

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: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

Date: 18 January 2022

Language: English

Classification: **Public**

Public Redacted Application to Authorise Advance Disclosure to Expert Witness DW1253

| Specialist Prosecutor | Counsel for Nasim Haradinaj |
|------------------------------|------------------------------------|
| Jack Smith | Toby Cadman |
| Valeria Bolici | Carl Buckley |
| Matthew Halling | Almudena Bernabeu Garcia |
| | Jonathan Worboys |
| James Pace | Counsel for Hysni Gucati |
| | Jonathan Elystan Rees QC |
| | Huw Bowden |
| | Eleanor Stephenson |

I. INTRODUCTION

1. Pursuant to Rule 139 (7) and Rule 149 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”),¹ and in the absence of an *inter partes* agreement with the Specialist Prosecutor’s Office (“SPO”), the Defence for Nasim Haradinaj (“Haradinaj Defence”) requests the Trial Panel to authorise the disclosure of the following relevant documents to the Expert Witness DW1253 (Proposed Disclosure), prior to his testimony via video link presently scheduled to take place on 24 and 28 January 2022:

- a) full unredacted transcripts of the evidence of Witness WO4841 (Zdenka Pumper);²
- b) full unredacted transcripts of the evidence of WO4842 (Miro Jukic);³
- c) full unredacted transcripts of WO4876 (Daniel Moberg);⁴
- d) video recording of 25 September 2020 SPO search;⁵

¹ KSC-BC-2020-07/F00469, Defence Submission of List of Anticipated Witnesses with Annex 1 and Annex 2, 2 December 2021.

² KSC-BC-2020-07, Transcript of 18 October 2021 (Confidential), Transcript of 19 October 2021 (Confidential), Transcript of 20 October 2021 (Confidential), Transcript of 21 October 2021 (Confidential), Transcript of 25 October 2021 (Confidential), Transcript of 26 October 2021 (Confidential), Transcript of 28 October 2021 (Public).

³ KSC-BC-2020-07, Transcript of 28 October 2021 (Public), Transcript of 4 November 2021 (Confidential).

⁴ KSC-BC-2020-07, Transcript of 5 November 2021 (Confidential).

⁵ ERN 104414-01 and 104414-02

- e) four SPO handover forms (dated 8,⁶ 17,⁷ 22 September 2020⁸ and 21 October 2020,⁹ respectively);
- f) declarations of Zdenka Pumper;¹⁰
- g) declarations of Miro Jukic;¹¹
- h) declarations of Daniel Moberg;¹² and

⁶ KSC-BC-2020-07-080449-080449, SPO Delivery Document 08.09.2020

⁷ KSC-BC-2020-07-079500-079500, SPO Delivery Document 17.09.2020

⁸ KSC-BC-2020-07-SPOE00220915-00220915, SPO Acknowledgement of delivery 22.09.2020

⁹ KSC-BC-2020-07-083986 - 083987 RED

¹⁰ KSC-BC-2020-07-084015-084026, Declaration of Zdenka Pumper; KSC-BC-2020-07-091791-091792, Declaration of Zdenka Pumper; KSC-BC-2020-07-091927-091930, Declaration of Zdenka Pumper; KSC-BC-2020-07-093492-093590, Declaration of Zdenka Pumper; KSC-BC-2020-07-095162-095239, SPO Declaration of Zdenka Pumper Annex 1 Chart on Batch 4; KSC-BC-2020-07-095533-095602, SPO Declaration of Zdenka Pumper Annex 1 Chart on Batch 1; KSC-BC-2020-07-095603-095653, SPO Declaration of Zdenka Pumper Annex 1 Chart on Batch 4; KSC-BC-2020-07-082727-082731, SPO Official Note, 9 October 2020 by Zdenka Pumper Subject: Submission of evidence Batch 3; KSC-BC-2020-07-083992-083996, SPO Official Note, 21 October 2020 by Zdenka pumper Subject: Submission of evidence Batch 3, KSC-BC-2020-07-103543-103544, Declaration by Zdenka Pumper dated 14 October 2020.

¹¹ KSC-BC-2020-07-084008-084010, Declaration of Miro Jukic, KSC-BC-2020-07-090142-090143, Addendum to Declaration of Miro Jukic.

¹² KSC-BC-2020-07-089919-089927, Information extracted from SPO Internal Document dated 21 October 2020, Seizure of Documents from the KLA War Veteran's Association Statement of Daniel Moberg SPO Operational Security Officer (p.1-2); KSC-BC-2020-07-083988-083991 RED, SPO Official Note 21 October 2020 by Daniel Moberg Subject: Seizure of documents from the KLA War Veteran's Association on 8 and 17.09.2020;21.09.2020; KSC-BC-2020-07-083986-083987 RED, SPO Official Note 21 October 2020 by Daniel Moberg Subject: Receipt of documents from Gazeta InFokus; KSC-BC-2020-07-102754-102755, SPO Official Note of 31 August 2021 by Daniel Moberg Subject: Seizure of documents from KLA War Veteran's Association; KSC-BC-2020-103915-103915, Declaration of Daniel Moberg.

- i) declarations of [REDACTED]¹³
2. The Haradinaj Defence requests the disclosure of the Proposed Material to the Expert Witness DW 1253 prior to his testimony on the basis that:
- a) the proposed disclosure is directly relevant to the scope of the testimony of the Expert Witness DW1253 as outlined by the Appeal Chamber, namely to provide an *“opinion on SPO’s practices as demonstrated by W04841, based on his own knowledge and experience of ICTY practices and practices in international criminal investigations.”*¹⁴

Furthermore, without the proposed disclosure, the Expert Witness DW1253 would not be able to assist the Trial Panel in making an assessment of the *“manner in which the evidence was collected and the effect this might have on the course and fairness of the proceedings”* in line with Rule 139(7) that sets out the obligation of the Trial Panel to assess the how the

¹³ KSC-BC-2020-07-089919-089927, Information extracted from SPO Internal Document dated 21 October 2020, Seizure of Documents from the KLA War Veteran’s Association Statement of [REDACTED] SPO Investigator (p.3-9); KSC-BC-2020-07-084011-084012, SPO Official Note, 27 October 2020 by [REDACTED] Activity: Handing of documents seized at the KLA WVA on 17 September 2020; KSC-BC-2020-07-082010-082013 RED, SPO Official Note 17 September 2020 by [REDACTED], Subject: Seizure of Documents from KLA War Veteran’s Association on 16.09.2020; KSC-BC-2020-07-082014-082016, SPO Official Note, 22 September 2020 by [REDACTED], Subject: Seizure of Documents from KLA War Veteran’s Association on 22.09.2020; KSC-BC-2020-07-083997-083998 RED, SPO Official Note, 22 October 2020 by [REDACTED] Subject: Documents seized on 22 September 2020 at the KLA WVA.

¹⁴KSC-BC-2020-07/IA006/F00006, Decision on Nasim Haradinaj’s Appeal Against Decision on Prosecution Requests, 7 January 2022, p.16 para. 28

evidence was collected in order to attribute weight to the SPO evidence; and

- b) the proposed disclosure would enable all the parties and the Trial Panel to hear DW1253's evidence expeditiously and facilitate the coordination of the Registry with the local authorities in the relevant state of residence of the witness, considering that DW1253 is expected to testify via video link from a country with a significant difference in the time zone from the Hague and is therefore presently scheduled between 08:00 – 12:00 CET on 24 and 28 January 2022.

3. The Haradinaj Defence further notes that if so required by the Trial Panel, DW1253, who is a professional who previously worked at the ICTY in a senior investigative management position, could be requested to sign a confidentiality agreement prior to the disclosure of the Proposed Material.

II. PROCEDURAL BACKGROUND

4. On 12 July 2021, the Haradinaj Defence filed its Pre-Trial Brief.¹⁵

¹⁵ KSC-BC-2020-07/F00260/RED, Public Redacted Submission of Interim Pre-Trial Brief on Behalf of the Defence of Nasim Haradinaj, 2 September 2021 (confidential version filed on 12 July 2021).

5. On 27 August 2021, Haradinaj filed submissions regarding the purported relevance of the proposed witnesses.¹⁶
6. On 23 October 2021, the Haradinaj Defence filed a request to add a new expert witness, Witness DW1253, to its List of Potential Witnesses.¹⁷
7. On 9 November 2021, the Haradinaj Defence filed DW1253's expert report.¹⁸
8. On 16 November 2021, the SPO filed its challenge regarding the admission of DW1253's proposed evidence.¹⁹
9. On 22 November 2021, Haradinaj responded to this challenge.²⁰
10. On 26 November 2021, the Trial Panel issued a decision denying the Defence motions to dismiss charges pursuant to Rule 130 of the Rules.²¹

¹⁶ KSC-BC-2020-07/F00289, Submission on Witnesses, 27 August 2021 (confidential, reclassified as public on 16 December 2021) ("List of Potential Witnesses").

¹⁷ KSC-BC-2020-07/F00394, Defence Request for Addition of an Expert to its List of Potential Witnesses, 23 October 2021 (confidential, reclassified as public on 16 December 2021)

¹⁸ KSC-BC-2020-07/F00426, Submission of Expert Report from the Defence for Mr. Haradinaj, 9 November 2021; F00426/A01, Annex A to Submission of Expert Report from the Defence for Mr. Haradinaj, 9 November 2021 (confidential). See also F00003/A03, Annex 3 to Haradinaj Defence Submission on Appeal in Respect of Decision KSC-BC-2020-07/F00470, 16 December 2021 (reclassified as confidential on 31 December 2021) ("Expert Report").

¹⁹ KSC-BC-2020-07/F00438, Prosecution challenge to proposed Defence expert Witness 18 and report, 6 December 2021 (confidential version filed on 16 November 2021).

²⁰ KSC-BC-2020-07/F00444, Haradinaj Defence Response to F00438, 6 December 2021 (confidential version filed on 22 November 2021).

²¹ KSC-BC-2020-07/F00450, Decision on the Defence Motions to Dismiss Charges, 26 November 2021

11. On 29 November 2021, the Haradinaj Defence filed its lists of witnesses and exhibits pursuant to Rule 119(2) of the Rules.²²
12. On 2 December 2021, the Trial Panel held the Defence Preparation Conference, during which it announced its decision not to hear the proposed Witnesses DW1250, DW1251 and DW1253.²³
13. On 3 December 2021, the Trial Panel issued the Impugned Decision, elaborating, *inter alia*, on its reasons for declining to hear the Proposed Witnesses' evidence.²⁴
14. On 6 December 2021, the Haradinaj Defence requested leave to appeal the Trial Panel's findings concerning the Issues and confirmed that he did not seek leave to appeal any other issues arising out of the Impugned Decision.²⁵
15. On 7 December 2021, the SPO indicated that it did not oppose the Request for Leave to Appeal.²⁶

²² KSC-BC-2020-07/F00461, Defence Rule 119 Filing on Behalf of Nasim Haradinaj, 21 December 2021 (confidential version filed on 29 November 2021). See also F00428, Scheduling Order for Work Plan and Time Limits for the Next Steps in the Proceedings, 9 November 2021, para. 17(a).

²³ Transcript, 2 December 2021, pp. 2105-2107.

²⁴ Impugned Decision, paras 80-82, 111-115, 127(b), (e).

²⁵ F00474, Defence Application for Leave to Appeal in respect of 'Decision on Prosecution Requests in Relation to Proposed Defence Witnesses', 6 December 2021 ("Request for Leave to Appeal"), paras 2, 4, 6-8.

²⁶ Transcript, 7 December 2021, p. 2238.

16. On 8 December 2021, the Trial Panel granted the Request for Leave to Appeal.²⁷
17. On 7 January 2022, the Court of Appeals Chamber issued a decision reversing in part the Trial Panel's findings rejecting the admission of DW1253's proposed evidence and deciding not to hear this Witness, to the extent that his evidence aims to challenge the evidence of SPO Witness W04841, within the parameters discussed in paragraphs 27-30 of this Decision ("Appeal Decision").²⁸
18. On 14 January 2022, the Trial Panel issued an oral order scheduling the testimony of DW1253 by video link on 24 and 28 January 2022.²⁹
19. On 17 October 2021, the Haradinaj Defence contacted the SPO by e-mail to seek an *inter partes* agreement on the disclosure of certain documents to DW1253 to consider prior to the preparation of his expert report. The SPO declined to take a position on what material should be provided to the expert and instead reserved its position to object to the expert's report.

²⁷ See also F00484, Decision on Defence Request for Leave to Appeal F00470, 8 December 2021

("Certification Decision"), para. 16.

²⁸ KSC-BC-2020-07/IA006/F00006, Decision on Nasim Haradinaj's Appeal Against Decision on Prosecution Requests, 7 January 2022 in Relation to Proposed Defence Witnesses

²⁹ KSC-BC-2020-07, Oral order of Trial Panel II, 14 January 2022, Page 3037 Line 6 to Page 3038 Line 2

20. On 16 January 2022, the Haradinaj Defence contacted the SPO by e-mail to seek an *inter partes* agreement on the video recording of 25 September 2020³⁰ being made available to DW1253 prior to his testimony by video link on 24 and 28 January 2022.
21. On 17 January 2022, the SPO responded that it objected to to the video recording of 25 September 2020 being made available to DW1253, arguing that it fell outside of what was permitted by the Court of Appeals Panel ruling.

III. SUBMISSIONS

- a) *The Proposed Material are directly relevant to the testimony of DW1253 and would assist a determination under Rule 139(7)*
22. The Court of Appeals Panel finding in its decision of 7 January 2022 held the part of the Expert report of DW1253 that *“concerns a comparison of the SPO’s undertakings, as explained by Witness 04841, with prosecutorial practices at the international criminal courts, primarily the International Tribunal for the former*

³⁰ ERN 104414-01 and 104414-02

*Yugoslavia ("ICTY"), with which DW1253 is familiar (...) might assist the trier of fact in understanding the evidence before it."*³¹

23. The Haradinaj Defence, while noting that the Expert Witness DW1253 has already been provided with the public transcript of the testimony of WO4841,³² which covers merely one³³ of the seven hearings³⁴ during which WO4841 testified, submits that the DW1253 will not be able to formulate a comprehensive opinion about the propriety of the SPO investigative practices based on partial access to WO4841's testimony.
24. Furthermore, the Haradinaj Defence submits that the Court of Appeals reference to SPO Witness W04841 – (in paragraph 28 of its decision) as part of its determination of the relevance of DW1253's evidence was merely illustrative and in no way limits the scope of DW1253's evidence merely to WO4841's evidence.

³¹ KSC-BC-2020-07/IA006/F00006, Decision on Nasim Haradinaj's Appeal Against Decision on Prosecution Requests, 7 January 2022, p.15-16, para 28

³² KSC-BC-2020-07/F00426, Submission of Expert Report from the Defence for Mr. Haradinaj, Annex A - Report of Robert William Reid, p.1

³³ KSC-BC-2020-07, Transcript of 28 October 2021 (Public)

³⁴ Transcript of 18 October 2021 (Confidential), Transcript of 19 October 2021 (Confidential), Transcript of 20 October 2021 (Confidential), Transcript of 21 October 2021 (Confidential), Transcript of 25 October 2021 (Confidential), Transcript of 26 October 2021 (Confidential)

25. Considering that the SPO's seizure of the leaked documents happened on four distinct occasions (8, 17, 22 September 2020 and 28 January 2021) and that the search was conducted in the course of a different visit to the KLA WVA premises on 25 September 2020, DW1253 will not be in a position to assess SPO practices without the relevant evidence, from the SPO itself, about how the seizures and search were conducted, how the SPO interacted with the Defendants and how the documents were handled on each and every occasion. When assessing investigative conduct and the reliability of evidence produced from such investigations, improper procedure on a single occasion could affect the reliability of the evidence.
26. Considering the Trial Panel's obligation under Rule 139 (7) to "*take into account the manner in which the evidence was collected and the effect this might have on the course and fairness of the proceedings,*" the Haradinaj Defence submits that DW1253's expert opinion would be incomplete without the disclosure of the Proposed Material and would therefore not allow the Trial Chamber to make a complete assessment of the propriety of the SPO procedures in the collection and handling of evidence against the Defendants. In *Brdjanin*,³⁵ the ICTY Trial Chamber held that it had to consider the alleged illegality of the manner in

³⁵ ICTY, Prosecutor v Brdjanin, Decision on the Defence Objection to Intercept Evidence, 3 October 2003 para 57

which the evidence was obtained. It is clear that incorrect procedure, or the inadequate implementation thereof, may trigger the Trial Panel's exclusionary discretion with regards to both, whether to accept the SPO evidence and what weight to attribute to it.

27. As a result, the Haradinaj Defence submits that the unredacted transcripts,³⁶ declarations of WO4841,³⁷ the unredacted transcript,³⁸ declarations of WO4876,³⁹ declarations of WO4842,⁴⁰ declarations of [REDACTED],⁴¹ the four

³⁶ KSC-BC-2020-07, Transcript of 18 October 2021 (Confidential), Transcript of 19 October 2021 (Confidential), Transcript of 20 October 2021 (Confidential), Transcript of 21 October 2021 (Confidential), Transcript of 25 October 2021 (Confidential), Transcript of 26 October 2021 (Confidential).

³⁷ KSC-BC-2020-07-084015-084026, Declaration of Zdenka Pumper; KSC-BC-2020-07-091791-091792, Declaration of Zdenka Pumper; KSC-BC-2020-07-091927-091930, Declaration of Zdenka Pumper; KSC-BC-2020-07-093492-093590, Declaration of Zdenka Pumper; KSC-BC-2020-07-095162-095239, SPO Declaration of Zdenka Pumper Annex 1 Chart on Batch 4; KSC-BC-2020-07-095533-095602, SPO Declaration of Zdenka Pumper Annex 1 Chart on Batch 1; KSC-BC-2020-07-095603-095653, SPO Declaration of Zdenka Pumper Annex 1 Chart on Batch 4; KSC-BC-2020-07-082727-082731, SPO Official Note, 9 October 2020 by Zdenka Pumper Subject: Submission of evidence Batch 3; KSC-BC-2020-07-083992-083996, SPO Official Note, 21 October 2020 by Zdenka pumper Subject: Submission of evidence Batch 3; KSC-BC-2020-07-103543-103544, Declaration by Zdenka Pumper dated 14 October 2020.

³⁸ KSC-BC-2020-07, Transcript of 5 November 2021 (Confidential).

³⁹ KSC-BC-2020-07-089919-089927, Information extracted from SPO Internal Document dated 21 October 2020, Seizure of Documents from the KLA War Veteran's Association Statement of Daniel Moberg SPO Operational Security Officer (p.1-2); KSC-BC-2020-07-083988-083991 RED, SPO Official Note 21 October 2020 by Daniel Moberg Subject: Seizure of documents from the KLA War Veteran's Association on 8 and 17.09.2020;21.09.2020; KSC-BC-2020-07-083986-083987 RED, SPO Official Note 21 October 2020 by Daniel Moberg Subject: Receipt of documents from Gazeta InFokus; KSC-BC-2020-07-102754-102755, SPO Official Note of 31 August 2021 by Daniel Moberg Subject: Seizure of documents from KLA War Veteran's Association; KSC-BC-2020-103915-103915, Declaration of Daniel Moberg

⁴⁰ KSC-BC-2020-07-084008-084010, Declaration of Miro Jukic, KSC-BC-2020-07-090142-090143, Addendum to Declaration of Miro Jukic

⁴¹ KSC-BC-2020-07-089919-089927, Information extracted from SPO Internal Document dated 21 October 2020, Seizure of Documents from the KLA War Veteran's Association Statement of [REDACTED] SPO Investigator (p.3-9); KSC-BC-2020-07-084011-084012, SPO Official Note, 27 October

handover forms (dated 8,⁴² 17,⁴³ 22 September 2020⁴⁴ and 21 October 2020⁴⁵ respectively); and the video of the SPO search of 25 September 2020,⁴⁶ fall within the scope of the DW1253's mandate as an expert as determined by the Court of Appeals Panel.

28. The Haradinaj Defence considers that providing such access to the DW1253 is critical to ensure Mr Haradinaj's right to equality of arms since it is integral to the Defence's ability to challenge the evidence of the SPO and would otherwise lead to an imbalance detrimental to Mr Haradinaj.

b) The Proposed Disclosure would expedite the testimony of DW1253

29. Considering the difficulties in scheduling the video link with DW1253, who currently resides in a location with a substantial time difference (+9 hrs) with the Hague, the urgency highlighted by the Trial Panel and the need for the local authorities in the relevant state to facilitate the logistics for the testimony,

2020 by [REDACTED] Activity: Handing of documents seized at the KLA WVA on 17 September 2020; KSC-BC-2020-07-082010-082013 RED, SPO Official Note 17 September 2020 by [REDACTED], Subject: Seizure of Documents from KLA War Veteran's Association on 16.09.2020; KSC-BC-2020-07-082014-082016, SPO Official Note, 22 September 2020 by [REDACTED], Subject: Seizure of Documents from KLA War Veteran's Association on 22.09.2020; KSC-BC-2020-07-083997-083998 RED, SPO Official Note, 22 October 2020 by [REDACTED] Subject: Documents seized on 22 September 2020 at the KLA WVA

⁴² KSC-BC-2020-07-080449-080449, SPO Delivery Document 08.09.2020

⁴³ KSC-BC-2020-07-079500-079500, SPO Delivery Document 17.09.2020

⁴⁴ KSC-BC-2020-07-SPOE00220915-00220915, SPO Acknowledgement of delivery 22.09.2020

⁴⁵ KSC-BC-2020-07-083986 - 083987 RED

⁴⁶ ERN 104414-01 and 104414-02

it is clear, as the Trial Panel pointed out during the hearing of 14 January 2022, that the availability of the DW1253 will be limited between 08:00 and 12:00 CET on 24 and 28 January 2022.

30. As a result, in order to expedite the testimony of DW1253 for all parties involved, considering the exceptional circumstances which prevent the witness from providing his testimony in any other way (either by being physically present on the premises of the Court or having Registry staff travel to the location of DW1253), the Haradinaj Defence submits that the Trial Panel's hearing of the DW1253's evidence would be greatly facilitated by allowing the Expert Witness to access and review the Proposed Material ahead of his testimony.

IV. CONCLUSION

31. In light of the above, the Haradinaj Defence requests the Trial Panel to authorise the disclosure of the Proposed Material to Expert Witness DW1253 ahead of his testimony, and if required to require DW1253 to commit to a confidentiality agreement.

V. CLASSIFICATION

32. This filing is classified as confidential because it refers to confidential decisions and the names of witnesses testifying under protective measures.

Word count: 3,154



Toby Cadman

Specialist Counsel



Carl Buckley

Specialist Co-Counsel