

In: KSC-BC-2020-07

The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: Court of Appeals Panel

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

Date: 2nd November 2020

Language: English

Classification: Public

Notice of Interlocutory Appeal on Behalf of Hysni GUCATI (“the Appellant”)

Specialist Prosecutor

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NOTICE OF INTERLOCUTORY APPEAL ON BEHALF OF
HYSNI GUCATI (“THE APPELLANT”)

INTRODUCTION

1. On 29th September 2020, the Appellant filed motions requesting his release from detention¹.
2. By decisions dated 27th October 2020, the Single Judge refused to release the Appellant from detention².
3. Pursuant to Articles 41(10) and 45(2) of the Law on Specialist Chambers and Specialist Prosecutor’s Office Law No.05/L-053 (“Law”) and Rule 58(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers KSC-BD-03/Rev3/2020 (“Rules”), the Appellant appeals against the decisions of the Single Judge dated 27th October 2020 refusing to release the Appellant from detention on remand.

RIGHT OF APPEAL

4. Article 41(10) of the Law provides that, until final judgment or until release, the parties may appeal against a ruling on detention on remand to a Court of Appeals Panel.

¹ “Challenge to the Lawfulness of the Arrest In Accordance with Article 41(2): The Arrest Warrant was Issued without Lawful Authority” KSC-BC-2020-07/F00034 at paragraph 17 and “Application for Bail” KSC-BC-2020-07/F00038 at paragraph 1

² “Decision on Defence Challenges” KSC-BC-2020-07/F00057 at paragraph 31 and “Decision on Application for Bail” KSC-BC-2020-07/F00059 at paragraph 21

5. Article 45(2) of the Law confirms that “interlocutory appeals shall lie as of right from decisions or orders relating to detention on remand”.
6. Rule 58(1) of the Rules repeats: “appeals before the Court of Appeals against decisions relating to detention on remand shall lie as of right pursuant to Article 45(2) of the Law”. Rule 170(1) of the rules shall apply³ which provides that the Appellant may file an appeal within 10 days of the impugned decision.
7. The right of appeal in the present matter has been recognised hitherto:
 - a. The arrest warrant for the Appellant⁴ set out at paragraph 10 that “upon arrest, Mr Gucati has the right to challenge, pursuant to Article 41(2) and (5) of the Law, the lawfulness of his arrest, the transfer order and the conditions on detention before the Single Judge and he has the right to appeal before the Specialist Chamber of the Court of Appeal”;
 - b. The Single Judge, during the hearing on 1st October 2020, confirmed that the Appellant was currently in detention on remand, referring to Article 21(5) of the Law⁵, and informed the Appellant that⁶: “You are entitled to challenge the lawfulness of your arrest and to request review of decisions on your detention, and to appeal such decisions directly before the Court of Appeal”; and
 - c. The SPO, in its document entitled “Consolidated Prosecution Response to Defence Motions Challenging the Lawfulness of Arrest and Requesting Release” dated 9th October 2020, noted “the availability of an

³ See Rule 58(2) of the Rules.

⁴ “Arrest Warrant for Hysni Gucati” KSC-BC-2020-07/F00012/A01/RED

⁵ Transcript First Appearance of Hysni Gucati 1st October 2020 at page 14 lines 3 to 5

⁶ Transcript First Appearance of Hysni Gucati 1st October 2020 at page 13 lines 2 to 4

appeal as of right for decisions relating to detention on remand (Article 45)”⁷.

FIRST GROUND OF APPEAL – THE APPELLANT’S ARREST AND DETENTION WAS NOT LAWFUL AND RELEASE SHOULD BE ORDERED PURSUANT TO ARTICLE 41(2) OF THE LAW

8. The Appellant challenges the lawfulness of his arrest in accordance with Article 41(2) of the Law.

9. 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”.

10. 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 Law⁸.

11. Article 33(2) of the Law provides for the assignment of a judge *other than the Pre-Trial Judge*.

⁷ “Consolidated Prosecution Response to Defence Motions Challenging the Lawfulness of Arrest and Requesting Release” KSC-BC-2020-07/F00045 at page 2 footnote 11

⁸ “Arrest Warrant for Hysni Gucati” KSC-BC-2020-07/F00012/A01/RED at page 1

12. The warrant was said to be issued in accordance with Article 39(3) of the Law⁹.
13. 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 (as recognised by the Single Judge at paragraph 8 of his Decision on Request for Arrest Warrants and Transfer Orders dated 24th September 2020¹⁰).
14. Article 39(3) does not provide a power to a judge other than the Pre-Trial Judge to issue such warrants.
15. 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.
16. Rule 85(1) of the Rules confirms that the functions in Article 39 of the Law are to be performed by a Pre-Trial Judge: “The President shall assign a Pre-Trial Judge pursuant to Article 33(1)(a) of the Law to perform the functions defined in Article 39 of the Law”.
17. As of 27th October 2020, the date of the Single Judge’s decisions subject to appeal, no indictment had been filed in this case, and no Pre-Trial Judge had been assigned with the power to issue a warrant under Article 39 of the Law¹¹. Despite the SPO publicly stated their intention to file an indictment by 31st October 2020¹², it remains unknown to the Appellant as to whether any indictment has been filed to date.

⁹ “Arrest Warrant for Hysni Gucati” KSC-BC-2020-07/F00012/A01/RED at page 1

¹⁰ “Decision on Request for Arrest Warrants and Transfer Orders” KSC-BC-2020-07/F00012

¹¹ “Decision on Defence Challenges” KSC-BC-2020-07/F00057 at paragraph 43

¹² Transcript First Appearance of Hysni Gucati 1st October 2020 at page 15 lines 21 to 22

18. It is submitted, accordingly, that the warrant was issued without lawful authority in those circumstances.

19. 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)¹³:

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]

20. 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]

¹³ See Annex 1

21. 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 Appellant refers to at paragraph 8).
22. 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").
23. 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)).
24. 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.

25. 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.
26. Instead, Rule 57 of the Rules is concerned only with detention following the exercise by the *Specialist Prosecutor* of his undoubted power to arrest a person during the investigative stage, as specifically provided for in Article 35(2)(h) of the Law. Although Rule 57(1) provides that a Single Judge assigned pursuant to Article 33(2) of the Law can *review* the detention of a Suspect following his/her arrest by the *Specialist Prosecutor* and consider a request for an extension of that detention, such an extension can be granted only where "justified by investigative measures to be taken by the Specialist Prosecutor".
27. It is not sufficient to extend detention under Rule 57 following arrest by the Specialist Prosecutor during the investigative stage that the grounds in Article 41(6) of the Law are made out¹⁴.
28. The effect of Article 35(2)(h) of the Law and Rule 57(1) of the Rules is only to provide that the Specialist Prosecutor (not the Specialist Chambers) can order the arrest and detention of a suspect during the investigative stage for no more

¹⁴ See Rule 57(1) of the Rules

than 48 hours without an extension, and on extension only for as long as is necessary for specific investigative measures to be taken.

29. Rule 57 does not provide the Single Judge with the power to issue an arrest warrant, or to authorise detention for a period longer than justified by investigative measures to be undertaken by the Specialist Prosecutor.

30. It is submitted that the Law is, in fact, clear: the only power of the Specialist Chambers to order arrest is provided by Article 39(3) of the Law and it 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)).

31. As the arrest warrant was not issued by a Pre-Trial Judge in the present case, but instead by a Single Judge, it was issued without lawful authority. Accordingly, it is submitted that the Appellant's detention pursuant to that warrant is not lawful and he should be released pursuant to Article 41(2) of the Law.

SECOND GROUND OF APPEAL – THE APPELLANT SHOULD BE GRANTED BAIL

32. Without prejudice to the first ground of appeal, it is submitted that the Appellant should be granted bail.

33. Article 41(6) of the Law provides that detention is only to be ordered when there are articulable grounds to believe that:

- i. There is a risk of flight;

- 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 in which he or she has threatened to commit.

34. Article 41(12) of the Law provides that the Specialist Chambers may order a range of measures including bail, conditions of residence including house detention, prohibitions on approaching specific places or persons, and requirements to report to police stations as alternatives to detention on remand to ensure presence, preventing reoffending or ensuring the successful conduct of criminal proceedings.

35. It follows that where alternative measures meet the concerns in Article 41(6) of the Law detention is no longer justified.

36. In the present case, the Applicant proposed bail on the following conditions¹⁵:

- a. A surety in the sum of 5000 Euros
- b. Surrender of his passport

¹⁵ "Application for Bail" KSC-BC-2020-07/F00038 at paragraph 5

- c. A requirement that he lives and sleeps each night at his home address
- d. Daily reporting to Eulex Police HQ
- e. A condition not to contact directly or indirectly any person the court thinks it appropriate to restrict contact with
- f. A condition not to go within 100 metres of the offices of the Kosovo Liberation Army War Veterans Association

37. The Single Judge accepted that the proposed conditions adequately addressed the risk of flight¹⁶, but found that there remained a risk that the Appellant may obstruct the progress of proceedings and/or commit further crimes¹⁷.

38. It is submitted that any risk that the Appellant may obstruct the progress of proceedings and/or commit further crimes can be adequately met by conditions.

39. In the first instance, the extent of any such risk is to be properly assessed in the following circumstances.

40. At the press conference on 7th September 2020, the Appellant said little and disclosed no witness details. The material had only been delivered that morning and the Appellant had not been through it¹⁸.

¹⁶ "Decision on Application for Bail" KSC-BC-2020-07/F00059 at paragraphs 15 and 16

¹⁷ "Decision on Application for Bail" KSC-BC-2020-07/F00059 at paragraphs 18 and 20

¹⁸ "Annex 1 to Request for arrest warrants and related orders" KSC-BC-2020-07/F00009/CONF/RED/A01 page 2

41. On the same date, the Single Judge authorised the seizure of the Documents received by the KLA WVA that day, and ordered the Appellant, the KLA WVA and any other individual who is in possession of those documents and/or their content, to refrain from copying, in whatever form, and further disseminating, by whatever means of communication, the Documents and their content¹⁹. The Single Judge also cautioned the Appellant from obstructing the execution of the present decision or violating its conditions²⁰. The Appellant was not present, however, when the seizure was effected and the order and caution directed at the Appellant was not conveyed to him²¹. In any event, there has been no breach of either the order at paragraph 22 or the caution at paragraph 25 of the Decision Authorising a Seizure dated 7th September 2020.
42. On 16th September 2020, further material was unexpectedly delivered to the KLA WVA HQ²². The Appellant again said little and disclosed no witness details. Indeed, there were no witness names in the documents (to the Appellant's knowledge, at least)²³. The Appellant invited the authorities to seize the material²⁴.
43. On 17th September 2020, the Single Judge authorised seizure of the documents received by the KLA WVA on 16th September and made a similar order and caution as made in the previous decision on seizure²⁵. There has been no breach

¹⁹ "Decision Authorising a Seizure" KSC-BC-2020-07/F00001 at paragraph 22

²⁰ "Decision Authorising a Seizure" KSC-BC-2020-07/F00001 at paragraph 25

²¹ "Prosecution Report Pursuant to Decision KSC-BC-2018-01/F00121 [subsequently refiled as KSC-BC-2020-7/F00001]" KSC-BC-2020-07/F00008 at pages 1 to 2

²² "Annex 1 to Request for arrest warrants and related orders" KSC-BC-2020-07/F00009/CONF/RED/A01 page 7

²³ "Annex 1 to Request for arrest warrants and related orders" KSC-BC-2020-07/F00009/CONF/RED/A01 page 7 page 8

²⁴ "Annex 1 to Request for arrest warrants and related orders" KSC-BC-2020-07/F00009/CONF/RED/A01 page 13

²⁵ "Decision Authorising a Seizure" KSC-BC-2020-07/F00007 at paragraphs 22 and 25

of the order at paragraph 22 or the caution at paragraph 25 of the Decision Authorising a Seizure dated 17th September 2020.

44. On 22nd September 2020, further documents were delivered unexpectedly to the KLA WVA HQ. At the third press conference, the Appellant called upon the authorities to investigate the disclosure, stated that the KLA WVA were not going to reveal any names contained within the documents²⁶ and he did not name any individuals or publish any files. The reference to publishing documents at page 14 of Annex 1 to the Request for Arrest Warrants and Related Orders should be seen in its proper context – as part of an exhortation to the SPO to stop the leaking of documentation (note: the translation at Annex 1 is only a ‘rough translation’²⁷).

45. The documents received at the KLA WVA HQ on 22nd September 2020 were seized by the SPO the same day²⁸. On the following day, the SPO sought an order from the Single Judge that “Mr Gucati, the KLA WVA and any representative, member or agent of the KLA WVA to (i) immediately notify the SPO if it has in its possession or in future obtains any further documents that appear to be confidential or non-public and relate to Special Investigative Task Force (SITF) or SPO investigations or witnesses, or proceedings of the Kosovo Specialist Chambers (‘KSC’); and (ii) without authorisation of the SPO or Single Judge, refrain from recording or copying, in whatever form, or disseminating, by whatever means of communication, such documents or their contents”²⁹.

²⁶ “Annex 1 to Request for arrest warrants and related orders” KSC-BC-2020-07/F00009/CONF/RED/A01 page 13 to 14 and page 24

²⁷ “Urgent Request for arrest warrants and related orders’ filing KSC-BC-2020-07/00009 dated 22 September 2020 with public Annexes 1-2” KSC-BC-2020-07/F00009/CONF/RED at page 3 footnote 6

²⁸ “Urgent Request for arrest warrants and related orders’ filing KSC-BC-2020-07/00009 dated 22 September 2020 with public Annexes 1-2” KSC-BC-2020-07/F00009/CONF/RED at paragraph 9

²⁹ “Prosecution Notice and Related Request” KSC-BC-2020-07/F00010/RED at paragraph 7

The SPO had not requested an order in those terms previously, and in fact, no such order was made by the Single Judge.

46. The extent to which any of the material referred to on 7th, 16th and 22nd September 2020 was not already public information is unclear. Certainly, in relation to 16th September 2020, it has been asserted that the information was already public³⁰.
47. Moreover, there is no suggestion of any force being used. There is no suggestion of any actual threats being uttered. There is no suggestion of actual harm being caused to any person. There is no suggestion of any person actually refraining from making a statement or making a false statement or otherwise failing to state true information to the police, prosecutor or judge because of the Appellant's actions.
48. The *maximum* custodial sentence for an offence of violating the secrecy of proceedings in the circumstances as alleged in the warrant is 1 years imprisonment.
49. The *maximum* custodial sentence for an offence of retaliation in the circumstances as alleged in the warrant is 3 years imprisonment.
50. Although the *maximum* custodial sentence for an offence of intimidation during criminal proceedings is 10 years (with a range starting as low as 2 years), the higher end of that range should be reserved for only those cases involving force and actual threat (which is not alleged in this case).

³⁰ "Annex 2 to Request for Arrest Warrants and Related Orders" KSC-BC-2020-07/F00009/CONF/RED/A02 at page 7

51. The Appellant is a man of hitherto good character and was compliant with the SPO officers throughout the arrest and transport³¹.
52. He has, as the Single Judge acknowledged, strong family and community ties in his hometown³². The Appellant is a family man, and his responsibilities include those towards his elderly mother who is unwell and vulnerable during these difficult times.
53. In the above circumstances, it is submitted that the Single Judge was wrong to conclude that there was a risk, which could not be met by any conditions, that the Appellant may obstruct the progress of proceedings/commit further offences .
54. The Appellant had proposed a condition not to contact directly or indirectly any person the court thinks it appropriate to restrict contact with and a condition not to go within 100 metres of the offices of the Kosovo Liberation Army War Veterans Association. Those conditions, it is submitted address any residual risk of the Appellant receiving and disseminating confidential and non-public information by communicating with the media or KLA veterans or by publishing the material himself. If necessary, those conditions could be made of wider scope – to include a requirement, for example, that the Appellant does not enter Pristina, and/or a requirement that he has access to a single electronic device for communication only, the details of which he is to provide to the SPO.
55. The Single Judge did not address the specific proposed conditions in his Decision on Application for Bail. Such conditions attached to bail are not mere

³¹ "Report on the Arrest and Transfer of Hysni Gucati to the Detention Facilities" KSC-BC-2020-07/F00031/RED at paragraph 8

³² "Decision on Application for Bail" KSC-BC-2020-07/F00059 at paragraph 14

'personal assurances' but are orders from the Specialist Chambers the breach of which would render the Appellant liable to again to detention and potential further penalty under Article 15(2) of the Law and Article 401 of the Kosovo Criminal Code 2012.

56. In rejecting the submission that the Appellant would abide by appropriate conditions, the Single Judge was wrong to assert that the Appellant had previously failed to abide by the orders of the Single Judge³³. The orders made by the Single Judge on 7th and 17th September 2020 were specific to the documents received on 7th and 16th September 2020 respectively and were in fact complied with. The only order sought of a wider scope was not requested by the SPO until 23rd September 2020, and was not ordered.

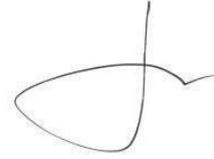
57. In the circumstances as set out above, it is submitted that the Court of Appeals can properly be satisfied that the Appellant will comply with such conditions of bail as are required to address any risk that the Appellant may obstruct the progress of proceedings/commit further offences.

58. Moreover, it is submitted that the Single Judge was wrong to conclude that "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" did not "make continued detention unreasonable or disproportionate in the circumstances"³⁴. It is precisely because of those features that, if contrary to the first ground of appeal the Appellant's arrest and initial detention was lawful, bail should nevertheless be granted at this stage.

³³ "Decision on Application for Bail" KSC-BC-2020-07/F00059 at paragraphs 16 and 17

³⁴ "Decision on Application for Bail" KSC-BC-2020-07/F00059 at paragraph 8

Word count: 4058 words



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