

In: KSC-BC-2020-06
**The 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: Defence Counsel for Kadri Veseli
Defence Counsel for Jakup Krasniqi

Date: 23 June 2023

Language: English

Classification: Confidential

Veseli and Krasniqi Defence Request

**for Certification to Appeal the “Second Decision on Specialist Prosecutor’s
Bar Table Motion”**

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I. INTRODUCTION

1. On 9 June 2023, the Trial Panel issued its Second Decision¹ on the request for admission of material from the bar table (“Bar Table Motion”) filed by the Specialist Prosecutor’s Office (“SPO”) on 8 February 2023.² In the Second Decision, the Trial Panel admitted a series of items which the SPO purports were found during a search and seizure operation carried out at Mr. Krasniqi’s residences on 4 November 2020.³ In finding that these items fulfil the requirements for admission, the Trial Panel dismissed the challenges raised by the Defence, and found the search and seizure to be lawful and compliant with the requirements of Rule 39 of the Rules.⁴

2. The Defence for Messrs Kadri Veseli and Jakup Krasniqi (“Defence”) jointly seeks leave to appeal the following discrete issues arising from the Second Decision:

- (i) **First Issue:** Whether the Trial Panel erred in its interpretation of Rule 39(4), with specific regard to the requirement that the inventory must contain “a detailed description of and information regarding each item seized”;⁵
- (ii) **Second Issue:** Whether the Trial Panel erred in finding that the inventory produced by the SPO on the day of the search and seizure operation fulfils the requirements of Rule 39(4) of the Rules.

¹ KSC-BC-2020-06, F01596, Trial Panel II, *Second Decision on Specialist Prosecutor’s Bar Table Motion* (“Second Decision”), 9 June 2023, confidential.

² KSC-BC-2020-06, F01268, Specialist Prosecutor, *Prosecution Application For Admission of Material Through the Bar Table*, 8 February 2023, public, with Annexes 5 and 8, public, and Annexes 1-4, 6 and 7, confidential.

³ Second Decision, paras 144, 153, 162, 167, 177.

⁴ Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).

⁵ Rule 39(4) of the Rules, emphasis added.

3. Pursuant to Rule 82(4) of the Rules, this request is filed confidentially because it relates to the Second Decision, which bears the same classification.⁶

II. PROCEDURAL HISTORY

4. On 8 February 2023, the SPO filed the Bar Table Motion.

5. On 21 March 2023, following a decision extending the time-limit to respond,⁷ the Defence jointly responded to the Bar Table Motion.⁸

6. On 23 March 2023, the SPO filed a notification correcting two submissions presented in its Bar Table Motion.⁹

7. On 31 March 2023, the Trial Panel issued the first decision on the Bar Table Motion.¹⁰

8. On 9 June 2023, the Trial Panel issued the Second Decision.

9. On 16 June 2023, the Thaçi, Veseli and Krasniqi Defence requested an extension of time to file a request for leave to appeal the Second Decision.¹¹

⁶ The Defence notes that the Second Decision was reclassified as confidential on 22 June 2023.

⁷ KSC-BC-2020-06, F01309, Trial Panel II, *Decision on Defence Request for a Revised Bar Table Motion and a Suspension and an Extension of Time*, 21 February 2023, public.

⁸ KSC-BC-2020-06, F01387, Joint Defence, *Joint Defence Response to Prosecution Application for Admission of Material Through the Bar Table*, 21 March 2023, confidential, with Annexes 1-8, confidential.

⁹ KSC-BC-2020-06, F01393, Specialist Prosecutor, *Prosecution Notification Concerning Two Submitted Bar Table Items*, 23 March 2023, confidential.

¹⁰ KSC-BC-2020-06, F01409, Trial Panel II, *Decision on Specialist Prosecutor's Bar Table Motion* ("First Decision"), 31 March 2023, confidential.

¹¹ KSC-BC-2020-06, F01612, Thaçi, Veseli and Krasniqi Defence, *Thaçi, Veseli and Krasniqi Defence Request for an Extension of Time for Requests for Certification to Appeal F01596 and F01603*, 16 June 2023, public.

10. On 19 June 2023, the Trial Panel granted an extension of time until 26 June 2023 to seek leave to appeal the Second Decision.¹²

III. APPLICABLE LAW

11. Article 45(2) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") provides:-

Interlocutory appeals shall lie as of right from decisions or orders relating to detention on remand or any preliminary motion challenging the jurisdiction of the Specialist Chambers. Any other interlocutory appeal must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel on the basis that it 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.¹³

12. Rule 77(2) of the Rules establishes 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 the Court of Appeals Panel may materially advance the proceedings".

13. The Trial Panel has previously elaborated on the necessary test required to reach the threshold for certification:-

- a. The issue for which certification is sought must have significant repercussions for either the "fair and expeditious conduct" of the

¹² KSC-BC-2020-06, In Court – Oral Order, Order on Defence Joint request for extension of time - Filing F01612, 19 June 2023, public.

¹³ Emphasis added.

proceedings or “the outcome of the trial”.¹⁴ In this context, “fair and expeditious conduct of proceedings” refers to the general requirement of fairness, which includes that proceedings should be adversarial in nature and that there should be equality of arms between the parties. “Expediency” is an attribute of fair trial and is closely linked to the requirement that proceedings should be conducted within a reasonable time.¹⁵ Alternatively, the test for certification is met if the claimed error is likely to impact the outcome of the case; an exercise which involves a forecast of the consequence of such an occurrence.¹⁶

- b. The second prong of the test for certification is that the immediate resolution of the appealable issue will materially advance proceedings, in the sense that “prompt referral of an issue to the Court of Appeals Panel will settle the matter and rid the ‘judicial process of possible mistakes that might taint either the fairness of proceedings or mar the outcome of the trial’ thereby moving the proceedings forward along the right course”.¹⁷
- c. Finally, the Party seeking clarification must identify issues which emanate from the ruling concerned and do not amount to abstract questions or hypothetical concerns.¹⁸

14. Certification is not concerned with the merits of the appeal,¹⁹ and thus the Defence refrains from submitting arguments on the merits of the appeal at this stage.

¹⁴ KSC-BC-2020-07, F00423, Trial Panel II, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect* (“Decision on SPO Requests”), 8 November 2021, public, para. 17.

¹⁵ *Idem*, para. 18.

¹⁶ *Idem*, para. 19.

¹⁷ *Idem*, para. 20.

¹⁸ *Idem*, para. 16.

¹⁹ *Idem*, para. 21.

IV. SUBMISSIONS

15. The Defence submits that the two issues identified above satisfy the test for certification. They originate from the Second Decision, do not amount to mere disagreements, affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and their immediate resolution by the Court of Appeal's panel would materially advance the proceedings.

A. THE ISSUES ARISE FROM THE SECOND DECISION

16. The **two issues** arise from the Second Decision, as the lawfulness of the search and seizure and the inventory's compliance with Rule 39(4) were considered by the Trial Panel as a preliminary matter to be addressed before ruling on the admissibility of the items purportedly recovered during the search and seizure operations,²⁰ and constitute identifiable topics that were essential to the determination of the Second Decision.

17. The **first issue** concerns the correct interpretation of the law applicable to search and seizure operations conducted by the SPO. Rule 39(4) of the Rules provides, *inter alia*, that the inventory produced at the end of the search and seizure operations shall contain a "**detailed description** of and information regarding **each item seized**".²¹ Without providing any reasons for its interpretation of this provision, the Trial Panel effectively moved away from the literal meaning of the words "detailed description" and "each item", and adopted a rather broad interpretation of Rule 39(4), finding in the abstract that "the Defence has argued a level of specificity of the inventory not required by the Rules",²² and considering sufficient, for the purpose of compliance

²⁰ Decision on SPO Requests, paras 120-121.

²¹ Emphasis added.

²² Second Decision, para. 110.

with the applicable requirement of itemisation, the reference to generic “collections” of documents.²³ The correctness and appropriateness of this interpretation is an issue which should be subject to the scrutiny of the Court of Appeals Panel.

18. The **second issue** relates to the Trial Panel’s conclusion that the inventory produced by the SPO on 4 November 2020 fulfils the requirements of Rule 39(4) of the Rules.²⁴ The inventory does not contain reference to individualised items, nor does it include any description or information beyond words such as “documents”, “photos”, or “documents in binder”.²⁵ Even adopting a broad interpretation of the requirements of Rule 39(4), the Panel’s conclusion is not supported by the factual reality of how the inventory was compiled, resulting in an effective misapplication of the applicable law to the facts under scrutiny. In particular, the Second Decision fails to provide reasons for its conclusion that vague expressions such as “documents” or “binder” could be considered akin to, or satisfy the requirement of, a “detailed description of and information regarding each item seized”. Even when addressing the appropriateness of recording “collections of documents” in the inventory, the Trial Panel did so in a general fashion and only with regard to the itemisation requirement, without engaging with the requirements of a “detailed description of and information regarding each item seized” as foreseen by Rule 39(4).²⁶ This issue requires a determination by the Court of Appeals Panel.

²³ Second Decision, para. 113.

²⁴ *Idem*, para. 110.

²⁵ KSC-BC-2020-06, F00125/A03, Specialist Prosecutor, *Annex 3 to Request for Reclassifications (Redacted Versions of Annexes 2 and 4 to Prosecution Report on Search and Seizure Pursuant to KSC-BC-2020-06-F00031-COR)*, 8 December 2020, confidential and *ex parte*.

²⁶ Second Decision, para. 113.

B. THE ISSUES DO NOT AMOUNT TO MERE DISAGREEMENTS

19. Rather than being mere disagreements with the Second Decision, the two issues go to the core of the lawfulness of an invasive investigative operation and the subsequent use in the trial of materials gathered in violation of statutory safeguards. Whether the Trial Panel erred in the interpretation of the law, depriving the careful wording of the relevant provisions of their literal meaning, is a matter which demands scrutiny by the Court of Appeals Panel (**first issue**). Similarly, whether a reasonable Trial Panel could consider the SPO inventory to be compliant with Rule 39(4) is a practical concern which is closely connected to whether the SPO's search and seizure was carried out in violation of the applicable safeguards and the Accused's fundamental rights, including to a fair trial (**second issue**). The Court of Appeal's Panel's intervention is warranted.

C. THE ISSUES AFFECT THE FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS OR THE OUTCOME OF THE TRIAL

20. The **two issues** have immediate consequences on the fairness of the proceedings or the outcome of the trial, requiring immediate resolution by the Court of Appeals Panel.

21. The lawfulness of search and seizure operations stands at the centre of the overall fairness of the proceedings. Due to their invasive character, these investigative acts are subject to strict procedural rules, which aim to protect the rights of the concerned person, avoid systematic abuse and ensure the integrity of the evidence which will eventually form part of the case record. On this basis, the European Court of Human Rights ("ECtHR") has repeatedly found a violation of Article 6 of the

Convention,²⁷ whenever a piece of evidence obtained in violation of the safeguards regulating a search and seizure operation was subsequently relied upon to enter a conviction.²⁸ As previously found in this case, issues concerning the Accused's fair trial rights under Article 6 of the Convention affect the fairness of the proceedings and meet the test for certification.²⁹

22. In a similar fashion, Rule 39 provides a list of mandatory safeguards to limit the impact of the operations, ensure meaningful participation of the concerned person and preserve the integrity of the evidence retrieved. Combined with the protection of Rule 138(2) - which provides for the inadmissibility of evidence obtained by means of a violation of the Law or the Rules or standards of international human rights law - respect for the procedural requirements set out in Rule 39 becomes an essential shield against the admission into the case record of evidence obtained in violation of the rights of the Accused. As such, the correct interpretation of Rule 39 and its correct application directly affect the overall fairness of the proceedings.

23. Furthermore, **both issues** would significantly affect the outcome of the trial. In the Second Decision, the Trial Panel admitted into evidence a number of items said to be retrieved during the search and seizure operations. These items can now be relied upon by the Trial Panel in its determination of the Accused's innocence or guilt. Resolution by the Court of Appeals Panel of whether the Trial Panel interpreted the applicable law correctly (**first issue**) and whether the procedural safeguards of Rule 39 were respected in practice (**second issue**) will have direct bearing on the

²⁷ European Convention on Human Rights ("Convention").

²⁸ ECtHR, *Budak v. Turkey*, no. 69762/12, *Judgment (Merits and Just Satisfaction)*, 16 February 2021, para. 89. See also ECtHR, *Botea v. Romania*, no. 40872/04, *Judgment (Merits and Just Satisfaction)*, 10 December 2013, paras 42-43.

²⁹ KSC-BC-2020-06, F00546, Pre-Trial Judge, *Decision on Applications for Leave to Appeal "Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused"*, 25 October 2021, public, para. 64.

admission or exclusion of tendered items from the case record, with inevitable impact on the outcome of the trial.

D. IMMEDIATE RESOLUTION BY THE APPEALS PANEL MAY MATERIALLY ADVANCE THE PROCEEDINGS

24. The **two issues** go to the heart of evidence admission in this trial. As such, resolution by the Court of Appeals Panel will guide the Trial Panel's future rulings on admission of evidence. Notably, the SPO tendered over 1,200 evidentiary items in its Bar Table Motion, a large number of which were purportedly seized from Mr. Krasniqi's residence.³⁰ So far, the Trial Panel has issued two decisions, covering a limited number of tendered materials, namely those related to two discrete groups of witnesses who were scheduled to testify shortly after the decisions were rendered.³¹ It follows that the Trial Panel has yet to rule on a large number of seized items which were included in the SPO Bar Table Motion. Furthermore, many items allegedly seized from Mr. Krasniqi's residence were added to the SPO Exhibit List but were not included in the Bar Table Motion, which precludes the SPO tendering - and the Trial Panel ruling on - many additional items which are said to originate from the search and seizure.

25. Similarly, the SPO continues to conduct search and seizure operations on a regular basis.³² It is thus reasonable to believe that the SPO will seek to add seized materials to its Exhibit List and eventually submit them for admission. Resolution of the correct interpretation of the law (**first issue**), and its concrete application (**second**

³⁰ See, *inter alia*, KSC-BC-2020-06, F01268/A02, Specialist Prosecutor, *Annex 2 to Prosecution Application for Admission of Material Through the Bar Table*, 8 February 2023, confidential.

³¹ First Decision, para. 20; Second Decision, para. 9.

³² See *e.g.* <https://www.dukagjini.com/specialja-vazhdon-bastisjet-ne-kerkim-te-provave-te-reja-kunder-ish-krereve-te-uck-se/>.

issue), will thus inform future decisions of a similar nature and materially advance the proceedings.

26. Finally, due consideration must be given to the fact that any trial judgment which relies on evidence obtained from an unlawful search and seizure, would be inevitably tainted with illegality. An authoritative determination by the Court of Appeals Panel on the lawfulness of the SPO's search and seizure operations, carried out at this stage, would materially advance the proceedings: if not settled early in the trial, these issues have the potential to mar the outcome of the proceedings.

V. CONCLUSION

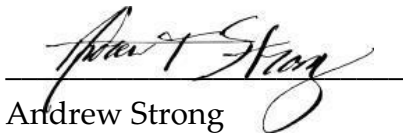
27. In light of the foregoing, the Defence respectfully seeks leave to appeal the two issues identified above.

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Respectfully submitted on 23 June 2023.



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