

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 Counsel for Nasim Haradinaj

Date: 19 October 2021

Language: English

Classification: Public

PUBLICLY REDACTED VERSION OF DEFENCE APPLICATION TO EXCLUDE

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. This is the Defence for Mr Haradinaj's application pursuant to Rules 62 and 63 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules") and Article 6(2) of the Kosovo Specialist Chamber's Code of Professional Conduct for Counsel and Prosecutor's Before the Kosovo Specialist Chambers ("Code of Professional Conduct") for an order excluding Associate Prosecutor [REDACTED] from appearing in the present proceedings as Trial Counsel on the basis that there is a real of becoming a witness in the proceedings and that his continuing to appear before the Trial Panel may well result in a breach of the Accused's fair trial rights.

II. THE LAW

2. Article 24(2) of the Law on the Specialist Chambers and Specialist Prosecutor's Office ("Law") stipulates that:

"The Specialist Prosecutor's Office, which takes over the mandate and personnel of the Special Investigative Task Force ("SITF"), shall be an

independent office for the investigation and prosecution of crimes within the jurisdiction of the Specialist Chambers.”¹

3. Article 35(1) of the Law further states:

“The Specialist Prosecutor shall be responsible for the investigation and prosecution of persons responsible for the crimes falling within the jurisdiction of the Specialist Chambers and shall be independent in the performance of his or her functions.”²

4. Article 6(2) of the Code of Professional Conduct provides that:

“Counsel and Prosecutors shall not act in their respective roles in proceedings where they are likely to appear as a witness, except when the testimony relates to:

- a. an uncontested issue; or*
- b. the nature and value of legal services rendered in the case.”³*

¹ Law on the Specialist Chambers and Specialist Prosecutor’s Office (‘the Law’), 05/L-053.

² *Ibid.*

³ Registry Practice Direction, Code of Professional Conduct – for Counsel and Prosecutors Before the Kosovo Specialist Chambers (‘KSC Code of Conduct’), 28 April 2021, KSC-BD-07-Rev1.

5. Article 31 of the Code of Professional Conduct further provides that in accordance with Article 24(2) and Article 35(1) of the Law and Article 6 of the Code of Professional Conduct:

“Prosecutors shall ensure the independence of the Specialist Prosecutor’s

Office by:

a. exercising their functions:

(1) free of improper influence, inducements, threats or interference;

and

(2) without seeking or receiving instructions from external sources;

b. instructing staff members or consultants of the Specialist Prosecutor’s Office as to the measures required to ensure such independence;

c. refraining from any activity which is incompatible with their functions or the mandate of the Specialist Prosecutor’s Office or which is likely to negatively affect confidence in its independence and integrity; and

d. reporting to the Specialist Prosecutor without undue delay any attempt by any source to induce them to violate their obligation of independence, and taking measures to ensure that their staff members report any such attempts to them.”⁴

6. Articles 22 and 31(5) of the Constitution of the Republic of Kosovo and Articles 3(2) and 21(3) of the Law incorporate international human rights standards regarding a fair trial, including Article 6 European Convention on Human Rights (“ECtHR”) and provide that:

“Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo, and in the case of conflict, have priority over provisions of the laws and other acts of public authorities... (2) The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; (3) International Covenant on Civil and Political Rights and its Protocols.”

“The Specialist Chambers shall adjudicate and function in accordance with,... (e) international human rights law which sets criminal justice standards including the European Convention on Human Rights and

⁴ KSC Code of Conduct, KSC-BD-07-Rev1.

Fundamental Freedoms, the International Covenant on Civil and Political Rights, as given superiority over domestic laws by Article 22 of the Constitution.”

7. Like the Professional Code of Conduct, codes of conduct before other international criminal tribunals similarly provide that Counsel must not appear when there is a risk that he or she might be called as a witness:

a. Article 12(3) of the Code of Professional Conduct for counsel before the ICC (‘ICC Code of Conduct’) states:

“Counsel shall not act in proceedings in which there is a substantial probability that counsel or an associate of counsel will be called to appear as a witness unless:

(a) The testimony relates to an uncontested issue; or

(b) The testimony relates to the nature and value of legal services rendered in the case.”⁵

b. Article 26 of the Code of Professional Conduct for Counsel appearing before the ICTY (‘ICTY Code of Conduct’) states:

⁵ ICC, Code of Professional Conduct for counsel, 2011, ICC-ASP/4/Res.1.

“Counsel shall not act as an advocate in a proceeding in which counsel is likely to be a necessary witness except where:

- (i) the testimony relates to an uncontested issue;*
- (ii) the testimony relates to the nature and value of legal services rendered in the case; or*
- (iii) substantial hardship would be caused to the client if that counsel does not so act.”⁶*

c. Article 16 of the Code of Professional Conduct for Defence Counsel before the ICTR (‘ICTR Code of Conduct’) stipulates:

“Counsel must not act as advocate in a trial in which the Counsel is likely to be a necessary witness except where the testimony relates to an uncontested issue or where substantial hardship would be caused to the client if that Counsel does not so act.”⁷

⁶ ICTY, Code of Professional Conduct for Counsel appearing before the International Tribunal, 22 July 2009, IT/125 Rev.3.

⁷ ICTR, Code of Professional Conduct for Defence Counsel, 14 March 2008.

III. SUBMISSIONS

8. The Prosecution intend to call its first witness, Ms. Zdenka Pumper, a senior investigator in the Specialist Prosecutor's Office ("SPO"), on 18 October 2021. Part of her testimony will relate to her analysis of the three batches of purported confidential and non-public documents that form the basis of the charges.
9. Revised disclosure received from the SPO on 11 October 2021⁸ refers sealed evidence bags⁹ being taken into SPO custody at The Hague following those documents being provided to [REDACTED] by Associate Prosecutor [REDACTED].¹⁰
10. Two of the live issues between the parties in this dispute are (a) whether the chain of custody has been maintained in respect of evidence that is central to this case and the Defence has not had an opportunity to examine; and (b) how allegedly confidential documents came into the possession of the Accused.

⁸ KSC-BC-2020-07-103521-103524, 29 October 2020 (revised 11 October 2021).

⁹ CEMU registration reference ERN 080449-081340

¹⁰ KSC-BC-2020-07-103521-103524, para 1.

11. Associate Prosecutor **[REDACTED]** cannot act in his capacity as Associate Prosecutor in the present case because it is likely that he will need to appear as a witness in this case. A matter that has been consistently argued throughout these proceedings is that there is a material gap in the chain of custody between key documents that ground the SPO's case being seized, the documents being taken into custody at The Hague, and being handed to Zdenka Pumper for examination. Zdenka Pumper cannot speak first hand to the movements of the documents between their seizure and them being taken into custody at The Hague and thus **[REDACTED]** testimony becomes key.
12. In accordance with Article 6(2) of the Code of Conduct, the likelihood of Associate Prosecutor **[REDACTED]** needing to be called as a witness cannot be excused because the issues that his evidence would relate to are not (a) uncontested; or (b) regarding the nature and value of legal services rendered in the case. For clarity, these are the only instances under Article 6(2) of the Code of Professional Conduct in which continuing to act as Counsel can be appropriate whereupon that person would be likely to appear as a witness.
13. If Associate Prosecutor **[REDACTED]** continues to act as Counsel in the present proceedings notwithstanding the likelihood that he will be called as a witness, there is a real risk that the Accused's fair trial rights will be

violated in that his continuing to act when he is likely to be called as a witness may well call into question his impartiality and the fairness of the Prosecution case that has been mounted throughout the proceedings. This concern is particularly real given that Associate Prosecutor [REDACTED] appears to have acted as not only an investigator but also prosecutor in this case.

V. CONCLUSION

14. For the reasons set out above, there are sufficient grounds for excluding Associate Prosecutor [REDACTED]. Defence Counsel for Mr Haradinaj consequently seeks an order in the terms set out in paragraph 1 above.

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