

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: 3 June 2021

Language: English

Classification: Confidential

**Application for Leave to Appeal the Decision on Prosecution Requests and
Challenges Pursuant to F00172**

Specialist Prosecutor

Jack Smith

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

Counsel for Hysni Gucati

Jonathan Elystan Rees QC

Huw Bowden

I. CLASSIFICATION

1. The Defence for Mr Haradinaj files this application for leave to appeal confidentially, with reference to the confidential classification of the Decision on Prosecution Requests and Challenges Pursuant to F00172 of 26 May 2021¹ (“Impugned Decision”).²

II. INTRODUCTION

2. Specialist Counsel for Mr. Haradinaj seek leave to appeal the Impugned Decision of in order to resolve the following issues:³
 - a. When ordering certain restrictions relating to the disclosure and viewing of Items 122-132 (the “Search and Seizure Videos”),
 - i. the Pre-Trial Judge failed to take into account or consider the applicable legal standard in Article 21(6) which requires that material *“shall be made available to the Accused before the beginning of and during the proceedings, subject **only** to restrictions which are **strictly necessary**”*

¹ KSC-BC-2020-07/F00210, 26 May 2021, confidential.

² Article 45 of the Law on the Specialist Chambers and Specialist Prosecutor’s Office (Law No. 05/L-053) (“Law”) and Rule 77 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”) of the Impugned Decision dated 26 May 2021

³ In making the application for leave to appeal it is hereby respectfully requested, if the Pre-Trial Judge considers that the deadline was 2 June 2021, that the deadline is extended for one day. The Defence Haradinaj repeats the submissions of the Defence for Gucati in that due to a number of factors, this is a matter in which the Pre-Trial Judge should exercise his discretion in granting the application for leave.

and when any necessary counter-balance protections are applied”

(emphasis added) (“Issue 1”).

- b. In relation to the Gucati Requests B-C and denying disclosure of material relevant to the Defence,
 - i. The Pre-Trial Judge erred in applying the correct “relevance”, “materiality” and “scope of the case” standard (“Issue 2”).
3. It is respectfully submitted that the erroneous approach that lacks a fair and balanced standard applied in the Impugned Decision, highlighted by Issues 1 and 2, which lead to a denial of disclosure or highly restricted disclosures prejudicial to the Defendants, risk making it impossible for Specialist Counsel to meaningfully prepare a Defence along the arguments instructed and maintained by the Defendant throughout these proceedings.
4. It is imperative that the contents, application and interpretation of the aforementioned tests and legal standards relating to disclosure are reviewed and clarified by means of an appeal, in order to allow for appropriate disclosures relevant to the Defendant’s case to be granted and make possible an adequate preparation of his Defence.
5. Whilst the SPO continues to maintain the position that the matters raised herein are not relevant, almost to a position of wilful blindness, it is quite clear that the manner in which the allegedly confidential material was potentially delivered to the Defendants is of the most relevance and it is not for the SPO to merely brush away

those arguments that it is not comfortable or capable of answering. There is a duty of candour and a requirement to maintain transparency.

III. BACKGROUND

6. The procedural background is set out in paragraphs 1-9 of the Impugned Decision and is not repeated here.

IV. LAW

7. Article 45(2) of the Law provides:

"Any other interlocutory appeal must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel on the basis that it involves on the basis that they involve 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."

8. Rule 77(2) of the Rules provides:

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

9. Further relevant legal provisions are set out in paragraphs 13-17 of the Impugned Decision and are not repeated here.

V. SUBMISSIONS

A. THE LEGAL TEST FOR APPLICATIONS FOR LEAVE TO APPEAL

10. It is noted that the following legal test applies to an application for leave to appeal:
- 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.⁴
11. These elements will be addressed in relation to Issues 1 and 2 below.

⁴ *Decision on the Thaçi Defence Application for Leave to Appeal (“Thaçi Decision on Leave to Appeal”)*, 11 January 2021, public, at para. 10

B. WHETHER THE ISSUES ARE “APPEALLABLE” ISSUES

Issue 1

12. Issue 1 challenges the following order in the Impugned Decision:

*“...the Pre-Trial Judge orders the SPO to make Items 122- 132 viewable to the Defence Counsel on the SPO premises and to allow the taking of notes during such viewing(s). Correspondingly, the Pre-Trial Judge reminds Defence Counsel of their obligation to respect the confidentiality of information and orders them to refrain from making any copies (e.g. videos, screenshots, stills) of Items 122- 132 during such viewing(s). Defence Counsel are, however, **permitted to show their notes to the Accused and discuss their content.**”⁵ (emphasis added)*

13. In adopting the aforementioned restrictions on the viewings of the Search and Seizure Videos, the Pre-Trial Judge:

a. failed to apply the appropriate legal test in imposing such restrictions on items that were determined to be required to be disclosed, by *first*, failing to set out why any or all such individual restrictions are “strictly necessary” – not just necessary but *strictly* necessary⁶ – and *second*, by failing to counter-balance them with the rights of the Defendants. Rather, in adopting the

⁵ Impugned Decision, at para. 40.

⁶ Article 21(6) of the Law.

restrictions on the viewings, the Pre-Trial Judge focused on the concerns of the SPO alone (which are categorically denied);⁷

- b. failed to set out why it is “strictly necessary” and appropriately counter-balanced that Specialist Counsel but not the Defendants themselves are entitled to *view* the videos – given *first*, that the Defendants themselves were not even present during the actual search and seizure; *second* they have not and will not be given an opportunity to “*observe the event neutrally, as it unfolded*” – which, according to the Pre-Trial Judge, the Defence is entitled to,⁸ and *third*, given that this entails no more than what Faton Klinkau and Tome Gashi saw;⁹
- c. failed to set out why it was “strictly necessary” or appropriately counter-balanced taking into account the rights of the Accused that the Search and Seizure Videos could *only* be watched on SPO premises;
- d. failed to set out how it would be sufficient for Specialist Counsel to ascertain with just “notes” upon viewing the Search and Seizure Videos, and without the Defendants viewing them, what the SPO did or what its officers took from the premises, thereby preventing Specialist Counsel from taking proper instructions from the Defendants on the search and seizure.

⁷ Impugned Decision, at para. 39.

⁸ Impugned Decision, at para. 35.

⁹ Impugned Decision, at para. 39 notes that “*the persons in the video may have already been identifiable to Mr Klinkau and Mr Gashi, who were present during the search.*”

14. It is submitted that if the correct legal standard had been applied in imposing any restrictions on the required disclosure of the Search and Seizure Videos, with due regard to “only” what that which is “*strictly* necessary” and with appropriate counter-balancing measures taking into account the *Defendants*, such restrictions simply could not have been justified, nor ordered.

Issue 2

15. Issue 2 challenges the following order in the Impugned Decision:

*“... material sought by the Defence in the Gucati Requests B-C are **not relevant to the case** and are **not material to the Defence preparation** and, as such, are not subject to disclosure under Rule 102(3) of the Rules. In light of the foregoing, the Pre-Trial Judge rejects the Gucati Requests B-C.”¹⁰*

16. At the outset, the Defence for Mr. Haradinaj submits that the Pre-Trial Judge contradicts himself by stating that the question of “[t]he extent to which the Defence’s submissions regarding incitement or entrapment may constitute a permissible substantive defence or a ground for the exclusion of evidence are matters to be addressed at trial” but then goes on to hold that the requests for disclosure of items relevant to such Defences are “not relevant to the case and material to Defence preparation”¹¹ and fall “squarely outside the scope of the present case.”

¹⁰ Impugned Decision, at para. 63.

¹¹ Impugned Decision, at para. 64.

17. If matters are recognised to be possibly relevant so much so they will be assessed at trial, what is the reason for not disclosing them during the pre-trial stage and thereby allow adequate and timely Defence preparations.
18. The Defence for Mr. Haradinaj accordingly takes issue with the Pre-Trial Judge's interpretation and application of the standards of "relevance" and "materiality" to the Defence preparation and the notion of "scope of the case".
19. In sum, the Defence for Mr. Haradinaj's submits that the test for "strictly necessary" restrictions to disclosures and appropriate counter-balancing (Issue 1), along with the tests for "relevance", "materiality" and "scope of the case" (Issue 2) must be set out, clarified and reviewed.
20. There clearly is significant discrepancy between the parties as to what the legal tests and standards, are or ought to be, which is why disclosure continues to be requested, and restrictions to disclosure continue to be challenged.
21. The Defence for Mr. Haradinaj submits that the aforementioned Issues constitute "appealable" issues, because they emanate from the Impugned Decision and do not amount to disagreements, or abstract questions or hypothetical concerns.¹²
22. Moreover, the Issues identify discrete topics of concern with the legal standards, their interpretation and application that go to the very essence of the right of Defendants at the KSC to be enabled to prepare their Defence. As noted by the Defence for Gucati, at paragraph 13, each of these matters emanate from the Impugned Decision

¹² *Thaçi* Decision on Leave to Appeal, at para. 11.

and do not amount to abstract questions or hypothetical concerns. In this regard it is respectfully submitted that these are issues that go to the very core of the case before the Court.

C. WHETHER THE ISSUES WOULD SIGNIFICANTLY AFFECT THE FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS OR THE OUTCOME OF THE TRIAL

23. The Issues have significant repercussions on (i) “the fair and expeditious conduct of proceedings” and (ii) “the outcome of the trial.”

(i) the fair and expeditious conduct of the proceedings

24. It is recalled that this part of the legal test refers to the norms of a fair trial¹³ and extends to pre-trial proceedings as well as the investigation of a crime.¹⁴

25. It is submitted that Issues 1 and 2, individually or taken together, *significantly* affect the fair trial of the Accused.

26. The two Issues and the requested disclosures underlying them form part of central arguments and narratives at the heart of the Defendants’ alleged actions, as well as

¹³ *Thaçi* Decision on Leave to Appeal, para. 13. *Similarly*, ICC, ICC-01/04-168, Judgment on Extraordinary Review, para. 11.

¹⁴ *Thaçi* Decision on Leave to Appeal, para. 13. *Similarly*, ICC, ICC-01/04-168, Judgment on Extraordinary Review, para. 11.

their Defences in this case, as has been articulated by the Defence on more than one occasion.

27. In the Impugned Decision, by unfairly restricting or denying the disclosures of the Search and Seizure Videos and the items forming part of the Gucati Requests B-C, yet another attempt of the Defence at gaining information on the workings of the SPO investigations, or lack thereof, is shut down or heavily and unjustifiably restricted.
28. As a result, Specialist Counsel are being prevented from effectively preparing an adequate defence that the Defendants insist on as underlying the conduct alleged by the Prosecution, arguments that they are perfectly entitled to pursue and matters which Specialist Counsel have been instructed to pursue in order to test the case against them.
29. The Defence are entitled to present a defence or incitement or entrapment, as noted by the Defence for Gucati [see paragraph 18 *et seq*], and that these matters can only be properly addressed once disclosure has taken place. These are not matters that are merely 'trial issues' as the conduct of the Prosecution, their candour, and their compliance with their disclosure obligations, are central to whether these proceedings should even go to trial or constitute a bar or stay of proceedings.
30. It is respectfully submitted that these are matters that must be resolved before this case can proceed any further.
31. Issues 1 and 2 go to the heart of a number of critical matters thus forming an essential part of their Defence:

- a. *First*, the argument that it was the SPO, and/or officers of the SPO, who leaked or permitted the leak of the documents to occur;
 - b. *Second*, the failure to conduct any meaningful investigation into the leak of documents and to identify the person(s) responsible;
 - c. *Third*, the argument that the SPO does not and did not have a proper chain of custody in place for the security of evidence, and/or the collection and storage of evidence in this case.
32. The items underlying Issues 1 and 2 are of genuine importance to the Defendants and their actions.
33. The Defendants have the fair trial right to adequately prepare their Defence, but this right is completely undermined when every attempt at obtaining investigative material or evidence to support those Defences is denied or severely and incomprehensively restricted.
34. Therefore, the legal tests and standards in Issues 1 and 2 go to the very notion of a fair trial and the right of Defendants to adequately prepare their Defence. Being hindered in following any of the lines of enquiry to explain their actions and build a Defence has significant repercussions for the fair trial of the Defendants.

35. It is also recalled that *“fairness is preserved when a party is provided with the genuine opportunity to present its case and to be apprised of and comment on the observations and evidence submitted to the Panel that might influence its decision.”*¹⁵

36. With respect, the Defendants are not provided with such fairness. Accordingly, the Defendant’s right to a fair trial is significantly undermined by the matters that arise from Issues 1 and 2.

(ii) the outcome of proceedings

37. In addition, it is submitted that Issues significantly affect the outcome of proceedings.

38. The error of not applying the appropriate *“strictly necessary”* standard or counterbalancing measures, or the correct *“relevance”, “materiality”* or *“scope of the case”* tests in the Impugned Decision, taken together, will impact the outcome of the case as disclosure requests regarding these central arguments to the Defence have been and continue to be made. Therefore, legal tests and standards must be clarified and correctly applied, taking due account of the possibility of the Defence to be able to meaningfully prepare its case at all.

39. The consequence of the correct application of the legal standard to disclosures from the SPO, subject of the Impugned Decision as well as others, would be that the Defendants are given an opportunity to properly prepare their Defence, put forward

¹⁵KSC-BC-2020-07/F00169, 1 April 2021, Public, at para. 14

the arguments that genuinely underlie their actions, and Specialist Counsel are able to run and support the arguments according to client instructions.

40. Ultimately, it serves to establish the truth, which cannot be done when disclosure is unfairly denied or restricted.

41. Further, applying the correct standard to disclosures that form a central part of the Defence case arguably *“provides the Accused with a genuine opportunity to challenge the SPO’s case and present his defence, as well as to be tried within a reasonable time, guarantees which are at the core of and significantly affect fair and expeditious proceedings.”*¹⁶

42. Denying the disclosures in the way this has been done in this case is effectively denying the preparation of a Defence. Therefore, the issues significantly affect the fair and expeditious proceedings and/or the outcome of the proceedings.

**D. WHETHER AN IMMEDIATE RESOLUTION BY THE APPEALS CHAMBER
MAY MATERIALLY ADVANCE THE PROCEEDINGS**

43. A determination that prompt referral of the Issues to the Court of Appeals Panel will settle the matter and rid the *“judicial process of possible mistakes that might taint either the fairness of proceedings or mar the outcome of the trial”*, thereby moving the proceedings forward along the right course.¹⁷

¹⁶ KSC-BC-2020-07/F00169, 1 April 2021, Public, at para. 27.

¹⁷ KSC-BC-2020-07/F00169, 1 April 2021, Public, at para. 17.

44. The Court of Appeals Panel ought to set out detailed and understandable tests, taking due account of the fact that most evidence and resources are in the hands of the SPO, and that the Defences that the Defendants insist on running ought to be respected and allowed to be determined. Where disclosure is heavily restricted or denied on almost all parts of the build-up of a Defence, the tests as currently applied cannot serve the finding of truth or justice for the Defendants in any meaningful way.
45. In conclusion, resolving Issues 1 and 2 would significantly affect fair and expeditious proceedings and outcome of the proceedings, and would benefit from an authoritative determination by the Court of Appeals Panel at the earliest opportunity in the proceedings for two reasons. First, such a determination would provide legal certainty as to the discrete topics regarding the interpretation and application of the legal standards on disclosure to the Defence. Secondly, such a determination could minimise subsequent delays and the diverting of resources during trial and appeal proceedings to address claims regarding unfair refusals or restrictions of disclosures from the SPO.
46. Therefore, the Defence for Mr. Haradinaj submits that a resolution of the Appeals Panel in relation to the Issues would materially advance the proceedings and that leave should be granted to allow the Court of Appeals Panel to consider whether disclosure of the Gucati Requests B and C was decided in error, and if so, to order disclosure.

VI. APPLICATION FOR RECONSIDERATION

47. The Defence for Haradinaj joins the Defence for Gucati in making an alternative application for reconsideration pursuant to Rule 79(1). In particular, emphasis is drawn to the contradiction at paragraph 63 of Decision F00201 in which the Pre-Trial Judge rules, erroneously, that incitement or entrapment are issues to be addressed at trial, then goes on to state that the SPO are required to disclosure exculpatory material under Rule 103 and then finally concludes by asserting that the manner in which the information arrived at the KLA WVA premises does not fall within the scope of the case. That is a wholly inconsistent and contradictory position to advance and is properly set out at paragraphs 26-30 of the Gucati filing and is not repeated here.
48. The Pre-Trial Judge is therefore invited to reconsider his ruling as an alternative course of action to granting certification to appeal.

VI. CONCLUSION

49. The Defence for Mr. Haradinaj accordingly requests certification of the Issues for leave to appeal.

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Toby Cadman

Specialist Counsel



Carl Buckley

Specialist Co-Counsel