



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

In: KSC-BC-2023-10
Specialist Prosecutor v. Sabit Januzi, Ismet Bahtijari and Haxhi Shala

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

Date: 23 February 2024

Language: English

Classification: Public

**Public redacted version of 'Prosecution challenge to disclosure of items in Rule 102(3)
Notice and related request with strictly confidential and *ex parte* Annex'**

Specialist Prosecutor's Office

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I. INTRODUCTION

1. Pursuant to the Framework Decisions,¹ Article 23 of the Law,² and Rules 80, 102, and 108 of the Rules,³ the Specialist Prosecutor's Office ('SPO') hereby contests the materiality of one item selected from the SPO's Rule 102(3) notice⁴ by Ismet BAHTIJARI, Sabit JANUZI, and Haxhi SHALA, (collectively, the 'Accused').

2. As explained below, the Item⁵ – which comprises [REDACTED] – is not material to the preparation of the Defence, and thus not subject to disclosure. In addition, the Item, if disclosed, may prejudice the safeguarding of witnesses [REDACTED]. This is especially so in a context where the Accused are charged with *inter alia* offences of intimidation in criminal proceedings. Alternatively, the SPO requests that the Item be withheld pursuant to Rule 108 of the Rules.

II. SUBMISSIONS

A. THE ITEM IS NOT MATERIAL TO THE PREPARATION OF THE DEFENCE

3. As a Panel of the Court of Appeal has explained, the test for materiality will not be met where the requested items are too remote, hypothetical or speculative in relation to the charges in the case.⁶ The Item at issue does not relate to the charges against the

¹ Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2023-11/F00023, 19 December 2023, para.111(l); Public Redacted Version of the Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2023-10/F00076/RED, 24 October 2023, para.122(i).

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

⁴ Prosecution's Rule 102(3) notice with confidential Annex 1, KSC-BC-2023-10/F00154 and KSC-BC-2023-11/F00036, 26 January 2024 (together, the 'Notice').

⁵ [REDACTED].

⁶ *Specialist Prosecutor v. Gucati and Haradinaj*, Public Redacted Version of Decision on the Appeals Against Disclosure Decision, KSC-BC-2020-07/IA005/F00008/RED, 29 July 2021, para.41.

Accused, and is not linked to any known live issue in the case. That the Item contains a passing reference [REDACTED] does not render it material to the preparation of the Defence in this case.⁷ Moreover, the same information and/or its equivalent is already available to the Defence from other sources, including in disclosed [REDACTED].⁸ Any purported connection of the Item to Case 10 is too substantively, temporally and geographically remote from the charges to qualify as material to the preparation of the defence. For these reasons, the Item should not be disclosed.

B. THE ITEM CANNOT BE DISCLOSED FOR THE REASONS PROVIDED IN RULE 108(1)

4. Alternatively, even if the Item is considered material, the SPO requests that the Item be withheld pursuant to Rule 108(1), since: (i) disclosure poses an objective and grave risk to protected persons and interests; (ii) non-disclosure is strictly necessary, *i.e.* no less restrictive measures are sufficient or feasible; and (iii) non-disclosure is proportionate, balancing the grave risks of disclosure with the minimal, if any, prejudice to the Defence.

(a) Non-disclosure is necessary to address objectively justifiable and grave risks to protected persons and interests

5. [REDACTED].⁹

6. [REDACTED].¹⁰

⁷ [REDACTED].

⁸ [REDACTED]. Where there are not important countervailing interests, the SPO seeks to minimise litigation, and disclose requested items, rather than contesting them – this does not amount to a concession as to their actual materiality.

⁹ [REDACTED].

¹⁰ [REDACTED].

7. [REDACTED]. In addition, disclosure of the Item would also defeat [REDACTED]. For example, [REDACTED].¹¹ Non-disclosure is therefore indispensable [REDACTED].

8. This request must also be assessed against the backdrop of (i) the pervasive climate of fear and intimidation in Kosovo against witnesses or potential witnesses of the Kosovo Specialist Chambers ('KSC'),¹² (ii) the Accused being charged with approaching [REDACTED] in order to induce him to refrain from (further) testifying and/or withdraw his testimony in KSC proceedings, including by exerting pressure on the witness [REDACTED], (iii) the recent revelation that the Case 06 Accused, who are detained together with the Accused in the Detention Centre, have revealed the identities of protected witnesses and disseminated the content of confidential information to persons visiting them at the Detention Centre,¹³ and (iv) the arrest of Isni Kilaj, who was found to be in possession of confidential material which was 'either intended or actually used for the purpose of interfering with the administration of justice'.¹⁴

(b) Appropriate counterbalancing measures are available

9. The Item does not contain any information relevant for the preparation of the defence which is not already available from other sources. For example, the small portions relevant to Witness 1 in the Item, [REDACTED] has already been disclosed

¹¹ [REDACTED].

¹² See e.g. Public Redacted Version of Decision on Review of Detention of Haxhi Shala, KSC-BC-2023-10/F00165/RED, 9 February 2024, para.36; *Specialist Prosecutor v. Thaçi et al.*, Decision on Periodic Review of Detention of Hashim Thaçi, KSC-BC-2020-06/F02125, 15 February 2024, para.17.

¹³ *Specialist Prosecutor v. Thaçi et al.*, Public Redacted version of 'Prosecution urgent request for modification of detention conditions with confidential Annexes 1 to 5', KSC-BC-2020-06/F01933/RED, 17 November 2023, para.1; *Specialist Prosecutor v. Thaçi et al.*, Further Decision on the Prosecution's Urgent Request for Modification of Detention Conditions for Hashim Thaçi, Kadri Veseli, and Rexhep Selimi, KSC-BC-2020-06/F01977, 1 December 2023, paras 35, 38.

¹⁴ Public Redacted Version of Reasons for Continued Detention, KSC-BC-2018-01/F00503/RED, 9 November 2023, paras 24, 32.

elsewhere, [REDACTED].¹⁵ In addition, the SPO has disclosed numerous other items, [REDACTED], which contain more comprehensive information about [REDACTED]. As such, no prejudice will result from withholding the Item here.

III. CLASSIFICATION

10. This request is strictly confidential and *ex parte* as it contains sensitive witness-related information. A confidential and public redacted version will be filed.

IV. RELIEF REQUESTED

11. For the foregoing reasons, the SPO requests that the Pre-Trial Judge:

- a. authorise the non-disclosure of the Item on the grounds that it is not material to the preparation of the defence; or, in the alternative
- b. authorise non-disclosure pursuant to Rule 108.

Word count: 1502



Kimberly P. West

Specialist Prosecutor

Friday, 23 February 2024

At The Hague, the Netherlands

¹⁵ [REDACTED].