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:	30 April 2021
Language:	English
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Further Defence Submissions Following Order Setting the Date for the Fourth Status Conference (KSC-BC-2020-07/F00187)

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I. INTRODUCTION

1. On 22 April 2021, the Pre-Trial Judge issued its Order 'Setting the Date for the Fourth Status Conference'.[1]

2. Within that Order, the Defence (and the Specialist Prosecutor's Office ('SPO')) were invited to make submissions on various issues as cited.

3. The Defence filed its written observations on 28 April 2021 as directed, it now seeks to make the following additional observations on those points in the Order raised by the Pre-Trial Judge, following receipt of the Written Submissions of the SPO and the Registrar, specifically those points that relate to the pre-trial proceedings compliance with Article 6(1) and Article 6(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR').

4. It is noted that the Registry of the Kosovo Specialist Chambers ('KSC') has affirmed its commitment to ensuring the Defence has "adequate time and facilities for the preparation of their defence" although there appears to be some disagreement as to the scope of the right and the degree to which it applies to the present proceedings, the Defence for Mr. Haradinaj recognises that the Registry, and by extension the Specialist Chambers, its obligation to secure such rights. However, it is with some regret that the matter is raised

[1] KSC-BC-2020-07/F00187

here, as there continues to be very real concerns over the ability or willingness to comply with such obligations in practice and they have now reached the point that requires intervention by the Pre-Trial Judge.

5. The Defence invites the Pre-Trial Judge to consider issuing an order for full and unrestricted access to the Defendant in the KSC Detention Management Unit ('DMU'), following significant impediments concerning practical and effective legal assistance for the purposes of the preparation of the Defence, which have a fundamental impact on these proceedings and the preparation for trial. It is recognised that there will need to be health measures in place, but not to the extent that they continue to hamper defence preparations.

II. THE PROCEDURAL BACKGROUND

6. The procedural background as highlighted within the **Order** of the Pre-Trial Judge is noted, and adopted for the purposes of these submissions without being further rehearsed.

7. Where reference to the procedural background and/or chronology is necessitated, it will be addressed within the body of the submissions below.

III. THE LAW

8. The applicable law in respect of these submissions is addressed within the **Order** of the Pre-Trial Judge and therefore, there is no need to rehearse the same here.

9. Once again, where reference to the law is warranted, it will be dealt with in the context of the specific issue being addressed.

IV. ISSUES OF DISCUSSION

Visits to DMU – Unrestricted Access to the Defendant in order to prepare for trial

10. It is respectfully submitted that there remain considerable obstacles concerning the ability of Counsel for Mr. Haradinaj to properly and effectively receive instructions, and subsequently advising for the purposes of preparing a Defence. Therefore, it is respectfully submitted that the present conditions are not in accordance with the strict application of the provisions of the European Convention of Human Rights ('ECHR'): Article 6(3)(b) and Article 6(3)(c).

Preparation of the Defence – Adequate Facilities (Article 6(3)(b) ECHR)

11. The aforementioned provision implies that the substantive defence activity on the Accused's behalf may comprise everything which is "necessary" to

prepare for trial. Thus, the Accused must have the opportunity to organise his Defence in an appropriate way and without restriction as to the ability to put all relevant Defence arguments before the trial court and to influence the outcome of the proceedings.[2]

12. According to the ECHR case-law, the "facilities" which must be granted to the Accused are restricted to those which assist or may assist him in the preparation of his Defence.[3]

13. The following correspondence is relevant in this respect: 7 April 2021 at 11:46, Counsel for Haradinaj informed the Head of Defence Office David Hein, via e-mail, that it is impractical to provide his client with documents through the guards, specifically because of Defence Counsel's need to guide his client through the case file of a total of 4,000 pages in order to take instructions from him. Although not specifically raised, where those documents have not been fully translated this makes the task even more burdensome. Accordingly, it is respectfully submitted that Article 6(3)(b) guarantees also bear relevance for an Accused's access to the file and in this context, these guarantees overlap with the principles of the equality of arms pursuant to Article 6(1).[4]

[2] *Gregačević v. Croatia*, Appl. no. 58331/09, 10 July 2012, para 51.

[3] *Mayzit v. Austria*, Appl. no. 63378/00, 20 January 2005, para 79.

[4] *Rowe and Davis v. The United Kingdom*, Appl. no. 28901/95, 16 February 2000, para 59; *Leas v. Estonia*, Appl. no. 59577/08, 6 March 2012, para 76.

14. Furthermore, according to the case-law of the European Court of Human Rights, the "facilities" provided to an Accused include consultation with his legal representatives as well as the opportunity for an Accused to confer with his Defence Counsel, which is incumbent to the preparation of his Defence.[5]

15. Accordingly, it is submitted that an issue under Article 6(3)(b) has arisen in that the presence of a glass partition between Counsel and his client is presenting a serious impediment in relation to the Accused's effective consultation with his lawyer.[6]

16. It is established that the aforementioned provision under the ECHR overlaps with a right to legal assistance under Article 6(3)(c) ECHR, which is of high relevance in this present case, particularly with regards to the glass partition on the basis of health and safety.

Access to a lawyer, practical and effective legal assistance – Article 6(3)(c) ECHR

17. According to the ECHR case-law, Article 6(3)(c) encompasses particular aspects of the right to a fair trial within the meaning of Article 6(1), in that the

[5] *Campbell and Fell v. United Kingdom*, Appl. no. 7819/77; 7878/77, 28 June 1984, para 99; *Can v. Austria*, Appl. no. 9300/81, Report of the Commission (adopted on 12 July 1984), para 52.

[6] *Yaroslav Belousov v. Russia*, Appl. nos. 2653/13 and 60980/14, 4 October 2016, paras 148-153.

right to be effectively defended by a lawyer is one of the fundamental features of a fair trial.[7]

18. Once again, the following correspondence is of relevance: the e-mail dated 7 April 2021 at 11:46 between Counsel for Haradinaj and the Head of Defence Office. Defence Counsel explained the circumstances in which he met with his client in detention by stating that he was separated by a glass partition with the only method of communication being through a telephone link, the sound of which was poor and which Mr. Haradinaj had difficulties hearing. As a result of this, the measures that are currently in place will continue to impact Defence preparations.

19. It is respectfully submitted that Counsel for Haradinaj is experiencing an inability to confer with his client and therefore, according to the ECHR, if this is indeed the case, the lawyer's assistance loses much of its usefulness and becomes ineffective.[8] Therefore, this clearly amounts to a serious limitation on lawyer-client relationship, which is thwarting the effective legal assistance to which a Defendant is entitled.[9]

[7] *Ibrahim and Others v. The United Kigndom*, Appl. nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, para 255.

[8] *Brennan v. The United Kingdom*, Appl. no. 39846/98, 16 October 2011, para 58.

[9] *Sakhnovskiy v. Russia*, Appl. no. 21272/03, 2 November 2010, para 102.

20. The measure imposed in relation to the glass partition affects "*indiscriminately everyone in the remand centre, regardless of their personal circumstances*."[10] Furthermore, "*the impossibility for the applicant to discuss with his lawyers issues directly relevant to his defence…without being separated by a glass partition, affected his right to defence*."[11]

21. The issues encountered in relation to the method of communication between Counsel and the Accused due to the existence of a glass partition as well as due to the hearing difficulties via telephone link also present risks pertinent to the confidentiality of the conversation.[12]

22. The above limitations concern the following:

a. The presence of a glass partition;

b. An inadequate method of communication;

c. The client's inability to confer with his lawyer and *vice versa*;

d. Inability to prepare an adequate and proper defence.

23. Accordingly, the right to a fair trial is compromised in cases where the consultation can only take place in the following circumstances:

[10] *Castravet v. Moldova*, Appl. no. 23393/05, 13 March 2007, paras 57-58.

[11] *Ibid*, para 60.

[12] *Cebotari v. Moldova*, Appl. no. 35615/06, 13 November 2007, paras 58-68; *Udovenko v. Ukraine*, Appl. no. 33040/08, 11 March 2021, paras 42-43.

a. In the presence of a prison guard;[13]

b. In the presence of police officers;[14] or

c. By means of a glass partition in order to communicate with a lawyer.[15]

24. Nevertheless, certain security measures could be allowed if proven truly necessary, ordinarily on the basis of security reasons,[16] and in this present case, it is respectfully submitted that the measures imposed are unnecessary.

25. The following correspondence is relevant for the following line of reasoning:

a. On 7 April 2021 at 8:30, the Head of the Defence Office indicated that the measures imposed in relation to the glass partition will stay in effect until after persons detained are fully vaccinated;

b. On 7 April 2021 at 14:51, the Registry Head of Judicial Services Division advised Counsel for Haradinaj, via e-mail, that the technical equipment available to all Defence teams, together with the infrastructures, protects individuals, thereby allowing for proper preparation with the client;

[13] *S. Switzerland*, Appl no. 12629/87; 13965/88, 28 November 1991.

[14] *Rybachi v. Poland*, Appl. no. 52479/99, 13 January 2009, paras 53-62.

[15] *Castravet v. Moldova*, Appl. no. 23393/05, 13 March 2007, paras 59-60.

[16] *Lanz v. Austria*, Appl. no. 24430/94, 31 January 2002.

c. On 13 April 2021 at 15:03, Counsel for Haradinaj requested the Head of Judicial Services Division, via e-mail, a copy of the independent medical advice or report that was mentioned in relation to these restrictive measures on the grounds of COVID-19 for the purposes of this present submission. This request was subsequently reiterated on 15 April 2021 at 9:09.

26. It is noted that despite a number of requests no formal statement has been put forward that sets out the basis for the policy that could be subject to challenge. On 15 April 2021, a member of the Registry wrote to Specialist Counsel and stated:

> "The Medical Officer provides advice to the Registrar both orally and in writing. As referred to in my e-mail of yesterday, the Medical Officer provided advice to the Registrar during a meeting held on 6 April. This advice was provided orally. It is important to note that the advice was provided in the context of the regular ongoing engagement with the DJI medical service and my previous e-mail represents an accurate reflection of that advice.

27. The failure to provide the details of the advice, whether oral or in writing, substantially undermines the ability to challenge whether the policy is reasonable, necessary and proportionate. It is submitted that it is not and the

continuation of the policy, until at least the end of July 2021, will impede Specialist Counsel's ability to adequately prepare for trial.

28. It is indeed clear that at present, the justifications are grounded on health and safety due to COVID-19. In the correspondence between the Head of Judicial Services Division and Counsel for Haradinaj, it is indeed acknowledged that due to the uncertain nature of the pandemic, certain measures need to be taken. However, it is respectfully submitted that the principal issue concerns the present conditions of the meetings between client and Counsel, which render these measures extremely disproportionate, thereby capable of amounting to a derogation from the right of access to a lawyer. This is akin to a denial of access as well as denial of a practical and effective legal assistance inconsistent with Article 6(3) ECHR.

29. Furthermore, the reply to both e-mails dated 13 April 2021 and 15 April 2021, concerning the request for a copy of the medical advice, entailed ambiguous responses by stating that the Medical Officer provides advice to the Registrar both orally and in writing, but that this advice was provided orally. Therefore, this questions the necessity as well as the proportionality of the aforementioned medical assessment.

30. In relation to the equipment and infrastructure mentioned by the Head of Judicial Services Division in the e-mail dated 7 April 2021, emphasising that

it allows for proper Defence preparation, is ill-advised, short-sighted and unreasonable. It is respectfully reiterated that Specialist Counsel clearly is experiencing grave difficulties with his client by explaining in detail what the specific issues are and accordingly, it is axiomatic that all of the above does not allow for proper Defence preparation: what amounts to 'proper preparation' or not can solely be defined in a subjective manner by Counsel for Haradinaj in these circumstances.

31. The Head of Defence Office only justification for the oral medical advice was that the measures imposed in relation to the glass partition will stay in effect until everyone is fully vaccinated, and that Mr. Haradinaj only received his first vaccine. It is respectfully submitted that it may be sensible and reasonable to propose a polymerase chain reaction (PCR) test for COVID-19, which would rectify these persistent impediments between Defence Counsel and the Accused. According to the National Institute for Public Health and the Environment located in the Netherlands, the PCR is the most commonly used and most reliable test for the virus.[17] In this manner, the Accused has been tested in anticipation of the meeting with his lawyer and this would be equally applied to Defence Counsel, which would result in the following:

[17] https://www.rivm.nl/en/novel-coronavirus-covid-19/testing-for-covid-19/pcr-test

a. Adequate facilities for the preparation of the defence under Article 6(3)(b) ECHR;

b. Guaranteed access to a lawyer as well as practical and effective legal assistance under Article 6(3)(c) ECHR;

c. Right to a fair trial under Article 6(1) ECHR.

Translation of Material Essential to the Preparation of the Defence

32. Notwithstanding the fact that the translations of documents are required by law, the Defence maintains its position that it seeks translation of material served by the SPO into a language the Defendant understands. It is further noted that a number of decisions and orders of the Pre-Trial Judge, as well as written pleadings by the parties.

33. It is respectfully submitted that at present, a significant proportion of the material has not been translated, contrary to Article 6(3)(a) ECHR, which specifically provides that it has to be in a language which the Accused understands. This is also prescribed under the Practice Direction 'Policy on Translation and Interpretation', which is pursuant to Article 34 of the Law on Specialist Chambers and Specialist Prosecutor's Office and Rule 23(1) of the Rules of Procedure and Evidence that accordingly give guidance on the scope of interpretation and translation services provided by the Language Services

Unit, as specifically stated in Section 1(1) of the aforementioned Practice Direction.[18]

34. In the Registrar's Submissions on Translations and Access to Documents,[19] at paragraph 3, it is noted that the official languages of the KSC are Albanian, Serbian and English and taking into account the submissions of the parties, the Pre-Trial Judge has determined that the working language of the proceedings shall be English. The Registrar cites Articles 21(4)(a) and 39(5) of the Law and Rules 86(8), 87(1), 92(2)(b) and 102(1) of the Rules for making the contention as to what is required by the applicable legislative and regulatory framework. However, what the Registrar fails to fully consider, is that the applicable legislative and regulatory framework of the KSC must be in full conformity with the Constitution and the international agreements that form an integral part of the legal system of the Republic of Kosovo.

35. The Registrar refers to the following matters that the Accused is entitled to receive in a language which he understands:

a. The nature and cause of the charges against him [Article 21(4)(a)];

b. The material supporting the indictment [Article 39(5)];

[18] KSC.BD-13

[19] KSC-BC-2020-07/F00192

c. The indictment [Rules 86(8) and 87(1)];

d. Detailed outline of the indictment demonstrating the relevance of the evidence to each of the charges [Rule 86(3)(b)];

e. The indictment shall be read to the Accused [Rule 92(2)(b)];

f. Statement of all witnesses to be called by the Prosecutor [Rule 102(1)];

36. The Registar submits at paragraph 16 of the written submissions, that once the Rule 86(3) summary has been translated (est. 17 May 2021) and any revisions made, this will complete the legal obligation of the Registry to provide translations. This in effect will mean that there is no obligation to provide the Accused with any further translation of material before the court.

37. The Registrar then addresses, at paragraphs 17-19, the issue that it terms **Outstanding Requests for Translation of Documents not Required by Law to be Translated and Timeline**. In this section it responds to the translation of the SPO Pre-Trial Brief and its annexes. The tentative timeline for translation is end of July 2021, but following prioritisation of the request, may be completed by 15 June 2021, although that may change if other priorities so dictate.

38. The conclusion that may be drawn from this is that there are certain limited items that are required by law to be translated, the vast majority of which are

not. In our submission such an approach is flawed for two important reasons. First, the proceedings before the KSC are largely paper based with prior requests for oral hearings having been refused as unnecessary. Therefore, in certain jurisdictions where the arguments are presented orally and decisions rendered at an oral hearing, translation may be provided by way of simultaneous translation and transcripts. Second, it must be noted that the KSC is a domestic institution of the Republic of Kosovo and that the Accused is entitled to have all material in the case against him, including decisions issued by the Judge, in a language which he understands.

39. It is recognised that Article 6(3)(e) does not require the written translation of all items of written evidence or official documents in the proceedings,[20] however, it must be sufficient to allow the Accused to have knowledge of the case against him and mount a proper defence.[21]

40. Therefore, it is submitted that the lack of translation of the relevant material undermines the essential prerequisite for ensuring that the proceedings are fair as guaranteed under Article 6(1).[22]

[20] *Diallo v. Sweden*, (dec.) Appl. no. 13205/07, 5 January 2010.
[21] *Güngür v.Germany*, (dec.) Appl. no. 31540/96, 17 May 2001, para 52; *Sejdovic v. Italy*, Appl. no. 56581/00, 1 March 2006, para 90
[22] *Pélissier and Sassi v. France*, Appl. no. 25444/94, 25 March 1999, para 52; *Sejdovic v. Italy*, Appl. no. 56581/00, 1 March 2006, para 90.

41. It is respectfully submitted that in order to prepare an adequate defence, the Accused must be able to understand and effectively communicate with Counsel to properly give instructions. Hence, the information, ergo the material in need of translation must be submitted in good time and therefore, promptly.

42. The following correspondence is relevant in this respect:

a. On 15 April 2021 at 12:32, Counsel for Haradinaj expressed serious concerns to the Head of Judicial Services Division, via e-mail, in relation to the fact that the SPO Pre-Trial Brief will not be translated until the end of July 2021, ergo a month after the case is supposed to be assigned to a Trial Panel;

b. On 19 April 2021 at 12:58, the Head of Judicial Services Division replied maintaining that this is a matter being kept under review and that the Language Services Unit will be informed of this issue;

c. In the written submissions to the Pre-Trial Judge, the Registrar has now confirmed that the matter is being prioritised and the translation *may* now be provided a month earlier.

43. It is respectfully submitted that Mr. Haradinaj does not speak English, but Albanian. Accordingly, in light of the ECHR case-law, if it is shown or there are reasons to believe that the Accused has insufficient knowledge of the

language in which the information is given, the authorities must provide him with a translation in a proactive manner.[23] Therefore, the authorities are required to take steps to ensure that the material is provided in a language he understands, unless it can be established that he does in fact have "*sufficient knowledge*" of the language and is able to understand.[24]

44. Furthermore, Mr. Haradinaj is effectively being placed at a practical disadvantage and arguably, the absence of a written translation in this case frustrates the Accused's ability of defending himself, followed by a denial of the right to a fair trial.[25] Therefore, it is respectfully submitted that the above amounts to a breach of Article 6(3)(a) taken with Article 6(3)(e) of the ECHR.

V. Conclusion

45. The restrictions currently in place are neither necessary nor proportionate in light of these specific circumstances. Accordingly, these lead to a violation of the rights prescribed under Article 6(3)(a) of the ECHR which have a fundamental impact on Article 6(1) ECHR as well.

[23] ECtHR, *Brozicek v. Italy*, Appl. no. 10964/84, 19 December 1989, para 41.

[24] *Ibid*.

[25] ECtHR, *Kamasinski v. Austria*, Appl. no. 9783/82, 19 December 1989, para 79.

46. As a consequence of these restrictive measures, it is ineluctable that the fairness of the proceedings will be compromised by this interference of communication between the Accused and Defence Counsel, leading to the obstruction of an effective and proper preparation of the Defence that is at the core of the principle of equality of arms.

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