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 Christoph Barthe
	Judge Guenael Mettraux
	Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Nasim Haradinaj
Date:	14 October 2021
Language:	English
Classification:	**Confidential**

Defence Response to 'WPSO's Request for Protective Measures for Witnesses W04841 and W04842 dated 13 October 2021'

Specialist Prosecutor

Jack Smith

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

Counsel for Hysni Gucati

Jonathan Elystan Rees QC

Huw Bowden

I. INTRODUCTION

1. On 2 September 2021, the Specialist Prosecutor's Office ("SPO") made a request for protective measures in respect of the two witnesses **W04841 and W04842**[1] and subject to the instant application, by way of Oral Submissions at the Trial Preparation Conference.

2. That application was denied by the Trial Panel at that same hearing.[2]

3. On 7 September 2021, the Trial Panel issued its written reasons for that decision.[3]

4. On 13 October 2021, the Witness Protection and Support Office (WPSO) filed its 'Request for Protective Measures for Witnesses W04841 and W04842 dated 13 October 2021',[4] noting that the application is in respect of those same witnesses subject to the decision at paragraphs 2 and 3 above.

5. On 14 October 2021, the Trial Panel issued its 'Order Varying the Time Limit to Respond to KSC-BC-2020-07/F00363'.[5]

[1] KSC-BC-2020-07/F00363, Confidential Redacted Version of "WPSO's Request for Protective Measures for Witnesses W04841 and W04842", 13 October 2021.
[2] Oral Order on SPO Request for Protective Measures for Witnesses, Draft transcript, 2 September 2021, p. 604, lines 3-7.
[3] KSC-BC-2020-07/F00303, *Decision on the Prosecution Request for Protective Measures*.
[4] KSC-BC-2020-07/F00363/CONF/RED.
[5] LSC-BC-202007/F00364.

6. That Order abridges the timescale for any Defence response, the same being due by 13:00 CET on 15 October 2021, taking into account evidence is presently due to commence being heard on the morning of 18 October 2021.

7. The Defence for Mr. Haradinaj submits its response below.

II. THE LAW

8. Pursuant to Article 23 of the Law on the Specialist Chambers and Specialist Prosecutor's Office ("Law"),[6] and Rule 80(1) of the Rules of Procedure and Evidence ("Rules"):[7]

> *"a Panel may, proprio motu, or upon request by a Party…order appropriate measures for the protection, safety, physical and psychological well-being, dignity and privacy of witnesses, victims participating in the proceedings and others at risk on account of testimony given by witnesses, provided that the measures are consistent with the rights of the Accused."*

9. As per the written reasons of the Trial Panel at paragraph 11,[8] there is no clear guidance contained within the Rules, and therefore it is appropriate to

[6] Law No. 05/L-53.
[7] Rules of Evidence and Procedure Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020.
[8] KSC-BC-2020-07/F00303 – *Decision on the Prosecution Request for Protective Measures*.

consider the test and standard set in other jurisdictions as a comparator, this being consider below under Part III as to the 'Submissions'.

III. SUBMISSIONS

10. The Defence opposes the application, and does so primarily on four grounds, or under four heads:

a. That the application has already been ruled upon;

b. That the appropriate test has not, in any event, been satisfied;

c. That the information used to justify the application was, or ought to have been, known to the SPO at the time the SPO made its previous application; and

d. That the information is already in the public domain.

11. Prior to considering the individual grounds or heads of challenge, it is appropriate to further consider the order of the Trial Panel of 7 September 2021.

12. As per these submissions at paragraph 9 above, the Trial Panel noted that there is no guidance within the Rules in terms of appropriate circumstances

where protective measures should be granted, and therefore other jurisdiction of the same or comparable standard ought to be considered.

13. Such a comparison:

> *"reveals a general uniformity of approach in respect of circumstances generally comparable to the ones being faced in this jurisdiction. A part 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 risk being interfered with or intimidate; this requires proof of some objective basis underlying the claim that the safety or security of the individual concerned is at risk."*[9]

[9] See ICTY, *Prosecutor v. Popović et al.*, IT-95-5/18-T, Decision on Urgent Prosecution Motion for Additional Protective Measures for Witness KDZ084, 10 May 2012, p. 3, referring to *Prosecutor v. Popović et al.*, IT-95-5/18-T, Decision on Urgent Prosecution Motion for Augmentation of Protective Measures for a Witness Due to Testify in the Tolimir Case, 6 July 2010, p. 3; *Prosecutor v. Boskoski*, IT-04-82-T, Decision on Prosecution's Motion for Protective Measures, 2 May 2007, para. 2; *Prosecutor v. Brdjanin and Talić*, IT-99-36/1, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, paras 26, 52; ICTR, Prosecutor v. Simba, ICTR-01-76-I, Decision on Defence Request for Protection of Witnesses, 25 August 2004, para. 5; *Prosecutor v. Nzirorera*, ICTR-98-44-I, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, 12 July 2000, para. 9; *Prosecutor v. Bizimungu et al*, ICTR-99-50-T, Decision on Casimir Bizimungu's Motion for Protection of Defence Witnesses, 27 June 2005, para. 8; *Prosecutor v.* Renzaho, ICTR-97-31-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 17 August 2005, para. 10; *Prosecutor v. Nchamihigo*, ICTR-2001-63-T, Decision on Defence Motion for Protection of Defence Witnesses, 20 March 2007, paras 3-4; *Prosecutor v. Setako*, ICTR-04-81-I, Decision on Prosecution Motion for Protective Measures, 18 September 2007, para. 4; *Prosecutor v. Nshogoza*, ICTR-07-91-PT, Decision on Prosecutor's Extremely Urgent Motion for Protective Measures for Victims and Witnesses, 24 November 2008, para. 6. See also Draft Transcript, 1 September 2021, pp. 413-414.

14. The decision of the Trial Panel goes on to affirm that the above reflects the importance of proceedings being public, but also, that any exception to this principle ought to be on the basis of being 'strictly necessary'.[10]

15. Further, and importantly, that same decision goes on to find 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 measures*".[11]

16. It is submitted at the outset, that the WPSO has not satisfied the test for the imposition of such measures, even where this application is an application of first instance, much less where the application is in fact a 'second attempt' at obtaining that which has already been refused by the Trial Panel.

That the Application has Already been Ruled Upon

[10] ECtHR, *P.S. v. Germany*, Judgment, no. 33900/96, 20 December 2001, paras 22-23. See also Framework Decision on Disclosure, para. 71.

[11] See e.g., ICTY, *Prosecutor v. Haradinaj et al*., IT-04-84, Decision on Second Haradinaj Motion to Lift Redactions of Protected Witness Statements, 22 November 2006, para. 2; *Prosecutor v. Lukić & Lukić*, IT-98-32/1-T, Order on Milan Lukić's Request for Protective Measures, 23 July 2008, pp. 3-4; ICTR, *Prosecutor v. Nshogoza*, ICTR-07-91-PT, Decision on Prosecutor's Motion for Protective Measures for Victims and Witnesses, 24 November 2008, para. 7; *Prosecutor v. Nizeyimana*, ICTR-2001-55C-PT, Decision on Prosecutor's Motion for Protective Measures for the Victims and Witnesses to Crimes Alleged in the Indictment, 9 June 2010, para. 6.

17. As per paragraphs 1-3 above, the application made by the WPSO has been previously made and ruled upon, on the last occasion that application being made by the SPO.

18. In refusing the application, the Trial Panel found:

> *"…that the SPO has failed to demonstrate the existence of a real likelihood of danger or risk to the safety, physical and psychological well-being, dignity and privacy of its Witnesses or to the safety of the persons with whom they are like to interact. The Panel concludes that the Measures are an unnecessary and disproportionate curtailment of the Accused's right to a public trial".*[12]

19. It is submitted that this position must hold true with the instant application, and further, that no justification has been provided as to why a further attempt is being made.

20. Further, the previous application was for 'less onerous' protective measures than those being applied for by the WSPO and therefore the bar must be even higher on this second occasion taking into account that voice and facial distortion is being requested.

[12] KSC-BC-2020-07/F00303 – *Decision on the Prosecution Request for Protective Measures*, at para. 23.

21. The WSPO, in its submissions have not satisfied the test required, and further, the application is merely a second attempt by a different entity and therefore ought to be rejected on this basis alone, but particularly when read in conjunction with the below submissions.

That the Test Has not been Satisfied

22. The WSPO have failed to provide any tangible evidence upon which an assessment can be made and therefore the application is made solely in the abstract.

23. Further, it is notable that the SPO in its application did not make any reference to the issues that are now being raised.

24. As the Trial Panel has already found on the previous application, the applicant must demonstrate a 'real likelihood of danger or risk', the current submission has summarily failed to do so, there being no tangible evidence, other than a mere hypothesis that there may be an increase to risk. With respect, this is not enough to satisfy the test. The WSPO have failed to demonstrate that there is a real likelihood of danger or risk.

25. It is notable that at paragraph 19 of the previous decision, the Trial Panel noted "*The SPO's argument that a risk will be created by the public disclosure of the Witnesses' names is undermined by the fact that the SPO is not asking that the physical appearance of the Witness should be concealed from the public*". It is

perhaps coincidental that this measure is now being sought in the instant application.

26. It is respectfully submitted that the mere inclusion of this measure in the application does not bolster what is a fatally unsubstantiated application.

27. Further, it is appropriate to rehearse previous submissions made on the test.[13]

28. Further to the submission that the application cannot be justified under Rule 80 of the Rules, the Defence maintains the previous position that such measures are not in any event consistent with the rights of the Accused and his right to a public hearing, including the right of confrontation.

29. The witnesses to be called by the SPO are not victims of any allegation contained within the indictment, or at all, and further, there does not appear to be a suggestion that it is these two individuals that require protective measures, but rather unnamed other individuals.

30. If it is that such measures are granted on this occasion, having previously been refused, the Defendant is being denied the right to face his accuser, it being notable that the instant application as already highlighted, does in fact go further than that which has already been refused.

[13] KSC-BC-2020-07/F00287.

31. Accordingly, if granted, the Defendant would thereby be placed at a significant disadvantage and thus subject to a violation of the principle of the 'Equality of Arms', this principle being at the very core of the right to a fair trial.[14]

32. The previous submissions note at paragraph 20 that "*…to grant such a request sets a precedent that SPO investigators and/or witnesses (other than victims and/or civilian witnesses) ought to enjoy such anonymity as of right*".[15]

33. It is respectfully submitted that that previous submission is now taken further given the basis upon which the application is now made in that the apparent suggestion, is that any witness who has had contact with an SPO staff member is at risk and therefore any such SPO staff member who has had contact with a witness ought to be granted anonymity at trial.

34. This cannot be appropriate, and again to rehearse that which has been argued previously, such a position offends any principle of transparency and open justice and renders the entire proceedings opaque.

That the Basis of the Application was, or ought to have been, known by the SPO at the time it made its application.

[14] *Prosecutor v. Delalić*, IT-96-21-T, 'Decision on the Prosecution's Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence', 4 February 1998, para 45; *Gorraiz Lizarraga and others v. Spain*, Appl. no. 62543/00, 27 April 2004, para 56; *Kress v. France*, Appl. no. 39594/98, 7 June 2001, para 72; *Prosecutor v. Stakić*, IT-97-24-A, 22 March 2006, para 149.
[15] Defence for Mr. Haradinaj, *Submissions in Preparation for Trial Preparation Conference*, 27 August 2021.

35. It must be borne in mind that the two witnesses subject to the application are both employees of the SPO and therefore one makes the obvious assumption that they are aware of the procedures, and further, are in regular contact with members of the SPO.

36. It is therefore submitted to be inconceivable that the issues raised within the current application were not known to the SPO at the time it made its earlier application, and even where that information was not known, it ought to have been known when determining whether each witness should be subject to an application and thus information gleaned from that witness to justify the application.

37. The issues that give rise to the current application are based upon facts that have already occurred, certainly up to 2 years ago,[16] and therefore the information, contrary to the position of the WSPO at paragraph 8 of the application, is not new, it was, or in the alternative, ought to have been, known previously.

38. In this regard it is noted that the SPO originally sought the very measure now being sought by the WPSO, but prior to the hearings on 1-2 September 2021, reflected on the position and sought a lesser measure of adopting

[16] KSC-BC-2020-07/F00363/CONF/RED at paragraph 10.

pseudonyms. The application by the WPSO therefore goes back to the original position of the SPO.

39. The Defence cannot comment upon or come up with any conceivable reasons why these issues were not raised by the SPO in its original application, and further, why it has taken until a few days before evidence is due to be heard for this application to be made, however, the fact remains that the information was not put forward and therefore, the WSPO ought not to be allowed a 'second bite of the cherry' simply because the application did not find favour on the first occasion when submitted by the SPO.

40. No reason has been advanced as to why this information is only being advanced now, the Defence not accepting the WSPO's position that this is 'new information', as all of this information was within the knowledge of the SPO witnesses at the time of the previous application, and therefore could have been advanced.

That the Information is Already in the Public Domain

41. The WSPO in its application at paragraph 18, "*recognises that the names of the Witnesses have already been released in the public domain*".

42. Further, those names and therefore the information has been in the public domain since at least 7 September 2021, or for some five weeks or more.

43. Any attempt to redact or anonymise has a distinct sense of trying to 'close the stable door after the horse has bolted', and with respect, any such measures are likely to be meaningless given the media scrutiny that this case has already been subject to.

44. The Defence has previously argued that the SPO is seeking to try the Defendant behind closed doors by failing to disclose material relevant to the charges, by seeking to present its case, predominantly through two staff members, behind closed doors with the most severe form of protective measures. Such an approach should not be entertained by the Court under any circumstances.

IV. CONCLUSION

45. It is respectfully submitted that for the forgoing reasons, the application ought to be rejected:

a. The application is being made at the last minute with no good reason advanced for it being made at such a late stage;

b. The application has already been refused once and no justifiable basis has been advanced for it now being appropriate to engage in a further attempt;

c. No reason has been provided for the basis for the application not being advanced by the SPO despite the SPO knowing, or should have known, as to the information;

d. The appropriate test has not, in any event, been satisfied; and

e. To grant the request sets a dangerous precedent and one that fundamentally undermines the principle of open justice.

V. CLASSIFICATION

46. This application is filed **Confidentially**. The Defence has no objection to its reclassification as **Public** and it would require no redactions.

Word Count: 2,321 words

Toby Cadman

Specialist Counsel

Carl Buckley

Specialist Co-Counsel