

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 Kadri Veseli
Specialist Counsel for Jakup Krasniqi

Date: 26 June 2023

Language: English

Classification: Confidential

**Thaçi, Veseli & Krasniqi Defence Request for Certification to Appeal the
'Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155'**

Specialist Prosecutor's Office

Alex Whiting

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. On 1 March 2023, the SPO filed its first motion in accordance with Rule 155, in respect of 15 deceased witnesses and one unavailable witness.¹ The four defence teams filed a joint response on 22 March 2023, identifying specific arguments rendering the material submitted by the SPO largely inadmissible pursuant to Rule 155, as well as expressing general concerns as to the volume of material sought to be admitted.²

2. On 14 June 2023, the Trial Panel issued its decision granting the SPO Motion in large part; admitting into evidence the statements and records of the 16 witnesses with only limited exceptions.³

3. The Defence for Mr Hashim Thaçi, Mr Kadri Veseli and Mr Jakup Krasniqi (“Defence”) submit that the Trial Panel erred in the Impugned Decision, for the reasons set out below. These errors warrant the intervention of the Court of Appeals Panel. Therefore, in accordance with Rule 77 of the Rules⁴ and Article 45 of the Law,⁵ the Defence applies for certification to appeal the Impugned Decision on the issues detailed below.

II. APPLICABLE LAW

4. To appeal the Impugned Decision, certification is required.⁶ Article 45(2) of the KSC Law provides, in the relevant part, that the Trial Panel shall grant certification where an appeal:

¹ KSC-BC-2020-06/F01329, Prosecution first motion for admission of evidence pursuant to Rule 155, 1 March 2023 (“SPO Motion”).

² KSC-BC-2020-06/F01391, Joint Defence Response to “Prosecution first motion for admission of evidence pursuant to Rule 155”, 22 March 2023 (“Joint Response”).

³ KSC-BC-2020-06/F01603, Trial Panel II: Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155, 14 June 2023 (“Decision”).

⁴ KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 (“Rules”).

⁵ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”).

⁶ Rule 77(1), Rules; Article 45(2), Law.

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. 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.”⁷

III. THE PROPOSED ISSUES FOR APPEAL

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

Issue 1: Whether the Trial Panel erred by repeatedly grounding its assessment of prejudice on a future event which may or may not occur, being the future testimony of other SPO witnesses;⁸

Issue 2: Whether the Trial Panel erred in finding W01984 was unavailable, having ignored or failed to give sufficient reasoning as to the adequacy of the documents provided by the SPO to demonstrate unavailability;⁹

Issue 3: Whether the Trial Panel erred in admitting the evidence of W01448 and W04733 concerning the acts and conduct of Mr Krasniqi and Mr Thaçi, having

⁷ *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.

⁸ Decision, paras. 103, 106, 144, 172, 203.

⁹ Decision, para. 123.

ignored or failed to give reasons in relation to the inconsistencies and retractions raised by the Defence;¹⁰ and

Issue 4: Whether the Trial Panel erred in refusing to consider documents relevant to its assessment of admissibility of Rule 155 material, on the grounds that these documents were not admitted in the record of the case.¹¹

IV. SUBMISSIONS: THE TEST FOR CERTIFICATION IS MET

A. THE ISSUES ARE APPEALABLE ISSUES

7. When material is admitted under Rule 155, the Defence is deprived of the ability to test the accusations therein through cross-examination, which is prejudicial. The Trial Panel repeatedly held that the prejudice flowing from the admission of the Rule 155 evidence, including evidence concerning the acts and conduct of the accused, was outweighed by its probative value. In doing so, the Trial Panel relied on the fact that “the SPO is intent on bringing **other witnesses** to testify to the same fact, which the Defence will be able to challenge.”¹²

8. In doing so, the Trial Panel conditions admissibility on the future testimony of SPO witnesses. In reality, these witnesses have not yet testified, and may or may not ultimately be called. Even if they are called, they may or may not testify on the facts now being admitted. **Issue 1** seeks to examine whether reliance on this hypothetical future testimony to justify admission of incriminating material is reasonable. This is an identifiable topic which arises directly from the decision, and which is neither an abstract or hypothetical concern. It should be adjudicated by the Court of Appeals Panel.

¹⁰ Decision, paras. 103, 88, 90.

¹¹ Decision, paras. 50, 52, 126.

¹² Decision, paras. 103, 106, 144, 172, 203 (emphasis added).

9. The assessment of the availability of W01984 reads “[t]he Panel is satisfied, on the evidence before it, that this condition would prevent the witness to testify effectively [...]”.¹³ The Defence made extensive submissions as to why the “medical” documents provided did not establish that W01984 was unavailable, not least because they were nearly seven years out of date. The Trial Panel failed to explain why it was satisfied of the witness’ unavailability, in the face of detailed Defence objections relating to these underlying medical documents. This was an error. The date of these materials was not properly considered by the Trial Panel, and there was no discussion justifying their continued relevance. This error is raised in **Issue 2**, and seeks to examine whether a reasonable Trial Panel could have concluded that a document from nearly seven years ago could adequately reflect the contemporary health of the witness and accordingly inform a decision on his ability to testify. Identifying a failure to take into account relevant factors or provide sufficient reasoning is not a mere disagreement. Instead, it is an identifiable topic, the resolution of which is essential for determination of the admissibility of Rule 155 material.

10. For the same reasons, **Issue 3** is also appealable. Both W01448 and W04733 purported to identify Mr Krasniqi in Kükes. W04733 also claimed to identify Mr Thaçi. Both witnesses later retracted their identification of Mr Krasniqi: W01448 stated **three times** that he never saw Mr Krasniqi in Kukës,¹⁴ and W04733 gave a clear explanation that he did not remember or did not see Mr Krasniqi in the courtyard in Kukës.¹⁵ As regards Mr Thaçi, the Trial Panel relied on the fact that there was “no indication of internal inconsistencies in the account of the witness on that point that would raise questions of *prima facie* reliability”.¹⁶ This ignores the inconsistencies as to the purported sightings which were raised by the Defence in relation to W04733’s

¹³ Decision, paras. 88, 123.

¹⁴ Joint Response, para. 64.

¹⁵ Joint Response, para. 73.

¹⁶ Decision, para. 103.

different statements.¹⁷ The failure to refer to, or otherwise consider, the impact of these inconsistencies amounts to a failure by the Trial Panel to take into account relevant factors, or to provide sufficient reasoning. Again, this is a discrete issue, arising directly from the decision, and is also appealable. Its resolution is essential for the determination of the judicial cause under examination.

11. Other materials exist that render the admitted Rule 155 material more or less capable of admission in a criminal trial. The Defence pointed the Trial Panel to material which demonstrated why certain statements or documents should not be admitted.¹⁸ The Trial Panel admitted the documents anyway, finding that it “will not base its assessment on reliability or probative value on material not offered for admission”.¹⁹ In doing so, it referred to “para. 17” which does not address this issue.²⁰ Failure to consider material directly relevant to admissibility, on the basis that this material was not itself admitted, is an erroneous approach. Most problematically, it will lead to an uncontrollable trial record where the parties will be required to seek admission into evidence of any and all materials relevant to the admissibility of other material. This cannot be the correct approach, and should be examined by the Court of Appeals Panel. **Issue 4** is an appealable issue: it is neither hypothetical or abstract, and arises directly from the decision.

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

12. All four Issues overwhelmingly and significantly affect the fair and expeditious conduct of the proceedings. The Issues have direct relevance to the rights of the Accused to a fair and public hearing,²¹ and to examine - or have examined - the

¹⁷ Joint Response, paras. 73-74.

¹⁸ Joint Response, paras. 41, 47, 53, 56, 72, 76, 87, 96-99, 131.

¹⁹ Decision, paras. 50, 52, 126.

²⁰ Decision, para. 50, fn. 65.

²¹ Article 21(2) of the Law.

witnesses against them.²² The principle of orality, which forms part of the KSC's statutory framework,²³ is meant to ensure the adversarial nature of criminal proceedings, and the rights of the accused to a public trial and to confront witnesses against them, subject only to narrow exceptions.²⁴ Both the ICC and the European Court of Human Rights ("ECtHR") have recognised that exceptions to the evidence being presented in the presence of the Accused with a view to an adversarial argument, albeit possible on an exceptional basis, have the potential to infringe on the rights of the Accused.²⁵

13. As such, the four Issues concern the correctness of the standard applied by the Trial Panel to justify a departure from the principle of orality and allow the admission of untested evidence. In particular, **Issue 1** relates to whether a proper assessment of prejudice includes consideration of whether the prejudice is purportedly mitigated by a future event that might not occur. This issue is directly relevant to the fairness of the admission of this material. **Issue 2** concerns the alleged unavailability of a witness, which goes to the core of the Accused being deprived of a chance to test the evidence against him.

14. **Issue 3** then relates, *inter alia*, to the prejudice caused to the Accused by the inability to cross-examine two witnesses who make direct allegations as to their acts and conduct, and the Trial Panel's balancing of such prejudice with the limited

²² Article 21(4)(f) of the Law.

²³ Article 37(2) of the Law. *See also* Articles 21(2) and 21(4)(f) of the Law, and Rule 141(1) of the Rules.

²⁴ ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-2635, Trial Chamber II, *Decision on the Prosecutor's Bar Table Motions*, 17 December 2010, para. 42; ICTY, *Prosecutor v. Milosević*, IT-02-54-T, Trial Chamber, *Decision on Prosecution's Request to Have Written Statements Admitted under Rule 92bis*, 21 March 2002, para. 25; *Prosecutor v. Milutinović et al.*, IT-05-87-T, *Decision Denying Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 bis*, 13 September 2006, para. 6.

²⁵ ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-222, Appeals Chamber, Judgment on the appeal of the Prosecution against Trial Chamber X's "Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules", 13 May 2022, paras. 81-84; ECtHR, *Al-Khawaja and Tahery v. the United Kingdom*, 26766/05 and 22228/06, Judgment, 15 December 2011, para. 118; *Hümmer v. Germany*, 26171/07, Judgment, 19 July 2012, para. 38; *Lucà v. Italy*, 33354/96, Judgment, 27 February 2001, para. 39.

reliability and probative value of the evidence. Also at issue is the overall quality of the evidence admitted into the trial record. The admission of two “identifications” which have been recanted in later testimony by the same witnesses, without the Defence being able to explore this anomaly during cross-examination, will serve to taint the trial record in a manner adverse to the Accused, impacting the fairness of the proceedings. **Issue 4**, more broadly, considers the consistent refusal of the Trial Panel to consider materials relevant to the admissibility of Rule 155 material, before then making adverse decisions over Defence objections. This practice also significantly impacts on the rights of the accused outlined above.

15. Expediency is also significantly impacted. On the most recent SPO witness list, 42 witnesses are listed as Rule 155 witnesses, including six²⁶ who are not deceased.²⁷ Where the bar is set inappropriately low for the admission of unavailable witnesses, expediency of the trial is impacted by: (i) continued litigation over admission; (ii) the expansion of the trial record through this admission; and (iii) the need for the Defence to investigate, locate and present material to confront the allegations made by unavailable witnesses, given cross-examination is ruled out. In particular, the Trial Panel’s position that the parties should move to admit materials that are relevant to an assessment of the inadmissibility of Rule 155 materials has the potential to exponentially expand the trial record, impacting on expediency.

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

16. As noted above, 42 witnesses are listed as Rule 155 witnesses. The combined effect of Rules 155 and 138(1) is such that a large number of requirements and circumstances must be evaluated and applied to the specific features of each proposed

²⁶ W00083, W01984, W03689, W03821, W04358, W04677.

²⁷ KSC-BC-2020-06/F01594/A02, ANNEX 2 - Prosecution submission of updated witness list, 9 June 2023.

Rule 155 witness. Setting the correct standard to be applied for this evaluation will materially advance the proceedings, as it will inform future decisions and ensure that the Accused's fair trial rights are respected throughout this process.

17. Moreover, the Decision is noteworthy for the fact that almost the entirety of the material sought by the SPO was admitted, including unsigned summaries, an accompanying statement of an **available** witnesses, and evidence concerning the acts and conduct of the accused. Given the types of documents and materials admitted in the Decision, over Defence objections, including evidence of the alleged acts and conduct of the accused, the Court of Appeals Panel may consider much of the impugned material inadmissible. This should be resolved now, at the outset of the proceedings, in order to avoid both continued protracted litigation around Rule 155 material, and to ensure the parties do not proceed on the basis of an evidential record that will be altered on appeal.

V. CONCLUSION AND RELIEF SOUGHT

18. 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: 2,455 words]

Respectfully submitted on 26 June 2023,



Gregory W. Kehoe

Counsel for Hashim Thaçi



Ben Emmerson, CBE KC

Counsel for Kadri Veseli



Andrew Strong

Co-Counsel for Kadri Veseli



Annie O'Reilly

Co-Counsel for Kadri Veseli



Venkateswari Alagendra

Lead Counsel for Jakup Krasniqi



Aidan Ellis

Co-Counsel for Jakup Krasniqi



Victor Băieșu

Co-Counsel for Jakup Krasniqi