

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: 15 October 2021

Language: English

Classification: **Public**

ANNEX 1

Expert Report of Ms. Anna Myers of the Whistleblowing International Network

Specialist Prosecutor

Jack Smith

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

Counsel for Hysni Gucati

Jonathan Elystan Rees QC

Huw Bowden

I. QUALIFICATION AS AN EXPERT ON WHISTLEBLOWING LAW AND PRACTICE

1. I am a lawyer, originally trained in Canada and called to the Bar of Ontario in November 1996 (since voluntarily resigned). I re-qualified as a solicitor in the UK and I have been a member of the Law Society of England and Wales, in good standing, since May 1998.
2. I am currently based in Glasgow, Scotland and I am the founding Executive Director of the Whistleblowing International Network (WIN), an independent incorporated charitable organisation since August 2018.¹
3. I worked for Public Concern at Work (now called Protect), from May 2000 to October 2008, first as Legal Officer and then as Deputy Director. Protect is the leading authority on whistleblowing and legal advice service for whistleblowers in the UK. It was established in 1993 as a non-profit charitable organisation based in London, England and its solicitors and barristers are regulated by their respective professional regulatory authorities for England and Wales.²
4. During my 9 years at Protect, I advised hundreds of individuals on whether or how to blow the whistle in the public interest, advising them on their legal protections under the UK's Public interest Disclosure Act, 1998, and on the

¹ Whistleblowing International Network (WIN), <https://whistleblowingnetwork.org/Home>

² Protect: Speak up, stop harm, 'About us', <https://protect-advice.org.uk/our-story/>

institutional and legal framework relevant to the substance of their concern or disclosure. The aim of the advice service is help individuals to raise public interest concerns in the most responsible and effective way possible; maximising the opportunity for the wrongdoing they reasonably believe is happening or the harm they reasonably believe is occurring or could occur to be addressed, while minimising the risk to themselves as the messengers of the relevant information.

5. After leaving Protect, I worked with the Group of States Against Corruption (GRECO) supporting the Secretariat to facilitate peer-to-peer country evaluations to monitor States' compliance with GRECO's anti-corruption standards, which included each country's whistleblowing laws and policies in place. During 2013, I advised the Council of Europe's European Committee on Legal Cooperation in the development of the Council of Ministers' CM/Rec(2014)7 Recommendation on the protection of whistleblowers and drafted the Explanatory Memorandum.³
6. In 2014, I was consultant to the UNODC and drafted the Resource Guide on Good Practices in the Protection of Reporting Persons under the UN Convention Against Corruption which was published in 2015.⁴

³ Council of Europe, 'Protection of Whistleblowers', Recommendation CM/Rec(2014)7, adopted by the Committee of Ministers of the Council of Europe on 30 April 2014 and explanatory memorandum, <https://rm.coe.int/16807096c7>

⁴ United Nations Office on Drugs and Crime (UNODC), The United Nations Convention against Corruption, 'Resource Guide on Good Practices in the Protection of Reporting Persons', August 2015, https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf

7. Finally, I worked for a year at the Government Accountability Project in DC in 2015-2016, the oldest whistleblower protection and advocacy organisation founded in 1977⁵ prior to returning to the UK to formally establish WIN, a network of non-profit organisations and civil society experts working around the world to protect whistleblowers that I had voluntarily coordinated since 2013.⁶ WIN was granted incorporated charitable status in Scotland in 2018.

II. EXPERIENCE PROVIDING EXPERT TESTIMONY AND EVIDENCE ON THE LEGAL PROTECTION OF WHISTLEBLOWERS

8. I have been asked to provide expert witness testimony in a number of regional and national settings including:
- a. to the UK's Committee on Standards in Public Life (10th Report, 2005)⁷; the Inquiry into the activities of the serial killer Dr. Shipman (2004)⁸ and the "Three Inquiries" into Drs Ayling, Neale, and Kerr/Haslam (2003)⁹;

⁵ Government Accountability Project, 'About', <https://whistleblower.org/our-story-2/>

⁶ WIN, 'About WIN', <https://whistleblowingnetwork.org/About>

⁷ Committee on Standards in Public Life, 'Getting the Balance Right: Implementing Standards of Conduct in Public Life', Tenth Report Cm 6407, January 2005, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/336897/10thFullReport.pdf

⁸ The National Archives, Reports: Fifth Report, 'Safeguarding Patients: Lessons from the Past – Proposals for the Future', Cm 6394, 9 December 2004, https://webarchive.nationalarchives.gov.uk/ukgwa/20090808163839mp/http://www.the-shipman-inquiry.org.uk/images/fifthreport/SHIP05_COMPLETE_NO_APPS.pdf

⁹ Department of Health, 'Committee of Inquiry: Independent Investigation into How the NHS Handled Allegations About the Conduct of Clifford Ayling', Cm 6298, 2004, <https://delta.bipsolutions.com/docstore/pdf/8221.pdf>; Department of Health, 'Committee of Inquiry To Investigate how the NHS Handled Allegations about the Performance and Conduct of Richard Neale',

- b. to the Council of Europe’s Committee on Legal Affairs and Human Rights examining whistleblowing in Europe in 2009 and examining the need to improve the protection of whistleblowers, particularly in national security sector in 2014. The former resulted in the PACE Recommendation for the protection of whistleblowers (Rec. 1916) adopted in 2010¹⁰ and the latter in PACE Recommendation for improving the protection of whistleblowers (Rec. 2073) adopted in 2015¹¹.
- c. to the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry in Quebec led by the Hon. France Charbonneau, a judge sitting on the Quebec Superior Court during a hearing dedicated to examining whistleblower protection as a tool to detect and prosecute corruption in 2014.
- d. to the Canadian Parliamentary Committee Operations Committee (OGGO) as part of its review of the Public Servants Disclosure Protection Act (PSDPA) (2017)¹².

Cm 6315, 2004; HM Government, ‘The Kerr/Haslam Inquiry’, Volume 1 of 2, Cm 6640, 2005, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/273245/6640.pdf

¹⁰ Council of Europe, Parliamentary Assembly, ‘Protection of “whistle-blowers”’, Recommendation 1916 (2010), <https://pace.coe.int/pdf/2979bde52f7f09f8260b537baf070ca327ca988dcb2f12ce030fb94c29b6807d/recommendation%201916.pdf>

¹¹ Council of Europe, Parliamentary Assembly, ‘Improving the protection of whistle-blowers’, Recommendation 2073 (2015), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21936&lang=EN>

¹² House of Commons Canada, ‘Strengthening the Protection of the Public Interest within the Public Servants Disclosure Protection Act’, Report of the Standing Committee on Government Operations and Estimates, June 2017, <https://www.ourcommons.ca/Content/Committee/421/OGGO/Reports/RP9055222/oggorp09/oggorp09-e.pdf>

9. Over many years, I have been asked by national governments around the world and regional and international bodies to provide expert feedback and consultancy on legislative and standard setting proposals and policies for the protection of whistleblowers including by the OECD, the European Union, the UNODC, and various governments such as Mexico, Costa Rica, Chile, Serbia, France, the Czech Republic, Liberia and Nigeria to name a few. I am happy to provide further details of this work if required.

III. WHAT IS YOUR UNDERSTANDING OF THE DEFINITION OF THE PHRASE 'WHISTLEBLOWER' AND TO WHAT IS THIS REFERENCED?

10. My understanding of the definition of a whistleblower is rooted in the fundamental right to freedom of expression and the public's right to know. Article 19 of the Universal Declaration of Human Rights guarantees the right to seek, receive and impart information and ideas through any media. In my expert opinion, the UN Special Rapporteur, David Kaye, has provided the best definition of a whistleblower:

“...a person who exposes information that he or she reasonable believes, at the time of disclosure to be true or to constitute a threat or harm to a specified public interest, such as a violation of national or

international law, abuse of authority, waste, fraud or harm to the environment, public health or public safety.”¹³

11. Mr. Kaye states in paragraph 29 of his report that while legal protections are often limited to whistleblowers who raise concerns or disclose information in the context of their work-based relationship “a person may come into contact with public interest information even outside such a relationship.”¹⁴ He points out that the United Nations Convention Against Corruption contains no such employment related provision.
12. In the context of my current role, I work to protect the organisations that support and defend whistleblowers and the ecosystem that traditional workplace whistleblowers rely on, namely the journalists who publish stories based on the information provided by whistleblowers, and the NGOs who receive information from whistleblowers to investigate or to expose because they are expert in the field to which the information relates.
13. I have always been clear that workplace whistleblowers must be fully protected against workplace retaliation (ie. workplace detriment, harassment, and dismissal) and that this in no way detracts from the need to protect

¹³ United Nations General Assembly, ‘Promotion and protection of the right to freedom of opinion and expression’, 8 September 2015, A/70/361, para 28, p13, <https://freedex.org/wp-content/blogs.dir/2015/files/2015/10/dkaye-whistleblower-report.pdf>

¹⁴ *Ibid*, para 29.

persons who raise whistleblowing concerns outside of a workplace relationship.

14. Further, I recognise and have advised on the protection of a variety of sources of information and highlighted the importance of protecting those to whom individuals may choose to provide information they have discovered in the context of their workplace, which is then disclosed publicly in the public interest.

15. For example, under my direction WIN wrote a joint open letter¹⁵ - supported by 48 other organisations - calling for a stop to the abusive legal action being taken against a WIN associate, the *Plateforme pour la protection des lanceurs d'alerte* (PPLAAF). PPLAAF was being sued for defamation for information contained in a report that the organisation wrote with another well-known NGO, Global Witness, that investigates and exposes the link between natural resources, conflict and corruption. The report took a critical look at billionaire Dan Gertler's business empire, particularly his mining operations in the DRC. Some of the report's findings were based on evidence provided to PPLAAF by two banker whistleblowers from the DRC who later voluntarily came forward to identify themselves.

¹⁵ WIN, joint open letter, 'France: Reprisals against PPLAAF and Global Witness intensify with new SLAPP procedures', 30 November 2020, <https://whistleblowingnetwork.org/News-Events/News/News-Archive/France-Reprisals-against-PPLAAF-and-Global-Witness>

16. Finally, my understanding of whistleblower protection encompasses protection for those who assist or facilitate a whistleblowing disclosure. The fact that persons “associated with whistleblowers” deserve access to the same protection as a whistleblower has been recognised in Article 8 of the Law to Protect Whistleblowers in Kosovo¹⁶ for example, and to “facilitators” under Article 4 (4) (a) of the EU Directive on the protection of persons who report breaches of Union law¹⁷.
17. In my experience, it is to the parties enumerated above in (paragraph 12), that workplace whistleblowers, or sources, will turn when they do not have confidence that their institution will address the wrongdoing or potential harm.
18. And when, as in this present case, the persons who receive the information from a source also have a reasonable belief that the authorities will not address the concerns that the information or documents appear to substantiate, then making the information available publicly is a channel they will choose to protect the public interest and which should be open to them.
19. Finally, where the original source of the information - in this case the person who delivered the documents - remains anonymous, the person or parties

¹⁶ Article 8, Law No. 06/L-085, ‘On Protection of Whistleblowers’, <https://md.rks-gov.net/desk/inc/media/701773B8-903F-476F-9D1E-2F7CC2C86A84.pdf>

¹⁷ Article 4(4)(a), Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (the EU Directive), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937>

who disclose the information publicly then become the target of the retaliation or punishment that would normally be reserved for the person who accessed and leaked the document in the first place. They become whistleblowers-by-proxy.

20. As well, it is worth noting that whistleblower protection laws are now being extended to ensure protection beyond traditional workplace retaliation and this is most evident in the new EU Directive on the protection of reporting persons which is due to be transposed by all EU Member States by the end of 2021.
21. Specifically, under Article 21 (7) of the EU Directive on the protection of reporting persons, persons covered by the Directive shall not **“incur any liability of any kind as a result of reports or public disclosures”** made under the Directive. Persons so covered, have the **“right to rely on that reporting or public disclosure to seek dismissal of a legal proceeding against them including for defamation, breach of copyright, breach of secrecy, disclosure of trade secrets, or for compensation claims based on private, public, or on collective labour law....”** (emphasis added).¹⁸

¹⁸ Article 21(7) of the EU Directive, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937>

IV. THE CRITERIA OR PRINCIPLES TO DETERMINE WHETHER A PUBLIC DISCLOSURE SHOULD BE PROTECTED IN THE CONTEXT OF WHISTLEBLOWING

22. I offer my expert opinion to assist the Court in determining whether or not it should consider a defence on the basis that the Defendants, Mr. Gucati and Mr. Haradinaj, as the President and Vice President, respectively, of the Kosovo Liberation Army Veterans Association (“KLA WVA”), are public interest whistleblowers or persons associated with a whistleblower who should receive similar protection to a whistleblower.
23. In my opinion the Defendants fall within the broad definition of whistleblowers as set out by the now former UN Special Rapporteur David Kaye in his 2015 Report to the United Nations General Assembly on the protection of sources of information and whistleblowers, and as persons associated with a whistleblower (see paragraphs 10 and 16 above).
24. I submit my opinion on the basis of my expertise in the field of whistleblowing law and practice and upon examining the information I received from the Defendants’ legal team which includes a) a 4-page Letter of Instruction b) the Indictment c) Defence Pre-Trial Brief and d) Prosecution Pre-Trial Brief.
25. On the basis of this examination, in my opinion, there is enough prima facie evidence to warrant the Court considering the Defendants as persons

qualifying for protection as whistleblowers or as persons associated with a whistleblower.

26. In order to assist the Court in examining whether the Defendants should be protected, assuming it agrees that they qualify within the whistleblowing categories I have set out above, the criteria that has been developed by the European Court of Human Rights (ECtHR) should be taken into account. The ECtHR has made a number of important rulings with respect to whistleblowers who have made public disclosures. They have done so primarily in the cases of *Guja v. Moldova* and later in *Heinisch v. Germany* and *Bucur and Toma v. Romania*¹⁹.
27. When dealing with whistleblowing and Article 10 rights with respect to public disclosure, the Court set out six principles to help determine whether an interference with the Article 10 right to freedom of expression was “necessary in a democratic society”.
28. I set out below these six principles as they are set out in the Explanatory Memorandum²⁰ of the CM/Rec(2014)7 Recommendation on the protection of

¹⁹ *Guja v. Moldova*, Appl. no. 14277/04, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), 12 February 2008, <http://hudoc.echr.coe.int/eng?i=001-85016>; *Heinisch v. Germany*, Appl. no. 28274/08, Judgment (Merits and Just Satisfaction), Court (Fifth Section), 21 July 2011, <http://hudoc.echr.coe.int/eng?i=001-105777>; *Bucur and Toma v. Romania*, Appl. no. 40238/02, Judgment (Merits and Just Satisfaction), Court (Third Section), 8 January 2013, <http://hudoc.echr.coe.int/eng?i=001-115844>

²⁰ Council of Europe, ‘Protection of Whistleblowers’, Recommendation CM/Rec(2014)7, adopted by the Committee of Ministers of the Council of Europe on 30 April 2014 and explanatory memorandum, para 53, pp28-30, <https://rm.coe.int/16807096c7>

whistleblowers which I helped draft. These are based on the order that the principles were used by the ECtHR in *Bucar and Toma v. Romania* :²¹

- (i) whether the person who has made the disclosure had at his or her disposal alternative channels for making the disclosure.
- (ii) the public interest in the disclosed information. *The Court in Guja v. Moldova noted that “in a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence”*
- (iii) the authenticity of the disclosed information. *The Court in Guja v. Moldova reiterated that the freedom of expression carries with it responsibilities and any person or persons who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable. The Court in Bucur and Toma v. Romania bore in mind Resolution 1729 (2010) of the Parliamentary Assembly of the Council of Europe and the need to protect whistleblowers on the basis that they had “reasonable grounds” to believe that the information disclosed was true.*

- (iv) detriment to the employer. *Is the public disclosure so important in a democratic society that it outweighs the detriment suffered by the employer? In both Guja v. Moldova and Bucur and Toma v. Romania the employer was a public body and the Court balanced the public interest in maintaining public confidence in these public bodies against the public interest in disclosing information on their wrongdoing;*
- (v) whether the disclosure is made in good faith. *The Court in Guja v. Moldova stated that “an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection.”*
- (vi) the severity of the sanction imposed on the person who made the disclosure and its consequences.

29. I should note here that while the good faith principle has not yet been challenged at the ECtHR, good faith has been largely removed from laws that have been adopted since 2014. It is not included in the EU Directive on the protection of reporting persons, for example²². Good faith was replaced by Principle 22 in the Council of Europe’s CM/Rec(2014)7 Recommendation on the protection of whistleblowers which states:

²² EU Directive, Article 6(1): “Reporting persons shall qualify for protection under this Directive provided that: (a) they had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of this Directive.”

*Protection should not be lost solely on the basis that the individual making the report or disclosure was mistaken as to its import or that the perceived threat to the public interest has not materialised, provided he or she had reasonable grounds to believe in its accuracy.*²³

30. The reason for this was to preclude either the motive of the whistleblower in making the report or disclosure or his or her good faith as being relevant to the question of whether or not a whistleblower should be protected.²⁴

V. CONSIDERATION OF THESE PRINCIPLES IN RELATION TO THIS CASE

31. According to the information that I have received and reviewed, I will discuss each of the ECtHR principles in relation to this case on the basis that these represent the main legal principles that apply to whistleblowers who make public disclosures in the public interest. I fully accept that this consideration is only indicative of the information and evidence that the Court will have fully presented to it and will examine during the trial. It will, of course, be entirely up to the Court to determine whether to follow this method of

²³ *Ibid*, para 22, p9.

²⁴ *Ibid*, para 85, p39.

examination in relation to the facts or, indeed, whether to accept that the Defendants qualify for whistleblower protection.

32. *Principle 1: Whether the person who has made the disclosure had at his or her disposal alternative channels for making the disclosure.* According to the information I reviewed, the Defendants assert that they have sought on various occasions to raise the same or similar concerns about a serious unfair bias in the operation and functioning of the Specialist Prosecutor's Office of the Kosovo Specialist Chamber (SPO), including the improper coordination with Serbian officials, and the transfer of case files to Serbian officials "through numerous official channels, including making previous reports to EULEX, and other national and international organisations and mandate holders."²⁵ These reports appear not to have been addressed, or were ignored and it would seem the Defendants believed there were no other channels available to them to raise their concerns or to have their concerns independently investigated, other than to put the evidence, that were delivered to them, in the public domain, via the media.
33. In the UK Public Interest Disclosure Act, 1998²⁶, for example, as well as in the EU Directive on the protection of reporting persons²⁷, a trigger for protection for a public disclosure occurs when an individual has already raised the same

²⁵ KSC-BC-2020-07/F00260/RED, 'PUBLIC REDACTED SUBMISSION OF INTERIM PRE-TRIAL BRIEF ON BEHALF OF THE DEFENCE OF NASIM HARADINAJ', para 293.

²⁶ Section 43G(2)(c).

²⁷ EU Directive, Article 15 on Public Disclosures.

or similar concerns via other official channels and the issue remains unaddressed or ignored.

34. *Principle 2: the public interest in the disclosed information; and Principle 3: the authenticity of the information.* According to the information I have reviewed, the Defendants allege that they have reason to believe the SPO is seriously and unfairly biased in how it fulfils its mandate. The independence of any judicial system, including its prosecutorial authorities, is a foundation for the rule of law and a cornerstone of democracy and democratic accountability. Further any concerns, if reasonably believed, that relate to fair and equal access before the law fall within the definition of information that would be in the public interest to disclose according to any and all of the laws to protect whistleblowers of which I am aware around the world. The Defendants state that they believed that the documents contained proof of the bias about which they have been long concerned, and that they believed at the time that the documents were authentic.

35. *Principle 4: detriment to the employer (or in this case, the SPO).* This principle reveals the importance of the reverse burden of proof that is included in most whistleblower protection laws. International best practice consensus is that once a prima facie case is proved that an individual made a protected disclosure and that he or she suffered retaliation, the burden shifts to the employer or the institution that is taking the action against the individual to

prove that such action was independently fair and unrelated to the whistleblowing.

36. However, in the context of this case, it will be up to the Court to examine whether the public interest in the disclosure outweighs the confidentiality of the information. In my opinion and on the basis of the information I have reviewed, there was likely enough information to warrant an investigation into the concerns of biased raised by the Defendants on earlier occasions. Where no such investigation is forthcoming, making a public disclosure of such information is often the last resort and is recognised as a protected disclosure in the laws that I have set out in this brief.

37. It should be noted here that in the definitions section²⁸ of the EU Directive on the protection of reporting persons, 'information on breaches' means information, including reasonable suspicions about actual or potential breaches.

38. *Principle 5: whether the disclosure is made in good faith.* As discussed above at paragraphs 29 and 30, most whistleblower protection laws have replaced "good faith" with a test of reasonable belief in the truth or accuracy of the information at the time of disclosure. Further in my expert opinion,

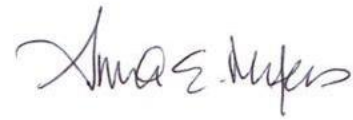
²⁸ EU Directive, Article 5(2).

reasonable belief must be assessed in relation to the person forming it and in relation to persons in a similar position of knowledge.

39. *Principle 6: the severity of the sanction imposed on the person who made the disclosure and its consequences.* Clearly a criminal conviction that results in imprisonment is the most severe sanction that can be imposed on any individual. This is where all the evidence that is presented as to the public interest in the information disclosed, the reasonable belief of the Defendants in the accuracy of the information disclosed, and the fact that they assert they had tried other official channels prior to making a public disclosure of information that they did not voluntarily seek out but that was brought to them, are all matters of significant importance to this case.

VI. CONCLUSION

40. In light of my expertise in whistleblower protection law and practice, the information I have had available to me in preparation of this opinion, and the criteria that I have identified as providing the legal framework to determine whether the Defendants qualify as whistleblowers, I come to the conclusion that they qualify for protection both as whistleblowers in their own right and as persons associated with a whistleblower, namely the unidentified person who voluntarily delivered the documents to the Defendants.

A handwritten signature in black ink, appearing to read "Anna Myers". The signature is written in a cursive, flowing style.

Anna Myers
Executive Director, WIN

Whistleblowing International Network