



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

**In:** **KSC-CA-2022-01**

**Before:** **A Panel of the Court of Appeals Chamber**  
Judge Michèle Picard  
Judge Kai Ambos  
Judge Nina Jørgensen

**Registrar:** Fidelma Donlon

**Date:** 16 January 2023

**Original language:** English

**Classification:** **Public**

---

**Decision on Haradinaj Request to Order the SPO to Disclose Material under  
Rule 102(3) or Rule 103 of the Rules**

---

**Specialist Prosecutor's Office:**  
Alex Whiting

**Counsel for Hysni Gucati:**  
Jonathan Elystan Rees

**Counsel for Nasim Haradinaj:**  
Toby Cadman

**THE PANEL OF THE COURT OF APPEALS CHAMBER** of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively)<sup>1</sup> acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 172 of the Rules of Procedure and Evidence (“Rules”) is seised of a request filed on 11 December 2022 by Mr Nasim Haradinaj (“Haradinaj” or “Accused”) requesting, *inter alia*, that the Specialist Prosecutor’s Office (“SPO”) be ordered to disclose information relevant to Haradinaj’s claim of entrapment by the SPO pursuant to Rules 102(3) and/or 103 of the Rules.<sup>2</sup> The SPO responded on 13 December 2022 that the Request should be rejected and that time limits should be imposed on the Defence regarding the filing of requests for disclosure or admission of additional evidence on appeal.<sup>3</sup> The Accused replied on 19 December 2022,<sup>4</sup> and filed additional submissions on 3 January 2023.<sup>5</sup>

## I. BACKGROUND

1. On 18 May 2022, Trial Panel II (“Trial Panel”) issued a judgment finding the Accused guilty of five of the six counts charged and sentencing each of them to four and a half years of imprisonment, with credit for the time served, and to a fine of 100 euros.<sup>6</sup>

---

<sup>1</sup> F00011, Decision Assigning a Court of Appeals Panel, 21 June 2022.

<sup>2</sup> F00098/RED, Public Redacted Version of Haradinaj Request for Order to the SPO to Release Video Recordings, 11 December 2022 (confidential version filed on 11 December 2022) (“Request”), para. 33.

<sup>3</sup> F00099/RED, Public Redacted Version of Prosecution Response to Haradinaj Request to Release Video Recordings, 14 December 2022 (confidential version filed on 13 December 2022) (“Response”), paras 10-11.

<sup>4</sup> F00100/RED2, Amended Publicly Redacted Version of Reply to Prosecution Response to Haradinaj Request for Order to the SPO to Release Video Recordings, 29 December 2022 (confidential version filed on 19 December 2022) (“Reply”).

<sup>5</sup> F00102/RED, Publicly Redacted Version of Supplement to Haradinaj Request of 11 December 2022 (F00098), 3 January 2023 (confidential version filed on 3 January 2023) (“Additional Submissions”).

<sup>6</sup> KSC-BC-2020-07, F00611/RED, Public Redacted Version of the Trial Judgment, 18 May 2022 (confidential version filed on 18 May 2022), paras 1012-1017.

2. Pursuant to a notification of the SPO of a confidential and *ex parte* communication with Witness W04730,<sup>7</sup> the Court of Appeals Panel issued a decision on 15 September 2022 ordering the SPO to, *inter alia*, disclose to the Defence under Rule 103 of the Rules two interviews of Witness W04730 dated 1 October 2020 and 22 April 2022 (“Rule 103 Material”) and/or to request counter-balancing measures.<sup>8</sup>
3. On 23 September 2022, the Panel granted the SPO’s request for protective measures regarding the Rule 103 Material and ordered the disclosure to the Defence of a confidential redacted version of the material by 26 September 2022.<sup>9</sup> The SPO accordingly disclosed the Rule 103 Material to the Defence.
4. On 7 November 2022, the Panel, *inter alia*, found no disclosure violation in relation to the Rule 103 Material.<sup>10</sup>
5. On 28 November 2022, the Panel rejected, *inter alia*, the Defence requests that interviews with certain witnesses be facilitated or their contact details be disclosed.<sup>11</sup>
6. On 1 and 2 December 2022, the Court of Appeals Panel held an appeal hearing.<sup>12</sup>

---

<sup>7</sup> F00028/RED, Public Redacted Version of Notification on W04730 telephone contact, 12 January 2023 (confidential redacted version filed on 23 September 2022, confidential and *ex parte* version filed on 7 July 2022).

<sup>8</sup> F00044/CONF/RED, Confidential Redacted Version of Decision on Prosecution Notifications, 26 September 2022 (confidential) (confidential and *ex parte* version filed on 15 September 2022) (“Decision on Prosecution Notifications”), paras 25-29, 38(a)-(b).

<sup>9</sup> F00049/CONF/RED, Confidential Redacted Version of Decision on Specialist Prosecutor’s Office Request for Protective Measures, 26 September 2022 (confidential) (strictly confidential and *ex parte* version filed on 23 September 2022), para. 15.

<sup>10</sup> F00083, Decision on Defence Motions for Alternate Relief Relating to Rule 103 Disclosure Violations, 7 November 2022 (confidential) (“Rule 103 Appeal Decision”), paras 26, 29.

<sup>11</sup> F00094, Decision on Defence Requests to Interview Witnesses, to Order an Updated Rule 102(3) Notice and to Adjourn the Appeal Hearing, 28 November 2022 (confidential) (“Decision on Further Investigations”).

<sup>12</sup> F00074, Order Scheduling an Appeal Hearing, 20 October 2022.

## II. DISCUSSION

### A. SUBMISSIONS OF THE PARTIES

7. Haradinaj argues that his Request is based on the belief that the SPO possesses information that is necessary for the Defence to conduct investigations that may lead to the discovery of further exculpatory material relevant to his claim of entrapment and therefore to the proper presentation of his appeal in this case.<sup>13</sup>

8. In relation to the person named in the first part of the Request and referred to by the SPO as the “Non-Witness” (“Person Named in the First Part of the Request”),<sup>14</sup> Haradinaj requests the Appeals Panel to order the SPO to confirm whether it possesses any material disclosable under Rule 102(3) and/or Rule 103 of the Rules. Should the SPO be in possession of such material, Haradinaj requests the Panel to order the SPO to disclose it without further delay.<sup>15</sup>

9. In relation to Witness W04349, referred to in the second part of the Request, Haradinaj seeks an order directing the SPO to respond to the Defence’s requests to be provided with the video recordings of any of the deliveries of batches of documents to the Kosovo Liberation Army War Veterans’ Association (“KLA WVA”), as allegedly shown to Witness W04349 in his interview with the SPO dated 9 November 2021 (“9 November 2021 Interview”).<sup>16</sup>

10. Regarding the 9 November 2021 Interview, Haradinaj explains that it was disclosed to the Defence on 16 November 2021 and that the transcript of the interview was so heavily redacted that the Defence could not be fully aware of its content. Haradinaj further explains that he carried out a further interview with Witness

---

<sup>13</sup> Request, para. 20; Reply, para. 26.

<sup>14</sup> Response, para. 2.

<sup>15</sup> Request, para. 23.

<sup>16</sup> Request, para. 24. Haradinaj further adds that the Defence had to conduct its investigations despite a total lack of cooperation from the SPO which resulted in “delay and an inability to pursue certain lines of enquiry”. See Request, para. 26. See also Request, para. 33.

W04349 on 11 November 2022 (“11 November 2022 Interview”), where it became “apparent” that the redacted portions of the 9 November 2021 Interview were referring to video recordings of the delivery of documents to the KLA WVA.<sup>17</sup>

11. Following the 11 November 2022 Interview, Witness W04349 provided the Defence with a statement signed on 10 December 2022 (“10 December 2022 Statement”), in which he declared that he was shown “video footage” during his 9 November 2021 Interview. Haradinaj suggests that this information might have been redacted from the transcript of the 9 November 2021 Interview.<sup>18</sup>

12. Haradinaj further submits that he has on several occasions, and as early as 13 March 2021, requested the SPO to disclose any information it may have regarding the manner in which the batches were delivered to the KLA WVA, but that these requests “have only resulted in vague and evasive responses from the SPO”.<sup>19</sup> Haradinaj therefore requests the Panel to order the SPO to release any video recordings or any undisclosed evidence related to the delivery of the documents at the KLA WVA.<sup>20</sup>

13. In its Response, the SPO argues that the two parts of the Request should be denied as they revisit previously settled matters, and come well after the closing of the case, the deadline for the submission of additional evidence on appeal, and the appeal hearing.<sup>21</sup> With regard to the Person Named in the First Part of the Request, the SPO responds that it has had no contact with this person that is relevant to the case and recalls the Panel’s ruling in the Rule 103 Appeal Decision dismissing the Defence’s request for additional disclosure.<sup>22</sup>

---

<sup>17</sup> Request, paras 27-28. See also F00098/RED/A02, Annex 2 to Haradinaj Request for Order to the SPO to Release Video Recordings, 11 December 2022 (confidential) (“Annex 2 to Request”), para. 9.

<sup>18</sup> Request, paras 28-29. See also Annex 2 to Request, para. 9.

<sup>19</sup> Request, paras 30-32.

<sup>20</sup> Request, para. 33.

<sup>21</sup> Response, paras 1-2, 10.

<sup>22</sup> Response, para. 4.

14. In relation to the interviews and the statement provided by Witness W04349, the SPO responds that it has already confirmed that it does not have in its possession any video footage of the kind requested by Haradinaj, that any video that it did possess was notified to the Defence under Rule 102(3) of the Rules, and their disclosure already litigated at trial.<sup>23</sup>

15. The SPO further responds that, consequently, the 11 November 2022 Interview and the false claim by Witness W04349 that the SPO played a video during the 9 November 2021 Interview is the only basis advanced by the Defence to try to justify different results than those already decided upon.<sup>24</sup> The SPO adds that the unredacted transcript of the 9 November 2021 Interview along with the official note of the interview were provided to the Trial Panel, which ordered the disclosure of the interview albeit in a redacted version.<sup>25</sup> The SPO also submits that the witness is intentionally providing false information.<sup>26</sup>

16. Finally, the SPO requests judicial intervention in view of the “repeated meritless disclosure applications” by the Defence and suggests that the Appeals Panel adopts a regime analogous to that of Rule 136 of the Rules, with a view to limiting further submissions amounting to frivolous litigation.<sup>27</sup>

17. In his Reply, Haradinaj notably argues that his Request was filed belatedly because the information relevant to the matter at hand – namely the issues related to videos having been shown to Witness W04349 during the 9 November 2021 Interview – only became known to the Defence recently.<sup>28</sup> Haradinaj adds that a further interview was conducted on 15 December 2022 with Witness W04349 where he maintains his position. According to Haradinaj, the only way to clarify the matter is

---

<sup>23</sup> Response, para. 3.

<sup>24</sup> Response, paras 5-6.

<sup>25</sup> Response, para. 6.

<sup>26</sup> Response, paras 7-8.

<sup>27</sup> Response, paras 1, 11-14.

<sup>28</sup> Reply, paras 31-33.

for the video recording of the 9 November 2021 Interview to be disclosed to the Defence.<sup>29</sup>

18. In his Additional Submissions, that pertain to the first part of his Request, Haradinaj refers to submissions originally filed on 14 November 2022 by Mr Kadri Veseli in the KSC-BC-2020-06 Case (“14 November 2022 Veseli Submissions”) that allegedly contain a redacted statement referring to the Rule 103 Material and supporting the possibility that the Person Named in the First Part of the Request collaborated with the SPO to entrap the Accused in both cases and met with the SPO “on at least 15 separate occasions”.<sup>30</sup> Haradinaj argues that the 14 November 2022 Veseli Submissions further support his Request, as well as his position that his claim of entrapment relates not only to the SPO, but also to persons connected to the Serbian State.<sup>31</sup>

#### B. ASSESSMENT OF THE COURT OF APPEALS PANEL

19. The Panel understands that the purpose of the Request and subsequent filings is to request the Appeals Panel to order the SPO to disclose, under Rule 102(3) and/or Rule 103 of the Rules: (i) any material it may have regarding the Person Named in the First Part of the Request;<sup>32</sup> and (ii) any undisclosed evidence related to the delivery of the documents at the KLA WVA, as well as the video recording of the 9 November 2021 Interview of Witness W04349.<sup>33</sup>

20. The Panel recalls that it has, in a previous decision, clarified that Rule 102(3) of the Rules does not apply during appeal proceedings unless the SPO had failed to notify material under this rule during the trial despite being in possession of such

---

<sup>29</sup> Reply, paras 24-25. See also F00100/RED2/A01, Annex 1 to Amended Publicly Redacted Version of Reply to Prosecution Response to Haradinaj Request for Order to the SPO to Release Video Recordings, 29 December 2022 (confidential version filed on 19 December 2022) (“Annex 1 to Reply”).

<sup>30</sup> Additional Submissions, paras 7-11.

<sup>31</sup> Additional Submissions, para. 8.

<sup>32</sup> Request, para. 23.

<sup>33</sup> Request, para. 33; Reply, paras 24-25. See also Annex 1 to Reply.

material.<sup>34</sup> The SPO denied being in possession of such material,<sup>35</sup> so Rule 102(3) of the Rules is not applicable to this matter.

21. The Pre-Trial Judge in this case acknowledged the exculpatory nature of material or information regarding the purported incitement or entrapment of the Accused, stating that such information would have to be disclosed to the Defence pursuant to Rule 103 of the Rules. This finding was confirmed by the Appeals Panel.<sup>36</sup> Since Haradinaj explained that the material he is seeking to obtain is related to his claim of entrapment,<sup>37</sup> the Panel will therefore address this Request under Rule 103 of the Rules.

22. The Panel recalls that, pursuant to Rule 103 of the Rules, and subject to Rules 107 and 108 of the Rules which regulate instances of information not subject to disclosure, the SPO shall immediately disclose to the Defence any information as soon as it is in its custody, control or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of the SPO evidence.<sup>38</sup> The Panel also recalls that, pursuant to Rule 112 of the Rules, the SPO shall disclose to the Defence any exculpatory information referred to in Rule 103, notwithstanding the closing of the case pursuant to Rule 136 of the Rules and any subsequent appeal. According to Rule 110 of the Rules, the Panel may decide, upon request by a Party or *proprio motu*, on measures to be taken as a result of the non-

---

<sup>34</sup> Decision on Further Investigations, para. 27. Rule 102(3) of the Rules provides, *inter alia*, that the SPO shall, pursuant to Article 21(6) of the Law, provide detailed notice to the Defence of any material and evidence in its possession and shall disclose to the Defence, upon request, any statements, documents, photographs and allow inspection of other tangible objects in its custody or control, which are deemed by the Defence to be material to its preparation, or were obtained from or belonged to the Accused.

<sup>35</sup> Response, paras 3-4.

<sup>36</sup> KSC-BC-2020-07, IA005/F00008/RED, Public Redacted Version of Decision on the Appeals Against Disclosure Decision, 29 July 2021 (confidential version filed on 29 July 2021) (“Disclosure Appeal Decision”), paras 49, 53.

<sup>37</sup> Request, paras 20, 33; Reply, para. 26.

<sup>38</sup> Rule 103 Appeal Decision, para. 19.



compliance with disclosure obligations pursuant to the Rules, including a stay of proceedings and the exclusion of evidence, except for exculpatory evidence.<sup>39</sup>

23. The Panel further notes that, if an accused wishes to show that the Prosecution is in breach of its disclosure obligations, he or she must identify the materials sought, make a *prima facie* showing of their probable exculpatory nature and prove the Prosecution's custody or control of the requested materials.<sup>40</sup> Even where a panel is satisfied that the Prosecution has failed to discharge its obligations, the panel will still examine whether the Defence was actually prejudiced by such a failure before considering whether a remedy is appropriate.<sup>41</sup>

### **1. The Person Named in the First Part of the Request**

24. As underlined by Haradinaj, the litigation with respect to this person is partly related to the Rule 103 Material, that was already disclosed to the Defence pursuant to Rule 103 of the Rules as relevant to the Defence's claim of entrapment.<sup>42</sup> The Panel previously determined that it did not consider that disclosure of the additionally requested material related to these interviews was warranted at this stage of the proceedings.<sup>43</sup>

25. The Panel further recalls that, as confirmed by extensive international criminal jurisprudence, there is a presumption of good faith on the Prosecution's part when discharging its disclosure obligations.<sup>44</sup>

---

<sup>39</sup> Rule 103 Appeal Decision, para. 19.

<sup>40</sup> See Rule 103 Appeal Decision, para. 20, referring to e.g. ICTY, *Prosecutor v. Bralo*, IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006 ("*Bralo* Appeal Decision"), para. 31; ICTR, *Kalimanzira v. Prosecutor*, ICTR-05-88-A, Judgement, 20 October 2010 ("*Kalimanzira* Appeal Judgement"), para. 18.

<sup>41</sup> See Rule 103 Appeal Decision, para. 20, referring to e.g. *Bralo* Appeal Decision, para. 31; *Kalimanzira* Appeal Judgement, para. 18.

<sup>42</sup> See Additional Submissions. See also Decision on Prosecution Notifications, paras 29, 38(a).

<sup>43</sup> Rule 103 Appeal Decision, para. 27.

<sup>44</sup> F00057/RED, 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 October 2022

26. The SPO confirmed in its Response, as well as in the context of previous litigation, that it has had no contact with the Person Named in the First Part of the Request that is relevant to the case or that would fall under the disclosure regime of Rule 103 of the Rules.<sup>45</sup> Consequently, the Court of Appeals Panel will assume that the SPO's representation that it does not possess any information on entrapment is made in good faith. The Panel has previously stressed in that regard that, were the SPO to have any material or information in its custody, control or actual knowledge on any purported incitement or entrapment of the Accused, this material must be disclosed immediately pursuant to Rule 103 of the Rules.<sup>46</sup>

27. The Panel finds that Haradinaj has not shown in the Request that there is any indication of exculpatory material being potentially held by the SPO. Recalling the presumption of good faith on the part of the SPO when discharging its disclosure obligations, the Panel finds that Haradinaj's request for the Appeals Panel to order the SPO to confirm whether it possesses any material disclosable under Rule 103 of the Rules has no merit.

28. As for the Additional Submissions, the Panel notes that they pertain to the 14 November 2022 Veseli Submissions, which were distributed in public redacted form on 16 December 2022. The Panel notes that the Additional Submissions were filed on 3 January 2023, long after the closing of the briefing schedule pursuant to Rules 76 and 173(3) of the Rules and that Haradinaj does not provide any explanation on the nature and timing of this filing. As a result, the Panel finds that it is not validly seized of the matter raised in the Additional Submissions.

29. That being said, the Panel notes that the person mentioned in the 14 November 2022 Veseli Submissions – whose name is redacted – reported that he met with the

---

(confidential version filed on 6 October 2022), para. 13, referring to Disclosure Appeal Decision, para. 53 and jurisprudence referenced therein.

<sup>45</sup> See Response, para. 4.

<sup>46</sup> Disclosure Appeals Decision, para. 53.

SPO “on at least 15 separate occasions”.<sup>47</sup> Even assuming, as suggested by Haradinaj, that this person is the same as the Person Named in the First Part of the Request, as previously noted, the SPO confirmed in its Response as well as in the context of previous litigation that it has had no contact with this person that is relevant to the case or that would fall under the disclosure regime of Rule 103 of the Rules.<sup>48</sup>

## 2. Witness W04349

30. In relation to Witness W04349, referred to in the second part of the Request, the Panel observes that the submissions of the Parties address various issues related to the credibility of the witness, including whether any video was played during the 9 November 2021 Interview, whether the witness has incentives to distort what happened during his interview for Haradinaj’s benefit, and further issues related to the timeliness of the Request.<sup>49</sup> The Panel will not entertain these submissions in the context of the present Decision as they have no bearing on findings related to the SPO’s disclosure obligations under Rule 103 of the Rules.<sup>50</sup>

31. In this respect, the Panel recalls that the disclosure of videos was already litigated before the Pre-Trial Judge in a decision issued on 26 May 2021, in which he found that videos pertaining to the SPO’s search and seizure at the KLA WVA premises on 25 September 2020 were subject to disclosure under Rule 102(3) of the

---

<sup>47</sup> Additional Submissions, paras 7-11. See also F00102/A01, Annex 1 to Supplement to Haradinaj Request of 11 December 2022 (F00098), 3 January 2023, paras 22, fn. 29, 31.

<sup>48</sup> See Response, para. 4.

<sup>49</sup> Compare Request, paras 27-29 with Response, paras 6-8.

<sup>50</sup> In particular, the question of the timeliness of the 11 November 2022 Interview and the 10 December 2022 Statement could be relevant if the Defence was requesting additional evidence to be admitted on appeal pursuant to Rule 181(3) of the Rules that requires, in addition to the general conditions for admitting evidence under Rule 138 of the Rules, the Panel to be satisfied that the proposed evidence was, *inter alia*, not available at the time of trial and could not have been discovered with the exercise of due diligence. However, this question is not relevant in the context of the present Decision related to the SPO disclosure obligations pursuant to Rule 103 of the Rules given that, in any event, pursuant to Rule 112 of the Rules, the SPO shall disclose to the Defence any exculpatory information referred to in Rule 103 of the Rules notwithstanding the closing of the case pursuant to Rule 136 of the Rules and any subsequent appeal.

Rules and ordered the SPO to make them available for viewing.<sup>51</sup> Further, the Panel recalls the decision issued by the Trial Panel on 15 November 2021, ordering the disclosure of evidence related to the 9 November 2021 Interview of Witness W04349 with redactions deemed necessary by the Panel and unrelated to the issue of entrapment.<sup>52</sup>

32. The Panel notes that Haradinaj takes advantage of his Reply to request that the 9 November 2021 Interview be disclosed to the Defence.<sup>53</sup> The Panel further recalls that the core of the moving party's arguments must be provided in the initial motion and not raised for the first time in reply, so that the opposing party is not deprived of an opportunity to respond.<sup>54</sup>

33. Ultimately, the SPO confirmed in its Response, as well as in the context of previous litigation, that it does not possess any disclosable video footage of the kind requested by Haradinaj.<sup>55</sup> Assuming that the SPO's representation is made in good faith, the Panel considers that Haradinaj's request for an order to the SPO to disclose such information is not warranted in the present circumstances. Finally, the Panel notes the SPO's suggestion that a regime analogous to that of Rule 136 of the Rules be adopted,<sup>56</sup> but finds that, in light of the very late stage of the proceedings, such a measure is no longer necessary.

---

<sup>51</sup> KSC-BC-2020-07, F00210/RED, Public Redacted Version of Decision on Prosecution Requests and Challenges Pursuant to F00172, 15 July 2021 (confidential version filed on 26 May 2021), paras 32-41.

<sup>52</sup> KSC-BC-2020-07, F00435/RED, Public Redacted Version of Decision on the Prosecution Request Related to Rule 102(3) Notice Item 201, 16 December 2021 (confidential version filed on 15 November 2021), paras 15-25.

<sup>53</sup> Reply, paras 24-25. See also Annex 1 to Reply.

<sup>54</sup> IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Motion for Access to Prosecution's Requests for Assistance and Responses Thereto, 18 April 2019, fn. 22.

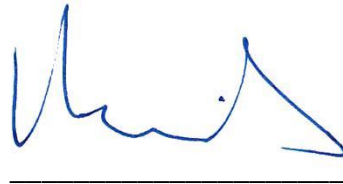
<sup>55</sup> See Response, para. 3.

<sup>56</sup> Response, paras 1, 11-14.

III. DISPOSITION

34. For these reasons, the Court of Appeals Panel:

**DENIES** the Request and the SPO's request for an application of Rule 136 of the Rules.



---

**Judge Michèle Picard,  
Presiding Judge**

Dated this Monday, 16 January 2023

At The Hague, the Netherlands