



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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 Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon
Filing Participant: Specialist Prosecutor
Date: 14 October 2021
Language: English
Classification: Public

**Prosecution Response to Application for Certification for Granting Leave to
Appeal**

Specialist Prosecutor's Office

Jack Smith

Counsel for Mr Gucati

Jonathan Elystan Rees

Counsel for Mr Haradinaj

Toby Cadman

I. INTRODUCTION

1. The Request¹ for leave to appeal the Reconsideration Decision² should be rejected because it fails to meet the requirements for leave to appeal under Article 45 of the Law³ and Rule 77 of the Rules.⁴ None of the four Issues⁵ constitute ‘appealable’ issues, and the Haradinaj Defence also fails to substantiate why the other leave to appeal criteria are met.

II. THE REQUIREMENTS FOR GRANTING LEAVE TO APPEAL HAVE NOT BEEN MET

2. Interlocutory appeals are an exceptional remedy.⁶ In accordance with Article 45(2) and Rule 77(2), the following strict requirements apply:

- (1) Whether the matter is an ‘appealable issue’;
- (2) 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
- (3) Whether, in the opinion of the Panel, an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁷

¹ Application for Certification for Granting Leave to Appeal Decision F00328, KSC-BC-2020-07/F00358, 12 October 2021 (‘Request’).

² Decision on the Defence Requests for Reconsideration of Decision F00328, KSC-BC-2020-07/F00353, 7 October 2021 (‘Reconsideration Decision’).

³ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015 (‘Law’). All references to ‘Article’ or ‘Articles’ herein refer to articles of the Law, unless otherwise specified.

⁴ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (‘Rules’). All references to ‘Rule’ or ‘Rules’ herein refer to the Rules, unless otherwise specified.

⁵ Request, KSC-BC-2020-07/F00358, para.1.

⁶ *Prosecutor v. Thaçi et al.*, Decision on the Thaçi Defence Application for Leave to Appeal, KSC-BC-2020-06/F00172, 11 January 2021 (reclassified 14 January 2021) (‘Thaçi et al. Decision’), para.9.

⁷ See generally *Thaçi et al. Decision*, KSC-BC-2020-06/F00172, paras 9-17.

3. As stated in the *Thaçi et al.* case concerning appealable issues:

Only an “issue” may form the basis of an appealable decision. An “issue” has been described as an identifiable topic or subject, the resolution of which is essential for determination of the matters arising in the judicial cause under examination, and not merely a question over which there is disagreement or conflicting opinion. An appealable issue requires the applicant to articulate clearly discrete issues for resolution by the Court of Appeals Panel that emanate from the ruling concerned and do not amount to abstract questions or hypothetical concerns. It is generally insufficient to argue that the entirety of the Pre-Trial Judge’s reasoning is erroneous.⁸

4. Neither the First nor Third Issues⁹ arise from the Reconsideration Decision. The Reconsideration Decision was rendered because the Haradinaj Defence was given an opportunity to reply following the Initial Decision¹⁰ on the Haradinaj Defence’s evidence admissibility challenges raised under Rule 117.¹¹ The Haradinaj Defence did so.¹² The Reconsideration Decision was rendered following replies, so this issue does not arise in respect of the impugned decision challenged in the Request.

5. The Second Issue¹³ is not essential to the determination of the Reconsideration Decision. The Trial Panel makes clear in the Reconsideration Decision that the Haradinaj Defence reply did not add new arguments or affect the Initial Decision’s deferral of the Defence’s admissibility challenges.¹⁴ The ‘substantive issues with the

⁸ *Thaçi et al.* Decision, KSC-BC-2020-06/F00172, para.11.

⁹ Request, KSC-BC-2020-07/F00358, para.1(a) (citation removed: ‘[w]hether the Trial Panel erred in making a decision on the substantive submissions 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’) and (c) (emphasis in original, citation removed: ‘[w]hether the Trial Panel was correct to exercise its “discretion to determine a matter without awaiting replies” without giving any prior notice thereof’).

¹⁰ Order on Rule 117 Defence Motions, KSC-BC-2020-07/F00328, 27 September 2021 (‘Initial Decision’).

¹¹ Order to the Defence to File Replies to F00322, KSC-BC-2020-07/F00344, 30 September 2021.

¹² Haradinaj Defence Reply to KSC-BC-2020-07-F00322, KSC-BC-2020-07/F00348, 4 October 2021.

¹³ Request, KSC-BC-2020-07/F00358, para.1(b) (‘[w]hether 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’).

¹⁴ Reconsideration Decision, KSC-BC-2020-07/F00353, para.24. *See also* Initial Decision, KSC-BC-2020-07/F00328, para.12.

Rule 117(2) Application'¹⁵ were not resolved in the Reconsideration Decision, so any failure to consider replies concerning them could have no impact on that decision.

6. The Fourth Issue¹⁶ is insufficiently discrete. It is nothing more than a recapitulation of Rule 79, effectively challenging the totality of the Reconsideration Decision. This is insufficient to constitute a clearly discrete issue for resolution by the Court of Appeals Panel.

7. As the leave to appeal test is cumulative, the failure to identify any appealable issue must lead to rejecting the Request. Nevertheless, the remaining criteria are addressed below for completeness.

8. As the Initial Decision did not make a final determination on the Defence's admissibility challenges, the Reconsideration Decision's impact on the fair and expeditious conduct of the proceedings or the outcome of the trial is entirely hypothetical.¹⁷ The Haradinaj Defence fails to substantiate how this criterion is met for any of the Issues.

9. For similar reasons, granting leave to appeal on any of the Issues would not materially advance the proceedings.¹⁸ Rather, interlocutory appeal in the current circumstances would only delay the testimony of W04841 and W04842 and the consequent resolution of the Haradinaj Defence's admissibility challenges.

III. RELIEF REQUESTED

10. For the foregoing reasons, the Request should be rejected in its entirety.

¹⁵ Request, KSC-BC-2020-07/F00358, para.1(b).

¹⁶ Request, KSC-BC-2020-07/F00358, para.1(d) ('[w]hether 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').

¹⁷ *Contra* Request, KSC-BC-2020-07/F00358, paras 34-45.

¹⁸ *Contra* Request, KSC-BC-2020-07/F00358, paras 46-50.

Word count: 957



Jack Smith

Specialist Prosecutor

Thursday, 14 October 2021

At The Hague, the Netherlands.