

In: KSC-BC-2020-07

Before: Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Hysni Gucati

Date: 29th September 2020

Language: English

File Name: *The Specialist Prosecutor v Nasim Haradinaj and Hysni Gucati*

CLASSIFICATION: Public

PARTICIPANTS TO WHICH THE SUBMISSION IS TO BE DISTRIBUTED: Single Judge, SPO, the President of the Specialist Chambers, Specialist Counsel for Mr Haradinaj

**Challenge to the Lawfulness of the Arrest in Accordance with Article 41(2):
Request for Disclosure**

Specialist Prosecutor's Office
Valeria Bolici

Specialist Counsel for Mr Gucati
Jonathan Elystan Rees QC

Specialist Co-Counsel for Mr Gucati
Valon Hasani

Challenge to the Lawfulness of the Arrest in Accordance with Article 41(2):

Request for Disclosure

1. The Applicant, Mr Gucati, challenges the lawfulness of his arrest in accordance with Article 41(2) of the Law No.05/L-53 on Specialist Chambers and Specialist Prosecutor's Office ("Law").

2. Article 41(2) of the Law provides that:

"Any person deprived of his or her liberty by arrest or detention shall be entitled ... to challenge the lawfulness of his or her arrest... and to have such challenge decided speedily by the Specialist Chambers and his or her release ordered if detention is not lawful".

3. Under Article 41(6) of the Law, a person cannot be detained unless there is a grounded suspicion that he has committed a crime within the jurisdiction of the Specialist Chambers.

4. In the present case, the Applicant does not accept:

a. That there is a grounded suspicion that he is criminally responsible for attempting to commit the offence of intimidation during criminal proceedings (see paragraph 1 of the warrant);

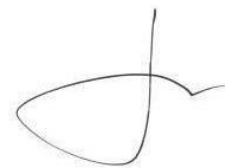
b. That there is a grounded suspicion that he is criminally responsible for committing the offence of retaliation (see paragraph 2 of the warrant);
and

- c. That there is a grounded suspicion that he is criminally responsible for committing the offence of violating the secrecy of proceedings.
5. Nor does the Applicant accept the matters alleged in paragraphs 4, 5 and 6 of the warrant.
6. The application for the warrant took place *ex parte* and the Applicant had no opportunity to make submissions on the evidence placed before the learned Judge.
7. A request for material has been refused by the Prosecutor without any explanation.
8. The evidence which was placed before the learned Judge during the application for the warrant should be disclosed to the Applicant at this stage, so that the Applicant can make submissions upon it, including whether or not the material does in fact support a 'grounded suspicion'.
9. The warrant itself provides at paragraph 8 that the Applicant is entitled to the rights under Article 21 of the Law. Article 21(6) of the Law requires that all material and relevant evidence or facts in possession of the Specialist Prosecutor's Office which are for or against him shall be made available to him *before the beginning* of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counter-balance protections are applied.
10. It is has not been suggested that it is strictly necessary to restrict disclosing the material upon which the warrant was based, and no counter-balance protections have been, or can be, applied. Without disclosure of that material,

the Applicant simply cannot make submissions upon it. The Applicant should not be placed in a worse position than if he had been arrested following confirmation of an indictment against him (which has not occurred).

11. All material and relevant evidence or facts in possession of the SPO which are for or against the Applicant should be disclosed in accordance with Article 21(6) of the Law so that the Applicant can challenge the material upon which the warrant was sought, and the lawfulness of his subsequent arrest based upon it, in accordance with Article 41(2) of the Law.

Word count: 521 words



JONATHAN ELYSTAN REES QC
Specialist Counsel for the Applicant

VALON HASANI
Specialist Co-counsel for the Applicant

29th September 2020
Cardiff, UK