

**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 Kadri Veseli

**Date:** 1 March 2024

**Language:** English

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**Veseli Defence Reply to the SPO's 'Consolidated Prosecution Response to Defence Certification Requests F02128 and F02131' (F02156)**

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**Specialist Prosecutor's Office**

Kimberly P. West

**Counsel for Hashim Thaçi**

Luka Misetić

**Counsel for Kadri Veseli**

Ben Emmerson

**Counsel for Victims**

Simon Laws

**Counsel for Rexhep Selimi**

Geoffrey Roberts

**Counsel for Jakup Krasniqi**

Venkateswari Alagenda

## I. INTRODUCTION

1. The Defence for Mr Kadri Veseli (“Defence”) hereby files this Reply to the SPO Response<sup>1</sup> to the Defence’s Request for leave Appeal the Trial Panel’s Second Rule 153 Decision.<sup>2</sup>

## II. SUBMISSIONS

2. At the outset, the Defence notes that the Response fails to meaningfully engage with the issues raised in the Request. The SPO equates Mr Veseli’s submissions with those raised by his co-Accused, without appreciating or, indeed, addressing nuances that distinguish Mr Veseli’s position. Mr Veseli’s identification of legal errors in the Impugned Decision are distinguishable. As such the SPO’s attempt to impute arguments advanced in respect of the Joint Request, to Mr Veseli, is both inattentive and unresponsive.<sup>3</sup>
3. In any event, what remains of the SPO’s Response misunderstands and misstates the substance of the Defence Request.
4. The Request clearly demonstrates appealable errors of law. As set out in the Request,<sup>4</sup> and succinctly summarised at paragraph 18 of the Response,<sup>5</sup> the errors identified include errors on the application of the Rules, which in turn have resulted in serious breaches of the Mr Veseli’s fundamental fair trial rights.

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<sup>1</sup> F02156, *Consolidated Prosecution response to Defence certification requests F02128 and F02131*, 28 February 2024, Public (“SPO Response”).

<sup>2</sup> F02131, *Veseli Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 153 (F02111)*, 15 February 2024, confidential (“Veseli Request”). A public redacted version was filed on 16 February 2024 (F02131/RED). F02111, *Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W04016, W04019, W04044, W04305, W04361, W04722, W04816, W04850, W04851, and W04852 pursuant to Rule 153*, 8 February 2024, confidential (“Impugned Decision”). A public redacted version was filed on 8 February 2024 (F02111/RED).

<sup>3</sup> SPO Response, paras. 18-19.

<sup>4</sup> Veseli Request, paras 7-26.

<sup>5</sup> SPO Response, para. 18.

5. Contrary to the SPO's assertions, the Defence did not argue that the Panel is required to specifically reference *every* Defence submission in order to render a sound, reasoned, decision.<sup>6</sup> The Defence argued that the Trial Panel did not provide **any** proper basis for the Impugned Decision. In circumstances where the Defence raise well-founded and reasoned submissions on issues of importance, a decision which fails to grapple with those submissions – and gives no indication which submissions (by *either* party) are accepted or rejected is defective for want of reasoning.
6. The Defence maintains that the Trial Panel failed to carry out a transparent and reasoned balancing of relevant considerations. This is a particularly serious error considering the importance of the rights in question – *i.e.* the burden of proof and the right to confront witnesses. The Panel failed to explain why, in the absence of any expressly asserted reason for seeking to admit the witnesses in question *via* Rule 153 (i) such a profound incursion on the Accused's rights was warranted; (ii) the Defence submissions were rejected; or (iii) these witnesses were found to be 'exceptional.'
7. The fact that the Panel denied the SPO Request in relation to some witnesses is wholly irrelevant to any determination of whether it erred in the manner asserted by the Defence and can have no bearing on any determination for leave to appeal.<sup>7</sup> This fact cannot support the submission that the law was correctly applied in the instances under review. Further, even if it were the case that the Panel has correctly interpreted and applied the law under Rule 153 for certain applications (which the Defence does not concede), that does not, and cannot, mean that the Panel is therefore incapable of misapplying the law in

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<sup>6</sup> SPO Response, para. 20.

<sup>7</sup> SPO Response, para. 20.

other instances and is infallible when it comes to any and all future Rule 153 decisions.

8. It is noted that throughout the SPO response, there is clear questioning and disregard of the Defence assertions that the evidence in question is central and unique to the Defence's case. This is clearly a matter within the knowledge and professional judgment of Defence counsel, who do not, at this stage in the proceedings, have obligations of disclosure akin to those incumbent upon the SPO.<sup>8</sup> The Defence clearly demonstrated, in the Joint Response to the Rule 153 application, as well as in the Request for leave to appeal, its vested interest in cross-examining W04722 and W04816.<sup>9</sup> It is wrong and unhelpful for the SPO to seek to undermine, without any proper basis, the professional judgement of their colleagues as to what evidence they deem to be important to their case and requires challenge.
9. It is submitted that when the Defence, on a good faith basis, asserts that a witness is unique, central or important to their case, such a witness cannot possibly be fairly admitted under Rule 153 without evidence of exceptional circumstances. The Defence observes that there remains no evidence proffered by the SPO to suggest that either W04722 or W04816 ought to be admitted through Rule 153. Indeed, it is clear that the SPO does not regard Rule 153 as an exceptional method for the admission of witness-based evidence but rather one which assists in streamlining its case.<sup>10</sup>
10. The Defence does not assert that the right to confront witnesses is absolute; it is, however, a fundamental guarantee which should not be so easily and readily

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<sup>8</sup> *C.f.* Rule 95(4) and 95(5) of the Rules, as well as Rules 102-103 and 104 of the Rules.

<sup>9</sup> F02063, *Joint Defence Response to Prosecution motion for the admission of the evidence of witnesses W04016, W04019, W04044, W04305, W04361, W04722, W04816, W04850, W04851, and W04852 pursuant to Rule 153 (F01994)*, 15 January 2024, confidential, paras 33-40 (W04722) and 41-46 (W04816); Veseli Request, para. 15.

<sup>10</sup> Transcript, 21 February 2024, p. 12775, lines 8-23.

disposed.<sup>11</sup> It can only be limited when there is a competing right or interest which requires preference. No such right or interest has been asserted by the SPO, who have provided no reasons at all for their choice of witnesses which are the subject of these applications. The goals of convenience or expediency are incapable of trumping a right as fundamental as the right to confront evidence.

11. In seeking broad deference to determine when cross-examining witnesses is required, and to conduct Mr Veseli's case as his Defence sees fit, the Defence does not challenge Rule 153 more generally, but seeks the same deference the SPO has been given to call their evidence in the order and manner it deems appropriate. The Defence seeks no more than parity. More pertinently, it seeks no more than adequate protection of Mr Veseli's right to challenge important evidence against him.
12. Finally, the suggestion that "[Mr] Veseli's logic would lead to a situation whereby any objection to proposed Rule 153 testimony would result in that witness testifying orally"<sup>12</sup> is, again, yet another misstatement and unhelpful mischaracterisation of the Defence argument. The Panel is referred to the Defence submissions at paragraphs 19 to 24 of the Request, where the Defence makes well-founded submissions as to why the *specific* admission of W04722 and W04816, *via* Rule 154, violate Mr Veseli's fair trial rights.<sup>13</sup>

### III. CLASSIFICATION

13. This filing is classified as public as it responds to a filing bearing the same classification.

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<sup>11</sup> *Contra*, SPO Response, paras 14 and 21.

<sup>12</sup> SPO Response, para. 21.

<sup>13</sup> Veseli Request, paras 19-24.

IV. CONCLUSION

14. In light of the foregoing, the Defence requests that leave to appeal is granted in accordance with the relief sought in its original Request.

**Word Count: 1,230**



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Ben Emmerson, CBE KC  
Counsel for Kadri Veseli

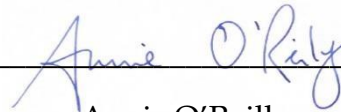
Friday, 1 March 2024,  
The Hague, The Netherlands



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Kerrie Ann Rowan  
Co-Counsel for Kadri Veseli

Friday, 1 March 2024,  
The Hague, The Netherlands



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Annie O'Reilly  
Co-Counsel for Kadri Veseli

Friday, 1 March 2024,  
The Hague, The Netherlands