



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 29 February 2024

Language: English

Classification: Public

Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P959 and P960

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TRIAL PANEL II (“Panel”), pursuant to Article 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 77 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 30 January 2024, after hearing submissions from the Parties,¹ the Panel rendered an oral order admitting P959 and P960 into evidence (“Impugned Decision”).²
2. On 6 February 2024, the Defence for Mr Veseli (“Veseli Defence”) filed a request for leave to appeal the Impugned Decision (“Request”).³
3. On 19 February 2024, the Specialist Prosecutor’s Office (“SPO”) responded to the Request (“Response”).⁴
4. On 22 February 2024, the Veseli Defence replied to the Response (“Reply”).⁵

II. SUBMISSIONS

5. The Veseli Defence requests leave to appeal the Impugned Decision on the following issues (collectively, “Issues”):

- 1) Whether the Panel committed numerous errors of reasoning when it decided to admit P959 and P960 through W04870 (“First Issue”); and

¹ Transcript of Hearing, 29 January 2024, pp. 11971-11981, 12058-12060, confidential.

² Transcript of Hearing, 30 January 2024, pp. 12074-12075.

³ F02104, Specialist Counsel, *Veseli Defence Request for Leave to Appeal Decision to Admit P959 and P960*, 6 February 2024, confidential.

⁴ F02135, Specialist Prosecutor, *Prosecution Response to ‘Veseli Defence Request for Leave to Appeal Decision to Admit P959 and P960’ (F02104)*, 19 February 2024, confidential.

⁵ F02142, Specialist Counsel, *Veseli Defence Reply to Prosecution Response to ‘Veseli Defence Request for Leave to Appeal Decision to Admit P959 and P960’*, 22 February 2024, confidential.

- 2) Whether the Panel erred in law when it determined that authorship was not a factor relevant to admissibility but rather one for the weight to be attributed to the items at the deliberation stage (“Second Issue”).⁶

6. The Veseli Defence submits that the Issues satisfy the requirements for leave to appeal as: (i) they arise from the Impugned Decision, and do not merely disagree with it;⁷ (ii) are liable to significantly affect the fair and expeditious conduct of the proceedings;⁸ and (iii) require immediate resolution by the Court of Appeals in order to materially advance the proceedings.⁹ In relation to the First Issue, the Veseli Defence submits that the Panel erred in finding P959 and P960 admissible as it incorrectly applied the test for admissibility under Rule 138(1).¹⁰ In particular, according to the Veseli Defence, the Panel: (i) relied on supporting evidence in relation to the content of the documents as sufficient to establish *prima facie* authenticity without any consideration of authorship;¹¹ and (ii) failed to consider how the lack of any evidence of authorship not only impacted authenticity, but the assessment of relevance and probative value.¹² In relation to the Second Issue, the Veseli Defence submits that the Panel erred in its conclusion that the authorship of P959 and P960 was not an issue of admissibility but rather one of weight to be determined at the end of the trial, after having regard to the entire body of evidence.¹³ The Defence contends that such a finding is legally incongruent with the conditions of Rule 138(1) of the Rules.¹⁴

⁶ Request, paras 1-2, 37.

⁷ Request, paras 11-33.

⁸ Request, paras 11, 34.

⁹ Request, paras 11, 35.

¹⁰ Request, para. 12.

¹¹ Request, paras 20-25.

¹² Request, para. 28.

¹³ Request, para. 31.

¹⁴ Request, para. 32.

7. The SPO responds that the Request should be dismissed as the Issues submitted for certification fail to meet the standard that is set forth in Article 45(2) and Rule 77(2).¹⁵ In particular, the SPO submits that the Request: (i) fails to articulate any appealable issue; (ii) misinterprets the Rule 138(1) test for admissibility; (iii) disagrees with the Impugned Decision; and (iv) makes notable mischaracterisations.¹⁶ The SPO further contends that neither of the two Issues would have a significant impact on, or would materially advance, the proceedings.¹⁷ The SPO therefore requests the Panel to reject the Request.¹⁸

8. The Veseli Defence replies that the Response misunderstands and misstates the substance of the Request.¹⁹ The Veseli Defence submits that: (i) appellate intervention is required;²⁰ (ii) when considering admissibility and, therefore, relevance, probative value and authenticity of documents, authorship must be considered;²¹ (iii) the Defence was precluded from litigating the matter in full;²² (iv) the SPO conflates what the documents are and their content;²³ and (v) the absence of any available evidence of authorship is fatal to P959's and P960's admissibility.²⁴

III. APPLICABLE LAW

9. 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. Rule 77(2) provides that:

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

¹⁵ Response, para. 1.

¹⁶ Response, para. 3. *See also* Response, paras 4-10.

¹⁷ Response, paras 11-14.

¹⁸ Response, para. 16.

¹⁹ Reply, para. 2.

²⁰ Reply, para. 3.

²¹ Reply, paras 4-5.

²² Reply, para. 6.

²³ Reply, para. 7.

²⁴ Reply, paras 8-9.

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.

10. The Panel incorporates by reference the applicable law on the legal standard for certification to appeal set out in past decisions.²⁵

IV. DISCUSSION

11. At the outset, the Panel observes that triers of fact are afforded considerable discretion in deciding whether evidence is admissible or not, and certification to appeal admissibility decisions must be an absolute exception.²⁶ Such principles are reflected in the Court of Appeals Panel's holding that "appellate intervention in decisions relating to the admission of evidence is warranted only in very limited circumstances."²⁷ The Panel further reiterates that the admission of exhibits in these proceedings is primarily regulated by Rules 137 and 138(1), and not by considerations or factors extraneous to these provisions.

12. In considering the Request before it, the Panel first observes that, contrary to the Veseli Defence's argument,²⁸ it issued the Impugned Decision after hearing the

²⁵ F01237, Panel, *Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses*, 30 January 2023, paras 7-8; KSC-BC-2020-07, F00423, Panel, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect*, 8 November 2021, paras 13-21; F00372, Panel, *Decision on Haradinaj Defence's Application for Certification of F00328*, 15 October 2021, paras 15-17; F00484, Panel, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021, paras 4-14. See also F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, paras 6-7, 9-17.

²⁶ See e.g. ICTY, *Prosecutor v. Tolimir et al.*, IT-04-80-AR73.1, Appeals Chamber, [Decision on Radivoje Miletic's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused](#), 27 January 2006, para. 4; *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeals Chamber, [Judgement](#), 20 February 2001, para. 533; ICTR, *Nyiramasuhuko v. Prosecutor*, ICTR-98-42-AR73.2, Appeals Chamber, [Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence](#), 4 October 2004, para. 5; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC/F3328, Trial Chamber, [Decision Denying 'Sabra Request for Certification to Appeal Decision Admitting Statement of PRH024 under Rule 158'](#), 15 September 2017, para. 11.

²⁷ KSC-CA-2022-01, F00114, Court of Appeals, Appeal Judgment, 2 February 2023, para. 35.

²⁸ Reply, para. 6.

Parties.²⁹ In addition, the Panel notes that, in the Impugned Decision, it found that P959 and P960, which were discussed by W04870 during the course of the witness's direct examination by the SPO, "contain lists of names of persons who were allegedly detained by the KLA and other relevant information, the nature and extent of which seems to corroborate or to be corroborated by the account of other witnesses, including the evidence of W02161 and W04421, as well as other documentary evidence including exhibits P10, P104, P738, and 1D7."³⁰ The Panel further stressed that it was not deciding on the issue of authorship of P959 and P960 as it was unnecessary for the purpose of deciding their admission and would be considered when assessing weight and probative value of that evidence at the end of the trial having regard to the entire body of evidence.³¹ The Panel found that P959 and P960 are *prima facie* relevant, authentic and probative, and that their probative value is not outweighed by their prejudicial effect.³²

A. FIRST ISSUE

13. The Panel notes that, in the First Issue submitted for certification, the Veseli Defence argues that "the Panel committed *numerous errors of reasoning* when it decided to admit P959 and P960 through W04870".³³ The Panel is of the view that, in its formulation of the First Issue, the Veseli Defence failed to clearly identify one or more errors which it seeks leave to appeal. The Panel therefore finds that the First Issue, as formulated by the Veseli Defence, is not specific, discrete, or identifiable.³⁴ For these reasons, the Panel is of the view that the First Issue could

²⁹ Transcript of Hearing, 29 January 2024, pp. 11971-11981, 12058-12060, confidential.

³⁰ Impugned Decision, p. 12074.

³¹ Impugned Decision, pp. 12074-12075.

³² Impugned Decision, pp. 12075.

³³ Request, para. 2(a) (emphasis added).

³⁴ See e.g. F00172, Pre-Trial Judge, *Decision on the Taçi Defence Application for Leave to Appeal*, 11 January 2021, para. 11. See also ICC, Situation in the Democratic Republic of the Congo, ICC-01/04-168, [Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal](#), 13 July 2006, para. 9.

be dismissed *in limine*. However, the Panel takes into consideration that, in its submissions relating to the First Issue,³⁵ the Veseli Defence identified certain errors allegedly committed by the Panel. The Panel will therefore exceptionally entertain the arguments set forth by the Veseli Defence in its submissions relating to the First Issue.

14. It is apparent from the above that, contrary to the Veseli Defence's submissions,³⁶ the Panel assessed the admissibility criteria in relation to P959 and P960 as prescribed by Rule 138(1), and did not fail to consider the Defence's submission that the alleged lack of evidence of authorship impacted the Rule 138(1) assessment. For the reasons set out above,³⁷ the Panel was satisfied that the alleged lack of evidence regarding the authorship of P959 and P960 did not affect their *prima facie* relevance, authenticity, and probative value to a degree that would bar their admission. The Panel is therefore of the view that the First Issue misrepresents the Panel's findings and constitutes a mere disagreement with them as well as an attempt to re-litigate the admission of P959 and P960. Accordingly, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed in relation to the First Issue. The request for certification to appeal the First Issue is rejected.

B. SECOND ISSUE

15. As shown by the reasoning outlined above,³⁸ in the Impugned Decision the Panel found P959 and P960 admissible under Rule 138(1) and specified that, in reaching such conclusion, it was not called upon to make a determination as to their authorship as authorship goes to their weight and not to their admissibility, and, the Panel shall

³⁵ Request, paras 12-30.

³⁶ Request, paras 12, 20-25, 28. *See also* Reply, paras 4-5.

³⁷ *See above* para. 12.

³⁸ *See above* para. 12.

assess the weight and probative value of each piece of evidence at the end of the trial having regard to the entire body of evidence. The Panel is of the view that, contrary to the SPO's submissions in relation to the Second Issue,³⁹ whether the authorship of P959 and P960 goes to their weight or to their admissibility constitutes a discrete topic emanating from the Impugned Decision. The Panel accordingly finds that the Second Issue arises from the Impugned Decision.

16. As concerns the significant effect on the fair and expeditious conduct of the proceedings or the outcome of the trial, the Panel notes that its finding that the issue of authorship of P959 and P960 affects their weight rather than their admissibility: (i) was not the only factor leading to the admission of those exhibits;⁴⁰ and (ii) in any event, merely resulted in the admission into evidence of two exhibits whose evidentiary weight will be duly assessed at the end of trial, having regard to the entire body of evidence, and taking into account the alleged lack of evidence of their authorship. Certification to appeal decisions pertaining to the admission of evidence is warranted only in very limited circumstances.⁴¹ The Panel notes, furthermore, that the Defence put forth no authority that was applicable before this Panel that would have required it to decide the issue of authorship as a condition for admission of P959 and P960. Nor has the Veseli Defence established that, had the Panel decided the issue of authorship, its decision would have been any different.

17. Based on the above, the Panel finds that the Veseli Defence has not demonstrated how the Second Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Accordingly, the remaining requirement of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed in relation to the Second Issue. The request for certification to appeal the Second Issue is rejected.

³⁹ Response, paras 3-10.

⁴⁰ *See above* para. 12.

⁴¹ *See above* para. 11.

V. CLASSIFICATION

18. The Panel notes that the Request and the Reply were filed confidentially and that no public redacted versions have been filed thus far. The Panel therefore orders the Defence to file public redacted versions of the Request and the Reply, or request their reclassification as public, by Friday, 8 March 2024. For future filings, the Panel reminds the Defence of the Panel's oral order regarding the publicity of proceedings, wherein the Panel ordered the Parties and participants, as a matter of principle, to: (i) file simultaneously a public redacted version of their confidential filing; and (ii) when there are compelling reasons not to do so, to indicate in the classification section of the filing the reasons why a public redacted version thereof cannot be provided at the same time.⁴²

19. The Panel further notes that the SPO does not object to the reclassification of the Response as public.⁴³ The Panel therefore directs the Registry to reclassify the Response as public.

VI. DISPOSITION

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

- (a) **REJECTS** the Request;
- (b) **ORDERS** the Veseli Defence to file public redacted versions of the Request and the Reply, or request reclassification thereof, by **Friday**,

⁴² Transcript of Hearing, 7 November 2023, p. 9446, lines 13-20. See also F02067, Panel, *Decision on Joint Defence Request for Certification to Appeal Decision F01693*, 19 January 2024, para. 37.

⁴³ Response, para. 15.

8 March 2024; and

(c) **DIRECTS** the Registry to reclassify the Response as public.

A handwritten signature in black ink, reading "Charles L. Smith, III". The signature is written in a cursive style and is positioned above a horizontal line.

Judge Charles L. Smith, III

Presiding Judge

Dated this Thursday, 29 February 2024

At The Hague, the Netherlands.