

**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:** 12 October 2021

**Language:** English

**Classification:** Public

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**Application for Certification for Granting Leave to Appeal Decision F00328**

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**Specialist Prosecutor**

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Huw Bowden

## I. INTRODUCTION

1. The Defence for Mr. Haradinaj seeks leave to appeal the Impugned Decision,<sup>1</sup> so as to resolve the following issues:
  - a. Whether the Trial Panel erred in making a decision on the substantive submissions<sup>2</sup> prior to the defence submitting its respective 'Reply' when it was entitled to do so pursuant to Rule 76 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules") [First Ground];
  - b. Whether the Trial Panel erred, in first granting the Defence the opportunity to submit its Reply and then going on to decide the matter as a reconsideration rather than considering the substantive issues with the Rule 117(2) Application, the Response of the Specialist Prosecutor's Office ("SPO") and the Defence Reply [Second Ground];
  - c. Whether the Trial Panel was correct to exercise its "*discretion to determine a matter without awaiting replies*"<sup>3</sup> without giving any prior notice thereof [Third Ground]; and

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<sup>1</sup> KSC-BC-2020-07/F00353, Decision on the Defence Requests for Reconsideration of Decision F00328, 7 October 2021, Public (hereinafter "Impugned Decision").

<sup>2</sup> KSC-BC-2020-07/F00328, Order on Rule 117 Defence Motions, 27 September 2021, Public.

<sup>3</sup> KSC-BC-2020-07/F00353, at paragraph 20.

- d. Whether the position taken by the Trial Panel, and the failure to reconsider the decision constitutes a 'a clear error of reasoning or injustice' for the purposes of Rule 79(1) of the Rules [Fourth Ground].

## II. BACKGROUND

2. The Procedural Background is set out within the Rule 117(2) Application,<sup>4</sup> the Defence Reply<sup>5</sup> and the Impugned Decision<sup>6</sup> and is not repeated here.

## III. THE LAW

3. Article 45(2) of the Law provides:

*“Any other interlocutory appeal must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel on the basis that it involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings”.*

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<sup>4</sup> KSC-BC-2020-07/F00318, Haradinaj Defence Rule 117(2) Application to Have the Evidence of SPO Witnesses Ruled Inadmissible, 18 September 2021, Confidential.

<sup>5</sup> KSC-BC-2020-07/F00348, Haradinaj Defence Reply to KSC-BC-2020-07-F00322, 4 October 2021, Public.

<sup>6</sup> KSC-BC-2020-07/F00318, at paras. 1-4.

4. Rule 77 of the Rules provides:

*“(1) When a Party seeks to appeal a decision of a Panel for which an appeal does not lie as of right according to the Law and the Rules, that Party shall request certification from the Panel that rendered the impugned decision within seven (7) days thereof.*

*“(2) The Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.*

*“(3) The Panel shall render a reasoned decision within seven (7) days of the last submission from the Parties or Victims’ Counsel, where applicable, identifying the issue(s), if any, for which certification is granted. Where the Panel does not render a decision within this time limit, the certification to appeal shall be considered granted.”*

5. Of further relevance, given the substantive arguments outlined below, is Rule 76, dealing with time-limits for submissions.

6. Rule 76 of the Rules provides:

*“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. The Panel shall only consider a reply or parts thereof addressing new issues arising from the response.”*

(emphasis added)

#### **IV. DEADLINE FOR MAKING AN APPLICATION FOR CERTIFICATION FOR LEAVE TO APPEAL**

7. Rule 77(1) of the Rules provides that where a party seeks to appeal a decision of a Panel for which an appeal does not lie as of right, certification for leave to appeal shall be requested from the Panel within seven (7) days of the impugned decision.
8. The Defence sought to file its application under Rule 117(2) on 17 September 2021, but due to technical difficulties with Legal Workflow, the application was received on 18 September 2021.<sup>7</sup>
9. The SPO filed its Response on 24 September 2021.<sup>8</sup>

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<sup>7</sup> KSC-BC-2020-07/F00318, Haradinaj Defence Rule 117(2) Application to Have the Evidence of SPO Witnesses Ruled Inadmissible, 18 September 2021, Confidential.

<sup>8</sup> KSC-BC-2020-07/F00322, Prosecution Consolidated Response to Defence Admissibility Challenges, 24 September 2021, Confidential.

10. In the absence of any judicial directions to the contrary, the deadline for filing a Defence Reply was on 29 September 2021.<sup>9</sup>
11. On 27 September 2021, the Trial Panel issued the Order on Rule 117 Defence Motions.<sup>10</sup>
12. On 28 September 2021, the Defence raised the matter with the Court Management Unit (“CMU”) that the Defence had intended to submit a Reply in accordance with Rule 76 of the Rules, but that the Trial Panel had already issued its Order. CMU informed the Defence, after having consulted the Trial Panel, that it would need to file an Application for Reconsideration.
13. On 29 September 2021, the Defence filed its Application for Reconsideration.<sup>11</sup>
14. On 30 September 2021, the Trial Panel issued its Order to the Defence to File Replies, in response to the Application for Reconsideration, in which it stated that *“For the purpose of deciding upon the Requests, the Panel finds it appropriate authorise the Defence to file their replies to the Request”* and directed the Defence to file accordingly by 4 October 2021.<sup>12</sup>

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<sup>9</sup> Rule 76 of the Rules of Procedure and Evidence.

<sup>10</sup> KSC-BC-2020-07/F00328, Order on Rule 117 Defence Motions, 27 September 2021, Public.

<sup>11</sup> KSC-BC-2020-07/F00338, Haradinaj Defence Application for Reconsideration of Decision F00328 on Rule 117 Defence Motions, 29 September 2021.

<sup>12</sup> KSC-BC-2020-07/F00344, Order to the Defence to File Replies to F00322, 30 September 2021, Public.

15. On 4 October 2021, the Defence filed its Reply.<sup>13</sup>
16. On 7 October 2021, prior to the Prosecution Opening Statement in accordance with Rule 117(2), the Trial Panel issued an Oral Order stating that “...*the Rule 117(2) request made by [both Defence teams] separately are overruled*”.<sup>14</sup>
17. On 7 October 2021, following its Oral Order, the Trial Panel issued a written Order in which it denied the request for reconsideration.<sup>15</sup>
18. It is respectfully submitted that the seven (7) day deadline, pursuant to Rule 77(1) of the Rules, for seeking certification for leave to appeal ran from the issuance of the written Order (KSC-BC-2020-07/F00353) of 7 October 2021, on the basis that the prior ruling (KSC-BC-2020-07/F00328) of 27 September 2021, was issued in the absence of having considered, and prior to the expiration of the deadline to submit, any Defence Reply, as required by Rule 76, and in the absence of any amendment to the time-period for filing an appeal.
19. The Trial Panel noted, at paragraphs 16 and 22 of the written Order (KSC-BC-2020-07/F00353) of 7 October 2021, that it had considered the Reply in deciding whether to reconsider the ‘Impugned Decision’ of 27 September 2021. However, by the Order (KSC-BC-2020-07/F00344) of 30 September 2021

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<sup>13</sup> KSC-BC-2020-07/F00348, Haradinaj Defence Reply to KSC-BC-2020-07-F00322, 4 October 2021, Public.

<sup>14</sup> KSC-BC-2020-07, Transcript, SPO Opening, 7 October 2021.

<sup>15</sup> KSC-BC-2020-07/F00353, Decision on the Defence Requests for Reconsideration of Decision F00328, 7 October 2021, Public.

it had explicitly authorised the Defence to file its 'Reply' to the 'Request' in order for the Trial Panel to rule on the 'Request'.

20. It is quite clear that the 'Request' in this regard was to be interpreted as the original Defence Rule 117(2) motion (KSC-BC-2020-07/F00318) as that was the filing against which the SPO had filed its Response to which the Reply was to be directed.
21. At paragraph 12 of the Order (KSC-BC-2020-07/F00344), it was stated "*For these reasons, the Panel **DIRECTS** the Gucati Defence and the Haradinaj Defence to file replies to the Response by 4 October 2021*".
22. The Defence filed the Reply as directed by the Trial Panel (KSC-BC-2020-07/F00344), prior to the expiration of the stipulated deadline. The Order authorising the Reply was following consideration of the Application for Reconsideration, which was filed on 29 September 2021. Therefore, the Order (KSC-BC-2020-07/F00344) authorising the Defence to file its Reply was subsequent to and independent of the Application for Reconsideration (KSC-BC-2020-07/F00338).
23. It is respectfully submitted that the Trial Panel should have issued its Order of 7 October 2021 independent of the Application for Reconsideration. At that stage, the Application for Reconsideration had already been dealt with, and by authorising the Reply, by implication, accepted. That clearly demonstrates



that the Defence were entitled to rely on the 7 October 2021 Order as *the* 'Impugned Decision' against which any application to certify leave to appeal was to be filed.

24. Therefore, the deadline for submitting an application for certification must have ran from 7 October 2021, the deadline of which is 14 October 2021.
25. It is respectfully submitted that it must follow this application is submitted timely and should be considered as such.

## V. SUBMISSIONS

### *The Legal Test for Applications for Leave to Appeal*

26. The legal test is as follows:
  - a. Whether the matter is an 'appealable issue';
  - b. Whether the issue at hand would significantly affect:
    - i. The fair and expeditious conduct of the proceedings; or
    - ii. The outcome of the trial; and
  - c. Whether, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

*Whether the issues are 'Appealable' issues*

27. Appealable issues must relate to *“an identifiable topic or subject, the resolution of which is essential for determination of the matters arising in the judicial cause under examination”* and must also *“emanate from the ruling concerned and...not amount to abstract questions or hypothetical concerns.”*<sup>16</sup>
28. It is respectfully submitted that the four issues as cited at paragraph 1 above, in respect of the Impugned Decision<sup>17</sup> are all 'Appealable' issues, and therefore this element of the test has been appropriately satisfied.
29. The four issues concern the interpretation of Rule 76 of the Rules, and further, the extent to which a Defendant is entitled to rely upon the timescale(s) provided for within that Rule, noting that in the instant case the Defendant has been disadvantaged by that reliance.
30. The Trial Panel has adopted an interpretation of Rule 76 that has in effect prevented the Defendant from submitting a Reply, and therefore making submissions, that are explicitly provided for within that Rule.
31. Further, in terms of the issues arising out of a decision on Rule 79 of the Rules, the Trial Panel has adopted a position that there has been no 'clear error of

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<sup>16</sup> KSC-BC-2020-06/F00172, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021, Public, at para. 11.

<sup>17</sup> KSC-BC-2020/07/F00353

reasoning'.<sup>18</sup> However, in this regard specific mention must be made of the fact that upon making an application for reconsideration,<sup>19</sup> the clear effect of which was consideration of the substantive motion alongside the SPO Response and the Defence Reply, the Trial Panel erred in first granting the Defence the opportunity to submit its Reply and then going on to decide the matter as a question of reconsideration rather than considering the substantive issues within the Rule 117(2) application, the SPO Response and the Defence Reply.

32. It is respectfully submitted that at the hearing held on 7 October 2021, Counsel for Mr. Gucati raised the issue in open court,<sup>20</sup> that the motion had to be dealt with prior to the SPO opening its case. The Trial Panel gave an oral order<sup>21</sup> that the Defence motion was overruled and subsequently issued a written order.<sup>22</sup>
33. The issues pleaded within this application to certify leave to appeal all concern a decision made of the Trial Panel and the reasoning provided within that decision, accordingly, the three issues fall into the category of those that are deemed 'Appealable'.

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<sup>18</sup> KSC-BC-2020-06/F00344, at para. 26.

<sup>19</sup> KSC-BC-2020-07/F00338.

<sup>20</sup> KSC-BC-2020-07, Transcript, 7 October 2021, page 747, paras. 12-14.

<sup>21</sup> KSC-BC-2020-07, Transcript, 7 October 2021, page 748, paras. 15-18.

<sup>22</sup> Impugned Decision.

*Whether the Issues would Significantly Affect the Fair and Expeditious Conduct of the Proceedings or the Outcome of the Trial*

(i) *the fair and expeditious conduct of the proceedings*

34. In order to be certified for appeal, it must be shown that an issue would significantly affect the fair and expeditious conduct of the proceedings. 'Fairness' is "generally understood as referencing the norms of fair trial", and "extends to pre-trial proceedings as well as the investigation of a crime."<sup>23</sup> 'Expeditionessness' includes the need to conduct a trial "within a reasonable time" and "without prejudice to the rights of the Parties concerned" and is "but one attribute of a fair trial."<sup>24</sup>
35. It is respectfully submitted that this element of the test has been clearly satisfied.
36. The substantive submissions sought to have certain evidence rendered inadmissible, and therefore not capable of presentation at trial, the substantive issue is therefore one that goes to the very heart of a fair trial, it concerning issues of admissibility.

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<sup>23</sup> *Thaçi* Decision on Leave to Appeal, at para. 13.

<sup>24</sup> *Thaçi* Decision on Leave to Appeal, at para. 13.

37. This, coupled with the fact that the Defendant sought to rely on the Rules, as is it is his right to do so, and given the Impugned Decision, to his detriment, again impinges upon the fairness of proceedings.
38. Further, and in a similar vein, the decision of the Trial Panel to exercise its discretionary powers, and to rule upon the substantive issue prior to the filing of any such Reply, noting that at no time had the Trial Panel ordered that any usual timescale would be 'abridged', or indeed that there would be no opportunity to file any Reply,<sup>25</sup> is again, an issue that clearly goes to the 'fairness' of proceedings.
39. The submission being that the Trial Panel was wrong to exercise that discretion without it being communicated as their intention.
40. The Defence are expected to make submissions in accordance with the Rules, and in the same vein, entitled to rely upon those Rules, unless otherwise directed, to depart from this is an issue of fundamental fairness.
41. Having regard to the above, this limb of the test is appropriately satisfied.

(ii) *the outcome of proceedings*

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<sup>25</sup> Reference is drawn to KSC-BC-2020-07/F00336, Order on the Reclassification of and Responses to the Rule 151 Transmission, 29 September 2021, at para. 7(c) in which specific reference was drawn to the fact that 'no reply will be entertained', thereby demonstrating that such a decision would be communicated prior to the event.

42. Where an issue does not impact upon the fairness and expeditiousness of proceedings, the first prong of the test for certification to appeal may also be met where it is shown that an error in the interlocutory decision may significantly affect the outcome of proceedings. This *“exercise involves a forecast of the consequence of such an occurrence.”*<sup>26</sup>
43. In considering the effect or otherwise on the ‘outcome of proceedings’, the decision of the Trial Panel to reject the substantive submissions without considering any Reply, is a decision that could possibly affect the trial proceedings, given that the substantive submissions deal with the admissibility or otherwise of certain evidence.
44. The decision of the Trial Panel is noted in that *“[T]he Defence will also have ample opportunity to cross-examine the two Witnesses on the issues raised in the Motions. As a result, deferring the decision on whether to admit the evidence until it is offered causes no prejudice to the Defence”*,<sup>27</sup> however, with respect, this is not an appropriate reason to refuse to consider the reply, or find that there is no ‘clear error of reasoning’ and adopting such an approach could lead to significant delay in the proceedings.

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<sup>26</sup> *Thaçi* Decision on Leave to Appeal, at para. 14.

<sup>27</sup> KSC-BC-2020-07/F00353, at para. 24.

45. The issues are those as highlighted above, it being the manner in which the impugned decision was reached being at issue at this stage.

*Whether an Immediate Resolution by the Court of Appeals Panel May Materially Advance the Proceedings*

46. As per the other relevant elements of this application for leave to appeal, it is respectfully submitted that this limb of the test has been properly satisfied.
47. The issue(s) concern the extent to which a Defendant can rely upon that which is proscribed within the Rules, and further, the extent to which the Trial Panel<sup>28</sup> can vary those rules without prior notice, and without communicating to a Defendant, or for that matter, the SPO, as the issue would apply equally to all parties, that such a variation is to be, or has been, made.
48. The Rules must be followed by all parties to proceedings, and to not do so has the effect of potentially prejudicing a party to the proceedings, and therefore it is respectfully submitted that an immediate resolution of the issue would materially advance not just the instant case, but equally, any current or envisaged case, any such decision providing legal certainty on the central issue, and analogous issues, and further, any such decision might prevent any subsequent delays should the issue arise again in the future.

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<sup>28</sup> Any such determination would further influence any decision of a Pre-Trial Chamber, however, as the instant case is before the Trial Panel the application has been limited accordingly.

49. The issues raised are of fundamental importance, both to the fairness of the proceedings against the Defendant, but any and all other Defendants that may be indicted before the Kosovo Specialist Chambers.
50. Resolution by the Court of Appeals Panel is therefore warranted.

## **VI. ANCILLARY APPLICATIONS**

51. The Defence would also seek a 'Suspensive Order' per Rule 171.
52. Rule 171 is noted, in that interlocutory appeals shall not ordinarily have a suspensive effect; however, it is respectfully submitted that the instant application is one that would justify an exceptional measure, on the basis that the trial against the Defendant has now commenced with the SPO scheduled to call its first witness on 18 October 2021.
53. The substantive submissions giving rise to the impugned decision concern the admissibility of evidence, that evidence being scheduled to be admitted, or at least commencing admission, on 18 October 2021.
54. If the proceedings are not suspended pending the outcome of any appeal, noting that the proposed remedy will be a redetermination of the substantive decision, there is a very real likelihood that any determination on appeal will



be rendered moot, its purpose having been defeated with evidence being called in the first instance.

**VII. CLASSIFICATION**

55. This Application is filed publicly.

**VIII. RELIEF SOUGHT**

56. The Defence for Mr. Haradinaj accordingly requests certification of the issues for leave to appeal.

Word Count: 2,734 words



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