

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: 12 July 2021

Language: English

Classification: Public

Defence Submissions for the Sixth Status Conference

Specialist Prosecutor

Jack Smith

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

Counsel for Hysni Gucati

Jonathan Elystan Rees QC

Huw Bowden

I. CLASSIFICATION

1. The Defence maintains that these submissions can appropriately be classified as public, and again, the Defence reiterates its previous submissions that maintain all submissions can appropriately be deemed public in the interests of transparency.

II. INTRODUCTION

2. On 23 June 2021, the Pre-Trial Judge varied the remaining calendar by way of a written order,¹ cancelling the Sixth Case Status Conference previously listed for 25 June 2021, rescheduling the same for 14 July 2021.
3. It is noted that that same order did not request any written submissions; however, the Defence for Mr. Haradinaj deem it appropriate to file written submissions so as to inform the Court of the position, addressing those points as raised within the aforementioned order.

III. SUBMISSIONS

¹ KSC-BC-2020-07/F00244

4. The submissions will follow the sequence as per the Order of the Pre-Trial Judge.

Detention Facilities

5. The Defence maintains the previous concerns raised in that the highly restrictive measures imposed during the COVID-19 Pandemic did not allow for proper defence preparations in this matter. It is noted that the Registry has taken steps to improve the situation with the introduction of computer screens. This was a welcome introduction although it was by no means sufficient and the system relied on a poor sound system and could not remove the limitations created by the glass wall partition.
6. It is noted that a further improvement has been made that will include the removal of the glass partition so that Counsel and Client may meet in the same room. That is an important measure although it is regrettable that it comes at a time when the pre-trial proceedings are being brought to an abrupt end and the case being prepared for transfer to the Trial Panel.

Translations

7. It is respectfully submitted that the position adopted by the Court and the Specialist Prosecutor's Office fails to recognise the status of the joint institutions. As noted in oral submissions by the Defence during the Fifth Status Conference, the position that only essential core documents need to be

translated according the KSC legal and regulatory framework is fundamentally misconceived. This approach is based on the erroneous self designated position as an international or hybrid tribunal. To be clear, it is neither. It is a domestic institution that falls under the legal, regulatory and constitutional framework of the Republic of Kosovo. All nationals of the Republic of Kosovo appearing before the institution(s) are entitled to have all case material in a language which they understand. To proceed on the basis that only core material is required in Albanian and the trial can be conducted in English with interpretation at trial is simply not accepted.

8. It is submitted that this is not a question of a foreign national appearing before a foreign court in which the language he speaks is not a language of the Court or the country's judicial system in which it sits.
9. There are obligations that fall on the Specialist Chambers as a national institution. First, all material that forms the case against the Defendant must be provided to him in a language which he understands in a timely fashion so as to enable him to provide instructions to his Counsel to prepare adequately for trial. Second, the proceedings must be conducted in a language which he understands or be provided with the free use of interpretation in all court proceedings.

10. The fact that there may be budgetary constraints do not affect the Defendant's rights in this regard. The appointing authority of the KSC, the European External Action Service ("EEAS") determined to create a national judicial institution within the framework of national law, and the international treaty obligations that stem from the constitution, and determined to staff the institutions with entirely non-nationals, the result of which is that all case material needs to be in multiple languages. Regardless, it has the obligation to secure and protect the rights of all persons brought before it in accordance with its national and international legal obligations.

11. The Defence do not take issue with the second requirement, in-court interpretation is provided, but it maintains that the Specialist Chambers is failing to comply with the first requirement. That is a matter of some concern that will ultimately affect the trial and its fairness to the Defendant.

Disclosure

12. The Defence maintain those previous submissions made, and in particular it is noted that the SPO are still making further disclosures despite the fact that they have consistently confirmed that they have disclosed all documentation.

13. This position was acknowledged by the pre-trial judge in his order² on the SPO request to provide a summary³ rather than the actual evidence.

14. In particular, the Pre-Trial Judge notes at paragraph 6 of that order:

“The Pre-Trial Judge recalls at the outset that, further to the SPO’s undertaking, the deadline to complete all disclosure under Rule 102(1)(b) and to disclose any Rule 103 material in the SPO’s possession was set to 9 April 2021. The Pre-Trial Judge reminds the SPO of its disclosure obligations and cautions against any further late disclosure”

15. Again therefore, we see a further example of the SPO failing to abide by the orders of the Pre-Trial Judge and failing to act in accordance with its own undertakings with little or any consequences.

16. The position therefore as far as the Defence is concerned, is that it is wholly impossible for the Defence, and the Specialist Chamber, to be satisfied that the SPO have complied with their disclosure obligations, and further, whether there will be any ongoing difficulties related to the remainder of the process as we simply do not know the correct position.

17. There is no basis for the SPO not to have disclosed the information in question prior to 9 July 2021 in Disclosure 39, noting again, that the SPO have failed to

² KSC-BC-2020-07/F00257

³ KSC-BC-2020-07, F00252/RED, Specialist Prosecutor, Confidential Redacted Version of ‘Prosecution Notification and Request to Provide Summary’ (“Request”), 5 July 2021, confidential.

confirm when the information contained within Disclosure 39 came into their possession.

18. The word 'Cavalier' has been previously used to describe the SPO approach to disclosure, and the same must remain here. The position has not been taken seriously from the outset of proceedings against the Defendant, and at each and every turn, the Defence have been forced to fight for disclosure, a process that ought to have been simple and straightforward.
19. Accordingly, the position must be that there should not be any issues in the future with disclosure; however, the Defence cannot be sure that there will not be as undertakings made are apparently meaningless.
20. Further, we would again highlight that the Court of Appeals Panel is currently reviewing a decision of the Pre-Trial Judge, and subject to the decision of the Chamber, it may be that further disclosure is ordered.
21. Again therefore, the position at this juncture remains unclear.
22. There are potentially two further issues upon which submissions will be made, at the Status Conference; however, in anticipation of the position of the SPO, and the subject matter to be discussed, the Pre-Trial Judge is notified that a period in 'Closed Session' will almost certainly be required.

Corrected Indictment

23. The Defence have now received the Corrected Indictment but notes that no further Order has been made as to whether it complies with the Order of the Court of Appeals Panel or the Order of the Pre-Trial Judge.

Defence Investigations

24. Defence investigations are ongoing and will continue to progress over the summer period.

Transmission of the Case File and Readiness for Trial

25. It is noted that submissions are invited on this point, however, the issue appears to have already been determined, noting paragraph 22(e) of the Order of the Pre-Trial judge “sets the date for the transmission of the case file under Rule 98(1) of the Rules to Friday, 16 July 2021”.
26. The Defence would therefore ask for clarification as to whether the issue has already been determined prior to hearing submissions on the point.
27. In any event, the case is not trial ready, nor is it ready for transfer to the trial panel, and it is not ready for the following reasons:
- a. There has been no Order as to the Corrected Indictment;
 - b. There is a matter of disclosure currently before the Court of Appeals Panel, a decision upon which is unlikely to be received prior to the 16 July 2021;

- c. That decision on Appeal may result in significant further disclosure having to be made by the SPO which affects any proposed timeline in terms of the trial itself, and any further written applications by the Defence;
 - d. A further request for disclosure in respect of certain items has been made that is yet to be determined. Subject to the outcome of that request, further disclosure and/or further applications to the Court of Appeals Panel may fall to be made; and
 - e. There is a degree of scepticism as to whether the disclosure process has been completed, for the aforesaid reasons.
28. Until such time as those outstanding issues have been resolved, the Defence are not in a position to advise as to when they expect to be ready to present the case for the Defence.

IV. CONCLUDING REMARKS

29. The Defence notes that written submissions have not been invited, however, given the issues arising, it is deemed imperative that certain matters are highlighted in writing prior to the Case-Status Conference.

30. Further, given the likelihood of the need for the Conference to in-part, be dealt with in closed session, it is deemed appropriate to put the Pre-Trial Judge 'on notice' of this fact.

Word Count: 1690 words



Toby Cadman

Specialist Counsel



Carl Buckley

Specialist Co-Counsel