



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: 30 March 2021

Language: English

Classification: Confidential

**Prosecution response to request for leave to appeal the Decision on Request for
Information on Diplomatic Briefing**

Specialist Prosecutor's Office

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Toby Cadman

I. SUBMISSIONS

1. The Request¹ for leave to appeal the Diplomatic Briefing Decision² was filed out of time³ and could be summarily dismissed on that basis alone. However, even if considered on its merits, the Request does not meet the applicable test for granting leave to appeal⁴ and should be rejected accordingly.

2. First, none of the Issues⁵ constitute 'appealable' issues.

3. The First Issue misrepresents the facts underlying the Diplomatic Briefing Decision. The Pre-Trial Judge explained that a decision on assignment could only occur after resolution of preliminary motions and would be immediately notified to the parties; as correctly indicated by the Pre-Trial Judge, no such decision has been rendered to date. There can be no '*de facto* decision' taken on an issue which cannot be decided yet. The First Issue is a mere disagreement with the Pre-Trial Judge's conclusions and the statutory framework of the Specialist Chambers.

¹ Application for Leave to Appeal through Certification of Decision KSC-BC-2020-07/ F00150 pursuant to Article 45(2) and Rule 77(1), KSC-BC-2020-07/F00159, 19 March 2021, Confidential (notified 22 March 2021) ('Request'), *joined by Gucati Defence in Joinder* re Application for Leave to Appeal through Certification of Decision KSC-BC-2020-07/F00150 pursuant to Article 45(2) and Rule 77(1), KSC-BC-2020-07/F00158, 18 March 2021, Confidential. From the Legal Workflow Metadata, it appears that the Haradinaj Defence filed an application with the same title on 18 March 2021 (KSC-BC-2020-07/ F00156). However, filing KSC-BC-2020-07/F00156 was just a duplicate of completely separate leave to appeal application (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). Noting that the Request was not actually notified to the SPO until 22 March 2021, the deadline for this response is 1 April 2021 (Rules 9(2) and 76).

² Decision on Request for Information on Diplomatic Briefing, KSC-BC-2020-07/F00150, 11 March 2021 ('Diplomatic Briefing Decision').

³ Pursuant to Rule 77(1) of the Rules, a party seeking leave to appeal must do so within seven days of the impugned decision. The Diplomatic Briefing Decision was notified on 11 March 2021. Following Rules 9 and 77, any application for leave to appeal that decision had to have been filed by 18 March 2021. However, the Request was not filed until the evening of 19 March 2021 and not notified until 22 March 2021. There is no indication that the Haradinaj Defence asked for an extension of the leave to appeal deadline, rather it appears to have simply filed late without explanation.

⁴ The applicable framework as previously set out is recalled: Prosecution response to applications for leave to appeal the Decision on Defence Preliminary Motions, KSC-BC-2020-07/F00161, 25 March 2021, paras 2-3.

⁵ Request, KSC-BC-2020-07/F00159, para.2 – para.2(a) ('First Issue'), para.2(b) ('Second Issue'), para.2(c) ('Third Issue'), para.2(d) ('Fourth Issue') and para.2(e) ('Fifth Issue') (together the 'Issues').

4. The Second Issue is based on a misapprehension of the disclosure framework, a misrepresentation of the Diplomatic Briefing Decision and a false premise. The Pre-Trial Judge correctly held that the disclosure sought - of material relating to the judicial administration of the Specialist Chambers, not in the possession of the SPO and unrelated to the charges - falls outside of the applicable rules of disclosure. No violation of any right of the accused - let alone an 'egregious' one warranting dismissal of the charges - has been established on even a *prima facie* basis. The Haradinaj Defence's bare assertions do not alter that fact. Consequently, the Second Issue does not arise from the Diplomatic Briefing Decision.

5. The Third Issue similarly reflects the Haradinaj Defence's misunderstanding of the disclosure framework and constitutes a misrepresentation of the Diplomatic Briefing Decision. There is no contradiction in the Pre-Trial Judge finding that a matter falls outside of the rules addressing disclosure, but nonetheless potentially within his general powers to ensure the fair and expeditious preparation of proceedings. As such, the Third Issue does not arise from the Diplomatic Briefing Decision.

6. The Fourth Issue again misrepresents the Diplomatic Briefing Decision. Despite having found that the disclosure requested fell outside of applicable disclosure rules - and notwithstanding the fact that the Haradinaj Defence had failed to plead any legal basis at all for the relief sought - the Pre-Trial Judge proceeded *proprio motu* to specifically consider whether the issue was such that exercise of his general powers to ensure fair and expeditious preparations for trial was warranted.⁶ As such, the Haradinaj Defence's submission that the Pre-Trial Judge failed to give any or sufficient weight to fair trial considerations is without foundation. The Haradinaj Defence simply disagrees with the Pre-Trial Judge's conclusion.

7. Similarly, in respect of the Fifth Issue, the Haradinaj Defence alleges that the Pre-Trial Judge abused his discretion by not granting the disclosure sought. This undeveloped and unsubstantiated argument constitutes mere disagreement with the

⁶ Diplomatic Briefing Decision, KSC-BC-2020-07/F00150, para.15.

Pre-Trial Judge's conclusions and with the entirety of the reasoning. As such, it is not an appealable issue.

8. While the Pre-Trial Judge need not proceed to consider the further requirements of Rule 77, it is apparent that they are not met. The Issues are all premised on speculation, forecasting decisions not yet made and seeking disclosure to prematurely investigate alleged fair trial violations that have not occurred. Accordingly, none of the Issues have any impact on the fair and expeditious conduct of the proceedings or the outcome of the trial. For the same reasons, an interlocutory appeal would do nothing to advance the proceedings.

II. CONFIDENTIALITY

9. This filing is confidential in accordance with Rule 82(4). The SPO has no objection to reclassifying it as public.

III. RELIEF REQUESTED

10. For the foregoing reasons, the SPO the Request should be dismissed in its entirety.

Word count: 944



Jack Smith

Specialist Prosecutor

Tuesday, 30 March 2021

At The Hague, the Netherlands.