



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-CA-2022-01
Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: **Court of Appeals Panel**
Judge Michèle Picard, Presiding Judge
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

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Prosecution Consolidated Response to Defence Disclosure Requests

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I. Introduction

1. The Requests¹ are the latest in a series of unsubstantiated attempts to obtain judicial relief from W04730's unsupported and ungrounded speculation.² There is no basis for the assertion of an SPO obligation to facilitate witness interviews of the kind requested, nor is there an obligation under the Rules to continue to notify Rule 102(3) information after the closing of the case.

II. Procedural History

2. On [REDACTED], the SPO conducted its First Interview with W04730.³ The interview was conducted by a former SPO prosecutor ('Former Prosecutor') and a former investigator ('Former Investigator').

3. On 17 September 2021, the Trial Panel adopted an order on the conduct of the proceedings in this case.⁴ This order, *inter alia*, required the SPO to ascertain in good faith if anyone on its witness list consents to be interviewed by the Defence ('Contact

¹ Defence Request for an Order for Disclosure of Witness Contact Details, KSC-CA-2022-01/F00079, 2 November 2022, Confidential ('Haradinaj Request'); Gucati Request for (i) a Declaration that Rule 102(3) applies to Appeal Proceedings; and (ii) an Order for Disclosure of Witness Contact Details, KSC-CA-2022-01/F00081, 2 November 2022, Confidential ('Gucati Request').

² Gucati Motion for Alternate Relief relating to Disclosure Violations, namely, An Order Overturning the Convictions, with the Imposition of a Stay or Order for Re-Trial, KSC-CA-2022-01/F00068, 17 October 2022, Confidential; Haradinaj Motion for Relief for Violations of Rule 103, KSC-CA-2022-01/F00073, 18 October 2022, Confidential (with three annexes); Gucati Application to Amend the Notice of Appeal pursuant to Rule 176(3), KSC-CA-2022-01/F00053, 3 October 2022, Confidential; Haradinaj Application to Amend the Notice of Appeal pursuant to Rule 176(3), KSC-CA-2022-01/F00055, 4 October 2022, Confidential; Gucati Application for Reconsideration of Decision F00064, KSC-CA-2022-01/F00066, 17 October 2022, Confidential; Haradinaj Application for Reconsideration of Decision F00064, KSC-CA-2022-01/F00071, 18 October 2022, Confidential, *rejected in* Decision on Defence Motions for Alternate Relief Relating to Rule 103 Disclosure Violations, KSC-CA-2022-01/F00083, 7 November 2022, Confidential; 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", KSC-CA-2022-01/F00082, 3 November 2022, Confidential; Decision on Defence Requests to Amend the Notices of Appeal Pursuant to Rule 176(3) of the Rules, KSC-CA-2022-01/F00064, 13 October 2022, Confidential.

³ See 082095-TR-ET RED (five parts) ('First Interview').

⁴ Annex to Order on the Conduct of Proceedings, KSC-BC-2020-07/F00314/A01, 17 September 2021.

Protocol').⁵ No comparable obligation was created to facilitate the interviews of anyone other than those on the SPO witness list.

4. On [REDACTED], the SPO conducted its Second Interview with W04730 (collectively with First Interview: 'Interviews').⁶ The interview was conducted by a senior prosecutor ('Senior Prosecutor') and SPO witness W04841.

5. On 23 September 2022, the Appeals Panel granted the SPO's request to redact all of W04730's identifying information prior to disclosing the Interviews.⁷ The Appeals Panel ordered the SPO to disclose the Interviews by 26 September 2022.⁸

6. On 26 September 2022, the SPO released Disclosure Package 1, containing the Interviews, pursuant to the Appeals Panel's order.

7. Between 16-25 October 2022, the Defence sent a series of emails requesting to interview W04730, an individual mentioned in the Second Interview who is not an SPO witness ('Non-Witness'), the Senior Prosecutor, the Former Prosecutor, the Former Investigator, and W04841 ('Requested Interviews').

8. Between 18-26 October 2022, the SPO responded by email to explain why the Requested Interviews would not be facilitated:

- *W04730*. W04730's identity is not known to the Defence, and he cannot be interviewed by them without defeating the Appeals Panel's protective measures.
- *Non-Witness*. The SPO does not possess any contacts with this person which are relevant to this case.⁹

⁵ KSC-BC-2020-07/F00314/A01, paras 27-40.

⁶ 105694-TR-ET RED Part 1 ('Second Interview').

⁷ Confidential Redacted Version of Decision on Specialist Prosecutor's Office Request for Protective Measures, KSC-CA-2022-01/F00049/CONF/RED, 23 September 2022, Confidential (redacted version notified 26 September 2022) ('Protective Measures Decision').

⁸ Protective Measures Decision, KSC-CA-2022-01/F00049/CONF/RED, para.15.

⁹ After this email response, the SPO did contact the Non-Witness solely to determine whether he wanted to be interviewed. See paragraph 13 below.

- *Senior Prosecutor.* As a courtesy, the SPO asked the Senior Prosecutor whether he consented to be interviewed by the Defence. He declined.
- *Former Prosecutor and Former Investigator.* As a matter of policy, the SPO does not give out the contact information of its former staff members unless strictly necessary.
- *W04841.* As someone on the SPO witness list, the SPO was bound to contact her under the Contact Protocol to ascertain whether she consented to be interviewed by the Defence. The SPO did so and she declined.

9. On 2 November 2022, the Haradinaj Request was filed requesting an order for the SPO to arrange the Requested Interviews or, alternatively, to provide the persons' contact details so they could be interviewed ('Contact Details').

10. On 3 November 2022, the Gucati Request was filed, requesting the same relief as the Haradinaj Defence and further seeking relief that the SPO's Rule 102(3) disclosure obligations apply during the appeals phase.

III. Submissions

A. THERE IS NO BASIS TO FACILITATE THE REQUESTED INTERVIEWS OR DISCLOSE THE CONTACT DETAILS

11. The SPO does not have any obligations to facilitate Defence interviews outside the Contact Protocol. The Defence request for the SPO to 'make available' non-witnesses for interviews expands the Trial Panel's Contact Protocol beyond its express terms. There is likewise no substantiation for the proposition that the Contact Details must be disclosed.¹⁰

12. For W04730, the Defence cannot interview him in a manner consistent with the protective measures granted him in this case [REDACTED]. In circumstances when

¹⁰ The Defence has no reasonable expectation to receive this information, given that the Pre-Trial Judge determined that it falls under standard redaction justifications. Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-07/F00104, 22 January 2021, para.82 ('B.1' and 'B.3' codes).

any stray remark in the course of an interview could risk exposing W04730's identity, picking a particular meeting venue with SPO presence and pre-agreed questions¹¹ cannot reasonably be expected to respect the authorised protective measures. That the Haradinaj Defence cannot articulate specific modalities for such an interview¹² illustrates how it is impracticable to interview W04730 under any conditions without defeating the anonymity granted to him. In these circumstances, facilitating an interview with W04730 or providing his contact details is inextricably linked to the Appeals Panel's previous authorisation not to disclose his identity.¹³ There is no basis to reconsider this ruling, and these protective measures must be maintained.

13. For the Non-Witness, following the SPO's response to the Defence, and though not required under the Contact Protocol, the SPO did contact him to ascertain whether he consented to be interviewed by the Defence. He declined, making his contact details of no relevance in this case.

14. For all current and former SPO staff, there is simply no indication any of these people have information relevant to this case beyond SPO witness W04841 (who was already extensively cross-examined at trial). Everything these persons said to, or heard from, W04730 is recorded in the disclosed interview transcripts, and the supposition they know anything more is fanciful. It is also noted that W04841 and the Senior Prosecutor declined to be interviewed, and the Haradinaj Defence has the Former Prosecutor's contact details.¹⁴

¹¹ See Haradinaj Request, KSC-CA-2022-01/F00079, paras 20-21.

¹² Haradinaj Request, KSC-CA-2022-01/F00079, para.21 (it is proposed that the 'KSC Witness Unit: [...] puts in place appropriate measures to ensure that [W04730's] identity is not revealed').

¹³ Protective Measures Decision, KSC-CA-2022-01/F00049/CONF/RED, paras 13-14.

¹⁴ Although the SPO did not provide the Former Prosecutor's contact details, he informed the SPO shortly before the Haradinaj Request was filed that the Haradinaj Defence had contacted him directly.

15. Providing contact details infringes the privacy rights of those involved, especially as concerns those who have expressly declined to be interviewed,¹⁵ and is contrary to the efficiency of the proceedings. Providing such information for W04730 also compromises SPO investigations and the witness's safety.¹⁶ The Defence requests to facilitate the Requested Interviews or provide the Contact Details is furthering a fishing expedition and they should be denied.

B. RULE 102(3) OBLIGATIONS DO NOT EXTEND TO APPELLATE PROCEEDINGS

16. The Appeals Panel has not previously determined whether the Rule 102(3) notification procedures extend beyond the closing of the case.¹⁷ This procedure is a statutory innovation of the KSC, making the continued applicability of Rule 102(3) a question of first impression for which little guidance can be drawn from other institutions.¹⁸

17. Contrary to the Gucati Defence's arguments, Rule 102(3) obligations do not continue after the closing of the case.¹⁹ Article 21(6) of the Law governs making all material and relevant evidence available to the Accused 'before the beginning and during the proceedings', with no reference to what happens after the proceedings close. Rule 112 clearly extends the SPO's obligation to disclose Rule 103 material beyond the closing of the case,²⁰ but the Rules do not have an equivalent provision on continuing Rule 102(3) notifications.

¹⁵ Namely, the Non-Witness, W04841, and the Senior Prosecutor.

¹⁶ See Rule 108(1)(a)-(b). [REDACTED].

¹⁷ Confidential Redacted Version of Decision on Prosecution Notifications, KSC-CA-2022-01/F00044/CONF/RED, 15 September 2022, para.35.

¹⁸ See Public Redacted Version of Decision on the Appeals Against Disclosure Decision, KSC-BC-2020-07/IA005/F00008/RED, 29 July 2021 ('Rule 102(3) Appeals Decision'), paras 39-40.

¹⁹ *Contra* Gucati Request, KSC-CA-2022-01/F00081, paras 7-12.

²⁰ 'The Specialist Prosecutor shall disclose to the Defence any exculpatory information referred to in Rule 103 notwithstanding the closing of the case pursuant to Rule 136 and any subsequent appeal'.

18. Not every procedure from trial continues on appeal,²¹ as conceded by the Gucati Defence itself.²² Rule 112 delineates what disclosure procedures continue past the closing of the case, and the Rule 102(3) procedure is not included. This procedure could have easily been included when drafting Rule 112, showing that the decision not to do so was a deliberate choice. Such choices by the drafters must inform the interpretation of the statutory framework.²³

19. Not including Rule 102(3) in the last sentence of Rule 112 is also a logical choice. This rule's notification procedure is a continuous obligation which runs throughout trial, covering information which is neither relied upon by the SPO nor is potentially exculpatory. The Appeals Panel is clear on the importance of the Rule 102(3) procedure before and during trial,²⁴ but the prospect of Rule 102(3) information having any impact on a trial judgment under appeal is exceedingly remote. The only disclosure with any real possibility of affecting the judgment under appeal is Rule 103 information, which is why this obligation extends after the closing of the case by virtue of Rule 112.

20. Maintaining the Rule 102(3) procedure after the closing of the case invites a constant stream of procedural litigation on appeal. The SPO is an investigating office, and regularly receives materials which are relevant in one or more KSC cases. If Rule 102(3) continues to apply, this appeal - and every future appeal before this court - risks being bogged down by such information creating notification disputes, materiality challenges, and protective measures litigation collateral to the appellate proceedings.

²¹ *Contra* Gucati Request, KSC-CA-2022-01/F00081, paras 7-8.

²² Response to Prosecution Request to Maintain Detention, KSC-CA-2022-01/F00024, 30 June 2022, *accepted by* Decision on Specialist Prosecutor's Office Request to Maintain Detention, KSC-CA-2022-01/F00031, 28 July 2022.

²³ See Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson Reuters, 2012), chapter 10 (Negative-Implication Canon: the expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)).

²⁴ See generally Rule 102(3) Decision, KSC-BC-2020-07/IA005/F00008/RED, paras 38-46.

Such litigation would extend to the disclosure of marginal items, including those immaterial to the defence's preparation or factually indistinguishable from items whose disclosure was denied during trial in findings not challenged on appeal.

21. Events from early November 2022 demonstrate how this could be the case. [REDACTED].²⁵ [REDACTED]. [REDACTED].²⁶ [REDACTED].

22. The SPO is conducting comprehensive investigations [REDACTED]. [REDACTED], and information falling under disclosure rules like Rule 108(1)(a) will likely continue to be identified throughout the Appeals Panel's deliberations. There will be no finality if appellate proceedings can be serially re-opened for clearly non-exculpatory information.

23. The SPO has been transparent when it identifies new information potentially relevant to this case. All such information identified since the judgment has been notified to the Appeals Panel,²⁷ and the SPO will continue to do so in all cases of doubt as to whether further disclosure is necessary. But granting the relief sought by the Gucati Defence is incompatible with the limits of appellate litigation and the expeditious conduct of proceedings.

IV. Classification

24. The present response is submitted as strictly confidential and *ex parte* in order to protect ongoing and sensitive SPO investigations. A confidential redacted version is filed simultaneously.

²⁵ [REDACTED]. [REDACTED].

²⁶ [REDACTED].

²⁷ Notification on W04730 telephone contact, KSC-CA-2022-01/F00028, 7 July 2022, Confidential and *Ex Parte* (with two annexes); Notification on communication received by the SPO, KSC-CA-2022-01/F00038, 7 September 2022, Confidential and *Ex Parte* (with annex). *See also* para.21 above.

V. Relief Sought

25. For the reasons above, the relief sought by the Defence should be rejected.

Word count: 2145



Alex Whiting
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Thursday, 12 January 2023

At The Hague, the Netherlands.