In:	**KSC-SC-2023-01**
	The Prosecutor v. Hysni Gucati and Nasim Haradinaj
Before:	**A Panel of the Supreme Court Chamber**
	Judge Ekaterina Trendafilova, Presiding
	Judge Christine van den Wyngaert
	Judge Daniel Fransen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Nasim Haradinaj
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Haradinaj Reply to Prosecution Consolidated Response to Requests for Protection of Legality

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I. INTRODUCTION

1. Following the Trial Judgment[1] and the Appeal Judgment,[2] Mr. Nasim Haradinaj ("Appellant") submitted the Re-filed Request for Protection of Legality on 9 May 2023[3] ("Request"). On 3 July 2023, the Specialist Prosecutor's Office ("SPO") submitted the Prosecution consolidated response to requests for protection of legality[4] ("Response").

2. The Appellant hereby submits his Reply to the Response. Where the submissions in the Response are not addressed, they are not accepted, unless stated to the contrary. The submissions in the Request are maintained except where otherwise stated.

II. SUBMISSIONS

OBSTRUCTION (KCC 401)

3. The Trial Panel found that a serious threat against third parties could be sufficient for Article 401(1) of the Kosovo Criminal Code 2018[5] ("KCC").[6] The Appeals Panel, Judge Ambos dissenting, found no error in the Trial Panel's

[1] Public Redacted Version of the Trial Judgment, KSC-BC-2020-07/F00611/RED, 18 May 2022 (with three annexes) ("Trial Judgment").

[2] Appeal Judgment, KSC-CA-2022-01/F00114, 2 February 2023 ("Appeal Judgment").

[3] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-SC-2023-01/F00009.

[4] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-SC-2023-01/F00014.

[5] Code No. 06/L-074.

[6] Trial Judgment, para. 647.

assessment.[7] The Appellant submits that the interpretation of KCC 401(1) by the Majority expands its scope beyond its natural reading in a manner detrimental to defendants and that it violates KCC 2(3) and Article 7 of the European Convention on Human Rights ("ECHR").[8]

4. The SPO raises several objections, all of which are flawed. Moreover, the SPO makes submissions on the basis of the alleged purposes of KCC 401(1)[9] which are circular to the extent that they closely resemble their interpretation of the provision.

5. It repeats its submission that KCC 401(1) should be read expansively to the extent that this is not prohibited by a literal interpretation.[10] As the Request makes clear, such an interpretation exceeds an ordinary and logical understanding of the provision and is to the detriment of the Appellant.[11]

6. The SPO points out that upholding the principle of legality still allows for judicial interpretation of the applicable law as long as the judicial development is consistent with the '"essence of the offence" (i.e. the existing

[7] Appeal Judgment, para. 285.

[8] Request, paras. 16, 17.

[9] Response, paras. 29, 30.

[10] Response, paras. 27, 31, 34. See Prosecution Brief in Response to Defence Appeals, para. 110.

[11] Response, paras.16-18.

law) and could have been reasonably foreseen'.[12] It submits that its interpretation of KCC 401(1) meets these criteria.[13]

7. The European Court of Human Rights (ECtHR) confirmed in *G.I.E.M. S.R.L. and Others v. Italy*, 'the principle that offences and sanctions must be provided for by law entails that criminal law must clearly define the offences and the sanctions by which they are punished, such as to be accessible and foreseeable in its effects'.[14] The SPO interpretation of KCC 401(1) could not have been reasonably foreseen because it is at variance with the ordinary and logical understanding of the provision.

8. Whilst the standard of foreseeability reflected in the jurisprudence of the ECtHR is met in the present case, a lower standard is called for, as the ECtHR applies its standard to determine serious violations of human rights as defined in the ECHR. Whereas the Kosovo Specialist Chambers ("KSC") are mandated to not only to comply with the ECHR, but also KCC 2 and Article 33 of the Kosovo Constitution. It is for these reasons that Trial Chamber II of the International Criminal Court expressed a more exacting standard of foreseeability in the *Katanga case*.[15]

[12] Response, para. 63.

[13] Response, para. 32.

[14] *G.I.E.M. S.R.L. and others v. Italy*, Judgment, 28 June 2018, ECtHR, Application No. 1828/06, para. 242.

[15] Prosecutor v. Katanga, Judgment, 7 March 2014, ICC, 01/04-01/07-3436, para. 52.

9. The SPO submission that its interpretation was reasonably foreseeable on the grounds that "Gucati and Haradinaj knew that their actions were both unlawful and could obstruct the SPO — indeed it was their express intention to do so"[16] is fallacious. The knowledge ascribed to them does not have implications for whether a particular interpretation of KCC 401(1) was reasonably foreseeable.

10. The SPO's submission suggests that a finding that the interpretation by the Majority of the Appeals Panel does not align precisely with the statutory language of KCC 401(1) would disallow any interpretation of flexible statutory language that the law intended to permit.[17] However, the Appellant's rejection of the Majority's interpretation does not have such sweeping implications, since it only concerns interpretations that are to the detriment of an accused, as specifically addressed in KCC 2(3).

11. Contrary to the SPO's claim,[18] the Appellant's position on KCC 401(1) does not imply a failure of understanding how threatening potential witnesses could hinder the work of the KSC and the SPO. This SPO submission does not justify a deviation from the natural meaning of KCC 401(1) which would violate KCC 2(3).

[16] Response, para. 32.

[17] Response, para. 33.

[18] Response, para. 28.

INTIMIDATION (KCC 387)

12. In the Request the Appellant submitted that the Trial Panel and the Appeals Panel erred in finding that the qualifier in KCC 387 "when such information relates to obstruction of criminal proceedings" only relates to the third of the three acts or omissions which the perpetrator intends to induce.[19]

13. The SPO states that the Defence position "would lead to an absurd interpretation where only witnesses privy to information about obstruction would be intimidated".[20] This appears to rest on the title of the Article ("Intimidation during criminal proceedings") which is much broader than the Appellant's interpretation of its content. However, titles of Articles in the KCC are not intended to be precise descriptions of the acts falling under them. This is demonstrated by the very next Article, KCC 388, which is entitled simply "Retaliation", but has in fact a much narrower scope.

14. The SPO further submits that KCC 386 governs obstruction generally across all 'official proceedings', whereas KCC 387 specifically addresses intimidation of those with information in 'criminal proceedings' as requiring special legal protection. In its submission, the unique harm caused in the latter context justifies a separate offence with higher penalties.[21] This argument fails because

[19] Request, paras. 22-29.

[20] Response, para. 39.

[21] Response, para. 41.

KCC 386(1)(3) explicitly covers intimidation of those with information in 'criminal proceedings'.

15. The Response does not address two of the Appellant's key submissions: that the Appeals Chamber falsely states that the qualifier is placed directly after the third alternative act or omission and consequently arrives at an interpretation that is inconsistent with the wording of the Article;[22] and that the interpretation of the Appeals Chamber would result in a glaring imbalance between the first two alternative acts or omissions and the third.[23]

SECRECY OF PROCEEDINGS (KCC 392(2))

16. The Trial Panel held that, in line with Article 62 of the Law on Specialist Chambers and Specialist Prosecutor Office No 05/L-053 ("Law"), a "person under protection in the criminal proceedings" in KCC 392(2) can also be a person whose identity or personal data appear in KSC or SPO documents or records the disclosure of which has not been authorised.[24] The Appeals Panel found that the Defence had failed to demonstrate an error in the Trial Panel's position on this point.[25]

[22] Request, paras. 23-24.

[23] Request, paras. 25, 27.

[24] Trial Judgment, para. 95.

[25] Appeal Judgment, paras. 181-187.

17. In the Request the Appellant submitted that Article 62 of the Law has been inappropriately applied in the interpretation of KCC 392(2).[26] The SPO responded that it follows from "the plain meaning" of KCC 392(2) that persons named in confidential documents not authorised for disclosure are "under protection in criminal proceedings".[27]

18. The inference that the SPO draws here is erroneous because it does not take account of Article 23(1) of the Law which, like KCC 392(2) but unlike Article 62 of the Law, makes reference to persons "subject to protection".

19. Article 23(1) of the Law sets out measures for the protection of victims and witnesses including their safety, physical and psychological well-being, dignity and privacy. Article 62 renders unauthorised the disclosure of information on the identity or personal data of *any* person referred to in a KSC or SPO document, whether or not that person is the subject of a measure of protection under Article 23(1) of the Law. Because of its use of the language of protection, Article 23(1) rather than Article 62 should therefore be used to interpret KCC 392(2).

SENTENCING

[26] Request, paras. 35, 39.

[27] Response, para. 51.

20. The SPO asserted that the Defence alleged a violation of Article 44(5) of the Law, focusing solely on how factual findings were weighed in determining the sentences for the Appellant.[28] The SPO also imply that this lies outside the scope of a request for protection of legality.[29]

21. The focus in paragraphs 52-58 of the Request is on factual findings in relation to Count 3 as a basis for a submission that the actual gravity of the crime under Article 387 has not been taken into account and that, accordingly, there has been a violation of Article 44(5) of the Law. This is a submission of "a violation of the criminal law contained within [the Law]" and is within the ambit of a request for protection of legality under Article 48(7)(a).

22. The SPO does not further address the detailed submissions in paragraphs 47-59 of the Request in regard to the sentence under Count 3 which is of significant consequence for the Appellant.[30]

23. In the Request the Appellant also submits that the Trial Panel did not give adequate attention to the case of *Domagoj Margetić*.[31] The SPO in its Response sets forth detailed differences between *Margetić* and the instant case.[32] Such

[28] Response, para. 69.

[29] Response, para. 69.

[30] Request para. 50.

[31] Request, para. 44 (referring to *Prosecutor v. Margetić*, Trial Judgement, 7 Febuary 2007, ICTY IT-95-14-R77.6).

[32] Response, paras. 71-77.

differences are not in question. Attention should be given to *Margetić* because it resembles that of the Appellant much more closely than the cases the Trial Panel gave in support of its statement that it noted the range of sentences imposed on persons convicted of similar offences at international courts or tribunals.[33]

ENTRAPMENT

24. The Appeals Panel upheld the finding of the Trial Panel that the Defence claim of entrapment was wholly improbable and unfounded.[34] The Appellant's case is that in reaching this conclusion the Appeals Panel employed a criterion that was not legally justified.[35] In its Response the SPO argues that the Defence interpretation of the applicable threshold misconstrued the jurisprudence of the ECtHR.[36]

25. In *Matanović v. Croatia*[37] the ECtHR held that in order to proceed with further assessment of entrapment the Court must satisfy itself that the situation under examination falls *prima facie* within the category of "entrapment cases".[38] The basic facts as found by the Trial Judgment establish that this is indeed the case:

[33] Trial Judgment, para. 979.

[34] Appeal Judgment, para. 374.

[35] Request, para. 60.

[36] Response, para. 60.

[37] *Matanović v. Croatia*, Judgment, 4 April 2017, ECtHR, Application no. 2742/12.

[38] *Matanović*, para. 131.

- Prior to the Indictment Period, Hysni Gucati and Nasim Haradinaj made statements expressing hostility towards the KSC.[39]

- Hysni Gucati and Nasim Haradinaj received on 7, 16 and 22 September 2020 three sets of papers.[40] The persons who delivered them are unknown.[41]

- The first two sets contained documents related to investigations by the SPO and the Special Investigative Task Force ("SITF").[42] The third set contained two incomplete copies of an internal SPO work product analysing evidence and related legal considerations in relation to five SPO suspects.[43]

- The three sets contained documents which SITF/SPO treated as confidential in the performance of its functions.[44]

- The Appellant publicised, made available and/or disseminated the three sets during press conferences and other media appearances.[45]

[39] Trial Judgment, para. 855.

[40] Trial Judgment, paras. 207, 243, 275, 300.

[41] Trial Judgment, paras. 207-209, 243-244, 275.

[42] Trial Judgment paras. 379, 380.

[43] Trial Judgment, para. 381.

[44] Trial Judgment, para. 458.

[45] Trial Judgment, para. 300.

These facts, as found by the Trial Chamber, establish that it is not wholly improbable that by engineering the delivery of the three Sets the SPO took actions that constituted entrapment.

26. The SPO applies an incorrect criterion when they assert that there is simply no evidence that Gucati and Haradinaj were influenced by the SPO, or anyone else, in the actions that they took.[46] In light of *Matanović*, *prima facie* evidence of the specific elements of entrapment, as per the definition in *Ramanauskas v. Lithuania*,[47] is not required. A *prima facie* case for entrapment is required and this rests on the facts found by the Trial Panel.

27. Once the Court is satisfied that the situation under examination falls *prima facie* within the category of entrapment cases, it should proceed to a substantive test of incitement, answering whether the offence would have been committed without the authorities' intervention.[48] Should the substantive test be inconclusive due to a lack of information, the Court proceeds to a procedural test of incitement.[49] The ECtHR confirmed that it, "applies this test in order to determine whether the necessary steps to uncover the circumstances of an arguable plea of incitement were taken by the domestic courts and … in a case in which the prosecution failed to prove that

[46] Response, para. 61.

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

[48] *Ramanauskas, para. 55.*

[49] *Matanović*, para. 134.

there was no incitement, the relevant inferences were drawn in accordance with the Convention".[50]

28. The SPO further made submissions that the Appellant's arguments regarding denial of access to information neglected the lengths the Trial Panel went to ensure their procedural rights.[51] Like the Appeals Panel,[52] the SPO enumerates the measures taken in order to prevent prejudice and unfairness to the Appellant,[53] but does not address the procedural disadvantages that remained and were outlined in paragraphs 67 and 68 of the Request.

IMPARTIALITY OF JUDGES

29. The Appellant submits that the composition of the Appeals Panel that decided on the appeal against the Trial Judgment was in violation of the fair hearing requirement of Article 21(2) of the Law because some of its members also sat on interlocutory appeals at an earlier stage in which they took positions on key issues that were addressed in the Appeal Judgment.[54]

30. The SPO submitted that that the Appellant never raised this matter with the Appeals Chamber or through the procedures in Rules 20(3) to 20(6).[55]

[50] *Matanović*, para. 135.

[51] Response, para. 59 (referring to Request, paras. 67-69).

[52] Appeal Judgment, paras. 80-81.

[53] Response, para. 59.

[54] Request, paras. 72-74.

[55] Response, para. 13.

However, the Appellant's request meets the requirements of Article 48(7)(b) of the Law. It is no less a substantial violation of the procedures set out in the Law because it has not yet been raised in the proceedings. In addition, the practical difficulties and routine practice referred to in paragraph 15 of the Response do not remove the obligation to meet the fair hearing requirement in Article 21(2).

31. On the substance the SPO submits that the Appellant presents no evidence to rebut the presumption of the personal impartiality of a judge[56] and that he does not explain how the allegations on this ground materially affected the Appeal Judgment[57] or present any precise legal authority in support.[58]

32. These submissions rest on confusion between the subjective and objective tests of impartiality. In *Hauschildt v. Denmark*, the ECtHR held that impartiality for the purposes of Article 6(1) of the ECHR must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered sufficient guarantees to exclude any legitimate doubt in this respect. [59] Indeed, the objective prong of the test is

[56] Response, para. 16.

[57] Response, para. 17.

[58] Response, para. 17.

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

reflected in the maxim, "justice must not only be done: but must be seen to be done".[60]

33. What is at issue is the objective test, which does not concern the judge's personal conduct, but whether there are ascertainable facts which may raise doubts as to their impartiality and "[i]n this respect even appearances may be of a certain importance".[61] In *De Cubber v. Belgium*, the ECtHR emphasised that, "a restrictive interpretation of Article 6 para. 1 (art. 6-1) - notably in regard to observance of the fundamental principle of the impartiality of the courts - would not be consonant with the object and purpose of the provision".[62]

34. Because of the nature of the prior involvement of judges on the Appeals Panel in interlocutory matters at issue on appeal the requirements of the objective test of impartiality are not met.[63] Evidence pertaining to personal impartiality is not relevant.

PUBLIC INTEREST

35. The Appeals Panel affirmed the Trial Panel's finding that the Appellant's criminal responsibility could not be excluded by considerations of public

[60] *See De Cubber v. Belgium*, Judgement, 26 October 1984, Application No. 9186/80, para. 26.

[61] *Hauschildt*, para. 48.

[62] *De Cubber*, para. 30.

[63] Request, paras. 72-73.

interest.[64] In the Request the Appellant submitted that the Trial Panel's narrow definition of public interest in this context[65] did not take account of factors that gravely undermined the independence, impartiality and integrity of the investigation by SITF/SPO and therefore led to a breach of the Appellant's right to a fair hearing under Article 21(2) of the Law.[66] The SPO responded that the Trial Panel's rejection of the Appellant's position depended on matters of fact which went beyond the scope of requesting protection of legality.[67] However, the Appellant's arguments concern the definition of "public interest" rather than the factual basis for determining whether it excludes the Appellant's criminal responsibility.

III. RELIEF SOUGHT

36. The Appellant requests the Supreme Court Panel to modify the impugned judgment in respect of Counts 1, 3, 5 and 6 to give effect to the principle of legality or, in the alternative, return the case to the appropriate panel for retrial.

Word Count: 3,000 words

[64] Trial Judgment, para. 824; Appeal Judgment, para. 340.

[65] Trial Judgment, para. 108.

[66] Request, para. 75.

[67] Response, para. 63.

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Thursday, 03 August 2023

At London, United Kingdom