



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: **KSC-BC-2020-07**
The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: **Single Judge**
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 27 October 2020

Language: English

Classification: **Public**

Decision on Request for Immediate Release of Nasim Haradinaj

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THE SINGLE JUDGE,¹ pursuant to Article 41 of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 57(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 22 September 2020, the Specialist Prosecutor's Office ("SPO") requested the arrest of Hysni Gucati ("Mr Gucati") and Nasim Haradinaj ("Mr Haradinaj") for alleged dissemination of confidential information relating to the work of the Specialist Prosecutor's Office ("SPO") at three press conferences and sought their transfer to the detention facilities of the Specialist Chambers ("SC").²
2. On 24 September 2020, the Single Judge issued arrest warrants for Mr Gucati and Mr Haradinaj for attempted intimidation of witnesses, retaliation and violation of secrecy of proceedings, and ordered their transfer to the SC detention facilities.³
3. Mr Haradinaj was arrested on 25 September 2020 and transferred to the SC detention facilities the following day.⁴

¹ KSC-BC-2020-07, F00003, President, *Decision Assigning a Single Judge Pursuant to Article 33(2) of the Law*, 29 May 2018, public, p. 5.

² KSC-BC-2020-07, F00001, Specialist Prosecutor, *Urgent Request for Arrest Warrants and Related Orders*, 22 September 2020, strictly confidential and *ex parte*, paras 1, 35(a); with Annexes 1-2, strictly confidential and *ex parte*.

³ KSC-BC-2020-07, F00012, Single Judge, *Decision on Request for Arrests and Transfers* ("Decision on Arrest and Transfer"), 24 September 2020, public, para. 36, with Annexes 1-4, public redacted.

⁴ KSC-BC-2020-07, F00016, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 25 September 2020, public; F00020, Registrar, *Notification of the Reception of Nasim Haradinaj in the Detention Facilities of the Specialist Chambers*, 26 September 2020, public, with Annex 1, confidential; F00021, Registrar, *Preliminary report on the arrest and transfer of Nasim Haradinaj pursuant to Decision KSC-BC-2018-01/F00128*, 26 September 2020, confidential; F00026, Registrar, *Corrected Report on the Arrest and Transfer of Nasim Haradinaj to the Detention Facilities*, 28 September 2020, strictly confidential and *ex parte*, with Annex 1, strictly confidential and *ex parte*. A public redacted version of F00026 was filed 14 October 2020.

4. On 29 September 2020, Mr Haradinaj had his first appearance.⁵

5. On the same date, Mr Haradinaj filed a request for his immediate release (“Request”).⁶ The SPO responded on 2 October 2020.⁷ Mr Haradinaj did not file a reply.

II. SUBMISSIONS

6. Mr Haradinaj requests his immediate release from detention or release under conditions set by the Pre-Trial Judge.⁸ Mr Haradinaj submits that there are no articulable grounds to believe that he is a flight risk, he will destroy evidence, or the seriousness of the crimes merit detention.⁹ Mr Haradinaj submits that he is willing to comply with any conditions placed on his release and that detention should not be ordered when lesser measures suffice.¹⁰

7. The SPO submits that the requirements under Article 41(6) of the Law are fulfilled.¹¹ The SPO argues that Mr Haradinaj’s conduct since his arrest has amplified the Article 41(6) risks¹² and his submissions fail to undermine prior findings that he has the incentive, means, motive, and opportunity to evade the SC jurisdiction and obstruct its proceedings.¹³ The SPO submits that the risks posed by Mr Haradinaj’s

⁵ KSC-BC-2020-07, Transcript, 29 September 2020, public.

⁶ KSC-BC-2020-07, F00030, Defence, *Initial appearance, preliminary motion to dismiss the charges and motion for immediate release*, 29 September 2020, public.

⁷ KSC-BC-2020-07, F00039, Specialist Prosecutor, *Prosecution response to Filing KSC-BC-2020-07/F00030 (“Response”)*, 2 October 2020, public.

⁸ Request, p. 8.

⁹ Request, pp. 6-7. Mr Haradinaj also submits that there is no grounded suspicion that he has committed a crime within the jurisdiction of the SC. As this submissions centers on jurisdictional challenges relating to Articles 387, 388, and 392 of the 2019 Kosovo Criminal Code, they will be dealt with in a separate decision dealing with such challenges.

¹⁰ Request, p. 7.

¹¹ Response, para. 7.

¹² Response, para. 9.

¹³ Response, para. 11.

release can only be managed through detention and as a result the Request should be dismissed.¹⁴

III. APPLICABLE LAW

8. 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 such challenge shall be decided speedily by the SC.

9. Article 41(6) of the Law provides that the SC shall only order the arrest and detention of a person when there is a grounded suspicion that the person has committed a crime within the jurisdiction of the SC; and there are articulable grounds to believe that the person (i) is a flight risk, (ii) will destroy, hide, change or forge evidence or specific circumstances indicate that the person will obstruct the progress of criminal proceedings; or (iii) will repeat or attempt to repeat the criminal offence(s).

10. Article 41(12) of the Law provides that, in addition to detention on remand, the following measures may be ordered to ensure the presence of the Accused, to prevent reoffending or ensure successful conduct of criminal proceedings: summons, arrest, bail, house detention, promise not to leave residence, prohibition on approaching specific places or persons, attendance at police station or other venue, and diversion.

11. Pursuant to Rule 57(1) of the Rules, the detention of a Suspect shall be reviewed by a Single Judge upon request of the Suspect where a change of circumstances since the last review has occurred. The total duration of the detention under this provision shall not exceed one (1) year.

¹⁴ Response, paras 13-14.

IV. DISCUSSION

A. LAWFULNESS OF THE ARREST

12. Article 41(2) of the Law allows the detained person to challenge the lawfulness of the arrest, including the grounds set out in Article 41(6) of the Law, namely whether (i) there is grounded suspicion that the person committed the offence(s); and (ii) there are articulable grounds to believe that any of the requirements set out in Article 41(6)(b) of the Law has been fulfilled. On the other hand, Rule 57(1) of the Rules stipulates that the Single Judge shall review the detention every two months or at any time earlier, upon request, where a change in circumstances *since the last review* has occurred (emphasis added). Therefore, the question arises which legal basis informs the Single Judge's present review.

13. The arrest warrant, pursuant to Article 41(6) of the Law, is issued *ex parte*, without participation of the Defence. Article 41(2) of the Law provides the detained person with an early opportunity to challenge the determinations on which the arrest and sequential detention rest. Accordingly, the Single Judge is called upon to inquire anew the existence of facts justifying detention in light of the arguments advanced by the Parties.

14. Conversely, Rule 57(1) of the Rules allows the detained person to raise "change in circumstances" since the last review occurred. Accordingly, the Single Judge is called upon to inquire whether facts underlying the initial ruling on detention have changed or new facts require a modification thereof of the prior ruling. Hence, the review within the meaning of Rule 57 of the Rules is dependent on an initial ruling by the Single/Pre-Trial Judge concerning continued detention, either upon application or rendered *proprio motu*.

15. As a result, the Single Just shall render the present ruling, in accordance with Article 41(2) of the Law, which will be subject to review every two months, pursuant to Rule 57 of the Rules.

B. GROUNDED SUSPICION

16. Under the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123, the evidentiary threshold of “grounded suspicion” is defined as “knowledge of information which would satisfy an objective observer that a criminal offence has occurred, is occurring or there is a substantial likelihood that one will occur and the person concerned is more likely than not to have committed the offence”.¹⁵

17. Mr Haradinaj submits that there is no grounded suspicion that he has committed a crime within the jurisdiction of the SC on the basis that the SC does not have subject matter jurisdiction over Article 387 of the 2019 Kosovo Criminal Code (“KCC”) and does not have the appropriate temporal jurisdiction with respect to Articles 387, 388 and 392 of the KCC.¹⁶ These challenges are jurisdictional in nature and have been rejected in the Single Judge’s “Decision on Defence Challenges”.¹⁷

¹⁵ See also Article 5(1)(c) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms European, as interpreted by the European Court of Human Rights, *Fox, Campbell and Hartley v. United Kingdom*, no. 12244/86; 12245/86; 12383/86, Judgment, 30 August 1990, vol. 182, Series A, p. 16, para. 32; *K.-F. v. Germany*, no. 144/1996/765/962, Judgment, 27 November 1997, Reports 1997-VII, para. 57; *Labita v. Italy*, no. 26772/95, Judgment, 6 April 2000, para. 155; *Berktaç v. Turkey*, no. 22493/93, Judgment, 1 March 2001, para. 199; *O’Hara v. United Kingdom*, no. 37555/97, Judgment, 16 October 2001, para. 34.

¹⁶ Request, p. 6.

¹⁷ KSC-BC-2020-07, F00057, Single Judge, *Decision on Defence Challenges*, 27 October 2020, public, paras 22-27.

C. NECESSITY OF ARREST AND DETENTION

18. Once the threshold in Article 41(6)(a) of the Law is met, the grounds that allow the Single Judge to deprive the person of his liberty must be articulable.¹⁸ In this regard, it is recalled that determining the existence of either risks under Article 41(6)(b)(i)-(iii) of the Law, so as to make the arrest of the person necessary, is a matter of assessing the possibility, as opposed to the unavoidability that such risks materialise.¹⁹

1. Risk of Flight

19. Mr Haradinaj submits that there is no risk that he will flee as: (i) he cooperated fully with local and international officers upon arrest; (ii) he has a known address and lives with his family; (iii) he is a European Union (“EU”) citizen and can stay in the Netherlands if requested; (iv) he receives a small monthly stipend from the Kosovo Liberation Army War Veterans Association (“KLA WVA”); and (v) the claim that he has a vast network upon which he can rely is unsubstantiated.²⁰

20. The SPO responds that: (i) Mr Haradinaj did not cooperate fully upon arrest;²¹ (ii) his EU citizenship allows him to travel freely;²² and (iii) prior findings regarding the network and resources of the KLA were not based on his alleged personal salary but rather the vast membership of the KLA WVA, which is estimated to include 40,000 members.²³

¹⁸ Article 19.1.9 of the KCPC.

¹⁹ Similarly, ICC, *Prosecutor v. Bemba Gombo et al.*, ICC-01/05-01/13-558, Appeals Chamber, [Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled “Decision on the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba’”](#), 11 July 2014, para. 107.

²⁰ Request, p. 6.

²¹ Response, para. 9.

²² Response, para. 12.

²³ Response, para. 11.

21. With regard to flight risk under Article 41(6)(b)(i) of the Law, the Single Judge considers that Mr Haradinaj's attempt to evade SPO officers by vehicle and on foot during his arrest support the finding that he is a flight risk.²⁴ Furthermore, Mr Haradinaj's statement that he does not recognise the SC²⁵ portends a lack of willingness to voluntarily bring himself before a judicial institution for which he has no regard. Mr Haradinaj's EU citizenship also supports the finding that he is a flight risk, as such citizenship enables him to travel with ease to a number of jurisdictions, including those that do not have extradition agreements with Kosovo. Finally, regardless of the monthly stipend received by Mr Haradinaj from the KLA WVA or the amount of money at the disposal of the organisation, Mr Haradinaj, as deputy head of the organisation, has the ability to call upon the network and resources of the KLA WVA's estimated 40,000 members to assist in any attempt to flee. The Single Judge accordingly finds that Mr Haradinaj remains a flight risk.

2. Obstruction of the Progress of Criminal Proceedings

22. Mr Haradinaj submits that information, files, and documents were seized by the SPO and there is consequently no more risk of disclosure.²⁶

23. The SPO responds that Mr Haradinaj's dissemination of confidential and non-public information on three recent occasions and public declarations that he will continue to disseminate such information, despite the Single Judge's orders, clearly demonstrate a risk that he will take measures to obstruct proceedings.²⁷

24. With regard to the risk that proceedings will be obstructed under Article 41(6)(b)(ii) of the Law, Mr Haradinaj has publicly stated that he would

²⁴ Response, para. 9.

²⁵ KSC-BC-2020-07, Transcript, 29 September 2020, public, p. 17, line 13 to p. 18, line 5.

²⁶ Request, p. 7.

²⁷ Response, para. 10.

continue to disseminate confidential and non-public information,²⁸ despite orders to the KLA WVA from the Single Judge forbidding such dissemination.²⁹ The SPO's seizure of the relevant confidential and non-public information does not negate Mr Haradinaj's intent to disseminate such information should the opportunity arise. In fact, on two occasions, Mr Haradinaj's involvement in press conferences regarding confidential and non-public documents were preceded by authorised seizures.³⁰ The Single Judge accordingly finds that the risk that Mr Haradinaj may obstruct the progress of proceedings remains.

3. Commission of Further Offences

25. Mr Haradinaj submits that the repetition of criminal acts is not a ground upon which a person can be held in detention.³¹ The SPO responds that the commission of further crimes is recognised under the Law.³²

26. As regards the risk that an individual will repeat the criminal offence, complete an attempted offence, or commit an offence which he or she has threatened to commit, this factor is explicitly set out in Article 41(6)(b)(iii) of the Law. For the reasons discussed above with regard to the obstruction of proceedings, the Single Judge finds that the risk that Mr Haradinaj may commit further crimes by threatening, intimidating, or putting at risk (potential) witnesses through the disclosure of confidential and non-public information remains.

²⁸ Annex 1 to SPO Request for Arrest Warrant, p. 5; Annex 2 to SPO Request for Arrest Warrant, p. 8.

²⁹ KSC-BC-2020-07, F00005, Single Judge, *Urgent Decision Authorising a Seizure* ("First Order"), 7 September 2020, public, para. 22; KSC-BC-2020-07, F00007, Single Judge, *Decision Authorising a Seizure* ("Second Order"), 17 September 2020, public, para. 22.

³⁰ See Annex I to SPO Request for Arrest Warrant; Annex 2 to SPO Request for Arrest Warrant; First Order; Second Order.

³¹ Request, p. 7.

³² Response, fn. 30.

4. Conclusion

27. The Single Judge finds that Mr Haradinaj's submissions do not undermine the determination that there are articulable grounds to believe that all three risks envisaged under Article 41(6)(b)(i)-(iii) of the Law exist.³³

D. CONDITIONAL RELEASE

28. Mr Haradinaj alternatively requests conditional release and expresses a willingness to comply with any of the conditions set out in Article 41(12) of the Law to mitigate any perceived risks.³⁴

29. The SPO responds that Mr Haradinaj's personal assurances are insufficient to guarantee compliance with any conditions or overcome the concrete risks of release.³⁵

30. As concerns Mr Haradinaj's request for release with conditions, the Single Judge notes that he merely lists the conditions under Article 41(12) of the Law without explaining how such conditions might address any of the Article 41(6)(b) risks.

31. The Single Judge considers that the risks of flight, obstructing proceedings, and committing further offences can only be effectively managed from detention. This is particularly so when Mr Haradinaj failed to comply with orders of the Single Judge on two prior occasions,³⁶ has vowed to continue disseminating confidential and non-public documents and information,³⁷ and has continuously reiterated his non-recognition of the SC.³⁸ In these circumstances, the Single Judge

³³ Decision on Arrest and Transfer, paras 27-31.

³⁴ Request, p. 7.

³⁵ Response, para. 13.

³⁶ First Order, para. 22; Second Order, para. 22.

³⁷ Annex 1 to SPO Request for Arrest Warrant, p. 5; Annex 2 to SPO Request for Arrest Warrant, p. 8.

³⁸ KSC-BC-2020-07, Transcript, 29 September 2020, public, p. 17, line 13 to p.18, line 5.

finds that conditional release would be insufficient to overcome the Article 41(6)(b) risks identified above.

32. The Single Judge accordingly finds that none of the conditions set out in Article 41(12) of the Law are sufficient to mitigate the Article 41(6)(b) risks enumerated above.

V. DISPOSITION

33. For the above-mentioned reasons, the Single Judge hereby:

REJECTS the Request.



Judge Nicolas Guillou
Single Judge

Dated this Tuesday, 27 October 2020
At The Hague, the Netherlands