



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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 Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

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Decision on Haradinaj Defence's Application for Certification of F00328

Specialist Prosecutor

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TRIAL PANEL II (“Panel”), pursuant to Articles 21, 40(6)(h) and 45 of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 77, 79(2) and 138(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 17 and 18 September 2021, the Defence of Hysni Gucati (“Gucati Defence”) and the Defence of Nasim Haradinaj (“Haradinaj Defence”) filed motions challenging the admissibility of declarations by Specialist Prosecutor witnesses W04841 and W04842 (collectively, the “Motions”).¹
2. On 24 September 2021, the Specialist Prosecutor Office (“SPO”) responded to the Motions.²
3. On 27 September 2021, the Panel issued an order dismissing the Motions (“Order”).³
4. On 29 September 2021, both the Gucati Defence and the Haradinaj Defence filed requests for reconsideration of the Order (“Requests”).⁴
5. On 30 September 2021, the Trial Panel granted leave to the Gucati Defence and the Haradinaj Defence to file their replies “[f]or the purpose of deciding upon the Requests [for reconsideration]”.⁵

¹ F00317, Gucati Defence, *Motion to Challenge the Admissibility of Evidence Pursuant to Rule 138(1)*, 17 September 2021, confidential. See also F00317/RED, public. F00318, Haradinaj Defence, *Rule 117(2) Application to Have the Evidence of SPO Witnesses Ruled Inadmissible*, 18 September 2021, confidential. See also F00318/RED, public.

² F00322, Specialist Prosecutor, *Prosecution Consolidated Response to Defence Admissibility Challenges*, 24 September 2021.

³ F00328, Panel, *Order on Rule 117 Defence Motions*, 27 September 2021.

⁴ F00335, Gucati Defence, *Request for Reconsideration of Decision F00328*, 29 September 2021; F00338, Haradinaj Defence, *Application for Reconsideration of Decision F00328 on Rule 117 Defence Motions*, 29 September 2021.

⁵ F00344, *Order to the Defence to File Replies to F00322*, 30 September 2021, in particular, paras 5, 11.

6. On 4 October 2021, the Gucati Defence and the Haradinaj Defence filed replies to the Response (“Replies”).⁶
7. On 7 October 2021, the Panel denied the Requests (“Impugned Decision”).⁷
8. On 12 October 2021, the Haradinaj Defence filed an application requesting certification to appeal the Impugned Decision (“Application”).⁸
9. On 13 October 2021, the Panel issued an order in which it reduced the time limit for the SPO and the Gucati Defence to respond to the Application and ordered that no reply may be filed.⁹
10. On 14 October 2021, the Gucati Defence joined the Application.¹⁰ On the same day, the SPO responded.¹¹

II. SUBMISSIONS

11. The Haradinaj Defence requests leave to appeal the Impugned Decision in relation to four issues outlined under letters (a)-(d) of paragraph 1 of its Application (“Issues”):
 - a. Whether the 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 (“First Issue”);
 - b. Whether the Panel erred, in first granting the Defence the opportunity to submit its reply and then going on to decide the matter as a reconsideration

⁶ F00349, Gucati Defence, *Reply to Prosecution Consolidated Response to Defence Admissibility Challenge* (“Gucati Reply”), 4 October 2021; F00348, Haradinaj Defence, *Defence Reply to KSC-BC-2020-007/F00322*, (“Haradinaj Reply”), 4 October 2021.

⁷ F00353, Panel, *Decision on the Defence Requests for Reconsideration of Decision F00328*, 7 October 2021.

⁸ F00358, Haradinaj Defence, *Application for Certification for Granting Leave to Appeal Decision F00328* (“Application”), 12 October 2021.

⁹ F00362, Panel, *Order Varying the Time Limit to Respond to F00358*, 13 October 2021.

¹⁰ F00365, Gucati Defence, *Response to Application for Certification for Granting Leave to Appeal Decision F00328*, 14 October 2021.

¹¹ F00366, Specialist Prosecutor, *Prosecution Response to Application for Certification for Granting Leave to Appeal*, 14 October 2021.

rather than considering the substantive issues with the Rule 117(2) application, the Response of the SPO and the Defence reply (“Second Issue”);

- c. Whether the Panel was correct to exercise its “*discretion to determine a matter without awaiting replies*” without giving any prior notice thereof (“Third Issue”); and
- d. Whether the position taken by the Panel, and the failure to reconsider the decision constitutes “a clear error of reasoning or injustice” for the purposes of Rule 79(1) of the Rules (“Fourth Issue”).

12. In essence, the Haradinaj Defence submits that these four Issues pertain to the interpretation of Rule 76 of the Rules and suggests that the Panel misinterpreted that Rule to the prejudice of the Defence by failing to allow the Defence to reply before rendering its Order.¹²

13. As a preliminary matter, the Haradinaj Defence submits that the seven-day deadline set by Rule 77(1) for seeking leave to appeal started on 7 October 2021 as the decision of the Panel on this matter was not valid and final until it had considered the Replies and rendered its decision in light of them.¹³

14. In its Response, the SPO submits that the Application fails to meet the requirements of Rule 77 of the Rules in respect of all four Issues.

III. APPLICABLE LAW

15. Rule 77(1) of the Rules provides that 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.

¹² See, in particular, Application, paras 29-30.

¹³ Application, paras 7, 38.

16. Rule 79(2) of the Rules provides that a request for reconsideration does not stay the time limits for any legal remedy.

17. The conditions for leave to appeal are set out in Article 45 of the Law and Rule 77(2) of the Rules: 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. A right to appeal arises only if the Panel is of the opinion that these requirements are met.¹⁴

IV. DISCUSSION

A. FIRST AND THIRD ISSUES

18. In relation to the First and the Third Issues raised by the Defence, the Application is rejected for the following reasons.

19. First, the Application is out of time in respect of these two issues since they pertain, in substance, to allegations of errors said to have been committed by the Panel in its Order, issued on 27 September 2021. Any application for leave to appeal should have been filed within seven days after this date.

20. The Panel does not accept the argument advanced by the Haradinaj Defence that time for seeking leave to appeal started to run with the Impugned Decision of 7 October 2021. By virtue of Rule 79(2) of the Rules, time for the Defence to seek leave to appeal the Order ran from the date of its issuance and expired on 4 October 2021. When the Panel granted leave to reply on 30 September 2021, it did not stay this time

¹⁴ See also KSC-BC-2020-06, F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, public, para. 9.

limit, nor did it invalidate the Order. By failing to seek leave to appeal the Order within the applicable time limit, the Defence effectively waived its right to do so.

21. A Party cannot challenge a decision outside the time limits set by the Rules by filing a motion for reconsideration and, after that motion is denied, challenged the initial decision by means of an appeal against the reconsideration decision. This option is not available under the Rules, and would enable a Party to seek leave to appeal at its preferred time rather than at the time set by the Rules.

22. The Defence, therefore, failed in respect of the first and third Issues to comply with the time limit set under Rule 77(1) of the Rules. Leave to appeal could be rejected on that basis alone.

23. Even if the Application had been filed on time in respect of these issues, the Defence has failed to demonstrate, in accordance with Article 45(2) of the Law and Rule 77(2) of the Rules, that either the First Issue or the Third Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and that an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

24. As already stated, the Panel has not yet decided whether to admit any of the items concerned by the Motions.¹⁵ None of them have yet been offered for admission, and the Panel will decide on the admission of those declarations tendered by the SPO at the conclusion of the testimony of witnesses W04841 and W04842. The Rules do not authorise a Party to challenge the admissibility of items of evidence on grounds of reliability before they are offered for admission by the opposing Party.¹⁶ The Defence is, therefore, seeking a relief from the Panel to which it is not entitled under the Rules.¹⁷

¹⁵ Order, para. 12; Impugned Decision, para. 24.

¹⁶ Order, para. 12; Impugned Decision, para. 24. See also F00334, Panel, *Decision on the Prosecution Request for Admission of Items Through the Bar Table*, 29 September 2021.

¹⁷ Order, para. 12; Impugned Decision, para. 23. See also Article 40(6)(h) of the Law and Rule 138(1) of the Rules.

25. As the Panel has repeatedly stated, the issues raised by the Defence are matters that can be fully, fairly and effectively raised if and when the declarations of witnesses W04841 and W04842 are tendered in evidence, and the Defence will have ample opportunity to explore those issues in cross-examination. No unfair prejudice arises for the Defence.¹⁸

26. Furthermore, as made clear in paragraph 19 of the Impugned Decision, the Panel gave full consideration to the submissions contained in the Replies. Therefore, the claim that the Panel committed an error of reasoning by issuing the Order without waiting for the Replies was rendered moot by the Panel's order of 30 September granting leave to reply and by the Panel's consideration of the resulting submissions.

27. The Haradinaj Defence has therefore failed to establish that the first and third Issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

28. The Haradinaj Defence has also failed to establish that an immediate resolution by the Court of Appeals Panel may materially advance the proceedings. The Panel repeats, once again, its findings that there will be a full and fair opportunity for the Defence: (i) to raise its objections to the admission of the relevant items, if and when they are offered for admission by the SPO; and (ii) to ask questions to these witnesses about the items in cross-examination which the Defence considers relevant to the issue of admissibility.¹⁹

29. For these reasons, leave to appeal the first and third Issues is denied.

B. SECOND AND FOURTH ISSUES

30. Regarding the Second and Fourth Issues for which leave to appeal is sought, the Panel rules as follows.

¹⁸ Order, para. 12; Impugned Decision, para. 24.

¹⁹ Order, para. 12; Impugned Decision, para. 24.

31. In relation to the Second Issue, the Defence fails to articulate what constitutes an error in the course taken by the Panel in this matter. The Defence complaint was that it had been denied an opportunity to file submissions in reply to the SPO Response. To cure that fact, the Panel granted leave to the Defence to reply despite the fact that the Panel could validly decide the matter without awaiting the replies. The Panel then proceeded to consider: (a) whether the Replies demonstrated grounds for reconsiderations pursuant to Rule 79 of the Rules; and (b) despite the fact that they did not, went on to consider the arguments advanced in those Replies in order to ascertain whether they would have had any effect on its Order. Nothing in the procedure thereby followed, therefore, demonstrates an error, let alone one that would meet the requirements of Rule 77 of the Rules.

32. The Panel notes, furthermore, that its order of 30 September 2021 was limited to granting leave to the Defence to file replies to the SPO's response of 24 September 2021.²⁰ In that order, the Panel did not determine that the Defence had established the requirements for reconsideration under Rule 79 of the Rules. Instead, the Panel granted leave to reply "[f]or the purpose of deciding upon the Requests [for reconsideration]".²¹ Leave to reply, therefore, did not displace the obligation of the Defence to establish that the conditions for reconsiderations were met. The Rules do not provide any other kind of remedy that would authorise a Party to ask a Panel to revisit one of its decisions without establishing those requirements. And, as determined in the Impugned Decision, the Defence failed to demonstrate that the conditions for reconsideration were met in this instance.²²

33. In relation to the Fourth Issue, despite the Defence having failed to establish the conditions for reconsideration under Rule 79 of the Rules, the Panel *nevertheless* proceeded to reconsider its Order in light of the submissions contained in the

²⁰ F00344, Panel, *Order to the Defence to File Replies to F00322*, 30 September 2021, paras 11-12.

²¹ *See supra* para. 5.

²² Impugned Decision, para. 26.

Replies.²³ For that reason, the claim that the Panel failed to take into consideration the Replies and thereby committed an error is without merit and is contradicted by the record.

34. Based on the above, the Panel finds that the Defence has failed to demonstrate, in accordance with Article 45(2) of the Law and Rule 77(2) of the Rules, that either the Second Issue or the Fourth Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and that an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

35. Therefore, leave to appeal is also denied in respect of both of these Issues.

V. DISPOSITION

36. For these reasons, the Panel:

- a. **DENIES** the Application in its entirety; and
- b. **DECLARES** the Defence's request for suspensive effect to be moot.



Judge Charles L. Smith, III

Presiding Judge

Dated this Friday, 15 October 2021

At The Hague, the Netherlands

²³ Impugned Decision, para. 22.