

In: KSC-CA-2022-01

The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: A Panel of the Court of Appeals Chamber

Judge Michéle Picard

Judge Kai Ambos

Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

Date: 29 November 2022

Language: English

Classification: Public

**Defence Application for Reclassification/Public Redacted Versions of Court of
Appeal Panel Decisions**

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I. INTRODUCTION

1. Throughout these proceedings, the presumption of openness and transparency that goes hand in hand with any criminal trial has been replaced by a presumption of secrecy.
2. Sadly, and disappointingly, this continues into the appeal stage of the proceedings.
3. A number of Decisions issued by the Court of Appeals Panel (the “COA Panel”) as set out below have not been made publicly available (the “COA Panel Decisions”). They have been filed confidentially only.
4. On 15 September 2022, the COA Panel issued an ex parte “Decision on Prosecution Notifications” to the SPO. The COA Panel provided the Defence with a confidential redacted version of this Decision on 26 September 2022.¹
5. No public redacted version was ever filed.
6. On 21 October 2022, the COA Panel filed a “Decision on the Specialist Prosecutor’s Office’s Request Regarding Item 206”. This was classified as confidential.²
7. No public redacted version was ever filed.
8. On 7 November 2022, the COA Panel issued a “Decision on Defence Motions for Alternate Relief Relating to Rule 103 Disclosure Violations”. This was classified as confidential.³

¹ KSC-CA-2022-01/F00044/CONF/RED

² KSC-CA-2022-01/F00075

³ KSC-CA-2022-01/F00083

9. No public redacted version was ever filed.
10. On 9 November 2022, the COA Panel issued a “Decision on Defence Requests for Extension of Time to File Potential Motions Pursuant to Rule 181”. This was classified as confidential.⁴
11. No public redacted version was ever filed.
12. On 28 November 2022, the COA Panel issued a “Decision on Defence Requests to Interview Witnesses, to Order an Updated Rule 102(3) Notice and to Adjourn the Appeal Hearing”. This was classified as confidential.⁵
13. No public redacted version has yet been filed and we do not anticipate that one will be filed.
14. The Appellant hereby applies for reclassification/public redacted versions of the COA Panel Decisions.

II. LAW

15. All submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential.⁶
16. Article 41 [Right of Access to Public Documents] of the Constitution of the Republic of Kosovo provides a constitutional right of access to public

⁴ KSC-CA-2022-01/F00090

⁵ KSC-CA-2022-01/F00094

⁶ KSC-BC-2020-07, IA004/F00007 at para. 13; KSC-BC-2020-06, F00005/RED at para. 10; See also ICTR, Prosecutor v. Nyiramasuhuko et al., ICTR-98-42-A, Decision on Prosecution’s Motion for Summary Dismissal or Alternative Remedies, 5 July 2013, para. 9.

documents, and it states that that any interference with that right should be strictly limited only where necessary.⁷

III. SUBMISSIONS

17. The public character of criminal proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society.⁸

18. In the present case, the principle of publicity has been replaced by a presumption of secrecy. Notwithstanding repeated protestations by the Defence, this has been a theme throughout the proceedings.

19. The COA Panel maintain the confidentiality classification of the COA Panel Decisions. There is no basis for maintaining this classification. Even if there were some reason for the classification, there is certainly no reason that could constitute “exceptional”. As it has done in a number of other Decisions issued around exactly the same time as the COA Panel Decisions⁹, the COA Panel could have issued public redacted versions of the COA Panel Decisions but it

⁷ Constitution of the Republic of Kosovo, Article 41.

⁸ Guide on Article 6 of the European Convention on Human Rights at paragraph 278 - https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf

⁹ KSC-CA-2022-01/F00057/RED, COA Panel, Public Redacted Version of Decision on Defence Applications for a Formal Decision that the Specialist Prosecutor’s Office Failed to Comply with Rule 179(5) of the Rules, 6/10/2022, Public; KSC-CA-2022-01/F00064/RED, Public Redacted Version of Decision on Defence Requests to Amend the Notices of Appeal Pursuant to Rule 176(3) of the Rules, COA Panel, 13/10/22, Public /; KSC-CA-2022-01/F00082/RED, Public Redacted Version of Decision on Defence Applications for Reconsideration of “Decision on Defence Requests to Amend the Notices of Appeal Pursuant to Rule 176(3) of the Rules”, COA Panel, 3/11/2022, Public

chose not to. There is no reason why redactions cannot be applied to the Decisions.

20. No explanation has been provided by the COA Panel for maintaining the classification.
21. It is worthy of note that the COA Panel has also ordered the Defence file public redacted versions of some filings but not others.¹⁰ It seemingly picks and chooses which filings it wants the public to see.
22. The COA Panel also repeatedly advocates transparency of all submissions filed before it.¹¹ It then does not adhere to its own principle. This calls into question the integrity of the proceedings.
23. Furthermore, the Decisions that the COA Panel have kept confidential have the following feature in common: they are rulings which are adverse to Defence submissions seeking to ensure the fairness of the trial process and to remedy disclosure failings on the part of the SPO during the trial. The COA Panel has refused any remedy yet the public have been prevented from (i) knowing of that refusal (ii) the COA Panel's reasons for so refusing and (iii) any ability to scrutinise those reasons.
24. As the Appellant has stated previously in these proceedings,¹² without the consideration of reclassification/public redacted versions of these filings, these proceedings are being conducted a state of secrecy with no justification.

IV. CONCLUSION

¹⁰ KSC-CA-2022-01/F00082 at paragraph 21; F00084 at paragraph 8

¹¹ KSC-CA-2022-01/F00082 at paragraph 8; F00084 at paragraph 7

¹² KSC-BC-2020-07/F00217 at para. 9

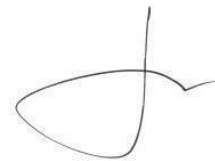
25. There is no exceptional basis for keeping the COA Panel Decisions confidential. There is no reason why redactions cannot be applied to the COA Panel Decisions as the COA Panel has done in other filings in similar circumstances.

26. On that basis, the Defence request reclassification/public redacted versions of the COA Panel Decisions.

V. CLASSIFICATION

27. This filing is classified as public.

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