



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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: Specialist Prosecutor's Office

Date: 4 April 2024

Language: English

Classification: Public

Public Redacted Version of 'Prosecution response to 'Veseli Defence Request for Leave to Appeal Decision to Admit P1046' (F02198)'

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I. INTRODUCTION

1. The Request¹ fails to meet the standard for certification² set forth in Article 45(2) of the Law³ and Rule 77(2) of the Rules.⁴ As this Trial Panel recently observed, ‘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’.⁵ None of the Three Issues⁶ identified by the Defence rise to the level that would warrant exceptional relief. As such, the Request should be dismissed.

II. SUBMISSIONS

A. FIRST ISSUE

2. Prong A of the First Issue is not appealable, as it merely disagrees with the Trial Panel’s decision and is based, in part, on the already-considered argument that evidence of factual errors in the document undermines its authenticity.⁷ Moreover, the Defence has not identified any provision in the legal framework or relevant precedent supporting its assertion that admissibility of evidence used and tendered in direct examination should

¹ Veseli Defence Request for Leave to Appeal Decision to Admit P1046, KSC-BC-2020-06/F02198, 25 March 2024, Confidential (‘Request’).

² The applicable law has been set out in prior decisions. *See, for example*, Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021 (‘Thaçi Certification Decision’), paras 9-17; *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect, KSC-BC-2020-07/F00423, 8 November 2021, paras 11-21.

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

⁴ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (‘Rules’). All references to ‘Rule’ or ‘Rules’ herein refer to the Rules, unless otherwise specified.

⁵ Decision on Veseli Defence Request for Leave to Appeal Decision to Admit P959 and P960, KSC-BC-2020-06/F02157, 29 February 2024 (‘P959 and P960 Decision’), para.11, *citing, inter alia*, *Specialist Prosecutor v. Gucati and Haradinaj*, Appeal Judgment, KSC-CA-2022-01/F00114, 2 February 2023, para.35.

⁶ *See* Request, KSC-BC-2020-06/F02198, para.2, defining the ‘First Issue’, ‘Second Issue’, and ‘Third Issue’ (collectively, ‘Three Issues’).

⁷ Request, KSC-BC-2020-06/F02198, paras 11-12; Transcript, 18 March 2024, pp.13145-13146, 13183.

only be determined after cross-examination.⁸ In any event, the ‘further relevant evidence’ elicited on cross that the Defence alleges was not considered by the Panel⁹ had already been discussed with the witness during examination-in-chief and was known to the Panel when the document was admitted.¹⁰ As no prejudice is shown, the Defence fails to meet the cumulative test requirement of a significant impact on either the fair and expeditious conduct of the proceedings or on the outcome of the trial.¹¹

3. Although Prong B of the First Issue, as defined, focuses on the Panel’s actions after the SPO made its admissibility submissions, the way the procedural history is set out misleadingly suggests that the Trial Panel denied the Defence of *any* opportunity to argue the admissibility of P1046. Despite the Defence’s claim to the contrary,¹² the Trial Panel did *not* decline to hear the Defence’s argument on the admissibility of P1046 before the evidence of W04811 began. Rather, Defence Counsel was permitted to argue *at length* about the admissibility of the document and focused particularly on authenticity, discussing alternative inferences, offering hypothetical scenarios, arguing that any evidence the witness could offer regarding the contents of the document would not be capable of authenticating it, and claiming that if there is no evidence the document was authored by the KLA, it could not be relevant, probative, or admissible.¹³ As the SPO had not yet attempted to use the document—the witness had not even entered the courtroom

⁸ Indeed, the Conduct of Proceedings Order specifically provides that the Panel will generally rule upon admissibility at the time that the exhibit is tendered, and only when it is more practical, the Panel may decide to postpone admissibility decisions until the conclusion of the witness’s evidence. *See* Order on the Conduct of the Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023 (‘Conduct of Proceedings Order’), para.119.

⁹ Request, KSC-BC-2020-06/F02198, paras 11-12, 14 and fn.8 *citing* Transcript, 18 March 2024, p.13222. [REDACTED].

¹⁰ *See* Transcript, 18 March 2024, pp.13173, 13175-13177.

¹¹ *See* Thaçi Certification Decision, KSC-BC-2020-06/F00172, paras 12-14.

¹² Request, KSC-BC-2020-06/F02198, para.8.

¹³ Transcript, 18 March 2024, pp.13143-13146.

at that point—the Trial Panel rightly ruled that the Defence’s objection on admissibility was premature.¹⁴

4. Similarly, after the SPO made submissions to tender the document into evidence, the Trial Panel noted that the Defence’s previous arguments about the document’s admissibility were already on the record and did not need to be repeated, but gave the Defence an opportunity to respond to the SPO’s specific submissions.¹⁵ Rather than making such a response¹⁶—even in regard to cited exhibits that had just been discussed during W04811’s examination-in-chief¹⁷—the Defence instead asked the Panel to defer its decision.¹⁸ The Panel then exercised its discretion, having heard admissibility arguments from both sides, which included those made by the Defence at the beginning of the hearing, and determined that the *prima facie* threshold had been satisfied.

B. SECOND ISSUE

5. The showing for the Second Issue also fails the certification test. The Defence asserts that leave to appeal should be granted to ensure that ‘[o]nly those items which meet the requirements of Rule 138 are admitted into the record’,¹⁹ but the alleged error defined by the Defence is limited to ‘the reasoning in deciding to admit P1046’.²⁰ As such, the Defence

¹⁴ Transcript, 18 March 2024, p.13147; Request, KSC-BC-2020-06/F02198, para.8.

¹⁵ Transcript, 18 March 2024, p.13182; Request, KSC-BC-2020-06/F02198, para.9 and *contra* paras 13-14.

¹⁶ Parties are generally expected to make their objections at the time the exhibit is tendered. *See* Conduct of Proceedings Order, KSC-BC-2020-06/F01226/A01, para.47. The Defence’s general request for additional time to examine the references in the SPO’s submissions was inadequate to justify any exception, considering, *inter alia*, that the SPO’s admissibility submissions were repetitive of and based on prior submissions and decisions, including in relation to similar documents, and cited exhibits just discussed during W04811’s examination in chief. *See* fn.17 below.

¹⁷ Transcript, 18 March 2024, pp.13161-13166 (discussing P738), 13166-13171 (discussing P10), 13171-13172 (discussing P104), 13181-13182 (citing P10, P104, P738 and 1D7 as corroborating exhibits).

¹⁸ Transcript, 18 March 2024, p.13182; Request, KSC-BC-2020-06/F02198, para.9.

¹⁹ Request, KSC-BC-2020-06/F02198, para.21b.

²⁰ Request, KSC-BC-2020-06/F02198, para.2b.

fails to identify a concrete or identifiable issue,²¹ or show that the issue has significant repercussions on either the fair and expeditious conduct of proceedings or the outcome of the trial.

6. Moreover, by focusing on one word in the decision without acknowledging or engaging with the detailed submissions on which the findings were based or on the relevant precedent cited, the Defence expresses mere disagreement with the Decision without identifying any appealable error. The Trial Panel correctly applied Rule 138(1) when it admitted P1046, adhering to the interpretation of admissibility criteria that has already been clarified and consistently applied at this Court. Contrary to the Defence's arguments,²² the Panel had numerous indicia of reliability and authenticity before it that substantiated the document's admission, including corroborating information that appeared in other admitted exhibits, [REDACTED]. The Defence's contention that the contents of the document were incorrect does not preclude its admission,²³ particularly since the SPO offered the list not to establish the truth of its contents, but in support of the fact that the KLA gathered information on alleged collaborators.²⁴ Moreover, absolute proof of authenticity or reliability is not required at the stage of admissibility but may impact the weight the Panel gives the evidence in reaching its final judgment.²⁵

²¹ In this respect, the issue, as framed, does not identify what part of the Decision or its reasoning is being challenged; it is only through the submissions in support that further specificity is provided.

²² Request, KSC-BC-2020-06/F02198, paras 16-17.

²³ *Contra* Request, KSC-BC-2020-06/F02198, para.17.

²⁴ Transcript, 18 March 2024, pp.13181-13182. *Contra* Request, KSC-BC-2020-06/F02198, para.17.

²⁵ *See, for example, Specialist Prosecutor v. Mustafa*, Public redacted version of Decision on the admission of evidence collected prior to the establishment of the Specialist Chambers and other material, KSC-BC-2020-05/F00281/RED, 13 December 2021, para.12; *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on the Defence Request for Admission of Items through the Bar Table and Related Matters, KSC-BC-2020-07/F00502, 17 December 2021, para.11. *See also* ICTR, *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgment, 26 May 2003, para.33 ('At the stage of admissibility, the beginning of proof that evidence is reliable, in other words, that sufficient indicia of reliability have been established, is quite admissible'); ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the *Decision on Prlić*

7. Finally, the Defence asserts that appellate intervention at this juncture ‘would obviate the risk of any prejudice caused to the Accused’, contending that certification would rectify the Panel’s error in regard to P1046 and ‘prevent further errors of reasoning in future decisions on Rule 138’.²⁶ This claim is speculative. In regard to any alleged ‘prejudice caused’, the weight that the Panel will ultimately assign to P1046 has not yet been established—and cannot be established until all the evidence is before the Panel for consideration at the end of proceedings.

C. THIRD ISSUE

8. Contrary to the Defence’s arguments that the Trial Panel failed to give reasons for the decision to admit P1046,²⁷ and consistent with the submissions above, the Panel’s decision shows that it considered all relevant factors, correctly applying the criteria of Rule 138.²⁸ It was within the Panel’s discretion not to articulate every detail supporting its decision to admit the document, particularly after having heard detailed submissions from the Parties and after recently issuing a decision that involved many of the same corroborating exhibits and witnesses and similar Defence objections.²⁹ Further, at the end of the proceedings, the Panel is required to issue a reasoned judgment, which will allow the Defence to verify the weight assigned the exhibit. Accordingly, in the circumstances, none of the leave to appeal criteria are met for the Third Issue.

Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, paras 34-37.

²⁶ Request, KSC-BC-2020-06/F02198, para.22.

²⁷ Request, KSC-BC-2020-06/F02198, paras 2c, 19.

²⁸ Transcript, 18 March 2024, p.13183.

²⁹ See P959 and P960 Decision, KSC-BC-2020-06/F02157.

9. As stated above, granting leave to appeal admissibility decisions should be an 'absolute exception'.³⁰ The Defence has failed to demonstrate any reasons that warrant exceptional relief.

III. CLASSIFICATION

10. This filing is classified confidentially pursuant to Rule 82(4).

IV. RELIEF REQUESTED

11. For the reasons discussed above, the Request fails to meet the standard for certification and should be rejected.

Word count: 1,795



Kimberly P. West

Specialist Prosecutor

Thursday, 4 April 2024

At The Hague, the Netherlands.

³⁰ See para.1, *supra*. See also ICTR, *Nyiramasuhuko v. Prosecutor*, ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's request for reconsideration, 27 September 2004, para.10.