

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 Hysni Gucati

Date: 14th June 2021

Language: English

Classification: Confidential

Reply to Prosecution Response to Defence Requests for Clarification

F00217 and F00220

Specialist Prosecutor

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I. INTRODUCTION

1. On Thursday 10th June 2021, the Accused received notification that the Specialist Prosecutor's Office ("SPO") had filed a response ("Response")¹ to the Defence Request for Clarification ("Request")².
2. The Accused hereby replies to the Response, pursuant to rules 9 and 76 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), and the Order Varying Time Limits for Responses and Replies to F00216, F00217 & F00219³, without prejudice to the submissions made in the Request and acknowledging that the Panel shall only consider a reply or parts thereof addressing new issues arising from the response.

II. SUBMISSIONS

3. The Accused does not seek to appeal, or reconsider, the order at paragraph 54 of F00210.
4. That order was obtained by the Accused in the face of further misplaced and erroneous intransigence on the part of the SPO, who had again wrongly insisted that the witness contacts, for which the contemporaneous notes were sought, were not with witnesses or potential witnesses in this case and therefore their statements were not disclosable⁴.

¹*Prosecution Response to Defence Requests for Clarification F00217 and F0020*, KSC-BC-2020-07/F00227

² *Motion for Clarification of Decision KSC-BC-2020-07/F00213*, KSC-BC-2020-07/F00217 (note, there is an error in the title of the Request – the Decision in relation to which clarification is sought is KSC-BC-2020-07/F00210 as understood by the SPO. See paragraph 1, footnote 1 to the Request

³ *Order Varying Time Limits for Responses and Replies to F00216, F00217 & F00219*, KSC-BC-2020-07/F00221

⁴ *Decision on Prosecution Requests and Challenges Pursuant to F00172*, KSC-BC-2020-07/F00210 at paragraph 53

5. Rejecting the SPO's unduly narrow and churlish approach to disclosure, the Pre-Trial Judge confirmed in paragraph 54 of F00210 that the contemporaneous notes are to be disclosed where they contain disclosable information which has not otherwise been disclosed.
6. The Request was made because it was clear through *inter partes* correspondence that the parties were not *ad idem* as to the interpretation of order F00210 - in particular what is meant therein by 'disclosable information'.
7. The Request submits that the "absence of a record in a contemporaneous note" is itself "disclosable information" that is not discernible from the Official Note and/or the Declaration and can support an inference of late fabrication, elaboration or exaggeration in the Official Note and/or the Declaration⁵. The SPO appears to reject that proposition wholesale, albeit with no or little reason.
8. In particular, the SPO fails to address the example at paragraph 4 of the Request. Does the SPO genuinely take the view that the contemporaneous note in that example would not be disclosable? If so, why is the contemporaneous note in that example not disclosable? Those questions are asked rhetorically only – the SPO has had its opportunity to answer and has chosen not to. That is no doubt because it has no answer.
9. Of course the contemporaneous note in the example at paragraph 4 is disclosable and should fall within the order of the Pre-Trial Judge. The contemporaneous note in the example contains disclosable information which has not been recorded in the Official Witness Note and Declaration, namely the absence of a record that witness A complained that he was intimidated by

⁵ See paragraph 3 of the Request

the holding of a press conference. To use the words of the SPO, the contemporaneous note in that example contains *more* disclosable information than the corresponding Official Note and Declaration because it reveals that the absence of a contemporaneous record that witness A complained that he was intimidated by the holding of a press conference.

10. That the SPO would withhold from disclosure such a contemporaneous note is greatly disturbing⁶.
11. The SPO must stop approaching disclosure as a ‘box-ticking’ exercise to be endured and ought to belatedly engage with the issues in the case. It does not amount to a reason for non-disclosure to state that “contemporaneous notes are not typically disclosable”.
12. In order to assist the Parties, the Request asks the Pre-Trial Judge to clarify the following in relation to the order in paragraph 54 of F00210:

“That where the Official Witness Note and the Declaration records information which is not recorded in the contemporaneous note taken during interview with the relevant contacted individual, the contemporaneous note will fall to be disclosed under the order”⁷.
13. That is a perfectly reasonable request, made with the intention of assisting both parties to complete disclosure fairly, efficiently, and effectively. The Defence is simply asking for transparency of the SPO’s investigation into issues going to the heart of the case. The objection to the Request itself demonstrates the lack of meaningful engagement with disclosure on the part of the SPO.

⁶ Indeed, it is the SPO’s position that such a contemporaneous note as per the example in paragraph 4 would not even be listed on a Rule 102(3) Notice

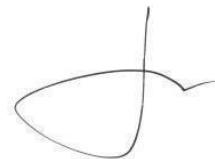
⁷ Note: the SPO misquotes the request at paragraph 2 in its Response at paragraph 3

14. Rule 75 of the Rules provides that any party may apply before the competent Panel for a relief, except where otherwise provided by the Rules. There is no Rule which states that the Panel is not able to assist the parties as to the interpretation and implementation of an order. Moreover, there is no good reason why any Party should object to such a motion being made. Why does the SPO not want to know whether its narrow and churlish interpretation of the order is correct or not?

III. CONCLUSION

15. The Accused maintains the Request and the submissions therein.

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