



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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

Before: **Pre-Trial Judge**
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 9 April 2021

Language: English

Classification: **Public**

**Decision on the Defence Applications for Leave to Appeal
the Decision on Request for Information on Diplomatic Briefing**

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 45(2) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 77 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 11 March 2021, the Pre-Trial Judge issued the "Decision on Request for Information on Diplomatic Briefing" ("Impugned Decision") rejecting Nasim Haradinaj's ("Mr Haradinaj") request for further disclosures after the release of a communiqué emanating from the Office of the President of the Specialist Chambers ("SC") and relating to an 11 February 2021 meeting briefing various members of diplomatic missions ("Diplomatic Briefing").²

2. On 19 March 2021, the Mr Haradinaj filed his request for leave to appeal,³ and Hysni Gucati ("Mr Gucati") joined in this request⁴ ("Haradinaj Request", "Gucati Request", respectively, and collectively referred to as "Certification Requests").

3. On 30 March 2021, the Specialist Prosecutor's Office ("SPO") submitted a consolidated response to the Certification Requests ("SPO Response").⁵

¹ KSC-BC-2020-07, F00061, President, *Decision Assigning a Pre-Trial Judge*, 29 October 2020, public.

² KSC-BC-2020-07, F00150, Pre-Trial Judge, *Decision on Request for Information on Diplomatic Briefing* ("Impugned Decision"), 11 March 2021, public.

³ KSC-BC-2020-07, F00159, Defence for Mr Haradinaj, *Application for Leave to Appeal through Certification of Decision KSC-BC-2020-07/F00150 Pursuant to Article 45(2) and Rule 77(1)* ("Haradinaj Request"), 19 March 2021, confidential.

⁴ KSC-BC-2020-07, F00158, Defence for Mr Gucati, *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)* ("Gucati Request"), 18 March 2021, confidential.

⁵ KSC-BC-2020-07, F00167, Specialist Prosecutor, *Prosecution Response to Request for Leave to Appeal the Decision on Request for Information on Diplomatic Briefing* ("SPO Response"), 30 March 2021, confidential.

4. On 6 April 2021, Mr Gucati filed a reply (“Gucati Reply”).⁶
5. On 7 April 2021, Mr Haradinaj filed a reply (“Haradinaj Reply”).⁷

II. SUBMISSIONS OF THE PARTIES

6. The Defence for Mr Haradinaj requests leave to appeal the Impugned Decision on the following five issues (“Five Issues”):

- (a) Whether 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, 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 (“First Issue”);⁸
- (b) Whether the Pre-Trial Judge erred in rejecting the disclosure for information concerning the Diplomatic Briefing on the grounds that the disclosure is “not relevant” to Mr Haradinaj’s charges, given that 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 (“Second Issue”);⁹
- (c) Whether the Pre-Trial Judge erred in finding that the disclosure requests do not fall within any of the disclosure categories, given that the Pre-Trial Judge contradicted himself on this point in the Impugned Decision by

⁶ KSC-BC-2020-07, F00174, Defence for Mr Gucati, *Reply to Prosecution Response to Request for Leave to Appeal the Decision on Request for Information on Diplomatic Briefing* (“Gucati Reply”), 6 April 2021, confidential.

⁷ KSC-BC-2020-07, F00176, Defence for Mr Haradinaj, *Defence Reply to the SPO Response to the Request for Leave to Appeal the Decision on Request for Information on Diplomatic Briefing* (“Haradinaj Reply”), 7 April 2021, confidential.

⁸ Haradinaj Request, para. 2(a).

⁹ Haradinaj Request, para. 2(b).

requiring the requesting party to “demonstrate why access to this information is necessary to ensure the fairness and the expeditiousness of the proceedings,” 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, and thereby recognising that such disclosure can be ordered (“Third Issue”);¹⁰

- (d) Whether the Pre-Trial Judge failed to give sufficient or any weight to relevant considerations of Mr Haradinaj’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 protection of the right to a fair trial by an independent and impartial tribunal established by law cannot be guaranteed (“Fourth Issue”);¹¹ 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 disclosure requests (“Fifth Issue”).¹²

7. In the Gucati Request, Mr Gucati joins the aforementioned submissions.¹³

8. The SPO responds that the Haradinaj Request was filed out of time and could be summarily dismissed on this basis alone.¹⁴ The SPO further responds that, even if considered on its merits, the Certification Requests do not meet the test for granting leave to appeal as none of the issues constitute appealable issues.¹⁵ The SPO further argues that the Certification Requests should be rejected as they fail to meet the requirements for leave to appeal under Rule 77 of the Rules.¹⁶

¹⁰ Haradinaj Request, para. 2(c).

¹¹ Haradinaj Request, para. 2(d).

¹² Haradinaj Request, para. 2(e).

¹³ Gucati Request, para. 1.

¹⁴ SPO Response, para. 1.

¹⁵ SPO Response, paras 2-7

¹⁶ SPO Response, para. 8.

9. Mr Gucati replied that the Gucati Request was timely¹⁷ and that the Haradinaj Request presents five appealable issues related to the independence and impartiality of the SC.¹⁸ Mr Gucati further replies that the SPO seeks to argue issues that go to the merits or the substance of the appeal, which are issues not to be considered at the current stage of proceedings whereby only leave to appeal is being sought.¹⁹

10. Mr Haradinaj replies that, contrary to the SPO's submissions, the Haradinaj Request presents five appealable issues²⁰ and should be deemed to have been submitted on time.²¹

III. APPLICABLE LAW

11. Pursuant to Article 45 of the Law, a Court of Appeals Panel shall hear interlocutory appeals from an accused or from the Specialist Prosecutor in accordance with the Law and the Rules. Interlocutory appeals, other than those that lie as of right, must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel on the basis that it involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.

12. Rule 77(2) of the Rules further provides that the Panel shall grant certification 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

¹⁷ Gucati Reply, para. 3.

¹⁸ Gucati Reply, paras 4-5.

¹⁹ Gucati Reply, para. 6.

²⁰ Haradinaj Reply, paras 20-35.

²¹ Haradinaj Reply, paras 6-19.

which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

IV. DISCUSSION

A. LEGAL TEST

13. A right to appeal arises only if the Panel is of the opinion that the standard for certification set forth in Article 45(2) of the Law and Rule 77(2) of the Rules has been met.²² The Pre-Trial Judge recalls the interpretation of these provisions as set out in detail previously.²³

14. Mindful of the restrictive nature of this remedy, the following specific requirements apply:

- (a) Whether the matter is an “appealable issue”;
- (b) 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
- (c) Whether, in the opinion of the Pre-Trial Judge, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.²⁴

²² See also KSC-2020-06, F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal* (“Thaçi Decision on Leave to Appeal”), 11 January 2021, public, para. 9. Similarly, ICC, *Situation in the Democratic Republic of the Congo, ICC-01/04-168, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal* (“ICC-01/04-168, Judgment on Extraordinary Review”), 13 July 2006, para. 20.

²³ See KSC-2020-07, F00169, Pre-Trial Judge, *Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions*, 1 April 2021, public, paras 10-18.

²⁴ Thaçi Decision on Leave to Appeal, para. 10.

B. TIMELINESS OF THE HARADINAJ REQUEST

15. As a preliminary matter, the Pre-Trial Judge notes that the Haradinaj Request was filed a day after the requisite deadline. Rule 77(1) of the Rules provides that requests for certification for leave to appeal shall be filed within seven days of the Impugned Decision. The Impugned Decision was filed and notified on 11 March 2021 and therefore a request for certification to appeal was required on 18 March 2021. Mr Haradinaj, however, did not file the present request until 19 March 2021. The Pre-Trial Judge notes that, within the requisite deadline, Mr Haradinaj filed a document which purported to be the current request for leave to appeal, but whose contents related to another matter.²⁵ When this oversight was brought to the attention of Mr Haradinaj, he filed the present request that same day.²⁶ The Pre-Trial Judge also notes that the Gucati Defence joined the Haradinaj Request on 18 March 2021, albeit without the content of the appeal being on record. In these specific circumstances, the Pre-Trial Judge does not consider the Haradinaj Request to be untimely.

C. THE FIVE ISSUES

1. First Issue

16. Mr Haradinaj submits that it is clear from the Diplomatic Briefing that the President has made a decision to appoint a Single Judge and had in fact requested the Judge to be present at the Court, which amounts to a pre-determination of a fundamental question as to trial process.²⁷ The SPO responds that the First Issue amounts to mere disagreement with the Pre-Trial Judge's conclusions and the statutory framework of the SC.²⁸

²⁵ KSC-BC-2020-07, F00156, Defence for Mr Haradinaj, *Application for Leave to Appeal through Certification of Decision KSC-BC-2020-07-F00147 Pursuant to Article 45(2) and Rule 77(1)*, 18 March 2021, confidential.

²⁶ KSC-BC-2020-07/CRSPD30, *Email re Filing F00156 as duplicate of F00153*, 19 March 2021.

²⁷ Haradinaj Request, paras 2(a), 11-15.

²⁸ SPO Response, para. 3.

17. The Pre-Trial Judge recalls that the Impugned Decision sets out the circumstances under which a Trial Panel may be assigned under the Law and the Rules and thereby established that no such ruling has been made.²⁹ Mr Haradinaj's assertion that a *de facto* ruling was made by the President amounts to mere disagreement with that assessment.

18. The Pre-Trial Judge accordingly finds that the First Issue is not appealable.

2. Second Issue and Third Issue

19. Mr Haradinaj submits that the Pre-Trial Judge erred in rejecting the disclosure of information concerning the Diplomatic Briefing given that (i) violations of fundamental rights of the accused may lead to the dismissal of charges and are therefore relevant to the charges³⁰ and (ii) the Pre-Trial Judge contradicted himself when he required the requesting party to "demonstrate why access to this information is necessary to ensure the fairness and expeditiousness of proceedings".³¹ The SPO responds that Mr Haradinaj misapprehends the Impugned Decision and thus the issues do not arise from the Impugned Decision.³²

20. In the Impugned Decision, the Pre-Trial Judge first considered whether the information sought could be provided to the Defence through the applicable rules on disclosure.³³ Upon finding this avenue foreclosed,³⁴ the Pre-Trial Judge considered whether the need to ensure the fair and expeditious preparation of proceedings warranted provision of the information sought.³⁵ In the Impugned Decision, the Pre-Trial Judge also found that the need for information sought had not been substantiated by Mr Haradinaj, notably in the absence of an assignment decision potentially

²⁹ Impugned Decision, para. 15.

³⁰ Haradinaj Request, para 2(b).

³¹ Haradinaj Request, para. 2(c).

³² SPO Response, para. 4.

³³ Impugned Decision, paras 13-14.

³⁴ Impugned Decision, paras 13-14.

³⁵ Impugned Decision, para. 15.

implicating an issue of fairness.³⁶ Mr Haradinaj consequently misrepresents the Impugned Decision when he asserts that the Pre-Trial Judge erred by not ordering disclosure and that he presented a contradiction when outlining the various avenues for obtaining the information being sought. The Pre-Trial Judge considers that the Second Issue and Third Issue amount to mere disagreement with the assessment that disclosure of the information sought in relation to the Diplomatic Briefing was not warranted.

21. The Pre-Trial Judge accordingly finds that the Second Issue and Third Issue are not appealable.

3. Fourth Issue

22. Mr Haradinaj submits that the Pre-Trial Judge failed to give sufficient or any weight to relevant considerations of his right to a fair trial and due process.³⁷ The SPO responds that Mr Haradinaj misrepresents the Impugned Decision and simply disagrees with the Pre-Trial Judge's conclusions.³⁸

23. The Pre-Trial Judge recalls that the Impugned Decision specifically considered whether issues of fairness warranted the requested disclosure.³⁹ Mr Haradinaj misrepresents the Impugned Decision.

24. The Pre-Trial Judge accordingly finds that the Fourth Issue is not appealable.

4. Fifth Issue

25. Mr Haradinaj submits that the Pre-Trial Judge erred in the exercise of his discretion under Article 39(3) or (10) of the Law in not granting the requested disclosure.⁴⁰ The SPO responds that the Fifth Issue constitutes mere disagreement with

³⁶ Impugned Decision, para. 15.

³⁷ Haradinaj Request, para. 2(d).

³⁸ SPO Response, para. 6.

³⁹ Impugned Decision, para. 15.

⁴⁰ Haradinaj Request, paras 2(d), 24.

the Pre-Trial Judge's conclusions and therefore does not amount to an appealable issue.⁴¹

26. The Pre-Trial Judge notes that Mr Haradinaj does not provide any further argumentation in relation to this issue. In so far as the Fifth Issue relates to and builds upon all the other issues presented by Mr Haradinaj, the Pre-Trial Judge considers his findings above that these issues do not amount to appealable issues.

27. The Pre-Trial Judge accordingly finds that the Fifth Issue is not appealable.

D. CONCLUSION

28. Having found that the Certification Requests do not present appealable issues, the Pre-Trial Judge will not assess the remainder of the legal test for certifying a request for leave to appeal.

V. RECLASSIFICATION

29. The Pre-Trial Judge notes that Certification Requests, the SPO Response, the Gucati Reply, and Haradinaj Reply have been filed confidentially. Finding no basis for maintaining the confidential classification, the Pre-Trial Judge accordingly directs the Registry to reclassify F00158, F00159, F00167, F00174, and F00176 as public.

VI. DISPOSITION

30. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **REJECTS** the Certification Requests; and

⁴¹ SPO Request, para. 7.

- b. **ORDERS** the Registry to reclassify F00158, F00159, F00167, F00174, and F00176 as public.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Friday, 9 April 2021
At The Hague, the Netherlands.