



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 Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon
Filing Participant: Specialist Prosecutor
Date: 20 January 2022
Language: English
Classification: Confidential

Prosecution Response to Application to Authorise Advance Disclosure to DW1253

Specialist Prosecutor's Office

Jack Smith

Counsel for Mr Gucati

Jonathan Elystan Rees

Counsel for Mr Haradinaj

Toby Cadman

I. INTRODUCTION

1. The Haradinaj Request¹ to provide an array of additional items ('Items')² to DW1253 before his testimony commencing on 24 January 2022 should be rejected. There is inadequate notice of DW1253's proposed supplemental evidence on the Items, a failure by the Haradinaj Defence to abide by clear disclosure and expert report deadlines set by the Trial Panel. The Haradinaj Defence has not acted diligently in securing this evidence and it has offered no justification for this late request.

2. PROCEDURAL BACKGROUND

3. On 23 October 2021, the Haradinaj Defence sought the Trial Panel's leave to add DW1253 to its list of witnesses.³ The Trial Panel subsequently directed the Haradinaj Defence to file DW1253's expert report ('Expert Report') by 9 November 2021.⁴

4. On 9 November 2021, the Haradinaj Defence filed the Expert Report.⁵

5. On 23 November 2021, the Haradinaj Defence sought the Trial Panel's guidance over email as to whether it could show materials in Disclosure Package 61 – which concerned materials other than the Items - to DW1253.⁶ This followed an earlier *inter partes* exchange, whereby the SPO declined to take a position on what materials the

¹ Application to Authorise Advance Disclosure to Expert Witness DW1253, KSC-BC-2020-07/F00524, 18 January 2022, Confidential ('Haradinaj Request').

² Haradinaj Request, KSC-BC-2020-07/F00524, para.1 (specifically: (a) the full, unredacted transcripts of W04841; (b) the full, unredacted transcripts of W04842; (c) the full, unredacted transcripts of W04876; (d) the video recording of the 25 September 2020 search; (e) four SPO handover forms; (f) declarations of W04841; (g) declarations of W04842; (h) declarations of W04876; and (i) declarations of an additional SPO investigator).

³ Defence Request for Addition of an Expert to its List of Potential Witnesses, KSC-BC-2020-07/F00394, 23 October 2021 (reclassified as public on 16 December 2021).

⁴ Transcript of Hearing, 26 October 2021, pp.1412-13.

⁵ Annex A to Submission of Expert Report from the Defence for Mr. Haradinaj, KSC-BC-2020-07/F00426/A01, 9 November 2021, Confidential.

⁶ Email from Haradinaj Defence, 23 November 2021, at 09:53.

Haradinaj Defence showed its own expert.⁷ The Trial Panel deferred ruling on the Haradinaj Defence request in light of the SPO's pending challenge to DW1253's testimony.⁸

6. On 29 November 2021, the Haradinaj Defence filed, *inter alia*, a summary of the facts DW1253 would testify to pursuant to Rule 119.⁹ The issues, facts, and circumstances on which DW1253 would testify were provided solely through a cross-reference to the Expert Report.¹⁰

7. On 3 December 2021, the Trial Panel declared DW1253's testimony inadmissible.¹¹ The Haradinaj Defence sought and was granted leave to appeal, and was therefore fully aware that DW1253 may, in fact, be permitted to testify.

8. On 7 January 2022, the Appeals Panel reversed the Trial Panel's decision on this point.¹² The Appeals Panel found that certain parts of the Expert Report could be relevant to show comparison of SPO's practices with the best practices of international criminal investigations¹³ and admitted it for the limited purpose of challenging W04841's evidence.¹⁴

⁷ Email from Haradinaj Defence, 28 October 2021, at 08:47, *responding to* Email from SPO, 27 October 2021, at 19:10 ('[a]t this stage the SPO takes no position on what information should be provided to the proposed Defence expert'), *responding to* Email from Haradinaj Defence, 27 October 2021, at 17:37 ('I intend to send the following documents in publicly redacted form: - Public transcripts of [W04841's] evidence; - Publicly redacted declarations; - Publicly redacted handover forms; - Publicly redacted Pre-trial briefs - Publicly redacted indictment. Please let me know if there is anything you would like to add.').

⁸ Email from Trial Panel, 24 November 2021, at 09:56.

⁹ Defence Rule 119 Filing on Behalf of Nasim Haradinaj, KSC-BC-2020-07/F00461, 29 November 2021 (reclassified as public on 21 December 2021). *See also* Rule 119 of the 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.

¹⁰ KSC-BC-2020-07/F00461/A01, p.6.

¹¹ Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, KSC-BC-2020-07/F00470, 3 December 2021, para.127(e).

¹² Decision on Nasim Haradinaj's Appeal Against Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, KSC-BC-2020-07/IA006/F00006, 7 January 2022 ('Appeals Decision').

¹³ Appeals Decision, KSC-BC-2020-07/IA006/F00006, para.25.

¹⁴ Appeals Decision, KSC-BC-2020-07/IA006/F00006, para.30.

9. On 18 January 2022, eleven days after the Appeals Panel decision and on the eve of DW1253's scheduled testimony, the Haradinaj Request was filed, formally requesting for the very first time that DW1253 be shown the Items.¹⁵

10. DW1253's testimony is scheduled to commence on 24 January 2022.¹⁶

II. SUBMISSIONS

11. The Haradinaj Request is tantamount to a concession that DW1253's Expert Report, as well as the notice of the issues he is expected to address during his testimony, is currently deficient. The Haradinaj Defence submits that the Items need to be disclosed, as without them DW1253's opinion is 'incomplete'¹⁷ and he 'will not be able to formulate a comprehensive opinion about the propriety of the SPO investigative practices'.¹⁸ This argumentation reveals that DW1253 levied serious accusations against SPO investigations in the Expert Report without a sufficient factual basis for doing so. The core of the Haradinaj Request fundamentally calls the probative value of the Expert Report into question, noting that the Appeals Panel's ruling was premised on DW1253 actually being able to speak to the opinions he makes in the Expert Report.

12. In an effort to make the report 'complete', the Haradinaj Defence now seeks to significantly expand the scope of DW1253's evidence just days before his testimony. The SPO is entitled to reasonable notice of the matters on which Haradinaj Defence

¹⁵ By way of an email of 16 January 2022 (at 22:11), the Haradinaj Defence sought the SPO's agreement as to whether the 25 September 2020 search operation videos could be shown to DW1253. The SPO objected on grounds this was outside the scope of the Expert Report. Email from SPO, 17 January 2022, at 14:09 ('[t]he SPO would also object to the addition of the video of the 25 September 2020 to the Haradinaj Defence exhibit list, considering that, inter alia, the matter falls outside the scope of DW1253's expert report, which replaced the summary/notice of the facts and circumstances this witness is to testify about according to the Haradinaj Defence's filing F00461/A01 (p.6)'). The Haradinaj Defence then responded it would file a formal application. Email from Haradinaj Defence, 17 January 2022, at 15:17.

¹⁶ Transcript of Hearing, 14 January 2022, pp.3037-38.

¹⁷ Haradinaj Request, KSC-BC-2020-07/F00524, para.26.

¹⁸ Haradinaj Request, KSC-BC-2020-07/F00524, para.23.

witnesses will testify, as well as a final expert report and notice of the documents upon which the expert will rely, and no justification is given for only showing the Items to DW1253 so soon before his testimony. The Items identified were not recently acquired - all were accessible to the Haradinaj Defence when filing its application to add DW1253 on 23 October 2021, with the only exception being W04876's testimony (completed on 5 November 2021).

13. The Haradinaj Defence did not manifest any intent to show DW1253 confidential materials until its 23 November 2021 email to the Trial Panel,¹⁹ and this email concerned *different* materials from those presently at issue. Having filed an appeal of the Trial Panel's decision excluding the evidence of DW1253, it was incumbent on the Haradinaj Defence to be fully prepared for the possibility, sought by the Haradinaj Defence itself, that the Appeals Panel would allow the testimony to proceed. After the Appeals Panel rendered its decision on 7 January 2022, the Haradinaj Defence took no immediate steps to amend the Expert Report or to seek leave to disclose the Items to DW1253, and it engaged in numerous colloquies in court with the Trial Panel regarding the scheduling of DW1253's testimony, assuring the Trial Panel that the witness's evidence could all be in public session.²⁰ Despite the significant resources and sizable team available to the Haradinaj Defence, it did not seek to disclose the Items to DW1253, and to effectively amend the Expert Report and the scope of DW1253's testimony, until a full eleven days after the Appeals Panel decision, seventy days after the Haradinaj Defence was ordered to file the Expert Report, and just days before DW1253's scheduled testimony.

¹⁹ Paragraph 5 above.

²⁰ See especially Transcript of Hearing, 13 January 2022, p.2923 ('I do not envisage having to go into private session at all during [DW1253's] evidence').

14. During the period of at least 23 October 2021²¹ through 23 November 2021²² and again from 7 January 2022²³ through 18 January 2022²⁴ ('Notice Period'), the Haradinaj Defence was required to act on an understanding that DW1253 would testify and that the scope of his testimony had to be adequately provided in advance. Nevertheless, the first time the Haradinaj Defence formally sought to show the specific Items to DW1253 is in the Haradinaj Request. The Haradinaj Defence failed to provide information necessary to prepare for DW1253's testimony during the Notice Period.

15. For the Haradinaj Defence to fundamentally change DW1253's testimony without justification puts additional burdens on the SPO while defeating the purpose of both the Trial Panel's previous expert report deadline²⁵ and the statutory requirement to provide advance information of the defence's case under Rule 119.²⁶ Granting the Haradinaj Request at this late stage would render those deadlines meaningless.

16. Although the Haradinaj Defence represented to the Trial Panel that the examination of DW1253 could be in public session, the Items identified are all confidential, making it impossible to show them to DW1253 unless he testifies with a secure video-link connection. In particular, the 25 September 2020 search footage is subject to strict confidentiality restrictions set by the Pre-Trial Judge.²⁷ The Haradinaj

²¹ Paragraph 3 above.

²² Paragraph 5 above.

²³ Paragraph 8 above.

²⁴ Paragraph 9 above.

²⁵ Paragraph 3 above. *See also* Rule 149(1).

²⁶ In this regard, *see* ICTY, *Prosecutor v. Gotovina et al.*, Decision and Guidance with Regard to the Expert Report, Addendum, and Testimony of Reynaud Theunens, IT-06-90-T, 17 November 2008, paras 17-18 (when considering whether it is in the interests of justice to consider an addendum to an expert report, the Chamber will consider whether the addendum is *prima facie* relevant and probative, whether the calling party has shown good cause to file the addendum at this stage, and the extent to which the new filing creates an additional burden on the non-calling party).

²⁷ Public Redacted Version of Decision on Prosecution Requests and Challenges Pursuant to F00172, KSC-BC-2020-07/F00210/RED, 26 May 2021 (reclassified as public on 15 July 2021), paras 35-41, *modified by* Decision on the Haradinaj Application for Leave to Appeal the Decision on the Search and Seizure Videos, KSC-BC-2020-07/F00236, 15 June 2021 (reclassified as public on 15 July 2021), para.24.

Defence does not even possess the 25 September 2020 videos,²⁸ and sharing this voluminous footage with DW1253 over open network channels is incompatible with the restrictions set by the Pre-Trial Judge. Further, the only evidence taken in the 25 September 2020 search operation is CCTV footage whose admissibility is uncontested, so there is also no discernible purpose in DW1253 analysing this operation.

17. The SPO is mindful that there may be cases where there is good cause for supplementing expert reports. But no good cause is present here, and expanding DW1253's evidence in the manner proposed causes prejudice to the SPO. The SPO offered its examination estimate of DW1253 on the understanding that he would testify on the basis of his original instructions and the Expert Report. Given DW1253's limited availability,²⁹ the SPO is confronted with having to expand its examination in uncertain directions without any guarantee of having adequate preparation or examination time to do so. Depending on what DW1253 says on the Items in what would effectively be a supplemental expert report, the SPO may have previously questioned those defence witnesses present at SPO investigative operations differently.

18. The Haradinaj Defence has been given permission through the Appeals Panel for DW1253 to testify on certain matters, and not others, in his Expert Report. Inherent in this authorisation is that the Appeals Panel expected DW1253's evidence to be circumscribed by the information he considered when making the Expert Report. Presenting the Items to DW1253 for his further opinion exceeds the scope of the Appeals Panel's ruling, violates the clear deadlines set by the Trial Panel and the Rules, and should not be entertained in the interest of ensuring fair and expeditious trial proceedings.

²⁸ *Contra* Haradinaj Request, KSC-BC-2020-07/F00524, para.20. n.30 (identifying the ERNs of CCTV footage of 22 September 2020, admitted as P163 and P164).

²⁹ *See* Haradinaj Request, KSC-BC-2020-07/F00524, para.29.

III. CLASSIFICATION

19. The present submission is filed confidentially pursuant to Rule 82(4). The SPO has no objection to this submission being reclassified as 'public'.

IV. RELIEF REQUESTED

20. For the foregoing reasons, the Haradinaj Request should be rejected.

Word count: 2112



Jack Smith

Specialist Prosecutor

Thursday, 20 January 2022

At The Hague, the Netherlands