



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2020-07

Before: **A Panel of the Court of Appeals Chamber**
Judge Michèle Picard
Judge Emilio Gatti
Judge Kai Ambos

Registrar: Fidelma Donlon

Date: 12 May 2021

Original language: English

Classification: Public

Decision on the Admissibility of Appeal and Joinder Against Decision on Preliminary Motions

Specialist Prosecutor's Office:
Jack Smith

Counsel for Hysni Gucati:
Jonathan Elystan Rees

Counsel for Nasim Haradinaj:
Toby Cadman

THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel” or “Panel” and “Specialist Chambers”, respectively),¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”) is seised of the “Appeal in Respect of the Decision on Defence Preliminary Motion” filed on 18 March 2021 by Nasim Haradinaj,² joined by the “Joinder re Interlocutory Appeal in Respect of the Decision on Defence Preliminary Motion made by Nasim Haradinaj” also filed on 18 March 2021 by Hysni Gucati³ (together the “Defence”), challenging the “Decision on Defence Preliminary Motions”.⁴ The Specialist Prosecutor’s Office (“SPO”) responded on 29 March 2021 that the Appeal and the Joinder should be dismissed in their entirety.⁵ Neither Haradinaj nor Gucati filed a reply.

I. BACKGROUND

1. On 27 October 2020, the Single Judge issued a decision on, *inter alia*, challenges raised by Haradinaj to the jurisdiction of the Specialist Chambers.⁶

¹ F00003, Decision Assigning a Court of Appeals Panel, 19 March 2021 (confidential, reclassified as public on 12 May 2021).

² F00001, Appeal in Respect of the Decision on Defence Preliminary Motion, 18 March 2021 (confidential) (“Appeal”).

³ F00002, Joinder re Interlocutory Appeal in Respect of the Decision on Defence Preliminary Motion made by Nasim Haradinaj, 18 March 2021 (confidential) (“Joinder”).

⁴ F00147/RED, Public Redacted Version of Decision on Defence Preliminary Motions, 8 March 2021 (original version filed on 8 March 2021) (“Impugned Decision”).

⁵ F00004, Prosecution response to Defence appeal of the Decision on Defence Preliminary Motions, 29 March 2021 (confidential) (“Response”).

⁶ F00057, Decision on Defence Challenges, 27 October 2020.

2. On 11 December 2020, the Pre-Trial Judge confirmed, in part, the indictment against Gucati and Haradinaj and ordered the SPO to submit a revised indictment, as confirmed.⁷ On 14 December 2020, the SPO submitted the operative Indictment.⁸

3. On 8 March 2021, the Pre-Trial Judge issued the Impugned Decision, rejecting Gucati's and Haradinaj's respective preliminary motions.⁹ The Pre-Trial Judge dismissed, *inter alia*, Haradinaj's argument that the three batches of material seized from the Kosovo Liberation Army War Veteran's Association (the "Batches") should have been submitted as supporting material under Rule 86(3) of the Rules or otherwise disclosed under Rule 102(1)(a) of the Rules.¹⁰

4. In the Appeal, Haradinaj submits that: (i) the Indictment has no jurisdictional basis, because the Pre-Trial Judge confirmed it without having had sight of the Batches;¹¹ (ii) his preliminary motion was brought prematurely, before disclosure of the Batches;¹² and (iii) the Indictment is insufficiently particularised and prevents Haradinaj from understanding the charges against him.¹³ In the Joinder, Gucati adopts the submissions made by Haradinaj in the Appeal.¹⁴

5. The SPO responds that the Appeal is inadmissible and should be summarily dismissed, together with the Joinder.¹⁵ The SPO nonetheless presents arguments in response to the three grounds raised in the Appeal.¹⁶ For the reasons developed below,

⁷ F00074/RED, Public Redacted Version of the Decision on the Confirmation of the Indictment, 22 December 2020 (original version filed on 11 December 2020).

⁸ F00075/A02, Redacted Indictment, 14 December 2020 (strictly confidential, reclassified as public on 14 December 2020) ("Indictment"). See also Indictment, para. 48.

⁹ Impugned Decision, paras 18-74.

¹⁰ Impugned Decision, paras 18-24.

¹¹ Appeal, paras 48-63.

¹² Appeal, paras 64-70.

¹³ Appeal, paras 71-82.

¹⁴ Joinder, para. 1.

¹⁵ Response, paras 1, 10-13.

¹⁶ Response, paras 2, 14-25.

and given the outcome of this decision, the Panels finds it unnecessary to set out the SPO's arguments in detail.

II. DISCUSSION

A. RECLASSIFICATION

6. The Court of Appeals Panel notes that the Appeal, the Joinder and the SPO Response and its Annex 1 have been filed confidentially, and that the Parties have all indicated having no objection to their reclassification as public.¹⁷

7. Considering that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential,¹⁸ and finding no basis for maintaining their confidential classification, the Panel accordingly orders the Registry to reclassify F00001, F00002, F00004 and F00004/A01 as public.

B. WHETHER THE APPEAL WAS PROPERLY FILED AS OF RIGHT

8. The Panel recalls that Article 45(2) of the Law provides that interlocutory appeals lie as of right from decisions or orders relating to detention on remand or any preliminary motion challenging the jurisdiction of the Specialist Chambers. Any other interlocutory appeal must be granted leave to appeal through certification.¹⁹

9. The Panel further recalls that, according to Rule 97(1) of the Rules, an accused may file preliminary motions before the Pre-Trial Judge in accordance with Article 39(1) of the Law, which, *inter alia*, (a) challenge the jurisdiction of the Specialist

¹⁷ Appeal, paras 1-3; Joinder, para. 2; Response, para. 26; F00004/A01, Annex 1 to Prosecution response to Defence appeal of the Decision on Defence Preliminary Motions, 29 March 2021 (confidential).

¹⁸ KSC-BD-2020-06, F00005/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021, para. 10. See also e.g. ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Decision on Prosecution's Motion for Summary Dismissal or Alternative Remedies, 5 July 2013, para. 9; ICTR, *Ntawukulilyayo v. Prosecutor*, ICTR-05-82-A, Decision on Prosecution's Request for Public Filings. 15 April 2011, p. 1. See also KSC-BD-15, Registry Practice Direction, Files and Filings before the Kosovo Specialist Chambers, 17 May 2019, Article 38(1).

¹⁹ Article 45(2) of the Law.

Chambers, or (b) allege defects in the form of the indictment. According to Rule 97(3) of the Rules, appeals against decisions on preliminary motions under Rule 97(1)(a) of the Rules lie as of right. For all other decisions rendered under Rule 97(1) of the Rules as well as for any other decisions for which an appeal does not lie as of right according to the Law and the Rules, certification to appeal shall be requested from the panel that rendered the impugned decision as per Rule 77 of the Rules.²⁰

10. The Court of Appeals Panel notes that Haradinaj and Gucati filed their submissions as of right.²¹ Before addressing their substance, the Panel must satisfy itself that these submissions are validly filed.

(a) First Ground of Appeal

11. Before the Pre-Trial Judge, Haradinaj argued that the Batches are the foundational evidence for the Indictment and ought to have been submitted as supporting material under Rule 86(3)(a) of the Rules or otherwise disclosed under Rule 102(1)(a) of the Rules.²²

12. The Pre-Trial Judge found that submissions under Rule 97 of the Rules are not the appropriate avenue for extensively litigating disclosure matters that are subject to other requests.²³ The Pre-Trial Judge nonetheless addressed this argument, but rejected it for other reasons.²⁴

13. In the Appeal, Haradinaj argues that, in so finding, the Pre-Trial Judge misinterpreted the issue which had been raised.²⁵ Haradinaj submits that, contrary to

²⁰ Rules 77, 97(3) of the Rules.

²¹ Appeal, paras 5-7; Joinder, para. 1.

²² F00116, Amended Filing with Public Redactions Preliminary Motion on the Issue of the Indictment Being Defective, 31 March 2021 (original version filed on 4 February 2021), paras 69, 71-72, 74-75; F00126, Defence Reply to Prosecution Response to Preliminary Motion, 15 February 2021, para. 9. See also Impugned Decision para. 18.

²³ Impugned Decision, para. 21.

²⁴ Impugned Decision, paras 22-23.

²⁵ Appeal, para. 54.

the Pre-Trial Judge's conclusions, the Batches form the basis of the charges.²⁶ Therefore, by confirming the Indictment without having had sight of said Batches, the Pre-Trial Judge failed to confirm the Indictment in accordance with the law, and therefore the Specialist Chambers has no jurisdiction over it.²⁷

14. The Court of Appeals Panel finds that the argument raised in the first ground of appeal pertains to the sufficiency of the evidentiary basis for the confirmation of the Indictment. The Panel considers that this ground of appeal does not constitute a challenge to the jurisdiction of the Specialist Chambers under Rule 97(1)(a) of the Rules, since it does not pertain to the personal, territorial, temporal or subject matter jurisdiction of the Specialist Chambers.²⁸ Therefore, this ground of appeal does not fall within the scope of appeals as of right as provided by Article 45(2) of the Law and Rule 97(3) of the Rules. Having not sought or been granted leave to appeal this issue according to Rule 77 of the Rules, Haradinaj's arguments on this matter are not properly brought before the Panel.

(b) Second Ground of Appeal

15. In his second ground of appeal, Haradinaj submits that the Pre-Trial Judge erred in considering that the Batches did not constitute material to be disclosed under Rule 102(1)(a) of the Rules, that disclosure under Rule 102(1)(a) of the Rules had been completed, and that, therefore, Haradinaj's preliminary motion was not filed prematurely.²⁹ Haradinaj further repeats arguments presented in support of the first ground of appeal.³⁰

²⁶ Appeal, paras 56-58.

²⁷ Appeal, paras 57-60.

²⁸ See Articles 6-9 of the Law. See also, ICTY, *Prosecutor v. Delić*, No. IT-04-83-AR72, Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal, 8 December 2005, para. 11.

²⁹ Appeal, paras 64-66.

³⁰ Appeal, paras 67-70.

16. The Court of Appeals Panel considers that Haradinaj's second ground of appeal does not constitute a challenge to the jurisdiction of the Specialist Chambers,³¹ but rather challenges the Pre-Trial Judge's ruling on the non-disclosure of the Batches and the findings subsequently made as a result. Therefore, this ground of appeal does not fall within the scope of appeals as of right as provided by Article 45(2) of the Law and Rule 97(3) of the Rules. Having not sought or been granted leave to appeal this issue according to Rule 77 of the Rules, Haradinaj's arguments on this matter are not properly brought before the Panel.

(c) Third Ground of Appeal

17. In his third ground of appeal, Haradinaj argues that the Pre-Trial Judge erred in determining that "the references [...] to witnesses and/or their family members as well as the serious consequences [...] are sufficiently clear and specific and do not create ambiguity as regards the charged offences or modes of liability".³² According to him, this is not merely a matter of "evidence" to be considered at trial, as found by the Pre-Trial Judge, but rather shows that the Indictment lacks legitimacy and that the Specialist Chambers have no jurisdiction over the counts of intimidation, as confirmed in the Indictment.³³

18. The Court of Appeals Panel disagrees with Haradinaj's assertion that his third ground of appeal constitute a challenge to the jurisdiction of the Specialist Chambers.³⁴ It is rather a challenge to the form of the Indictment as it pertains to whether the SPO has pleaded the crimes and actions alleged with sufficient specificity in the Indictment.³⁵ The Panel recalls that ambiguity or vagueness of an indictment may

³¹ See above, para. 14, fn. 28.

³² Appeal, paras 72, 80, quoting Impugned Decision, para. 60; see also Appeal, paras 71, 73-77.

³³ Appeal, para. 81.

³⁴ See above, para. 14, fn. 28.

³⁵ See e.g. ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR72.1, Decision on Petković's Interlocutory Appeal Against the Trial Chamber's Decision on Jurisdiction, 16 November 2005, para. 13. See also ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction, 6 June 2007, para. 21.

render an indictment defective. This however does not constitute a jurisdictional challenge as it does not affect the power of a panel to decide whether an indictment relates to the Specialist Chambers' personal, territorial, temporal or subject-matter jurisdiction. The Panel recalls the applicable law set out above, providing that challenges on defects in the Indictment under Rule 97(1)(b) of the Rules are not challenges for which an appeal lies as of right and that this ground of appeal does not fall within the scope of appeals as of right as provided by Article 45(2) of the Law and Rule 97(3) of the Rules. The Panel further notes that Haradinaj raised the same arguments in another filing currently before the Court of Appeals Panel, the Defence Submissions for Mr. Haradinaj on Appeal of Decision KSC-BC-2020-07/F00147, filed on 13 April 2021.³⁶ Accordingly, the admissibility of these arguments as well as, if applicable, their merits, will be addressed in another decision. For the purpose of the present Decision, Haradinaj's third ground of appeal is not properly brought before the Panel.

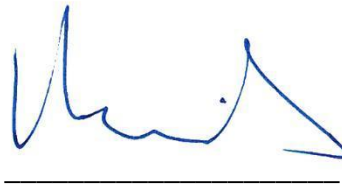
³⁶ F00002, Defence Submissions for Mr. Haradinaj on Appeal of Decision KSC-BC-2020-07/F00147, 13 April 2021, paras 56-61, 77.

III. DISPOSITION

19. For these reasons, the Court of Appeals Panel:

DECLARES that the Appeal and the Joinder are inadmissible; and

ORDERS the Registry to reclassify F00001, F00002, F00004 and F00004/A01 as public.



**Judge Michèle Picard,
Presiding Judge**

Dated this Wednesday, 12 May 2021

At The Hague, the Netherlands