KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

File number:	**KSC-BC-2020-07**
Before:	**The President of the Specialist Chambers** Judge Ekaterina Trendafilova
Registrar:	Fidelma Donlon
Date:	20 August 2021
Language:	English
Classification:	**Public**

Decision on the Request for Reconsideration of the Decision on Recusal or Disqualification

Judges of Trial Panel II:

Judge Charles Smith III, Presiding Judge

Judge Christoph Barthe

Judge Guénaël Mettraux

Judge Fergal Gaynor, Reserve Judge

Specialist Prosecutor's Office:

Jack Smith

Counsel for Hysni Gucati:

Jonathan Elystan Rees

Huw Bowden

Counsel for Nasim Haradinaj:

Toby Cadman

Carl Buckley

THE PRESIDENT of the Specialist Chambers ("President"), acting pursuant to Rule 79(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules" and "KSC", respectively), herewith renders a decision on the application of Messrs Nasim Haradinaj and Hysni Gucati for reconsideration of the decision on recusal or disqualification ("Application").[1]

I. PROCEDURAL BACKGROUND

1. On 6 August 2021, the President in her Decision on the Application for Recusal or Disqualification ("Decision"),[2] *inter alia*, dismissed the Defence request for her recusal and disqualification in relation to both her judicial and administrative functions in the present case and for the recusal or disqualification of the Vice President.[3] The President further summarily dismissed the request for disqualification of Judge Smith as a member of Trial Panel II in the present case and dismissed as moot the remainder of the reliefs requested.[4]

2. On 13 August 2021, the Defence of Mr Haradinaj filed the Application, which the Defence of Mr Gucati joined on the same day.[5]

II. DISCUSSION

3. The President recalls that for an application for reconsideration to succeed pursuant to Rule 79 of the Rules, the moving party or participant must demonstrate the

[1] F00274, Request for Reconsideration of the Decision on Recusal or Disqualification, 13 August 2021. F00276, Joinder re Request for Reconsideration of the Decision on Recusal or Disqualification KSC-BC-2020-07-F00274, 13 August 2021 ("Joinder").
[2] F00272, Decision on the Application for Recusal or Disqualification, 6 August. See also F00268/RED, Public Redacted Version of Application for Recusal of the President of the Specialist Chambers, Judge Ek[a]terina 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) ("Initial Application").
[3] Decision, para. 36.
[4] Decision, para. 36.
[5] Joinder, para. 1.

existence of a clear error of reasoning or that reconsideration is necessary to avoid injustice. Reconsideration should only take place in exceptional circumstances.

4. New facts and arguments may be relevant to an assessment of reconsideration, if demonstrated how such new facts or arguments justify reconsideration.[6] Mere disagreement with the outcome of a decision or the reasoning of a decision is not sufficient for reconsideration.[7]

A. The President's Decision on her own Recusal or Disqualification

5. The Defence submit that even though the President did recognise "a fundamental and incontrovertible principle of law" that "a Judge cannot rule in his or her own cause", she nevertheless acted contrary to this principle.[8] The Defence reiterate in this respect their previous argument that the legal framework of the KSC requires that another Judge should take such a decision and that therefore the Decision was in breach of the applicable rules and procedure.[9] The Defence of Mr Haradinaj states that "it is not accepted that the President is immune from recusal or disqualification on any grounds …" and that such a position cannot be sustainable in any institution based on the rule of law.[10]

6. The Defence further assert that "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".[11] Furthermore, the Defence do not accept that the President was

[6] ICTY, *Prosecutor v. Jadranko Prlić et al.*, IT-04-74-AR73.l6, Decision on Jadranko Prlić's Interlocutory Appeal against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, para. 18.
[7] Cf. ICC, *Prosecutor v. Laurent Gbagbo and Blé Goudé*, ICC-02/11-01/15 OA 14, Appeals Chamber, Decision on counsel for Mr Gbagbo's request for reconsideration of the 'Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute' and on the review of the conditions on the release of Mr Gbagbo and Mr Blé Goudé, 28 May 2020, para. 59.
[8] Application, para. 24.
[9] Application, para. 26.
[10] Application, para. 10(a).
[11] Application, para. 10(b).

exercising "a purely administrative function" and did not exercise any judicial function, as the Decision was, in the view of the Defence, a judicial decision in itself as it has an impact on the case at hand.[12]

7. As a first relief the Defence therefore request:

> a. Reconsideration of the President's Decision that she has the power to decide on her own recusal or disqualification, as this constitutes a clear error of reasoning;[13]

8. The President recalls that neither the Law nor the Rules foresee a disqualification request by a party of the President exercising his or her administrative authority.[14] The Defence does not address the established jurisprudence supporting this finding nor does it otherwise engage with the reasoning provided in the Decision that distinguishes the role of the President in her judicial administration from the situation regulated in Rule 20 of the Rules and that of a Judge "sit[ting] in any case".[15] The Defence merely disagree with this finding and thus fails to point to any clear error of reasoning.

9. The President notes that the Defence reads in isolation her finding that Rule 20 of the Rules is confined to Judges who "will be determining the innocence or guilt of an accused". Read in context, it is clear from the language in the Decision as well as Rule 20 itself, that this provision refers to a Judge "sit[ting] in any case". This includes the Judge's involvement at the different stages of the proceedings leading to a determination on the innocence or guilt of the accused person(s). The Defence merely disagree with the plain wording of Rule 20 of the Rules and fail to point to a clear error of reasoning in the Decision.

10. The Defence further fails to show that new facts have arisen since the issuance

[12] Application, para. 10(c).
[13] Application, para. 40(a).
[14] Decision, para. 22.
[15] Decision, para. 22.

of the Decision, which requires its reconsideration. In light of the foregoing, the President considers that the Defence demonstrated neither a clear error of reasoning nor any exceptional circumstances that would justify reconsideration to avoid injustice.

B. Judge Smith's Recusal or Disqualification as a Member of Trial Panel II

11. The Defence urge that the President reconsider the Decision, as the "allegations of serious misconduct" are not "unsubstantiated" or "entirely" lacking in substance.[16] In this respect, the Defence argue that the President appeared to rely on their statement that "these are allegations and not stated as proven facts".[17] The Defence submit that such a categorisation does not diminish the entirety of the evidence presented.[18] The Defence refer to case-law of the European Court for Human Rights ("ECtHR") for support that once an allegation is made it is "to be investigated unless devoid of merit, and that in this regard, even appearances may be of certain importance".[19] The Defence further refer to the Bangalore Principles of Judicial Conduct to reiterate impartiality as one of the fundamental values in the judicial function.[20]

12. As a second relief the Defence therefore request:

> 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.[21]

13. The President recalls that Rule 20 of the Rules is an avenue through which a party may seek the disqualification of a Judge sitting in a case, where the party contends that the Judge may be biased or where an appearance of bias may exist with

[16] Application, para. 28.
[17] Application, para. 31.
[18] Application, para. 31.
[19] Application, para. 32.
[20] Application, paras 33-36.
[21] Application, para. 40(b).

respect to its case. The President recalls that Rule 20 of the Rules places the burden on the party alleging bias or an appearance of bias to adduce relevant, reliable and sufficient evidence to rebut the strong presumption of impartiality attached to a Judge.

14. The ECtHR case-law referred to by the Defence does not question this standard. The President notes the reference to *Remli v. France* wherein the ECtHR imposes an obligation on a court "to check" whether, it is an impartial tribunal within the meaning of Article 6(1) of the Convention, in particular where grounds have been raised "that do not immediately appear to be manifestly devoid of merit".[22] The KSC has established such a mechanism in Rule 20 of the Rules, providing the President with the authority to assess whether such applications are vexatious, misconceived, frivolous or lacking in substance, and — only when the answer would be in the negative — to proceed assigning a Panel to deal with the merits of the disqualification request. The Defence fail to demonstrate how the case-law referred to contradict the procedure of the KSC in this respect.

15. The President further recalls again that unsubstantiated allegations alone are insufficient to rebut the presumption of impartiality attached to a Judge.[23] Moreover, where allegations concerning any *prior* professional conduct of a Judge are raised, it is incumbent upon the Defence to demonstrate the relevance of such allegations to the specific case at hand, in which disqualification is sought, and how they may create bias or an appearance thereof.[24]

16. The Defence, while having acknowledged the nature of their submissions, merely disagree with the conclusion drawn by the President on the basis of established

[22] ECtHR, *Remli v. France*, no. 16839/90, Judgment, 23 April 1996, para. 48.
[23] ICTR, *Eliézer Niyitegeka v. the Prosecutor*, ICTR-96-14-A, Judgement, 9 July 2004, para. 45.
[24] The mere assertion of an individual's unsubstantiated views and his interpretation of e-mail exchanges reflecting discontent about performance appraisals alone cannot, by itself, provide a basis for any reasonable apprehension of bias on the part of a Judge in respect of whom these views have been made.

jurisprudence. Accordingly, the Defence fails to show a clear error or reasoning warranting reconsideration of the Decision in this respect.

17. The Defence also fails to show that new facts have arisen since the issuance of the Decision, which requires its reconsideration. In light of the foregoing, the President considers that the Defence demonstrated neither a clear error of reasoning nor any exceptional circumstances that would justify reconsideration to avoid injustice.

C. Consideration of Submissions on the Code of Judicial Ethics

18. The Defence submits that their arguments with respect to the Code of Judicial Ethic were not addressed in the Decision.[25] They submit that the Code of Judicial Ethics provides more detailed disciplinary procedures than the Rules and that this disregard constitutes another clear error of reasoning, as any consideration of the Code of Judicial Ethics would have led to a different interpretation.[26]

19. The President recalls that it is not necessary to provide reasoning on each and every argument presented by a party, as long as it is clear from the context of the decision that the arguments have been considered.[27] Contrary to the Defence's submissions, the arguments to which they point have been referred to throughout the Decision and have thus been duly considered.[28] Moreover, the President recalls that the Defence requested that the President and Judge Smith, as a member of Trial Panel II, either recuse themselves or be disqualified in accordance with Rule 20 of the Rules.[29]

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[25] Application, para. 38.
[26] Application, para. 38.
[27] *Cf.* ICTY, *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, IT-01-47-A, Judgement, para. 13.
[28] See Decision, fns. 31, 32.
[29] The relief requested stated in relevant parts: "For the reasons set out above, it is respectfully submitted that it is in the interests of justice that: a. The President *is recused or disqualified* from fulfilling any judicial, administrative or case-management role in the instant case, including, but not limited to, the assignment of judges to panels, sitting as a member of an appeals panel or making decisions in respect of the recusal application against the Vice President in accordance with the Rules; b. That the Vice President *is recused or disqualified* from any judicial, administrative or case management duties in the instant case; c. That a Panel of Three Judges is assigned, *in accordance with Rule 20(3) of the Rules*, to determine the present application, on the basis that, for the reasons set out in this application, neither

The President further recalls that the Decision addresses the relief as requested by the Defence. The President therefore found no merit in the Defence submissions with respect to the Code of Judicial Ethics.

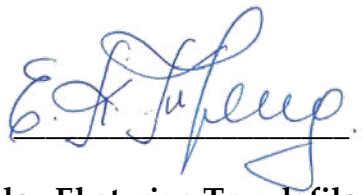
20. Accordingly, the Defence contention that there exists a clear error of reasoning in this respect is dismissed. The Defence further fails to show that new facts have arisen since the issuance of the Decision, which requires its reconsideration. In light of the foregoing, the President considers that the Defence demonstrated neither a clear error of reasoning nor any exceptional circumstances that would justify reconsideration to avoid injustice.

21. Given that the Defence failed to meet the standard necessary for reconsideration of the Decision in respect of the recusal and/or disqualification of the President and Judge Smith as a member of Trial Panel II, the Defence request that the Judge most senior rule on the above two requests for relief[30] is therefore rendered moot.

III. DISPOSITION

22. For the foregoing reasons, the President hereby

DISMISSES the Application.



Judge Ekaterina Trendafilova,

President of the Specialist Chambers

Dated this Friday, 20 August 2021
At The Hague,
The Netherlands

the President nor the Vice President can adjudicate on the complaint against the other; […]" (emphasis added). See Initial Application, para. 101(a)-(c).

[30] Application, para. 40(c).