



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2023-10
Specialist Prosecutor v. Sabit Januzi, Ismet Bahtijari and Haxhi Shala

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

Date: 11 March 2024

Language: English

Classification: Confidential

Prosecution consolidated reply to Defence Responses to Prosecution challenge to disclosure of items in Rule 102(3) Notice and related request

Specialist Prosecutor's Office

Kimberly P. West

Counsel for Sabit Januzi

Jonathan Elystan Rees

Counsel for Ismet Bahtijari

Felicity Gerry

Counsel for Haxhi Shala

Toby Cadman

1. The Responses¹ should be rejected, and non-disclosure of the Item² authorised, as per the Request. Contrary to assertions in the Responses, the Request is in full compliance with Article 21 of the Law,³ Rule 108 of the Rules,⁴ and the European Convention on Human Rights ('ECHR').⁵

2. Shala appears to contend that a failure to argue that less restrictive measures than non-disclosure would be inadequate amounts to a failure to satisfy the 'strictly necessary' standard imposed by Article 21(6) and the ECHR.⁶ The jurisprudence quoted in support of this contention, however, identifies no such requirement.⁷ Rather, factors considered in the relevant jurisprudence in relation to the 'strictly necessary' standard include: i) whether the evidence would be 'decisive' to conviction;⁸ ii) whether there is an actual necessity to withhold the evidence (including considering the rights of witnesses/victims under Article 8 of the ECHR);⁹ and iii) whether there are sufficient counterbalancing

¹ Response to Prosecution challenge to disclosure of items in Rule 102(3) Notice, KSC-BC-2023-10/F00196, 3 March 2024, Confidential ('Shala Response'); Response to Prosecution Challenge to Disclosure of Items in Rules 102(3) Notice on behalf of Januzi, KSC-BC-2023-10/F00198, 6 March 2024, Confidential ('Januzi Response') (collectively 'Responses').

² As defined in Prosecution challenge to disclosure of items in Rule 102(3) Notice and related request, KSC-BC-2023-10/F00186, 23 February 2024, Strictly Confidential and *Ex Parte* ('Request'), para.2.

³ Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

⁴ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

⁵ Shala Response, KSC-BC-2023-10/F00196, paras 14-16; Januzi Response, KSC-BC-2023-10/F00198, paras 11-12.

⁶ See Shala Response, KSC-BC-2023-10/F00196, paras 15-16.

⁷ See Shala Response, KSC-BC-2023-10/F00196, para.15.

⁸ ECtHR, *Van Mechelen et al. v. The Netherlands*, 21363/93, Judgement, 23 April 1997 ('*Van Mechelen*'), paras 62-63; ECtHR, *Doorson v. The Netherlands*, 20524/92, Judgement, 26 March 1996 ('*Doorson*'), para.76; ECtHR, Grand Chamber, *Jasper v. The United Kingdom*, 27052/95, Judgement, 16 February 2000, para.55; ECtHR, *Yakuba v. Ukraine*, 1452/09, Judgement, 12 February 2019, para.43; ECtHR, *Jakubczyk v. Poland*, 17354/04, Judgement, 10 May 2011, paras 46-48.

⁹ *Van Mechelen*, 21363/93, para.61; *Doorson*, 20524/92, para.75; ECtHR, *Marcello Viola v. Italy (Extracts)*, 45106/04, Judgement, 5 October 2006, para.51.

measures.¹⁰ Considering that: i) the Item is substantively, temporally and geographically remote from the charges;¹¹ ii) non-disclosure is necessary to address objectively justifiable and grave risks to protected persons and interests;¹² and iii) the Item does not contain any information relevant for the preparation of the defence which is not already available from other sources,¹³ the 'strictly necessary' requirement of Article 21(6) and the ECHR is satisfied. Further, in any case, the SPO does explain why less restrictive measures than non-disclosure are inadequate in this situation.¹⁴

3. The above submissions in relation to counterbalancing measures satisfy the requirements of Rule 108,¹⁵ and address the related concerns raised in the Responses.¹⁶

4. This filing is submitted confidentially pursuant to Rule 82(4). A public redacted version will be filed.

5. For the foregoing reasons, the Pre-Trial Judge should reject the Responses and grant the Request.

¹⁰ *Doorson*, 20524/92, para.75; ECtHR, *Jakubczyk v. Poland*, 17354/04, Judgement, 10 May 2011 ('*Jakubczyk*'), paras 46-48.

¹¹ Request, KSC-BC-2023-10/F00186, paras 3, 9.

¹² Request, KSC-BC-2023-10/F00186, paras 5-8.

¹³ Request, KSC-BC-2023-10/F00186, paras 3, 9; *see in particular Jakubczyk*, 17354/04, paras 48-50 (noting the existence of 'considerable alternative evidence' and the ability of the defence to otherwise challenge the reliability of the relevant witness(es)).

¹⁴ Request, KSC-BC-2023-10/F00186, para.7.

¹⁵ *See supra* para.2 *citing* Request, KSC-BC-2023-10/F00186, paras 3, 9; *Contra* Januzi Response, KSC-BC-2023-10/F00198, paras 11-12.

¹⁶ *See* Shala Response, KSC-BC-2023-10/F00196, para.14; Januzi Response, KSC-BC-2023-10/F00198, paras 8, 10.

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Kimberly P. West

Specialist Prosecutor

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At The Hague, the Netherlands