In:	**KSC-BC-2020-07**
	The Prosecutor v. Hysni Gucati and Nasim Haradinaj
Before:	**Pre-Trial Judge**
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Nasim Haradinaj
Date:	19 March 2021
Language:	English
Classification:	**Confidential**

Application for Leave to Appeal through Certification of Decision KSC-BC-2020-07/ F00150 pursuant to Article 45(2) and Rule 77(1)

Specialist Prosecutor

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I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law on Specialist Chambers and Specialist Prosecutor's Office Law No.05/L-053 ("Law") and Rule 77 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("RPE"), it is respectfully submitted that the Pre-Trial Judge should grant the request for leave to appeal the "Decision on Request for Information on Diplomatic Meeting" rendered on 11 March 2021 ("Impugned Decision").[1]

2. Leave to appeal is sought on the following primary issues:

   a. That the Pre-Trial Judge erred in finding that "no decision" has already been made by the President as to the appointment of a Single Judge to the trial of Mr. Gucati and Mr. Haradinaj,[2] given that the President voiced a *de facto* decision she had taken in this regard at the said diplomatic meeting and recorded such a finding in the diplomatic note;

   b. That the Pre-Trial Judge erred in rejecting the disclosure for information concerning the diplomatic meeting on the grounds that the disclosure is "not relevant" to Mr. Haradinaj's *charges*,[3] given

[1] Decision on Request for Information on Diplomatic Meeting, KSC-BC-2020-07/ F00150, Public, 11 March 2021 ("Impugned Decision").
[2] Impugned Decision, at para. 15.
[3] Impugned Decision, at para. 13.

international case law has established that "egregious" violations of fundamental rights of the accused, including due process rights and the right to a fair trial, may lead to the *dismissal of charges* of an accused;

c. That the Pre-Trial Judge erred in finding that the disclosure requests do not fall within any of the disclosure categories,[4] given that the Pre-Trial Judge contradicted himself on this point in his Decision: He required the requesting party to "demonstrate why access to this information is necessary to ensure the fairness and the expeditiousness of the proceedings"[5] – which is a formulation directly taken from the Pre-Trial Judge's discretion to issue *any* order (including disclosure) in Article 39(3) of the Law. In setting this threshold the Pre-Trial Judge recognised that such disclosure can be ordered;

d. That the Pre-Trial Judge failed to give sufficient or any weight to relevant considerations of Mr. Hardinaj's right to a fair trial and due process in denying the disclosure and that it is an established principle of international human rights law that it constitutes an abuse of process to put a person on trial where the fundamental

[4] Impugned Decision, at para. 13.
[5] Impugned Decision, at para. 15.

protection of the right to a fair trial by an independent and impartial tribunal established by law cannot be guaranteed; and

e. That, in light of the above, the Pre-Trial Judge erred in the exercise of his discretion under Article 39(3) or (10) of the Law in not granting the Haradinaj Defence disclosure requests.

II. BACKGROUND

3. On 23 February 2021, Mr. Haradinaj requested the disclosure of material relating to a diplomatic briefing conducted by the President of the Specialist Chambers ("Request") which raised concerns with respect to statements and decisions by the President about the present case.[6]

4. On 26 February 2021, the Specialist Prosecutor's Office ("SPO") responded to the Request ("Response")[7] indicating that it's Office was not represented at the diplomatic briefing in question that is said to have occurred on 11 February 2021.

[6] Defence Submissions Following Order Setting the Date for the Second Conference and Related Matters, KSC-BC-2020-07/F00129 ("Request"), 23 February 2021, public, paras. 43-54.
[7] Prosecution Response to the Haradinaj Defence Request for Information Concerning Diplomatic Briefings ("Response"), 26 February 2021, public.

5. On 3 March 2021, Mr. Haradinaj replied to the Response ("Reply"),[8] in particular seeking disclosure from the SPO as to whether it had attended diplomatic briefings on occasions other than 11 February 2021. The SPO failed to respond to the further request.

6. On 11 March 2021, the Pre-Trial Judge rendered his Decision on the Request ("Impugned Decision"), rejecting disclosure.[9]

III. LAW

7. As per Rule 77(2) RPE, certification to appeal against a decision shall be granted 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*."

8. As per Article 21 of the Law:

[8] Defence Reply to Prosecution Response to the Haradinaj Defence Request for Information Concerning Diplomatic Briefings ("Reply"), 3 March 2021, public.
[9] Decision on Request of Information on Diplomatic Meeting, KSC-BC-2020-07/ F00150, Public, 11 March 2021 ("Impugned Decision").

"2. In the determination of charges against him or her, the accused shall be entitled to a ***fair and public hearing****…"* (emphasis added)

9. Further, as per Article 39 of the Law:

"3. ***The Pre-Trial Judge may****, at the request of the Specialist Prosecutor,* ***issue*** *such orders and warrants for the arrest and transfer of persons to the Specialist Chambers and* ***any other orders as may be required*** *for the conduct of the investigation and* ***for the preparation of a fair and expeditious trial,*** *including orders pertaining to a special investigative opportunity and special investigative measures."* (emphasis added)

"10. The Pre-Trial Judge may, at the request of any person arrested or appearing pursuant to a summons, issue such orders as may be necessary to assist the person in preparation of his or her defence."

IV. SUBMISSIONS

10. The test for certification to appeal pursuant to Article 45(2) of the Law and Rule 77(2) RPE is met.

(i) *The issues at hand would significantly affect the fair and expeditious conduct of the proceedings*

11. The Pre-Trial Judge erred in his finding that the President had rendered "no decision"[10] as to the appointment of a Single Judge Panel for the trial of Mr. Gucati and Mr. Haradinaj.[11] It is contended that the Pre-Trial Judge's finding is plainly wrong because *de facto* the President explicitly expressed such a decision and informed the diplomatic representatives accordingly.

12. In the Diplomatic Note the President stated clearly and unequivocally:

> "The case against Mr. Gucati and Mr. Haradinaj **will be** handled by a Single Judge…An exact date for the commencement of this trial will be communicated to the public as soon as the Pre-Trial Judge issues a decision to this effect…The same purpose informed **my decision** to request the presence of the Single Judge in the Gucati and Haradinaj at the court as of 1 February [2021]." (emphasis added)

13. There can be no confusion that the President had made the decision to appoint a single judge and had in fact requested the judge to be present at the court. This is clearly not a statement where there can be any ambiguity.

14. Moreover, it is respectfully submitted that throughout the briefing note, the President expresses a view, on consideration of matters that may well come before the Basic Court, Court of Appeal or Supreme Court, the latter over

[10] Impugned Decision, at para. 15.
[11] Impugned Decision, at para. 15.

which she presides, that amount to a determination of the issues. That in itself provides a reasonable basis to believe, that an objective observer might, on balance, conclude that the objective test of impartiality is met.

15. It is not noted that the applicable process stipulated in the Rules for the assignment of a Trial Panel, the notification by Pre-Trial Judge to the President, has not taken place. This appeal does not seek to argue that the Pre-Trial Judge has notified the President, as the Pre-Trial Judge has confirmed that there was "no decision".[12] However, it is quite clear that at the diplomatic meeting the President had unilaterally decided to designate a Single Panel Judge and even informed diplomats on the next steps in securing the presence of a designated judge to preside over the trial of Mr. Gucati and Mr. Haradinaj. This clearly demonstrates that the President had made a determination, months before she is even formally given notice to make such a decision on assignment. This is of significant concern to the Defence. It amounts to a pre-determination of a fundamental question as to the trial process. One might reasonably enquire, in the absence of full and complete disclosure, what other decisions have already been made and communicated to diplomats, without the knowledge or presence of counsel for the accused,

[12] Impugned Decision, at para. 15.

and potentially in breach of orders for confidentiality that protects the integrity of the proceedings.

16. The Office of the President has communicated in response to the unintended disclosure of the confidential briefing note, that the information concerned matters already in the public domain, namely the subject of public court filings. Secondly, it has been suggested that such a practice is not without precedence.

17. It is respectfully submitted that such a position is simply unsustainable.

18. In regard to the above, one must take note of the fact that the diplomatic note of 11 February 2021 has now been made public, due to an administrative oversight. It was inadvertently disclosed and the Office of the President sought to conceal its contents as 'a confidential briefing' and sought to argue that this was standard practice for a judicial institution of this kind. This raises two important issues.

19. First, it would tend to indicate that it is not an isolated incident, due to the fact that it is not unprecedented and the Office of the President, in their response to media queries, provided the following text:

> "…It was delivered as part of ~~the regular updates~~ a briefing to the EU Heads of Mission in The Hague which President Trendifilova ordinarily provides on a bi-annual basis."

20. The strikethrough in the text was clearly not intended to be communicated to the media, but reveals a distinct lack of transparency. Further, the response to the media further goes on to state that it was intended for "internal use" and the contents should be treated as confidential, which further reinforces a lack of transparency.

21. Therefore, such statements, and in particular, any pre-emptive or pre-determined decisions by a representative body of the court that will according to the Rules be called upon to take judicial decisions in the same case significantly affect the fair and expeditious conduct of the trial.

22. Second, the Office of the President stated in their response to the media that "[this] is not unprecedented and it is indeed routine practice of similarly situated courts." In this regard, it must be recalled that the Specialist Chambers is an institution of the Republic of Kosovo established under a national act of parliament. Whilst it is not accepted that such a practice is commonplace amongst international, *ad hoc* or hybrid tribunals, it is noted that the KSC is neither of these. It is a national institution whose international character is exclusively geographical.

23. The suggestion that such a practice is not unprecedented or uncommon is not accepted. It would set a very dangerous precedent if such confidential briefings were permitted to take place, to discuss confidential matters that are

sub judice, in the absence of the parties, and before an audience that may have a vested interest in the outcome of the proceedings.

24. For the above reasons, the Pre-Trial Judge's refusal to grant such disclosure threatens the fairness and expeditiousness of the proceedings. The Pre-Trial Judge therefore erred in not exercising his discretion to order such disclosure pursuant to Article 39(3) or (10) of the Law and sufficiently considering due process rights and the right to a fair trial of the accused.

(ii) *The issue at hand significantly affects the outcome of the trial*

25. The extent to which any *de facto* decisions have been made by the President is a matter which directly affects the outcome of the trial.

26. At the ICTR, it has been held that "egregious" violations of fundamental rights of the accused must result dismissal of the charges and the release of the accused.[13] It is submitted that where serious violations of due process rights and the right of a fair trial are alleged, and where potentially more have happened in previous meetings and may well continue to happen if the President's statements are not reviewed and scrutinized, this could lead to an abuse of process. An abuse of process would require proceedings to be terminated "if improper or illegal procedures are employed in pursuing an

[13] ICTR, *Barayagwiza v. The Prosecutor*, ICTR-97-19-AR72, Decision of the Appeal Chamber, 3 November 1999, paras. 73-106

otherwise lawful process."[14] Accordingly, the request for disclosure could significantly affect the outcome of the trial.

(iii) ***An immediate resolution by the Court of Appeal may materially advance the proceedings***

27. The pre-emptive decision on the appointment of a Single Judge to the Trial Panel of Mr. Haradinaj and Mr. Gucati in its current form is prejudicial to the two defendants and the outcome of the proceedings.

28. The remedy sought at this stage is for an order of full disclosure directed at the President relating to further relevant statements made about the case at diplomatic meetings behind closed doors and the Specialist Prosecutor to confirm whether he, or any member of his staff, attended this or any such briefing session or submitted written notes to this or any other such briefing. Reviewing whether the Pre-Trial Judge should have made such an order is a remedy that is within the remit of the Court of Appeal.

29. In remedying the refusal of the disclosure request, the Court of Appeal would provide the opportunity for the Defence to review whether any further *de facto* decisions have been pre-empted or pre-determined regarding the defendants. Thus, the proceedings would be materially advanced.

[14] *Ibid.*, at para. 74ff.

V. CONCLUDING REMARKS

30. The original submissions of Counsel for Mr. Haradinaj in the Request are maintained for the purposes of the appeal.

31. The relevant test per Article 45(2) of the Law and Rule 77(2) of the Rules has been satisfied, and accordingly, leave to appeal ought to be granted.

Word Count: 2408 words

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