

In: KSC-CA-2022-01

The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: A Panel of the Court of Appeals Chamber

Judge Michéle Picard

Judge Kai Ambos

Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

Date: 20 January 2023

Language: English

Classification: Public

**Public Redacted Version of Gucati Motion for Alternate Relief
relating to Disclosure Violations, namely, An Order Overturning
the Convictions, with the Imposition of a Stay or Order for Re-
Trial**

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I. INTRODUCTION

1. On 1 October 2020, the Prosecution interviewed W04730¹.
2. On 27 January 2022, the Prosecution received item 206².
3. On 22 April 2022, the Prosecution further interviewed W04730³.
4. On 18 May 2022, the Trial Judge pronounced Judgment⁴.
5. On 17 June 2022, the Appellant filed his Notice of Appeal⁵ pursuant to Rule 176 of the Rules.
6. On 11 July 2022, the Appellant refiled his Notice Appeal⁶ pursuant to the direction of the Court of Appeals Panel⁷.
7. On 19 August 2022, the Appellant filed his Appeal Brief⁸ pursuant to Rule 179 of the Rules.

¹ Disclosure 1, ERN 082095-TR-ET Parts 1 to 5 (“Items 186-190”)

² 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

³ Disclosure 1, ERN 105694-TR-ET Part 1

⁴ KSC-BC-2020-07/F00611, *Trial Judgment*, Trial Panel II, 18 May 2022, Confidential

⁵ KSC-CA-2022-01/F00009, *Gucati Notice of Appeal*, Gucati, 17 June 2022, Confidential

⁶ KSC-CA-2022-01/F00030, *Re-Filed Gucati Notice of Appeal*, Gucati, 11 July 2022, Confidential

⁷ 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

⁸ KSC-CA-2022-01/F00036, *Gucati Appeal Brief*, Gucati, 19 August 2022, Confidential

8. 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 item⁹.
9. 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 2022¹⁰. Disclosure 1 is exculpatory material which fell to be disclosed under Rule 103 as material which was relevant to the Defence's Entrapment Claim at trial¹¹.
10. On 29 September 2022, the Appellant filed his response to the Prosecution's challenge to disclosure of item 206¹². A decision in relation to disclosure of item 206 is outstanding at the time of filing.
11. On 30 September 2022, the Appellant filed his application to amend the notice of appeal pursuant to Rule 176(3) of the Rules:
 - a. seeking to add a ground of appeal arguing that "the TP erred in law and fact by pronouncing Judgment following a trial which was in breach of the Appellant's rights under Rule 103 of the Rules and Article 6 of the European Convention on Human Rights, which require the Prosecution

⁹ 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

¹⁰ 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

¹¹ KSC-CA-2022-01/F00044, *Confidential Redacted Version of Decision on Prosecution Notifications*, Court of Appeal Panel, 15 September 2022, Confidential at paragraph 29

¹² KSC-CA-2022-01/F00050, *Gucati Response to Prosecution Notice of Additional Item 206 and Challenge to Disclosure*, Gucati, 29 September 2022, Confidential

to disclose all exculpatory material in its custody, control or actual knowledge”¹³; and

- b. challenging the Trial Panel’s finding at paragraph 851 of the Judgement that: “the Defence was afforded a full and fair opportunity to put forward its Entrapment Claim in compliance with standards laid down by the ECtHR”.

12. On 13 October 2022, the Appellant received notification of the Decision on Defence Requests to Amend the Notices of Appeal Pursuant to Rule 176(3) of the Rules (“the Decision”)¹⁴. The Court of Appeals Panel therein refused the application to vary the grounds of appeal but gave permission to seek alternate relief by filing a motion before the Appeals Panel¹⁵.

13. The Appellant accordingly files a motion before the Court of Appeals Panel seeking:

- a. A declaration that there has been a disclosure violation contrary to Rule 103 and an order that the convictions are overturned accordingly; plus
- b. An order that acquittals are entered on each count; or
- c. An order staying proceedings; or
- d. An order that there be a re-trial.

II. LAW

¹³ KSC-CA-2022-01/F00053, *Gucati Application to Amend the Notice of Appeal pursuant to Rule 176(3) of the Rules*, *Gucati*, 30 September 2022, Confidential

¹⁴ KSC -CA-2022-01/F00064, *Decision on Defence Requests to Amend the Notices of Appeal Pursuant to Rule 176(3) of the Rules*, Court of Appeals Panel, 13 October 2022, Confidential

¹⁵ KSC -CA-2022-01/F00064, *Decision on Defence Requests to Amend the Notices of Appeal Pursuant to Rule 176(3) of the Rules*, Court of Appeals Panel, 13 October 2022, Confidential at paragraph 16

14. Rule 103 of the Rules provides that 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.
15. The phrase "reasonably suggest" requires the application of an objective test that involves no assessment of the weight or reliability of the material or the credibility of a witness. Instead, the phrase "reasonably suggest" means that the information in question must point, in some logical manner, towards the innocence or mitigated guilt of the Accused, regardless of whether the SPO finds the information reliable. Holding otherwise would lead to the SPO's entitlement to withhold exculpatory evidence in violation of the Accused's right to a fair trial and the equality of arms principle¹⁶.
16. Rule 6 of the Rules provides that the Court of Appeals Panel may address any non-compliance with the Rules causing material prejudice and take *any measure* deemed appropriate to ensure the integrity and fairness of the proceedings.
17. Rule 110 of the Rules provides that the measures that the Panel may decide to be taken as a result of the non-compliance with disclosure obligations pursuant to the Rules specifically include a stay of proceedings.
18. The jurisprudence of the European Court of Human Rights ("ECtHR") requires that an accused must be effectively able to raise an issue of incitement (or

¹⁶ KSC -BC -2020-07/F00413, *Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice*, Trial Panel II, 3 November 2021, Confidential at paragraph 43

entrapment) during their trial to ensure compliance with Article 6 of the European Convention on Human Rights (“ECHR”)¹⁷.

19. The prosecuting authorities therefore have to disclose information relevant to entrapment to permit the Defence to argue a case on entrapment in full at trial, otherwise, the proceedings will fail to comply with the principles of adversarial proceedings and equality of arms and the right of the accused to a fair trial, in violation of Article 6(1) of the ECHR¹⁸.
20. Accordingly, the Court of Appeals Panel ruled that any material or information in the custody, control or actual knowledge of the Specialist Prosecutor’s Office on any purported incitement or entrapment of the Accused was to be disclosed immediately pursuant to Rule 103 of the Rules¹⁹.
21. As the Trial Panel had stated, the Defence must be permitted to receive, as part of the disclosure process, relevant and disclosable information that could assist the Entrapment Allegations, to conduct effective investigations thereon and to elicit evidence from those witnesses capable of testifying thereto²⁰.
22. It was premature, the Trial Panel rightly held, to decide whether or not the Entrapment Allegation was wholly improbable until full disclosure had been completed of relevant and disclosable information that could assist the Defence with Entrapment

¹⁷ KSC -BC-2020-07/IA 0005/F00008, *Decision on the Appeals Against Disclosure Decision*, Court of Appeals Panel, 29 July 2021, Confidential at paragraph 52

¹⁸ KSC-BC-2020-07/IA 0005/F00008, *Decision on the Appeals Against Disclosure Decision*, Court of Appeals Panel, 29 July 2021, Confidential at paragraph 52

¹⁹ KSC -BC-2020-07/IA 0005/F00008, *Decision on the Appeals Against Disclosure Decision*, Court of Appeals Panel, 29 July 2021, Confidential at paragraph 53

²⁰ KSC-BC-2020-07/F00413, *Order on the Updated Rule 102(3) Detailed Notice*, Trial Panel II, 7 September 2021, Public with confidential and ex parte annex at paragraph 53

Allegations, and to permit the Defence to conduct effective investigations thereon and to elicit evidence at trial from those witnesses capable of testifying thereto²¹.

23. Disclosure constitutes an essential and fundamental element of the guarantee of a fair trial²².
24. The first step of the “three-step system” of disclosure is the provision of a “detailed notice” of the material in the possession of the SPO. This first step constitutes a practical and procedural step by which the SPO informs the Defence of what material is in its position so as to place the Defence in a position to: (i) determine in a meaningful way which of the items listed in the notice could be material to its case; and (ii) make a disclosure request for any such items²³. The fact that the SPO does not agree with or accept a part of the Defence case is no ground to take the view that the material in question is not “relevant”. The opposite is in fact true: the SPO is expected to carefully consider the arguments advanced by the Defence to ensure that all information in relation to which a reasonable claim of relevance could be made is included in the Rule 102(3) Notice²⁴. The evaluation of “relevance” must necessarily be broad, erring on the side of disclosure, and account for the nature of the case put forward by the Defence²⁵.
25. Information was disclosable in the context of the Entrapment Allegations if: (i) the information could assist for the Defence claim or its investigations of

²¹ KSC-BC-2020-07/F00413, *Order on the Updated Rule 102(3) Detailed Notice*, Trial Panel II, 7 September 2021, Public with confidential and *ex parte* annex at paragraph 53

²² KSC-BC-2020-07/F00413, *Order on the Updated Rule 102(3) Detailed Notice*, Trial Panel II, 7 September 2021, Public with confidential and *ex parte* annex at paragraph 48

²³ 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 paragraph 16

²⁴ 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 paragraph 18

²⁵ 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 paragraph 17

entrapment (without assessing the weight, reliability or credibility of that information); or (ii) the information, interpreted in the relevant context, suggested that the SPO failed to take adequate investigative steps to exclude the possibility that a member of its staff or someone under its control entrapped the Accused by disclosing the impugned information²⁶.

26. Any information which suggested the [REDACTED] the provenance of the Batches was relevant to the claim of entrapment and should have been made available to the Defence under Rule 103 of the Rules²⁷.

III. DISCLOSURE VIOLATION

27. Disclosure 1, containing the interviews of W04730 dated 1 October 2020 and 22 April 2022, consists of exculpatory material which was disclosable under Rule 103²⁸.
28. The material therein was relevant to the Defence's claim of entrapment²⁹ and was exculpatory in that it included [REDACTED] provenance of the Batches³⁰.
29. The interviews of W04730 on 1 October 2020 and 22 April 2022, contain [REDACTED].

²⁶ KSC-BC-2020-07/F00413, Order on the Updated Rule 102(3) Detailed Notice, Trial Panel II, 7 September 2021, Public with confidential and ex parte annex at paragraph 56;

²⁷ KSC -CA -2022-01/F00044/CONF/RED , *Confidential Redacted Version of Decision on Prosecution Notifications*, Court of Appeals Panel, 15 September 2022, Confidential at paragraph 26

²⁸ KSC-CA-2022-01/F00044/CONF/RED, *Confidential Redacted Version of Decision on Prosecution Notifications*, Court of Appeals Panel, 15 September 2022, Confidential at paragraph 27 and 29

²⁹ KSC-CA-2022-01/F00044/CONF/RED, *Confidential Redacted Version of Decision on Prosecution Notifications*, Court of Appeals Panel, 15 September 2022, Confidential at paragraph 29

³⁰ KSC -CA -2022-01/F00044/CONF/RED, *Confidential Redacted Version of Decision on Prosecution Notifications*, Court of Appeals Panel, 15 September 2022, Confidential at paragraphs 26 and 27

30. W04730 described that, [REDACTED]:

“[REDACTED]”³¹.

31. The [REDACTED].

32. At the time of the first interview on 1 October 2020, W04730 [REDACTED]³².

33. The information that the detailed account of the provenance of the Batches provided in the 1 October 2020 interview [REDACTED]³³. However, the 22 April 2022 interview was not immediately disclosed. On the contrary, it was not disclosed until 4 months after the Trial Panel had pronounced Judgment on 18 May 2022.

34. Moreover, the suggestion of [REDACTED] provenance of the Batches did not arise for the first time on 22 April 2022. The suggestion of [REDACTED] in the interview of W04730 on 1 October 2020.

35. The allegation that there was a [REDACTED].

36. The [REDACTED] W04730 at the outset of the interview on 1 October 2020³⁴.

37. The [REDACTED].

³¹ 082095-TR-ET Part 2 at pages 1 to 2

³² 105694-TR-ET Part 1 at pages 13 to 17

³³ KSC -CA -2022-01/F00044/CONF/RED , *Confidential Redacted Version of Decision on Prosecution Notifications*, Court of Appeals Panel, 15 September 2022, Confidential at paragraph 26

³⁴ 082095-TR-ET Part 1 at page 2 lines 19-22

38. Moreover, [REDACTED]³⁵.
39. At the very least, that passage of the interview on 1 October 2020 in which W04730 alleged that [REDACTED] involved in the provenance of the Batches and should have been made available to the Defence immediately under Rule 103 of the Rules.
40. The Appellant had sought disclosure of the interview dated 1 October 2020 (Items 186-190 on the Rule 102(3) Notice³⁶) during the trial but disclosure had been refused by the Trial Panel³⁷, despite the Trial Panel having previously indicated that those items were at least *prima facie* subject to disclosure³⁸.
41. The Trial Panel had stated that the interview dated 1 October 2020 contained [REDACTED]. But they had done so in circumstances where the Defence did not have access to the material provided and for that reason was not in a position to make informed submissions on whether or not the material tendered by the SPO should be disclosed³⁹.
42. The only information that the Defence had received about the interview dated 1 October 2020 was the description on the Rule 102(3) Notice which simply read:

“Transcript of SPO interview with W04730. This witness claims that [REDACTED].

³⁵ KSC-BC-2020-07/F00611, Trial Judgment, Trial Panel II, Confidential at para.860

³⁶ KSC-BC-2020-07/F00307/A 01, Annex 1 to Prosecution Addendum to its Consolidated Rule 102(3) Notice, Prosecution, 9 September 2021, Confidential at page 1-2

³⁷ KSC-BC-2020-07/F00413, Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice, Trial Panel II, 3 November 2021, Confidential at paragraph 61

³⁸ 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)

³⁹ KSC-CA-2022-01/F00044/CONF/RED , Confidential Redacted Version of Decision on Prosecution Notifications, Court of Appeals Panel, 15 September 2022, Confidential at paragraph 18

43. The description on the Rule 102(3) Notice stated nothing about [REDACTED]:

“[REDACTED]”.

44. The Rule 102(3) Notice description certainly did not include all information in relation to which a reasonable claim of relevance could be made⁴⁰.

45. The belated disclosure of the transcript of the interview on 1 October 2020 reveals 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.

46. Once the interview of 22 April 2022 was received by the SPO, the alleged involvement of [REDACTED] in the provenance of the Batches was made explicit. The SPO still failed to disclose the items contained in Disclosure 1 (the interview of 1 October 2022 and the interview of 22 April 2022) immediately or at all before the Trial Panel pronounced Judgment on 18 May 2022.

47. Indeed, the SPO provided no notice whatsoever of the fact of the further interview of W04730 on 22 April 2022, until the transcript of it was received by the Appellant on 26 September 2022.

48. No explanation, or no explanation that withstands any scrutiny, has been given for why the information provided in the interviews on 1 October 2020 and 22 April 2022 was not identified for disclosure immediately, despite the fact that:

⁴⁰ 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 paragraph 18

- (a) The SPO were aware of each of the items in Disclosure 1 as far back as 1 October 2020 and 22 April 2022, when W04730 spoke to (i) [REDACTED] and Ms Pumper (SPO Investigator) respectively;
- (b) that Ms Pumper's evidence during the trial in October and December 2021 demonstrates that she was aware of the importance of the issue as to how the Batches arrived at the KLA WVA⁴¹; and
- (c) of her assurance during her evidence that she would bring relevant material to the attention of the Specialist Prosecutor or his deputy immediately⁴².

49. On 29 July 2021, the Court of Appeals Panel had spelt out for the SPO that all material concerning the process through which the Batches arrived at the KLA WVA premises was relevant to the case⁴³.

50. Moreover, the Trial Panel had warned the SPO about its disclosure conduct. The quality of legal understanding advanced by the SPO in these proceedings had caused the Trial Panel to be concerned about the SPO's full compliance with its disclosure obligations⁴⁴. The SPO were warned in the present case that failure to disclose material falling under Rule 103 would be treated with the utmost severity⁴⁵. The SPO were

⁴¹ 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]

⁴² 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)

⁴³ KSC-BC-2020-07/IA 005/F00008, *Decision on the Appeals Against Disclosure Decision*, Court of Appeals Panel, 29 July 2021, Confidential at paragraph 47

⁴⁴ K SC-BC-2020-07/F00413, *Order on the Updated Rule 102(3) Detailed Notice*, Trial Panel II, 7 September 2021, Public with confidential and ex parte annex at paragraph 48

⁴⁵ KSC-BC-2020-07/F00413, *Order on the Updated Rule 102(3) Detailed Notice*, Trial Panel II, 7 September 2021, Public with confidential and ex parte annex at paragraph 48

cautioned that the disclosure obligations stemming from the guarantee of a fair trial were not duties to be circumvented through sophistries, but legal obligations to be fulfilled with the greatest care, urgency and diligence⁴⁶. The SPO were reminded of its “ongoing obligation to conduct a full and effective review of its holdings in a manner consistent with the Rules”⁴⁷.

51. Despite those warnings, the SPO did not complete its disclosure obligations with urgency or at all during the trial.

52. The strong inference must be that, despite those warnings, the SPO deliberately withheld relevant and exculpatory material, based on a “unilateral assessment by the SPO of credibility and reliability”, which the Trial Panel had claimed would be treated “with the utmost severity”⁴⁸.

53. That disclosure violation, deliberate or otherwise, occurred at the moment that the Specialist Prosecutor failed to *immediately* disclose the material, and by 22 April 2022 at the very latest.

IV. RELIEF

⁴⁶ KSC-BC-2020-07/F00413, *Order on the Updated Rule 102(3) Detailed Notice*, Trial Panel II, 7 September 2021, Public with confidential and ex parte annex at paragraph 53

⁴⁷ KSC-BC-2020-07/F00413, *Order on the Updated Rule 102(3) Detailed Notice*, Trial Panel II, 7 September 2021, Public with confidential and ex parte annex at paragraph 53

⁴⁸ 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; K SC -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

⁴⁹ KSC-BC-2020-07/F00611, *Trial Judgment*, Trial Panel II, 18 May 2022, Confidential at paragraph 851

54. The Trial Panel's finding⁴⁹ that the Defence was afforded a full and fair opportunity to put forward its Entrapment Claim in compliance with the standards laid down by the ECtHR was wrong.
55. The Prosecution had failed to disclose exculpatory information relevant to entrapment (Disclosure 1) to permit the Defence to argue a case on entrapment in full at trial.
56. The proceedings accordingly failed to comply with the principles of adversarial proceedings and equality of arms and the right of the accused to a fair trial in violation of Article 6(1) of the ECHR⁵⁰.
57. The Defence did not receive Disclosure 1 during the trial and were not permitted to conduct effective investigations thereon and to elicit evidence arising therefrom.
58. The finding of the Trial Panel that the Entrapment Allegation was wholly improbable⁵¹ is invalid because it was made in circumstances where the Prosecution had failed to disclose exculpatory information relevant to entrapment (Disclosure 1) to permit the Defence to argue a case on entrapment in full at trial and the proceedings failed to comply with the principles of adversarial proceedings and equality of arms and the right of the accused to a fair trial in violation of Article 6(1) of the ECHR.
59. It was premature to decide whether or not the Entrapment Allegation was wholly improbable when full disclosure had not been completed of relevant and disclosable information that could assist the Defence with the Entrapment Allegations, and

⁵⁰ KSC-BC-2020-07/IA005/F00008, *Decision on the Appeals Against Disclosure Decision*, Court of Appeals Panel, 29 July 2022, Confidential at paragraph 52

⁵¹ KSC -BC-2020-07/F00611, *Trial Judgment*, Trial Panel II, 18 May 2022, Confidential at paragraph 890

without permitting the Defence to conduct effective investigations thereon and to elicit evidence at trial from those witnesses capable of testifying thereto⁵².

60. Where there is a violation of Article 6 of the Convention, the court must demonstrate a capacity to deal with the violation, such as offering a substantive defence or the exclusion of evidence obtained as a result or other similar consequences⁵³.

61. In accordance with Rule 6 of the Rules the Court of Appeals Panel may address such non-compliance and take *any measure* deemed appropriate to ensure the integrity and fairness of the proceedings.

62. In the first instance, the Court of Appeals Panel should overturn the convictions as the trial proceedings failed to comply with the principles of adversarial proceedings and equality of arms and the right of the accused to a fair trial in violation of Article 6(1) of the ECHR.

63. Thereafter, given the delay in these proceedings (it is now over two years since the Appellant was arrested, and over two years since W04730 gave his interview on 1 October 2020), it is submitted that the Court of Appeals Panel should either: (a) pronounce a judgment of acquittal on all counts on the basis that the Prosecution evidence in its entirety must be excluded under Rule 138(2) of the Rules (as it all results from the delivery of the three Batches to the KLA WVA HQ), or otherwise (b) impose a stay on further proceedings.

64. In the further alternative, the Court of Appeals Panel should order a retrial, affording the Appellant adequate time and facilities to conduct effective investigations in

⁵² KSC-BC-2020-07/F00413, *Order on the Updated Rule 102(3) Detailed Notice*, Trial Panel II, 7 September 2021, Public with confidential and ex parte annex at paragraph 53

⁵³ *Ramanauskas v Lithuania*, ante at paragraph 60; *Ramanauskas v Lithuania* (no 2) (55146/14) ECtHR Chamber 20 February 2018 at paragraph 59

relation to Disclosure 1 and to elicit evidence at trial from those witnesses capable of testifying thereto in accordance Article 6(3)(b) ECHR.

V. CONCLUSION

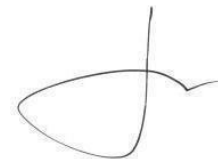
65. The Appellant was convicted after trial proceedings which failed to comply with the principles of adversarial proceedings and equality of arms and the right of the accused to a fair trial in violation of Article 6(1) of the ECHR.

66. Accordingly, the convictions should be overturned and judgment of acquittal or a stay of proceedings ordered accordingly, or a retrial in the alternative.

VI. CLASSIFICATION

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

Word count: 4618 words



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20 January 2023

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