



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: **KSC-CA-2024-03**

Before: **A Panel of the Court of Appeals Chamber**
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Fidelma Donlon

Date: 10 January 2025

Original language: English

Classification: **Public**

Public Redacted Version of Decision on Defence's Request Regarding Disclosure

Specialist Prosecutor's Office:

Kimberly P. West

Counsel for Pjetër Shala:

Jean-Louis Gilissen

Counsel for Victims:

Simon Laws

THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively),¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 172 of the Rules of Procedure and Evidence (“Rules”), is seised of a motion filed on 10 December 2024 by Mr Pjetër Shala (respectively, “Motion” and “Shala” or “Accused” or “Defence”).² The Specialist Prosecutor’s Office (“SPO”) responded on 19 December 2024 (“Response”).³ Shala did not file a reply.

I. PRELIMINARY MATTER

1. The Panel notes that the Response was filed as confidential and that the SPO has not filed a public redacted version thereof.⁴ The Panel recalls that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential, and that Parties shall file public redacted versions of all submissions filed before the Panel.⁵ The Panel therefore orders the SPO to file a public redacted version of its Response within ten days of receiving notification of the present Decision.

¹ F00011, Decision Assigning a Court of Appeals Panel, 3 September 2024 (confidential, reclassified as public on 4 September 2024).

² F00030/RED, Public Redacted Version of Defence Request for Order to Prosecution to Disclose Rule 103 Material and Finding of Violation of Disclosure Obligations by the Prosecution, 19 December 2024 (confidential version filed on 10 December 2024) (“Motion”).

³ F00031, Prosecution Response to Defence Request for Order to Disclose and Related Requests, 19 November 2024 (confidential) (“Response”).

⁴ See Response, para. 16.

⁵ See e.g. KSC-BC-2020-06, IA008/F00004/RED, Public Redacted Version of Decision on Kadri Veseli’s Appeal Against Decision on Review of Detention, 1 October 2021 (confidential version filed on 1 October 2021), para. 8. See also KSC-CA-2022-01, F00103, Decision on Gucati Application for Reclassification or Public Redacted Versions of Court of Appeals Panel Decisions, 9 January 2023, para. 2.

II. DISCUSSION

2. Shala requests the Court of Appeals Panel to order the SPO to disclose immediately all statements and testimonies in its possession related to W04264.⁶ In addition, Shala requests the Panel to find that the SPO has failed to comply with its disclosure obligations.⁷ Shala further requests the Panel to instruct the SPO to conduct a comprehensive review of its evidence database with a view to disclosing promptly any additional material relevant to the Defence case.⁸ Finally, Shala submits that this violation by the SPO should be “taken into consideration” by the Panel in its assessment of Shala’s arguments on appeal that his trial has been unfair.⁹

3. Shala’s request for the disclosure of W04264-related material was triggered, as recalled in the Motion, by the SPO disclosure of “Package 2”, on 9 December 2024. The package was disclosed under Rule 103 of the Rules. It includes the transcript of an SPO interview with W04264 on [REDACTED] and corresponding translations (“W04264’s SPO Interview”), and two SPO witness [REDACTED] notes dated [REDACTED].¹⁰ Shala mentions that, on the same day, he requested, *inter partes*, the SPO to immediately disclose additional Rule 103 potentially exculpatory material related to W04264.¹¹ Shala reiterates this request in the Motion.¹² Shala further explains the relevance of W04264 related material to the Defence case.¹³

4. Shala underlines that the SPO was in possession of W04264’s SPO Interview contained in “Package 2” since [REDACTED] and that the unjustifiable late disclosure

⁶ Motion, paras 1, 12. Shala requests, in particular, the Panel to order the SPO to disclose (i) the transcript of [REDACTED] and (ii) W04264’s interview with [REDACTED]. See Motion, para. 12.

⁷ Motion, paras 1, 24. See also Motion, paras 18-22.

⁸ Motion, paras 1, 24. See also Motion, paras 12-22.

⁹ Motion, para. 22.

¹⁰ Motion, paras 7-8.

¹¹ Motion, para. 8.

¹² Motion, para. 12.

¹³ Motion, para. 14. See also Motion, paras 15-18.

of these documents undermines the fairness of the proceedings.¹⁴ Shala argues that this situation is not isolated and rather illustrates a pattern of how the SPO has operated in this case by “consciously” denying to the Defence the use of important material for the preparation of its case.¹⁵ Relying on the provisions of Rule 110 of the Rules, Shala requests the Panel to remedy the prejudice caused by this late disclosure.¹⁶

5. In its Response, the SPO argues that it disclosed, on 13 December 2024, the additional material related to W04264 in its possession requested by the Defence, that the Defence’s request is therefore moot and that no order to disclose further materials is necessary.¹⁷

6. The SPO acknowledges that W04264’s SPO Interview – included in “Package 2” – should have been disclosed at an earlier stage.¹⁸ However, the SPO submits that any prejudice suffered by the Defence is minimal and that the Defence misrepresents the prior disclosure record in these proceedings.¹⁹ In support of its argument, the SPO notably submits that: (i) the late disclosure was unintentional;²⁰ (ii) the relevance of “Package 2” is only marginally relevant to the Defence’s case;²¹ and (iii) W04264’s SPO Interview was listed in the very first Rule 102(3) notice provided to the Defence in September 2021, and each version thereafter.²²

7. Regarding Shala’s request for a remedy, the SPO responds that the disclosure of “Package 2”, is, in itself, demonstrative of the SPO’s “cognisance of, and ongoing

¹⁴ Motion, para. 19.

¹⁵ Motion, para. 20. See also Motion, para. 21.

¹⁶ Motion, paras 22, 24. See also above, para. 2.

¹⁷ Response, paras 1, 2, 17.

¹⁸ Response, para. 3, fn. 4.

¹⁹ Response, paras 1, 3-9, 15.

²⁰ Response, para. 14.

²¹ Response, paras 3, 5-9.

²² Response, paras 4, 14.

commitment to, its disclosure obligations”.²³ The SPO challenges the Defence’s assertion that the SPO continuously failed to comply with its disclosure obligation in this case and rather argues that instances of late disclosure were very few, isolated and caused no prejudice to the Defence.²⁴ The SPO asserts that it has always discharged its disclosure obligations in this case in good faith.²⁵ Under these circumstances, the SPO is of the view that no measures under Rule 110 of the Rules are warranted.²⁶ Recalling the requirements of Rule 179(5) of the Rules, the SPO also argues that a Panel’s order to review the evidentiary records to identify any disclosable material would serve no additional purpose at this time.²⁷

8. The Panel first notes that, on the same day that “Package 2” was disclosed, Shala requested, *inter partes*, the SPO to immediately disclose additional Rule 103 potentially exculpatory material, listed per categories and related to W04264.²⁸ Shala reiterates an identical request in the Motion,²⁹ and the SPO responds that the additional material in its possession requested by Shala was disclosed on 13 December 2024.³⁰ Indeed, additional material identified as “Package 3” was disclosed to the Panel, Defence and Participants on 13 December 2024 pursuant to Rule 102(3) of the Rules.³¹ The Panel therefore considers this part of the Motion moot.³²

²³ Response, para. 4.

²⁴ Response, paras 10-13.

²⁵ Response, para. 13. See also Response, para. 14.

²⁶ Response, para. 15.

²⁷ Response, para. 13. Finally, the SPO submits that, to the extent the Defence considers that “Package 2” or other W04264’s related material would assist its case, remedies remain open for it to pursue. See Response, para. 9 referring, e.g., to Rule 181 of the Rules.

²⁸ Motion, para. 8. See also above, para. 3.

²⁹ Motion, para. 12.

³⁰ Response, paras 1, 2, 17. See also above, para. 5.

³¹ “Package 3” contains: (i) W04264’s interview with [REDACTED]; (ii) W04264’s testimony [REDACTED]; and (iii) W04264’s interview [REDACTED]. The SPO indicates that it did not disclose [REDACTED]. See Response, para. 2, fn. 2.

³² See Motion, paras 1, 12, 24.

9. As to the disclosure of “Package 2”, which is the subject of the Motion, the Panel acknowledges that the SPO made this disclosure, which includes W04264’s SPO Interview, on 9 December 2024.³³ The Panel further notes that “Package 2” was disclosed under Rule 103 of the Rules.³⁴

10. The Panel recalls that pursuant to Rule 103 of the Rules, and subject to Rules 107 and 108 which regulate instances of information not subject to disclosure, the SPO shall immediately disclose to the Defence any information as soon as it is in its custody, control or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of the SPO evidence. The Panel also recalls that, pursuant to Rule 112 of the Rules, the SPO shall disclose to the Defence any exculpatory information referred to in Rule 103 of the Rules notwithstanding the closing of the case pursuant to Rule 136 of the Rules and any subsequent appeal. According to Rule 110 of the Rules, the Panel may decide, upon request by a Party or *proprio motu*, on measures to be taken as a result of the non-compliance with disclosure obligations pursuant to the Rules, including a stay of proceedings and the exclusion of evidence, except for exculpatory evidence.³⁵

11. The Panel previously stressed the importance of the disclosure process in ensuring both the fairness of the proceedings and that the rights of the Defence are respected, and that these considerations should remain paramount in disclosure related decisions.³⁶

³³ Motion, para. 7. See also Response, paras 3, 14. “Package 2” was disclosed without description of its content.

³⁴ The Panel further stresses that the disclosure is classified under Rule 103 of the Rules on Legal Workflow.

³⁵ See e.g. KSC-CA-2022-01, F00083/RED, Public Redacted Version of Decision on Defence Motions for Alternate Relief Relating to Rule 103 Disclosure Violations, 31 January 2023 (confidential version filed on 7 November 2022) (“*Gucati and Haradinaj* Appeal Decision on Defence Motions for Alternate Relief”), para. 19.

³⁶ See e.g. KSC-BC-2020-07, IA005/F00008/RED, Public Redacted Version of Decision on the Appeals Against Disclosure Decision, 29 July 2021 (confidential version filed on 29 July 2021), para. 35; KSC-CA-2022-01, F00044/RED, Public Redacted Version of Decision on Prosecution Notifications, 31 January

12. The Panel notes that the SPO was in possession of W04264's SPO Interview disclosed in "Package 2" since December 2018 (according to the interview records).³⁷ The Panel also notes the SPO's argument that W04264's SPO Interview was listed in the SPO's first Rule 102(3) notice on 3 September 2021.³⁸ The SPO only disclosed these documents after the delivery of the Trial Judgment, on 9 December 2024. In light of Rule 112 of the Rules,³⁹ and taking into consideration the SPO's own admission that the material should have been disclosed to the Defence at an earlier stage,⁴⁰ the Panel finds that the SPO has failed to discharge its disclosure obligations with regard to W04264's SPO Interview in a timely manner.⁴¹

13. Recalling that there is a presumption of good faith on the Prosecution's part when discharging its disclosure obligations,⁴² the Panel accepts the SPO's explanation that it identified an oversight and took immediate steps to remedy it through the disclosure of "Package 2".⁴³ Therefore, the Panel sees no reason to conclude that the late disclosure of W04264's SPO Interview in "Package 2" was the result of bad faith on behalf of the SPO. Nonetheless, the Panel recalls that on 15 November 2024, the SPO disclosed "Package 1" under Rule 102(3) of the Rules and that on 21 November 2024, the Panel issued a decision in which it found that the SPO failed to discharge its disclosure obligations in a timely manner in relation to "Package 1".⁴⁴

2023 (confidential and *ex parte* version filed on 15 September 2022, confidential redacted version filed on 15 September 2022), para. 20.

³⁷ See [REDACTED] (English translation of W04264's SPO Interview), disclosed on 9 December 2024 (Package 2).

³⁸ See KSC-BC-2020-04, F00069/A01, Annex 1 to Prosecution Rule 102(3) notice, 3 September 2021 (confidential), items 141-142. See also the SPO's subsequent Rule 102(2) notices, for example, KSC-BC-2020-04, F00319/A01, Annex 1 to Prosecution amended Rule 102(3) notice dated 19 October 2022, 19 October 2022 (confidential), items 227-244. See also Response, fn. 7.

³⁹ See above, para. 10. See also *Gucati and Haradinaj* Appeal Decision on Defence Motions for Alternate Relief, para. 20.

⁴⁰ Response, para. 3.

⁴¹ See above, para. 10.

⁴² See e.g. Decision on Request for Suspension or Extension of Time to File Appeal Brief, para. 15.

⁴³ Response, para. 4.

⁴⁴ Decision on Request for Suspension or Extension of Time to File Appeal Brief. See also Motion, paras 6, 21.

This is therefore the second time that the Panel makes such a finding since the delivery of the Trial Judgment in this case.

14. The Panel further recalls that in the context of its previous decision dated 21 November 2024, the SPO had spontaneously indicated that it has already conducted a comprehensive review of the evidence in its possession and that it complied with its disclosure obligations in the Shala case.⁴⁵ The late disclosure of W04264's SPO Interview suggests that this was not the case.

15. Notwithstanding the above, the Panel recalls that even where a panel is satisfied that the SPO has failed to discharge its disclosure obligations in a timely manner, the panel will examine whether the Defence was actually prejudiced by such failure before considering whether a remedy is appropriate.⁴⁶ The onus is on the Defence to substantiate its claim of alleged prejudice from the disclosure violation.⁴⁷ To the extent that the Defence might have demonstrated any prejudice at this stage, the Panel notes that the Defence has already availed itself of a potential remedy through filing a motion pursuant to Rule 181 of the Rules to, *inter alia*, have the relevant evidence admitted on appeal. This request is currently under consideration by the Panel with the respective issues relating to prejudice and relevance of the said evidence.⁴⁸

⁴⁵ Decision on Request for Suspension or Extension of Time to File Appeal Brief, paras 7, 15. See also F00027/RED, Public Redacted Version of 'Prosecution Response to Defence urgent request for suspension or extension of time to file its Appeal Brief', 3 December 2024 (confidential version filed on 19 November 2024), paras 2, 10.

⁴⁶ See e.g. F00028, Decision on Defence's Urgent Request for Suspension or Extension of Time to File its Appeal Brief, 21 November 2024 (confidential, reclassified as public on 25 November 2024) ("Decision on Request for Suspension or Extension of Time to File Appeal Brief"), para. 9; *Gucati and Haradinaj* Appeal Decision on Defence Motions for Alternate Relief, para. 20.

⁴⁷ See e.g. Decision on Request for Suspension or Extension of Time to File Appeal Brief, para. 9.

⁴⁸ See F00033, Defence Motion to Present Additional Evidence Pursuant to Rule 181, 6 January 2025 (confidential).

16. In addition, the Appeals Panel finds that the remainder of the specific remedies Shala requests in the Motion are not warranted for the following reasons.⁴⁹ First, the Panel recalls that, according to Rule 179(5) of the Rules, the SPO shall make a declaration in its response brief that “disclosure of material in his or her custody or control has been completed at the time of filing of that brief”.⁵⁰ The Panel notes that the deadline for the SPO to file its response brief is 17 January 2025.⁵¹ In light of the fact that the SPO is required to have conducted the review of its evidence database as requested by Shala in the Motion by that date, the Panel finds that ordering the SPO to conduct such a review is redundant and therefore not warranted.

17. Second, the Panel notes Shala’s request that the SPO’s repeated disclosure violations should be “taken into consideration” by the Panel in its assessment of Shala’s arguments in appeal.⁵² The Appeals Panel recalls that as a general rule, appeals from judgments are not the proper vehicle to advance alleged disclosure violations identified only during the appeal proceedings as they are normally limited to challenges against particular findings made by a lower panel.⁵³ Therefore, and while mindful of the SPO’s continuing disclosure obligation under Rule 103 of the Rules and of the potential impact that repeated failures to comply with such obligations may have on the conduct of the proceedings, the Appeals Panel finds that the relief sought by Shala is not warranted at this stage.

⁴⁹ The Panel recalls that Shala’s request to order the SPO to disclose additional material in its possession has been found moot. See above, para. 8.

⁵⁰ See Rule 179(5) of the Rules. See also Response, para. 13.

⁵¹ F00025, Decision on Specialist Prosecutor’s and Victims’ Counsel’s Requests for Extension of Time to File Briefs in Response, 13 November 2024, para. 11.

⁵² Motion, para. 22.

⁵³ See ICTR, *Mugenzi and Mugiraneza v. Prosecutor*, ICTR-99-50-A, Judgement, 4 February 2013, para. 49. See also F00017/COR/RED, Public Redacted Version of Corrected Version of Revised Defence Notice of Appeal, 31 October 2024 (uncorrected confidential version filed on 30 September 2024, corrected confidential version filed on 30 October 2024), para. 19 (Ground 9); F00029/COR, Corrected Version of Defence Appeal Brief with confidential Annexes 1 and 2, 26 November 2024 (confidential, uncorrected version filed on 25 November 2024), paras 169-191 (Ground 9).

III. DISPOSITION

18. For these reasons, the Court of Appeals Panel:

GRANTS the Motion **in part**;

FINDS that the SPO has failed to discharge its disclosure obligations with regard to W04264's SPO Interview in a timely manner, as required by Rule 103 of the Rules;

DECLARES moot the Defence's request for the Appeals Panel to order the SPO to disclose immediately all statements and testimonies in its possession related to W04264;

DENIES the remainder of the Motion; and

INSTRUCTS the SPO to file a public redacted version of its Response within ten days of receiving notification of the present Decision.



Judge Michèle Picard,
Presiding Judge

Dated this Friday, 10 January 2025.

At The Hague, the Netherlands