



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

**In:** KSC-BC-2020-07  
**The Prosecutor v. Hysni Gucati and Nasim Haradinaj**

**Before:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Date:** 15 June 2021

**Language:** English

**Classification:** Confidential

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**Decision on the Haradinaj Application for Leave to Appeal  
the Decision on the Search and Seizure Videos**

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**THE PRE-TRIAL JUDGE**,<sup>1</sup> pursuant to Article 45(2) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 77 and 79 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 26 May 2021, the Pre-Trial Judge issued a decision ("Impugned Decision") on, *inter alia*, access to videos depicting the SPO's search and seizure at the premises of the Kosovo Liberation Army War Veterans' Association on 25 September 2020 ("Search and Seizure Videos").<sup>2</sup>
2. On 3 June 2021, the Defence for Nasim Haradinaj ("Mr Haradinaj") filed an application for leave to appeal the Impugned Decision, in relation to, *inter alia*, the Search and Seizure Videos ("Haradinaj Application").<sup>3</sup>
3. On 10 June 2021, the SPO filed a response to Haradinaj Application.<sup>4</sup>
4. On 14 June 2021, the Defence for Mr Haradinaj filed its reply.<sup>5</sup>

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<sup>1</sup> KSC-BC-2020-07, F00061, President, *Decision Assigning a Pre-Trial Judge*, 29 October 2020, public.

<sup>2</sup> KSC-BC-2020-07, F00210, Pre-Trial Judge, *Decision on Prosecution Requests and Challenges Pursuant to F00172* ("Impugned Decision"), 26 May 2021, confidential.

<sup>3</sup> KSC-BC-2020-07, F00219, Defence for Mr Haradinaj, *Application for Leave to Appeal the Decision on Prosecution Requests and Challenges Pursuant to F00172* ("Haradinaj Application"), 3 June 2021, confidential. The Defence for Mr Haradinaj also seeks leave to appeal the Impugned decision in relation to non-disclosure of any material relating to the origin, provenance and individuals purportedly making disclosure of the Three Batches (Gucati Requests B-C). *See* Haradinaj Application, para. 2(b). This application is dealt with in a separate decision.

<sup>4</sup> KSC-BC-2020-07, F00226, Specialist Prosecutor, *Consolidated Prosecution Response to Defence Applications F00216 and F00219 for Leave to Appeal and Reconsideration* ("SPO Response"), 10 June 2021, confidential.

<sup>5</sup> KSC-BC-2020-07, F00234, Defence for Mr Haradinaj, *Defence Reply to Prosecution Response to Defence Applications F00216 and F00219* ("Reply"), 14 June 2021, confidential.

## II. SUBMISSIONS OF THE PARTIES

5. The Defence for Mr Haradinaj requests leave to appeal the Impugned Decision as regards the Pre-Trial Judge's order to the SPO to make the Search and Seizure Videos viewable to the Defence Counsel on the SPO premises and to allow the taking of notes during such viewing(s), notes which could be shown to and discussed with the Accused.<sup>6</sup>

6. The SPO responds that the Haradinaj Application should be dismissed as it was filed out of time and, in any event, rejected as it fails to meet the requirements for leave to appeal under Article 45 of the Law and Rule 77 of the Rules.<sup>7</sup>

7. The Defence for Mr Haradinaj maintains its submissions on reply.<sup>8</sup>

## III. APPLICABLE LAW

8. Pursuant to Article 45 of the Law, a Court of Appeals Panel shall hear interlocutory appeals from an accused or from the Specialist Prosecutor in accordance with the Law and the Rules. Interlocutory appeals, other than those that lie as of right, must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel 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.

9. Rule 77(2) of the Rules further provides that 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

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<sup>6</sup> Haradinaj Application, para. 12.

<sup>7</sup> SPO Response, para. 1.

<sup>8</sup> Reply, paras 49, 51.

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.

10. Pursuant to Rule 79 of the Rules, in exceptional circumstances and where a clear error of reasoning has been demonstrated or where reconsideration is necessary to avoid injustice, a Panel may, upon request by a Party or *proprio motu* after hearing the Parties, reconsider its own decisions.

#### IV. DISCUSSION

##### A. TIMELINESS OF THE HARADINAJ APPLICATION

11. As a preliminary matter, the Pre-Trial Judge notes that the Defence for Mr Haradinaj filed its application outside the time limit provided by the Rule 77(1) of the Rules.<sup>9</sup> The Pre-Trial Judge emphasises that none of the factors advanced by the Defence for Mr Haradinaj qualify, in the ordinary course of events, as good cause for extension of time limits.<sup>10</sup> Moreover, such requests should typically be submitted prior to the expiry of said deadline and only exceptionally, where the delay is unexpected, together with the relevant submission. Nevertheless, the Pre-Trial Judge finds it appropriate to recognise these submissions as validly made, pursuant to Rule 9(5)(b) of the Rules. This recognition is made on an exceptional basis so as not to deny the

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<sup>9</sup> The Impugned Decision was notified on 26 May 2021. Pursuant to Rule 77(1) of the Rules, a party seeking leave to appeal must request certification within seven days of the impugned decision. Pursuant to Rules 9 and 77 of the Rules, any application for leave to appeal the Impugned Decision should have been filed by 2 June 2021.

<sup>10</sup> Haradinaj Application, fn. 3, adopting the factors named by KSC-BC-2020-07, F00216, Defence for Mr Gucati, *Application for Leave to Appeal through Certification from Decision KSC-BC-2020-07-F00210 pursuant to Article 45(2) and Rule 77(1); Alternative Request for Reconsideration under Rule 79(1)*, 3 June 2021, confidential, fn. 3 (the ongoing preparations for the fifth status conference, the review of recent disclosure and an official holiday observed in the United Kingdom); Haradinaj Reply, paras 11-14.

Defence for Mr Haradinaj the opportunity to request leave to appeal the Impugned Decision on the aforementioned matters.

## B. CERTIFICATION

### 1. Legal Test

12. A right to appeal arises only if the Panel is of the opinion that the standard for certification set forth in Article 45(2) of the Law and Rule 77(2) of the Rules has been met.<sup>11</sup> The Pre-Trial Judge recalls the interpretation of these provisions as set out in detail previously.<sup>12</sup>

13. Mindful of the restrictive nature of this remedy, the following specific requirements apply:

- (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.<sup>13</sup>

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<sup>11</sup> See also KSC-BC-2020-06, F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal* (“Thaçi Decision on Leave to Appeal”), 11 January 2021, public, para. 9. Similarly, ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, [Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal](#) (“ICC-01/04-168, Judgment on Extraordinary Review”), 13 July 2006, para. 20.

<sup>12</sup> See KSC-2020-07, F00169, Pre-Trial Judge, *Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions*, 1 April 2021, public, paras 10-18.

<sup>13</sup> Thaçi Decision on Leave to Appeal, para. 10.

## 2. Whether There Is an Appealable Issue

14. The Defence for Mr Haradinaj submits that the Pre-Trial Judge failed to apply the appropriate legal test in imposing the restrictions on the Search and Seizure Videos, by failing to set out why any or all such individual restrictions are strictly necessary and by failing to counterbalance them with the rights of the Accused.<sup>14</sup> The Defence for Mr Haradinaj further submits that the Pre-Trial Judge failed to set out how it would be sufficient for Specialist Counsel to ascertain with the notes taken during the viewing(s), and without the Accused viewing them, what the SPO did or what its officers took from the premises, thereby preventing Specialist Counsel from taking proper instructions from the Accused on the search and seizure.<sup>15</sup>

15. The SPO responds that, by merely referring to the Pre-Trial Judge's ruling, the Defence for Mr Haradinaj falls short of identifying an appealable issue.<sup>16</sup> The SPO submits that the remaining submissions of the Defence for Mr Haradinaj on this matter both misrepresent the Impugned Decision and are overly broad to identify a discrete appealable issue and instead they only outline a mere disagreement with the Pre-Trial Judge's conclusions.<sup>17</sup>

16. The Defence for Mr Haradinaj rejects the SPO submissions and reiterates its previous arguments.<sup>18</sup>

17. The Pre-Trial Judge recalls that the Impugned Decision reviewed the SPO's request for the non-disclosure of the Search and Seizure Videos pursuant to Rule 102(3) and 108 of the Rules. Having found that the Search and Seizure Videos were material to the Defence preparation under Rule 102(3) of the Rules, the Pre-Trial Judge went on to consider whether the aforementioned videos were to be withheld

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<sup>14</sup> Haradinaj Application, para. 13(a)-(c).

<sup>15</sup> Haradinaj Application, para. 13(d).

<sup>16</sup> SPO Response, para. 9.

<sup>17</sup> SPO Response, para. 9.

<sup>18</sup> Haradinaj Reply, paras 19-26.

under Rule 108 of the Rules. The Pre-Trial Judge then found that if the Accused gained access to the Search and Seizure Videos, there would be a risk that they would disseminate the identities of the aforementioned persons and thereby cause prejudice to SC investigations and proceedings. On this basis, the Pre-Trial Judge ordered the non-disclosure of the aforementioned videos to the Accused, but, as a counterbalancing measure, directed the SPO to make the videos viewable to Defence Counsel, who were in turn permitted to share and discuss their notes thereon with the Accused.<sup>19</sup>

18. Accordingly, the Pre-Trial Judge considers that the assertion of the Defence for Mr Haradinaj that the Impugned Decision failed to apply the appropriate legal test misrepresents the specific finding and does not address how the Pre-Trial Judge, by applying Rule 108 of the Rules, has failed to take in consideration the overall requirements of Article 21(6) of the Law. As a result, the assertions of the Defence for Mr Haradinaj do not identify a discrete topic nor do they articulate a specific issue emanating from the Impugned Decision, which could be presented before the Court of Appeal Panel.

19. The Pre-Trial Judge accordingly finds that the Defence for Mr Haradinaj advanced no appealable issue.

### **3. Conclusion**

20. Having found that the Haradinaj Application does not present an appealable issue, the Pre-Trial Judge will not assess the remainder of the legal test for certifying a request for leave to appeal.

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<sup>19</sup> Impugned Decision, paras 35-41.

### C. RECONSIDERATION

21. Having found that the Haradinaj Application does not meet the requirements for certification, the Pre-Trial Judge will consider, *proprio motu*, whether reconsideration of the Impugned Decision in relation to the Search and Seizure Videos is necessary.

22. The Pre-Trial Judge recalls that reconsideration is an exceptional measure and should only be undertaken if a clear error of reasoning has been demonstrated or if necessary to avoid injustice. New facts and arguments arising since the Impugned Decision was rendered may be relevant to this assessment.<sup>20</sup>

23. In the present case, the Pre-Trial Judge takes into consideration that, since the issuance of the Impugned Decision, the Registrar has confirmed that: (i) the storage capacity of the Secure Electronic Data Sharing (“SEDS”) system, used in the Specialist Chambers (“SC”) detention facilities, has been successfully increased and that the system continues to operate effectively;<sup>21</sup> and (ii) the SEDS system can and is being used to transmit large volumes of information between Counsel and the Accused and is the most efficient and secure method of transferring information.<sup>22</sup> Moreover, the Pre-Trial Judge takes into account the submissions of the Registrar and the Defence for Hysni Gucati at the fifth status conference that the Registry was in a position to provide Defence Counsel with a bespoke laptop and placed some screens in the consultation room so that he and his client may look at documents simultaneously in real-time.<sup>23</sup> Based on these new developments and mindful of the need to protect the

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<sup>20</sup> KSC-BC-2020-05, F00046, Pre-Trial Judge, *Decision on Specialist Prosecutor’s Request for Reconsideration or Certification for Appeal*, 5 November 2020, public, para. 14. Similarly, for example, ICC, *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15-468, Trial Chamber IX, Decision on Request for Reconsideration of the Order to Disclosure Requests for Assistance, 15 June 2016, para. 4; *Prosecutor v Jean-Pierre Bemba Gombo et al*, ICC-01/05-01/13-1085, Trial Chamber VII, Decision on Kilolo Defence Request for Reconsideration, 15 July 2015, para. 4.

<sup>21</sup> KSC-BC-2020-07, F00208, Registrar, *Registrar’s Submissions for the Fifth Status Conference*, 26 May 2021, public, para. 4; Transcript, 28 May 2021, public, pp. 277-278.

<sup>22</sup> KSC-BC-2020-07, F00208, Registrar, *Registrar’s Submissions for the Fifth Status Conference*, 26 May 2021, public, para. 5; Transcript, 28 May 2021, public, pp. 277-280.

<sup>23</sup> KSC-BC-2020-07, Transcript, 28 May 2021, public, pp. 278, 281.



identity of SPO staff and other persons appearing in the Search and Seizure Videos, the Pre-Trial Judge considers that the viewing of the aforementioned videos by the Accused, in the SC detention facilities, without the possibility of retaining or copying such videos, is the most appropriate counterbalancing measure for the non-disclosure of the videos, as ordered in the Impugned Decision.

24. In light of the foregoing, the Pre-Trial Judge is of the view that maintaining the original order of providing access to the Search and Seizure Videos to Defence Counsel only would constitute an injustice within the meaning of Rule 79(1) and finds it appropriate to reconsider the Impugned Decision concerning the access of the Accused to the aforementioned videos. Therefore, the Pre-Trial Judge orders the SPO to make the Search and Seizure Videos viewable to both Accused, together or separately, in the presence of their respective Defence Counsel, in the SC detention facilities and to allow the taking of notes during such viewing(s). Correspondingly, the Pre-Trial Judge orders Defence Counsel and the Accused to refrain from making any copies (e.g. videos, screenshots, stills) of the Search and Seizure Videos during such viewing(s). The Pre-Trial Judge directs the Registrar to assist in setting up the aforementioned viewings.


## V. DISPOSITION

25. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **REJECTS** the Haradinaj Application;
- b. **RECONSIDERS** *proprio motu* the Impugned Decision to the extent provided in paragraph 24;
- c. **ORDERS** the SPO to make available to the Accused, upon request, the Search and Seizure Videos, as set out in paragraph 24, and **ORDERS** the Accused and

the Defence Counsel to abide by the measures provided in the same paragraph; and

- d. **DIRECTS** the Registrar to assist in the aforementioned measure.



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**Judge Nicolas Guillou**  
**Pre-Trial Judge**

Dated this Tuesday, 15 June 2021  
At The Hague, the Netherlands.