



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA KOSOVA

**In:** **KSC-BC-2020-04**

**The Specialist Prosecutor v. Pjetër Shala**

**Before:** **Trial Panel I**

Judge Mappie Veldt-Foglia, Presiding Judge

Judge Roland Dekkers

Judge Gilbert Bitti

Judge Vladimir Mikula, Reserve Judge

**Registrar:** Fidelma Donlon

**Date:** 17 July 2023

**Language:** English

**Classification:** **Public**

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**Decision on the Defence request for certification to appeal the “Decision on the Specialist Prosecutor’s requests to admit the evidence of TW4-02 and TW4-04 under Rule 153 of the Rules”**

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**Acting Specialist Prosecutor**

Alex Whiting

**Counsel for the Accused**

Jean-Louis Gilissen

**Victims’ Counsel**

Simon Laws

**TRIAL PANEL I** (Panel) hereby renders this decision on the Defence request for certification to appeal the “Decision on the Specialist Prosecutor’s requests to admit the evidence of TW4-02 and TW4-04 under Rule 153 of the Rules”.

## I. PROCEDURAL BACKGROUND

1. On 23 June 2023, the Panel rendered the “Decision on the Specialist Prosecutor’s requests to admit the evidence of TW4-02 and TW4-04 under Rule 153 of the Rules” (Impugned Decision), admitting the written statements and associated exhibits of the two above-mentioned witnesses in lieu of their oral testimony, pursuant to Rule 153 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (Rules).<sup>1</sup>
2. On 30 June 2023, the Defence for Pjetër Shala (Defence and Accused, respectively) requested leave to appeal the Impugned Decision (Request).<sup>2</sup>
3. On 7 July 2023, the Specialist Prosecutor’s Office (SPO) responded to the Request (Response).<sup>3</sup>
4. Victims’ Counsel did not file a response and the Panel did not entertain a reply.<sup>4</sup>

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<sup>1</sup> KSC-BC-2020-04, F00556, Trial Panel I, *Decision on the Specialist Prosecutor’s requests to admit the evidence of TW4-02 and TW4-04 under Rule 153 of the Rules*, 23 June 2023, confidential. A public redacted version was issued on 17 July 2023, F00556/RED.

<sup>2</sup> KSC-BC-2020-04, F00559, Defence, *Defence Request for Certification to Appeal the “Decision on the Specialist Prosecutor’s requests to admit the evidence of TW4-02 and TW4-04 under Rule 153 of the Rules”*, 30 June 2023, confidential. A public redacted version was filed on 5 July 2023, F00559/RED.

<sup>3</sup> KSC-BC-2020-04, F00573, Specialist Prosecutor, *Prosecution response to Defence request for certification to appeal the Rule 153 Decision*, 7 July 2023, confidential.

<sup>4</sup> See Impugned Decision, paras 53, 54(g).

## II. SUBMISSIONS

### A. DEFENCE

5. The Defence requests leave to appeal the Impugned Decision on three issues:
- (i) Whether the Panel erred in interpreting and applying the requirement concerning the “acts and conduct of the Accused” restrictively and inconsistently with Article 6 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>5</sup> (First Issue);
  - (ii) Whether the Panel erred by failing to consider and apply the correct test for accepting interferences with Article 6 of the ECHR only when required for a legitimate aim and when the impugned measure is strictly necessary and the least restrictive (Second Issue); and
  - (iii) Whether the Panel erred by depriving the Accused of the opportunity to confront TW4-02 and TW4-04 and, by doing so, violated his right to examine witnesses against him (Third Issue).<sup>6</sup>
6. The Defence submits that: (i) all three issues are appealable issues as they are sufficiently concrete, precise and arise directly from the Impugned Decision; (ii) all three issues significantly affect the fair and expeditious conduct of the proceedings, as well as the outcome of the trial, as they go to the core of the Accused’s fundamental fair trial rights, in particular his right to examine witnesses against him; and (iii) an immediate resolution by the Appeals Panel of the issues would materially advance the proceedings, as it would ensure that the proceedings are continuing in compliance with the fundamental rights of the Accused.<sup>7</sup>

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<sup>5</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

<sup>6</sup> Request, para. 4.

<sup>7</sup> Request, paras 12, 16-17, 32-35.

## B. SPO

7. The SPO submits, in response, that the Request should be rejected as: (i) none of the issues constitute appealable issues, rather the Defence merely disagrees with the Impugned Decision; (ii) the issues have no prospect of significantly affecting the fair and expeditious conduct of the proceedings or the outcome of the trial; and (iii) an immediate appellate resolution would not materially advance the proceedings at this stage.<sup>8</sup>

## III. APPLICABLE LAW

8. The Panel notes Articles 21 and 45 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Law), Rule 77 of the Rules and Articles 36(3) and 43 of the Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers (Practice Direction on Files and Filings).<sup>9</sup>

9. The Panel incorporates by reference the standard for certification to appeal set forth in Article 45(2) of the Law and Rule 77(2) of the Rules and outlined in past decisions.<sup>10</sup>

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<sup>8</sup> Response, paras 1-4, 9, 12, 15-16, 18.

<sup>9</sup> KSC-BD-15, Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers, 17 May 2019, public.

<sup>10</sup> KSC-BC-2020-04, F00587, Trial Panel I, [Decision on the Defence's Request for Leave to Appeal and/or Reconsideration of F00538](#), 13 July 2023, public, paras 8, 11-12; F00401, Trial Panel I, [Decision on Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala](#), 24 January 2023, public, paras 13-20; F00116, Pre-Trial Judge, [Decision on Application for Leave to Appeal "Decision on Motion Challenging the Form of the Indictment"](#), 29 November 2021, public, paras 11-13.

## IV. ANALYSIS

### A. PRELIMINARY MATTERS

10. The Panel notes that the Request exceeds the word limit set by the Practice Direction on Files and Filings for requests for certification to appeal. While motions generally have a word limit of 6,000 words,<sup>11</sup> requests for certification to appeal shall not to exceed 3,000 words.<sup>12</sup> The Request is 4,436 words long.<sup>13</sup> The Defence has not sought an extension of the word limit, nor has it provided a justification for exceeding the limit.

11. For reasons of expediency – and on an exceptional basis – the Panel accepts the Request pursuant to Article 36(3) of the Practice Direction on Files and Filings. However, the Panel reminds and urges the Defence to respect the word limit in the future, or seek variation, or else it risks its filings not being considered as validly made.<sup>14</sup>

### B. ASSESSMENT OF THE REQUEST

#### 1. **First Issue**

##### (a) Submissions

12. The Defence submits that the Panel erred in giving an “overly restrictive” interpretation – inconsistent with the Accused’s right to a fair trial – to the phrase “acts and conduct of the Accused” in Rule 153(1) of the Rules, as referring “exclusively to

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<sup>11</sup> Article 41 of the Practice Direction on Files and Filings.

<sup>12</sup> Article 43 of the Practice Direction on Files and Filings.

<sup>13</sup> Request, p. 15.

<sup>14</sup> See also KSC-BC-2020-04, F00401, Trial Panel I, [Decision on Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala](#), 24 January 2023, public, para. 12, where the Panel gave the same directions to the Defence in a similar context.

the personal actions and omissions of the Accused, thus not encompassing the actions and omissions of others which are attributable to him under the modes of liability charged by the SPO".<sup>15</sup> The Defence advances that the Panel failed to acknowledge the manner in which the SPO relies on the evidence of TW4-02 and TW4-04 to demonstrate the alleged conduct of the Accused.<sup>16</sup> It submits that certain information provided by TW4-02 in his written statements does go to proof of the acts and conduct of the Accused and that TW4-02 also provides other "important information".<sup>17</sup>

13. The SPO responds that the First Issue constitutes a mere disagreement with the Impugned Decision and the Defence has failed to substantiate the alleged error committed by the Panel.<sup>18</sup>

(b) Panel's Determination

14. The Panel notes that, beyond advancing that the Panel has interpreted the phrase "acts and conduct of the Accused" too restrictively, the Defence fails to substantiate its submission that the Panel has erred in its interpretation. The Defence simply asserts that certain information provided by TW4-02 goes to proof of the acts and conduct of the Accused or is "important".<sup>19</sup> The Defence fails to show under which interpretation the evidence of TW4-02 would go to proof of the acts and conduct of the Accused and how such an interpretation would have led to a different outcome. In effect, the Defence is disagreeing with the Panel's determination and seeks to re-litigate the admission of TW4-02's and TW4-04's written statements before the Court of Appeals Panel.

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<sup>15</sup> Request, para. 18, *citing* the Impugned Decision, para. 32.

<sup>16</sup> Request, para. 19.

<sup>17</sup> Request, para. 21.

<sup>18</sup> Response, paras 4-8.

<sup>19</sup> *See* Request, paras 18, 21.

15. As regards the Defence's claim that the Panel erred in failing to acknowledge the manner in which the SPO relies on the evidence of TW4-02 and TW4-04, and the ensuing alleged violation of the right of the Accused to cross-examine the witnesses, the Panel is of the view that this aspect is an integral part of the Second Issue (and Third Issue) and is therefore discussed best under the Second Issue.

16. For these reasons, the Panel finds that the First Issue does not constitute an appealable issue arising from the Impugned Decision. As the first prong of the test is not met, the Panel does not find it necessary to address the remaining requirements and rejects certification for the First Issue.

## 2. Second Issue

### (a) Submissions

17. The Defence submits that the Panel erred by interpreting the right to examine witnesses inconsistently with Article 6 of the ECHR.<sup>20</sup> It advances that admitting written statements in lieu of oral testimony must be "a measure of last resort" and "strictly necessary".<sup>21</sup> The Defence further submits that the Panel has failed to justify the limitation of the right of the Accused to confront witnesses against him as guaranteed by Article 6 of the ECHR and has not addressed "at all why the Defence should be deprived of every opportunity to cross-examine [the witnesses]".<sup>22</sup>

18. The SPO responds that the Second Issue is not an appealable issue as the Defence is simply disagreeing with the Panel's determination, mischaracterises the Impugned Decision, ignores the Panel's reasoning and findings, and repeats arguments previously made and considered by the Panel.<sup>23</sup>

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<sup>20</sup> Request, para. 22.

<sup>21</sup> Request, paras 24-25.

<sup>22</sup> Request, para. 25.

<sup>23</sup> Response, paras 9-11.

(b) Panel's Determination

19. Firstly, the Panel considers that, in submitting that the admission of written statements in lieu of oral testimony must be "a measure of last resort" and "strictly necessary", the Defence takes issue, in fact, not with the Impugned Decision, but with Rule 153 of the Rules as such. In this regard, the Panel recalls that the Rules were reviewed by the Specialist Chamber of the Constitutional Court and Rule 153 of the Rules was not considered to be inconsistent with Chapter II of the Kosovo Constitution.<sup>24</sup> As this Panel has determined before, a disagreement with the Rules cannot form the basis for formulating a request under Rule 77 of the Rules.<sup>25</sup>

20. Secondly, in arguing that the Panel has failed to justify the limitation of the right of the Accused to confront witnesses against him, the Defence disregards the Panel's reasoning and misrepresents the Impugned Decision. The Panel considered at length whether the introduction of TW4-02's and TW4-04's written statements in lieu of their oral testimony was prejudicial to or inconsistent with the rights of the Accused and found that it was not, as their evidence: (i) did not go to the acts and conduct of the Accused; (ii) was limited in scope; and (iii) was cumulative and/or corroborative of the testimonies of other witnesses who had appeared live before the Panel and who the Defence had cross-examined.<sup>26</sup>

21. For these reasons, the Panel finds that the Second Issue does not constitute an appealable issue arising from the Impugned Decision. As the first prong of the test is

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<sup>24</sup> KSC-CC-PR-2017-01, F00004, Specialist Chamber of the Constitutional Court, [Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19\(5\) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office](#), 26 April 2017, public, paras 186, 206.

<sup>25</sup> See KSC-BC-2020-04, F00587, Trial Panel I, [Decision on the Defence's Request for Leave to Appeal and/or Reconsideration of F00538](#), 13 July 2023, public, para. 14.

<sup>26</sup> Impugned Decision, paras 32-35, 39, 43-47, 49.



not met, the Panel does not find it necessary to address the remaining requirements and rejects certification for the Second Issue.

### 3. Third Issue

#### (a) Submissions

22. The Defence submits that the Panel erred in finding that the introduction of TW4-02's and TW4-04's written statements was not prejudicial to the rights of the Accused, as in fact it deprived the Defence of the opportunity to cross-examine, confront and challenge "two important Prosecution witnesses", who provide evidence on "critical issues" and "important actors" in the case.<sup>27</sup> The Defence further recalls its previous submissions that the evidence of TW4-02 and TW4-04 is neither cumulative nor corroborative of the evidence of other witnesses and advances that the Panel failed to address these submissions.<sup>28</sup> Lastly, the Defence repeats certain arguments made under the Second Issue.<sup>29</sup>

23. The SPO responds that the Third Issue is not an appealable issue as the Defence is again simply disagreeing with the Panel's determination, repeats arguments that were considered and dismissed by the Panel, and does not identify any error which could potentially invalidate the Impugned Decision.<sup>30</sup>

#### (b) Panel's Determination

24. The Panel finds that the Defence is repeating arguments already made, considered and dismissed by the Panel, and is also mischaracterising the Impugned Decision. The Panel explicitly found in the Impugned Decision that the evidence of

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<sup>27</sup> Request, paras 26, 29, 31.

<sup>28</sup> Request, para. 26.

<sup>29</sup> Request, para. 28.

<sup>30</sup> Response, paras 12-14.

TW4-02 and TW4-04 was limited in scope and noted that the Defence had failed to explain the importance of the issues that it considered to be “central” to the SPO’s case.<sup>31</sup> The Panel also explicitly considered whether the evidence of the two witnesses was cumulative and/or corroborative of witnesses heard live and found that it was.<sup>32</sup> The Defence is simply disagreeing with the Panel’s determination and seeks to re-litigate the matter before the Court of Appeals Panel.

25. To the extent that the Defence is repeating arguments made under the Second Issue, the Panel refers to its determination above and will not entertain them further.

26. For these reasons, the Panel finds that the Third Issue does not constitute an appealable issue arising from the Impugned Decision. As the first prong of the test is not met, the Panel does not find it necessary to address the remaining requirements and rejects certification for the Third Issue.

## V. DISPOSITION

27. For the above-mentioned reasons, the Panel hereby:

- a. **REJECTS** the Request; and
- b. **ORDERS** the SPO to file a public redacted version of its Response (F00573) by **Friday, 21 July 2023**.

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<sup>31</sup> Impugned Decision, paras 33, 44, 46.

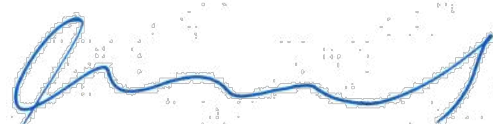
<sup>32</sup> Impugned Decision, paras 34, 45.



**Judge Mappie Veldt-Foglia**  
**Presiding Judge**



**Judge Gilbert Bitti**



**Judge Roland Dekkers**

Dated this Monday, 17 July 2023

At The Hague, the Netherlands.