

In: KSC-BC-2020-06
Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: **Pre-Trial Judge**
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Kadri Veseli

Date: 11 April 2022

Language: English

Classification: Public

**Veseli Defence Request for
Reclassification of Evidentiary Material**

Specialist Prosecutor's Office

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I. INTRODUCTION

1. Pursuant to Rule 75(1) and Rule 83(1), the Defence for Mr Kadri Veseli (“Defence”), hereby, requests the Pre-Trial Judge to order the SPO to review the confidential basis of material disclosed to the Defence thus far, reclassify any non-confidential evidentiary items as public and justify the confidential classification of the remaining items.

II. APPLICABLE LAW

2. The principle of the publicity of proceedings is a cornerstone requirement of fair trial rights, which is protected by the Law creating the KSC,¹ the Kosovo Constitution,² international human rights instruments that directly bear upon the Kosovo Specialist Chambers,³ and is reflected in the practice of international criminal tribunals.
3. In particular, Rule 83(1) states that “[a]ny non-public record of proceedings and evidence **shall indicate the reasons for such classification**, and whether and when it may be reclassified” (emphasis added).
4. Paragraph 48 of the Framework Decision, similarly requires that:

When disclosing evidence, the Parties shall determine the appropriate level of classification of each item and **shall register evidence as public**, unless there exist reasons to classify the material otherwise, in accordance with Rule 83(1) of the Rules. (Emphasis added)⁴
5. This comports with the approach adopted at the ICC. The ICC decision referred to by the Pre-Trial Judge in the Framework Decision asserts:

¹ Law, article 21.

² Constitution of Kosovo, articles 22, 31.

³ See, article 6(1) ECHR and article 14(1) ICCPR. See also, ECtHR, *Fazliyski v. Bulgaria*, Application no. 40908/05, [Judgment](#), 16 April 2013, paras 64-69 (and associated references); ECtHR, *Krestovskiy v. Russia*, Application no. 14040/03, [Judgment](#), 28 October 2010, para 24; ECtHR, *Riepan v. Austria*, Application no. 35115/97, [Judgment](#), 14 November 2000.

⁴ F00099, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020, para. 48.

In view of the principle of publicity of proceedings, the evidence submitted shall in principle be registered as public unless there is a reason to classify it otherwise. It is incumbent upon the parties to indicate such classification when submitting the evidence for disclosure and to **provide the factual and legal basis for any proposal to classify (as non-public)** the evidence submitted. (Emphasis added)⁵

6. Article 6 ECHR provides further protection. In *Fazliyski v. Bulgaria* the ECtHR found a violation of Article 6(1) given that the material from the case file was inaccessible to the public,⁶ even considering that the material in the case was reclassified as public months after the close of proceedings. *Fazliyski* clarifies that the publicity of evidentiary material is central to ensuring fair proceedings *during the proceedings*.

III. SUBMISSIONS

A. Confidential Classification of Evidentiary Material

7. The SPO has now completed its Rule 102(1)(b) disclosure; it has substantially completed its investigation; and it is in the process of completing its Rule 103 and Rule 102(3) disclosure obligations. The Defence submits that now is an appropriate moment to reassess the SPO's classification system.
8. The Defence notes that the SPO has designated **all** material disclosed pursuant to Rule 102(1)(b), Rule 103, Rule 102(3) as confidential, without exception. This classification system forbids any Party from discussing – or even referring to – any of the evidence in public.
9. Rule 83(1) and the Framework Decision make clear that the default position is that information disclosed should be public.⁷ Both require that, in order to classify any material as confidential, the disclosing party must provide reasons for the designated classification. Classifying all disclosure as confidential

⁵ ICC, *Prosecutor v. Yekatom*, ICC-01/14-01/18-64-Red, [Public Redacted Version of "Decision on Disclosure and Related Matters"](#), 23 January 2019, para. 17.

⁶ A violation of 6(1) ECHR was found, *see* ECtHR, *Fazliyski v. Bulgaria*, App. No. 40908/05, [Judgment](#), 16 April 2013, paras 64-69 (and associated references).

⁷ F00099, para. 48.

without justification is utterly inconsistent with the public and open nature of these proceedings.

10. The Defence notes that the SPO has unilaterally classified all Rule 102(1)(b), Rule 102(3) and Rule 103 material as confidential without providing any legal or factual basis. This drastically exceeds the degree of confidentiality that is provided for in the Pre-Trial Judge's decisions on protective measures and Rule 107, which already shield a significant portion of the case from public scrutiny. The Defence submits that the SPO's classification of disclosure clearly exceeds any protective measure application or confidentiality agreement with a cooperating organisation or State Party. As a matter of law, the SPO's approach frustrates the ability of the Court to ensure a public trial and violates the Rules of Procedure and Evidence, the Framework Decision and the Constitution of Kosovo.
11. Furthermore, from a practical perspective, forcing the Parties to move into private session each time any evidence in this case is discussed is simply not a workable system. Particularly so in a case of this size. Such a system would prove inordinately cumbersome and inefficient to a process that is already straining under the volume of disclosure released and proposed evidence sought by the SPO.
12. Finally, the Defence submits that the SPO policy of indiscriminately labelling all evidence as confidential deprives the classification system of meaning. It is self-evident that not all the disclosure in this case is in need of the protection that confidentially affords. In this regard, there is clearly a difference between a news article published in a national newspaper and the identity of a vulnerable victim-witness with substantiated concerns about testifying in open session. The purpose behind forcing a party to provide reasons for information to be classified as confidential is, in part, so that all the Parties can understand

the reasons and any legitimate interests which may exist to keep something confidential. By labelling *everything* as confidential the SPO flattens this distinction. As a result, the Defence has no way of knowing what is truly sensitive, and no way of understanding the reasons for classifying it as such. The Defence cannot therefore assist the Court and the SPO in protecting it.

13. The Defence submits that for reasons of law, practicality and policy, the SPO should review its classification of all items disclosed, so that the confidential classification applies strictly to confidential documents, as ordered by the Pre-Trial Judge in the Framework Decision on Disclosure of Evidence and Related Matters.⁸

IV. CONCLUSION

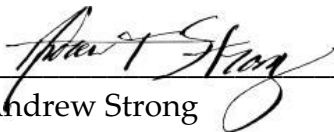
14. The Defence, hereby, requests the Pre-Trial Judge to order the SPO to reclassify non-confidential material as public.
15. Additionally, under Rule 83(1), the Defence requests the Pre-Trial Judge to order the SPO to justify confidential classification of non-publicly available evidentiary material.
16. Finally, the Defence respectfully requests the Pre-Trial Judge to set a deadline for the completion of reclassification of disclosure.

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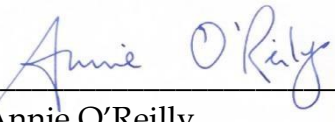


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⁸ F00099, para. 48.



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