

In: KSC-BC-2020-06
Specialist 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 Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Hashim Thaçi
Counsel for Kadri Veseli
Counsel for Rexhep Selimi
Counsel for Jakup Krasniqi

Date: 4 December 2023
Language: English
Classification: Public

**Public Redacted Version of Joint Defence Request for Leave to Appeal
Decision on Admission of Documents Shown to W04769 (F01963)**

Specialist Prosecutor's Office

Kimberly P. West

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 Alagenda

I. INTRODUCTION

1. In accordance with Article 45(2) of the Law,¹ and Rule 77(2) of the Rules,² the Defence for Messrs Thaçi, Veseli, Selimi and Krasniqi (“Defence”) hereby files this request for leave to appeal the Decision on Admission of Documents Shown to W04769 (“Impugned Decision”).³
2. The Defence submits the following issues for certification:
 - a. **First Issue:** Whether the Trial Panel erred in its application of Rule 138(1) when it determined that the Defence’s submissions⁴ in respect of P651 were issues of weight rather than admissibility.
 - b. **Second Issue:** Whether the Trial Panel erred in law by reversing the burden of proof in Rule 138(1) of the Rules by requiring the Defence to prove P651’s inauthenticity and lack of probative value.
 - c. **Third Issue:** Whether the Trial Panel mischaracterised the Defence’s submissions regarding the dubious nature of P651’s origin.
 - d. **Fourth Issue:** Whether the Trial Panel committed an error of reasoning when it relied upon Serbian derived documents tendered by the Thaçi Defence to confirm the authenticity of documents from or provided by Serbia.
 - e. **Fifth Issue:** Whether the Trial Panel committed numerous errors of fact when it determined that P651 was both authentic and reliable.

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (“Law”).

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

³ F01963, *Decision on Admission of Documents Shown to W04769*, 27 November 2023, confidential (“Impugned Decision”).

⁴ See, F01911, *Joint Defence Response to Prosecution Submissions on Admissibility of Items Following W04769’s Testimony, With Confidential Annexes 1-3*, 8 November 2023, confidential (“Defence Response”).

II. PROCEDURAL BACKGROUND

3. The Defence incorporates herein, by reference, the procedural background as stated in the Impugned Decision that was issued on 27 November 2023.⁵

III. APPLICABLE LAW

4. Pursuant to Article 45(2) and Rule 77(2), a right to appeal only arises if the standard of certification set forth therein has been met.

5. Rule 77(2) provides:

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.

6. The Defence notes that the legal test for leave to appeal under Rule 77(2) has been developed in prior Decisions issued by this Court, and recently cited in a separate and unrelated Defence request for certification.⁶ Accordingly, the legal test, as developed, is incorporated herein by reference.⁷

IV. SUBMISSIONS

7. The **Five Issues** satisfy the requirements for leave to appeal. They arise from the Impugned Decision, do not merely disagree with said Decision, are liable to significantly affect the fair and expeditious conduct of the proceedings and

⁵ Impugned Decision, paras 1-8.

⁶ F01964, *Veseli Defence Request for Leave to Appeal the Decision on Prosecution Motion for the Admission of the Accused's Statements*, 27 November 2023, confidential, paras 7-9.

⁷ F01678, *Decision on Veseli and Krasniqi Defence Request for Certification to Appeal the Second Decision on Specialist Prosecutor's Bar Table Motion*, 17 July 2023, public, paras 9-11; F01237, *Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses*, 30 January 2023, paras 7-8; F00172, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, paras 6-7, 9-17. See also, KSC-BC-2020-07, F00423, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect*, 8 November 2021, paras 13-21; F00372, *Decision on Haradinaj Defence's Application for Certification of F00328*, 15 October 2021, paras 15-17; F00484, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021, paras 4-14.

require immediate resolution by the Appeals Chamber in order to materially advance the proceedings.

A. The Issues Arise From the Impugned Decision

i. First Issue

8. At paragraphs 30 and 31 of the Impugned Decision, the Trial Chamber determined that the issues raised by the Defence went exclusively to the weight to be assigned to P651 and not its admissibility.⁸ In doing so, the Trial Panel failed to properly apply the admissibility requirements contained in Rule 138(1) of the Rules, such that an assessment of weight during the final deliberations took precedence over engaging with the merits of admissibility at this stage in the case. The Defence notes that whilst a prevailing trend to admit items *en masse* has emerged to the detriment of the rules governing admissibility, the legislative framework of this Court compels the Trial Panel to consider objections to admissibility when raised. Not only is this required to “ensure that the Panel is not burdened by evidence that is irrelevant, lacks indicia of authenticity or probative value,”⁹ but it is furthermore crucial for protecting the fair trial rights of the Accused – specifically, the need to avoid the overt prejudice that will necessarily emanate from a bloated and unmanageable evidentiary record. To delay a proper assessment of the item’s admissibility, despite well-founded reasons to doubt its authenticity and reliability, is incongruent with the Accused’s right not to be prejudiced as protected under Rule 138(1) of the Rules.

ii. Second Issue

9. Between paragraphs 28-31 of the Impugned Decision, the Trial Panel made abundantly clear that it was incumbent upon the Defence to prove that P651

⁸ Impugned Decision, paras 30-31.

⁹ F01409, *Decision on Specialist Prosecutor’s Bar Table Motion 31 March 2023*, confidential, para. 9.

was inadmissible. Whereas the Trial Panel *summarised* the Prosecution's arguments for the item's admission,¹⁰ the Defence is unable to locate any passage in the Impugned Decision in which the Trial Panel actually assessed whether or not the Prosecution fulfilled the criteria for admission. The entire Decision is concerned solely with the Defence's purported inability to demonstrate why the item is inadmissible. This runs contrary to the requirements of Rule 138(1) of the Rules, as developed by this Court's jurisprudence and, indeed, the well-established principle that the burden of proving an item's *prima facie* authenticity, relevance and probative value lies with the tendering Party.¹¹

10. Crucially, the Trial Panel's approach to the Prosecution's Request offers a stark juxtaposition when considered alongside its approach to the Veseli Defence's Request to have certain items used with W04769 admitted.¹² In that instance, the Panel's assessment focused exclusively upon the demerits of the Defence's arguments.¹³ At no point was the Prosecution required to prove why any of the three items were inadmissible.¹⁴ It follows that within the context of the Prosecution Request to have P651 admitted, the onus of proof contained in Rule 138(1) of the Rules was promptly reversed and made to fall squarely with the Defence.

iii. Third Issue

11. At paragraph 28 of the Impugned Decision, the Trial Panel asserted that "there is no basis to suggest that documents originating from or provided by Serbian

¹⁰ Impugned Decision, para 12.

¹¹ See, Rule 138(1) of the Rules; F01409, *Decision on Specialist Prosecutor's Bar Table Motion*, 31 March 2023, confidential, para. 9.

¹² *C.f.*, Impugned Decision, paras 15-20 and 27-32.

¹³ Impugned Decision, paras 15-20.

¹⁴ Impugned Decision, paras 15-20.

authorities are *prima facie* suspicious.”¹⁵ The Defence did not make this claim. This is a mischaracterisation of its argument.

12. In its Response, the Defence pointed to an **array** of specific issues arising from P651’s substance and circumstance that rendered it dubious – including its near non-existent and highly contentious chain of custody involving two high-ranking agents of the Serbian State Security Department (“RDB”), whose efforts to falsify evidence to incriminate the KLA is well-documented. In arriving at its conclusion, the Trial Panel disregarded relevant ICTY jurisprudence,¹⁶ prosecutorial decisions,¹⁷ and other contemporaneous examples invoked by the Defence¹⁸ that cast significant doubt over the P651’s authenticity and reliability.

iv. Fourth Issue

13. At paragraph 28 of the Impugned Decision, the Trial Panel drew parallels between P651 and completely unrelated Serbian-derived documents tendered by the Thaçi Defence to suggest that evidence of Serbian origin was not suspicious.¹⁹ In so doing, the Panel paid little, if any, attention to the form and substance of P651 when compared to those tendered by the Thaçi Defence. The Defence notes, in this respect, that the documents tendered by Thaçi have nothing to do with the KLA, nor did they contain anything even remotely incriminating or similar to that contained in P651. Rather, all three of the Thaçi documents exist within the context of 1992 Croatian War of Independence and

¹⁵ Impugned Decision, para. 28.

¹⁶ ICTY, Prosecutor v. Đorđević, IT-05-87/1-T, Trial Chamber II, [Public Judgement with Confidential Annex Volume I of II](#), 23 February 2011, paras 143, 1262-1380.

¹⁷ IT-04-84 D00086.E; ICTY, Prosecutor v. Haradinaj et al., [Transcript](#), 23 May 2007, p.4685 et seq.

¹⁸ See, Defence Response, paras 20-22 within which specific attention is drawn to (i) Milan Petrović and Zoran Mijatović’s involvement with the item (fns 37-38); (ii) Petrović’s role as senior RDB member and subsequent leader of the Serbian War Crimes Prosecution Office (fn. 39); (iii) Petrović’s role in the twice-failed Prosecution of Ramush Haradinaj that saw overt instances of Serbian manipulation of evidence (fns 40 and 43); (iv) Clear personal motives for Petrović to act malignantly (fn. 42); and (v) Other well-document examples previously cited by the Defence (fn. 45).

¹⁹ Impugned Decision, para. 28 referring to 1D00059, 1D00060 and 1D00061.

were tendered for the sole purpose of establishing [REDACTED]'s military service.²⁰ To draw equivalence between these two sets of documents is demonstrative of a manifest error of reasoning on the part of the Trial Panel.

v. Fifth Issue

14. Between paragraphs 29 and 31, the Trial Panel determined that P651 was both authentic and reliable given that:
- a. It comprised various “factual details” including, *inter alia*, the names of alleged intelligence members whose roles and functions had been corroborated by other evidence;²¹
 - b. W04769 commented “on the substance of various elements” and corroborated “several pieces of information” contained in P651;²²
 - c. Other extracts from the same notebook contained no indication of forgery and were found to be authentic and reliable;²³
 - d. Nothing suggested that the information in P651 was “available to anyone outside of the KLA”;²⁴
 - e. Neither the differences in handwriting and vocabulary, the “misalignment” of ERNs, nor P651’s chain of custody suggested that incriminating pages of the notebook were forged or otherwise planted by a third party.²⁵
15. The Defence avers that the Panel’s assessment of P651 is laden with manifest errors of fact. Any reasonable arbiter would have concluded, at the very least,

²⁰ See, Transcript, 9 October 2023, T.8519-8523. See also, Transcript, 17 October 2023, T.8989-8990.

²¹ Impugned Decision, paras 29 and 31.

²² Impugned Decision, paras 29 and 31.

²³ Impugned Decision, paras 29 and 31.

²⁴ Impugned Decision, paras 29 and 31.

²⁵ Impugned Decision, paras 29-31.

that the item fell short of one or more of the admissibility requirements enumerated in Rule 138(1) of the Rules. The Defence notes, in this respect that the Panel's characterisation of P651 is highly misleading.

16. First and foremost, inasmuch as W04769 commented on portions of the item, those comments were restricted exclusively to mundane and inconsequential details contained in the item. For instance, (i) [REDACTED];²⁶ and (ii) [REDACTED].²⁷ Contrary to the Panel's analysis, W04769:
 - a. Said that he was unfamiliar with the [REDACTED] in P651;²⁸
 - b. Noted, with concern, the handwriting issues alluded to in the Response,²⁹ stating that the RDB "[REDACTED]."³⁰
 - c. Admonished the most incriminating pages of the item by explaining that he had never seen any documents allegedly authored by the KLA within which "[REDACTED]."³¹
 - d. Explicitly stated that "[REDACTED]."³²

It is on the basis of this testimony, in particular, that the Trial Panel's description of P651 as "factual"³³ is all the more concerning. Its contents was not verified by the witness, nor has it been verified in any other way. To claim that W04769 is a suitable authenticating witness would be to stretch the substance of his testimony beyond any reasonable limit.

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ 116072-116077, para. 27.

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ Impugned Decision, paras 29 and 31.

17. Secondly, the Panel's appeal to its own decision to admit documents taken from the very *same notebook* which the Defence strongly challenged, is in reality not a reason but an observation, which does not help to support the decision to admit P651.
18. Thirdly, it is clear on the evidence that the information contained in P651 was available to those outside the KLA because it was seized by Serbian forces in September 1998,³⁴ and turned over to the ICTY by Zoran Mijatović in 2001³⁵ and to SITF by Milan Petrović.³⁶ This *factual* conclusion is clear following any fair evaluation of the evidence cited in the Response.
19. Lastly, the Panel completely neglected to consider the details surrounding the use of different handwriting and vocabulary, on the most incriminating pages of the notebook. It did so without due regard for the item's severely compromised chain of custody which involved two of the most well-known Serbian agents who have made concerted and persistent efforts to impart wrongdoing upon the KLA.³⁷
20. It follows that a review of the Panel's factual conclusions in respect of P651 is required to properly assess the item's authenticity and reliability as an item of evidence against the Accused.

B. The Issues Significantly Affect the Fair and Expeditious Conduct of the Proceedings

21. It is plain and self-evident that all the **Five Issues** proposed are prone to directly affecting the outcome of these proceedings. As indicated above, the Decision is rife with manifest errors of law and fact that need to be addressed in order to

³⁴ See, Annex 1 to Defence Response, p. 1; Annex 2 to Defence Response, p. 1.

³⁵ See generally, U002-4932-U002-4935.

³⁶ SITF00254223-00254552, p. SITF00254407 et seq.

³⁷ Namely, Zoran Mijatović and Milan Petrović.

safeguard (i) the integrity of the Court's Rules of Procedure and Evidence; and (ii) the fair trial rights of the Accused – specifically that which guarantees that evidence declared in admissible will not be considered by the Trial Panel during its final deliberations.³⁸

C. An Immediate Resolution by the Appeals Chambers Will Materially Advance the Proceedings.

22. It follows that a positive resolution from the Appeals Chamber at this juncture would obviate the risk of any prejudice caused to the Accused, thereby materially advancing the proceedings. Moreover, an authoritative determination from the Court of Appeals Panel would provide clarity in respect of:

- a. The application of Rule 138(1) of the Rules – specifically the requirements of authenticity and reliability;
- b. The placement of the burden of proof when it comes to arguing an item's admissibility;
- c. The approach to be used when assessing specific documents of Serbian origin; and
- d. The myriad of factual uncertainties surrounding P651's authenticity and reliability, amongst other things.

V. CONCLUSION

23. In light of the foregoing, the Defence respectfully seeks leave to appeal the **Five Issues** identified above.

Word Count: 2,566

³⁸ See, Rule 139(1) of the Rules.

Respectfully submitted on Monday, 4 December 2023, in The Hague.



Gregory W. Kehoe

Counsel for Hashim Thaçi



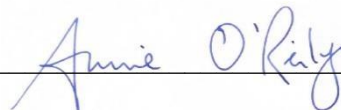
Ben Emmerson, CBE KC

Counsel for Kadri Veseli

/signed/

Andrew Strong

Co-Counsel for Kadri Veseli



Annie O'Reilly

Co-Counsel for Kadri Veseli



Geoffrey Roberts



Eric Tully

Counsel for Rexhep Selimi

Co-Counsel for Rexhep Selimi



Rudina Jasini

David Young

Co-Counsel for Rexhep Selimi

Co-Counsel for Rexhep Selimi



Venkateswari Alagendra

Counsel for Jakup Krasniqi



Aidan Ellis

Victor Băieșu

Co-Counsel for Jakup Krasniqi

Co-Counsel for Jakup Krasniqi