



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

In: KSC-BC-2020-07
Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 25 March 2021

Language: English

Classification: Public

**Prosecution response to applications for leave to appeal the Decision on Defence
Preliminary Motions**

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Requests¹ for leave to appeal the Preliminary Motions Decision² should be rejected because they fail to meet the requirements for leave to appeal under Article 45 of the Law³ and Rule 77 of the Rules.⁴ None of the Issues⁵ constitute ‘appealable’ issues, as all are insufficiently discrete. The Defence also fails to substantiate why the other leave to appeal criteria are met.

II. THE REQUIREMENTS FOR GRANTING LEAVE TO APPEAL HAVE NOT BEEN MET

2. Interlocutory appeals are an exceptional remedy.⁶ In accordance with Article 45(2) and Rule 77(2), the following strict requirements apply:

- (1) Whether the matter is an ‘appealable issue’;
- (2) Whether the issue at hand would significantly affect:
 - i. The fair and expeditious conduct of the proceedings, or
 - ii. The outcome of the trial; and
- (3) Whether, in the opinion of the Panel, an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁷

3. As stated in the *Thaçi et al.* case concerning appealable issues:

¹ Application for Leave to Appeal through Certification from Decision KSC-BC-2020-07/F00147 pursuant to Article 45(2) and Rule 77(1), KSC-BC-2020-07/F00151, 15 March 2021 (‘Gucati Request’); Application for Leave to Appeal through Certification from Decision KSC-BC-2020-07/F00147 pursuant to Article 45(2) and Rule 77(1), KSC-BC-2020-07/F00153, 15 March 2021 (‘Haradinaj Request’) (collectively, ‘Requests’). It is noted that the Haradinaj Defence filed a duplicate version of its request (KSC-BC-2020-07/F00156), which has been disregarded.

² Decision on Defence Preliminary Motions, KSC-BC-2020-07/F00147, 8 March 2021.

³ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (‘Law’). All references to ‘Article’ or ‘Articles’ herein refer to articles of the Law, unless otherwise specified.

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 Gucati Request, KSC-BC-2020-07/F00151, para.3; Haradinaj Request, KSC-BC-2020-07/F00153, para.6. All five issues are the same in both requests.

⁶ *Prosecutor v. Thaçi et al.*, Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021 (reclassified 14 January 2021) (‘*Thaçi et al.* Decision’), para.9.

⁷ See generally *Thaçi et al.* Decision, KSC-BC-2020-06/F00172, paras 9-17.

Only an “issue” may form the basis of an appealable decision. An “issue” has been described as an identifiable topic or subject, the resolution of which is essential for determination of the matters arising in the judicial cause under examination, and not merely a question over which there is disagreement or conflicting opinion. An appealable issue requires the applicant to articulate clearly discrete issues for resolution by the Court of Appeals Panel that emanate from the ruling concerned and do not amount to abstract questions or hypothetical concerns. It is generally insufficient to argue that the entirety of the Pre-Trial Judge’s reasoning is erroneous.⁸

A. NONE OF THE ISSUES ARE APPEALABLE ISSUES

4. All five Issues are framed in the same way, referencing the law applied by the PTJ and alleging that the PTJ erroneously applied that law to co-perpetrators,⁹ accomplices,¹⁰ assisted/incited persons,¹¹ and/or formulations,¹² and certain open-ended language¹³ in the Indictment.¹⁴ The Defence does not appear to challenge the law as stated by the PTJ, and no further specificity is given as to the alleged errors. Such argumentation is tantamount to challenging the entirety of the PTJ’s reasoning on these points, and is insufficiently discrete to constitute appealable issues. The Defence merely disagrees with the PTJ’s conclusions.

5. As the leave to appeal test is cumulative, the failure to identify any appealable issue must lead to rejecting the Requests. Nevertheless, the remaining criteria are addressed below for completeness.

⁸ *Thaçi et al.* Decision, KSC-BC-2020-06/F00172, para.11.

⁹ Gucati Request, KSC-BC-2020-07/F00151, para.3(i); Haradinaj Request, KSC-BC-2020-07/F00153, para.6(a).

¹⁰ Gucati Request, KSC-BC-2020-07/F00151, para.3(ii); Haradinaj Request, KSC-BC-2020-07/F00153, para.6(b).

¹¹ Gucati Request, KSC-BC-2020-07/F00151, para.3(iii); Haradinaj Request, KSC-BC-2020-07/F00153, para.6(c).

¹² Gucati Request, KSC-BC-2020-07/F00151, para.3(iv); Haradinaj Request, KSC-BC-2020-07/F00153, para.6(d).

¹³ Gucati Request, KSC-BC-2020-07/F00151, para.3(v); Haradinaj Request, KSC-BC-2020-07/F00153, para.6(e).

¹⁴ Annex 2 to Submission of confirmed Indictment, KSC-BC-2020-07/F00075/A02, 14 December 2020 (‘Indictment’).

B. NONE OF THE ISSUES SIGNIFICANTLY AFFECT THE FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS OR THE OUTCOME OF THE TRIAL

6. The Defence argues that the Issues meet this criterion because of the importance of the Indictment in the present proceedings.¹⁵ The fact that indictments are important documents cannot be enough on its own to justify granting leave to appeal. If it could, this would make any allegation of an indictment being in any way defective effectively appealable as of right. The statutory framework of the KSC clearly indicates otherwise,¹⁶ and the Defence fails to argue why these particular alleged defective Indictment issues justify granting leave to appeal.

7. In any event, the Preliminary Motions Decision does not amount to a denial of any information relating to the Issues and sought by the Defence. Rather, it draws a distinction between the material facts that must be pleaded in the indictment and the evidence which will prove such facts.¹⁷ The Issues concern information which the Pre-Trial Judge considered was best addressed at trial.¹⁸ In this regard, the Defence has been provided or will be provided the ‘particulars’ it seeks – to the extent such information is relevant and available – through the disclosure process, Rule 86(3)(b) outline, confirmation decision, and Rule 95(4) documents.¹⁹ In these circumstances – where the Defence will receive all information necessary to its preparations in a timely manner and in accordance with the established framework – the Issues can have no impact on the fairness and expeditiousness of the proceedings or the outcome of the trial.²⁰

¹⁵ Gucati Request, KSC-BC-2020-07/F00151, paras 13-20; Haradinaj Request, KSC-BC-2020-07/F00153, paras 44-48.

¹⁶ Article 45(2); Rule 97(1)(a) and (3).

¹⁷ Preliminary Motions Decision, KSC-BC-2020-07/F00147, para.40.

¹⁸ Preliminary Motions Decision, KSC-BC-2020-07/F00147, paras 40, 51-52, 57-59, 63, 70.

¹⁹ Preliminary Motions Decision, KSC-BC-2020-07/F00147, paras 40, 51, 57.

²⁰ See, similarly, ECtHR, *Previti v. Italy*, no.45291/06, Decision on Admissibility, 8 December 2009, para.208; ECtHR, *Sampech v. Italy*, no.55546/09, Decision on Admissibility, 19/5/2015, para.110. See also Gucati Request, KSC-BC-2020-07/F00151, para.21, citing ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Judgement, 28 November 2007, para.325.

8. The Defence fails to substantiate how this criterion is met.²¹

C. GRANTING LEAVE TO APPEAL ON ANY OF THE ISSUES WOULD NOT MATERIALLY ADVANCE THE PROCEEDINGS

9. As any issues in understanding the Indictment can be resolved in the course of trial, an interlocutory appeal on alleged defects in the Indictment is not necessary to ensure that the proceedings are on the right course.

10. In the present proceedings, the SPO is to file its Pre-Trial Brief by 9 April 2021²² and the Defence is to file its Pre-Trial Brief by 14 June 2021.²³ In the amount of time it would take to resolve an interlocutory appeal, the pre-trial proceedings will have advanced considerably. Trial proceedings are also anticipated to be concluded in a relatively short period of time. In these circumstances, the Defence will generally have an adequate and timely opportunity to raise procedural issues in the context of a final appeal.

11. For these reasons, granting leave to appeal on any of the Issues would not materially advance the proceedings. Rather, interlocutory appeal in the current circumstances would only delay the imminent transfer of the case to the trial panel and the start of trial proceedings.²⁴

III. CONFIDENTIALITY

12. It is noted that the Gucati Request is classified as public, and that the Haradinaj Defence has no objection to its request being so reclassified.²⁵ Noting Rule 82(4) and

²¹ See, similarly, ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-PT, Decision on Defence Motions for Certifications, 22 April 2009 ('*Stanišić and Župljanin Decision*'), paras 12-13 (finding that, as the alleged defects were matters to be dealt with at trial and in any event, would depend on the evidence of which the Defence would receive notice, there would be no significant impact on the fair and expeditious conduct of the proceedings).

²² Consolidated Calendar for the Remainder of the Pre-Trial Proceedings, KSC-BC-2020-07/F00148, 8 March 2021 ('*Consolidated Calendar*'), para. 6(a)(vii).

²³ Consolidated calendar, KSC-BC-2020-07/F00148, para. 6(ii)(4).

²⁴ See, similarly, *Stanišić and Župljanin Decision*, para.14.

²⁵ Haradinaj Request, KSC-BC-2020-07/F00153, para.2.

the fact that no confidential information is included in the present filing, this filing is classified as Public.

IV. RELIEF REQUESTED

13. For the foregoing reasons, the Requests be rejected in their entirety.

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Jack Smith

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Thursday, 25 March 2021

At The Hague, the Netherlands.