

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):
The Arrest Warrant was Issued Without Lawful Authority**

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Challenge to the Lawfulness of the Arrest in Accordance with Article 41(2):
The Arrest Warrant was Issued Without Lawful Authority

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. The arrest warrant dated 24th September 2020 was issued by the Single Judge assigned by the President of the Specialist Chambers pursuant to Article 33(2) of the Law.
4. Article 33(2) of the Law provides for the assignment of a judge *other than the Pre-Trial Judge*.
5. The warrant was said to be issued in accordance with Article 39(3) of the Law.
6. Article 39(3) of the Law provides for the power of the *Pre-Trial Judge* to issue warrants for the arrest and transfer of persons to the Specialist Chambers. Article 39(3) does not provide a power to a judge other than the Pre-Trial Judge to issue such warrants.
7. As a Pre-Trial Judge will be assigned only upon the filing of an indictment (see Article 33(1)(a) of the Law), the power under Article 39(3) of the Law to issue a

warrant for the arrest and transfer of a person to the Specialist Chambers can arise only after an indictment has been filed (see also Rule 85(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”) which confirms that the functions in Article 39 of the Law are to be performed by a Pre-Trial Judge).

8. No indictment has been filed in this case, and no Pre-Trial Judge has been assigned with the power to issue a warrant under Article 39 of the Law.
9. It is submitted that the warrant was issued without lawful authority in those circumstances.
10. The above submission is consistent with the opinion of the learned editors of Archbold International Criminal Courts: Practice, Procedure and Evidence, 5th Edition at § 6-265 (page 345):

Before the ad hoc Tribunals and special courts, *the issuance of an arrest warrant may only follow the confirmation of an indictment”*

[emphasis added – see also § 6-130 at page 279]

11. According to Archbold International Criminal Courts: Practice, Procedure and Evidence, 5th Edition at § 6-266 (pages 345-346) the procedure for the issuing of arrest warrants is as follows:

“When investigations lead the Prosecutor to conclude that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crimes with which the accused (see ... art.38(4) Law on KSCPO). A duty or reviewing judge designated for this matter will review the indictment. If satisfied that a prima facie case has been established

by the Prosecutor, the designated judge shall confirm the indictment (see ... art.39(2) Law on KSCPO). *Only then may the duty or reviewing judge issue a warrant of arrest* (see ... art.39(3) Law on KSCPO).

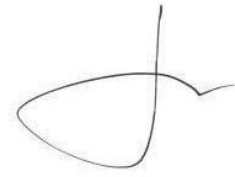
[emphasis added]

12. It is consistent with the above that the subject of the warrant of arrest is entitled to the 'Rights of the Accused' under Article 21 of the Law (as the warrant addressed to the Applicant refers to at paragraph 8). Where a warrant is issued following the confirmation of an indictment pursuant to Article 39(2) of the Law, the subject is indeed entitled to the Rights of the Accused under Article 21 as at that stage he has the status of the accused, and only at that stage (see Rule 86(6)(a) of the Rules: "Upon confirmation of any charge(s) of the indictment: (a) the suspect shall have the status of an Accused; and (b) the Pre-Trial Judge may issue an arrest warrant ... and any other decisions or orders provided for in Article 39(3) of the Law").
13. Article 41(6) of the Law, referred to in the warrant, does not create any additional power to order an arrest, but only provides the criteria upon which any other power to order an arrest can be exercised (namely, the powers provided to the Specialist Prosecutor under Article 38(2) of the Law and provided to a Pre-Trial Judge in Article 39(3) of the Law, which is available to the Trial Panel also by way of Article 40(6)(a)).
14. Whereas Rule 53 of the Rules, also referred to in the warrant, provides that 'a Panel may issue an arrest warrant if it is satisfied that the conditions set out in Article 41(6) of the Law are met', that Rule does not and cannot provide the Single Judge with a power to issue a warrant for a person's arrest. 'Panel' is defined as 'any panel or individual judge assigned in accordance with Articles 25(1) and 33 of the Law' (see Rule 2 of the Rules). Under Article 25(1) the

individual judge will be assigned only as 'necessary performing the functions of a pre-trial judge' (issuing arrest warrants being a function of a pre-trial judge under Article 39(3) of the Law) or 'as necessary performing other functions required by the Law'. As the Law does not require a Single Judge to perform the function of issuing arrest warrants, a Single Judge falls outside the definition of 'panel' for the purposes of Rule 53 of the Rules. In essence, Rule 53 simply sets out what information must be contained in an arrest warrant when the criteria for the issue of an arrest warrant by a Pre-Trial Judge or Trial Panel are met.

15. Further, although Rule 57 of the Rules (not referred to in the warrant) envisages a suspect being in detention prior to assignment of a Pre-Trial Judge, and provides that his detention shall be reviewed by a Single Judge assigned pursuant to Article 33(2), it does not and cannot provide the Single Judge with a power to issue a warrant for a suspect's arrest in the first instance.
16. In any event, to the extent that there is a conflict between the Law and the Rules, the Law shall prevail (Rule 4(2) of the Rules). It is submitted that the Law is clear: the only power of the Specialist Chambers to order arrest is provided by Article 39(3) of the Law and is provided to the Pre-Trial Judge (and the Trial Panel exercising the functions or powers of the Pre-Trial Judge through Article 40(6)).
17. As the arrest warrant was not issued by a Pre-Trial Judge in the present case, it was issued without lawful authority. Accordingly, it is submitted that the Applicant's detention pursuant that warrant is not lawful and he should be released pursuant to Article 41(2) of the Law.

Word count: 1125 words

A handwritten signature in black ink, appearing to be 'J. E. Rees', written in a cursive style.

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29th September 2020

Cardiff, UK