('*Prlić* Decision').

²⁹ *Prlić* Decision, paras 16-17; see also ECtHR, *Case of Ibrahim and Others v. UK* [GC], 50541/08 et al., Judgment, 13 September 2016, para.270.

³⁰ Significantly, the *Prlić et al* Chamber came to its determination after the *Halilović* Chamber's decision cited by Selimi, and noted that decision. See *Prlić* Decision, para.6.

³¹ SITF00009289-00009298, at SITF00009289; SITF00371392-00371396, at SITF00371393; SPOE00067168-SPOE00067174-ET, at SPOE00067169; SPOE00068075-SPOE00068087-ET, at SPOE00068076.

³² Compare ICTY Rules of Procedure and Evidence, IT/32/Rev.40, 12 July 2007, Rule 90, with ICTY Rules of Procedure and Evidence, IT/32/Rev.40, 12 July 2007, Rule 42(A).

³³ T000-2344-T000-2345.

³⁴ See ECtHR, *Ibrahim and Others v. United Kingdom* [GC], 13 September 2016, para.267 (privilege against self-incrimination not absolute and concerned with coercion).

subsequent interviews, including with the SPO as a suspect, where he addressed the same or similar information after being informed of his right not to self-incriminate, is a strong indication that he provided the evidence not because he was not aware of that right, but because he wanted to, and disposes of any prejudice. As a result, any offense in admitting this testimony would be limited or non-existent.³⁵

17. Regardless, there are no indicia of unreliability in these statements, nor possible damage to the integrity of the proceedings occasioned by admitting statements that were consistent with the procedures applicable at the time, and these statements should be admitted.³⁶

c. The Statements are Admissible without Limitation

10. As the Panel has held, the admission of a record or statement of an accused does not, without more, infringe upon the fundamental rights of his co-defendants.³⁷ That finding was made having considered relevant jurisprudence,³⁸ including submissions based upon the Kosovo Criminal Procedure Code.³⁹ Additional references to provisions of the Law and Rules in the Response are unavailing. The KSC legal framework reflects a clear choice to grant trial panels, composed of professional judges, wide discretion to freely assess all types of evidence,⁴⁰ with a presumption in favour of admission.⁴¹ Further, Selimi's submissions on use are premature; the statements should be admitted without limitation. The Panel will be in a position to weigh them in light of the totality of the

³⁵ See Shala Decision, KSC-BC-2020-04/IA006/F00007, para.79.

³⁶ Cf. Shala Decision, KSC-BC-2020-04/IA006/F00007, para.81.

³⁷ Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, KSC-BC-2020-06/F01380, 16 March 2023 ('Bar Table Decision'), para.50 (and jurisprudence cited therein).

³⁸ Contrary to Defence submissions, the ICTY, as reflected in Appeals Chamber jurisprudence, has a clear position on the matter – which does not reflect the standard which Selimi seeks to put forward in para.84 of the Response.

³⁹ Bar Table Decision, KSC-BC-2020-06/F01380, para.50.

⁴⁰ Rule 137(2).

⁴¹ Rule 138(1).

evidence, taking account, in particular, of the opportunity the Defence had to challenge such evidence, and their degree of corroboration.⁴²

II. CONCLUSION

18. For the foregoing reasons, Selimi fails to demonstrate that the statements should not be admitted.

Word Count: 1996



Alex Whiting

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Monday, 8 May 2023

At The Hague, the Netherlands.

⁴² Prosecution motion for admission of Accused's statements, KSC-BC-2020-06/F01351, paras 91-92.