



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

Decision on the Defence Motion for Clarification of Decision F00210

Specialist Prosecutor

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 39(13) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 75(1) 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 ("Decision F00210") on, *inter alia*, the disclosure of contemporaneous notes in the SPO's possession which refer to statements made by a witness or questions put to a witness ("Gucati Request A").²
2. On 3 June 2021, the Defence for Mr Gucati requested clarification of Decision F00210 in relation to the Gucati Request A ("Request").³
3. On 7 June 2021, the Defence for Nasim Haradinaj ("Mr Haradinaj") joined the Request.⁴
4. On 10 June 2021, the SPO filed a response to the Request.⁵
5. On 14 June 2021, the Defence for Mr Gucati and the Defence for Mr Haradinaj filed their respective replies.⁶

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

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

³ KSC-BC-2020-07, F00217, Defence for Mr Gucati, *Motion for Clarification of Decision KSC-BC-2020-07-F00213* ("Request"), 3 June 2021, confidential.

⁴ KSC-BC-2020-07, F00220, Defence for Mr Haradinaj, *Motion for Clarification of Decision KSC-BC-2020-07-F00210* ("Haradinaj Joinder"), 7 June 2021, confidential.

⁵ KSC-BC-2020-07, F00227, Specialist Prosecutor, *Prosecution Response to Defence Requests for Clarification F00217 and F00220* ("SPO Response"), 10 June 2021, confidential.

⁶ KSC-BC-2020-07, F00231, Defence for Mr Gucati, *Reply to Prosecution Response to Defence Requests for Clarification F00217 and F00220* ("Gucati Reply"), 14 June 2021, confidential; F00233, Defence for Mr Haradinaj, *Reply to Prosecution Response to Defence Requests for Clarification F00217 and F00220* ("Haradinaj Reply"), 14 June 2021, confidential.

II. SUBMISSIONS OF THE PARTIES

6. The Defence for Mr Gucati requests clarification of Decision F00210 in the sense that the Pre-Trial Judge find that:

“that where the Official Witness Note⁷ and the Declaration⁸ 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.”⁹

7. The Defence for Mr Gucati submits that the absence of a record in the contemporaneous note is itself disclosable information and can support an inference of late fabrication, elaboration or exaggeration in the Official Witness Notes and/or Declarations.¹⁰ The Defence for Mr Gucati further avers that the same considerations must apply whenever there are inconsistencies between the contents of the contemporaneous note and the Official Witness Note or Declaration.¹¹

8. The SPO responds that requests for clarification are not provided under the Law and the Rules and that a Party may instead request certification or reconsideration of a decision.¹² The SPO seeks the dismissal of the Request, as there is no uncertainty or unclarity in Decision F00210.¹³ The SPO submits that the interpretation suggested by the Defence of Mr Gucati would imply that any contemporaneous note taken in the course of contacts with relevant individuals be disclosed to the Defence unless it was identical to the subsequent official note.¹⁴ The SPO further avers that the Request

⁷ F00210 defined as “Official Witness Notes” all official SPO notes concerning contact with witnesses. *See* Decision F00210, para. 51.

⁸ F00210 defined as “Declarations” two statements prepared by an SPO investigator. *See* Decision F00210, para. 51.

⁹ Request, para. 2.

¹⁰ Request, para. 3.

¹¹ Request, para. 6.

¹² SPO Response, para. 2.

¹³ SPO Response, para. 7.

¹⁴ SPO Response, para. 6.

amounts to a further circuitous attempt to obtain disclosure of all and any contemporaneous notes, which has already been adjudicated.¹⁵

9. The Defence for Mr Gucati replies that the Request was made because it was clear through *inter partes* correspondence that the Parties were not *ad idem* as to the interpretation of Decision F00210 – in particular what is meant therein by “disclosable information”.¹⁶ The Defence for Mr Gucati submits that the Request is made with the intention of assisting both Parties to complete disclosure fairly, efficiently, and effectively and that the Defence is asking for transparency of the SPO’s investigation into issues going to the heart of the case.¹⁷ The Defence for Mr Haradinaj joins the submissions of the Defence for Mr Gucati and submits that 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.¹⁸

III. APPLICABLE LAW

10. Rule 75(1) of the Rules provides that the Parties and the Registrar may apply before the competent Panel for a relief, except where otherwise provided by the Rules.

IV. DISCUSSION

A. REQUESTS FOR CLARIFICATION

11. The Pre-Trial Judge notes that Rule 75(1) of the Rules provides the Parties and the Registrar with a general entitlement to apply for relief, except where otherwise provided by the Rules. Such a relief may also encompass the clarification of a specific finding or disposition of a decision or order of the competent Panel. That being said,

¹⁵ SPO Response, para. 6.

¹⁶ Gucati Reply, para. 6.

¹⁷ Gucati Reply, para. 13.

¹⁸ Haradinaj Joinder, paras 2, 5; Haradinaj Reply, paras 2-6.

a request for clarification may not be used as an indirect avenue to seek reconsideration of said decision or request an additional relief in a previously decided matter.

B. THE SCOPE OF DECISION F00210

12. The Pre-Trial Judge recalls his finding in Decision F00210 that any contemporaneous notes taken during interviews with contacted individuals and on the basis of which the Official Witness Notes and the Declarations were prepared are subject to disclosure under Rule 102(3) of the Rules only to the extent that they contain disclosable information that has not been recorded in the Official Witness Notes and Declarations.¹⁹ On this basis, the Pre-Trial Judge ordered the SPO to review any such contemporaneous notes and, where they contained disclosable information, such as the questions posed to the contacted individuals, which has not been recorded in the Official Witness Notes and the Declarations, to disclose such notes to the Defence.²⁰

13. The Pre-Trial Judge also recalls that the aforementioned order in Decision F00210 was confined to “disclosable information”, meaning any information that was subject to disclosure under Rule 102 of the Rules, except where and to the extent that such information fell under Rule 106 or Rule 108 of the Rules.²¹ The Pre-Trial Judge further recalls that the aforementioned order in Decision F00210 was confined to disclosable information “that has not been recorded” from the contemporaneous notes into the Official Witness Notes or Declarations.²² This formulation encompasses any disclosable note, annotation or other text that appears in the contemporaneous notes, but does not appear in the Official Witness Notes or Declarations. In light of the foregoing, the Pre-Trial Judge underlines that the aforementioned order did not

¹⁹ Decision F00210, para. 54.

²⁰ Decision F00210, paras 54 and 65(e).

²¹ Decision F00210, para. 54.

²² Decision F00210, para. 54.

encompass the disclosure of any notes that may have contained less information than the Official Witness Notes or Declarations prepared on their basis.

14. The Pre-Trial Judge accordingly finds that Decision F00210 is unequivocal in the above respects and needs no further clarification.

V. DISPOSITION

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

REJECTS the Request.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Tuesday, 15 June 2021

At The Hague, the Netherlands.