

In: KSC-CA-2022-01

The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: A Panel of the Court of Appeals Chamber

Judge Michèle Picard

Judge Kai Ambos

Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

Date: 18 January 2023

Language: English

Classification: Public

**Public Redacted Version of Defence Request for an Order for Disclosure of
Witness Contact Details**

Specialist Prosecutor

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I. INTRODUCTION

1. Mr. Haradinaj (“Appellant”) seeks an Order from the Panel of the Court of Appeals Chamber (“Panel”) to require the Specialist Prosecutor’s Office (“SPO”) to make available certain witnesses (“Requested Witnesses”), including by disclosing contact details for and/or arranging interviews with them.
2. The disclosure of this information is necessary to conduct important and urgent investigative opportunities relevant to the proper preparation of the Appellant’s appeal, in accordance with his right to adequate facilities for the preparation of his defence.

II. FACTS

3. On 18 October 2022, as part of an ongoing dialogue in respect of disclosure issues, a request was made by the Appellant’s legal representatives that the SPO disclose the contact details of [REDACTED] [REDACTED] on the grounds that it was necessary for the preparation of the Appellant’s case on appeal. Similar requests were made in respect of [REDACTED] [REDACTED], [REDACTED] [REDACTED], [REDACTED] ([REDACTED], and [REDACTED] [REDACTED].

4. The Appellant's legal representatives also requested that the SPO facilitate a meeting with [REDACTED] [REDACTED], through the KSC Witness Protection Unit, to ensure that all proper safeguards were in place.
5. On the same day, the SPO refused the requests in respect of [REDACTED] on the grounds 'that there are no contacts between the SPO and [REDACTED] which are relevant to this case'.
6. The SPO also refused to establish contact between the Appellant's legal representatives and [REDACTED] on the grounds that doing so would be *"incompatible with the protective measures authorised by the Appeals Panel (KSC-CA-2022-01/F00049/CONF/RED, paras 10-15)."*
7. On 21 October 2022, the SPO denied the requests in respect of the remaining Requested Witnesses on the grounds that:

"the SPO does not give out the contact information of its staff members or former staff members unless strictly necessary. Three of the referenced persons are not SPO witnesses in this case. As such, the SPO's obligations for facilitating Defence contacts with its witnesses (KSC-BC-2020-07/F00314, paras 27-40) only apply to [REDACTED]. [REDACTED] did not consent to being interviewed by the defence. The only other current staff member on your list is [REDACTED], who was also asked as a courtesy if he consented to an interview. [REDACTED] likewise did not consent. For these

reasons, the SPO does not provide the information requested and will not arrange the requested interviews."

8. On 25 October 2022, it was confirmed to the SPO that *"it is the intention of both defence teams to conduct urgent investigative opportunities in relation to the witnesses referred to..."*. A further request was therefore made as follows:

"Representatives of both defence teams will be in The Hague during the weeks of 31st October 2022 and 7th November 2022. We would be happy to agree that any interviews be conducted at either the Kosovo Specialist Chambers or an address proposed by the Specialist Prosecutor's Office. We can agree that there be a representative of the Specialist Prosecutor's Office present during any interview, and that the interview be recorded. Furthermore, we would be able to provide a list of questions in advance so that there is full knowledge and agreement of the questions to be asked.

Whilst we appreciate your responses to date, these are urgent and necessary enquiries and we would be grateful for your assistance in allowing these investigative opportunities to be pursued, by either providing direct assistance in the arrangement of the interviews, or by providing us with the witnesses' contact details to enable us to complete these investigations.

Given that [REDACTED] is a protected witness, we would propose that the Kosovo Specialist Chambers witness unit organises and facilitates the

interview with this witness (we would suggest this takes place online via a meeting platform) and puts in place appropriate measures to ensure that their identity is not revealed. As you are aware, this would be the normal procedure at the other international tribunals and should be a straightforward enough exercise.”

9. On 26 October 2022, this request was again denied on the grounds that

“the SPO does not provide contact information of persons who are not SPO witnesses, staff members or former staff members unless strictly necessary. Further, as also previously noted, [REDACTED] and [REDACTED] did not consent to being interviewed by the defence, and any efforts to facilitate an interview with [REDACTED] would be incompatible with the protective measures authorised by the Appeals Panel.”

10. Following this refusal, the Requested Witnesses have not been made available to the Appellant. No contact details have been provided and no interviews have been arranged.

III. APPLICABLE LAW

11. Pursuant to Article 40(2) of the Law on the Specialist Chambers and Specialist Prosecutors Office (“Law”), a Trial Panel shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
12. Pursuant to Rule 116(1) of the Rules of Procedure and Evidence of the Kosovo Specialist Chambers (“Rules”), a Trial Panel shall take all the measures and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the trial proceedings.
13. Pursuant to Rule 173 of the Rules, the rules governing trial proceedings shall apply *mutatis mutandis* to proceedings before the Court of Appeals Panel.

IV. SUBMISSIONS

14. Pursuant to Article 2(e) of the Law, the Kosovo Specialist Chambers (“KSC”) shall adjudicate and function in accordance with “*international human rights...including the European Convention on Human Rights*”.
15. Article 6(3)(b) of the European Convention on Human Rights (“ECHR”) guarantees the right of a person in criminal proceedings to “*have adequate time and facilities for the preparation of his defence*”.

16. This requirement guarantees a right of access to facilities “*which assist or may assist him in the preparation of his defence.*”¹ Access to such facilities includes an obligation ensure that a defendant has “*the opportunity to organise his defence in an appropriate way and without restriction as to the possibility of putting all relevant defence arguments before the trial court and thus of influencing the outcome of the proceedings*”.²
17. Contrary to the assertions of the SPO, access to all possible evidential avenues is not and should not be limited to what it deems to be “*strictly necessary*” on the basis of its own experience with relevant witnesses. Rather, the Appellant is entitled to access those witnesses if they will, or may, assist him in the preparation of his defence.
18. In this case, access to the Requested Witnesses is absolutely necessary for the Appellant’s preparation of his defence. Whilst he should not be compelled to disclose his litigation strategy in documents available between the parties, it is noted that the Appellant has clearly set out in its requests to the SPO and in requests for disclosure to the Panel, the basis for which disclosure and access to the witnesses is sought, in order to further advance the defence of entrapment.

¹ *Mayzit v. Russia* (Judgment) [2005] ECHR, Application No. 633378/00, at [79].

² *Huseyn and Ors. v. Azerbaijan* (Judgment) [2005] ECHR, Application Nos. 35485/05, 45553/05, 35680/05 and 36085/05, at [175].

19. The Appellant notes that in order to be in a position to make a timely application for calling additional evidence in accordance with Rule 181 of the Rules, necessary preparation must be conducted as a matter of priority. The Appellant has made timely requests through *inter partes* communications to the SPO all of which have been rejected.
20. It is of course noted that the SPO has an interest in safeguarding the secrecy with which it operates, and it is for precisely this reason that numerous mitigatory steps have been proposed, including that:
- a. any interviews be conducted at either the Kosovo Specialist Chambers or an address proposed by the SPO;
 - b. a representative of the SPO be present during any interview, and that the interview be recorded; and
 - c. a list of questions be provided in advance so that there is full knowledge and agreement of the questions to be asked.
21. It is also of course noted that the SPO has an interest in maintaining the protective measures afforded to [REDACTED]. Again, it is for precisely this reason that it has been proposed that the KSC Witness Unit:
- a. directly organises and facilitates the interview with this witness; and

b. puts in place appropriate measures to ensure that their identity is not revealed.

22. Taking this into account, it is submitted that the measures proposed properly balance the fair trial rights of the Appellant and the interests of procedural fairness with the interests of the SPO in ensuring confidentiality and witness protection.

V. CONCLUSION

23. For the reasons stated above, the Court of Appeals Panel is respectfully requested to order the SPO to:

a. make available the Requested Witnesses and facilitate interviews with them; or, in the alternative

b. disclose contact details for them.

24. Further, in respect of [REDACTED], the Court of Appeals Panel is respectfully requested to order that the KSC Witness Unit:

a. directly organises and facilitates the interview with this witness; and

b. puts in place appropriate measures to ensure that their identity is not revealed.

Word Count: 1,661 words



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