

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 Hysni Gucati

Date: 12 May 2022

Language: English

Classification: Confidential

Gucati Request for Permission to Make Further Submissions re Disclosure

Specialist Prosecutor

Jack Smith

Valeria Bolici

Matthew Halling

James Pace

Counsel for Hysni Gucati

Jonathan Elystan Rees QC

Huw Bowden

Eleanor Stephenson

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

Jonathan Peter Worboys

I. INTRODUCTION

1. The Defence for Mr Gucati requests that the Trial Panel grants permission to make further submissions re disclosure in accordance with Rule 136(2) of the Rules.

II. RELEVANT FACTUAL BACKGROUND

2. On 18 March 2022, the Trial Panel declared the case closed in accordance with Rule 136(1) of the Rules.
3. In a series of press reports beginning on 10 April 2022, it was reported that Mr Dick Marty, the former Swiss senator, supported by information received from the Office of the Attorney General of Switzerland, had alleged that Serbian state authorities were behind a serious and shocking plot to threaten his life with the design of falsely implicating Kosovan Albanians in the operation ('Reported Matters'). It was reported that the existence of the plot had been known to the Swiss Federal Office of Police (Fedpol) since December 2020.
4. On the face of the reports, the information shared two features relevant to the defence case of Mr Gucati: (i) a deliberate attempt by a state agency to create the circumstances in which to implicate Kosovan Albanians; and (ii) the allegation that Serbian state authorities are engaged in impropriety with a view to the fabrication and manipulation of evidence (such that collaboration by the SPO with Serbian state agencies jeopardises the independence, impartiality and fairness of any investigation).

5. In order to avoid unnecessarily troubling the Trial Panel, on 02 May 2022, 04 May 2022, 05 May 2022, 10 May 2022, 11 May 2022, the Parties were in correspondence in order to ascertain, on the part of the Defence, whether the SPO held any information in relation to the Reported Matters in late April (which might confirm or otherwise the Reported Matters). In particular, the Defence sought to clarify whether the SPO had any information relating to these allegations *before* the declaration of the closing of the case (no such material appearing on any Rule 102(3) Notice).
6. The SPO in reply has refused to confirm whether or not it is in possession of any material relating to these allegations, nor when it first received such material (if it is in possession of such material). The SPO has stated that it considers the information requested is not relevant to the case under Rule 102(3).
7. The pronouncement of the Trial Judgment is scheduled for 10am on 18 May 2022¹.

III. APPLICABLE LAW

8. Rule 112 provides for the continuing nature of the SPO's disclosure obligations, notwithstanding the closing of the case pursuant to Rule 136.
9. The disclosure obligations of the SPO under Rule 102(3) require the provision of a notice of all relevant material in the possession of the SPO, whether or not such information must thereafter be disclosed as material to the preparation of

¹ KSC-BC-2020-07/F00596, *Scheduling Order for the Pronouncement of the Trial Judgment*, Trial Panel II, Public at paragraph 6

the defence, or exculpatory material (information which may reasonably suggest the innocence or mitigate the guilt of the Accused).

10. Rule 102(3) provides a mechanism for the Specialist Prosecutor to seize the Panel where grounds to dispute the materiality of information exist. The SPO has refused to do so.

11. There is no mechanism in Rule 102(3) for the defence to seize the Panel. Moreover, the dispute mechanism foreseen under the last limb of Rule 102(3) concerns challenges to the *materiality* of the requested materials, not their *relevance* (i.e. basis for inclusion in the Rule 102(3) Notice)².

12. Though the route to remedy is undefined it cannot follow, however, that the SPO has the power to make a unilateral and *unchallengeable* assessment as to ‘relevance to the case’ of information in its possession³. Indeed, Rule 75 of the Rules makes general provision for the defence to “apply before the competent Panel for a relief, except where otherwise provided by the Rules”.

13. In accordance with Rule 136(2), however, no further submissions may be made to the Panel post-closing unless in exceptional circumstances and on showing of good cause.

IV. APPLICABLE LAW

14. The Defence seek permission of the Trial Panel pursuant to Rule 136(3) to make submissions in relation to the compliance of the SPO with its obligations in

² KSC-BC-2020-07/IA005/F00008, *Decision on the Appeals Against Disclosure Decision*, Court of Appeals Chamber, 29 July 2021, Confidential at paragraph 47; KSC-2020-07, Oral Order on updated Rule 102(3) Notice, 1 September 2021, Trial Panel II, Transcript pages 442-443

³ KSC-BC-2020-07/IA005/F00008, *Decision on the Appeals Against Disclosure Decision*, Court of Appeals Chamber, 29 July 2021, Confidential at paragraph 45;

relation to Rule 102(3) towards any material they possess in relation to the Reported Matters.

15. Compliance with the obligation under Rule 102(3) to provide detailed notice of any material and evidence in the SPO's possession which has not been disclosed and which is relevant to the case is fundamental to the three-step process to disclosure under Rule 102(3)⁴. Within the framework of Rule 102(3), detailed notice of all such material must be provided to the Defence, *before any request for the disclosure of information potentially material to the Defence preparation can be made*⁵. In the absence of detailed notice of all relevant information in the possession of the SPO, the Defence are deprived of the opportunity to be informed of the relevant materials in the SPO's possession in order to assist its identification of items which could be material to its preparation and facilitate its request of such items (placing a higher – and unwarranted – burden on the Defence to identify with specificity material not in its possession and potentially not even within its knowledge)⁶.
16. The publication of these shocking allegations after the closing of the case amount to exceptional circumstances.
17. The Defence have attempted through *inter partes* correspondence to avoid troubling the Trial Panel, but the SPO have refused to provide any clarification as to whether they hold any information related to the Reported Matters, and if so, the nature of it and whether they were in possession of any such information before the closing of the case.

⁴ KSC-BC-2020-07/IA005/F00008, *Decision on the Appeals Against Disclosure Decision*, Court of Appeals Chamber, 29 July 2021, Confidential at paragraph 38

⁵ KSC-BC-2020-07/IA005/F00008, *Decision on the Appeals Against Disclosure Decision*, Court of Appeals Chamber, 29 July 2021, Confidential at paragraph 44

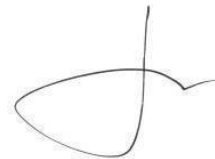
⁶ KSC-BC-2020-07/IA005/F00008, *Decision on the Appeals Against Disclosure Decision*, Court of Appeals Chamber, 29 July 2021, Confidential at paragraph 44 and 45

18. The SPO *has* asserted that the information requested was not relevant to the case, from which it might be inferred that they do hold such information. Certainly, the SPO has not stated that it does not hold any such information
19. Given (i) the shared features of the Reported Matters and the Defence case, on the face of the reports, and (ii) the refusal of the SPO to provide in *inter partes* communication any further detail which might allow the Defence to consider the SPO's assessment of relevance further, the Defence seek to challenge that unilateral assessment, and the same amounts to good cause to do so at this stage. There is no other opportunity to the Defence to do so. The Trial Judgment is due on 18 May 2022.

V. CLASSIFICATION

20. This filing is classified as confidential.

Word count: 1163 words



JONATHAN ELYSTAN REES QC

Specialist Counsel for Mr Gucati

HUW BOWDEN

Specialist Co-Counsel for Mr Gucati

ELEANOR STEPHENSON

Specialist Co-Counsel for Mr Gucati

12 May 2022

Cardiff, UK