



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 9 November 2023

Language: English

Classification: Public

**Decision on Veseli Defence Request for Reconsideration of Decision to
Admit P380**

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TRIAL PANEL II (“Panel”), pursuant to Articles 21 and 40(2) and (6)(h) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 79 and 138(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 6 September 2023, after hearing the Parties’ submissions,¹ the Panel admitted into evidence Chapter 10 of the Human Rights Watch (“HRW”) Report entitled *Humanitarian Law Violations in Kosovo* (“P380”) (“Impugned Decision”).²
2. On 12 October 2023, in accordance with the Panel’s instructions,³ the Defence for Mr Veseli (“Veseli Defence”) filed a request for reconsideration of the Impugned Decision (“Request”).⁴
3. On 23 October 2023, the Specialist Prosecutor’s Office (“SPO”) filed a response to the Request (“Response”).⁵
4. On 30 October 2023, the Veseli Defence filed a reply to the Response (“Reply”).⁶

II. SUBMISSIONS

5. The Veseli Defence requests the Panel to reconsider its decision to admit P380 to avoid injustice and irreparable harm being caused to Mr Veseli’s fair trial

¹ Transcript of Hearing, 6 September 2023, pp. 7342-7347.

² Transcript of Hearing, 6 September 2023, pp. 7347-7348.

³ Transcript of Hearing, 7 September 2023, p. 7593.

⁴ F01853, Specialist Counsel, *Veseli Defence Request for Reconsideration of Decision to Admit P380*, 12 October 2023.

⁵ F01878, Specialist Prosecutor, *Prosecution Response to Veseli Defence Request Relating to Exhibit P380*, 23 October 2023.

⁶ F01893, Specialist Counsel, *Veseli Defence Reply to Prosecution Response to Veseli Defence Request Relating to Exhibit P380*, 30 October 2023, confidential.

rights.⁷ It argues that: (i) at the time the SPO tendered the Report it was already evident that the conditions for admission under Rule 138(1) were not met, due to underlying sourcing issues affecting the item's reliability and, by implication, its probative value;⁸ and (ii) W04408's cross-examination confirmed that P380 and the conclusions made therein drew primarily from secondary sources that either could not be identified or were otherwise unavailable to the Panel.⁹ The Veseli Defence submits that "a more fastidious application of the admissibility requirements is preferred over *en masse* admission of tendered items".¹⁰ The Veseli Defence further submits that, at the very least, P380 should be marked for identification pending the production of additional evidence by the SPO attesting to its reliability.¹¹

6. The SPO responds that the Request does not provide valid grounds for reconsideration and should be rejected.¹² It argues that the Defence expresses mere disagreement with the Impugned Decision and that submissions on ultimate weight are separate and distinct from the Panel's decision on the admission of evidence.¹³ The SPO further submits that: (i) P380 is *prima facie* relevant, authentic, reliable, and probative;¹⁴ (ii) admissibility decisions of other courts, relied upon in the Request, are inapposite;¹⁵ and (iii) no prejudice arises from the Impugned Decision.¹⁶

7. The Veseli Defence replies that "[n]ew facts and circumstances" arose after the Impugned Decision was rendered, principally, during W04408's cross-examination, which amounted to exceptional circumstances that necessarily

⁷ Request, paras 1, 3, 30. *See also* Request, para. 28.

⁸ Request, para. 2. *See also* Request, paras 16-21.

⁹ Request, para. 3. *See also* Request, paras 16, 22-27.

¹⁰ Request, para. 29.

¹¹ Request, para. 30.

¹² Response, paras 1, 15.

¹³ Response, paras 3-4.

¹⁴ Response, paras 5-9.

¹⁵ Response, paras 10-12.

¹⁶ Response, paras 13-14.

require reconsideration to avoid injustice.¹⁷ The Veseli Defence submits that the SPO's submissions are largely unresponsive to the issues raised in the Request, as they fail to properly account for the cross-examination of W04408.¹⁸ The Veseli Defence challenges the SPO's submission that: (i) the Defence "can argue in, *inter alia*, its final trial brief and closing arguments about the ultimate probative value of P380";¹⁹ (ii) admissibility decisions of other courts, relied upon in the Request, are inapposite;²⁰ and (iii) overlooked two interviews carried out by HRW which are cited in P380.²¹ The Veseli Defence argues that the Response should be disregarded.²²

III. APPLICABLE LAW

8. The law applicable to deciding a request for reconsideration of a decision has been laid out extensively in earlier decisions. The Panel will apply this standard to the present decision.²³

IV. DISCUSSION

9. As a preliminary matter, the Panel notes that reconsideration is subject to stringent conditions.²⁴ The principle of finality dictates that the power of a Panel

¹⁷ Reply, para. 2, referring to F01206, Panel, *Decision on SPO Request for Reconsideration and/or Leave to Appeal of F01149, Suspensive Effect and Request for Time Extension* ("13 January 2023 Decision"), 13 January 2023, confidential, para. 18, footnote 33.

¹⁸ Reply, para. 4.

¹⁹ Reply, para. 5, referring to Response, para. 4. See also Reply, para. 3.

²⁰ Reply, paras 6-7.

²¹ Reply, para. 8.

²² Reply, para. 9.

²³ See F01736, Panel, *Decision on Urgent Prosecution Request for Reconsideration of Decision F01727*, 23 August 2023, confidential, para. 11; F01448, Panel, *Decision on Victims' Counsel's Request for Reconsideration of Trial Panel II's "Order on the Disclosure of Application Forms Pertaining to Dual Status Witnesses"* ("12 April 2023 Decision"), 12 April 2023, paras 7-12; 13 January 2023 Decision, para. 18.

²⁴ See Rule 79. See also 12 April 2023 Decision, paras 8-12; 13 January 2023 Decision, para. 18; ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Trial Chamber III, [Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses](#), 29 August 2005, para. 8; *Prosecutor*

to reconsider previous decisions should be exercised sparingly, and a party must therefore meet a high threshold in order to succeed in its motion for reconsideration.²⁵ The party seeking reconsideration bears the burden of showing that the Panel clearly erred or that reconsideration is necessary in order to avoid injustice.²⁶

10. Regarding the substance of the application, the Panel notes that P380 was shown to and discussed with W04408 – its primary author – during W04408’s examination in chief by the SPO.²⁷ The Panel also notes that, at that time, the Presiding Judge on behalf of the Panel considered the Defence’s objections to admission, overruled those objections and admitted P380 into evidence.²⁸ The Presiding Judge observed that the issue of the methodology and sources used by HRW in compiling P380 would be subject to cross-examination by the Defence and assessed by the Panel when weighing the evidence at the end of the trial.²⁹ The Defence did not seek leave to appeal the Panel’s decision on admission.

11. Therefore, contrary to the Veseli Defence’s submissions,³⁰ the Panel was satisfied that P380 met the conditions for admission under Rule 138(1), including that its *prima facie* probative value was not undermined by the sourcing issues

v. Karemera et al., ICTR-98-44-T, Trial Chamber III, [Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure](#), 31 October 2005, para. 3; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Trial Chamber III, [Decision on Reconsideration of Admission of Written Statements in lieu of Oral Testimony and Admission of the Testimony of Prosecution Witness GAY](#), 28 September 2007, para. 10.

²⁵ See e.g. ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84bis-T, Trial Chamber II, Decision on Prosecution Motion for Reconsideration of Majority Decision Denying Admission of Document Rule 65 *ter* Number 03003 or in the Alternative Certification of the Majority Decision with Partly Dissenting Opinion of Judge Delvoie (“[Haradinaj et al. Decision](#)”), 27 February 2012, para. 12 (and references cited therein); *Prosecutor v. Šešelj*, IT-03-67-T, Chamber Convened by Order of the Vice-President, [Decision on Prosecution Motion for Reconsideration of Decision on Disqualification, Requests for Clarification, and Motion on Behalf of Stanišić and Župljanin](#), 7 October 2013, para. 10 (and references cited therein).

²⁶ See e.g. ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.16, Appeals Chamber, [Decision on Jadranko Prlić Interlocutory Appeal Against the Decision on Prlić’s Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence](#), 3 November 2009, para. 18; [Haradinaj et al. Decision](#), para. 11.

²⁷ Transcript of Hearing, 6 September 2023, pp. 7341-7346.

²⁸ Transcript of Hearing, 6 September 2023, pp. 7345, 7347-7348.

²⁹ Transcript of Hearing, 6 September 2023, pp. 7345.

³⁰ Request, paras 2, 16-21.

referred to by the Veseli Defence in its in-court objections and reiterated in the Request. It is apparent from Rule 138(1) that admission of an exhibit requires certain minimum conditions to be met, namely, the proposed item must be relevant, authentic, have probative value and its probative value must not be outweighed by its prejudicial effect. The Panel's decision on admission therefore necessarily implied a verification of these requirements.

12. The Panel is of the view that, in the Request, the Veseli Defence expresses mere disagreement with the outcome of the Impugned Decision, *i.e.* the admission of P380 into evidence. Such a disagreement does not meet the requirements of Rule 79.

13. The Panel further notes that the Veseli Defence was given ample time to cross-examine W04408,³¹ including in respect of the methodology and sources used by HRW in compiling P380.³² The Veseli Defence argues that new facts and circumstances arose during W04408's cross-examination, which amounted to exceptional circumstances warranting reconsideration of the Impugned Decision to avoid an injustice.³³ The Panel disagrees. Nothing elicited during cross-examination affected any of the requirements of Rule 138(1) regarding the admissibility of this item. The Panel observes that, while it falls within the prerogative of the Defence to challenge evidence through cross-examination, the mere assertion that the reliability of an admitted exhibit was undermined during cross-examination does not meet the threshold of Rule 79. The Panel is therefore not convinced that the evidence elicited from W04408 by the Veseli Defence in support of its position that P380 draws primarily from secondary sources constitutes an exceptional circumstance requiring the Panel to reconsider the Impugned Decision to avoid irreparable harm to Mr Veseli's fair trial rights. This

³¹ Transcript of Hearing, 6 and 7 September 2023, pp. 7416-7554.

³² Transcript of Hearing, 6 and 7 September 2023, pp. 7462-7468, 7471-7475, 7491-7500.

³³ Request, paras 3, 22-27; Reply, para. 2.

item, like others, will be subject to the Panel's careful assessment of its weight and probative value in light of the evidence as a whole.

14. For these reasons, the Panel concludes that the Veseli Defence has failed to demonstrate that the Panel committed a clear error of reasoning in admitting P380 or, in light of W04408's cross-examination, caused an injustice warranting the exceptional reconsideration of the Impugned Decision.³⁴ The Panel therefore finds that the Veseli Defence has failed to demonstrate that reconsideration of the Impugned Decision is warranted pursuant to Rule 79. The Request is therefore rejected.

V. CLASSIFICATION

15. The Panel notes that the Reply has been filed confidentially. The Panel therefore orders the Veseli Defence to submit a public redacted version or request the reclassification of the Reply by Friday 17 November 2023.

VI. DISPOSITION

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

- a) **REJECTS** the Request; and
- b) **ORDERS** the Veseli Defence to submit a public redacted version or

³⁴ *Contra* Request, paras 1, 3, 28, 30; Reply, para. 4.

request the reclassification of the Reply by **Friday 17 November 2023**.

A handwritten signature in black ink, reading "Charles L. Smith, III". The signature is written in a cursive style with a horizontal line underneath the name.

Judge Charles L. Smith, III

Presiding Judge

Dated this Thursday, 9 November 2023

At The Hague, the Netherlands.