

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: 14 June 2021

Language: English

Classification: Confidential

**Defence Reply to Prosecution Response to Defence Applications F00216 and
F00219**

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I. CLASSIFICATION

1. **NOTE:** in an abundance of caution, this Defence Reply to the Prosecution Response has been categorised as **Confidential** to reflect those earlier submissions; however, the Defence for Haradinaj takes no issue with these submissions and indeed all submissions being made **Public**.

II. INTRODUCTION

2. On 10 June 2021, the SPO filed its 'Consolidated Prosecution Response to Defence Applications F00216 and F00219 for leave to appeal and reconsideration'.
3. Accordingly, as per the reduced timetable for submissions on this issue, per the Order of the Pre-Trial Judge,¹ the Defence for Mr. Haradinaj now seeks to file a 'Reply' to that response.
4. Further, the Defence reminds itself that the purpose of a 'Reply' is to refer to specific issues contained in any response, and not an opportunity to argue to the application, and therefore, the Defence limits itself to those issues raised within the submissions of the SPO where it is necessary to address them.

¹ KSC-BC-2020-07/F00221

5. Finally, the Defence Reply will follow the structure and issues as they appear within the SPO Response, for ease of navigation.
6. As per the submissions below, the initial request for Leave to Appeal is maintained and thus the Pre-Trial Judge is respectfully requested to grant the application and to reject the Prosecution's objections as being made without any proper factual or lawful basis.
7. As a preliminary matter, as set out in the Gucati Reply,² the Prosecution's position is entirely misplaced in that it seeks to argue the merits of the appeal rather than limit itself, as it should, to whether leave should be granted (or certified) by the Pre-Trial Judge.

III. BACKGROUND

8. The background to the Defence request for leave to appeal has already been outlined, and thus there is no intention to rehearse the same here. The Defence relies on those submissions already made.

IV. THE LAW

² KSC-BC-2020-07/F00230

9. The Law in respect of the granting of Leave to Appeal is outlined at paragraphs 7-9 of the Defence application for Leave,³ and again, there is no intention to rehearse the same, save where it is essential to do so within the body of the main submissions.

IV. LIMITATION

10. The SPO highlights at paragraph 1 of its Response that the application for Leave to appeal was filed 'out of time'.
11. The Defence accepts that the application was filed late, owing to a miscalculation in respect of the time limits for the filing of such an application and has requested an extension of the time limit prescribed by Rule 77(1) by one day pursuant to Rule 9(5).
12. The Defence recognises the oversight on its part, and respectfully requests that the Pre-Trial Judge 'extends' the limitation period for the filing of the application and therefore exercises discretion per Rule 76,⁴ or as part of the inherent discretion of the Pre-Trial Judge.
13. In making the application to extend that time period, the Defence notes that the Pre-Trial Judge has already, per its "*Order Varying Time Limits for Responses*

³ KSC-BC-2020-07/F00219

⁴ Rules of Procedure and Evidence

and Replies to F00216, F00217 & F00219”,⁵ varied the time limits, by way of shortening, for ‘responses’ and ‘replies’, and therefore, it is respectfully submitted that no prejudice has been suffered by the SPO in the late filing of the application for leave to appeal.

14. Further, and in the same vein, the Chamber has not been prejudiced in its determination of the issue, nor in the management of the substantive case.
15. Conversely however, if the application for leave to be appeal be summarily dismissed on the limitation point, the Defendant would be so prejudiced, him having been denied the opportunity to challenge an important issue, and further, an issue that, contrary to the submissions of the SPO, directly affects the manner in which this case will be heard, and further, directly affects the fairness of the proceedings as a whole.
16. Accordingly, the Defence asks that the limitation period be extended, and further, submits that it is only fair and appropriate that that period be so extended.

V. THE APPLICATIONS DO NOT IDENTIFY APPEALABLE ISSUES

⁵ KSC-BC-2020-07/F00221

17. Firstly, in terms of the issues raised specifically by the Defence for Gucati, the Defence for Haradinaj joins with their submissions, and adopts their position for the purposes of both the substantive application and the reply filed.
18. In particular the Defence for Haradinaj takes note of paragraph 5 of the Gucati reply that specifically refers to paragraphs 25, 31, 36 and 54 of the impugned decision. The submission by the SPO that the Defence 'merely challenges the entirety of the decision' is nonsensical and not supported by any reasoned argument.
19. The SPO attempts to, once again, raise the argument that the issues raised by the Defence are not 'appealable issues'.⁶ This is a common theme that runs through the SPO's submissions on each and every occasion.
20. To be clear, each and every decision of the Pre-Trial Judge has the potential to be an appealable issue, further, each and every appeal that may be brought, in any jurisdiction not simply before this Chamber, constitutes a disagreement with the decision and/or conclusion of the presiding Judge.
21. The submissions of the SPO are therefore trite on this point.

⁶ KSC-BC-2020-07/F00226, at paragraph's 3-10

22. The issues raised by both the Gucati and the Haradinaj defence are issues arising out of a decision of the Chamber, and/or an issue arising in the substantive case, and therefore they constitute 'appealable issues'.
23. Whether those issues satisfy the relevant test for the granting of leave, and whether such leave is granted is a decision for the Pre-Trial Judge. The fact that the SPO does not accept or believe that such issues ought to be appealed does not render those issues not 'appealable'.
24. The issues raised by both teams are 'appealable', and are therefore issues that ought to be considered within the application for leave framework per the Law as outlined within the substantive application for Leave.
25. As the Gucati filing sets out at paragraph 10, there is no requirement at this stage to set out or identify an error in the reasoning, as that would clearly defeat the purpose of an appeal being heard on the merits and at paragraph 12, that these are not factors to be considered at the leave stage, but by the Court of Appeal Panel once leave has been granted.
26. It is respectfully submitted that the issues identified in the original submission appealable issues within the meaning of the leave certification framework.

VII. NONE OF THE ISSUES SIGNIFICANTLY AFFECT THE FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS OR THE OUTCOME TO THE TRIAL

27. The submission at paragraph 11 of the SPO response, that *“no allegation in the Indictment relates to any of the information covered by any of these three issues”*, is fundamentally wrong.
28. Time and time again, at each and every case status hearing, issues of disclosure have been raised, further, in the context of those submissions, access to evidence which the SPO have thus far been reluctant, or refused, to disclose has been a consistent theme or developing pattern of submissions.
29. The Defence reminds itself that it is not the purpose of the application for leave to argue the substantive elements of the appeal itself, and therefore it is limited in what it can submit at this juncture; however, to suggest that records of searches, and evidence that the Defence require sight of, do not relate to the counts on the indictment, is nonsensical.
30. The Defence for Haradinaj makes specific reference to, and joins, paragraphs 13-17 of the Gucati filing in that the matters raised in the leave application are neither hypothetical nor abstract propositions. They go to the very core of the case and the availability of incitement/entrapment as a substantive defence or grounds for excluding liability such as necessity. As the Defence for both

Haradinaj and Gucati have repeatedly argued since the beginning of these proceedings the cavalier approach to disclosure as displayed by the SPO in this case, raises very real concerns as to whether the trial should in fact proceed or be stayed. As alluded to by the Defence for Gucati, the Defence for Haradinaj considers these are matters which are determinative to the outcome of the trial.

31. In terms of what is referred to as the 'Third Issue' at paragraph 13 of the SPO response it is of note that only video recordings concerning one search have been viewed, there were at least three attendances at the offices of the Veterans Association (KLA WVA) given the allegations concerning three batches of documents, and in any event, with direct regard to the video recordings that have been seen, the Defendant is explicitly prevented from viewing the same.
32. Subsequent to the filing of the application for leave to appeal, both Defence teams have since been notified that the SPO, for reasons unknown to the Defence, omitted to record the first three attendances where material consisting of the alleged three batches were seized. The fact that there is a gaping hole in the investigation of this matter clearly demonstrates that there is an even greater need for these matters to be properly resolved.

33. Further, to suggest that the Defence Teams have “*obtained access to any information contained therein*”, is demonstrably inaccurate, having regard to the fact that the SPO have not, nor will they, disclose what evidence and/or documents were seized, nor have they disclosed any statements taken from officers present, nor have they disclosed any proper semblance of a chain of custody record, in terms of that which was seized, where it was seized, by whom and importantly, its origin.
34. The Defence therefore **have not** had access to the information contained within the videos, they have merely seen one set of videos in the absence of the Defendant, and therefore again, the Defendant is prevented from having sight of information essential to the preparation of any Defence.

VIII. GRANTING LEAVE TO APPEAL ON ANY ISSUE WOULD NOT MATERIALLY ADVANCE THE PROCEEDINGS

35. At paragraphs 14-15 of its Response, the SPO appear to be suggesting that:
- a. There is not enough time to resolve any appeal; and/or
 - b. Any issue that the Defence takes can be dealt with “*in the context of a final appeal*”.

36. The two submissions advanced by the Prosecution are disconcerting. To suggest that an issue so fundamental as to the fairness of proceedings should be dictated by the premature transfer of this case to the Trial Panel and to the judicial calendar more generally, is quite simply, ludicrous. The Pre-Trial Judge is invited to simply dismiss the argument.
37. Second, to suggest that this matter can be resolved at the final appeal stage fails to take account of the fact that the questions being asked at this stage will determine whether there is even a proper basis for the trial to proceed. To subject a Defendant to a trial based on a process that may constitute an abuse of process, depending upon how the Court of Appeal Panel decides, taking into account the cost of proceedings, is simply not justified. These are matter that can, and must, be determined at this stage.
38. Parties are reminded that the Defendant must be guaranteed a fair trial, and further, that as much as there is an obligation to conduct proceedings expeditiously, the concept of expedition cannot and must not override the right to a fair trial and due process.
39. Whether an issue can be argued in the context of a final appeal or otherwise, is wholly immaterial as to whether that issues ought to be argued in the context of an 'interlocutory appeal'.

40. The possibility of raising the issue on 'final appeal' is not the test, nor should it be part of the test, and therefore the submissions of the SPO on this point ought to be summarily rejected given their irrelevance.
41. In a similar vein, simply because there is a target date for the transferring of the case to the trial panel does not render that date as final if matters that require determination have not been concluded by that point.
42. We note that it is the SPO that failed to disclose material including the recently served video footage in good time, and therefore the delay in considering that material, and consequently, the need for the request for leave is a direct result of the inefficiency of the SPO and its intransigence. It is important to note that the video footage was taken on 25 November 2020 and there is no good reason as to why it was only served recently.
43. The Defendant ought not to be prejudiced, particularly when the issue(s) arising and therefore the subject of this application for leave to appeal are not down to something done or not done by the Defendant.
44. As noted in the Gucati filing, these are matters that require determination during the pre-trial phase, and certainly in advance of the matter being transferred to a Trial Panel (Rule 95(2)).
45. In relation to the observations made concerning the *Bemba et al.* ruling, the Defence for Haradinaj joins the Defence for Gucati in respect of the wholly

different set of circumstances in the instant case. The instant case remains in the Pre-Trial phase, no decision has been made on the definitive date of transfer to the Trial Panel and no decision has been taken, or submissions heard, on the composition of the Trial Panel.

46. The issue, as noted in the Gucati filing, and joined by the Defence for Haradinaj, is that the issue(s) concern (a) matters that go to whether incitement/entrapment is available as a substantive offence or as grounds for the exclusion of evidence, a defence based on exclusionary grounds or a stay or bar of proceedings – matters fundamental to the outcome of the trial; and (b) whether disclosure as requested by the Defence should have been made is fundamental to materially advancing the proceedings. Consequently, it is respectfully submitted, on these grounds, leave should be granted.

IX. RECONSIDERATION

47. The previous submissions as per the substantive request for leave are maintained.
48. The SPO does not raise any issue that falls to be addressed, other than the now trite argument that the Defence have misrepresented the decision, argument that is as unfounded as it is offensive.

VII. CONCLUSION

49. The original submissions filed are maintained.
50. Further, the Defence for Mr. Haradinaj joins with the submissions of the Gucati team.
51. The position is maintained that leave to appeal ought to be granted for the aforesaid reasons.
52. Finally, for the reasons outlined, the Defence seek an extension to the limitation period for the original application for leave to appeal.

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