

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 Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr. Fidelma Donlon

Filing Participant: Defence Counsel for Kadri Veseli
Defence Counsel for Jakup Krasniqi

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Classification: Confidential

Veseli and Krasniqi Defence Reply to the Prosecution Response to the ‘Request for Certification to Appeal the “Second Decision on Specialist Prosecutor’s Bar Table Motion”

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I. INTRODUCTION

1. The Response¹ mischaracterises the Defence Request² for certification to appeal the Second Decision,³ fails to grasp and engage with its substance, and ultimately misconstrues the applicable test for certification. The two issues proposed for appeal meet the standard of Rule 77 of the Rules,⁴ warranting immediate resolution by the Court of Appeal's Panel.

2. Pursuant to Rule 82(4) of the Rules, this filing is confidential, as it replies to a document with the same classification.

II. SUBMISSIONS

3. Throughout the Response, the Specialist Prosecutor's Office ("SPO") argues that the *mere admission* of evidence does not affect the fair and expeditious conduct of the proceedings or its outcome, since its weight will only be evaluated by the Trial Panel at end of the proceedings.⁵ The Response goes so far as to claim that no error which may taint the judicial process can be identified "when admissibility, not weight, is the subject of the Decision".⁶ This position is fundamentally erroneous and ultimately untenable: taking it to its logical conclusion, no admissibility decision

¹ KSC-BC-2020-06, F01640, Specialist Prosecutor, *Prosecution response to 'Veseli and Krasniqi Defence request for certification to appeal the "Second Decision on Specialist Prosecutor's Bar Table Motion"'* ("Response"), 4 July 2023, confidential.

² KSC-BC-2020-06, F01624, Veseli and Krasniqi Defence, *Veseli and Krasniqi Defence Request for Certification to Appeal the "Second Decision on Specialist Prosecutor's Bar Table Motion"* ("Defence Request"), 23 June 2023, confidential.

³ KSC-BC-2020-06, F01596, Trial Panel II, *Second Decision on Specialist Prosecutor's Bar Table Motion* ("Second Decision"), 9 June 2023, confidential.

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

⁵ Response, paras 3, 12.

⁶ Response, para. 7.

would ever be appealable, even if legally and/or factually wrong. This would in turn misconstrue the role and foundation of Rule 77 of the Rules.

4. Contrary to the SPO's submissions, the admissibility of evidence is an issue which affects the fair and expeditious conduct of the proceedings and its outcome. Without repeating arguments already raised in the Defence Request, suffice it to note that the items allegedly obtained through the search and seizure were extensively referenced both in the SPO PTB⁷ and the SPO opening statements,⁸ and go to the issues at the centre of the SPO case: once admitted, the Trial Panel is unrestricted in relying upon this material to determine the Accused's innocence or guilt. That the Trial Panel will rely on this evidence in its final determinations is not a speculative assertion;⁹ rather, it is speculative to suggest that, if admitted, the Panel will decide not to assign *any* weight to *any* of the items allegedly seized during the search and seizure, and ultimately disregard them in their entirety. It is also for this reason that the two issues identified in the Defence Request should be resolved at this stage rather than at the end of trial: considering the amount of evidence allegedly obtained through search and seizure operations, and the SPO's heavy reliance on this material in the presentation of its case, resolution by the Court of Appeals panel is warranted before additional material of similar nature is admitted into the case record, to the benefit of all Parties and participants.

5. In a similar vein, the SPO's generic reference to the Trial Panel's "broad discretion"¹⁰ in relation to the admissibility of evidence is an unpersuasive consideration in this context. No "discretion" can overrun the clear provisions and

⁷ The SPO's Pre-Trial Brief ("SPO PTB"), cites to more than 100 documents seized by the SPO. See F01594/A03, Specialist Prosecutor, ANNEX 3 to Prosecution submission of updated witness list and confidential lesser redacted version of pre-trial brief, 9 June 2023, confidential.

⁸ KSC-BC-2020-06, Trial Hearing, 3 April 2023, p. 2178, lines 20-24; p. 2228, lines 17-21, p. 22243, lines 7-10.

⁹ *Contra*, Response, para. 12.

¹⁰ Response, paras 2, 7, 12.

combined effect of Rules 39(4) and 138 and justify the admission of evidence obtained through an unlawful investigative procedure. The Court of Appeal's Panel's intervention is specifically warranted to determine whether the Trial Panel erred in the way it *discretionally* interpreted and applied the relevant provisions.

6. The Defence also notes that according to the Response, the Defence assertion that procedural safeguards were not respected during the search and seizure operations is undeveloped:¹¹ the SPO misconstrues the nature of requests for certification to appeal, which are not concerned with the merits of the appeal.¹² The Defence clearly articulated the proposed issues, and explained why they meet all the applicable requirements for certification. Further arguments will be *developed* before the Court of Appeal's Panel.

7. Lastly, the Response claims that "the Defence completely disregards the Panel's findings that the search and seizure operation was conducted in a manner consistent with the Law and the Rules".¹³ The Defence did not disregard this finding; it is precisely this finding that forms the basis of the Defence Request.¹⁴ In order to conclude that the search and seizure operations were lawful, the Trial Panel adopted a broad interpretation of Rule 39(4) (**First Issue**), and found the SPO's inventory to be compliant with the applicable requirements (**Second Issue**). The correctness of these successive steps, which eventually led to the admission of the evidence, must be subject to the evaluation of the Court of Appeal's Panel.

¹¹ Response, para. 11.

¹² Defence Request, para. 14.

¹³ Response, para. 12.

¹⁴ Defence Request, para. 1.

III. CONCLUSION

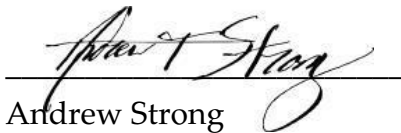
8. In light of the foregoing, the Defence respectfully requests the Trial Panel to reject the SPO objections and to grant certification to appeal the two issues outlined in the Defence Request.

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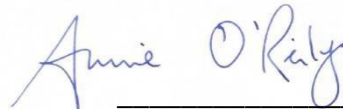
Respectfully submitted on 10 July 2023.



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