In:	**KSC-CC-2023-22**
	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
Date:	20 November 2023
Language:	English
Classification:	**Confidential**

Haradinaj Defence Referral to the Specialist Chamber of the Constitutional Court

---

Specialist Prosecutor's Office

Kimberly P. West

Counsel for Nasim Haradinaj

Toby Cadman

Almudena Bernabeu

John Cubbon

Counsel for Hysni Gucati

Jonathan Elystan Rees KC

Huw Bowden

Eleanor Stephenson

I. INTRODUCTION

1. Further to Article 113(7) of the Constitution of the Republic of Kosovo[1] ("Constitution"), Article 49(3) of the Law on Specialist Chambers and Specialist Prosecutor's Office[2] ("Law") and Rule 4(c) of the Rules of Procedure for the Specialist Chamber of the Constitutional Court of Kosovo[3] ("RPSCCC"), the Defence for Mr. Nasim Haradinaj ("Appellant" or "Accused") files this Referral to the Specialist Chamber of the Constitutional Court.

2. The Appellant submits that the Appeals Panel and the Supreme Court Panel acted in breach of:

(a) Article 33(1) of the Constitution and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") in their interpretation of Articles 401(1), 387 and 392(2) of the Kosovo Criminal Code 2018 ("KCC") as applied in Counts 1, 3 and 6;[4]

[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 ("Appeal Judgment"), paras. 281-285, 221-222, 181-187; Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-SC-2023-01/F00021, Decision on Requests for Protection of Legality, 18 September 2023 ("Supreme Court Decision"), paras. 40-48, 59-62, 81-82.

(b) Article 31(2) of the Constitution and Article 6(1) of the ECHR in their findings on entrapment/incitement;[5] and

(c) Article 10 of the ECHR in not concluding that a finding of criminal responsibility in this case was a violation of the Appellant's right to freedom of expression.[6]

3. The Appellant therefore requests that the Specialist Chamber of the Constitutional Court find that the convictions of the Appellant on Counts 1, 3, 5, and 6 of the Indictment are in breach of the Constitution or, in the alternative schedules an oral hearing so that such argument can be properly, and fairly, present to the Specialist Chamber of the Constitutional Court.

II. PROCEDURAL HISTORY

4. On 18 May 2022, the Trial Panel delivered the Trial Judgment,[7] in which it found Hysni Gucati and Nasim Haradinaj guilty on Counts 1, 2, 3, 5 and 6 of the Indictment and not guilty on Count 4.[8] The Trial Panel sentenced each of

[5] Appeal Judgment, paras. 361-368; Supreme Court Decision, paras. 92-96.

[6] Appeal Judgement, paras. 334-337.

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

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

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.[9]

5. On 19 August 2022, both Accused filed their appeal briefs.[10] On 31 August 2022, the Appellant filed a corrected version of his appeal brief, and on 2 September 2022, a further corrected version.[11]

6. On 21 September 2022, the Specialist Prosecutor's Office ("SPO") filed its response brief.[12] On 6 and 7 October 2022, the Accused filed their reply briefs.[13]

7. On 12 October 2022, the Appeals Panel ordered the Appellants to refile their reply briefs in compliance with the Practice Direction on Files and Filings before the Kosovo Specialist Chambers.[14]

[9] Trial Judgment, paras 1014, 1017.

[10] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-CA-2022-01/F00036, Gucati Appeal Brief, 19 August 2022, confidential; 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.

[11] 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").

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

[13] 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.

[14] 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.

8. On 16 and 17 October 2022, the Appellants refiled their respective reply briefs.[15]

9. On 2 February 2023 the Panel of the Court of Appeals Chamber ("Appeals Panel") issued its Appeal Judgment.[16] The Appeals Panel reversed the conviction of both Appellants on Count 2 and affirmed their convictions on Counts 1, 3, 5, and 6 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.[17] Judge Kai Ambos delivered a Partially Dissenting Opinion in respect of the *actus reus* of Article 401(1) of the KCC,[18] as applied in Count 1.

10. On 9 May 2023 the Appellant submitted the Re-filed Request for Protection of Legality[19] ("Request for Protection of Legality").

11. On 3 July 2023 the Specialist Prosecutor's Office ("SPO") submitted the Prosecution Consolidated response to requests for protection of legality[20].

[15] 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 ("Gucati Brief in Reply"); 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.

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

[17] Appeal Judgment, para. 442.

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

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

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

12. On 2 August 2023 the Appellant submitted the Haradinaj Reply to Prosecution Consolidated Response to Requests for Protection of Legality.[21]

13. On 18 September 2023 the Specialist Chamber of the Supreme Court issued the Decision on Requests for Protection of Legality[22] ("Supreme Court Decision"), in which it, *inter alia*, rejected both Appellants' requests in their entirety.[23]

14. It is noted that the Specialist Chamber of the Supreme Court declined to order an oral hearing and proceeded to an 'on the papers' review of the Requests for Protection of Legality, based on solely on the respective requests for legal protection and the SPO consolidated response.

15. On 12 October 2023, the President of the Specialist Chambers issued a Decision on Commutation, Modification or Alteration of Sentence in regard to Mr. Haradinaj,[24] in which she decided that commutation of the Appellant's sentence was not appropriate and was therefore not granted.[25]

[21] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-SC-2023-01/F00019.

[22] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-SC-2023-01/F00021.

[23] Supreme Court Decision, para. 126.

[24] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-SC-2023-01/CS002, Decision on Commutation, Modification or Alteration of Sentence, confidential, 12 October 2023 ("October 2023 Decision").

[25] October 2023 Decision, para. 78.

III. APPLICABLE LAW

16. Article 113(7) of the Constitution provides:

> "*Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.*"

17. Article 49(3) of the Law specifically grants to individuals, including the accused and victims, the power to make referrals under Article 113(7) to the Specialist Chamber of the Constitutional Court in relation to alleged violations by the Specialist Chambers of individual rights and freedoms.[26]

18. Individual rights and freedoms are set forth in Articles 21 to 56 of the Constitution. Pursuant to Article 22(2), human rights and fundamental freedoms guaranteed by, *inter alia*, the ECHR and its Protocols are guaranteed by the Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions.

19. Article 33(1) of the Constitution provides: "*No one shall be charged or punished for any act which did not constitute a penal offense under law at the time it was committed, except acts that at the time they were committed constituted genocide, war*

[26] See also Rule 20(1) of the RPSCCC.

crimes or crimes against humanity according to international law." The same principle is expressed in Article 7 of the ECHR.

20. Article 31(2) of the Constitution provides: "*Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law*." This principle is also contained in Article 6(1) of the ECHR.

21. Article 10 of the ECHR provides, *inter alia*:

> "*(1) Everyone has the right to freedom of expression….*
>
> "*(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*"

IV. LEGAL ARGUMENTS

Scope of Referral to the Specialist Chamber of the Constitutional Court

22. The Appeals Panel heard the Appellant's appeal against the Trial Judgment pursuant to Article 46(1) of the Law. It was the Appellant's case that the Appeal Judgment included violations of the criminal law contained within the Law, substantial violations of the procedures set out in the Law and violations of rights available under the Law which are protected under the Constitution and the ECHR.[27] These allegations lay outside the scope of Third Instance Appellate Proceedings in Article 47 of the Law. The only Extra-ordinary Legal Remedy available under Article 48 of the Law was a request for protection of legality under Articles 48(6) and 48(7). Since this request was dismissed in the Supreme Court Decision, the requirement of exhaustion of all legal remedies provided by law in Article 113(7) of the Constitution has been met.

23. The Supreme Court Panel held that "[a]rguments that reasonably could have been raised before the first and second instance panels, cannot be raised *de novo* before the Supreme Court Panel."[28]

[27] Request for Protection of Legality, para. 2.

[28] Supreme Court Decision para. 10.

24. In deciding upon the instant referral the Constitutional Court Panel may consider taking the same position. The Appellant will therefore set out here the reasons for not doing so.

25. When dismissing arguments that could reasonably have been raised earlier in the proceedings, the Supreme Court Panel stated: "Notably, this standard has been developed in the jurisprudence of the Court of Appeals Panel. The Supreme Court Panel does not see a reason not to endorse the same standard when addressing a request for protection of legality. Logically, the standard applicable before the Supreme Court Panel, if not equal to the one applied by the Court of Appeals Panel, should be at least equal or narrower."[29]

26. The argumentation of the Supreme Court Panel is based on the appeal process, which is different from decisions on referrals to the Constitutional Court and requests for protection of legality. The authorities that the Panel cites in support[30] all concern appeals from first-instance Decisions[31] and therefore are not directly applicable. Referrals to the Constitutional Court address matters of special legal importance and therefore a failure to bring

[29] Supreme Court Decision, n. 20.

[30] Supreme Court Decision, n. 20.

[31] Prosecutor v. Orić, MICT-14-79, Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015, 17 February 2016, para. 14; André Rwamabuka v. The Prosecutor, Case No.: ICTR-98-44C-A, Decision on Prosecutor's Notice of Appeal and Scheduling Order, 18 April 2007, para. 6; Prosecutor v. Boškoski and Tarčulovski, Case No. IT-04-82-A, Judgement, 19 May 2010, para. 244. The Rwamabuka Decision in fact includes a Partially Dissenting Opinion which gives examples of the Appeals Chamber of the ICTY/ICTR addressing arguments that were not advanced at an earlier stage and asserts that the failure to raise an argument before a Trial Chamber does not constitute an absolute bar to the filing of an appeal. Partially Dissenting Opinion of Judge Shahabudeen.

them to the attention of the courts at an earlier stage should not be an impediment to their proper consideration on the merits. Besides there is no statutory provision whereby matters which could reasonably have been raised at an earlier stage but were not may not be considered in a referral to the Court. A smaller range of issues tend to be addressed as one progresses up the tiers of review in domestic and international judicial systems. However, this is a general tendency not a logical necessity, as the Supreme Court Panel suggests.

27. Equally, the Appellant will present or incorporate by reference arguments which he has already advanced at earlier stages of the proceedings. This is no more objectionable than making submissions that are entirely new. There is no prohibition in the law. Moreover, it is well-established in domestic jurisdictions that higher-tier judicial bodies may accept legal positions that lower-tier bodies have rejected.

Violations of Article 33(1) of the Constitution and Article 7 of the ECHR

28. It is the Appellant's submission that he was found guilty of crimes under unjustifiably broad interpretations of Articles 401(1), 387 and 392(2) of the KCC which are such that his actions did not constitute criminal offences under these Articles at the time that they were committed.

29. Article 7(1) of the ECHR provides in relevant part: "*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed*."

30. Here the term "law" implies implies qualitative requirements, notably those of accessibility and foreseeability.[32] In *Cantoni v. France*, the ECtHR set out the principle underlying Article 7 and its implications. The Article embodies, *inter alia*, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy.[33] From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.[34]

31. The ECtHR held in *Vasilauskas v. Lithuania*:

> *"The Court reiterates that however clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of*

[32] Del Río Prada v. Spain, Judgment, 21 October 2013, ECtHR, Application no. 42750/09, para. 91.

[33] Cantoni v. France, Judgment, 11 November 1996, ECtHR, Application no. 17862/91, para. 29.

[34] Cantoni v. France, Judgment, 11 November 1996, ECtHR, Application no. 17862/91, para. 29.

doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial interpretation is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen."[35]

(i) Article 401 of the KCC

32. The Trial Panel found the Appellant guilty of Obstructing Persons in Performing Official Duties by serious threat under Articles 15(2) and 16(3) of the Law and Articles 17, 31 and 401(1) and 401(5) of the KCC.[36]

33. 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."

34. The Appellant submitted in the Haradinaj Appeal Brief that the Trial Panel erred in law in concluding that a serious threat against third parties could be

[35] Vasilauskas v. Lithuania, Judgment, 20 October 2015, ECtHR, Application no. 35343/05, para. 155.

[36] Trial Judgement, para. 1015(a).

sufficient to meet the *actus reus* and intent for the crime of obstructing official persons.[37] The Appeals Panel by Majority and the Supreme Court Panel upheld the position of the Trial Panel.[38]

35. This interpretation expands the scope of Article 401(1) beyond a natural reading in a manner that is detrimental to the accused.[39]

36. The Appellant supports the position taken in the Partially Dissenting Opinion of Judge Kai Ambos[40] ("Partially Dissenting Opinion"). Judge Ambos holds 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*)."[41] The Appellant reaffirms his reasoning which is summarised in paragraphs 16-18 of the Request for Protection of Legality.

37. The Supreme Court does not address the theoretical considerations raised in Judge Ambos's Partially Dissenting Opinion, but essentially adopts the literal approach and purposive interpretation of the Appeals Panel.[42]

[37] Haradinaj Appeal Brief, paras. 172-177.

[38] Appeal Judgment, para. 282; Supreme Court Decision, paras. 40-48.

[39] Request for Protection of Legality, para. 16.

[40] Appeal Judgment, Part VI.

[41] Request for Protection of Legality, para. 16 (referring to Partially Dissenting Opinion, para. 3.)

[42] Supreme Court Decision, paras. 39-40, 44-48; Appeal Judgment, para. 282.

38. The argument in paragraphs 47-48 of the Supreme Court Decision is circular. The Supreme Court Panel states in paragraph 47 that the purpose of Article 401(1) is to protect the exercise of official duties and to ensure that official persons are not obstructed in performing such duties by force or by serious threat. In line with this purpose, it considers that the wording of Article 401(1) of the KCC concisely articulates that the intended target of the obstruction has to be the official person performing official duties.[43] It infers from this:

> *"It is clear that the official person and his or her ability to perform official duties may equally be targeted through indirect ways in order to achieve the ultimate purpose, namely preventing the performance of official duties. Therefore, any force or serious threat may be directed against another (not the official) person or against an object, as long as the target of the obstruction is the official person and his official duties."*[44]

39. The conclusion here regarding who by force or serious threat may be directed against only follows if the initial premise formulated in paragraph 47, namely the supposed purpose of Article 401(1), is accepted; and this initial premise is precisely what is at issue.

[43] Supreme Court Decision, para. 48.

[44] Supreme Court Decision, para. 48.

40. The Supreme Court Panel stated that the commentary by Ismet Salihu et al. on the Kosovo Criminal Code[45] ("Salihu et al. Commentary") explicitly recognises that threats may be directed at third persons or even an object, as long as the threat is issued with the intention of obstructing the official duties. This might appear to support its interpretation of Article 401(1). However, the text of the Commentary is ambiguous for the reasons given in footnote 171 of the Haradinaj Appeal Brief and is therefore insufficient to meet the requirements of accessibility and foreseeability in Article 7.

(ii) Article 387 of the KCC

41. The Trial Chamber found the Accused guilty of Intimidation During Criminal Proceedings under Articles 17, 31 and 387 of the KCC. Article 387 provides:

> *"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."*

[45] Ismet Salihu et al., Commentary on the Penal Code of Republic of Kosovo (GIZ, 2014), pp 1165-1166.

42. In the Request for Protection of Legality the Appellant submitted that the phrase "when such information relates to obstruction of criminal proceedings" qualifies all of the acts or omissions that a perpetrator uses various measures to induce another person to perform (refraining from making a statement, making a false statement and otherwise failing to state true information). This is a much narrower interpretation than that of the Appeals Panel which found that the phrase only qualified the third (otherwise failing to state true information).[46] The Appellant bases his understanding of Article 387 on its formulation,[47] the penalty for the criminal offence[48] and the relationship with the immediately preceding Article.[49] The Appellant reaffirms those bases.

43. The SPO presented two Basic Court Decisions in which findings of guilt are made under Article 387 in the absence of predicate acts of obstruction.[50] They were issued at first-instance and the point raised here was neither argued nor addressed in them.[51] They therefore do not amount to interpretation by the courts by which an individual would know that the acts or omissions

[46] Request for Protection of Legality, paras. 21-30.

[47] Request for Protection of Legality, paras. 24-26.

[48] Request for Protection of Legality para. 28.

[49] Request for Protection of Legality, para. 29.

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

[51] Gucati Brief in Reply, para. 19.

concerned would make him criminally liable,[52] especially in view of the wording and context of Article 387 which point firmly in the other direction.

44. The Supreme Court Panel dismissed the Appellant's submissions summarily on the grounds that he did not raise them before Appeals Panel.[53] It is the Appellant's case that the Constitutional Court should not dismiss them for the same reason because of the scope of the review that it can undertake, as explained earlier.

(iii) Article 392(2) of the KCC

45. 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.[54]

46. Article 392(2) of the KCC 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] Cantoni v. France, para. 29.

[53] Supreme Court Decision, para. 56.

[54] Trial Judgment, para. 1015.

47. The Trial Panel adopted a broad interpretation of "*a person under protection in criminal proceedings*" so as to include anyone who is subject to 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, in line with Article 62 of the Law, a person whose identity or personal data appears in KSC or SPO documents or records the disclosure of which has not been authorised.[55] Neither the Appeal Chamber nor the Supreme Court Chamber found an error in this.[56]

48. Article 62 of the Law concerns access to documents, papers, records and archives and not protection in criminal proceedings. The latter is the subject matter of Article 23 of the Law, which sets forth measures for the protection of victims and witnesses, and the related Article 3(1.3) of the Law on Witness Protection, which gives a definition of "protected person". These provisions are the proper basis for interpreting Article 392(2) of the Law which should be understood to concern persons subject to the measures indicated in Article 23 of the Law, which is a narrower category than just those whose names appear in confidential SPO records.

49. In Ground 3 of the Request for Protection of Legality, the Appellant explains in more detail why an expansive view of Article 392(2) is erroneous. The

[55] Trial Judgment, para. 95.

[56] Appeal Judgment, paras. 183-184; Supreme Court Decision, para. 82.

Supreme Court Panel summarily dismissed Ground 3 in part because the Appellant did not make these arguments before the Court of Appeal Panel, when he could reasonably have done so.[57] Again, the Appellant would oppose rejection by the Constitutional Court for reasons given above. The Supreme Court Panel also observed that the Appellant "did not refer to any jurisprudence or otherwise to support his arguments under this Ground".[58] The Appellant's arguments were in fact based on statutory construction which is a sound basis for interpretation in a civil law jurisdiction such as Kosovo, in which the Specialist Chambers sits as a domestic judicial organ, not an international or hybrid institution. This is reinforced by Article 1(2) of the Law.

50. The reading of Articles 401(1), 387 and 392(2) of the KCC by the Kosovo Specialist Chambers substantially expands the meaning of the provisions: in Article 401(1) by removing the restriction of force or serious threat to the official person referred to; in Article 387 by taking away the limitation of information relating to the obstruction of criminal proceedings from two of the three acts or omissions that the other person is induced to perform; and in Article 392(2) by broadening the category of persons whose identity or personal data is revealed from those subject to protective measures in criminal

[57] Supreme Court Decision, paras. 81-82.

[58] Supreme Court Decision, para. 82.

proceedings to anyone whose identity or personal data appears in certain official documents. In each instance there is, so to speak, a fundamental conceptual leap. The requirement specified in *Cantoni v. France* that the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable is clearly not met. Moreover, the expansion of the type of acts falling under the three Articles of the KCC is such that it cannot be considered a "gradual clarification of the rules of criminal liability" in which "the resultant development is consistent with the essence of the offence and could reasonably be foreseen".[59]

Violations of 31(2) of the Constitution and Article 6(1) of the ECHR

(i) Entrapment/incitement

51. The ECtHR has held that:

> *"[p]olice 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*

[59] Vasilauskas v. Lithuania, Judgment, 20 October 2015, ECtHR, Application no. 35345/05, para. 155.

order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution."[60]

52. For the trial to be fair within the meaning of Article 6(1) of the ECHR, all evidence obtained as a result of police incitement must be excluded or a procedure with similar consequences must apply.[61] It falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable. In the absence of any such proof, it is the task of the judicial authorities to examine the facts of the case and to take the necessary steps to uncover the truth in order to determine whether there was any incitement.[62]

53. The Appeals Panel concluded that the Appellants failed to demonstrate an error in the finding of the Trial Panel that their claim of entrapment/incitement was wholly improbable and unfounded.[63]

54. In the Request for Protection of Legality the Appellant submitted that in reaching this conclusion the Appeals Panel employed a criterion that was not legally justified.[64] The Appeals Panel stated incorrectly that the ECtHR case

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

[61] Akbay and Others v. Germany, Judgment, 15 October 2020, ECtHR, Application nos. 40495/15 and 2 others, para. 123.

[62] Ramanauskas v Lithuania, para. 70.

[63] Appeal Judgment, para. 374.

[64] Request for Protection of Legality, para. 60.

law reflected the requirement that the Defence provide *prima facie* evidence of entrapment. The case law in fact adopts the lower and less precise criterion of falling *prima facie* within the category of entrapment.[65] The Panel of the Supreme Court Chamber, however, follows the Appeals Panel and fails to acknowledge the distinction between *prima facie* evidence and a *prima facie* case.[66]

55. In the Request for Protection of Legality the Appellant also submitted that the Appeals Panel erroneously found that in order to meet the "not wholly improbable" standard, he should have brought *prima facie* evidence of the SPO's involvement in some capacity in the commission of the offences.[67] The Appeals Panel incorrectly states that the ECtHR jurisprudence on entrapment *requires* the involvement of law enforcement officers (or those acting under their instructions) in the commission of the offence as a pre-existing starting point for its discussions and it finds that this stated requirement is not met in the instant case.[68]

56. It may be a *contingent fact* that in the cases that have so far come before the ECtHR the involvement of law enforcement officers or those instructed by

[65] Request for Protection of Legality, para. 64 (referring to Matanović v. Croatia, Judgment, 4 April 2017, ECtHR, Application no. 2747/12, paras. 131-132.).

[66] Supreme Court Decision, paras. 92-93.

[67] Appeal Judgment, paras. 367-369; Request for Protection of Legality, para. 65.

[68] Appeal Judgment, para. 367.

them has not been in dispute.[69] The ECtHR has not found that this is *necessary* in showing that entrapment is not wholly improbable. The essential test is that there should be a *prima facie* case of entrapment, which may be established without the involvement of law enforcement officers (or those acting under their instructions) being a pre-existing starting point for the discussions of the Court. The Supreme Court Chamber takes no account of this and reaffirms the difference between the present case and cases where there was no dispute as to the involvement of the law enforcement officers or those acting under their instruction.[70]

57. The insistence of the Appeals Panel and the Supreme Court Panel on *prima facie* evidence of the SPO's involvement in some capacity in the commission of the offences reveals a fundamental (and fatal) misunderstanding of the position that the ECtHR adopted and that the Appellant is advancing. In order for defendants to allege that entrapment is not wholly improbable, it is not incumbent on them to adduce *prima facie* evidence of <u>each element</u> of entrapment (that the officers involved do not confine themselves to investigating criminal activity in an essentially passive manner, that they exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, and that their purpose is to

[69] Request for Protection of Legality, para. 66.

[70] Supreme Court Decision, para. 94.

make it possible to establish the offence, that is, to provide evidence and institute a prosecution). Rather there should be items of evidence which together make entrapment not wholly improbable, even if there is no evidence which on its face proves that any one of its elements has been instantiated. In the instant case there is a web of circumstantial evidence that as a whole is such as make entrapment not wholly improbable[71] without constituting *prima facie* evidence for any one of its elements. As was pointed out in the Request for Protection of Legality, the ECtHR in *Matanović v. Croatia* cites two cases in support of its position in which the issue is not whether there was *prima facie* evidence of entrapment but whether what was alleged constituted a claim of entrapment.[72]

58. 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 error in the Trial Panel's finding that the Appellants' claim of entrapment/incitement was wholly improbable and unfounded. It is

[71] See, e.g., Haradinaj Appeal Brief, paras. 138-140.

[72] Request for Protection of Legality, para. 64; Matanović v. Croatia, Judgment, ECtHR, 4 April 2017, Application no. 2742/12, 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).

submitted that this resulted in a substantial violation of the right to a fair hearing.

59. Throughout the entirety of the proceedings, it was the Appellant's case that the documents disclosed 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.[73]

60. 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[74] but which the defence were denied the opportunity to access in full.[75]

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

[74] 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").

[75] 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").

61. 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".[76]

62. As set out above, the Appeals Panel 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 offences.[77] 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[78] but which the defence were denied the opportunity to access in full.[79]

63. 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

[76] Appeal Judgment, para. 363.

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

[78] Request regarding witness contact details, paras. 3-10, 23-24; Request regarding video recordings.

[79] Decision on interviewing witnesses, paras. 14-22; Decision regarding Disclosing Material.

prejudice ongoing SPO investigations and accordingly should not be permitted.[80]

64. The Appeals Panel enumerated, and attached significant weight to, the measures that the Trial Panel took in order to prevent prejudice and unfairness to the Appellant.[81] 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[82] and parts of items of evidence which the Trial Panel found to be material but which were not fully disclosed.[83] 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.[84] In *Edwards & Lewis*, the ECtHR held that where an argument as to entrapment is raised it would amount to a procedural breach Article 6(1) ECHR where the judge, making the determination of entrapment, has seen material that is

[80] 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.

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

[82] Decision on interviewing witnesses, paras. 14-22; Decision regarding Disclosing Material, paras. 14-22.

[83] 15 November 2021 Disclosure Decision, paras 19, 24; 3 November 2021 Disclosure Decision, paras. 68, 73, 74.

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

withheld from the defence and the basis of which the defence is denied, on the basis of non-disclosure, from making submissions on a question of fact that may have been determinative of the finding of entrapment. The situation in the present case is therefore analogous to that determined by the ECtHR.

65. Finally, this was further 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,[85] that were crucial to the finding of fact as to entrapment, 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 exacerbated the procedural disadvantages of the Appellant in establishing entrapment.

66. As a result of all these deficiencies, the Appellant's right to a fair trial under Article 31(2) of the Constitution and Article 6(1) of the ECHR has been violated.

Violation of Article 10 of the ECHR

67. In the Request for Protection of Legality the Appellant submitted that the Trial Panel erred in its definition of public interest in the context of SITF/SPO cooperation with Serbia and that, therefore, it did not conclude that a finding

[85] Ibid.

of criminal responsibility in this case amounted to a violation of the Appellant's right to freedom of expression guaranteed under the ECHR and the Constitution.[86]

68. The Trial Panel affirmed that the restriction of the rights of the Accused pursued a number of legitimate public interests, such as protecting witnesses from harm, enabling the SPO to fulfil its mandate effectively, and maintaining public confidence in the integrity of proceedings before the Specialist Chambers.[87] It held: "Moreover, taking into consideration, on the one hand, the importance of witnesses for criminal investigations, and, on the other hand, the nature of the revealed information, the indiscriminate manner in which it was revealed, the large number of witnesses affected and the stated purposes of the revelation, the Panel is satisfied that the restriction was also necessary in a democratic society to protect a pressing social need and proportionate to the legitimate aims pursued."[88]

69. In the terms of Article 10 of the ECHR, the Trial Panel's position is that the restrictions and penalties imposed on the Accused were necessary in a democratic society, *inter alia*, "for the prevention of disorder or crime, for

[86] Request for Protection of Legality, para. 75.

[87] Trial Judgment, para. 821.

[88] Trial Judgment, para. 821.

preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary."

70. The Appeals Panel found that the Trial Panel properly assessed whether the public interest outweighed the interest in the non-disclosure of the confidential information and that the restriction was necessary in a democratic society in order to protect a pressing social need and proportionate to the legitimate aims pursued.[89] It found that the Appellant failed to demonstrate an error in the finding of the Trial Panel that the public interest defence did not apply to the Appellant.[90] 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".[91] 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

[89] Appeal Judgment, para. 337.

[90] *Ibid.*, paras. 334-337.

[91] Trial Judgment, para. 808.

Milošević regime, which gravely undermines the independence, impartiality and integrity of the investigations.[92]

71. It was a central tenet of the Appellant's defence was that his disclosures were justified by the public interest in information regarding what he maintains to be the discriminatory, politically motivated, and non-independent *modus operandi* of the SPO.[93] For this reason, the Appellant sought to adduce the evidence of Witness DW1250 [Malcom SIMMONS], a former EULEX Judge willing to testify to the politicisation of institutions and individuals linked to the Specialist Chambers, including, in particular through his account of political pressures previously brought to bear on him and his colleagues by the now Vice President of the Specialist Chambers and the Presiding Judge during the proceedings.[94] Relatedly, the Appellant also sought to rely upon Witness DW1251 [Maria BAMIEH], a former EULEX prosecutor who would again provide evidence of politicisation, giving testimony as to the non-renewal of her EULEX contract following her disclosure of evidence of corruption in senior judicial/prosecutorial EULEX ranks.[95]

[92] Haradinaj Appeal Brief, para. 113.

[93] KSC-BC-2020-07, Transcript 28 October 2021, p.1762, ll.1-3; Trial Judgment, para.391.

[94] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07, Decision Assigning TP II, 15 July 2021, public; Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07, Publicly Redacted Version of the Corrected Version of Application for the Recusal of the President of the Specialist Chambers, Judge Ekaterina Trendafilova, and the Vice President, Judge Charles L. Smith III, Presiding Judge of Trial Panel II, public with confidential annexes, 23 August 2021, Annex, para.42(c).

[95] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07, Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, 3 December 2021, Public ("Decision on Defence Witnesses").

72. Whilst neither Witness DW1250 or DW1251 were employed by the SPO, or its precursor, the EU Special Investigative Task Force ("SITF"), it was maintained that by virtue of their prior professional positions, each was nonetheless able to give relevant evidence as to the existence of political interference, widespread corruption, and collaboration with Serbian authorities amongst the European External Action Service ("EEAS"), which were the appointing authorities for EULEX and the SITF/SPO.

73. Each witness was thus able to offer an account that was intrinsically relevant to the Appellant's case that his disclosures were made in the public interest, and permitting the presentation of those facts was essential to his ability to prepare and develop a full and proper defence

74. Nonetheless, on 2 December 2021 the Trial Panel decided not to hear those witnesses, on the grounds that they were unable to offer testimony of 'direct' relevance to the issues in the case, a decision that was upheld on appeal despite the Appellant's extensive representations to the contrary.[96]

75. Further to wholly preventing his reliance on certain witnesses, the Trial Panel also unduly restricted key parts of testimony that it did permit.[97]

[96] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07, Decision on Nasim Haradinaj's Appeal Against Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, 07 January 2022, public, paras 18-21.

[97] Decision on Defence Witnesses, paras 98–99.

76. For example, Witness DW1252, a recognised expert on 'whistleblowing' and 'public interest', whom the Appellant sought to rely upon on the grounds that her expertise was directly relevant to his defence of whistleblowing and its application to the facts of his case, in particular her assessment, on the evidence, as to whether he met the requirements of being a 'whistleblower' and whether his disclosures were justified in the 'public interest'.

77. However, whilst the Trial Panel agreed to hear general testimony from Witness DW1252 [Anna MYERS] in relation to whistleblowing/public interest issues, it expressly prevented her admission of evidence in relation to, or cross examination on, applied whistleblowing issues apparent in the Appellant's case, on the basis that any such specialist testimony fell within the exclusive competence of the Trial Panel itself.[98]

78. The Trial Panel found that there was no credible basis to conclude that the allegedly protected information revealed by the Appellant contained indications of improprieties attributable to the SITF/SPO.[99] However, in reaching this conclusion, it took no account of the stance that Serbia has taken over the years towards Kosovo. As the Appellant testified, Serbia still refuses to recognise Kosovo as an independent state, continuing to refer to it as

[98] Decision on Defence Witnesses, paras 98-99.

[99] *Ibid*, para.817.

Kosovo and Metohija,[100] and denies atrocity crimes committed during the conflict with Kosovo.[101] The Appellant also affirmed that those with whom SITF/SPO was collaborating had official positions during the Milošević regime[102] and at least one was implicated in atrocities committed in Kosovo during the conflict.[103] In addition, Prosecution Witness W04866 (Halil BERISHA) testified that given the past of the people of Kosovo and the conflict he had lived through, it was of public interest that the system of evidence collection by SITF mostly took the form of requests to collect evidence given by former Serbian police officers and Serbian chiefs of police stations.[104] The sheer volume of the contacts with Serbian officials,[105] especially those with murky pasts, called into question the independence, impartiality or integrity of the SITF/SPO's investigation.

79. The error of the Trial Panel in finding that there was no credible basis to conclude that the protected information revealed by the Appellant contained indications of improprieties attributable to the SITF/SPO[106] removes one of the principal bases for its conclusion that the criminal responsibility of the

[100] KSC-BC-2020-07, Transcript, 11 January 2021, p.2712, ll.3-4; Cf. KSC-BC-2020-07, Transcript, 27 October 2021, p.1608 l.12-1609 l.13.

[101] KSC-BC-2020-07, Transcript, 11 January 2022, p.2712, ll. 1-4.

[102] KSC-BC-2020-07, Transcript 12 January 2022, p.2876 ll.1-10.

[103] KSC-BC-2020-07, Transcript 11 January 2021, p.2713, ll. 7-l.15

[104] KSC-BC-2020-07, Transcript 27 October 2021, pp.1603, ll.13-1604 l.6 (commenting on P00129, p. 15); KSC-BC-2020-07, Transcript 11 January 2022, pp.2711 ll.21- 2712 l.1.

[105] *See,* Annex 1 of P00090.

[106] Trial Judgment, para.817.

Appellant cannot be excluded by considerations of public interest[107] and thereby establishes a violation of his right to freedom of expression.

80. The ECtHR has held that freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.[108] The Court has also taken the view that there is little scope under Article 10(2) for restrictions on political speech or on debate of questions of public interest and that the most careful scrutiny on the part of the Court is called for when the measures taken or sanctions imposed by the national authorities are capable of discouraging the participation of the media in debates over matters of legitimate public concern.[109] These considerations are certainly relevant in the instant case but they do not on their own prove that there has been a violation of Article 10.

81. In *Glor v. Switzerland*, the ECtHR considered that in order for a measure to be considered proportionate and necessary in a democratic society, there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned.[110] In *Lehideux & Isorni v. France* when deciding that a criminal conviction for the publication of a

[107] *Ibid*, para.824.

[108] Thorgeir Thorgeirson v. Iceland, Judgment, 25 June 1992, ECtHR, Application no. 13778/88, para. 63.

[109] Monnat v. Switzerland, Judgment, 21 September 2006, ECtHR, Application no. 73604/01, para. 58.

[110] Glor v. Switzerland, Judgment, 30 April 2009, ECtHR, Application no. 13444/04, para. 94.

newspaper article was disproportionate the Court attached weight to the existence of other means of intervention and rebuttal, particularly through civil remedies.[111]

82. The failure of the Trial Panel and the Appeal Panel to consider whether in this case there were any other means than prosecution to attain the objectives set forth in Article 10(2) is particularly serious in view of the importance that the ECtHR attaches to political speech and debate on questions of public interest and undermines the finding that there has been no violation of Article 10.

83. In conclusion, the Appellant's right to freedom of expression under Article 40 of the Constitution and Article 10 of the ECHR has been breached.

VI. CONCLUSION

84. The Defence requests that the Constitutional Court Panel:

(a) Find that the convictions of the Appellant on Counts 1, 3, 5 and 6 are in violation of the Constitution; and

(b) Reverse the convictions on Counts 1, 3, 5 and 6 and enter acquittals.

[111] Lehideux and Isorni v. France, Judgment, 23 September 1998, ECtHR, Application no. 55/1997/839/1045, para. 57.

85. In the alternative the Constitutional Court Panel is requested to convene an oral hearing so that the arguments of the Defence can be fully and properly presented for fair determination.

Word Count: [8,328 words]

Toby Cadman

Specialist Counsel

Monday, 20 November 2023

At the Hague, the Netherlands