



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

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Prosecution submission pertaining to periodic detention review of Ismet Bahtijari

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I. INTRODUCTION

1. Pursuant to Article 41 of the Law¹ and Rule 57 of the Rules,² the Specialist Prosecutor's Office ('SPO') makes the following submissions in support of the need for the continued detention of Ismet Bahtijari. The Pre-Trial Judge has previously held that Bahtijari's detention is justified on multiple bases, that no conditions short of detention in the Kosovo Specialist Chambers ('KSC') detention facilities would be sufficient to minimise the risks, and that the detention period—taking all relevant circumstances into account—is reasonable. Since the most recent determination of the Pre-Trial Judge on 28 March 2024,³ there has been no change in circumstances that merits deviating from that determination. Indeed, continued disclosure and the steady progression of the case continue to give Bahtijari further access to sensitive information in the case against him and reinforce the necessity and reasonableness of detention.

II. PROCEDURAL HISTORY

2. On 28 March 2024, the Pre-Trial Judge issued his Decision denying Bahtijari's request for interim release.

3. On 27 March 2024, the Pre-Trial Judge issued his Calendar Decision⁴ for the remaining procedural steps of the pre-trial phase, which, *inter alia*, set the date for transmitting the case file to the Trial Panel to 21 June 2024.⁵

¹ Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

³ Public Redacted Version of Decision on Review of Detention of Ismet Bahtijari, KSC-BC-2023-10/F00238/RED, 28 March 2024 ('Decision').

⁴ Decision Setting out the Calendar for the Remaining Procedural Steps of the Pre-Trial Phase, KSC-BC-2023-10/F00233, 27 March 2024 ('Calendar Decision').

⁵ Calendar Decision, KSC-BC-2023-10/F00233, para.30(k).

4. On 19 April 2024, Bahtijari received Disclosure Package 29, pursuant to Rule 102(1)(b), containing sensitive evidence that the SPO intends to present at trial.

III. SUBMISSIONS

5. The Pre-Trial Judge has noted the law applicable to deciding such matters as set out in Article 41 of the Law, and Rules 56 and 57.⁶

6. Since the most recent Decision, there have been no developments that diminish the factors supporting the need for and reasonableness of detention. Indeed, the continued progression of the case and attendant disclosure of sensitive information in the case against Bahtijari augment the necessity of detention.

A. GROUNDED SUSPICION

7. Article 41(6)(a) requires a grounded suspicion that the detained person has committed a crime within the jurisdiction of the KSC.⁷ There remains a grounded suspicion that Bahtijari has done so.⁸ In the Confirmation Decision, the Pre-Trial Judge determined that there is a suspicion that Bahtijari is liable for intimidation during criminal proceedings and obstructing official persons in performing official duties within the meaning of Articles 387 and 401(1), (2) and (5) of the 2019 Kosovo Criminal Code,

⁶ Decision, KSC-BC-2023-10/F00238/RED, paras 13-18.

⁷ Decision, KSC-BC-2023-10/F00238/RED, para.19.

⁸ Decision, KSC-BC-2023-10/F00238/RED, para.14.

Code No. 06/L-074 and Articles 15(2) and 16(3) of the Law,⁹ to a standard that exceeds that required for detention based on ‘grounded suspicion.’¹⁰

8. Nothing has occurred since the Confirmation Decision was filed that would detract from the Pre-Trial Judge’s determination. Indeed, it has only been reinforced that there remains a well-grounded suspicion that Bahtijari has committed crimes within the KSC’s jurisdiction.¹¹

B. DETENTION IS JUSTIFIED UNDER ALL ARTICLE 41(6)(B) FACTORS

i. Risk of Flight (Article 41(6)(b)(i))

9. The Pre-Trial Judge has previously concluded that Bahtijari presents a moderate risk of flight.¹² The Pre-Trial Judge considered: (i) Bahtijari’s awareness of the seriousness of the charges and potential sentence in the event of a conviction; (ii) his increased insight into the evidence underpinning these charges; and (iii) his means to flee and opportunity to evade justice.¹³ The Pre-Trial Judge further considered that Bahtijari is aware of the forthcoming transmission of the case file to the Trial Panel.¹⁴

⁹ Corrected Version of Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2023-10/F00008/RED/COR, 2 October 2023 (‘Confirmation Decision’), paras 95, 111, 123, 126, 131, 135, 139, 144.

¹⁰ Decision, KSC-BC-2023-10/F00238/RED, para.21.

¹¹ See Decision, KSC-BC-2023-10/F00238/RED, paras 21-22; Public redacted version of ‘Prosecution submission pertaining to periodic detention review of Ismet Bahtijari’, KSC-BC-2023-10/F00147/RED, 15 January 2024, Confidential, para.9; Public redacted version of ‘Consolidated Prosecution response to Bahtijari Defence submissions on detention on remand’, KSC-BC-2023-10/F00089/RED, 3 November 2023, paras 18-19.

¹² Decision, KSC-BC-2023-10/F00238/RED, para.30.

¹³ Decision, KSC-BC-2023-10/F00238/RED, para.29.

¹⁴ Decision, KSC-BC-2023-10/F00238/RED, para.29.

10. That transmission of the case file to the Trial Panel now has a date certain, in combination with the revelation of additional incriminating evidence against him, only further elevates Bahtijari's risk of flight.

ii. *Risk of Obstruction of Proceedings (Article 41(6)(b)(ii))*

11. Bahtijari continues to present a risk of obstructing the proceedings. The Pre-Trial Judge has previously concluded that the risk that Bahtijari will obstruct the progress of KSC proceedings continues to exist.¹⁵

12. The Pre-Trial Judge recalled his previous conclusions in this regard,¹⁶ in combination with the fact that Bahtijari has received increasing access to sensitive witness-related information; and no information has been brought to the Pre-Trial Judge's attention that would detract from those conclusions.¹⁷

13. The Pre-Trial Judge assessed these conclusions against the backdrop of the pervasive climate of fear and intimidation in Kosovo against witnesses and potential witnesses of the KSC, which the Court of Appeals has agreed is a relevant 'contextual consideration.'¹⁸ Similar findings were made in the *Mustafa* Trial Judgment¹⁹ and the *Gucati and Haradinaj*

¹⁵ Decision, KSC-BC-2023-10/F00238/RED, para.34.

¹⁶ Public Redacted Version of Decision on Review of Detention of Ismet Bahtijari, KSC-BC-2023-10/F00156/RED, 29 January 2024, paras 24-27.

¹⁷ Decision, KSC-BC-2023-10/F00238/RED, para.33.

¹⁸ *Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention, KSC-BC-2020-06/IA017/F00011/RED, 5 April 2022, paras 41-48; *Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, KSC-BC-2020-06/IA014/F00008/RED, 31 March 2022, para.50; *Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, KSC-BC-2020-06/IA015/F00005/RED, 25 March 2022, para.43.

¹⁹ *Specialist Prosecutor v. Mustafa*, Further Redacted Version of Corrected Version of Public Redacted Version of Trial Judgment, KSC-BC-2020-05/F00494/RED3/COR, 16 December 2022 ('*Mustafa* Trial Judgment'), para.57.

Appeal Judgment.²⁰ The Trial Panel in KSC-BC-2020-07 ('Case 07') considered that 'witness protection has continued to be a live and critical issue in Kosovo,'²¹ and credited the testimony of defence expert Robert Reid, who remarked that, in over 20 years in the field, he had never seen witness intimidation on the level that exists in Kosovo.²²

14. In this regard, the SPO notes that, as held by the Trial Panel in Case 07, 'the mere fact that the Accused is entitled to disclosure of relevant material does not mean that the Panel ought to ignore the risks that come with such disclosure, especially in the context of conditional release.'²³

iii. Risk of Criminal Offences (Article 41(6)(b)(iii))

15. In previously finding that Bahtijari may commit further crimes, the Pre-Trial Judge recalled that, even though the existence of a risk of obstruction does not automatically translate into a risk of committing further offences, the factors underpinning the former are of relevance to the assessment of the latter in the circumstances of the present case.²⁴

16. Additionally, Trial Panel II in KSC-BC-2020-06 ('Case 06') has held that especially once information regarding sensitive witnesses has been disclosed to the Defence, any risk of the further commission of crimes must be avoided.²⁵ Therefore, and especially in

²⁰ *Specialist Prosecutor v. Gucati and Haradinaj*, Appeal Judgment, KSC-CA-2022-01/F00114, 2 February 2023 (*Gucati and Haradinaj* Appeal Judgment), para.438 (*quoting* KSC-BC-2020-07, Transcript, 18 May 2022, pp.3858-3859).

²¹ *Specialist Prosecutor v. Gucati and Haradinaj*, Public Redacted Version of the Trial Judgment, KSC-BC-2022-01/F00611/RED, 18 May 2022 ('Case 7 Judgment'), para.579.

²² Case 7 Judgment, KSC-BC-2020-07/F00611/RED, para.577.

²³ *Specialist Prosecutor v. Gucati and Haradinaj*, Public Redacted Version of Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00507/RED, 21 December 2021, para.36.

²⁴ Decision, KSC-BC-2023-10/F00238/RED, paras 37-38.

²⁵ See e.g., *Specialist Prosecutor v. Thaçi et al.*, Decision on Periodic Review of Detention of Hashim Thaçi, KSC-BC-2020-06/F02125, 15 February 2024, para.26; *Specialist Prosecutor v. Thaçi et al.*, Decision on Periodic Review of Detention of Kadri Veseli, KSC-BC-2020-06/F02126, 15 February 2024, para.27.

light of continuing disclosure, the unacceptable risk for the commission of further crimes mandates Bahtijari's continued detention.

C. NO MODALITIES OF CONDITIONAL RELEASE ARE ABLE TO SUFFICIENTLY MITIGATE THE RISKS

17. The Pre-Trial Judge has previously concluded, the relevant risks can only be effectively managed at the KSC's detention facilities.²⁶

18. The Pre-Trial judge found that none of Bahtijari's proposed conditions for release, nor any additional measures foreseen in Article 41(12), could sufficiently mitigate the existing risks related to obstruction and the commission of further crimes.²⁷

19. The Pre-Trial Judge recognized that while the risk of illicit messages and instructions cannot be entirely eliminated, the measures in place at the KSC detention facilities, viewed as a whole, provide robust assurances against unmonitored visits and communications with family members and pre-approved visitors with a view to minimising the risks of obstruction and commission of further crimes.²⁸ In this regard, the Pre-Trial Judge and the Registrar, who have unrestricted access to confidential information concerning witnesses and victims, may take action more promptly than other authorities acting under a distinct framework.²⁹

20. The Pre-Trial Judge has also recognized that (i) previous rulings in Case 06 have found that the Kosovo Police do not have the capacity to implement corresponding measures that sufficiently mitigate the existing risks; (ii) the very reason for establishing

²⁶ Decision, KSC-BC-2023-10/F00238/RED, paras 45-46.

²⁷ Decision, KSC-BC-2023-10/F00238/RED, para.44.

²⁸ Decision, KSC-BC-2023-10/F00238/RED, para.44.

²⁹ See Public Redacted Version of Decision on Review of Detention of Haxhi Shala, KSC-BC-2023-10/F00165/RED, 9 February 2024 ('Shala Decision'), para.54.

the KSC was that criminal proceedings against former KLA members could not be conducted in Kosovo; and (iii) the procedural framework and operational practice of the KSC have been specifically designed to ensure, to the maximum extent possible, the protection of witnesses, victims as well as others at risk with a view to implementing the mandate of the KSC.³⁰

21. Nothing has occurred since the Pre-Trial Judge's previous determination warranting a different assessment, either generally or for a discrete period of time; rather, the progression of the case and attendant further disclosures render the underlying risks higher than ever.

D. DETENTION IS PROPORTIONAL

22. Detention remains proportional. At the last detention review, the Pre-Trial Judge found that the time Bahtijari has spent in pre-trial detention is not unreasonable within the meaning of Rule 56(2).³¹

23. The Pre-Trial Judge recalled his previous findings that: (i) Bahtijari has been detained since his arrest on 5 October 2023; (ii) he is charged with two counts of obstructing official persons in performing official duties and one count of intimidation during criminal proceedings, which carry a possible sentence of up to five years and ten years of imprisonment, respectively; (iii) the risks under Article 41(6)(b)(ii) and (iii) of the Law cannot be mitigated by the proposed conditions for release, house arrest or any additional conditions; (iv) all required procedural steps relating to the pre-trial phase of the present case have been, are being or will be completed with a view to transmitting the case for

³⁰ Shala Decision, KSC-BC-2023-10/F00165/RED, para.54.

³¹ Decision, KSC-BC-2023-10/F00238/RED, para.52.

trial at a point in the foreseeable future; and (v) Bahtijari's detention shall be reviewed every two months or as soon as a change in circumstances arises.³²

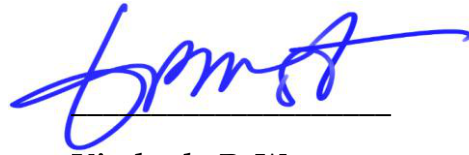
24. The proceedings continue to move forward expeditiously. Notably, the date for transmitting the case file to the Trial Panel has been set for 21 June 2024.³³

25. Given all of the above, detention remains both reasonable and proportional at this time.

IV. CONCLUSION

26. For the foregoing reasons, the SPO respectfully submits that Bahtijari should continue to be detained.

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Monday, 6 May 2024

At The Hague, the Netherlands

³² Decision, KSC-BC-2023-10/F00238/RED, paras 50-51.

³³ Calendar Decision, KSC-BC-2023-10/F00233, para.30(k).