

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: 18 June 2021

Language: English

Classification: Public

Defence Application to Vary the Consolidated Calendar

Specialist Prosecutor

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I. CLASSIFICATION

1. These submissions have been designated as 'Public' as there would appear to be nothing to warrant a Confidential marking.

II. INTRODUCTION

2. On 8 March 2021 the Pre-Trial Judge issued an order containing the Consolidated Calendar.¹
3. In accordance with that Calendar, the Defence were to submit, where they choose to do so, a Pre-Trial Brief by Monday 14 June 2021.
4. Further in accordance with that Calendar, the Defence were to submit its objections to the admissibility of evidence pursuant to Rule 102, by Monday 14 June 2021.
5. On 9 June 2021, the Pre-Trial Judge in the *"Revised Calendar for the Remainder of the Pre-Trial proceedings and Order Setting the Date for the Sixth Status Conference"*,² noted at paragraph 19 that there had been *"several decisions on disclosure"* and that *"several disclosures have taken place, including a voluminous amount of metadata"*.

¹ KSC-BC-2020-07/F00148

² KSC-BC-2020-07/F00224

6. Consequently, and the fact that further requests remained pending, the Pre-Trial Judge extended the time limit for the submission of the Defence Pre-Trial Briefs.
7. The Defence 'objections to the admissibility of evidence' was similarly extended.
8. Accordingly, the relevant deadlines were extended, per paragraph 22 of that Order, by 8 days, the deadline being 22 June.
9. The Defence submits that these deadlines are now impossible to adhere to and seek an extension of the time limits within that Calendar and Order, as per the reasoning given in both the written submissions prior to the Fifth Status Conference, and those expanded submissions made at that same Status Conference.

III. BACKGROUND

10. For the purposes of these submissions the following background is deemed as relevant, it containing the dates of SPO disclosures.
11. On 04/01/2021, 06/01/2021, 19/02/2021 the SPO circulated disclosure number 2.
12. On 06/01/2021, 19/02/2021 the SPO circulated disclosure number 3.

13. On 19/02/2021 the SPO circulated disclosure number 4.
14. On 28/01/2021, 19/02/2021 the SPO circulated disclosure number 5.
15. On 19/02/2021, 09/04/2021 the SPO circulated disclosure number 6.
16. On 18/02/2021, 19/02/2021 the SPO circulated disclosure number 7.
17. On 04/03/2021 the SPO circulated disclosure number 8.
18. On 09/03/21 the SPO circulated disclosure number 9.
19. On 09/04/21 the SPO circulated disclosure number 10.
20. On 12/03/21 the SPO circulated disclosure number 11.
21. On 15/03/21 the SPO circulated disclosure number 12.
22. On 17/03/21 the SPO circulated disclosure number 13.
23. On 18/03/2021, 19/03/2021 the SPO circulated disclosure number 14.
24. On 19/03/21 the SPO circulated disclosure number 15.
25. On 25/03/2021, 26/03/2021 the SPO circulated disclosure number 16.
26. On 25/03/21 the SPO circulated disclosure number 17.
27. On 25/03/21 the SPO circulated disclosure number 18.
28. On 09/04/2021 the SPO circulated disclosure number 19.

29. On 09/04/2021 the SPO circulated disclosure number 20.
30. On 09/04/2021 the SPO circulated disclosure number 21.
31. On 14/04/21 the SPO circulated disclosure number 22.
32. On 22/04/21 the SPO circulated disclosure number 23.
33. On 27/04/21 the SPO circulated disclosure number 24.
34. On 28/04/21 the SPO circulated disclosure number 25.
35. On 28/04/21 the SPO circulated disclosure number 26.
36. There does not appear to be a disclosure 27.
37. On 07/05/21 the SPO circulated disclosure number 28.
38. On 14/05/21 the SPO circulated disclosure number 29.
39. On 25/05/21 the SPO circulated disclosure number 30.
40. On 26/05/21 the SPO circulated disclosure number 31.
41. There does not appear to be a disclosure number 32.
42. On 02/06/21 the SPO circulated disclosure number 33.
43. On 07/06/21 the SPO circulated disclosure number 34.
44. On 11/06/21 the SPO circulated disclosure number 35.

IV. SUBMISSIONS

45. As per the order of the Pre-Trial Judge, the Defence Pre-Trial Brief is now due to be filed on 22 June 2021, as are any submissions objecting to the admissibility of evidence.
46. For the reasons already given in written submissions prior to the Fifth Status Conference, and expanded upon at that same Status Conference, the amended date provided remains unfeasible, and thus an application to extend the same is made.
47. On 24 February 2021, at the Second Case Status Conference, the SPO indicated that it had discharged its obligations under Rule 102(1)(b), disclosure at that stage comprising some 3,000 pages of evidence, including a significant number of hours of video evidence.
48. At this stage, seven separate disclosures had been made by the SPO.
49. The position maintained by the SPO at that time was woefully inaccurate.
50. At the Third Case Status Conference, the SPO referred to two outstanding requests made of third parties, with no indication given as to the volume of further material that might fall to be disclosed, although the SPO did submit that the “*bulk*” of material had been disclosed.

51. The word 'bulk', given that which has occurred after that third Conference, was clearly meaningless.
52. In any event, at that stage, there was no indication that outstanding requests would affect the proposed timeline for Defence submissions.
53. On 23 April 2021 further disclosures were made by the SPO, noting that this was just 1 day prior to the scheduled Case Status Conference.
54. At this point, the disclosure made on 23 April was the Disclosure 23.
55. As referred to in oral submissions at the Fifth Case Status Conference, that disclosure comprised some **17 lever arch files** of documents, and therefore an estimated **8,500** pages of disclosure.
56. Accordingly, the comments made by the SPO on 24 February were, as noted above, woefully inaccurate.
57. This position has been exacerbated in the extreme by the further disclosures made by the SPO on the eve of the Fifth Case Status Conference, where some 18,549 pages of documents were disclosed.
58. In the space of approximately 6 weeks, the SPO have disclosed over 27,000 pages of documents, despite maintaining back in February that its obligations had been discharged with a mere 3,000 pages of disclosure. That figure has been increased **ninefold**.

59. The SPO has now made 33 separate disclosures of varying volume.
60. It is noted that the Pre-Trial Judge refers to the voluminous documents as being 'meta-data', however, regardless of the contents of those documents, they need to be considered, and where required, instructions taken.
61. The Defence accepts that as a case progresses, there may be further disclosures to be made that were not necessarily anticipated, however, the position the Defence now find themselves in is, with respect, nonsensical.
62. At the time of suggesting it had met its obligations, 7 separate disclosures had been made by the SPO, to date, 33 separate disclosures have been made.
63. It simply cannot be appropriate that the Defence are held to a deadline imposed when assurances were given that disclosure obligations had been completed with 3,000 pages, when the clear reality of the position is that those obligations had been in no way discharged, and further, the amount of disclosure has increased over nine times that which it was originally.
64. Further, as much as an extension of 8 days has been granted, this is with respect, insufficient.
65. Again, to rehearse submissions previously made, as much as the SPO may have submitted, and may maintain that not every page disclosed is relevant, the SPO is conflating opinion with fact.

66. It is not for the SPO to determine what is relevant.
67. It is not for the SPO to dictate what the Defence need and need not consider.
68. The Defence are obliged to read each and every word of each and every page of disclosure; there can be no compromise on this point, as to fail to do so would be doing a disservice to the Defendant, and amount to a failure in Counsel's professional obligations.
69. Further, it falls to be highlighted that it is not the Defence that have prolonged matters, in that it has always been the intention to file the Pre-Trial Brief in accordance with the timeframe as set out by the pre-Trial Judge previously, however, it is now clear that this is an impossible deadline to meet, given the drip-feed approach to disclosure on the part of the SPO.
70. Accordingly, the previously suggested new timeframe per submissions made orally at the 5th Status Conference, is reaffirmed, namely that the deadline for the filing of the pre-trial brief is extended by 28 days to the 12 July 2021 at the earliest.
71. Further, given the disclosure issues, it is suggested that the deadline for the filing of any submissions deemed appropriate regarding the admissibility of evidence is likewise extended by a period of 28 days to 12 July 2021.

72. The Defence are mindful of the obligation to ensure that proceedings progress expeditiously, however, as noted above, the delay is solely on account of the position adopted by the SPO and its cavalier approach to its disclosure obligations.
73. Further and in any event, there is a matter that is currently under review by the Court of Appeals panel and a decision awaited.
74. Still further, leave to appeal has been recently granted in respect of a second issue.³
75. To therefore extend the period of filing of the Pre-Trial Brief and associated objections to the admission of evidence would not prolong matters further, given the aforesaid issues that need to be resolved by the Court of Appeals Panel.
76. Considering the deadlines for submissions on the issue subject to the most recent granting of leave, it is perhaps unlikely that any decision will be made on appeal prior to the new suggested date for submission of the Pre-Trial Brief.

V. CONCLUSION

³ KSC-BC-2020-07/F00235

77. At the time of fixing the timetable for the submission of filings, the deadlines imposed were realistic and appropriate, relying on the SPO's position in respect of disclosure obligations, and whether they had been discharged, or, whether they were to be discharged soon.
78. As this case has progressed however, the position adopted by the SPO has been demonstrated to be wholly inaccurate, and thus as a consequence, the timetable previously fixed is similarly inaccurate in terms of whether it is feasible to meet those deadlines or otherwise.
79. The Defence therefore respectfully requests that the two deadlines subject to this filing are extended in the terms outlined so as to ensure that the evidence disclosed can be appropriately considered, the case prepared, and of the utmost importance, so as to ensure that the Defendant suffers no prejudice.
80. Finally, it is submitted that by granting a further extension, the case will not be prolonged unduly, both having regard to the principles of fairness, and the unresolved appeals that preclude the case from being transferred to the Trial Panel in any event.

Word Count: 1853 words



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