

In: KSC-BC-2020-07

The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: Trial Panel II

Judge Charles L. Smith III, Presiding Judge

Judge Christophe Barthe

Judge Guénaël Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

Date: 14 October 2021

Language: English

Classification: Confidential

Response to Confidential Redacted Version of “WPSO’s Request for Protective Measures for Witnesses W04841 and W04842”, dated 13 October 2021

Specialist Prosecutor

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I. INTRODUCTION

1. On 13 October 2021, the Accused received notification of a redacted request by the WPSO for protective measures for witnesses W04841 and W04842¹ ('Request').
2. The Accused responds as follows.

II. SUBMISSIONS

3. The Request should be refused.
4. The Request follows an earlier unsuccessful request for protective measures by the SPO².
5. In refusing that request, the Trial Panel observed that a general expression of fear that is not substantiated by concrete, objective elements or the hypothetical possibility that the safety or security of an individual could be affected by the public disclosure of certain information, would not normally warrant the granting of protective measures³. A party seeking protective measures for one or more of its witnesses must demonstrate that there is a real likelihood that the witness for whom the protective measure is sought may be in danger, or

¹ F00363, Confidential Redacted Version of "WPSO's Request for Protective Measures for Witnesses W04841 and W04842" dated 13 October 2021, Registrar, 13 October 2021, Confidential

² F00282, Prosecution Request for Protective Measures, Specialist Prosecutor, 23 August 2021, Confidential

³ F00303, Decision on the Prosecution Request for Protective Measures, Trial Panel II, 7 September 2021, Public at paragraph 11

risk being interfered with or intimidated; this requires proof of some objective basis underlying the claim that the safety or security of the individual concerned is at risk⁴.

6. The SPO in their unsuccessful request argued, as the WPSO repeats, that disclosure of information relating to the Witnesses could put those whom they interact with at risk⁵. Although the Request asserts that it is based on 'new information', there is no new information in the redacted version of the Request that demonstrates that there is a real likelihood that the witness for whom the protective measure is sought may be in danger, or risk being interfered with or intimidated.
7. The Request merely repeats the concern raised in the unsuccessful request by the SPO that disclosure of information which identifies W04841 and W04842 during the course of their evidence may increase the likelihood that others will recognise their interaction with third parties⁶.
8. A general expression of fear or hypothetical possibility that such third parties, if the fact alone of their interactions with W04841 and W04842 become known, may be in danger or risk being interfered with or intimidated, is not sufficient, as the Trial Panel has already ruled.
9. The hypothetical nature of the risk alleged is apparent from the fact that the SPO decided to call these W04841 and W04842 on the assumption that they

⁴ F00303, Decision on the Prosecution Request for Protective Measures, Trial Panel II, 7 September 2021, Public at paragraph 11

⁵ F00303, Decision on the Prosecution Request for Protective Measures, Trial Panel II, 7 September 2021, Public at paragraph 13 and 15

⁶ F00282, Prosecution Request for Protective Measures, Specialist Prosecutor, 23 August 2021, Confidential at paragraph 3; F00303, Decision on the Prosecution Request for Protective Measures, Trial Panel II, 7 September 2021, Public at paragraph 13

may be required to do so without protective measures and did not seek to conceal the physical appearance of W04841 and W04842.

10. That weakness in the case for protective measures for W04841 and W04842 is not remedied by a new request at this stage asking for their physical appearance (and indeed their voices also) to be disguised, in addition to the rejected measures of the use of pseudonyms and the redaction of names and identifying information from public records. It was open to the Trial Panel, after all, to have permitted the SPO's request with the additional measure of the use of an image and voice altering device, if the Trial Panel was of the view that the measures proposed were insufficient. However, the Trial Panel rejected the SPO's request, not because they did not go far enough, but because the measures proposed were themselves unnecessary and disproportionate.
11. In previously rejecting the request for protective measures, the Trial Panel observed that W04841 and W04842, as SPO investigators, fell into the category of witnesses who are members of the police or associated authorities, and that it is in the nature of things that their duties, particularly in the case of arresting officers, may involve giving evidence in open court⁷.
12. The Trial Panel was mindful that the SPO intends to ask W04841 and W04842 to testify about issues and circumstances in respect of which the underlying evidence is in some respects not available to the Defence and, to some extent, to the Trial Panel. Finding that "these circumstances will involve an erosion of the publicity of the proceedings" the Trial Panel observed that adding yet another level of confidentiality through the granting of protective measures was unnecessary and disproportionate⁸.

⁷ F00303, Decision on the Prosecution Request for Protective Measures, Trial Panel II, 7 September 2021, Public at paragraph 17

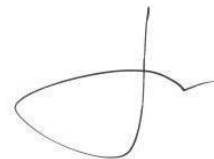
⁸ F00303, Decision on the Prosecution Request for Protective Measures, Trial Panel II, 7 September 2021, Public at paragraph 20

13. The Trial Panel further noted that the approach proposed did not appear to find any support in the law of Kosovo or in the practice of its courts, or internationally (acknowledging that in the one international jurisdiction that has dealt with crimes committed in Kosovo, namely, the International Criminal Tribunal for the former Yugoslavia, investigators of the Office of the Prosecutor (who frequently travelled to Kosovo as part of their duties) testified in Kosovo-related trials in open court, under their own names)⁹. The approach proposed by the SPO (and now the WPSO also) is unprecedented.
14. The findings of the Trial Panel in rejecting the SPO request remain apposite to the present Request.
15. For those reasons, the Request should be rejected.

III. CLASSIFICATION

16. This filing is classified as confidential.

Word count: 987 words



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⁹ F00303, Decision on the Prosecution Request for Protective Measures, Trial Panel II, 7 September 2021, Public at paragraph 21

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14 October 2021

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