

**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:** 6 October 2022

**Language:** English

**Classification:** Public

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**Publicly Redacted Version of Haradinaj Application for a Ruling on the Prosecution  
Failure to Comply with Rule 179**

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## I. INTRODUCTION

1. On 8 July 2022, in accordance with Rule 176 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”),<sup>1</sup> the Appellant filed his Refiled Notice of Appeal.<sup>2</sup>
2. On 19 August 2022, pursuant to Art.32 of the Constitution of the Republic of Kosovo (“Kosovo Constitution”), Art.46 of the Law on Specialist Chambers and Specialist Prosecutor Office Law No 05/L-053 (“Law”), and Rule 179 of the Rules, the Appellant filed his Appeal Brief<sup>3</sup> against the Trial Judgment of Trial Panel II of 18 May 2022.<sup>4</sup>
3. On 21 September 2022, the Specialist Prosecutor’s Office (“SPO”) filed what it purports is its “Prosecution Brief in Response to Defence Appeals” (“Prosecution Brief”).<sup>5</sup>
4. On 26 September 2022, the Appellant received disclosure of Items 186-190 (redacted) on the Rule 102(3) Notice under Rule 103 [REDACTED] and another item [REDACTED] (“Disclosure 1”), pursuant to orders of the Court of Appeals Panel dated 15 September 2022 and 23 September 2022.<sup>6</sup>

## II. LAW

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<sup>1</sup> KSC-BD-03/Rev3/2020.

<sup>2</sup> KSC-CA-2022-01/F00029, Haradinaj Defence Refiled Notice of Appeal of Trial Judgment, 8 July 2022.

<sup>3</sup> KSC-CA-2022-01/F00035COR2, Defence Appeal Brief on Behalf of Nasim Haradinaj.

<sup>4</sup> KSC-BC-2020-07/F00611RED, Trial Judgement, 18 May 2022 (“Trial Judgment”) and Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07, Dissenting Opinion of Judge Barthe, 18 May 2022 (“Barthe Dissenting Judgment”).

<sup>5</sup> KSC-CA-2022-01/F00047 (Prosecution Brief in Response).

<sup>6</sup> KSC-CA-2022-01/F00044; KSC-CA-2022-01/F000049

5. Rule 102(3) of the Rules provides as follows:

“The Specialist Prosecutor shall, pursuant to Article 21(6) of the Law, provide detailed notice to the Defence of any material and evidence in his or her possession. The Specialist Prosecutor shall disclose to the Defence, upon request, any statements, documents, photographs and allow inspection of other tangible objects in the custody or control of the Specialist Prosecutor, which are deemed by the Defence to be material to its preparation, or were obtained from or belonged to the Accused. Such material and evidence shall be disclosed without delay. The Specialist Prosecutor shall immediately seize the Panel where grounds to dispute the materiality of the information exist.”

6. Rule 103 of the Rules provides as follows:

“Subject to Rule 107 and Rule 108, the Specialist Prosecutor shall immediately disclose to the Defence any information as soon as it is in his or her custody, control or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of the Specialist Prosecutor’s evidence.”

7. Rule 179(5) of the Rules, insofar as is relevant, provides as follows:

(2) The Respondent may file a Brief in Response setting out all arguments and authorities within thirty (30) days, or where the appeal is limited to sentencing, within fifteen (15) days of the Appeal Brief.

(3) An Appellant may file a Brief in Reply within fifteen (15) days or, where the appeal is limited to sentencing, within ten (10) days of the Brief in Response.

(5) The Specialist Prosecutor shall make a declaration in his or her Appeal or Response Brief, as applicable, that disclosure of material in his or her custody or control has been completed at the time of filing of that brief.

8. The effect of Rule 179(5) is that the Brief in Response must contain a declaration that disclosure of material in the custody or control of the prosecution has been completed at the time of filing. It is clear that such a declaration is to be unqualified and not conditional upon certain steps in the litigation process being completed.

### III. CHRONOLOGY

9. The Appellant adopts the chronology as set out in the *“Gucati Application for a Formal Decision that the Prosecution has Failed to File a Brief in Response which complies with Rule 179”* (“Gucati Application”) at paragraphs 14-21.<sup>7</sup>

### IV. SUBMISSIONS

10. At paragraph 192 of the Prosecution Brief, the SPO asserts that “[s]ubject to pending litigation, and in accordance with Rule 179(5), as of filing the SPO has disclosed all material in its custody or control falling under its disclosure obligations.” The

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<sup>7</sup> At the time of filing this application, a filing reference number had not been allocated to the *“Gucati Application for a Formal Decision that the Prosecution has Failed to File a Brief in Response which complies with Rule 179.”*

qualifications in the Prosecution Brief in regard to disclosure (“[s]ubject to pending litigation”) do not alter the obligation under Rule 179(5) or create an exception to it.

11. The clear intent of Rule 179(5) is to ensure that the Appellant is in full possession of the evidence to be disclosed at the time of the first filing by the SPO in the appeal process. In the instant case this was not so. Pursuant to Rule 179(4) the Appellant may file a Brief in Reply within 15 days of the Brief in Response. It is submitted that since at the time of the filing of the Prosecution Brief the SPO had not fulfilled their filing obligations, time would not begin to run until a clear unequivocal declaration in accordance with Rule 179(5) has been made.
  
12. On 19 September 2022, the SPO filed its “Prosecution notice of additional item 206 and challenge to disclosure”<sup>8</sup> in which it notified the Appellant of a further item of material within its possession, namely Item 206, which is deemed as being relevant to the case. The SPO goes on to pre-emptively challenge the disclosure of the item, on the basis that the item is “*immaterial*”;<sup>9</sup> and, “*even if Item 206 was deemed material, disclosing [REDACTED] would prejudice ongoing or future investigations and [REDACTED]*.”<sup>10</sup>

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<sup>8</sup> KSC-CA-2022-01/F00046/CONF/RED

<sup>9</sup> *Ibid* at paragraph 3

<sup>10</sup> *Ibid* at paragraph 4

13. On 23 September 2022 the Court of Appeals Panel ordered the SPO to disclose to the Defence, by 26 September 2022, [REDACTED] (“Disclosure 1”).<sup>11</sup> The redacted [REDACTED] were subsequently disclosed to the Appellant on 26 September 2022.<sup>12</sup>
14. It is notable that Disclosure 1 concerns material in the custody or control of the SPO since 1 October 2020<sup>13</sup> and 22 April 2022<sup>14</sup> and that the Appeals Panel were notified of this material in an *ex parte* “Notification” on 7 July 2022.<sup>15</sup>
15. Further, as noted in the Gucati Application, Items 186-190 of Disclosure 1 was noticed on the Rule 102(3) prosecution updated notice during the trial, but such belated notice was not sufficiently detailed to comply with the provision, nor was it sufficiently detailed to allow the Trial Panel to rule properly on disclosure or to allow the Appellant to properly engage in the process and make representations as to how the material goes to an issue in the case and should be disclosed to the defence during the trial.
16. Regarding [REDACTED] with [REDACTED], no explanation has been given as to why that material was not noticed on an updated Rule 102(3) Notice.

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<sup>11</sup> KSC-CA-2022-01/F00049, Decision on Specialist Prosecutor’s Office Request for Protective Measures, 23 September 2022, para. 15.

<sup>12</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>13</sup> KSC-CA-2022-01-082095-TR-ET Parts 1,2,3,4,5 RED.

<sup>14</sup> KSC-CA-2022-01-105694-TR-ET Part 1 RED.

<sup>15</sup> KSC-CA-2022-01/F00028/CONF/RED

17. The Appellant is confronted now, with material that is directly relevant to a central issue at trial,<sup>16</sup> namely material that goes to the issue of [REDACTED] involvement in how the Batches arrived at the KLA WVA headquarters in Prishtinë, some twenty-four (24) and six (6) months, respectively, after it came into the custody or control of the SPO.
18. The Appellant has argued throughout these proceedings that the SPO has adopted a cavalier attitude to its disclosure obligations and the duty to ensure that the proceedings are conducted fairly, and the parties have equality of arms.<sup>17</sup>
19. This application is made at a time where the Appellant is awaiting a decision on the challenge to the non-disclosure of Item 206,<sup>18</sup> material that corroborates some of the account given by [REDACTED], and material that was within the custody or control of the SPO since 27 January 2022 and for which no explanation, adequate or otherwise, has been given for the late notice.
20. It is notable that the SPO states clearly that it had no intention to provide notice of material that was relevant to an issue in the case. At paragraph 5 of the [REDACTED],<sup>19</sup> the SPO states that [REDACTED] it then goes to suggest that as this is the first judgment on appeal [REDACTED] that it has seen fit to notify the Appeals Panel [REDACTED]. Frankly put, this is the equivalent of closing the stable door after

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<sup>16</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>17</sup> See e.g. KSC-CA-2022-01/F00035COR2, Grounds 1, 4, 10,

<sup>18</sup> KSC-CA-2022-01/F00051

<sup>19</sup> KSC-CA-2022-01/F00038/CONF/RED

the horse has bolted. The information to which the item relates was originally received by the SPO on 27 January 2022.

21. The SPO has now filed notifications in respect of two separate witnesses, [REDACTED] and [REDACTED] in Item 206. [REDACTED]. Both [REDACTED] relate to [REDACTED], and both make reference to [REDACTED].
22. Item 206 makes reference [REDACTED] and that the former is clarified to be the [REDACTED]and [REDACTED], although no explanation in the notice is made as to [REDACTED]. The statement by the SPO that [REDACTED] without further inspection of [REDACTED] is meaningless and based on the SPO's cavalier approach to its disclosure obligations to date, simply not reliable.
23. [REDACTED] confirms that during [REDACTED], [REDACTED].<sup>20</sup> [REDACTED]. The [REDACTED] in Item 206 supports [REDACTED], in part, such as the reference to [REDACTED] seeking to implicate [REDACTED], the [REDACTED].
24. Rules 179(5) provides: "The Specialist Prosecutor shall make a declaration in his or her Appeal or Response Brief, as applicable, that disclosure of material in his or her custody or control has been completed at the time of filing of that brief." The [REDACTED]were disclosed *after* the filing of the Prosecution Brief in Response. It follows that the SPO has in effect acted in breach of Rule 179(5). If the Court of Appeal Panel finds that Item 206 should also be disclosed, whether in redacted form or not, there will be a further breach.

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<sup>20</sup> 082095-TR-ET Part 2, p.2, line 6.



25. Pursuant to Rule 179(4) the Appellant may file a Brief in Reply within 15 days of the Brief in Response. It is submitted that since at the time of the filing of the Prosecution Brief the SPO has not fulfilled their filing obligations, it would be in the interests of justice for the 15 days to run not from 21 September 2022 when the Brief in Response was filed but from the date on which those filing obligations are fulfilled.

## V. RELIEF SOUGHT

26. The Appellant invites the Appeals Panel to rule that the Prosecution Brief fails to comply with the unambiguous terms of Rule 179(5) and rule that the fifteen (15) day deadline does not start to run until such time as all matters of disclosure, including the present litigation, have been concluded and the SPO files an affirmative, and unequivocal, declaration in accordance with that provision.

## VI. CLASSIFICATION

27. This filing is classified as confidential in accordance with Rule 82(4).

Word Count: 1,868 words



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