

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: 6 June 2021

Language: English

Classification: Confidential

Motion for Clarification of Decision KSC-BC-2020-07/F00210

Specialist Prosecutor

Jack Smith

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

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Jonathan Elystan Rees QC

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I. CLASSIFICATION

1. The Defence for Mr Haradinaj files this motion confidentially, with reference to the confidential classification of the Decision on Prosecution Requests and Challenges Pursuant to F00172 (“Decision”)¹ of 26 April 2021. There is no objection to re-classify this filing as public.

II. SUBMISSIONS

2. The Defence for Mr. Haradinaj joins the Defence for Mr. Gucati’s motion dated 3 June 2021 for clarification of the aforementioned Decision, as well as the Gucati Defence submissions concerning the importance of giving due consideration to the re-classifications of certain past confidential filings and decisions.²
3. The Defence for Mr. Haradinaj does not seek to repeat the arguments of the Gucati Defence but makes the following supplementary observations.
4. It is abundantly clear that the Decision ordered the SPO to disclose the *substance* of the Official Witness Notes and Declarations.
5. Further, the danger of the *absence of a record in the contemporaneous note* is that what is provided in the witness notes alone is not entirely accurate or cannot be put into context.

¹ Decision on Prosecution Requests and Challenges Pursuant to F00172, KSC-BC-2020-07/F00210.

² Motion for Clarification of Decision F00213, KSC-BC-2020-07/F00217, paras. 2; 8-9.

6. It is quite clear, as noted by the Gucati Defence [paras. 4-6] the absence of a record in the contemporaneous note or the inconsistency between the contemporaneous notes and the official witness note and declaration constitutes 'disclosable information'.
7. The Gucati Defence makes reference to Article 41 of the Constitution and the constitutional right of access to public documents, subject to a test of strict necessity and proportionality of any limitation and restriction of such a right. The Gucati Defence makes further reference to the very real danger in these proceedings descending into a state of secrecy without real justification.
8. This latter submission is a matter of very concern.
9. It has already been argued at the Fifth Status Conference, and in a number of filings before the Pre-Trial Judge, that the Prosecution continues to adopt a position of bringing this case with a distinct lack of transparency. It seeks to rely on the alleged dissemination of material that the Defence is not entitled to examine, based on witness accounts that will not be presented as direct evidence at trial, merely being summarised by witnesses, members of its office, that will present its entire case in closed session, under full anonymity and with the most extreme protective measures. That means its case will be conducted entirely behind closed doors and the defence will be afforded no opportunity to bring any proper challenge to the case presented. The existence of matters said or done within the contemporaneous notes are of critical importance to establishing the conduct as alleged by the Prosecution.
10. It is noted that this matter now needs to be resolved by further clarification by the Pre-Trial Judge.

Word Count: 545 words



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