



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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 Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

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Language: English

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Decision on the WPSO Request for Protective Measures

Specialist Prosecutor

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TRIAL PANEL II ("Panel"), pursuant to Articles 21, 23(3), 40(2), 40(6)(d) and (f) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 80, 116(4)(b) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 23 August 2021, the Specialist Prosecutor's Office ("SPO") filed a request for protective measures ("Initial Request") in respect of W04841 and W04842 ("Witnesses").¹
2. On 2 September 2021, the Panel denied in an oral order the Initial Request.²
3. On 7 September 2021, the Panel provided written reasons for that decision ("Decision on Protective Measures").³
4. On 13 October 2021, the Witness Protection and Support Office ("WPSO") of the Registry submitted a request for protective measures in respect of the same two witnesses ("Request").⁴
5. On 14 and 15 October 2021, pursuant to the order of the Panel varying the time limit for responses,⁵ the Defence and the SPO made submissions in response to the Request ("Gucati Response", "Haradinaj Response", "SPO Response").⁶

¹ F00282, Specialist Prosecutor, *Prosecution Request for Protective Measures*, 23 August 2021.

² Oral Order on SPO Request for Protective Measures for Witnesses, Transcript, 2 September 2021, p. 604, lines 2-7.

³ F00303, Panel, *Decision on the Prosecution Request for Protective Measures* ("Decision on Protective Measures"), 7 September 2021.

⁴ F00363, Witness Protection and Support Section, *WPSO's Request for Protective Measures for Witnesses W04841 and W04842* ("Request"), 13 October 2021, strictly confidential and *ex parte*. See also F00363/CONFRED, confidential.

⁵ F00364, Panel, *Order Varying the Time Limit to Respond to F00363*, 14 October 2021, confidential.

⁶ F00368, Gucati Defence, *Response to Confidential Redacted Version of "WPSO's Request for Protective Measures for Witnesses W04841 and W04842"*, Dated 13 October 2021 ("Gucati Response"), 14 October 2021, confidential; F00369, Haradinaj Defence, *Defence Response to "WPSO Request for Protective Measures for Witnesses W04841 and W04842 Dated 13 October 2021"* ("Haradinaj Response"), 14 October 2021, confidential; F00370, Specialist Prosecutor, *Prosecution Response to WPSO's Request for Protective*

II. SUBMISSIONS

6. WPSO requests the Panel to grant the following protective measures for the Witnesses: (a) identification of the Witnesses only by their assigned pseudonyms throughout the public proceedings; (b) redaction of the Witnesses' names and identifying information from the Specialist Chambers' public records; and (c) the giving of testimony through image and voice altering devices.⁷

7. The Gucati Defence submits that the Request should be denied as the findings of the Panel in rejecting the Initial Request remain apposite to the Request.⁸ The Haradinaj Defence opposes the Request on the grounds that (i) it has already been ruled upon; (ii) the appropriate test has not, in any event, been satisfied; (iii) the information used to justify the Request was, or ought to have been, known to the SPO at the time the SPO made its previous application; and (iv) the information is already in the public domain.⁹

8. The SPO submits that it is not seeking to re-litigate the matter, but, in view of the additional facts raised by WPSO, the SPO is available to answer any questions or provide further information as the Panel requires.¹⁰

III. APPLICABLE LAW

9. Pursuant to Article 40(6)(d) and (f) of the Law, the Panel may, as necessary, provide for the protection of witnesses and confidential information. Pursuant to Article 23(3) of the Law and Rule 80(1) of the Rules, WPSO may apply to the Panel for appropriate measures for the protection, safety, well-being, dignity and privacy of witnesses, victims participating in the proceedings and others at risk on account of testimony

Measures for Witnesses W04841 and W04842 ("SPO Response"), 15 October 2021, strictly confidential and *ex parte*. See also F00370/CONFRED, confidential.

⁷ Request, para. 18.

⁸ Gucati Response, paras 14-15.

⁹ Haradinaj Response, para. 10.

¹⁰ SPO Response, para. 1.

given by witnesses, provided that the measures are consistent with the rights of the Accused.

10. The SC regulatory framework provides that proceedings shall in principle be public, unless the pursuit of a competing legitimate interest warrants an exception to that principle.¹¹ The principle of publicity not only safeguards the fundamental rights of the Accused to a public and fair trial, but also ensures trust in the judicial process through transparency, thereby constituting an important safeguard against arbitrariness.¹² As a result, exceptions to this principle must be commensurate to the importance of the interests and rights that it seeks to protect and must preserve the fundamental right of the Accused to a fair trial and the essence of other fundamental rights.¹³

11. The Panel recalls that, under Rule 80 of the Rules, a request for protective measures must demonstrate that there is a real likelihood that the safety, physical and psychological well-being, dignity or privacy of a witness, victim participating in the proceeding or other person at risk on account of testimony given by witnesses is endangered. This requires proof of an objective basis underlying the claim that the individual concerned is in danger, or risk being interfered with or intimidated.¹⁴

IV. DISCUSSION

A. STANDING OF WPSO TO REQUEST PROTECTIVE MEASURES

12. Article 23(3) of the Law and Rule 80(1) of the Rules give standing to WPSO to request protective measures. In such cases, WPSO must comply with the

¹¹ Decision on Protective Measures, para. 9.

¹² Decision on Protective Measures, para. 9, citing the European Court of Human Rights (“ECtHR”), *Riepan v. Austria*, no. 35115/97, [Judgment](#), 14 November 2000, para. 27; *Krestovskiy v. Russia*, no. 140440/03, [Judgment](#), 28 October 2010, para. 24; *Sutter v. Switzerland*, no. 8209/78, [Judgment](#), 22 February 1984, para. 26.

¹³ Decision on Protective Measures, para. 9.

¹⁴ Decision on Protective Measures, para. 11.

SC regulatory framework in the same manner as a Party. Therefore, when requesting protective measures, the onus is on WPSO to demonstrate that the aforementioned legal test is met.¹⁵

13. Although WPSO did not take part in the litigation that gave rise to the Decision on Protective Measures, the issue which the Panel decided (whether the Witnesses may testify at trial with measures to withhold their identity from the public) is the same issue as that raised here. By virtue of its function, WPSO was fully apprised of all arguments raised by the Parties on this issue. Had it considered relevant and necessary to exercise its procedural right under Rule 80(1) of the Rules to make submissions in relation to the protection of the Witnesses, WPSO should have taken steps to ensure that it made those submissions *at that time*. Furthermore, the original requesting party was the SPO. The Law and the Rules provide a limited number of remedies for challenging or revisiting decisions of a Panel and those remedies were available to the SPO, which elected not to use them.

14. Furthermore, it is of critical importance to the expeditiousness and good order of proceedings that issues of relevance to the trial are in principle litigated only once, by all Parties concerned, so as to avoid duplication of efforts and associated delays. For that reason, as a general matter, WPSO should submit a request for protective measures either concomitantly with the calling Party's request or as a result of that Party's refusal or failure to submit such a request if and when it has received credible information justifying such a request. Therefore, when a Party submits a request for protective measures under Rule 80 of the Rules, WPSO is expected to conduct an immediate evaluation of any necessary protective measures in respect of that request and, if need be, make submissions as soon as possible, but in any case *during the litigation of that request*. In exceptional circumstances, where WPSO was not in a position, for legitimate reasons, to conduct its own evaluation at the time of the calling

¹⁵ See *supra* para. 11.

Party's filing, a subsequent request for protective measures may be submitted, detailing the reasons for the delay. Where WPSO intends to submit a request for protective measures where the calling Party does not intend to do so, WPSO should file its request at the earliest opportunity, as soon as it is aware of the expected testimony of a witness and has had the opportunity to evaluate the protection needs of that witness. Steps should be taken to ensure that this is not being done at the last minute before the witness concerned is due to start testifying.

B. TIMING OF THE REQUEST

15. The Panel recalls that, in its 17 September 2021 order on the conduct of proceedings ("Order on the Conduct of Proceedings"),¹⁶ it instructed the Parties "to file applications for protective measures as early as possible, and in any event sufficiently early to permit the opposing Party to respond meaningfully".¹⁷ This also applies to WPSO if and when exercising its procedural right under Article 23(3) of the Law and Rule 80(1) of the Rules.

16. The Panel notes that the Request was submitted almost six weeks after the Panel's oral order denying the SPO's request for protective measures, five weeks after the Decision on Protective Measures and two working days before the first of the Witnesses was due to testify before the Panel. The Panel further notes that, in accordance with WPSO's own practices,¹⁸ a completed Witness Information Form for each of the two Witnesses must have been provided by the SPO at least 35 days in advance of the expected testimony. Furthermore, an up-to-date list of witnesses

¹⁶ F00314, Panel, *Order on the Conduct of Proceedings* ("Order on the Conduct of Proceedings"), 17 September 2021.

¹⁷ Order on the Conduct of Proceedings, para. 24.

¹⁸ F00286, Registry, *Registry Submissions for Trial Preparation Conferences and on the Draft Order on the Conduct of Proceedings* ("Registry Submissions"), 27 August 2021, para. 6, as approved by the Panel in the Order on the Conduct of Proceedings, para. 41(i).

expected to testify was due 14 days before the expected testimony.¹⁹ The Panel also reiterates that, by virtue of its function, WPSO has been privy to the SPO's initial witness list, filed on 9 April 2021,²⁰ the Initial Request and the ensuing litigation. The Panel also notes that the Witnesses are SPO employees and are based in The Hague and therefore available at any time for assessment.

17. The Panel understands that WPSO carries out a vulnerability assessment as part of its initial familiarization procedure.²¹ In its 17 September 2021 Order on the Conduct of Proceedings, the Panel did not regulate the timeframe within which WPSO was required to make a request for protective measures, as it was assumed that WPSO would ensure that any such request would be submitted in a timely fashion, either concomitantly with the calling Party's request or sufficiently in advance to be dealt with by the Panel after hearing the Parties, and would not be dependent on the aforementioned familiarization procedure.

18. In the present case, the belated nature of the Request has required the Panel to curtail the time available to the Parties to respond and set aside ongoing preparations for trial. Both the SPO and the Defence are in a work-intensive phase of preparation to commence the presentation of the evidence at trial. They have now been put in a position of having to set aside some of these preparations for the purpose of responding to the Request. Moreover, preparations have been carried out by the Parties and by the Panel for the examination of the Witnesses on the basis that neither will testify with protective measures. Arrangements could have and should have been made at an earlier time so as to avoid a late application such as the Request, and the prejudicial consequences that result from it.

¹⁹ Registry Submissions, para. 8, as approved by the Panel in the Order on the Conduct of Proceedings, para. 41(i)(a).

²⁰ F00181/A02, Specialist Prosecutor, *Submission of Pre-Trial-Brief, Witness and Exhibit Lists, and Rule 109(c) Chart List of Witnesses*, 9 April 2021, confidential.

²¹ Registry Submissions, para. 12.

19. In order to prevent such delays in the future, the Panel amends its Order on the Conduct of Proceedings, and orders the Registry to adjust its practices so as to submit requests for protective measures either concomitantly with the calling Party's request or as a result of that Party's refusal or failure to submit such a request if and when WPSO has received credible information justifying such a request, and, in any event, no later than 14 days prior to the expected testimony of a witness.

C. MERITS OF THE REQUEST

20. WPSO submits that during the pre-trial familiarisation process of W04841 and W04842, it received "new information" regarding persons with whom the two Witnesses interacted.²² WPSO maintains that if the Witnesses testified without protective measures, the risks to these persons would increase as it is likely that local residents would make a connection between them and the Witnesses and would realise that these persons cooperated with the SPO.²³

21. The Gucati Defence responds that the Request contains no new information and that it merely repeats the concern raised in the Initial Request that disclosure of information which identifies the Witnesses during the course of their evidence may increase the likelihood that others will recognise their interaction with third parties.²⁴ The Haradinaj Defence submits that WPSO has not satisfied the test for imposition of protective measures, even if the Request would be one of first instance, much less where it is in fact a second attempt at obtaining that which has already been refused by the Panel.²⁵

22. As the Panel noted earlier, the SPO did not seek reconsideration or certification for appeal of the Decision on Protective Measures. The Request is, in essence, a fresh

²² Request, paras 5-16.

²³ Request, paras 5-16.

²⁴ Gucati Response, paras 6-7.

²⁵ Haradinaj Response, para. 16.

application for protective measures in respect of two proposed witnesses who were refused protective measures following an earlier application by the SPO.

23. As regards the “new” nature of the WPSO information, the Panel is satisfied that the SPO is intimately familiar with the nature of the work of the Witnesses, as they are SPO employees. The SPO must have had the relevant information in the Request in its possession when it filed the Initial Request.²⁶ Accordingly, while the information might be “new” for WPSO, it can be reasonably expected that this information would have been put forth by the SPO either in its application for protective measures or as grounds for reconsideration. Moreover, had WPSO conducted its evaluation before or during the litigation of the Initial Request, this information would have become available to it.

24. As regards the risks referred to by WPSO, the Panel recalls that it denied the Initial Request because it found no objective, concrete indications that the public disclosure of the Witnesses’ names meant that there was a real likelihood that they or others may be in danger.²⁷ While WPSO provides information regarding specific persons, the allegedly increased risk it describes is a possibility of some local residents making a connection between these persons and the Witnesses, which in turn might lead to those residents understanding that the persons in question cooperated with the SPO. Such an argument, however, applies to virtually all SPO investigators who come into contact with protected persons during their investigative activities, and who later testify at trial. Such risks, while theoretically possible, have not been shown to be more than hypothetical in this case.

25. The Panel recalls its finding in the Decision on Protective Measures that the Witnesses, as SPO staff members, fall into the category of witnesses who are members of the police or associated investigative authorities, and that “it is in the nature of

²⁶ The Panel notes footnote 3 of the SPO Response, listing documents that predate both the Initial Request and the Request.

²⁷ Decision on Protective Measures, paras 15-23.

things that their duties, particularly in the case of arresting officers, may involve giving evidence in open court”.²⁸

26. The Panel also recalls that the SPO has broad discretion (subject to the requirement that their testimony is relevant) to choose which witnesses to call at trial, and it decided to call these two particular witnesses, and asked them to prepare to give evidence on the assumption that they may be required to do so without protective measures.²⁹

27. The Panel is therefore not satisfied that the anticipated testimony of the Witnesses in open session would create a real likelihood that the safety, well-being, dignity or privacy of the persons with whom the Witnesses came into contact would be endangered as a result of their testifying without protective measures.

V. DISPOSITION

28. For the foregoing reasons, the Panel:

- a. **DENIES** the Request;
- b. **AMENDS** its Order on the Conduct of Proceedings to **ORDER** the Registry to adjust its practices so as to submit requests for protective measures either concomitantly with the calling Party’s request or as a result of that Party’s refusal or failure to submit such a request if and when WPSO has received credible information justifying such a request, and, in any event, no later than 14 days prior to the expected testimony of a witness; and

²⁸ Decision on Protective Measures, para. 17, citing ECtHR, *Mechelen et al. v. The Netherlands*, nos. [21363/93](#), [21364/93](#), [21427/93](#) and [22056/93](#), [Judgment](#), 23 April 1997, para 56.

²⁹ Decision on Protective Measures, para. 16, citing Transcript, 1 September 2021, pp. 410-411.

- c. **ORDERS** WPSO, the SPO and the Defence to submit public redacted versions or request reclassification as public of their respective filings by **20 October 2021**.



Judge Charles L. Smith, III
Presiding Judge

Dated this Friday, 15 October 2021
At The Hague, the Netherlands