

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

Before: **Trial Panel II**
Judge Charles L. Smith, III, Presiding Judge
Judge Christoph Barthe
Judge Guenael Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

Date: 29 September 2021

Language: English

Classification: **Public**

Application for Reconsideration of Decision F00328 on Rule 117 Defence Motions

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. On 27 September 2021 the Trial Panel II issued its 'Order on Rule 117 Defence Motions'.¹
2. The Defence for Mr. Haradinaj seeks to make an application for that decision to be reconsidered pursuant to Rule 79 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules").

III. THE LAW

3. The application for reconsideration is made *per* rule 79 of the Rules, it reading:

"[I]n 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"

4. The Defence respectfully submits that the Order and the circumstances surrounding the making of that Order, satisfy the requirements of Rule 79.

II. SUBMISSIONS

¹ KSC-BC-2020-07/F00328, Order on Rule 117 Defence Motions, Trial Panel II, Public, 27 September 2021

5. The Defence submits that the Order ought to be reconsidered on the grounds that:
- a. There has been a clear error of reasoning; and
 - b. It is, in any event, necessary to reconsider the Order so as to avoid an injustice.
6. In citing the above, the Defence seeks to rely on the following two points:
- a. That the Trial Panel II erroneously found the Haradinaj submission to be filed out of time;² and
 - b. That the Trial Panel II determined the application prior to receiving the Defence 'Reply' to the SPO 'Response'.

That the Submission was Found to be Out of Time

7. At the Trial Preparation Conference held on 1 and 2 September 2021, the Trial Panel ordered the Parties to file any Rule 117 motions no later than 17 September 2021.³
8. On 17 September 2021 the Defence for Mr. Haradinaj sought to file its motion in accordance with that motion, through the usual electronic means provided

² *Ibid* at para. 9

³ Order setting deadline for submissions of Rule 117 motions, 2 September 2021, p.603, line 21 to p.604 line 1.

and maintained by the Kosovo Specialist Chamber IT Department, Legal Workflow.

9. The Defence have raised concerns about accessing this system remotely in the past as it is failed on a number of occasions. The Case Management Unit (“CMU”) has in the past stated that where the system has shut down, due to technical reasons, that Specialist Counsel should make contact in order to report the fault so as to receive the filing electronically through other means. However, the CMU has also stated in the past that it cannot receive submissions through e-mail, so the position is not entirely clear.
10. At the time of the attempted filing, the system was ‘down’, in that it could not be accessed, it could not be used, and therefore the filing could not be lodged.
11. Specialist Counsel contacted other members of the Defence Team to enquire as to whether the system was in fact down, or whether Specialist Counsel was encountering a local connection problem. All members of the Defence Team confirmed that the system was down and inaccessible.
12. After repeatedly trying to access Legal Workflow for several hours, Specialist Counsel wrote to the CMU via e-mail at 21.38 BST with the following message:

“Dear all, Please note that I have attempted to make a filing this evening in relation to Oral Order No. 8 from the hearing of 2 September 2021, the deadline being today. Regrettably, the system appears to be down and so I have not been to submit

the filing. I will endeavour to make the filing tomorrow, but this will be past the stipulated deadline. Kind regards, Toby Cadman."

13. Due to the late hour, no reply was received.
14. A further communication was sent via e-mail communication at 22:31 BST with the following message:

"Dear all, I will endeavour to make the filing tomorrow but as you can see there appears to be a problem. Kind regards, Toby Cadman."

15. In order to show that the system was in fact down, a screenshot was attached to this second e-mail which is exhibited as Annex 1.
16. Specialist Counsel further sought to contact a CMU representative by telephone the following morning. Specialist Counsel was unable to reach CMU representative and therefore left a voicemail setting out the issue. Regrettably, no contact was made with Specialist Counsel until 11:28 BST on 19 September 2021, whereupon the same CMU representative returned the telephone call, after which time the system was up and running and the filing had already been submitted via Legal Workflow.
17. The system error resulted in the Haradinaj Rule 117 submission being lodged and recorded on 18 September 2021.

18. The filing was recorded as having been filed on 18 September 2019 at 13:54 CET.
19. The filing was dated 17 September 2021.
20. It is therefore respectfully submitted that the criticism directed at the Haradinaj Defence, at paragraph 9 is wholly unjustified and unwarranted. Specialist Counsel had taken all necessary and available steps to resolve the matter. The inability to make the filing was due to a system error.

That the Issue was Determined prior to receiving the Defence Reply

21. On 24 September 2021, the Specialist Prosecutor's Office ("SPO") filed its response to the Defence application.⁴
22. Per Rule 76 of the Rules of Evidence and Procedure, the Defence were entitled to file a reply to that Response within five (5) days of receipt, that being Friday 1 October 2021, on the basis that the Trial Panel had not reduced the time limit pursuant to Rule 9(5).
23. The Trial Panel determined the application prior to the expiration of that time-limit.
24. Rule 76 reads:

⁴ KSC-BC-2020-07/F00322, Prosecution Consolidated Response to Defence Admissibility Challenges, SPO, Confidential, 24 September 2021.

“Unless otherwise provided in the Rules, any response to a motion shall be filed within ten (10) days of the motion and any reply to a response shall be filed within five (5) days of the response”. (emphasis added)

25. There is no provision within the rules that prevents any submission in reply being filed prior to a ruling being made.
26. Further, and importantly, there was no prior direction and/or order of the Trial Panel that sought to reduce or abridge that time-limit.
27. Further, there was no prior direction and/or order of the Trial Panel that sought to remove the right to file a Reply in its entirety.
28. The SPO and the Defence alike, must be able to rely upon the Rules and therefore work in accordance with the provisions of those rules, and further, any *ad-hoc* changes that may be required from time to time as a Panel may direct with appropriate notice.
29. The Defence, in relying on Rule 76, in the absence of any direction to the contrary, has done so to its detriment.
30. In making its decision and rendering the Order prior to the submission and consideration of any reply, the Trial Panel, in the Defence’s submission, have demonstrated a ‘clear error of reasoning’.

31. Further, or in the alternative, in making its decision and rendering the Order prior to the submission and consideration of any reply, in circumstances that are in violation of the Rules, it is submitted that the Trial Panel must reconsider its decision, having first made provision for the Accused to submit its intended reply, so as to avoid a clear 'injustice'.

III. CLASSIFICATION

32. The Defence invites the Trial Panel to reconsider the decision under Rule 79, thereby granting permission for the Defence to submit a reply to be taken into account before reconsideration of its prior ruling.

IV. RELIEF SOUGHT

33. This filing is classified as public.

Word Count: 1,330 words



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