



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 Application for Bail

Specialist Prosecutor
Jack Smith

Counsel for Hysni Gucati
Jonathan Elystan Rees

Duty Counsel for Nasim Haradinaj
Bastiaan Martens

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 ("Decision on Arrest and Transfer").³

3. On 25 September 2020, Mr Gucati was arrested⁴ and transferred to the detention facilities of the SC in The Hague, the Netherlands.⁵

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 SPO Request for Arrest Warrant, paras 1, 35(a).

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

⁴ KSC-BC-2020-07, F00012/A01/RED, Single Judge, *Public Redacted Version of Arrest Warrant for Hysni Gucati* ("Arrest Warrant"), 24 September 2020, public; KSC-BC-2020-07, F00015, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 25 September 2020, public.

⁵ KSC-BC-2020-07, F00012/A02/RED, Single Judge, *Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers*, 24 September 2020, public; KSC-BC-2020-07, F00018, Registrar, *Notification of the Reception of Hysni Gucati in the Detention Facilities of the Specialist Chambers*, 25 September 2020, public, with Annex 1, confidential.

4. On 29 September 2020, Mr Gucati filed the “Application for bail” (“Request”).⁶ The SPO responded on 9 October 2020.⁷ Mr Gucati did not file a reply.

5. On 1 October 2020, Mr Gucati had his first appearance.⁸

II. SUBMISSIONS

6. Mr Gucati submits that detention is no longer justified where the alternative measures can address the risks set out in Article 41(6)(b) of the Law.⁹ He proposes the following alternative measures: bail of EUR 5000, surrender of passport, living and sleeping at his home address, daily reporting to the European Union Rule of Law Mission in Kosovo (“EULEX”) police headquarters, restriction of contacts, and a prohibition on going to the offices of the Kosovo Liberation Army War Veterans Association (“KLA WVA”) (collectively referred to as “Proposed Conditions”).¹⁰ Mr Gucati further submits that detention on remand is disproportionate in the circumstance considering: (i) he was cooperative upon arrest; (ii) he has not been charged with an offence; (iii) the offences under investigation do not involve use of force or actual threats or harm; and (iv) the relatively low maximum sentences for the relevant offences.¹¹ Finally, Mr Gucati argues that his deep family and community ties as well as health issues provide the circumstances in which bail could be properly granted under the conditions proposed.¹²

7. The SPO submits that the requirements under Article 41(6) of the Law for continued detention are fulfilled¹³ and the Defence submissions ignore the circumstances leading

⁶ KSC-BC-2020-07, F00038, Defence, *Application for Bail*, 29 September 2020, public.

⁷ KSC-BC-2020-07, F00045, Specialist Prosecutor, *Consolidated Prosecution response to Defence motions challenging lawfulness of arrest and requesting release*, 9 October 2020 (“Response”), public.

⁸ KSC-BC-2020-07, Transcript, 1 October 2020, public.

⁹ Request, para. 4; KSC-BC-2020-07, Transcript, 1 October 2020, public, p. 17, line 25 to p. 18, line 4.

¹⁰ Request, paras 5-6; KSC-BC-2020-07, Transcript, 1 October 2020, public, p. 17, line 4 to p. 19, line 25.

¹¹ Request, para. 6; KSC-BC-2020-07, Transcript, 1 October 2020, public, p. 20, line 3 to p. 21, line 7.

¹² KSC-BC-2020-07, Transcript, 1 October 2020, public, p. 18, line 5 to p. 19, line 8.

¹³ Response, para. 4.

up to Mr Gucati's arrest.¹⁴ The SPO argues that notification of the arrest warrant against Mr Gucati has increased his incentives to flee, obstruct proceedings, and commit further crimes.¹⁵ The SPO further argues that Mr Gucati's proposals regarding his conditional release fail to adequately address the Article 41(6)(b) risks.¹⁶ With respect to Mr Gucati's health issues, the SPO argues that such issues are irrelevant to the Article 41(6)(b) risks and do not amount to compelling reasons justifying release on humanitarian grounds.¹⁷ The SPO submits that the Request should be dismissed.¹⁸

III. APPLICABLE LAW

8. 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 offences.

9. 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.

10. Rule 56(3) of the Rules provides that a Panel may order the temporary release of a detained person where compelling humanitarian grounds justify such release.

¹⁴ Response, paras 5, 7-8. KSC-BC-2020-07, Transcript, 1 October 2020, public, p. 22, lines 1-17.

¹⁵ Response, para. 9; KSC-BC-2020-07, Transcript, 1 October 2020, public, p. 21, lines 21-25.

¹⁶ Response, paras 10-11; KSC-BC-2020-07, Transcript, 1 October 2020, public, p. 22, lines 18-22.

¹⁷ Response, para. 12.

¹⁸ Response, para. 13.

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.

IV. DISCUSSION

A. ASSESSMENT OF PROPOSED CONDITIONS

12. The Single Judge notes that Mr Gucati rejects the existence of a grounded suspicion,¹⁹ but submits no arguments as to the reasons why the threshold of Article 41(6)(a) of the Law has not been reached. He also does not challenge his prior assessment of the Article 41(6)(b) risks, but rather asserts that the Proposed Conditions for his release address such risks.²⁰ The Single Judge will therefore assess the Article 41(6)(b) risks against the Proposed Conditions.

13. Mr Gucati submits that the Proposed Conditions adequately address any risk of flight.²¹ The SPO responds that the Proposed Conditions fail to adequately address such risks,²² noting in particular that (i) Mr Gucati's proposal to surrender his passport does not address the fact that international travel from Kosovo is possible to countries such as Albania without a passport and (ii) the monetary surety proposed is insufficient in light of Mr Gucati's access to KLA WVA resources.²³

¹⁹ KSC-BC-2020-07, F00033, Defence, *Challenge to Lawfulness of the Arrest in Accordance with Article 41(2): Request for Disclosure*, 30 September 2020, public, paras 4(a)-(c).

²⁰ Request, para. 6.

²¹ Request, paras 5-6.

²² Response, para. 10.

²³ Response, para. 11.

1. Risk of Flight

14. With regard to flight risk, the Single Judge considers that, in addition to the factors set out in the Decision on Arrest and Transfer,²⁴ the notification of the arrest warrant and the SPO's commitment to file an indictment in a month's time²⁵ increases Mr Gucati's incentives to flee. Nevertheless, the Single Judge is cognisant of the fact that such risks may be mitigated by the Proposed Conditions. In this regard, the Single Judge notes favourably the surety in the sum of EUR 5000, the surrender of Mr Gucati's passport, the requirement that he sleep each night at his home address, and the daily reporting to EULEX police headquarters. Mr Gucati's strong family and community ties in his hometown also mitigate the risks that he will flee.²⁶

15. The Single Judge accordingly finds that the Proposed Conditions adequately address the risk that Mr Gucati may flee. Nevertheless, a determination must be made as to whether the Proposed Conditions adequately address the remaining risks.

2. Obstruction of the Progress of Criminal Proceedings

16. As concerns the risk that Mr Gucati will obstruct proceedings by disseminating confidential and non-public information, the Single Judge recalls that Mr Gucati participated in the unauthorised dissemination of confidential and non-public information.²⁷ The dissemination of confidential and non-public information persisted even after Mr Gucati was ordered on two occasions to refrain from doing so.²⁸ In fact, after the issuance of these orders, Mr Gucati

²⁴ Decision on Arrest and Transfer, para. 28.

²⁵ KSC-BC-2020-07, Transcript, 1 October 2020, public, p. 15, lines 19-22.

²⁶ KSC-BC-2020-07, Transcript, 1 October 2020, public, p. 18, lines 5-12, 20-22.

²⁷ Decision on Arrest and Transfer, para. 29.

²⁸ 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.

publicly stated that he and the KLA WVA would continue to publish all documents they receive²⁹ and encouraged members of the media to do the same.³⁰

17. None of the Proposed Conditions adequately guarantee that Mr Gucati will not obstruct the progress of proceedings. If released, Mr Gucati would be in a position to receive, without oversight, confidential and non-public information. He would also have the means to disseminate such information by communicating freely with the media or his network of KLA veterans or publishing the material himself. Any personal assurances to refrain from such conduct cannot be relied upon in light of his public statements vowing to continue to disclose confidential and non-public information³¹ and his failure to abide by the orders of the Single Judge.³²

18. The Single Judge accordingly finds that the Proposed Conditions do not adequately address the risk that Mr Gucati may obstruct the progress of proceedings.

3. Risk of Committing Further Crimes

19. As regards the risk that Mr Gucati may commit further crimes, for the reasons discussed above with regard to the obstruction of proceedings, the Single Judge finds that the risk that Mr Gucati may commit further crimes by threatening, intimidating, or putting at risk (potential) witnesses through the disclosure or dissemination of confidential and non-public information remains and none of the Proposed Conditions are sufficient to mitigate such risks.

20. The Single Judge accordingly finds that the Proposed Conditions do not adequately address the risk that Mr Gucati may commit further crimes.

²⁹ Annex 1 to SPO Request for Arrest Warrant, p. 13.

³⁰ Annex 1 to SPO Request for Arrest Warrant, p. 23.

³¹ Annex 1 to SPO Request for Arrest Warrant, p. 13.

³² First Order, para. 22; Second Order, para. 22.

4. Conclusion

21. The Single Judge concludes that continued detention remains necessary as the Proposed Conditions do not eliminate all of the Article 41(6)(b) risks.

B. HEALTH ISSUES AND ADDITIONAL CONSIDERATIONS

22. Mr Gucati submits that continued detention on remand is disproportionate considering Mr Gucati's health issues,³³ cooperativeness during arrest, the lack of confirmed charges, and the nature of the alleged offences and their possible penalties.³⁴ The SPO responds that Mr Gucati's health issues are, on their face, irrelevant to the Article 41(6)(b) risks and do not justify release on humanitarian grounds,³⁵ and the other factors fail to adequately guarantee that Mr Gucati will not flee, obstruct proceedings, or commit further crimes.³⁶

23. As regards Mr Gucati's health issues raised during his first appearance and in connection with the Request,³⁷ the Single Judge considers, that on their face, and without further details, these health issues are common, manageable illnesses which do not alter his assessment of the Article 41(6)(b) risks or amount to compelling humanitarian grounds justifying temporary release of a detained person pursuant to Rule 56(3) of the Rules.

24. Finally, with regard to Mr Gucati's cooperation upon arrest, the lack of an indictment, the non-violent nature of the offences under investigation, the lack of alleged actual threats or harm, and the possible minimal penalties associated with the relevant offences,³⁸ the Single Judge considers that the overarching concern, necessitating arrest and detention, as noted above, is the risk that Mr Gucati will

³³ KSC-BC-2020-07, Transcript, 1 October 2020, public, p. 18, lines 13-19.

³⁴ Request, para. 6.

³⁵ Response, para. 12.

³⁶ Response, para. 10.

³⁷ KSC-BC-2020-07, Transcript, 1 October 2020, public, p. 18, lines 13-19.

³⁸ Request, para. 6.

obstruct proceedings and commit further crimes. These additional factors do not undermine this assessment or make continued detention unreasonable or disproportionate in the circumstances.

V. DISPOSITION

25. 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