



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: 23 September 2022

Original language: English

Classification: **Public**

**Public Redacted Version of Decision on Specialist Prosecutor's
Office Request for Protective Measures**

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel” or “Panel” and “Specialist Chambers”, respectively),¹ 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 strictly confidential and *ex parte* request for protective measures filed by the Specialist Prosecutor’s Office (“SPO”) on 19 September 2022 (“Request”).² The Request is filed with two confidential and *ex parte* annexes.³

I. BACKGROUND

1. Pursuant to the SPO notification of two confidential and *ex parte* communications on 7 July 2022 (“7 July 2022 Notification”)⁴ and on 7 September 2022 (“7 September 2022 Notification”) (collectively, “Notifications”),⁵ the Court of Appeals Panel issued on 15 September 2022 a decision ordering, *inter alia*, the SPO to disclose to the Defence under Rule 103 of the Rules two interviews of Witness W04730 dated [REDACTED] (“First Witness W04730 Interview”) and [REDACTED] (“Second Witness W04730 Interview”).⁶

¹ F00011, Decision Assigning a Court of Appeals Panel, 21 June 2022.

² F00045, Request for Protective Measures, 19 September 2022 (strictly confidential and *ex parte*) (“Request”). The SPO underlines that it will file a confidential redacted version of the filing if so ordered. See Request, para. 7.

³ F00045/A01, Annex 1 to Request for Protective Measures, 19 September 2022 (confidential and *ex parte*) (“Annex 1”). Annex 1 is the interview of Witness W04730 that took place on [REDACTED] with redactions suggested by the SPO; F00045/A02, Annex 2 to Request for Protective Measures, 19 September 2022 (confidential and *ex parte*) (“Annex 2”). Annex 2 is composed of: (i) the transcription of the audio recording of the [REDACTED] interview with the witness with redactions suggested by the SPO; and (ii) an official note dated 4 July 2022 with some corrections to the transcription of Witness W04730’s interview. It also contains redactions suggested by the SPO.

⁴ F00028, Notification on W04730 telephone contact, 7 July 2022 (confidential and *ex parte*).

⁵ F00038, Notification on communication received by the SPO, 7 September 2022 (confidential and *ex parte*).

⁶ F00044, Decision on Prosecution Notifications, 15 September 2022 (confidential and *ex parte*) (“Decision of 15 September 2022”), paras 25-29, 38(a).

2. In the First Witness W04730 Interview, the witness suggested that “[REDACTED]”.⁷ In the Second Witness W04730 Interview, the witness claimed that [REDACTED].⁸

3. The Court of Appeals Panel found that the Second Witness W04730 Interview had to be disclosed pursuant to Rule 103 of the Rules as relevant to the Defence’s claim of entrapment.⁹ The Panel further found that the First Witness W04730 Interview also had to be disclosed to the Defence given that the interviews are inter-related and the second one cannot be properly understood without the first one.¹⁰

4. The Court of Appeals Panel further ordered the SPO to seize the Panel with any request for non-disclosure of the First Witness W04730 Interview and the Second Witness W04730 Interview, pursuant to Rules 105 to 108 of the Rules, and with any corresponding counter-balancing measures, if warranted.¹¹

II. DISCUSSION

A. PRELIMINARY MATTERS

5. The Panel considers that, given the sensitive nature of the information contained in the First Witness W04730 Interview and the Second Witness W04730 Interview and of the issues addressed in this Decision, it will rule on the Request on a strictly confidential and *ex parte* basis and all filings submitted in relation to this decision should retain their present classification. The Panel shall revisit this finding when appropriate and will either reclassify as confidential, or file a confidential redacted version of, the present Decision.¹²

⁷ Decision of 15 September 2022, para. 22.

⁸ Decision of 15 September 2022, para. 23.

⁹ Decision of 15 September 2022, para. 26.

¹⁰ Decision of 15 September 2022, paras 27-29.

¹¹ Decision of 15 September 2022, para. 38(b).

¹² See e.g. Decision of 15 September 2022, para. 16.

6. Since the Notifications were filed *ex parte* the Defence, the Panel rules on this matter without having heard from the Defence. The Panel however recalls its inherent discretion to determine a matter without awaiting responses or replies, taking account of the particular circumstances before it and the absence of prejudice to the Party whose response or reply would be pending.¹³

B. DISCUSSION

1. Submissions of the SPO

7. The SPO requests authorisation not to disclose the identity of Witness W04730 by redacting identifying information from the First Witness W04730 Interview and from the Second Witness W04730 Interview.¹⁴

8. The SPO argues that, [REDACTED], the [REDACTED] has already authorised [REDACTED].¹⁵

9. The SPO argues that the basis on which the [REDACTED] authorised [REDACTED] also applies in this case. In the SPO's view, although the Second Witness W04730 Interview contains [REDACTED], his interview is otherwise focused on [REDACTED].¹⁶ The SPO argues that the same reasoning applies to the First Witness W04730 Interview.¹⁷

2. Assessment of the Court of Appeals Panel

10. The Panel recalls that, pursuant to Rule 103 of the Rules and subject to Rule 107 and Rule 108, the SPO shall immediately disclose to the Defence any information in

¹³ See e.g. Decision of 15 September 2022, para. 17.

¹⁴ Request, para. 1.

¹⁵ Request, para. 2, referring to [REDACTED]. See also, Request, para. 3.

¹⁶ Request, para. 5.

¹⁷ Request, para. 6, referring to [REDACTED].

its possession which may reasonably suggest the innocence or mitigate the guilt of the Accused, or affect the credibility or reliability of the SPO's evidence.¹⁸

11. Pursuant to Article 23(1) of the Law and Rule 80(1) of the Rules, a Panel may order appropriate measures for the protection, safety, physical and psychological well-being, dignity and privacy of witnesses, victims participating in the proceedings, as well as other persons at risk on account of testimony given by witnesses. Pursuant to Rule 108(1)(b) of the Rules, such measures may include withholding information from the Defence.¹⁹ Pursuant to Rule 108(3) and (4) of the Rules, appropriate counterbalancing measures may be adopted, *proprio motu* by the Panel or upon request of a Party, to ensure the accused's right to a fair trial.²⁰

12. Pursuant to Rule 81(1)(a) of the Rules, once protective measures have been ordered by a panel in respect of a witness, such measures shall continue to have effect *mutatis mutandis* in any other subsequent proceedings before the Specialist Chambers.²¹ In that regard, the Panel observes that, [REDACTED], [REDACTED].²² The SPO underlines that, [REDACTED], [REDACTED] authorised [REDACTED].²³

13. The Panel finds that [REDACTED], pursuant to Rule 81(1)(a) of the Rules. Moreover, according to Rule 81(1)(b) of the Rules, these protective measures should not prevent the SPO from discharging its disclosure obligation under Rule 103 of the Rules in the current proceedings, provided that it notifies the Defence of the nature of the protective measures ordered and of the obligation to abide thereby.²⁴ The Panel therefore authorises the SPO not to disclose the identity of Witness W04730, by

¹⁸ Rule 103 of the Rules.

¹⁹ Article 23(1) of the Law and Rules 80(1) and 108(1)(b) of the Rules.

²⁰ Rule 108(3) and (4) of the Rules.

²¹ Rule 81(1)(a) of the Rules.

²² [REDACTED].

²³ Request, para. 2. See [REDACTED].

²⁴ See also Request, para. 4.

redacting identifying information from the Second Witness W04730 Interview as suggested in Annex 2 to the Request.²⁵

14. [REDACTED]. The Panel is further mindful that Trial Panel II, in this case, has already noted that the First Witness W04730 Interview contains “[REDACTED]”.²⁶ Accordingly, the Panel authorises the SPO not to disclose the identity of Witness W04730, by redacting identifying information from the First Witness W04730 Interview as suggested in Annex 1 to the Request.

III. DISPOSITION

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

AUTHORISES the SPO not to disclose the identity of Witness W04730, by redacting identifying information from the First Witness W04730 Interview and from the Second Witness W04730 Interview as suggested in Annex 1 and Annex 2 to the Request;


ORDERS the SPO to file a confidential redacted version of the 7 July 2022 Notification and of the 7 September 2022 Notification, by 26 September 2022;

ORDERS the SPO to file a confidential redacted version of the Request, by 26 September 2022; and

²⁵ [REDACTED].

²⁶ [REDACTED].

ORDERS the SPO to disclose to the Defence, by 26 September 2022, Annex 1 and Annex 2 to the Request.



Judge Michèle Picard,

Presiding Judge

Dated this Friday, 23 September 2022

At The Hague, the Netherlands