

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

Before: **The President of the Specialist Chambers**
Judge Ekterina Trendafilova

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

Date: 12 August 2021

Language: English

Classification: Public

**REQUEST FOR RECONSIDERATION OF THE DECISION ON RECUSAL OR
DISQUALIFICATION**

Judges of Trial Panel II

Judge Charles Smith III, presiding

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor (reserve)

Specialist Prosecutor

Jack Smith

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

Counsel for Hysni Gucati

Jonathan Elystan Rees QC

Huw Bowden

I. INTRODUCTION

1. Pursuant to Rule 79(1) of the Rules of Procedure and Evidence of the Specialist Chambers (“Rules”), Specialist Counsel for Mr. Nasim Haradinaj hereby seek reconsideration of the President’s Decision on Recusal or Disqualification rendered on 6 August 2021 (“Decision”),¹ on the grounds of:
 - a. Exceptional circumstances;
 - b. The Decision demonstrates clear errors of reasoning;
 - c. Reconsideration of the Decision is necessary to avoid injustice.

2. The Defence requests reconsideration of the following:
 - a. The finding that the President of the Specialist Chambers, Judge Ekterina Trendafilova, has the power to decide on her own recusal or disqualification;
 - b. The finding that the President of the Specialist Chambers, Judge Ekterina Trendafilova, was not exercising a judicial function; and

¹ KSC-BC-2020-07/F00272, Decision on Recusal or Disqualification, 6 August 2021, Public.

- c. The finding that the Application for recusal or disqualification of the Vice President, Judge Charles L. Smith III, supported by a witness statement and corroborating evidence is “*entirely* lacking in substance” (emphasis added).
3. In accordance with Article 41 of the Practice Direction on Files and Filings before the Kosovo Specialist Chambers,² and in light of the criticisms made by the President in her Decision³ this application is submitted within the word limit of 6,000 words and no application for any variation or extension is sought.
4. Further, although the Rules are silent on the time frame for making an application for reconsideration pursuant to Rule 79(1) of the Rules and on the basis that it does not stay proceedings or any part thereof, pursuant to Rule 79(2), nor is the Defence seeking a stay of proceedings at this stage, the Defence has adopted the position as set out in Rule 77(1) where an interlocutory appeal does not lie as of right and requires certification the deadline shall be seven (7) days from the date of the original Decision. That being so, applying the principle *mutatis mutandis*, the deadline for the present application is 13 August 2021.

² Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers, KSC-BD-15

³ KSC-BC-2020-07/F00272, Decision on Recusal or Disqualification, 6 August 2021, Public, paras. 4-5

5. This Application is therefore made in accordance with the Rules and the relevant Practice Direction insofar as there is provision for guidance.

II. BACKGROUND

6. On 15 July 2021, the President of the Specialist Chambers (“President”) assigned Trial Panel II to hear the trial against Hysni Gucati and Nasim Haradinaj.⁴ The President appointed the Vice President of the Specialist Chambers, Judge Charles L. Smith III (“Vice President”) to Trial Panel II, who was subsequently after his assignment, appointed as the Presiding Judge of Trial Panel II.⁵
7. On 26 July 2021, the Defence of Mr. Haradinaj filed the Application for the Recusal or Disqualification of both President Ekaterina Trendafilova and Vice President Charles L. Smith III of the Kosovo Specialist Chambers (“Application”), which the Defence of Mr. Gucati joined on 28 July 2021.⁶

⁴ KSC-BC-2020-07/F000263, Decision Assigning Trial Panel II, 15 July 2021, Public.

⁵ KSC-BC-2020-07/F00266, Decision Notifying the Election of a Presiding Judge, 16 July 2021, Public.

⁶ KSC-BC-2020-07/F00268/RED, Public Redacted Version of Application for Recusal of the President of the Specialist Chambers, Judge Ekaterina Trendafilova, and the Vice President of the Specialist Chambers, Judge Charles L. Smith, Presiding Judge of Trial Panel II, 28 July 2021 (confidential version filed on 26 July 2021) (public with confidential annexes); KSC-BC-2020-07/F00269, Joinder re Application for Recusal KSC-BC-2020- 07/F00268, 28 July 2021 (confidential). Mr. Haradinaj’s Defence filed corrected version of the Application on the same day. See KSC-BC-2020-

8. On 6 August 2021, the President rendered a Decision, dismissing both her own recusal or disqualification and the recusal or disqualification of Vice President Smith.⁷

9. In the Decision refusing the Application, insofar as is relevant to the present Application, the President notes the following:
 - a. Finds there can be no recusal or disqualification of a President pursuant to Rule 20(1) of the Rules;⁸

 - b. Declines to recuse herself from exercising *administrative* functions uniquely conferred on her by the Specialist Chambers legal framework;⁹

 - c. Declines to recuse herself from exercising *administrative* or *case management* functions in the present case, which the law confers solely upon her as President;¹⁰

07/F00268/COR, Application for Recusal of the President of the Specialist Chambers, Judge Ekaterina Trendafilova, and the Vice President of the Specialist Chambers, Judge Charles L. Smith, Presiding Judge of Trial Panel II, 28 July 2021 (confidential with confidential annexes).

⁷ KSC-BC-2020-07/F00272, Decision on Recusal or Disqualification, 6 August 2021, Public.

⁸ KSC-BC-2020-07/F00272, Decision on Recusal or Disqualification, 6 August 2021, Public, para. 19.

⁹ KSC-BC-2020-07/F00272, Decision on Recusal or Disqualification, 6 August 2021, Public, para. 20.

¹⁰ KSC-BC-2020-07/F00272, Decision on Recusal or Disqualification, 6 August 2021, Public, para. 21.

- d. Determines that the recusal of a judge pursuant to Rule 20 of the Rules is limited to judges determining the guilt of innocence of an accused, and therefore there can be *no* circumstances, it would appear, in which the President would consider recusing herself from any decision arising from the making or from the issuing of any decision or order in the present case;¹¹
- e. Determines that she is not fulfilling any *judicial* role and that she can neither recuse herself nor be presently disqualified from fulfilling the judicial role as provided in Rule 20(1) of the Rules;¹²
- f. Refers to an allegation made by an “individual in relation to Judge Smith’s tenure as President of the Assembly of Judges” rather than considering that a serious allegation has been made by a fellow judge, Malcolm Simmons,¹³ who in 2014 was appointed as the President of

¹¹ KSC-BC-2020-07/F00272, Decision on Recusal or Disqualification, 6 August 2021, Public, para. 22.

¹² KSC-BC-2020-07/F00272, Decision on Recusal or Disqualification, 6 August 2021, Public, para. 23.

¹³ Confidential Annexes 5 and 6.

EULEX Judges, as set out in his witness statement, and supported by allegations¹⁴ made in writing by at least two other judges;¹⁵

- g. Determines that the Application does not distinguish between the Vice President's administrative role as Vice President and his trial duties as Presiding Judge of Trial Panel II.¹⁶

10. To be clear the following points are made:

- a. It is *not* accepted that the President is immune from recusal or disqualification on any grounds as the President's Decision appears to indicate. Such a position cannot be sustainable in any institution based on the rule of law;
- b. It is *not* accepted that a judge can only be recused or disqualified from acting in a judicial capacity in which guilt or innocence is determined. Such a position is simply illogical and fails to take into account that decisions are made, at various stages of the proceedings, by different

¹⁴ Confidential Annexes 7 and 8.

¹⁵ KSC-BC-2020-07/F00272, Decision on Recusal or Disqualification, 6 August 2021, Public, para. 24

¹⁶ KSC-BC-2020-07/F00272, Decision on Recusal or Disqualification, 6 August 2021, Public, paras. 26-35.

judicial actors, that have a direct or indirect impact on whether a trial is fair, it is not merely in the determination of guilt where the right lies;

- c. It is *not* accepted that the President is exercising a purely administrative function and therefore does not exercise any judicial function. Decisions and orders issued have an impact on the case at hand. Further, the Decision issued by the President against which this Application for Reconsideration is made, is a judicial decision in itself from which the President should have recused herself;
- d. The application seeking the recusal or disqualification of the Vice President is made in respect of his appointment as a member of Trial Panel II and from exercising any judicial or non-judicial function in the present case;
- e. The allegations made against the Vice President are *not* unsubstantiated. They are supported by the Witness Statement of Malcolm Simmons, a former senior EULEX Judge, and are supported by e-mail communications between Simmons and the Vice President, and the e-mail communications of two other EULEX judges with Malcolm Simmons during his tenure as a senior EULEX Judge. The Defence has qualified the allegations with the utmost deference to a senior Judge of

the Specialist Chambers as appears proper. That, however, does not undermine the gravity of the allegations nor that it would be anything other than wholly improper for the Vice President to continue on Trial Panel II;

- f. The summary dismissal of the application for recusal or disqualification pursuant to Rule 20(3) has no proper basis in fact or law;
- g. The fact that the ten (10) day time limit has expired should not be a basis for refusing an application that goes to the very core of whether a fair trial can now be guaranteed and as the President notes, it is in the interests of justice to at least “entertain the merits of the Application” as the Defence now seeks;¹⁷
- h. It was *not* in accordance with Rule 20(6) of the Rules for the President to determine the Application as directed against herself, the wording of the provision is quite clear, it was for the Vice President, or more properly pursuant to Rule 14 of the Rules, applying Article 32(4) of the Law and Rule 16(2) of the Rules, the most senior Judge after the President and Vice President.

¹⁷ KSC-BC-2020-07/F00272, Decision on Recusal or Disqualification, 6 August 2021, Public, para. 14.

11. It is maintained that the only appropriate course of action in order for the interests of justice to be maintained, is for a Panel of three Judges to be assigned, as provided for in Rule 20(3) of the Rules, by the most Senior Judge of the Specialist Chambers, as provided for in Rule 14, to consider the Application on its merits.

III. LAW

12. Rule 79 of the Rules of Procedure and Evidence provides:

(1) 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, where applicable, Victims' Counsel, or proprio motu after hearing the Parties, reconsider its own decisions. Judgments are not subject to reconsideration.

13. Rule 20 of the Rules of Procedure and Evidence in relevant part provides:

(3) A Party may apply to the President for the disqualification of a Judge immediately, but no later than ten (10) days after the grounds on which the application is based become known to the Party. A Judge whose disqualification is sought may recuse himself or herself after being notified of the application for

disqualification. If the President considers that the request is vexatious, misconceived, frivolous or lacking in substance, he or she shall summarily dismiss it as soon as possible. In any other case, the President shall assign a Panel of three Judges to determine whether the Judge should be disqualified. The Judge shall be given the opportunity to respond to the application. His or her submissions shall be provided to the Parties, who may be allowed by the Panel to make observations. The Judge shall be allowed to reply to those observations. The Panel shall take a reasoned decision as soon as possible. Such a decision shall be public, with redactions in exceptional circumstances.

(5) A decision under paragraphs (2) and (3) is not subject to review.

(6) "If the application concerns the President, the Vice-President shall assume the President's responsibilities under this Rule."

14. Rule 14 of the Rules provide:

"If neither the President nor the Vice-President are able to carry out their functions, subject to Article 32(4) of the Law, the most senior Judge shall assume these functions pursuant to Rule 16(2)."

15. Article 37(4) of the Law No.05/L-053 ("Law") provides:

“The Vice-President shall be activated from the Roster and shall assume the duties of the President of the Specialist Chambers in the latter’s absence or inability to act.”

16. Article 15(3) of the Code of Judicial Ethics provides:

“... If a Complaint is brought against the President, the Vice-President shall assume the functions of the President for the purposes of this Chapter.”

IV. SUBMISSIONS

A. The Difference Between Review and Reconsideration

17. At the outset, it is noted that Rule 20(5) of the Rules and Article 17(4) of the Code of Judicial Ethics provide that a decision on the recusal or disqualification of a judge is not subject to “review.”

18. However, it is important this does not expressly or impliedly exclude “reconsideration” of a decision. “Reconsideration” and “review” are different concepts in the legal and regulatory framework of the Specialist Chambers; they are not used interchangeably, and one does not fall within the scope of the other.

19. This is demonstrated by the fact that “the power of reconsideration” has a stand-alone rule (Rule 79). The *raison d’être* of reconsideration is that errors may occur, and there must be a way, in any event, for “a Panel” to be able to quickly rectify “clear errors” in a decision that the panel took itself; or where such reconsideration is “necessary to avoid injustice.”
20. This also explains why only specific Rules allow for “review” of decisions¹⁸ whereas the power of reconsideration is wide-ranging in terms of types of decisions, limited only to “exceptional circumstances” where such “clear errors” or injustices occur.
21. Therefore, Rule 20(3) cannot preclude “reconsideration” of the President’s Decision pursuant to Rule 79(1). In the Decision, and in the exceptional circumstances as presented here, clear errors of reasoning occurred, and reconsideration is necessary to avoid injustice.

B. Request for Reconsideration

¹⁸ For example, Rule 57 of the Rules of Procedure provides for “review” of detention; Rule 84 for “review” of classifications of submissions; Rule 86 for “review” of an indictment; Rule 183 for “review” of a case sent back by an appeals panel to a trial panel; Rule 196 for “review” of commutation of sentence and Rules 12, 13 and 15 of the Rules of Procedure and Evidence of the Specialist Chambers Constitutional Court regarding “review” of the rules. The only instance where the Rules specifically provide “reconsideration” rather than “review” is respect of return or destruction of certain material.

22. Reconsideration of the President's Decision is requested both in respect of her decision to dismiss her own recusal or disqualification, as submitted in breach of Rule 20(6) of the Rules, and her decision to dismiss the recusal or disqualification of Vice President Smith (as the Vice President of the Specialist Chambers and more specifically as a trial judge on Trial Panel II), as unsubstantiated.
23. As this is a request for reconsideration, the Defence for Mr. Haradinaj will not focus on setting out in detail the arguments on the law and the facts, as argued in the original Application, and pointing out any defects with the Decision, other than where it supports the request for reconsideration.

1. The President's Decision on Her Own Recusal or Disqualification

24. In the Decision, the President herself states that "it is generally recognised that a Judge cannot rule in his or her own cause."¹⁹ The Defence endorses such a clear iteration of the law. There is no rule or provision in the applicable legal framework which allows her to do otherwise. Yet, regrettably, after having expressed a fundamental and incontrovertible principle of law, the President chose to act otherwise than in accordance with this principle.

¹⁹ KSC-BC-2020-07/F00272, Decision on Recusal or Disqualification, 6 August 2021, Public, para. 3.

25. Where a decision normally taken by the President must be taken in respect of the President herself, the legal framework of the Specialist Chambers requires that such a decision be taken by another judge (the Vice President, or if the Vice President cannot act either, the most senior judge).²⁰ This is the case also with applications for recusal or disqualification.²¹
26. Accordingly, by deciding she has the power to rule on her own recusal or disqualification, the President is in clear breach of the applicable rules and procedure. This constitutes a clear error of reasoning and in these truly exceptional circumstances, the Decision must be reconsidered.
27. For the avoidance of any doubt, the Defence maintains that any decision on the President's recusal or disqualification should be taken by a competent, impartial, and independent judge or panel of judges as provided in the Rules. Further, in the present circumstances where the recusal or disqualification of that Vice

²⁰ Article 37(4) of the Law provides: "The Vice-President shall be activated from the Roster and shall assume the duties of the President of the Specialist Chambers in the latter's absence or inability to act." Rule 14 of the Rules of Procedure and Evidence provides: "If neither the President nor the Vice-President are able to carry out their functions, subject to Article 32(4) of the Law, the most senior Judge shall assume these functions pursuant to Rule 16(2)."

²¹ Rule 20(6) of the Rules of Procedure and Evidence; Article 15(3) of the Code of Judicial Ethics.

President is requested also, the most senior judge ought to assume his role as per Rule 14 of the Rules.²²

2. The President's Decision on the Vice President's Recusal or Disqualification

28. In her Decision, the President summarily dismisses the Defence's allegations of serious misconduct against the Vice President in a single paragraph, calling them "unsubstantiated allegations" and "*entirely* lacking in substance" (emphasis added).²³
29. The Defence urges reconsideration of this Decision as plainly, the allegations are not "unsubstantiated" or "*entirely*" lacking in substance. The use of such absolute terminology is plainly wrong.
30. The Defence Application is supported by a detailed signed witness statement taken under oath given by a former senior EULEX judge, Malcolm Simmons,²⁴ a

²² Rule 14 of the Rules of Procedure and Evidence provides: "If neither the President nor the Vice-President are able to carry out their functions, subject to Article 32(4) of the Law, the most senior Judge shall assume these functions pursuant to Rule 16(2)."

²³ KSC-BC-2020-07/F00272, Decision on Recusal or Disqualification, 6 August 2021, Public, at para. 34.

²⁴ Confidential Annex 5

transcript of his testimony before the Kosovo National Assembly²⁵ and supported by e-mail communications from at least two other judges.²⁶

31. In summarily rejecting the Complaint against the Vice President, the President appears to heavily rely on the Defence's statement, as referenced in a footnote in the Decision, that these are "allegations and not stated as proven facts."²⁷ As noted above, the Defence adopted necessary deference to a senior judicial official holding high judicial office in an institution of the Republic of Kosovo. The Defence made the application reluctantly as no Counsel wishes to make such allegations against any judge. However, it became necessary once the Vice President was appointed to Trial Panel II. The Defence was careful to point out these are *allegations*, as to their knowledge no disciplinary finding against the Vice President was made, or any disciplinary proceedings ever initiated, and the Vice President is entitled to be presumed innocent of any misconduct. Further, submitting the evidence as established *facts* might have risked it going so far as making accusations of gross misconduct. The Defence accordingly stands by its careful and considerate wording of these as "allegations" and not "established

²⁵ Confidential Annex 6

²⁶ Confidential Annexes 7 and 8.

²⁷ KSC-BC-2020-07/F00272, Decision on Recusal or Disqualification, 6 August 2021, Public, at footnote 42.

facts”, which does not diminish, as the President considers, the “entirety” of the evidence presented.

32. The President is reminded that the approach of the European Court of Human Rights,²⁸ in determining whether a challenge is properly made out, in that once an allegation is made, it is to be investigated unless devoid of merit, and in this regard, even appearances may be of certain importance.²⁹ The European Court has held that the failure to examine a complaint, one in which it does not appear to be manifestly devoid of merit, may lead to a breach of the right to a fair trial under Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”).³⁰ The fact that the complaint is based on allegations, albeit well-grounded allegations, does not absolve the appropriate authority of its obligation to investigate and take action where appropriate.

²⁸ Guide of Article 6 of the European Convention on Human Rights, Right to a Fair Trial (Criminal Limb), updated on 30 April 2021, paras 108 *et seq.* (https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf)

²⁹ *Ibid.* para. 111 citing *Castillo Algar v. Spain*, Appl. No. 79/1997/863/1074, judgment of 28 October 1998, at para. 45, *Morice v. France*, Appl. Grand Chamber, No. 29369/10, judgment of 23 April 2015 at para. 78, *Škrlj v. Croatia*, Appl. No. 32953/13, (final) judgment of 11 October 2019, at para. 43 and *Elin Sigfúsdóttir v. Iceland*, Appl. No. 41382/17, (final) judgment of 25 June 2020, at para 35.

³⁰ *Ibid.* at para. 116 citing *Remli v. France*, Appl. No. 16839/90, judgment of 23 April 1996, at para. 48)

33. Furthermore, the *Bangalore Principles of Judicial Conduct*,³¹ adopted by the Judicial Group on Strengthening Judicial Integrity and noted by the UN Commission on Human Rights,³² include impartiality as one of the fundamental values inherent in the judicial function.

34. Principle 2 of the Bangalore Principles provides:

“Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.”

35. Principle 2 goes on to provide:

“2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.”

“2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably

³¹ The *Bangalore Principles of Judicial Conduct*, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices at The Hague, 2002

³² Commission on Human Rights, Resolution 2003/43

be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.”

“2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where:

2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy: Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or,

because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

36. Principle 2.5 provides detailed guidelines as to the cases in which judges should disqualify themselves from a case:

“2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.”

37. Altogether, rejecting the Defence Application as “*entirely*” lacking in substance is not only a clear error of reasoning, but leaving these allegations un-investigated and not reconsidering the Decision to summarily dismiss the Application in this regard risks serious injustice.

3. Failure to Consider the Code of Judicial Ethics

38. Throughout its Application, the Defence relies heavily on the Code of Judicial Ethics, including to establish the forms of misconduct alleged and setting out how the misconduct substantially affects the Defendant. The Code of Judicial Ethics provides for much more detailed rules on disciplinary procedures of

judges than the Rules of Procedure and Evidence. Yet, the Decision does not address the Code of Judicial Ethics at all.

39. This constitutes a separate clear error of reasoning, also because due consideration and weight given to the Code of Judicial Ethics would have led to a very different interpretation of the application of the Rules.³³

V. CONCLUSION AND RELIEF SOUGHT

40. Specialist Counsel for Mr. Haradinaj accordingly seek:
- a. Reconsideration of the President's Decision that she has power to decide on her own recusal or disqualification, as this constitutes a clear error of reasoning;

³³ For example, at paragraph 19 of the Decision, the President states that "there can be no recusal or disqualification of a President pursuant to Rule 20(1) of the Rules." While this blanket statement, which effectively puts the President beyond the reach of applications for recusal or disqualification, is rejected by the very simple inclusion of Rule 20(6), it further makes no sense in light of the circumstances in which a Complaint for misconduct can be made pursuant to the Code of Judicial Ethics (see e.g. Article 15: "Complaints concerning *any conduct* defined under Articles 13 or 14 may be submitted by a Judge, a staff member, a Party or a participant in the proceedings before the Specialist Chambers, the Registrar or any other person alleging that their rights or interests have been substantially affected by an alleged misconduct." (emphasis added)).

- b. Reconsideration of the President's Decision that the Complaint against the Vice President "entirely lacks in substance," as this constitutes a clear error of reasoning and reviewing the substance and evidence underlying the Complaint is necessary to avoid injustice;
- c. In accordance with Rule 14 of the Rules of Procedure and Evidence, for the most senior judge to decide both the Complaint against President and the Complaint against the Vice President, and to assign a Panel of Three Judges in accordance with Rule 20(3) of the Rule.

Word count: 4,40 words



Toby Cadman

Specialist Counsel



Carl Buckley

Specialist Co-Counsel