

In: KSC-BC-2023-10

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

Before: **Pre Trial Judge**

Judge Marjorie Masselot

Registrar: Dr Fidelma Donlon

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

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Public Redacted Version of BAHTIJARI submissions on detention review

Specialist Prosecutor's Office

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I. DOCUMENT

1. This is an application for review of Mr Bahtijari's detention and for his release to Kosovo to await trial at his home. It is made Pursuant to Rule 57 of the *Rules of Procedure and Evidence* ('the Rules') and Articles 41 of the *Law on the Specialist Chambers and the Specialist Prosecutor's Office* ('Law') and with consideration to the Decision on Review of Detention of 26 July 2024, which sets out the procedural history.¹

II. INTRODUCTION

2. It is submitted that the recent disclosures give rise to a change in circumstances. Alternatively, it is submitted that a review of detention can be properly made solely on request.
3. The construction of Rule 57(2) allows for a review by request without the need for a change in circumstances: It provides for an entitlement to review and reconsideration of ongoing detention under the *Rules* and the *Law* either within two months of the last ruling on detention or at any time upon request by the Accused, or the Specialist Prosecutor, or proprio motu, where a change in circumstances since the last review has occurred.²
4. Rule 57(2) is written so as to provide for a review at the Accused's request or where a change in circumstances has occurred since the last review has occurred - that is, that the 'change in circumstances' provision is in the alternative and the conditions triggering a review are separate. As opposed to the use of the conjunction '*and*'

¹ KSC-BC-2023-10, F00408, *Decision on Review of Detention of Ismet Bahtijari*, 26 July 2024 ('July Detention Decision').

² Ibid; KSC-BD-03/Rev2/2020, *Rules of Procedure and Evidence Before the Kosovo Specialist Chambers*, adopted 17 May 2015 and last revised 5 May 2020, rule 57(2) ('the Rules') (emphasis added); 05/L-053, *Law on the Specialist Chambers and the Specialist Prosecutors Office*, 3 August 2015, article 41(10) ('the Law').

which would suggest that the conditions for review were connected and must be read together.

5. Notably, the paragraph in the *Haradinaj* review decision that has been cited by multiple review decisions does not provide any evidence to support the statement that a review must focus on a change of circumstances giving rise to a different analysis of the criteria for detention at Article 41(6)(b) of the *Law*.³ To clarify, the contention in *Haradinaj* is not supported by any extant principle of law, or in fact, *by any authority at all*.⁴ A review is not about continuing circumstances but about the right not to be disproportionately detained. Accordingly, it is submitted that, even if the disclosures do not give rise to a change in circumstances, Mr Bahtijari's detention can be reviewed on his request (herein).
6. It is therefore respectfully requested that Mr Bahtijari's detention be reviewed and he be released to await his trial at home in Kosovo. This could be on condition of residence and surrender of his identification documents to the SPO (other than for travel to his trial).

III. PROCEDURAL BACKGROUND

7. On 2 October 2023 an *Arrest Warrant* for Mr Ismet Bahtijari was issued.⁵
8. The *Order for Transfer to Detention Facilities of the Specialist Chambers* for Mr Bahtijari was made on 2 October 2023.⁶

³ *Specialist Prosecutor v. Gucati and Haradinaj*, KSC-BC-2020-07, IA002/F00005, Court of Appeals Panel, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, para 55 ('*Haradinaj* decision'); KSC *Law* article 41(6)(b).

⁴ *Haradinaj* decision, para 55.

⁵ KSC-BC-2023-10, F00009, Pre-Trial Judge, Public Redacted Version of Arrest Warrant for Ismet Bahtijari, 2 October 2023 ('Arrest Warrant'); KSC-BC-2023-10, F00002, Specialist Prosecutor, Submission of Indictment for Confirmation and Related Requests, 11 September 2023, strictly confidential and ex parte, with Annexes 1-3, strictly confidential and ex parte. A publicly redacted version of the Indictment was made available on 4 October 2023, KSC-BC-2023-10/F00016, Public redacted Indictment, 4 October 2023.

⁶ KSC-BC-2023-10, F00009, Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers, 2 October 2023 ('Order for Transfer').

9. Mr Bahtijari was arrested in Kosovo at 6.33 am on 5 October 2023.⁷ Following the arrest, he was transferred to the Host State and detained at the Detention Facilities of the Specialist Chambers by 6 October 2023.⁸ He was assessed as fit to travel (see F00021).⁹
10. Mr Bahtijari appeared before the KSC on 9 October 2023 having been taken from the medical wing/ hospital so it can be inferred that he was not fit to travel after all (see F00021). At this *Initial Appearance* Mr Bahtijari entered a plea of not guilty.¹⁰
11. Duty Counsel for Mr Bahtijari filed ‘Submission on Detention on Remand’ on 11 October 2023.¹¹ Duty counsel opposed detention on remand, citing insufficiencies in the SPO meeting the positive onus in Rule 41(6)(b) of the *Rules*,¹² and lack of adequate alternatives to detention.¹³ Additionally Duty Counsel filed a supplement to this submission on 25 October 2023 stating their opposition to detention on remand, citing further jurisprudence on Rule 41(6)(b) to support the argument that the SPO had not met the positive burden contained in the *Rules*.¹⁴

⁷ KSC-BC-2023-10, F00011, Notification of Arrest of Ismet Bahtijari Pursuant to Rule 55(4), 5 October 2023 (‘Notification of Arrest’) para 4.

⁸ KSC-BC-2023-10, F00014, Notification of the Reception of Ismet Bahtijari in the Detention Facilities of the Specialist Chambers, 6 October 2023.

⁹ KSC-BC-2023-10, F00021, Report on the Arrest and Transfer of Ismet Bahtijari to the Detention Facilities with strictly confidential and ex parte Annexes 1-3, 9 October 2023, para 30 (‘Report on Arrest and Transfer’).

¹⁰ *Ibid*, paras 39, 48. Transcript of Initial Appearance of Ismet Bahtijari, 9 October, page 12, line 6.

¹¹ KSC-BC-2023-10, F00030, Hendrick Sytema, ‘Submission on detention on remand’, 11 October 2023.

¹² *Ibid*, 8.

¹³ *Ibid*, 11.

¹⁴ *Ibid*, 6 - 18.

12. The SPO filed a 'Prosecution request for extension of time' on 23 October 2023¹⁵ which was granted by the Pre-Trial Judge on 24 October.¹⁶ The SPO then filed their response to the Defence submissions on detention¹⁷ in which they opposed the release of Mr Bahtijari based on criteria under Article 41(6).¹⁸ A request for Interim Release' on 29 November 2023¹⁹ was refused,²⁰
13. Continued detention was ordered by the then pre-trial judge in January 2024.²¹
14. Issues with Mr Bahtijari's health were raised on his behalf in submissions on a detention review on 4 March 2024.²² Counsel noted that Mr Bahtijari has significant health conditions which were not considered or addressed in previous decisions regarding the necessity of Mr Bahtijari ongoing detention.²³ The SPO responded to these submissions on 14 March 2024 and submitted there had been 'no developments that diminish the factors supporting the need for and reasonableness of detention'.²⁴ This despite not obtaining or disclosing the medical assessment they obtained regarding his fitness to travel.

¹⁵ KSC-BC-2023-10, F00074, SPO, 'Prosecution request for extension of time', 23 October 2023.

¹⁶ KSC-BC-2023-10, F00075, Judge Guillou, 'Decision on the Prosecution Request for Extension of Time', 24 October 2023.

¹⁷ KSC-BC-2023-10, F00079, SPO, 'Consolidated Prosecution Response to Bahtijari Defence Submissions on Detention on Remand', 3 November 2023.

¹⁸ KSC-BC-2023-10, F00116, Judge Guillou, 'Public Redacted Version of Decision on Ismet Bahtijari's Request for Interim Release', 29 November 2023.

¹⁹ Ibid.

²⁰ Ibid, 59(a).

²¹ KSC-BC-2023-10, F00156, Judge Guillou, 'Public Redacted Version of Decision on Review of Detention of Ismet Bahtijari' 29 January 2024.

²² KSC-BC-2023-10, F00195, Dr Felicity Gerry KC, 'Bahtijari Review of Detention Submission', 4 March 2024.

²³ Ibid, page 7, para 39.

²⁴ Ibid, page 2, para 7.

15. On 22 March 2022 at the status conference Mr Bahtijari's health issues were raised again.
16. On 28 March 2024 Mr Bahtijari's continued detention was ordered.²⁵
17. On 1 May 2024 an application was made ex parte for relevant medical reports. This necessarily remains strictly confidential. No decision has been issued on that request.²⁶
18. On 12 July 2022 at a hearing relating to the indictment Mr Bahtijari's health issues were mentioned to ensure his comprehension of the process.
19. On 20 June 2024 Mr Bahtijari filed a pre- trial brief. On 19 August 2024 Mr Bahtijari filed an updated pre- trial brief.²⁷ In both of these documents he indicated that he met [REDACTED] on 5 April 2023 and then went to see [REDACTED] . The prosecution case is that he met with [REDACTED] .
20. On 26 July 2024 Bahtijari's continued detention was ordered.²⁸
21. On 8 July 2024 the SPO served disclosures 39 and 40 in which they provided the recordings from the witnesses' phones.²⁹ There is no recording from 5 April 2023 as alleged. The witness evidence is incredible on this issue.³⁰

²⁵ Ibid, page 18, para 59(a).

²⁶ KSC-BC-2023-10, F00273, 'BAHTIJARI FILING FOR MEDICAL REPORTS ex parte', 1 May 2024.

²⁷ KSC-BC-2023-10, F00343, 'BAHTIJARI PRE-TRIAL BRIEF', 19 June 2024; F00439, BAHTIJARI UPDATED PRE- TRIAL BRIEF, 20 August 2024.

²⁸ *July Detention Decision*, para 54(a); KSC-BC-2023-10, F00373 'Prosecution submission pertaining to periodic detention review of Ismet Bahtijari', 5 July 2024.

²⁹ KSC-BC-2023-10, F00374_Prosecution submission of amended exhibit list with confidential Annex 1, 8 July 2024.

³⁰ See for example KSC-BC-2023-10-SPOE00339033-00339038,[REDACTED] (Apple iPhone 7);

22. Recordings in those disclosures from 12 April 2023 reveal [REDACTED] telling [REDACTED] that it was he who visited Mr Bahtijari on 5 April 2023. Accordingly, the prosecution case that Mr Bahtijari was in some kind of 3 -way joint activity is now unsupported.
23. These disclosures also support the contention that what Mr Bahtijari said in his interview about hierarchy (particularly in the absence of military records) is unreliable, probably because he was interviewed when unwell, by way of leading and confusing questions, post charge and without a lawyer. Add to this that the witness evidence is that he was in fear (wrongly described in the prosecution pre-trial brief as 'discomfort'), it is obvious that the prosecution evidence is that, whatever was said, Mr Bahtijari is no risk whatsoever to any witness, nor to the community.³¹ Those recordings help to conclude for this stage of the proceedings that he had no intention to threaten his family member nor to interfere with the court nor its officers.

III. APPLICABLE LAW

24. These submissions are filed under Rule 57 of the *Rules* and Article 41 of the KSC *Law*.
25. The criteria that must be established for pre-trial detention are derived from Article 41(6) of the Law which states that the Specialist Chambers shall only order arrest and detention where:
- (a) There is grounded suspicion that he or she has committed a crime within the jurisdiction of the Specialist Chambers; **and**
 - (b) There are articulable grounds to believe that
 - (i) There is a risk of flight;

³¹ See KSC-BC-2023-10-112906-TR-AT Part 1 Revised 1-ET RED, pp.13, 22; KSC-BC-2023-10-112769-112772 RED, para.7; Cf KSC-BC-2023-10/F00177/A01/6 of 28/ at 14.

- (ii) He or she will destroy, hide, change or forge evidence of a crime or specific circumstances indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices; or
- (iii) The seriousness of the crime or the manner or circumstances in which it was committed and his or her personal characteristics, past conduct, the environment and conditions in which he or she lives or other personal circumstances indicate a risk that he or she will repeat the criminal offence, complete an attempted crime or commit a crime which he or she has threatened to commit.

(‘Article 41(6) criteria’)

26. The burden of proof for establishing that the detention is necessary lies with the SPO.³²

IV. NO GROUNDED SUSPICION

27. In the *Decision on Review of Detention of Ismet Bahtijari* (‘July Detention Decision’) of 26 July 2024 the Pre-Trial Judge ‘underscores that any analysis of Mr Bahtijari’s detention must duly consider his presumption of innocence’ and that ‘pre-trial detention cannot be maintained lightly’.³³

28. The mere fact that he is charged with the offences at Article 15(2) of the *KSC Law*³⁴ is not sufficient in evaluating the Article 41(6)(b)(ii) criteria. It requires an examination of the evidence. It is submitted that, read as a whole, the evidence no longer gives a well- grounded suspicion of the commission of a crime. At most he visited, in fear, there was a conversation about the motives of others and he did not engage in any of the following activity by others. In his circumstances at

³² *July Detention Decision*, para 21.

³³ *July Detention Decision*, para 21.

³⁴ KSC-BC-2023-10, F00009_Decision on Request for Arrest Warrants and Transfer Orders, paras 17 and 21 (‘*Decision on Arrest and Transfer*’).

the time, there is no longer a sufficient threshold to conclude that he intimidated nor intended to intimidate the witness nor was he involved in the alleged promises by others nor that he applied his mind to the process of the court or its officers.

29. Detention should not be the general rule³⁵ nor arbitrary.³⁶ A proper and thorough evaluation of the prosecution evidence, as now disclosed, gives rise to the opposite conclusion than the SPO have hitherto sought namely there is now a reasonable and well- grounded suspicion that a vulnerable unwell man may have been used, but was not involved.

V. NO ARTICULABLE GROUNDS

30. In the *Decision on Arrest and Transfer* and the *July Detention Review* the Pre-Trial Judge found that the flight risk in relation to Mr Bahtijari was ‘moderate’.³⁷ It is submitted it is non- existent. Any assessment of flight risk put forward by the SPO is not based on any articulable evidence. It is “general and abstract”.³⁸ Pre-trial detention should be assessed with reference to all the details of an Accused’s life.³⁹ His ties to his family and community, his financial status, his health status and the impact of his detention on his family.⁴⁰ All of this demonstrates that SPO suggestions of flight risk are mere contention without substance.

³⁵ *International Convention on Civil and Political Rights* article 9(3). Emphasis added.

³⁶ *Arbitrary Detention Report*, para 10 - 12.

³⁷ Working Group on Arbitrary Detention, *Report on Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings Before Court*, A/HRC/30/37 (United Nations Human Rights Office of the High Commissioner, 6 July 2015), para 23; *July Detention Review*, para 31.

³⁸ Ibid para 20 quoting ECtHR, *Khudoyorov v. Russia*, no. 6847/02, Judgment, 8 November 2005, para 173

³⁹ ECtHR, *Case of Grishin v. Russia* (App No. 14807/08), para 143.

⁴⁰ This is a point that is also covered by the judgment in *Khudoyorov* in which the Russian court was admonished for ‘taking no notice of the arguments in favour of the applicant's release pending trial, such as his deteriorating health and family connections in the region’, see: *Khudoyorov* para 185

31. The idea that Mr Bahtijari has the means to flee and evade justice is fanciful. As the court is aware, since 10 May 2024 Mr Bahtijari has received Legal Aid funding on the basis of indigence – that is, he simply does not have the financial means to flee and his family ties lead inevitably to the conclusion that he plainly will not do so. There is no serious dispute that Mr Bahtijari is in poor health and of limited means whose wife awaits him in his village.
32. The circumstances as a whole as they are before this pre-trial judge do not point to someone who is able or motivated to flee. The fact that he was not involved in events after 12 April 2024 is also good evidence that he will be of no flight risk. Notably, the Pre-Trial Judge has previously noted that Mr Bahtijari's rootedness in his community.⁴¹
33. Continued detention is not necessary,⁴² rather less restrictive measures alternative to detention could be made available and applied.⁴³ The Pre-Trial Judge is invited to exercise her obligations to consider unlimited release or alternatives.⁴⁴
34. The SPO have previously put emphasis on a so-called 'pervasive climate of fear and intimidation in Kosovo against witnesses or potential witnesses'.⁴⁵ These statements contend that continued detention is necessary because of this climate, they do not articulate *why* or *how* this contributes to any conclusion of risk under the art 41(6)(ii) but refer to previous decisions, which refer to the same statements

⁴¹ *Fourth Detention Decision*, page 8 and 9, para 25.

⁴² 06/L-740, The Criminal Code of the Republic of Kosovo, 14 January 2019, article 184. See also: United Nations Standard Minimum Rules for Non-custodial Measures ('The Tokyo Rules'), Rule 6.1.

⁴³ European Commission, Commission Recommendation (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, para. 23 of the Preamble. Available at <https://eurlex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32023H0681> (accessed July 18, 2023).

⁴⁴ ECtHR, *Case Of Khodorkovskiy v. Russia* (App No. 5829/04) para 186

⁴⁵ *Decision on Arrest and Transfer*, para 21; KSC-BC-2023-10, F00373, Prosecution submission pertaining to periodic detention review of Ismet Bahtijari, page 5, para 13.

in other previous decisions, or rely on statements in the *Gucati* judgment which articulate the existence of such a climate in the past.⁴⁶ Again, this does not shed light on how this 'climate' relates to the decision on Mr Bahtijari's continued pre-trial detention in any meaningful way with respect to his actual circumstances.⁴⁷ Moreover, there has been a lack of consideration by the SPO to the fact that if any such climate properly exists in 2024, alternative measures would mitigate any perceived or actual risks. The pre-trial judge is invited to reject such suggestions can be linked to Mr Bahtijari.

35. Further, there is absolutely no evidence he will destroy, hide, change or forge evidence of a crime nor any specific circumstances to indicate that he will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices and no indication he will repeat any visits witnesses, not least because [REDACTED] is in detention, as is [REDACTED]. It should not be forgotten that Mr Bahtijari did not take part in the events on 12 April 2023.

36. Since Mr Bahtijari is plainly no risk and no flight risk, when considering the proportionality in the determination of the reasonableness of ongoing detention on remand, it is submitted that it is disproportionate to continue his detention.⁴⁸

37. Add to this the ongoing delay in medical evidence, being detained since October 2023 is quite long enough.

38. Finally, at the time of issuing the *Warrant of Arrest* for Mr Bahtijari, the Pre-Trial Judge noted the SPO had not provided information regarding the personal circumstances of Mr Bahtijari.⁴⁹ This has now been provided through detailed pre-trial briefs and submissions on behalf of Mr Bahtijari so the new pre-trial judge has ample evidence upon which to adjudicate this submission /request.

⁴⁶ For example, KSC-BC-2020-07, F00611/RED, *The Prosecutor v. Hysni Gucati and Nasim Haradinaj*, Public Redacted Version of the Trial Judgment, 18 May 2022 para 553.

⁴⁷ Ibid, para.577.

⁴⁸ KSC Rules, Rule 56(2).

⁴⁹ *Decision on Arrest and Transfer*, para 20.

V. CONCLUSION

39. For all the above reasons, it is submitted that Mr Bahtijari should no longer be detained. He should go home, be treated by Kosovan medics and return for trial, if or when there is one.

40. Or in the alternative, an order for Mr Bahtijari's release and return to Kosovo, with conditions that would be acceptable to him and the court.⁵⁰

VI. CLASSIFICATION

41. This document is filed as a public redacted version of the confidential filing.

Word count: 2473



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1 October 2024

At Bendigo, Australia

⁵⁰ For example those proposed by counsel in F00195 para 31.