

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: 24 October 2021

Language: English

Classification: Public

**Publicly Redacted Defence Submissions on the Reclassification as Public of Parts
of the Trial Hearing Transcripts Held in Private Session**

Specialist Prosecutor

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I. INTRODUCTION

1. During the trial hearings on 18, 19, 20 and 21 October 2021, the SPO's first and principal witness, SPO investigator Zdenka Pumper, gave testimony and was cross-examined by Specialist Counsel for Mr. Gucati.
2. In respect of Ms Pumper's testimony, Specialist Counsel for the Defence repeat their concern about the extensive use of private sessions which has meant that important statements and information that have come to light during the testimony are not available to the public.
3. Accordingly, pursuant to Rule 84 (1) of the Rules of Procedure and Evidence ('RPE'), the Defence seeks:
 - a. A review of the transcripts of private sessions during the trial hearings from 18 to 21 October 2021, in particular the cross-examination of Ms Pumper, held in private session, and
 - b. An order for their reclassification as public or publicly redacted, as appropriate.

II. LAW

4. Rule 84(1) RPE on reclassification of records of proceedings and evidence provides:

"On an ongoing basis and before rendering its Judgment, the Panel shall review the classification of records of proceedings and evidence and, where applicable, order their reclassification."

5. Pursuant to Article 40(4) of the Law:

“The hearings shall be public unless the Trial Panel decides to close the proceedings in accordance with the Rules of Procedure and Evidence.”

6. In accordance with Rule 120(1) RPE:

“All proceedings before a Panel, other than deliberations, shall be held in public, unless otherwise decided by the Panel after hearing the Parties.”

7. Further, in accordance with Rule 120(2) RPE:

*“...private sessions shall be held in camera, excluding the public from the audio broadcast outside the courtroom, and shall be ordered in **exceptional circumstances**. The reasons to hold proceedings in closed or private session shall be announced in public.” (emphasis added)*

8. Rule 120(3) RPE provides the test for private sessions:

“The Panel may order closed or private sessions, as appropriate, for reasons of:

(a) public order;

(b) security;

(c) national security interests of Kosovo or a Third State;

(d) non-disclosure of the identity of a witness or a victim participating in the proceedings, as provided for in Rule 80; or

(e) the interests of justice.”

III. SUBMISSIONS

9. During the hearings of 18 to 21 October 2021, the Trial Panel questioned on numerous occasions the reasons or necessity of moving to or remaining in private session,¹ a concern also voiced by Specialist Counsel for Mr. Haradinaj and Mr. Gucati.²

10. In response, the Trial Panel gave a 'notice on private sessions' on 20 October 2021:

*"...in response to Mr. Cadman's comment about the SPO's use of private sessions yesterday, the Panel agrees with you, Mr. Cadman, that the Prosecutor could have made more limited use of private sessions by organising its questions differently. However, in the circumstances, and in the light of the fact that this **did not cause prejudice and was only limited in scope**, the Panel will refrain, for this one time, to order the reclassification of this part of the transcript. The Panel directs the parties, however, to organise their questioning in such a manner as to limit the need for private and closed session to the maximum extent possible."*³ (emphasis added)

11. Further objections were raised by Specialist Counsel as to private sessions ordered in relation to publicly known names and individuals, as well as documents not marked as confidential.⁴

¹ KSC-BC-2020-07, Provisional Transcript, 19 October, at p. 957: [REDACTED]; p. 959: Presiding Judge Smith: [REDACTED] (emphasis added); p. 959: Presiding Judge Smith: [REDACTED]

² See, e.g. KSC-BC-2020-07, Provisional Transcript, 19 October 2021, p. 960: MR. CADMAN: [REDACTED]; KSC-BC-2020-07, Provisional Transcript, 20 October 2021, p. 1093: [REDACTED]; p. 1110 PRESIDING JUDGE SMITH: "For purposes of maintaining the confidentiality of this document and the names contained therein in relation thereto, we will go into private session." MR. REES: "The claimed confidentiality of the document, Your Honour."

³ KSC-BC-2020-07, Provisional Transcript, 20 October 2021, p. 1039.

⁴ KSC-BC-2020-07, Provisional Transcript, 20 October 2021, p. 1093, MR. CADMAN: [REDACTED]; p. 1110 PRESIDING JUDGE SMITH: "For purposes of maintaining the confidentiality of this document and the names contained therein in relation thereto, we will go into private session." MR. REES: "The claimed confidentiality of the document, Your Honour."

12. In response thereto, the Trial Panel repeated an official ‘warning’ the Panel had issued at the opening of the case on 7 October 2021⁵:

“The material that the accused are said to have unlawfully publicised contain names and details of various individuals who are connected to investigations carried out by the SITF or SPO. Until that time when the Panel determines whether that material was or still is confidential in nature, the Parties are ordered not to make public reference to this information in public hearings.

We, therefore, expect the parties to exercise due diligence in ensuring that the names and details of such individuals are not disclosed in public sessions, whether in their opening statements, questioning of witnesses, or submissions. If necessary, the Parties should request private session if the name or function of any such individual is deemed material to a question they wish to ask or submissions they wish to make.” (emphasis added)

13. In accordance with the Trial Panel’s ‘notice on private sessions’ of 20 October 2021 and its ‘warning’ of 7 October 2021, as well as the Law and Rules, Specialist Counsel seeks the review for purposes of reclassification as public or, if necessary, publicly redacted of certain parts of the cross-examination of Ms Pumper.
14. It is recalled that the presumption is that these proceedings are public⁶ and that hearings are held in public.⁷

⁵ KSC-BC-2020-07, Provisional Transcript, 20 October 2021, pp. 1116-1117.

⁶ KSC-BC-2020-07, Provisional Transcript, 21 October 2021, p. 1166.

⁷ Article 40(4) of the Law, Rule 120(1) RPE.

15. As per the Law and Rules, private sessions can be ordered only in “*exceptional circumstances*”⁸ in accordance with the applicable legal framework.
16. The Defences wishes to highlight the following part of the cross-examination on 21 October 2021, with a view to its reclassification as public:

[REDACTED]⁹ (emphasis added)

17. *First*, in this part of the private session, no names, publicly known or confidential, were mentioned, nor were specific documents in the Batches discussed.
18. *Second*, the question and answer relate to something that was publicly stated by the Specialist Prosecutor at the SPO Opening on 7 October 2021, namely that there are SPO investigations undergoing into the “theft” of the documents from the SPO.¹⁰ Ms Pumper’s answer, that [REDACTED] must be made public as a direct response to the Specialist Prosecutor’s statement. Ms Pumper’s answer is astonishing, *inter alia*, because it comes from what the Defence understands to be of the most senior and experienced investigators at the SPO, who also for years has shared her desk with the SPO investigator leading the investigation around the Batches, [REDACTED].¹¹
19. *Third*, the Specialist Prosecutor’s Opening was public, as was the reference to the “theft” of the documents being investigated. Ms Pumper’s statements relate to the very same investigation.

⁸ Rule 120(2) RPE.

⁹ KSC-BC-2020-07, Provisional Transcript, 21 October 2021, p. 1249.

¹⁰ KSC-BC-2020-07, Provisional Transcript, 7 October 2021, p. 790.

¹¹ *See, e.g.* KSC-BC-2020-07, Provisional Transcript, 21 October 2021, pp. 1234-1235.

20. *Fourth*, not revealing this [REDACTED] of the Specialist Prosecutor's statement would "*cause prejudice*" to the Defence, as per the Trial Panel's notice on private sessions of 20 October 2021, mentioned above.¹²
21. *Fifth*, there is no reason pursuant to Rule 120(3) RPE why this question and answer could be excluded from the public transcript. "Embarrassment" of the SPO is not one of the grounds to justify private sessions listed in this Rule.
22. *Sixth*, there are no "*exceptional circumstances*"¹³ requiring the private session on this part of the cross-examination, given that the witness spoke to the very information the Specialist Prosecutor stated in public.
23. *Seventh*, in accordance with the applicable legal framework,¹⁴ therefore, the general rule that hearings must be public should have been applied to this part of the hearing. As this was not done, this part of the transcript must be reclassified as public.

IV. CONCLUSION

24. In sum, the statement of Ms Pumper made in cross-examination on 21 October 2021 in private session, that to her knowledge [REDACTED] must be put on the public record.
25. Apart from this specific statement, the Defence invites the Trial Panel to review the transcripts of other parts of private sessions with a view to their reclassification as public or publicly redacted, as necessary and appropriate.

¹² See para. 10 and corresponding footnote.

¹³ Rule 120(2) RPE.

¹⁴ See Part II above.

V. CLASSIFICATION

26. This filing is classified as confidential because of its references to private sessions of the trial hearings that have not been reclassified as public yet. There is no objection to reclassifying this filing as public.

Word Count: 1,437 words



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