In:	**KSC-CA-2022-01**
	The Prosecutor v. Hysni Gucati and Nasim Haradinaj
Before:	**The President of the Specialist Chambers**
	Judge Ekaterina Trendafilova
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Nasim Haradinaj
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Haradinaj Defence Request for Protection of Legality

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I. INTRODUCTION

1. Further to Article 32 of the Constitution of the Republic of Kosovo ("Kosovo Constitution"),[1] Articles 48(6) to 46(8) of the Law on Specialist Chambers and Specialist Prosecutor's Office No 05/L-053 ("Law")[2] and Rule 193 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers KSC-BD-03/Rev3/2020 ("Rules"),[3] the Defence for Mr. Nasim Haradinaj ("Appellant" or "Accused") files this Request for Protection of Legality following the decision of the Panel of the Court of Appeals Chamber ("Appeals Panel") of 2 February 2023 ("Appeal Judgment").[4]

2. The Appellant seeks a finding of the existence of violations of law in the Appeal Judgment and a return of the case to a separately constituted Panel of the Court of Appeals Chamber[5] in order to revise the Appeal Judgment by taking account of the following incorrect interpretations of the law:

   a) **Ground 1:** The Majority of the Appeals Panel erred in expanding the scope of Article 401(1) of the Kosovo Criminal Code 2018 ("KCC")[6] in

[1] Constitution of the Republic of Kosovo, Official Gazette of the Republic of Kosovo No. K-09042008 of 9 April 2008

[2] Law No.05/L-053.

[3] KSC-BD-03/Rev3/2020.

[4] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-CA-2022-01/F00114, Appeal Judgment, 2 February 2023.

[5] It is requested that the return of the case is transmitted to a separately constituted Panel of the Court of Appeals Chamber as the Appeals Panel that heard the appeal and rendered its judgment on 2 February 2023 (KSC-CA-2022-01/F00114) lacked the requisite impartiality to hear the appeal (see Ground 6 at paras. 71 – 76 below).

[6] Code No.06/L-074, Official Gazette of the Republic of Kosovo No. 2/14 January 2019.

a manner that was detrimental to the Appellant under Count 1 in violation of the principle of legality;

b) **Ground 2:** The Appeals Panel erred in interpreting Article 387 of the KCC under Count 3 on the basis of the placement and formulation of the qualifier ("when such information relates to obstruction of criminal proceedings");

c) **Ground 3:** The Appeals Panel erred by conflating Article 62 of the Law which grants confidentiality to the identity and personal data of individuals within the records of the Kosovo Specialist Chambers ("KSC" or "Specialist Chambers") or the Specialist Prosecutor's Office ("SPO") with the protected status under Article 23 of the Law and Article 3 (1.3) of the Law on Witness Protection,[7] when determining the scope of Article 392(2) of the KCC in Count 6;

d) **Ground 4:** In violation of Article 44(5) of the Law, the Trial Panel and the Appeals Panel erred in failing to take due account of the gravity of the crimes in determining the overall sentence and specifically the sentence for the crime of "Intimidation" under Article 387;

e) **Ground 5:** In breach of Article 21(2) of the Law and Article 6 of the European Convention for the Protection of Human Rights and

[7] The Law on Witness Protection, Law No. 04/L-015

Fundamental Freedoms ("ECHR") the Appeals Panel erred in introducing and relying on evidential requirements in reaching their finding that the Appellants failed to demonstrate an error in the Trial Panel's ruling that an allegation of entrapment/incitement was wholly improbable and unfounded;[8]

f) **Ground 6:** The Appeals Panel's composition violates the requirement of Article 21(2) of the Law in that the members of the Appeals Panel that decided on the appeal against the Trial Judgment also sat on (differently and similarly) constituted panels hearing interlocutory appeals at the pre-trial and trial phase. As such, they had already taken positions on issues that were addressed in the Appeal Judgment, and thereby denied the Appellant an adequate right to an appellate hearing considering the issues afresh in terms of the requirement to ensure that proceedings were fair in accordance with Article 6(1) of the ECHR and that the constituted panel was independent and impartial; and

g) **Ground 7:** The Trial Panel erred in its definition of public interest in the context of SITF/SPO cooperation with Serbia. It therefore did not conclude that a finding of criminal responsibility in this case

[8] Appeal Judgment, para. 374.

amounted to a violation of the Appellant's right to freedom of expression guaranteed under the ECHR and the Constitution.

II. PROCEDURAL HISTORY

3. The trial of Hysni Gucati and Nasim Haradinaj opened on 7 October 2021 and closed on 17 March 2022. On 18 May 2022, the Trial Panel delivered the Trial Judgment,[9] in which it found both Accused guilty on Counts 1, 2, 3, 5 and 6 of the Indictment and not guilty on Count 4.[10] The Trial Panel sentenced each of the Accused to a single sentence of four and a half years of imprisonment, with credit for the time served, and a nominal fine of 100 EUR.[11]

4. On 19 August 2022, both Accused filed their appeal briefs.[12] On 31 August 2022, the Appellant filed a corrected version of his appeal brief, and on 2 September 2022, a further corrected version.[13] On 21 September 2022, the SPO filed its response brief.[14] On 6 and 7 October 2022, the Accused filed their

[9] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07/F00611/RED, Trial Judgment, 18 May 2022.

[10] Trial Judgment, paras. 794, 1012-1016.

[11] Trial Judgment, paras 1014, 1017.

[12] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-CA-2022-01/F00036, Gucati Appeal Brief, 19 August 2022, confidential ("Gucati Appeal Brief"); Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-CA-2022-01/F00035, Defence Appeal Brief on Behalf of Mr. Nasim Haradinaj, 19 August 2022, confidential.

[13] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-CA-2022-01/F00035/COR, Corrected Version of Defence Appeal Brief on Behalf of Mr. Nasim Haradinaj, 31 August 2022l; Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-CA-2022-01/F00035/COR2, Further Corrected Version of Defence Appeal Brief on Behalf of Mr. Nasim Haradinaj, 2 September 2022 ("Haradinaj Appeal Brief").

[14] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-CA-2022-01/F00047, Prosecution Brief in Response to Defence Appeals, 21 September 2022, confidential.

reply briefs and, at the same time, requested an extension of the word limit applicable to these briefs.[15] On 12 October 2022, the Appeals Panel rejected the Appellants' requests for an extension of the word limit and ordered them to refile their reply briefs in compliance with the KSC Practice Direction on Filings.[16] On 16 and 17 October 2022, the Appellants refiled their respective reply briefs.[17]

5. In the Appeal Judgment the Appeals Panel reversed the conviction of bith Appellants on Count 2 and affirmed their convictions on Counts 1, 3, 5, and 6 of the Indictment and imposed a single sentence of four years and three months of imprisonment (with credit for time served) and affirmed the fine of 100 EUR.[18] Judge Kai Ambos delivered a partly dissenting opinion in respect of the *actus reus* of Article 401(1) of the KCC.[19]

[15] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-CA-2022-01/F00058, Gucati Reply to Consolidated Prosecution Response to Defence Requests concerning the Response Brief and amendment to Notices of Appeal, 6 October 2022, confidential; Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-CA-2022-01/F00062, Haradinaj Reply to SPO Brief in Response to Defence Appeal Brief, 7 October 2022, confidential; Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-CA-2022-01/F00061, Application for the Extension of the Word Limit of Gucati Brief in Reply pursuant to Rule 179(3), 7 October 2022.

[16] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-CA-2022-01/F00063, Decision on Defence Requests for Variation of Word Limit of Briefs in Reply, 12 October 2022, paras 7, 10.

[17] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-CA-2022-01/F00067, Re-Filed Gucati Brief in Reply pursuant to Rule 179(3) with one Annex, 17 October 2022, confidential; Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-CA-2022-01/F00065, Haradinaj Re-filed Reply to SPO Brief in Response to Defence Appeal Brief, 16 October 2022.

[18] Appeal Judgment, para. 442.

[19] Appeal Judgment, Partially Dissenting Opinion of Judge Kai Ambos.

III. APPLICABLE LAW

6. Article 48 (7) of the Law, entitled "Extra-ordinary Legal Remedy" provides that:

> *A protection of legality request must allege:*
>
> *a. a violation of the criminal law contained within this Law; or*
>
> *b. a substantial violation of the procedures set out in this Law and in the Rules of Procedure and Evidence*.

7. Article 48(8) provides:

> *A request for an extra-ordinary legal remedy under this Article may be filed on the basis of rights available under this Law which are protected under the Constitution or the European Convention on Human Rights and Fundamental Freedoms.*

8. There has been no request for the protection of legality in respect of a judgment issued by a Panel of the Court of Appeals Chamber of the Specialist Chambers. However, in *Prosecutor v. Kadri Veseli et al*. a Panel of the Supreme Court Chamber of the Specialist Chambers issued a decision on a request for protection of legality challenging a decision of the Panel of the Court of

Appeals Chamber on continuing detention[20] and held that "*the protection of legality is not meant to create another general avenue of appeal [but] [r]ather, it is limited to the specific instances defined in the Law and the Rules*."[21] It further ruled that a party cannot merely "*submit the disagreement with the first and the second instance judgment or to repeat the submissions of the previous appeals*".[22] It is submitted, nonetheless, that the matters being raised in the *Prosecutor v. Kadri Veseli et al*. matter were of an interlocutory basis and that this instant challenge is the first for the protection of legality against conviction and sentence and that the issues being raised are those in which it is said that the Appeals Panel erred in law, but also, and importantly, reached decisions in the first instance over which there was no right of interlocutory appeal. Those matters had an impact on the ability of the Appellants to fully and properly argue the defence of entrapment/public incitement, and by extension advance the defence of disclosures in the public interest. The Panel of the Supreme Court Chambers is therefore being invited to address matters that will have a precedential impact on future cases that come before the Specialist Chambers and not only of importance in terms of written submissions, but equally on hearing oral

[20] Prosecutor v Hashim Thaçi et al., KSC-BC-2020-06/PL001, Decision on Kadri Veseli's Request for Protection of Legality, 15 August 2022.

[21] *Ibid*., para. 21.

[22] Decision on Kadri Veseli's Request, para. 25, citing Kosovo Supreme Court, Plm.Kzz 178/2016, Judgment, 19 December 2016, para. 68.

argument in an adversarial process as the fundamental principle underpinning the fairness of proceedings requires.

A) Grounds pursuant to Article 48(7)(a)

9. The Appellant has been found guilty of crimes under Articles 387, 392 and 401 of the KCC which have been incorporated by reference into the Law by the effect of Article 15(2) in conjunction with Article 64.[23] In addition, pursuant to Article 12 of the Law, these three Articles of the KCC form part of the substantive law of the Republic of Kosovo which the Specialist Chambers, as a domestic judicial institution of the Republic of Kosovo, shall apply. For these reasons they are "*contained within*" the Law, as set forth in Article 48(7)(a).

10. It is important to recall at this point that the Specialist Chambers, whilst created under a *lex specialis* and amendments to the national constitution, remain domestic institutions and must apply the law as applied by the domestic courts in the Republic of Kosovo unless there is good reason for such a departure by the higher instance courts such as the Supreme or Constitutional Court. Consistency and foreseeability lie at the cornerstone of

[23] Article 15(2) of the Law provides that Articles 395, 400 and 409 of the Kosovo Criminal Code 2012 (KCC 2012) apply to the official proceedings and officials of the Specialist Chambers, the Registry and Specialist Prosecutor's Office and that the Specialist Chambers shall have jurisdiction over these offences where they relate to its official proceedings and officials. Pursuant to Article 64 of the Law, since the KCC 2012 was repealed and replaced by the KCC 2018, Articles 395, 400 and 409 of the KCC 2012 should be interpreted as referring to Articles 387, 392 and 401 of the KCC 2018.

a functional legal system and are essential components of ensuring a fair trial. It follows that incorrect interpretations of these Articles in the Appeal Judgment fall within the scope of a request for the protection of legality. Grounds 1 to 3 argue that the Appeals Panel adopted such incorrect interpretations. In Ground 4 which pertains to sentencing the Defence submits that there has been a substantial (or essential) violation of Article 44(5) of the Law.

B) Grounds pursuant to Article 48(7)(b)

11. A request for protection of legality under Article 48(7)(b) must allege a *substantial* violation of the procedures set out in the Law and the Rules. In *Kadri Veseli et al*. the Panel of the Court of Appeals Chamber held that this is a high threshold and one which materially affects the judicial finding.[24]

12. Article 21(2) of the Law provides: "*In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 23 of this Law and any measures ordered by the Specialist Chambers for the protection of victims and witnesses*." Pursuant to Articles 48(7) and 48(8) of the Law, a request for protection of legality may be filed on the basis of the right to a fair hearing under Article 21(2) of the Law which is protected under Article 6(1) of the ECHR. Ground 5 and 6 submit that the Appellant did not have a fair

[24] Decision on Kadri Veseli's Request, para. 23.

hearing in respects pertaining to entrapment/public incitement and the lack of impartiality of the judges respectively. Ground 7 argues that there has been a violation of the Appellant's right to freedom of expression guaranteed, a protected right under the ECHR.

IV. LEGAL ARGUMENTS

Ground 1: Obstructing Official Persons in Performing Official Duties (Article 401(1) of the KCC)

13. Article 401(1) of the KCC provides: "Whoever, by force or serious threat, obstructs or attempts to obstruct an official person in performing official duties or, using the same means, compels him or her to perform official duties shall be punished by imprisonment of three (3) months to three (3) years." The Appellant was found guilty pursuant to this provision under Count 1 of the Indictment.

14. The Defence submitted in its Appeal Brief that the Trial Panel erred in law in concluding that a serious threat against third parties could be sufficient to meet the *actus reus* and intent for the crime of obstructing official persons.[25]

[25] Haradinaj Appeal Brief, paras. 172-177. See also Gucati Appeal Brief, paras. 287-291.

15. The Appeals Panel, Judge Ambos dissenting, agreed with the Trial Panel's finding that nothing in the language of Article 401(1) required that the serious threat be specifically directed at the official person in question.[26] The Majority argued that "[t]o incorporate that element, the provision would have been formulated in a manner that explicitly requires that the use of force or serious threat be directed against the official person(s)."[27]

16. In the Defence's submission, underpinned by Judge Ambos' Partially Dissenting Opinion, was that the Majority's position on Article 401(1) provides "a too broad interpretation which violates the principle of legality in its variation of lex stricta (prohibition of analogy in *malam partem*)."[28] Clearly, if someone is said to obstruct another person by force or serious threat, the force or threat will ordinarily and logically be understood as being directed at the person obstructed. The interpretation by the Majority of the Appeals Panel would expand the scope of Article 401(1) beyond its natural reading in a manner that is detrimental to defendants[29] and defies any logical and natural reading of the provision. If the intention of the legislative drafters was to lower the threshold required and provide indirect intent, it would have clearly legislated the point. Article 2(3) of the KCC provides that: "[i]n case of

[26] Appeal Judgment, para. 282, citing Trial Judgment, paras. 146, 639.

[27] Appeal Judgment, para. 282.

[28] Appeal Judgment, Partially Dissenting Opinion of Judge Kai Ambos, para. 3.

[29] Haradinaj Appeal Brief, para. 176.

ambiguity, the definition of a criminal offense shall be interpreted in favor of the person against whom the criminal proceedings are ongoing." The Appeals Panel failed to apply such an approach as required by Article 2(3).

17. Judge Ambos points out that this principle is reflected in the jurisprudence of the Kosovo Court of Appeal,[30] well-established in other civil law jurisdictions[31] and has been recognised by Article 7 of the ECHR.[32] Whilst he points out that the approach of human rights case law on this point is flexible,[33] the European Court of Human Rights (ECtHR) has established that there should be accessibility and foreseeability with regard to criminal offences in the context of Article 7 of the ECHR.[34] It follows that "any doubt as to the meaning of a statutory provision, including as to its objective elements (*actus reus*), has to be resolved in favour of the accused."[35]

18. In Judge Ambos's opinion, the text of Article 401(1) states unequivocally that the threat must be directed against an official person, but it does not say that it can also be directed against private persons[36] and threats directed against

[30] Partially Dissenting Opinion of Judge Kai Ambos, para. 9.

[31] *Ibid*, para. 7.

[32] *Ibid*, para. 5.

[33] *Ibid*, paras. 5-6.

[34] G.I.E.M. S.R.L. and Others v. Italy, Judgment, 28 June 2018, ECtHR, Appl. nos. 1828/06, 34163/07, 19029/11, para. 242; Vasiliauskas v. Lithuania, Judgment, 20 October 2015, ECtHR, Appl. no. 35343/05, para. 155. See also Al-Nashif v Bulgaria, Judgment, 20 June 2002, ECtHR, Appl. no. 50963/99, paras. 118-119.

[35] Partially Dissenting Opinion of Judge Kai Ambos, para. 10.

[36] *Ibid*, para. 10.

private persons unrelated to SPO officials in the present case clearly lie outside the wording of the provision.[37]

19. It is respectfully submitted that the construction of the approach adopted by the Trial Panel and the Majority of the Appeals Panel is based on an indirect form of liability that is not foreseen by the drafters of the legislation and has no basis in the established jurisprudence of the domestic courts in Kosovo interpreting the legislation. Further, there was no evidential basis presented by the prosecution at trial[38] or on appeal for concluding that the Appellant obstructed an official person. In fact, the prosecution called no evidence as to obstruction by the Appellant other than the disclosures and public statements to the media. The Trial Panel found that the Appellant did *not* obstruct official persons under Article 401(1) but rather found the inchoate form of the offence as an attempt,[39] the only evidence of which were the disclosures and public statements to the media, there being no evidence of any attempt to obstruct an official person by "force or serious threat" from carrying out their duties, an essential ingredient of the offence,.

20. In conclusion, the Appeals Panel by majority committed an essential violation of the criminal law contained in the Law in finding that the Accused failed to

[37] *Ibid*, para. 12.

[38] Trial Judgment, paras. 995-998.

[39] Appeal Judgment, paras. 644-658.

demonstrate an error in the Trial Panel's assessment of the *actus reus* of the offence under Article 401(1) of the KCC.[40]

Ground 2: Intimidation During Criminal Proceedings (Article 387 of the KCC)

21. The Trial Panel found the Appellant guilty on Count 3, Intimidation During Criminal Proceedings, under Articles 15(2) and 16(3) of the Law and Articles 17, 31 and 387 of the KCC.[41] Article 387 reads as follows:

> *"Whoever uses force or serious threat, or any other means of compulsion, a promise of a gift or any other form of benefit to induce another person to refrain from making a statement or to make a false statement or to otherwise fail to state true information to the police, a prosecutor or a judge, when such information relates to obstruction of criminal proceedings shall be punished by a fine of up to one hundred and twenty-five thousand (125,000) EUR and by imprisonment of two (2) to ten (10) years."*

22. The Trial Panel found that the phrase "when such information relates to obstruction of criminal proceedings" qualified only the final of the three alternative acts which the other person is to be induced to make ("to otherwise

[40] Appeal Judgment, para. 285.

[41] Trial Judgment, para. 1015(c).

fail to state true information").[42] The Appeals Panel erroneously found no error in this interpretation.[43]

23. The Appeals Panel follows the Trial Panel in justifying its interpretation by the placement and formulation of the qualifier ("when such information relates to obstruction of criminal proceedings").[44]

24. The Appeals Panel asserts that the qualifier is directly placed after the third alternative.[45] In our submission, this is in fact not correct. In the Albanian, Serbian and English texts of the Article what another person is induced to do consists of five phrases in the following order:

i. To refrain from making a statement or

ii. To make a false statement or

iii. To otherwise fail to state true information

iv. To the police, a prosecutor or judge

v. When such information relates to obstruction of criminal proceedings.

[42] Trial Judgment, para. 114.

[43] Appeal Judgment, paras. 221-222.

[44] Appeal Judgment, para. 221; Trial Judgment, para. 114.

[45] Appeal Judgment, para. 221.

25. It would be implausible to suggest that the fourth phrase "To the police, a prosecutor or judge" *only* qualifies the immediately preceding third phrase "To otherwise fail to state true information." This would have the result that the Article would criminalise the act of inducing a person to make a false statement or refrain from making a statement *to any other person*. The fourth phrase should therefore be taken to qualify the three preceding phrases.[46] In other words, what must be shown under the Article is that what the perpetrator says, does not say or refrains from saying must be to the police, a prosecutor or judge. Since the fourth phrase should be taken to qualify all three preceding phrases, the fifth phrase ("when such information relates to obstruction of criminal proceedings") should be taken to do so as well. If it had been intended to relate only to the third phrase ("To otherwise fail to state true information") it would have been placed immediately next to it and not following a phrase that qualifies the first three phrases.

26. The Appeals Panel notes that "the qualifier refers to 'such information' and thus to 'true information' mentioned in the third alternative"[47] and, by implication, not to the statements referred to in the first two alternatives. However, there is nothing in the third alternative that differentiates it from the first two so as to suggest the qualifier is necessary or appropriate to it

[46] See Gucati Appeal Brief, para. 12.

[47] Appeal Judgment, para. 221.

alone. The first two alternatives concern stating information and for this reason the qualifier refers to them as well.[48] In the context of Article 387, the distinction between making a statement and stating information is of little importance. What is significant is that all three alternatives in essence entail the failure to provide information that should be provided, and it is this to which the qualifier relates.

27. There are further reasons for rejecting the Appeals Panel's interpretation as being without any proper or rational basis.

28. The offence under Article 387 incurs a high penalty: a heavy fine *and* imprisonment of between two and ten years. It is in fact the highest penalty for any of the offences for which the Appellant was convicted. If the construction adopted by the Appeals Panel were correct, which the Appellant submits it is not, there would be a glaring disparity in the gravity of the acts to which it would apply. Failing to state true information to the police, a prosecutor or a judge when the information relates to obstruction of criminal proceedings is inherently more serious than refraining from making a statement about anything to the police, a prosecutor or a judge.[49] The interpretation that the Appellant advances gives Article 387 a coherent policy rationale in that it imposes a heavy penalty for inducing another person not

[48] Transcript, 1 December 2022, pp. 37-38.

[49] cf. Gucati Appeal Brief, 22 August 2022, para. 18.

to tell the whole truth in various ways in regard to the obstruction of criminal proceedings which strikes at the heart of the criminal justice system.

29. Moreover, if the clause "when such information relates to obstruction of criminal proceedings" only applied to the third limb, there would be a significant and confusing overlap with criminal acts provided for in the preceding Article 386 of the KCC for which there would be no apparent justification. Using compulsion to cause a person to make a false statement in an official proceeding under Article 386(1)(1), using compulsion to prevent the communication of information relevant to the commission of a criminal offence to a police officer, prosecutor or judge under Article 386(1)(3) and using compulsion to induce a witness or expert to decline to give a statement or to give a false statement in court proceedings under Article 386(1)(7) could all fall under Article 387 according to its interpretation by the Trial and Appeals Panels but these acts would also incur the substantially lower penalty range of imprisonment of between six months and five years under Article 386.

30. The SPO states that Kosovo courts make findings of guilt under Article 387 in the absence of predicate acts of obstruction.[50] They present in justification two Basic Court Decisions.[51] Since they were issued at first-instance, they have

[50] Prosecution Brief in Response, para. 61.

[51] Prosecution Brief in Response, Annex 2.

little persuasive value since, as stated in the Gucati Brief in Reply, and adopted by the Haradinaj Defence, the point raised here was neither argued nor addressed in those Decisions.[52]

31. In conclusion, the Appeals Panel's interpretation of Article 387 amounted to an essential violation of the criminal law contained in the Law and the findings of the Appeal Judgment should be reconsidered on this basis.

Ground 3: Violating secrecy of proceedings (Article 392(2) of the KCC)

32. The Appellant was found guilty on Count 6 of Violating Secrecy of Proceedings through unauthorised revelation of the identities and personal data of protected witnesses, under Articles 15(2) and 16(3) of the Law and Articles 17, 31 and 392(2)-(3) of the KCC.[53]

33. Article 392(2) provides:

> *"Whoever without authorization reveals information on the identity or personal data of a person under protection in the criminal proceedings or in a special program of protection shall be punished by imprisonment of up to three (3) years."*

[52] Re-Filed Gucati Brief in Reply pursuant to Rule 179(3), 17 October 2022, para. 19.

[53] Trial Judgment, para. 1015.

34. The Trial Panel held that "a person under protection in the criminal proceedings" in Article 392(2) covers persons who the law regards as protected, as well as those for whom an order or a measure of protection has been adopted in criminal proceedings. The Panel underscored that the requirement of being under protection in criminal proceedings does not necessarily require a judicial order. It held that it can also entail measures of protection adopted by the SPO during its investigations pursuant to, *inter alia*, Article 35(2)(f) of the Law, Rule 30(2)(a) of the Rules or any other applicable law and that, in line with Article 62 of the Law, "a person under protection in the criminal proceedings" can also be a person whose identity or personal data appears in KSC or SPO documents or records the disclosure of which has not been authorised.[54]

35. Both Appellants opposed the definition given by the Trial Chamber in their Appeal Briefs.[55] The Appeals Panel nevertheless, in our respectful submission, quite improperly and without any proper basis upheld such a definition.[56]

36. The Appellant submits that the definition affirmed by the Appeals Panel entails an essential violation of the criminal law. Specifically, the Trial Panel (and by extension the Appeals Panel) erred by conflating Article 62 of the Law

[54] Trial Judgment, para. 95.

[55] Gucati Appeal Brief, paras. 217-221, 234-243; Haradinaj Appeal Brief, paras. 196-208.

[56] Appeal Judgment, paras. 81-87.

which grants confidentiality to the identity and personal data of individuals within the records of the KSC or SPO with protected status under Article 23 of the Law and Article 3 (1.3) of the Law on Witness Protection, Law No. 04/L-015.

37. Article 3 (1.3) of the Law on Witness Protection defines a "protected person" as:

> *"the person to whom the protection measures are applied and who in the position of witness or damaged party, shall notify or witness on the facts and circumstances,* ***that comprise an object of relevant proof*** *in a criminal procedure, for criminal offences foreseen in paragraph 1 of Article 4 of this Law and* ***due to these notifications or proofs, is in a serious risk situation****, and the person, who expiates the criminal sentence or is accused in criminal procedure, towards whom the special protection measures shall be applied, because of cooperation, notification and declarations made in criminal procedure, for criminal offences foreseen in paragraph 1 of Article 4 of this Law and that for these reasons, is in a serious threat situation."*

38. The relevance test is required before the application of protective measures to witnesses because protective measures are a serious intervention in the lives of the witnesses, and they can have significant consequences for the right of the accused under Article 6 of the ECHR to examine witnesses and to have

access to all the evidence in the case, including the identity of a witness. Thus, any decision to apply protective measures must be made on a case-by-case basis to balance the interests of protecting the witness with the rights of an accused. The relevance test is necessary before the application of protective measures to witnesses because it ensures that the measures are justified, proportionate, and not applied unnecessarily. If protective measures were applied without considering whether the evidence is relevant or not, it could potentially lead to misuse (or abuse) of the protective measures.

39. While the Appeals Panel is correct that protected status does not necessarily require a court order, and could be granted *de facto* to vulnerable witnesses such as SGBV crime victims and children in line with Article 23(2) of the Law, for any other victim, witness or expert witness, the assessment of relevance of the testimony to the criminal offences foreseen in Article 4(1) of the Law on Witness Protection[57] is still required before balancing the alleged risk to the victim or witness with the rights of the defence.

[57] Article 4 (Grounds for application of protection measures) provides:

1. Protection measures may be implemented before, during and after criminal proceeding for the endangered person with regard to the investigations for criminal offences as follows:

1.1. criminal offence against Kosovo, its citizens and residents;

1.2. criminal offence against international law;

1.3. criminal offence against the economy;

1.4. criminal offence against the official position;

40. The mere fact that information about a witness is contained within the SPO records grants it confidentiality under Article 62 of the Law but not necessarily protected status under Article 392(2) of the KCC. The key difference between these two concepts is that confidentiality is primarily concerned with protecting information from unauthorized access, while the protected status of a victim or witness is focused on protecting individuals from harm or retaliation. To grant protected status it must be established that the individual's evidence is relevant in the first place, that there is a risk arising from the disclosure of his or her information and that when the interest of the individual concerned in protecting his or her personal data is weighed against the competing interest of society in investigating and prosecuting criminal offences, the protective measures are justified, proportionate, and not applied unnecessarily.

41. This distinction is critical in this case considering that the SPO would seemingly appear to have imported data in bulk from other existing institutions, some of which may not be directly relevant to any of the crimes foreseen in Article 4(1) of the Law on Witness Protection or indeed give rise to a risk arising from the disclosure relating to one of these crimes. The mere fact that confidentiality has been breached under Article 62 of the Law does

1.5. criminal offence which, as foreseen by the Law, is punishable by imprisonment of five (5) or more years.

not imply that the individuals whose details may have been disclosed were at risk at any point in time, whether before or after the leak from the SPO's records.

42. Both the Trial Panel and the Appeals Panel erroneously employed a broad definition of "person under protection in the criminal proceedings" in Article 392(2) of the KCC, thereby resulting in an essential violation of the criminal law.

Ground 4: Sentence

43. It is submitted that the Trial Panel, in violation of Article 44(5) of the Law, imposed a sentence that did not appropriately reflect the gravity of the crimes and their consequences. In finding no basis for the Appellant's contention that his sentence was "grossly disproportionate and unjustifiable", based on the counts on which he was convicted, the Appeals Panel committed the same violation of Article 44(5).[58]

44. In determining an appropriate sentence for the Appellant, the Trial Panel stated that it took note of the range of sentences imposed on persons convicted of similar offences at international courts or tribunals.[59] It is difficult to see on what basis it could have done so.

[58] Appeal Judgment, paras. 431-439.

[59] Trial Judgment, para. 979.

45. It gave the following five examples: the *Marijačić & Rebić* and the *Jović* Trial Judgments, both at the International Criminal Tribunal for the former Yugoslavia ("ICTY"); the *Akhbar Beirut* and the *Al-Khayat* Sentencing Judgments, both at the Special Tribunal for Lebanon ("STL"); and the *Nzabonimpa et al*. Trial Judgment at the International Residual Mechanism for Criminal Tribunals ("IRMCT").[60] However, in all those cases the penalties were significantly lower than the sentence imposed on the Appellant.[61] Adequate attention was also not given to the ICTY case of *Domagoj Margetić*.[62] Although Margetić was found to have published the names of a large number of witnesses in aggravating circumstances, unlike the Appellant who had merely provided documents to members of the media, Margetić received a significantly lower custodial sentence of three months' imprisonment.[63]

46. The Appeals Panel stated that it had "further considered relevant cases from international criminal courts and tribunals raised by the Parties during the Appeal Hearing and in their written submissions" and that it was "cognisant of the variations in the sentences imposed – some significantly different – as

[60] Trial Judgment, footnote 2012.

[61] Marijačić and Rebić Trial Judgement, 10 March 2006, ICTY IT-95-14-R77.2, para. 53; Jović Trial Judgement, 30 August 2006, ICTY IT-95-14 & IT-95-14/2-R77, para. 27; Akhbar Beirut S.A.L. and Al Amin Sentencing Judgment, 5 September 2016, STL-14-06/S/CJ, para. 20; Al Khayat Sentencing Judgment, 6 October 2015, STL-14-05/S/CJ, para. 23; Nzabonimpa et al. Trial Judgement, 25 June 2021, MICT-18-116-T, paras. 407-408. See also KSC-CA-2022-01, Transcript, 1 December 2022, pp. 99-102.

[62] Prosecutor v Margetić, Trial Judgement, 7 February 2007, ICTY IT-95-14-R77.6.

[63] Margetić, paras. 38, 50, 69, 83, 86, 94. See also KSC-CA-2022-01, Transcript, 1 December 2022, pp. 67-68, 102-103; Transcript, 2 December 2022, pp. 165-166, 185-186.

compared to the sentences in this case".[64] It gives examples in footnotes of relevant cases and of such cases with significantly different sentences from the present case.[65] However, it gave no analysis of them, how they were distinguished or discussed them any further. Instead, it focused on the specific facts of the instant case[66] and concluded that the Trial Panel did not err in its determination of the Appellant's sentence[67] without giving any justification for such a fundamental and unjustified departure.

47. It is respectfully submitted that in reaching this conclusion, the Appeals Panel gave insufficient attention to the case law of international courts and as a result did not correctly assess the gravity of the crimes in violation of Article 44(5) of the Law. The Appeals Panel provided no rationale for departing from the established international jurisprudence and further reasoned that it had considered and applied the existing jurisprudence, although any reading of the existing jurisprudence and the pronounced sentence clearly demonstrates a fundamental, and wholly unjustified departure. Such an approach is quite clearly manifestly excessive and not supported by any clear reasoning as required by Article 6(1) of the ECHR.[68]

[64] Appeal Judgment, para. 437.

[65] Appeal Judgment, footnotes 972, 973.

[66] Appeal Judgment, para. 437.

[67] Appeal Judgment, para. 439.

[68] Moreira Ferreira v Portugal (No. 2), Judgment, 11 July 2017, ECtHR, Grand Chamber, Application No. 19867/12, para. 84.

48. Moreover in relation to Count 3, the Trial Panel imposed a sentence of four years' imprisonment that does not take proper account of the gravity of the offence in violation of Article 44(5) of the Law, thereby giving rise to a single sentence of four years and a half years.[69] The sentence was reduced by the Appeals Panel to four years and three months, as a consequence of the partial acquittal on appeal under Count 2.[70] The Trial Panel's sentence was preserved by the Appeals Panel in all other respects.

49. Rule 163(4) of the Rules provides for the determination of sentence, and states in relevant part:

> *"The Panel shall determine a sentence in respect of each charge in the indictment under which the Accused has been convicted and shall impose a single sentence reflecting the totality of the criminal conduct of the Accused... The single sentence shall not be less than the highest individual sentence determined in respect of each charge."*

50. The only custodial term imposed in respect of the Appellant that exceeds two years' imprisonment relates to his conviction for Count 3 in contravention of Article 387 of the KCC, which is titled "Intimidation during criminal proceedings".[71] The custodial sentencing range for contravention of Article

[69] Trial Judgment, para. 1009.

[70] Appeal Judgment, para. 440.

[71] Trial Judgment, para. 1006.

387 is imprisonment of two to ten years. A sentence of four years was imposed in respect of the Appellant.[72]

51. Per Rule 163(4) the highest individual sentence provides the entry point for determination of the single sentence. Accordingly, the individual sentence imposed in respect of Count 3 is of significant consequence for the Appellant, as it raises the entry point for his single sentence from two to four years. Significantly, the sentencing range for Article 387 starts at two years.

52. The Appeals Panel noted that the "gravity of the offence is the primary consideration [...] in imposing a sentence".[73] In exercising its sentencing discretion through consideration of the gravity of the offences and aggravating and mitigating factors, the Trial Panel did not disaggregate the individual sentences it imposed in respect of each count.[74] Failing to do so has resulted in a single sentence which is "so unfair or unreasonable as to constitute an abuse of its discretion".[75]

53. The unfairness and unreasonableness in the Trial Panel's failure to assess individually the gravity of the Appellant's sentence under this count, as well as mitigating and aggravating factors, is exacerbated by two considerations:

[72] *Ibid*.

[73] Appeal Judgment, para. 410.

[74] Trial Judgment, paras. 987-1011.

[75] Appeal Judgment, para. 414.

a) the offence under Article 387 has a very broad spectrum of severity; and b) none of the considerations mentioned in relation to the gravity of the Appellant's conduct, nor any of the aggravating factors assessed relates to the commission of an offence under Article 387.

54. The Appeals Panel affirmed that the Appellant was "found guilty under the first alternative of Article 387 of the KCC, namely having used serious threats to induce someone to 'refrain from making a statement'".[76]

55. The first alternative is on the low end of the spectrum of the offence of intimidation during criminal proceedings, according to the Trial Panel's interpretation of Article 387. Indeed, offending on the higher end of the spectrum includes instances in which an offender uses force to actually induce another not to state true information to the police, a prosecutor or a judge, when such information in fact relates to obstruction of criminal proceedings.

56. In determining the appropriate individual sentence in respect of Count 3, no regard was paid to the gravity of the Appellant's conduct in relation to the spectrum of conduct proscribed by Article 387.

57. The assessment of gravity that underpinned the single sentence relates to the scope and nature of the revelation of protected information.[77] It was not

[76] Appeal Judgment, para. 220.

[77] Trial Judgment, paras. 987-994.

established that the gravity of the conduct in relation to Article 387 was any greater than the minimum for conviction under this provision.

58. The aggravating factors in relation to the Appellant did not relate to his conduct in respect of any of the elements of the offence proscribed by Article 387.[78] Indeed, the Trial Panel specifically noted that:

> *"… Mr Haradinaj did not make any threats involving death or serious injury in relation to witnesses. Furthermore, Mr Haradinaj did not directly threaten any SPO official and, when present, was cooperative during the SPO seizure operations..."*[79]

59. For these reasons the individual sentence in relation to Count 3 is "so unfair or unreasonable as to constitute an abuse of [the Trial Panel's] discretion". No basis was established by either the Trial Panel or the Appeals Panel to justify a four-year prison sentence in respect of the Appellant's conviction under Article 387. The effect of this individual sentence on the single sentence is thus manifestly excessive, grossly unfair, and unreasonable.

60. In conclusion, neither the Trial Panel nor the Appeals Panel have taken into account the *actual* gravity of the crime of Intimidation during criminal

[78] Trial Judgment, paras. 995-998.

[79] Trial Judgment, para. 998.

proceedings under Article 387 for which the Appellant was convicted. Accordingly, the penalty imposed is in violation of Article 44(5) of the Law.

Ground 5: Entrapment/Incitement

61. The Appeals Panel concluded that the Appellant failed to demonstrate an error in the finding of the Trial Panel that their claim of entrapment/incitement was wholly improbable and unfounded.[80] However, in reaching this conclusion the Appeals Panel employed a criterion for establishing that such a claim was wholly improbable and unfounded that was not legally justified.

62. The use in a criminal trial of evidence obtained by incitement may render the trial unfair in breach of Article 6 of the ECHR.[81] In *Ramanauskas v Lithuania*, the European Court of Human Rights stated:

> "*Police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in*

[80] Appeal Judgment, para. 374.

[81] Teixera de Castro v Portugal, Judgment, 9 June 1998, ECtHR, Application No. 44/1997/828/1034, paras. 31-39.

order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution."[82]

63. Throughout the entirety of the proceedings, it was the Appellant's case that the documents leaked in the public interest were provided to him by an individual from the SPO or other linked institution; that conclusion being logically deduced from the fact that those files could only have been in the possession of the SPO or an individual or entity working with it at that time or alternatively that the documents were as a result of a sophisticated action by Serbian State Intelligence to penetrate the secure evidence management systems.[83]

64. The Appeals Panel noted that the Trial Panel correctly identified the fact that "provided that the accused's allegations are not wholly improbable, it falls on the prosecution to prove that there was no entrapment".[84] It goes on to elucidate the standard of the accused's allegations being not wholly improbable,[85] but in doing so it introduces evidential requirements that are not supported by the jurisprudence.

[82] Ramanauskas v Lithuania, Judgment, 5 February 2008, ECtHR, Application No. 74420/01, para. 55.

[83] Haradinaj Appeal Brief, Ground 9, paras. 108-114; Ground 10, paras. 115-126; Ground 11, paras. 128-134; Ground 13, paras. 137-144

[84] Appeal Judgment, para. 363, citing Trial Judgment para. 837, which in turn cites ECtHR, Guide on Article 6 of the ECHR, para. 248.

[85] Appeal Judgment, paras. 364-369.

65. It is submitted that the Appeals Panel states incorrectly that the ECtHR case law reflects the requirement that the Defence provide *prima facie* evidence of entrapment. It cites as an example a passage from *Matanović v Croatia*.[86] However, here the ECtHR states that "the Court must satisfy itself that the situation under examination falls *prima facie* within the category of 'entrapment cases'"[87] and that "[i]f the Court is satisfied that the applicant's complaint falls to be examined within the category of 'entrapment cases', it will proceed, as a first step, with the assessment under the substantive test of incitement."[88] Falling *prima facie* within the category of "entrapment cases" is a lower and less precise standard than providing *prima facie* evidence of entrapment. The ECtHR in *Matanović* cites two cases in support of its position.[89] In both these cases, the issue is not whether there was *prima facie* evidence of entrapment but whether what was alleged *constituted* a claim of entrapment.

66. The Appeals Panel also erroneously found that in order to meet the "not wholly improbable" standard, the Appellant should have brought *prima facie* evidence of the SPO's involvement in some capacity in the commission of the

[86] Appeal Judgment, para. 364 (citing Matanović v Croatia, Judgment, 4 April 2017, ECtHR, Application No. 2742/12, paras. 131-132).

[87] Matanović v Croatia, para. 131.

[88] Matanović v Croatia, para. 132.

[89] Matanović v Croatia, para. 131 (citing Trifontsov v Russia, Decision, 9 October 2012, ECtHR, Application No. 12025/02, paras. 32-35 and Lyubchenko v Ukraine, Decision, 31 May 2016, ECtHR, Application No. 34640/05, paras. 33-34).

offences.[90] The Appeals Panel bases this on the contingent fact that in the cases that have so far come before the ECtHR the involvement of law enforcement officers or those instructed by them has not been in dispute and what had been in dispute was the extent and nature of that involvement.[91] However, the ECtHR has not found that in order to establish that entrapment is not wholly improbable there must be *prima facie* evidence of such involvement.[92] The Appeals Panel failed to take account of the defence argument that the entrapment could have been orchestrated by the Serbian State, for which there was an evidential basis before both the Trial Panel and Appeals Panel[93] but which the defence were denied the opportunity to access in full.[94]

67. The introduction of an additional evidential requirement by the Appeals Panel breaches the ECHR in raising the threshold that the Defence has to meet before the Prosecution has the burden of proving that there has been no entrapment. The result is that the Trial Panel effectively reversed the burden of proof. The Appeals Panel, therefore, erred in determining that there was no

[90] Appeal Judgment, para. 367-369.

[91] Appeal Judgment, para. 367.

[92] Contra Appeal Judgment, para. 368.

[93] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-CA-2022-01/F00079, Defence Request for an Order for Disclosure of Witness Contact Details, 2 November 2022 ("Request regarding witness contact details"), paras. 3-10, 23-24; Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-CA-2022-01/F00098, Haradinaj Request for Order to the SPO to Release Video Recordings, 11 December 2022 ("Request regarding video recordings").

[94] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-CA-2022-01/F00094, Decision on Defence Requests to Interview Witnesses, to Order an Updated Rule 102(3) Notice and to Adjourn the Appeal Hearing, 28 November 2022 ("Decision on interviewing witnesses"), paras. 14-22; Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-CA-2022-01/F00105, Decision on Haradinaj Request to Order the SPO to Disclose Material under Rule 102(3) or Rule 103 of the Rules, 16 January 2023 ("Decision regarding Disclosing Material").

error in the Trial Panel's finding that the Appellants' claim of entrapment/incitement was wholly improbable and unfounded. It is submitted that this resulted in a substantial violation of the right to a fair hearing to which the Appellant is entitled under Article 21(2) of the Law.

68. The Appellant's procedural disadvantage was in fact compounded by his lack of access to evidence to which both the Trial Chamber and the SPO had access in violation of his fair trial rights under Article 6(1) of the ECHR. The Trial Panel determined in *ex parte* proceedings that certain items were material in the context of entrapment allegations but that their full disclosure would prejudice ongoing SPO investigations and accordingly should not be permitted.[95]

69. The Appeals Panel enumerates, and attaches significant weight to, the measures that the Trial Panel took in order to prevent prejudice and unfairness to the Appellant.[96] However, in doing so the Appeals Panel failed to give attention to the evidential value of what the Appellant was not permitted to access, including interviews with certain individuals[97] and parts of items of evidence which the Trial Panel found to be material but which

[95] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07/F00413RED, Public Redacted Version of Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice, 3 November 2021 ("3 November 2021 Disclosure Decision"), paras. 62-74; Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-7/F00435RED, Public Redacted Version of Decision on the Prosecution Request Related to Rule 102(3) Notice Item 201, 15 November 2021 ("15 November 2021 Disclosure Decision"), paras. 15-25.

[96] Appeal Judgment, paras. 80 and 81.

[97] Decision on interviewing witnesses, paras. 14-22.

were not fully disclosed.[98] In view of the circumstantial nature of the evidence for entrapment, the significance of some of what was not disclosed may not have been readily apparent to the Trial Panel in the proceedings from which the Appellant was excluded. Such material may have been of determinative importance in the trial in view of its possible relation to entrapment.[99] Accordingly, the Appeals Panel substantially violated the requirements of a fair trial by finding no error in the criteria applied by the Trial Panel in not granting the Appellant full access.[100]

70. Finally, this was compounded by the Appeals Panel as there was no possibility of interlocutory appeal against Decisions in which the Appeals Panel denied requests for interviews and other evidence, as explained above[101] and by not permitting the Defence the opportunity to test that evidence on appeal. In light of the potential effect of those Decisions on the outcome of the proceedings, the absence of any avenue of review further exacerbates the procedural disadvantages of the Appellant in establishing entrapment.

Ground 6: Challenges to impartiality of Judges

[98] 15 November 2021 Disclosure Decision, paras 19, 24; 3 November 2021 Disclosure Decision, paras. 68, 73, 74.

[99] Cf. Edwards and Lewis v. UK, Judgment, 27 October 2004, ECtHR, Appl Nos. 39647/98, 40461/98, para. 46.

[100] Decision on interviewing witnesses; Decision regarding Disclosing Material

[101] Ibid.

71. The right to a fair hearing implies that criminal proceedings will be conducted by an independent and impartial tribunal established by law, as set forth in Articles 27 and 31 of the Law, Article 6(1) of the ECHR and in Article 31(2) of the Kosovo Constitution. Article 6(1) does not guarantee a right of appeal from a decision by a court complying with Article 6 in a criminal case, but if a state provides a right of appeal, proceedings before the appellate court should be governed by Article 6(1).[102] Pursuant to Article 46 of the Law, a Court of Appeals Panel of the Specialist Chambers shall hear appeals against judgement by a Trial Panel. Accordingly, the judges of the Appeals Panel should meet the standards for impartiality.

72. Impartiality is determined by both a subjective and an objective test.[103] In *Hauschildt v. Denmark,* the ECtHR held:

> *"Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused. Accordingly, any judge in respect*

[102] Delcourt v. Belgium, Judgment, 17 January 1970, ECtHR, Application No. 2685, para. 25.

[103] Hauschildt v. Denmark, Judgment, 24 May 1989, ECtHR, Application No. 10486/83, para. 46.

of whom there is a legitimate reason to fear a lack of impartiality must withdraw."[104]

What is decisive is whether the fear that a particular judge lacks impartiality can be held objectively justified.[105]

73. Members of the Appeals Panel that decided on the appeal against the Trial Judgment also sat on panels hearing interlocutory appeals at the pre-trial (and trial) phase, in particular one relating to disclosure of material on the removal of proposed Witnesses DW1250 and DW1251 from the Appellant's List of Potential Witnesses and the limitation of the expert evidence of Witness DW1253[106] and another to the origin and provenance of the material contained within the Three Batches and attempts by the SPO to identify and trace the individual(s) making the disclosure of the Three Batches.[107]

74. The ECtHR has held that the mere fact that a judge has also made pre-trial decisions in a case cannot be taken as in itself justifying fears as to impartiality.[108] What matters is the extent and nature of the pre-trial measures

[104] Hauschildt v. Denmark, para. 48. See also Fey v. Austria, Judgment, 24 February 1993, ECtHR, Application No. 14396/88, para. 30; Piersack v. Belgium, 1 October 1982, ECtHR, Application No. 8692/79, para. 30.

[105] Hauschildt v. Denmark, para. 48.

[106] KSC-BC-2020-07/IA006/F00006, Decision on Nasim Haradinaj's Appeal Against Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, 7 January 2022 ("Decision on Defence Witnesses") (Judges Picard and Jørgensen).

[107] KSC-BC-2020-07/IA005/F00008, Decision on Appeals against Disclosure Decision, 29 July 2021 ("Disclosure Decision") (Judges Picard and Jørgensen).

[108] Hauschildt v. Denmark, para. 50.

taken by the judge.[109] In the instant case the Judges on the Appeals Panel that issued the Appeal Judgment had already taken positions on key issues that were addressed in the Appeal Judgment,[110] consequently undermining the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused. In the Appeal Judgment, the Appeals Panel fails to address the fact that they have made interlocutory rulings on matters that were determined on the substantive appeal and whether they were considered *de novo*.

75. It follows that there are ascertainable facts which may raise doubts as to the impartiality of the Judges on the Appeals Panel that issued the Appeal Judgment and that the objective test for impartiality has not been met. Accordingly, the composition of the Appeals Panel violates the requirement of Article 21(2) of the Law that an accused is entitled to a fair hearing. There has therefore been a substantial violation of the procedures set out in the Law.

Ground 7: Public Interest Defence

76. The Appeals Panel found that the Appellant failed to demonstrate an error in the finding of the Trial Panel that the public interest defence was properly made out and applicable under Kosovan law and that it did not apply to the

[109] Fey v Austria, para. 30.

[110] Appeal Judgment, paras. 90-97 (the refusal to hear the testimony of DW1250 and DW1251 in Decision on Defence Witnesses) and paras. 74-81 (disclosure of material relevant to entrapment/incitement in Disclosure Decision).

Appellant.[111] It followed the Trial Panel's narrow definition of public interest in this context as "limited to evidence that would suggest that some of the material allegedly disclosed by the Accused contain indications of improprieties occurring in the context of the cooperation between the Republic of Serbia (or its officials) and the SITF/SPO, which would have affected the independence, impartiality or integrity of the SITF/SPO's investigation".[112] This does not take account of the stance that Serbia has taken over the years towards Kosovo and the sheer volume of the contacts of the SITF/SPO with Serbian officials, some of whom served in the Milošević regime, which gravely undermines the independence, impartiality and integrity of the investigations.[113] As a result of the failure of the Appeals Panel to find an error, the Appellant's right to a fair hearing under Article 21(2) of the Law has been breached. This amounts to a substantial violation of the procedures set out in the Law.

V. REQUEST FOR AN ORAL HEARING

[111] Appeal Judgment, paras. 334-337.

[112] Trial Judgment, para. 808.

[113] Haradinaj Appeal Brief, para. 113.

77. The Law and the Rules do not preclude an oral hearing on a request for protection of legality. It is submitted that such a hearing would be in the interests of justice.

78. It is evident that the instant request raises a number of questions concerning the application of provisions of the Law and the Rules and, in some instances, the nature of the rights available under the Law which are protected under the ECHR and part of the domestic law to the which Specialist Chambers is bound as a domestic institution. In addition, it is the first request for protection of legality in respect of a judgment issued by a Panel of the Court of Appeals Chamber. The decision of the Panel of the Supreme Court Chamber will, therefore, not take place in the context of prior practice in a proceeding of the same nature.

79. Besides, the decision of the Appeals Panel to hold an oral hearing on the appeals of both Accused against the Trial Judgment provides further support.[114] In its Order the Appeals Panel was satisfied that an appeal hearing was necessary "taking into consideration the specific circumstances of this case, including the length and complexity of the Trial Judgment."[115] Essentially the same considerations are applicable at the present stage since

[114] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-CA-2022-01/F00074, Order Scheduling an Appeal Hearing, 20 October 2022 ("Scheduling Order").

[115] Scheduling Order, para. 9.

the Appeal Judgment is almost 200 pages in length, no less complex than the Trial Judgment and raises fundamental legal issues.[116]

80. For these reasons the Defence requests an oral hearing in regard to the present request for protection of legality.

VI. CONCLUSION

81. It is submitted that:

(a) In affirming the conviction of the Appellant on Counts 1, 3 and 6 the Appeals Panel acted in violation of Articles, 401(1), 387 and 392(2) of the KCC;

(b) In imposing a single sentence of four years and three months of imprisonment (with credit for time served) and affirming a fine of 100 EUR and, more particularly, in accepting the sentence imposed by the Trial Panel for Count 3 the Appeals Panel acted in violation of Article 44(5) of the Law;

(c) In determining the threshold that the Appellant has to meet before the Prosecution has the burden of proving that there has been no entrapment, the Appeals Panel erred in law with the result that the

[116] E.g. Partially Dissenting Opinion of Judge Kai Ambos (challenging the interpretation by the Majority of Article 401(1) of the KCC on the basis of the principle of legality).

Appellant did not have a fair hearing in substantial violation of the procedures set out in Article 21(2) of the Law;

(d) In rendering the Appeal Judgment with the composition ordered by the President,[117] the Appeals Panel did not provide a fair hearing in substantial violation of the procedures set out in Article 21(2) of the Law; and

(e) The Appeals Panel erred in the application of the legal criteria in upholding the finding of the Trial Panel that the public interest defence was not available to the Appellant.

82. The Defence requests that the Supreme Court Panel:

a) Make a finding of the existence of the violations of law in the Appeal Judgment as set out herein; and

b) Return the case to a Panel of the Court Appeals Chamber with a different composition for a new decision on the Appellant's appeal from the Trial Judgment in light of the correct determinations of the law.

Word Count: 9,988 words

[117] Decision Assigning a Court of Appeals Panel, KSC-CA-2022-01/F00011, 21 June 2022.

Toby Cadman

Specialist Counsel

Tuesday, 02 May 2023

At London, United Kindom