

**In:** KSC-BC-2023-10

**The Specialist Prosecutor v. Sabit Januzi, Ismet Bahtijari and Haxhi Shala**

**Before:** **Pre Trial Judge**

Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** **Specialist Counsel for Ismet Bahtijari**

**Date:** 1 March 2024

**Language:** English

**Classification:** Confidential

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**BAHTIJARI REVIEW OF DETENTION SUBMISSIONS**

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**Specialist Prosecutor's Office**

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## I. INTRODUCTION

1. On 29 January 2024, the Pre-Trial Judge issued an Order for the Bahtijari Defence to file submissions on the next review of detention, if it so wishes, by 8 March 2024.<sup>1</sup> These are those submissions:

## II. PROCEDURAL BACKGROUND

2. The procedural background is as set out in paragraphs 1 to 3 of the Public Redacted Version of Decision on Review of Detention of Ismet Bahtijari dated 29 January 2024 (the “Second Detention Decision”).<sup>2</sup>
3. In addition, the circumstances relating to funding of the Defence in this case are relevant. The pre-trial judge has sought information from the Registry on these issues and Counsel has replied. Mr Bahtijari’s health issues are also relevant
4. Accepting that the SPO trial brief is a summary, the evidence in the disclosures appears to be beyond that summarised - that Mr Bahtijari frequented a café, acted as an instrument of others, did not make a threat but answered a question and was frightened, confused and confusing. As part of the review of detention the pre-trial judge is invited to consider the weaknesses of the SPO case.
5. It is not yet known to the defence what enquiries were made by SPO / investigators about Mr Bahtijari’s state of health before the case was filed and before warrants were applied for in October 2023. It is not known if the Mr Bahtijari’s health issues were brought to the attention of the pre-trial judge before warrants for arrest were issued. Accordingly, it is not clear whether the SPO and KSC have complied with their obligations to assist the Defence in preliminary investigations.<sup>3</sup>

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<sup>1</sup> KSC-BC-2023-10, F00156/RED, Specialist Chambers, “Public Redacted Version of Decision on Review of Detention of Ismet Bahtijari”, 29 January 2024, Public at paragraph 42(b)

<sup>2</sup> Ibid

<sup>3</sup> ICC-ASP/21/24, “Report on the Court on Cooperation”, International Criminal Court, 20 October 2022; Report 2015/137, Office of Internal Oversight Services, “Audit of the Provision of Assistance to National

6. Counsel has actively engaged in Mr Bahtijari's defence and, in particular, has raised concerns about his health and connected funding issues to the Kosovan Ministry of Justice and the Registry and the Detention Unit and at the last status conference.
7. It is understood that Mr Bahtijari has been diagnosed with / had treatment for the following issues (at least):
  - a. Diabetes.
  - b. Heart problem.
  - c. Hearing issues.
  - d. Sight issues.
  - e. Thyroid issues.
  - f. Tooth extraction.
8. In addition, whilst it is not known if he has PTSD or other psychological or psychiatric conditions, his presentation is such that counsel has made it known to the KSC and the Ministry of Justice that he appears to have the type of health issues that would require expert assessment of his fitness to be tried, his cognitive function at the time of the alleged offences and his health on transfer. Even a cursory glance reveals he is obviously an elderly man (more advanced than his years) in the advanced stage of a dependency problem but Counsel is not a medical expert and needs expert assistance to ensure his needs are known and accorded sufficient respect.
9. Thus far, anticipated and suitable funding from the Ministry of Justice (apparently previously provided to all accused before the Kosovan Specialist Chambers) has been refused for Mr Bahtijari so it has not been possible for him to be expertly assessed on these issues.

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*Jurisdictions by the International Criminal Tribunal for the Former Yugoslavia and the Mechanism for International Criminal Tribunals*", 10 November 2015

10. Thus far, despite efforts, it has also not been possible to complete the detailed and complex legal aid forms with him.

11. In a recent seizure process executing an order, counsel had to assist the SPO investigator to explain Mr Bahtijari's rights (not just read them). It is not known if this type of explanation was done on arrest.

### III. APPLICABLE LAW

12. The applicable law is as set out in paragraphs 5 to 8 in the Second Detention Decision.

13. In addition, it is to be stressed that:

(a) Any analysis of continued detention must accept the presumption of innocence as its starting point;

(b) Detention cannot be maintained lightly and the burden to demonstrate that detention is necessary is on the SPO; and

(c) It is not incumbent upon the defendant to demonstrate the existence of reasons warranting his release.<sup>4</sup> It follows that he should not be detained because he needs treatment.

### IV. SUBMISSIONS

14. The Pre-Trial Judge is bound to examine the reasons or circumstances for detention and determine whether they still exist to satisfy himself that, at the time of the review decision, grounds for continued detention still exist.<sup>5</sup>

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<sup>4</sup> KSC-BC-2020-07/F00390, "Decision on Review of Detention of Hysni Gucati", Trial Panel II, 22 October 2021, Public at paragraph 13

<sup>5</sup> KSC-BC-2020-07/F00143, "Decision on Review of Detention of Hysni Gucati", Pre-Trial Judge, 24 February 2021, Public at paragraph 13

15. The defence invite such examination to include assessment of the relevant health and funding issues, to include independent expert evidence.
16. It is submitted that the grounds for continued detention do not exist, and the continued detention of Mr Bahtijari is neither necessary nor proportionate. He needs to be in Kosovo, with his family and a Kosovan speaking medical team.

*Risk of Flight/ Risk of Obstructing Proceedings/Commission of Further Crimes*

17. The Pre-trial Judge in the Second Detention Decision found that the risk of flight was only a moderate risk. He also recognised that Mr Bahtijari was “*rooted in his residential area*” and that he had cooperated with the SPO following his arrest and that these factors diminished (but did not eliminate) the risk of flight.
18. Not only is Mr Bahtijari rooted in his residential area, he has an extremely close relationship with his son, and strong community ties to his hometown. He is frankly desperate to go home.
19. The Defence also places reliance on his good character, and the fact that he has been compliant throughout not only his arrest but throughout his detention. He has engaged in medical treatment but is observably fatigued and vulnerable.
20. Of critical importance – and relevant to the question of the risk of flight and the risk of obstructing proceedings/commission of further crimes - is the state of his health. This issue, worryingly, appears to have not been identified in the indictment filing nor arrest nor review of detention process thus far. The issue was only raised once Dr Gerry KC was instructed and was able to progress his case. She has considerable experience with vulnerable defendants and is widely published in this field and is his choice of counsel. The need to make special arrangements so that defendants can effectively participate, if fit to be tried, is well known. The need to assess the health of an accused person on the substantive issues as well as fitness to stand trial is also well known. The pre-trial judge is invited to consider these issues on this review.

21. Once Mr Bahtijari's medical records are provided to defence counsel they will need translation. There is currently no funding to translate the documents. Quotes have been sought from Kosovan speaking experts which include costs of travel and accommodation for which there is no funding.
22. Counsel has travelled to the Hague, at her own significant expense, to try and progress funding and health matters, currently without success.
23. Aside from the many procedural and legal issues that may arise from his ill health, as regards the risk of flight, Mr Bahtijari poses no risk. He would return to his home and seek medical treatment. Put another way, there is in no way "more than a mere possibility of a risk materialising."<sup>6</sup>
24. Therefore, Mr Bahtijari's continued detention may not be justified on the ground of risk of flight.
25. In the event however that the Pre-Trial Judge maintains that there is a risk of flight, Mr Bahtijari would agree to release with conditions.
26. The Pre-trial Judge and Trial Panel previously found in the case of Hysni Gucati that any risk of flight could be adequately managed by alternative measures,<sup>7</sup> and for that reason that Mr Gucati's detention could not be justified on the risk of flight.
27. Mr Bahtijari would agree to any or all of the same conditions proposed in Mr Gucati's case and the Defence submit that there is no material difference between the two Defendants in the context of assessing the flight risk. The main and very apparent difference is the ill health of Mr Bahtijari and it follows that the risk of flight in respect of Mr Bahtijari is lower than in respect of Mr Gucati.
28. Furthermore, the Pre-trial Judge stated in the Second Detention Decision that he "*recalls his previous findings that Mr Bahtijari would have both the means to flee, through his strong ties with influential individuals from within the former senior*

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<sup>6</sup> Second Detention Submission paragraph 16.

<sup>7</sup> KSC-BC-2020-07/F00390, "Decision on Review of Detention of Hysni Gucati", Trial Panel II, 22 October 2021, Public at paragraphs 19 and 20

*Kosovo Liberation Army*.<sup>8</sup> The same of course would also have been true in Mr Gucati's case given that he was the chairman of the KLA WVA. Notwithstanding, it was found, repeatedly, by both the Pre-Trial Judge and the Trial Panel that the risk of flight could be mitigated by alternative measures.<sup>9</sup>

29. In any event, insofar as Mr Bahtijari's alleged connections are as alleged in the disclosures so far, he is currently in detention with the others also detained and he could be separated and at home.

30. On this basis, the Pre-trial Judge ought to find that the risk of flight posed by Mr Bahtijari can be adequately managed by alternative measures.

31. Mr Bahtijari could be made subject to any or all of the following conditions until trial:

- a. Surrender of his passport
- b. A requirement that he lives and sleeps each night at his home address.
- c. Daily reporting to Eulex Police HQ
- d. A condition not to contact directly or indirectly any person the court thinks it appropriate to restrict contact with
- e. A condition not to go to the premises of the Kosovo Liberation Army War Veterans Association

32. The above conditions meet any concerns as regards the risk of flight, and the concern that he will obstruct the progress of criminal proceedings or commit further offences.

33. The SPO cannot demonstrate that detention is necessary especially if no due attention has been afforded to Mr Bahtijari's vulnerability and where there is no scope for a relevant fitness / health assessment at the moment.

34. Mr Bahtijari is not obstructing the progress of criminal proceedings, nor would he commit further offences.

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<sup>8</sup> Second Detention Decision at paragraph 20

<sup>9</sup> KSC-BC-2020-07/F00390, "Decision on Review of Detention of Hysni Gucati", Trial Panel II, 22 October 2021, Public at paragraph 20

35. Given the Mr Bahtijari's health issues, one solution in all the circumstances would be for Mr Bahtijari to be tried in Kosovo in a Kosovan Court where he can be close to his son and receive the medical support that he needs.
36. Mr Bahtijari finds himself in a novel situation at the KSC and there appears to be no mechanism within the Law<sup>10</sup> or Rules<sup>11</sup> to allow for his transfer of his case to a Kosovan Court, unless the pre-trial judge concludes that the information which was supplied for the arrest warrants was inadequate and orders a stay of proceedings or if the KSC can exceptionally agree with the Ministry of Justice that Mr Bahtijari can be tried in Kosovo.
37. Nevertheless, the issue of his health is of fundamental importance and has to be addressed and dealt with appropriately. It cannot be right that a vulnerable person can be brought to the Hague to be tried, far away from any support and in the absence of meaningful expert evidence as to whether he has or may have conditions which affect his fitness / the case against him. The current lack of funding means it is impossible for the Defence to organise the expert assessments of Mr Bahtijari. In the current circumstances, Mr Bahtijari faces the very real and sad prospect of being tried whilst in a state of vulnerability.
38. In any event, wherever and whenever he is to be tried, his detention should cease.

## V. CONCLUSION

39. Mr Bahtijari is clearly not well. How unwell is not clear. In reviewing detention, the pre-trial judge is invited to consider the health and funding situation and to consider releasing Mr Bahtijari back to Kosovo where he can be close to his son and Kosovan speaking medical professionals

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<sup>10</sup> Law on Specialist Chambers and Specialist Prosecutor's Office

<sup>11</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers



40. Overall, it is submitted that Mr Bahtijari should be released from the detention unit, with or without conditions and with emergency funding for his flight home.

VI. CLASSIFICATION

This filing is currently classified as confidential in accordance with Rule 82(4).

**Word Count: 2164**

A handwritten signature in black ink, appearing to read 'Felicity Gerry', with a long, sweeping underline that extends to the left and then curves back under the signature.

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**Dr Felicity Gerry KC**

**Counsel for Mr Bahtijari**

1 March 2024

London, The United Kingdom