

Witness K spared jail after pleading guilty to breaching secrecy laws over Timor-Leste bugging

ACT magistrate Glenn Theakston says Witness K appeared to be motivated by justice rather than personal gain

<https://www.theguardian.com/australia-news/2021/jun/18/witness-k-should-be-shown-judicial-mercy-not-used-to-deter-others-court-told>



Protest vehicle outside Canberra law courts. Whistleblower Witness K is being sentenced over his involvement in exposing a 2004 bugging operation against the Timor-Leste government during negotiations over the Timor Sea. Photograph: Marion Rae/AAP

Christopher Knause – *The Guardian* - 18 June 2021

Witness K has been spared jail time for his role in exposing Australia's 2004 bugging of [Timor-Leste](#) with a Canberra court finding he appeared to be motivated by justice not personal gain.

The former Australian Secret Intelligence Service officer stood behind a wall of black panels, invisible to the packed courtroom, as he was sentenced on Friday to a three-month suspended term of imprisonment and a 12-month good behaviour order.

The sentence was the culmination of almost three years of protracted, secretive court proceedings, brought against Witness K, now an elderly man, for his role in disclosing Australia's 2004 spy operation against Timor-Leste as the two allies negotiated over oil and gas resources in the Timor Sea.

Witness K's actions have seen him branded a hero of Timor-Leste. In Australia, the former attorney general, Christian Porter, signed off on his prosecution.

In delivering his sentence, magistrate Glenn Theakston said Witness K appeared to be motivated by justice rather than personal gain.

Witness K made the illegal disclosures in two affidavits in 2013, which were intended to be used at the Hague, where Timor-Leste had accused Australia of failing to negotiate in good faith by spying on its impoverished ally.

Witness K's disclosures, Theakston said, were an attempt to participate in the rules-based order of international relations.

The former spy's moral culpability was also lessened due to his mental health conditions which the court found were linked to his disclosure of the information.

But Theakston also warned the offence was "not trivial". He described it as an "express, deliberate breach of the defendant's obligations to maintain the secrecy of the operations of Asis".

There were good reasons for the all-consuming secrecy around agencies like Asis, which Theakston described as "strict and absolute".

Breaches could put the agency's effectiveness at risk, compromise safety and security, and jeopardise Australia's relationships and reputation.

"It cannot and should not be up to ... former staff members to unilaterally depart from those security obligations," Theakston said.

Despite this, the magistrate said, Witness K had not attempted to hide his actions from the Australian government. "It was not a breach that was going to go hidden for some time," he said.

Efforts by Witness K's lawyers to secure a non-conviction order failed. The court deemed the offending too serious.

The extraordinary delays in bringing the case against Witness K were taken into account during Friday's sentencing.

Witness K's home was raided in 2013 and his passport seized.

"That means the ongoing threat of sanction has been hanging over Witness K's head since that time," Theakston said.

Despite the raid, no charges were brought until 2018. It took another three years still to get to sentencing, despite Witness K indicating a guilty plea in 2019.

Former attorney general George Brandis had avoided giving sign-off to the prosecution for years, the court has previously heard. But when Porter came into the office, the approval was quickly given.

The offence committed by Witness K was one of conspiring with his lawyer Bernard Collaery, who is awaiting trial, to communicate the protected information to Timor-Leste's government in 2013.

There was some argument between prosecutors and Witness K's lawyers this week about how long that conspiracy had lasted. Theakston found the conspiracy was ongoing between February and November, 2013, during which Witness K produced the two affidavits.

The court heard Collaery had also disclosed some of the contents of Witness K's affidavits during an interview with the late Mark Colvin, a famed ABC broadcaster.

Theakston said there was no evidence Witness K knew of Collaery's plans to disclose the material during the interview. He placed no weight on it.

The court heard only limited information about Witness K's identity. He is more than 70 years old, and had served with distinction in the Navy and across multiple government agencies before his employment with Asis.

He was highly decorated and had suffered significant trauma from a vaguely-described incident that was "large in scale" during his career.

Witness K was married, had adult children and grandchildren, but now suffered from post-traumatic stress disorder, suicidal ideation, depression, anxiety, and hyper mania.

Earlier on Friday, Witness K's lawyers had urged the court to show the former intelligence officer "judicial mercy", saying he suffered from numerous afflictions, and should not be used as an example to deter others.

Counsel for the commonwealth director of public prosecutions, Richard Maidment QC, had confirmed he was not seeking an immediate term of imprisonment but pushed back against Witness K's attempt to secure a non-conviction order.

Maidment argued Witness K's case should be used as a vehicle to deter others in the community from engaging in similar acts.

The court heard Witness K may have been motivated by a sense of altruism or a sense of "justice for Timor-Leste". But Maidment said he should be afforded no mitigation simply because he thought the act was "appropriate".

"In our submission, the consideration of whether it was appropriate for him to breach the obligations, which had been brought to his attention many times, does not afford him mitigation," he said.

Maidment said Witness K's conspiracy to disclose protected intelligence information had lasted many months – spanning the preparation of the two affidavits in early and late 2013. It was not an "instantaneous" act, he said.

"He had the opportunity to consider, reconsider, reconsider, many times over," Maidment said.

Before the sentence was handed down, Witness K's counsel, Robert Richter QC, had argued that the offending was "related and rose out of" his client's mental illness.

He argued strongly against using the case to achieve general deterrence against others committing similar acts, saying his client was elderly and suffered from a number of afflictions. Not using Witness K's case to deter others would be an "exercise of judicial mercy", Richter argued.

The prosecution said Witness K's initial interactions with Collaery were to seek legal advice about a promotion he had been denied because Asis had wanted someone younger.

He was approved by the inspector general of intelligence and security (IGIS) to approach Collaery with complaints about his treatment, the court heard. Maidment said Witness K was "totally consumed" by the decision to deny him the job.

The IGIS did not have any record of receiving a complaint about Australia's operations in Timor-Leste.