

**In:** KSC-CA-2022-01  
**The Prosecutor v. Hysni Gucati and Nasim Haradinaj**

**Before:** Court of Appeal Panel  
Judge Michele Picard, Presiding Judge  
Judge Kai Ambos  
Judge Nina Jorgensen

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Nasim Haradinaj

**Date:** 5 October 2022

**Language:** English

**Classification:** Public

---

**Publicly Redacted Version Haradinaj Application to Amend the Notice of Appeal  
pursuant to Rule 176(3)**

---

**Specialist Prosecutor**

Jack Smith

Alex Whiting

Matt Halling

**Counsel for Nasim Haradinaj**

Toby Cadman

Carl Buckley

Almudena Bernabeu

**Counsel for Hysni Gucati**

Jonathan Elystan Rees KC

Huw Bowden

Eleanor Stephenson

## I. INTRODUCTION

1. The Appellant applies for leave to vary the previously submitted refiled grounds of appeal<sup>1</sup> pursuant to Rule 176(3) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”),<sup>2</sup> so as to enable it to add and argue a further ground of appeal to address the ongoing failure of the Specialist Prosecutor’s Office (“SPO”) to comply with Rule 103 during the trial, and thus raise a further issue of whether the Appellant has received a fair trial, having regard to the numerous and ongoing disclosure failings.
2. On 26 September 2022, the Appellant received disclosure of seven items (“Disclosure 1”)<sup>3</sup> under Rule 103 pursuant to Orders of the Court of Appeals Panel (“Appeals Panel”) dated 15 September 2022 and 23 September 2022.<sup>4</sup>
3. Each of those items were in the possession of the Prosecution prior to the pronouncement of Judgment by the Trial Panel, and the failure to disclose them prior to pronouncement of Judgment was in breach of Rule 103.

---

<sup>1</sup> KSC-CA-2022-01/F00029, Haradinaj Defence Refiled Notice of Appeal of Trial Judgment, 8 July 2022.

<sup>2</sup> KSC-BD-03/Rev3/2020.

<sup>3</sup> KSC-CA-2022-01-082095-TR-ET Parts 1,2,3,4,5 RED; KSC-CA-2022-01-105694-TR-ET Part 1 RED; KSC-CA-2022-01-106868 RED (“Disclosure 1”).

<sup>4</sup> KSC-CA-2022-01/F00044, *Confidential Redacted Version of Decision on Prosecution Notifications*, Court of Appeals Panel, 15 September 2022, Confidential; KSC-CA-2022-01/F000049, *Confidential Redacted Version of Decision on Specialist Prosecutor’s Office Request for Protective Measures*, Court of Appeals Panel, 23 September 2022, Confidential

## II. BACKGROUND

4. The Appellant adopts the chronology as per the 'Gucati Application to Amend the Notice of Appeal pursuant to Rule 176(3) of the Rules' ("Gucati Application"),<sup>5</sup> however, for completeness repeats the same below.
5. On [REDACTED], the Prosecution [REDACTED].<sup>6</sup>
6. On [REDACTED], the Prosecution received item 206.<sup>7</sup>
7. On [REDACTED], the Prosecution further [REDACTED].<sup>8</sup>
8. On 18 May 2022, the Trial Judge pronounced Judgment.<sup>9</sup>
9. On 20 June 2022, the Appellant filed his Notice of Appeal<sup>10</sup> pursuant to Rule 176 of the Rules.
10. On 10 July 2022, the Appellant refiled his Notice Appeal<sup>11</sup> pursuant to the direction of the Appeals Panel.<sup>12</sup>

---

<sup>5</sup> KSC-CA-2022-01/F00053, *Gucati Application to Amend the Notice of Appeal pursuant to Rule 176(3) of the Rules*, 3 October 2022, Confidential

<sup>6</sup> Disclosure 1, ERN 082095-TR-ET Parts 1 to 5 ("Items 186-190")

<sup>7</sup> KSC-CA-2022-01/F00046, *Confidential Redacted Version of Prosecution Notice of Additional Item 206 and Challenge to Disclosure*, Court of Appeals Panel, 19 September 2022, Confidential

<sup>8</sup> Disclosure 1, ERN 105694-TR-ET Part 1

<sup>9</sup> KSC-BC-2020-07/F00611, *Trial Judgment*, Trial Panel II, 18 May 2022, Confidential

<sup>10</sup> KSC-CA-2022-01/F00008, *Haradinaj Defence Notice of Appeal of Trial Judgment*, 20 June 2022, Confidential

<sup>11</sup> KSC-CA-2022-01/F00029, *Haradinaj Defence Re-Filed Notice of Appeal of Trial Judgment*, 10 July 2022, Confidential

<sup>12</sup> KSC-CA-2022-01/F00021, *Decision on Haradinaj's Request for Variation of Word Limit to File Appeal Brief and SPO's Request for Order to Re-File Haradinaj's Notice of Appeal*, Court of Appeals Panel, 1 July 2022, Public

11. On 19 August 2022, the Appellant refiled his Appeal Brief.<sup>13</sup>
12. On 30 August 2022, the Appellant filed a Corrected Version of the Appeal Brief.<sup>14</sup>
13. On 31 August 2022, the Appellant filed an Application to Reclassify the Appeal Brief.<sup>15</sup>
14. On 2 September 2022, the Appellant filed his Further Corrected Appeal Brief pursuant to Rule 179 of the Rules.<sup>16</sup>
15. On 2 September 2022, the Appellant filed a Further Corrected Version of the Appeal Brief.<sup>17</sup>
16. On 19 September 2022, the Appellant received notification of additional item 206 on the Rule 102(3) Notice and the prosecution's challenge to disclosure of that item.<sup>18</sup>
17. On 26 September 2022, the Appellant received Disclosure 1 pursuant to orders of the Court of Appeals Panel dated 15 September 2022 and 23 September

---

<sup>13</sup> KSC-CA-2022-01/F00035, *Defence Appeal Brief on Behalf of Mr. Nasim Haradinaj*, 19 August 2022, Confidential

<sup>14</sup> KSC-CA-2022-01/F00035/COR, *Corrected Version of Defence Appeal Brief on Behalf of Mr. Nasim Haradinaj*, 30 August 2022, Confidential

<sup>15</sup> KSC-CA-2022-01/F00037, *Haradinaj Defence Application to Reclassify Defence Appeal Brief*, 16 September 2022

<sup>16</sup> KSC-CA-2022-01/F00035, *Defence Appeal Brief on Behalf of Mr. Nasim Haradinaj*, 19 August 2022, Confidential

<sup>17</sup> KSC-CA-2022-01/F00035/COR2, *Further Corrected Version of Defence Appeal Brief on Behalf of Mr. Nasim Haradinaj*, 2 September 2022, Confidential

<sup>18</sup> KSC-CA-2022-01/F00046/CONF/RED, *Confidential Redacted Version of Prosecution Notice of Additional Item 206 and Challenge to Disclosure*, Prosecutor, 19 September 2022, Confidential

2022.<sup>19</sup> Disclosure 1 is exculpatory material which fell to be disclosed under Rule 103.

18. On 29 September 2022, the Appellant filed his response to the Prosecution's challenge to disclosure of Item 206.<sup>20</sup> A decision in relation to disclosure of Item 206 is outstanding at the time of filing.

### III. The Law

19. Rule 176(2) provides that a party may appeal against Trial Judgment by filing a notice of appeal setting forth the grounds of appeal within 30 days.
20. Rule 179(1) of the Rules requires an Appellant to file an Appeal Brief setting out all the arguments and authorities in support of his grounds of appeal within 60 days thereafter.
21. Rule 176(3) provides that the Appeals Panel may authorise a variation of the grounds of appeal where there is good cause.
22. Rule 103 of the Rules requires the Prosecution to immediately disclose to the Defence any information as soon as it is in his custody, control or actual

---

<sup>19</sup> KSC-CA-2022-01/F00044, *Confidential Redacted Version of Decision on Prosecution Notifications*, Court of Appeal Panel, 15 September 2022, Confidential; KSC-CA-2022-01/F000049, *Confidential Redacted Version of Decision on Specialist Prosecutor's Office Request for Protective Measures*, Court of Appeals Panel, 23 September 2022, Confidential

<sup>20</sup> KSC-CA-2022-01/F00051, Haradinaj Defence Response to 'Prosecution notice of additional item 206 and challenge to disclosure', 29 September 2022, Confidential

knowledge, which may reasonably suggest the innocence or mitigate the guilt of the Accused.

23. The obligation on the Prosecutor to disclose Rule 103 material is an obligation which continues up to the pronouncement of the Trial Judgement (and beyond)<sup>21</sup> and is an “essential and fundamental element of the guarantee of a fair trial”.<sup>22</sup>

#### IV. Submissions

24. The Appellant maintains that having regard to the previous, and now evidenced ongoing disclosure failings of the SPO, that ‘good cause’ is clearly demonstrated for allowing the application to vary the grounds.
25. It should not be in dispute that the material that forms Disclosure 1 was not available to the Appellant at the time of filing his Notice of Appeal and subsequently the Appeal Brief, the material only having been disclosed pursuant to orders of the Appeals Panel on 15 and 23 September 2022<sup>23</sup> and

---

<sup>21</sup> Rule 112 of the Rules

<sup>22</sup> KSC-BC-2020-07/F00413/RED, Public Redacted Version of *Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice*, Trial Panel II, 3 November 2021, Public at para.48

<sup>23</sup> KSC-CA-2022-01/F00044; KSC-CA-2022-01/F000049

not disclosed to the Appellant through Legal Workflow until 26 September 2022.

26. Further, having regard to the timing of the SPO submissions, and the rulings that have followed from the Appeals Panel, and having informed the Appeals Panel on 29 September 2022 of its intention to file such an application, the Appellant has filed this application in good time.
27. In terms of the specific submissions, and to repeat and adopt that which has been raised within the Gucati Application, the Appeals Panel in their decision of 15 September 2022 established that the material should have been disclosed under Rule 103, the inference being that the SPO had acted in breach of Rule 103 prior to the pronouncement of the Trial Judgment.<sup>24</sup>
28. The submission of the SPO, the material subject to that submission and the decisions thereafter were beyond the knowledge of the Appellant until the decision of 26 September 2022.
29. The Appeals Panel is respectfully reminded that Items 186-190 had been requested for disclosure by the Defence during the Trial; however, this had

---

<sup>24</sup> KSC-CA-2022-01/F00044, para 25-30

been refused despite the prior indication of the Trials Panel that those items were at least *prima facie* disclosable.<sup>25</sup>

30. To quote from the submission of the Gucati Application:<sup>26</sup>

“(22) *Having had no access to Items 186-190, and only the blandest of descriptions of the same on the Rule 102(3) Notice during the trial, the Appellant was unaware of any grounds to challenge non-disclosure until notification of the decision of the Court of Appeals Panel dated 15 September 2022, and disclosure of the documents themselves.*

“(23) *The belated disclosure of items 186-190 reveal that (i) such notice was not “detailed notice” as required by Rule 102(3) and that (ii) such description as was provided was misleading and insufficient to allow the Appellant to effectively participate in the disclosure process at trial.*

“(24) *The Appellant had no notice of the fact of [REDACTED] until the transcript of it was received on 26 September 2022, let alone grounds to challenge its non-disclosure (the same applies to item 206). No explanation has been given for why the information provided [REDACTED] was not identified for disclosure immediately, despite the fact: (i) that the witness and*

---

<sup>25</sup> KSC-BC-2020-07/F00304, *Order on the Updated Rule 102(3) Detailed Notice*, Trial Panel II, 7 September 2021, Public with confidential and *ex parte* annex at para.23; KSC-BC-2020-07/F00413/RED, *Public Redacted Version of Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice*, Trial Panel II, 3 November 2021, Public at para.95(a)

<sup>26</sup> KSC-CA-2022-01/F00053, paras. 22-25



*investigator W04841 (Zdenka Pumper) was present in the interview where that information was provided<sup>27</sup>; (ii) that her evidence in October and December 2021 demonstrates that [REDACTED]<sup>28</sup>; and (iii) of her assurance during her evidence that she would bring relevant material to the attention of the Specialist Prosecutor or his Deputy immediately<sup>29</sup>. The strong inference must be that the failure to disclose that material was based on a “unilateral assessment by the SPO of credibility and reliability”, which the Trial Panel had said would be treated “with the utmost severity”<sup>30</sup>.*

*“(25) As a result of the Prosecution’s failure to comply with Rule 103, the Appellant was unaware of the breach of Rule 103 until 26 September 2022, over 3 months after he was obliged to file his Notice of Appeal and over one month after he was obliged to file his Brief in Appeal (albeit the Prosecution had notified the Court of Appeals Panel of this material in an ex parte “Notification” on 7 July 2022<sup>31</sup>).”*

---

<sup>27</sup> Disclosure 1 at 105694-TR-ET Part 1, page 1

<sup>28</sup> See e.g. Transcript 21 October 2021, page 1226 lines 7-22, page 1237 lines 4-17, page 1249 lines 5-12; Transcript 26 October 2021, page 1450 lines 1-5, page 1477 lines 8-25, page 1478 line 19 to page 1479 line 2; Transcript 15 December 2021, page 2622 lines 10 to line 15 referring to 1D33 [REDACTED]

<sup>29</sup> Transcript, 21 October 2021, page 1193 lines 17-25 (albeit within a broader passage of the evidence suggesting that the SPO does not regard a systematic approach to disclosure as a necessary part of its work - see Transcript, 21 October 2021, page 1179 line 22 to 1196 line 18)

<sup>30</sup> KSC-CA-2022-01/F00028/CONF/RED, *Confidential Redacted Version of Notification on W04370 telephone contact with two confidential and ex parte annexes*, Prosecutor, 23 September 2022, Confidential at para.1, 8, 9 and 11; KSC-BC-2020-07/F00413/RED, *Public Redacted Version of Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice*, Trial Panel II, 3 November 2021, Public at para.48

<sup>31</sup> KSC-CA-2022-01/F00028/CONF/RED, *Confidential Redacted Version of Notification on W04370 telephone contact with two confidential and ex parte annexes*, Prosecutor, 23 September 2022, Confidential

31. It is of note that no explanation has been provided as to why the information has in effect been 'sat on' by the SPO, and why there was no immediate notification of Item 206, having regard to the fact that the issues raised within that item were issues at trial,<sup>32</sup> had been raised previously, and therefore, were very much a live and salient issue in terms of the defence(s) to be advanced.
32. Further, in not disclosing, or providing sufficiently detailed notice within the ordinary meaning of Rule 102(3) of Items 186-190 and 206, concerning the material contained therein at the appropriate time, the Appellant was prevented from addressing the content with W04841 in cross-examination or seeking to call evidence in respect of relevant matters within the custody, control, or actual knowledge of the SPO.
33. The above must be considered against the background that the Trial Panel had previously ruled that all material relating to the origin, provenance and delivery of the Batches to the KLA WVA was to be subject to a detailed notice under Rule 102(3);<sup>33</sup> and further, that the information [REDACTED], was

---

<sup>32</sup> KSC-BC-2020-07, 'Trial Hearing', Transcript 11 January 2022, page 2710, lines 2-25; page 2711, lines 1-25; page 2713, lines 23-25; page 2714, lines 1-19; KSC-BC-2020-07/F00509, Annex 2 to Submission of Statement of Nasim Haradinaj, Confidential, 28 December 2021, paras 21, 32, 34-35, 45, 52, 132-134.

<sup>33</sup> KSC-BC-2020-07/F00304, *Order on the Updated Rule 102(3) Detailed Notice*, Trial Panel II, 7 September 2021, Public with confidential and *ex parte* annex at para.5 and 10

seemingly received by the SPO in the midst of a disclosure challenge relating to material dealing with items 203-205 on the same topic.<sup>34</sup>

34. Accordingly, the SPO were aware prior to, after, and importantly, during the time [REDACTED], that that same issue was one subject to submissions by the Appellant both in terms of a disclosure issue, and an issue pertinent to the defence(s) being argued.
35. It is therefore beyond comprehension that the SPO would not give sufficiently detailed notice of those items within their custody, control or actual knowledge until, not only after the trial had been concluded, but after the Appellant had filed his Notice of Appeal and Appeal Brief.
36. Disclosure goes to the very heart of any trial process, and such a process cannot be said to be 'fair' without an appropriate disclosure basis.
37. As has been put repeatedly before the Pre-Trial Judge, the Trial Panel, and the Appeals Panel, it is not for the SPO to determine what is relevant or what is material, or what the Defence \ Appellant should and should not have sight of.

---

<sup>34</sup> KSC-BC-2020-07/F00533, *Decision on the SPO Request Regarding Items 203 and 204*, Trial Panel II, 25 January 2022, Confidential; KSC-BC-2020-07/F00541, *Decision on the SPO Request Regarding Item 205*, Trial Panel II, 28 January 2022, Confidential

38. It is for the SPO to provide details of all material within its custody, control or actual knowledge. It is for the Defence to request disclosure, and for the relevant judicial panel to rule on whether that item should be disclosed or otherwise should there be a challenge to any such disclosure.
39. It is trite law that fairness requires adequate disclosure to the defence of material capable of assisting the defence or undermining the prosecution case,<sup>35</sup> to which there can be no exception or departure from such a basic and fundamental principle aimed at securing the fair trial rights of the Appellant. As the ICC Trial Chamber I ruled in the *Lubanga Decision*:<sup>36</sup>

“...the prosecution would be under an obligation to withdraw any charges where non-disclosed exculpatory material has a material impact on the Chamber's determination of the guilt or innocence of the accused. If the prosecution were in doubt as to whether or not any material falls into this category, the Chamber directed that it should be put before the Trial Chamber for its determination.”

---

<sup>35</sup> *Jespers v Belgium no.8403/78m Commission decision of 15 October 1980, DR 22, p.116; Rowe and Davis v The United Kingdom [GC], no.28901/95; Edwards v The United Kingdom 16 December 1992*

<sup>36</sup> ICC-01704-01/0, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, para. 6

40. The duty is one that continues continuously through the trial,<sup>37</sup> and on appeal,<sup>38</sup> and is not contingent upon a request from the defence for disclosure.<sup>39</sup>
41. It is quite clear that the SPO cannot and should not be the arbiter of what is material and what should be notified to the defence, as to do so would create a very real risk of unfairness, and in the instant case, that risk has been realised, thereby occasioning a miscarriage of justice.
42. In terms of the variation of the appeal grounds themselves, subject to the Appeals Panel ruling on this application, it is noted that there is no requirement to confirm 'what' that variation would be when making this application, only that good cause to do so has been shown.
43. The Appellant avers that such cause has been shown and that the application ought to be granted, the application being premised on the basis of an SPO failing, rather than one of the Appellant or the Appellant's legal representatives.
44. However, in anticipation of any SPO submission opposing this request, the Appellant refers to Ground 4 wherein it is argued that the Trial Panel erred

---

<sup>37</sup> ECtHR, *Natunen v. Finland* (App. No. 21022/04), 31 March 2009, para. 42; ICC-01/05-01/08., *Prosecutor v. Bemba Gombo*, Decision on defence requests for disclosure, 2 July 2014, para. 10.

<sup>38</sup> ICC-01/04-01/0, *Prosecutor v. Thomas Lubanga Dyilo*, Order related to the Prosecutor's response to Mr. Lubanga's article 70 investigation request, 3 April 2014, para. 3.

<sup>39</sup> ECtHR, *Edwards v. United Kingdom*, Appl. No. 13071/87, 16 December 1992, paras. 35-36.

by allowing the SPO to withhold and/or excessively redact material; Grounds 10, 11, and 12 which argues the trial panel erred in terms of the issue of public interest and 'whistleblowing'; Ground 13 dealing with the investigation into the 'leaks' themselves' and Ground 15 and 16 dealing with the errors made in terms of the defence of entrapment.

45. The items now subject to notification are relevant to all of those grounds of appeal advanced and therefore, to refuse the application to vary made would prevent the Appellant from developing and arguing an entirely relevant point on appeal, and one that has been a constant theme throughout the proceedings from the Pre-Trial phase through to the Appeal phase, and one that is now supported by material that was not available at the time the appeal grounds were formulated.

46. Further, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") still applies in that where proceedings can be shown to have been unfair or prejudiced on appeal, then any conviction arising might, and should, be reversed.

47. Within the framework of the right to a fair trial, under Article 6 of the ECHR, the right to adequate facilities for the preparation of a defence, as guaranteed

under Article 6(3)(c), must ‘include access to documents and other evidence’ that are both *inculpatory* and *exculpatory*.<sup>40</sup>

48. Any decision that seeks to deny access to relevant material must be (i) proved by the authorities to be necessary and proportionate; (ii) accompanied by procedural safeguards; and (iii) subject to counterbalancing measures required to limit any prejudice caused and ensure that he has a fair trial. The International Criminal Court has held that where the prosecution seeks to withhold material from the defence that is potentially exculpatory, the material must be put, in its original form and its entirety, before the judges,<sup>41</sup> and a refusal to do so may result in a stay of proceedings.<sup>42</sup>
49. It is respectfully submitted that the recent examples are another example of the previously submitted ‘unfairness’ of proceedings. Evidently, the SPO have not taken their disclosure burden seriously, nor have they acted in accordance with the rules governing that disclosure.
50. To further that unfairness by preventing the Appellant from addressing clear errors within his grounds of appeal, cannot be justified.

---

<sup>40</sup> See e.g. HRC, General Comment No. 32 (2007) para. 33; UNWGAD, *al Baluchi v. United States* (Opinion no. 89/2017), 24 November 2017, para. 56; ECtHR, *Edwards v. United Kingdom*, Appl. No. 13071/87, 16 December 1992, paras. 57-59.

<sup>41</sup> ICC-01704-01/0, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the admissibility of four documents, Decision of 13 June 2008, para. 88.

<sup>42</sup> *Ibid*, paras. 92-95.

## V. CONCLUSION

51. The SPO are yet again paying lip-service to their disclosure obligations and seeking to make determinations that exceed its mandate.
52. Having regard to the aforesaid, the Appellant seeks the addition of the following ground and therefore variation of the already filed appeal notice:

### *Ground 4A*

*That the Trial Panel erred in law and fact in making findings of guilt and/or pronouncing a trial judgment when the SPO had failed to adhere to their disclosure obligations under Rule 103 and thereby:*

- i) Failed to ensure that the Appellant had received or at least had received notice of all relevant information held by the SPO;*
- ii) Failed to ensure that the Appellant had received or at least had notice of all actual or potential exculpatory evidence material within custody, control or actual knowledge of the SPO;*
- iii) Failed to ensure that it had taken account of all relevant evidence including exculpatory evidence and thereby failed to ensure that the trial process was not deficient;*



- iv) Failed to ensure that it had taken account of all relevant evidence and thereby ensuring that the evidence was assessed in accordance with Rule 139.*
- v) Without prejudice to the aforesaid, failed to ensure that the Appellant had received a fair trial per Article 6 of the Convention.*

Word Count: 2,700 words



---

**Toby Cadman**  
**Specialist Counsel for Nasim Haradinaj**



---

**Almudena Bernabeu**  
**Specialist Co-Counsel**



---

**Carl Buckley**  
**Specialist Co-Counsel**