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In:	**KSC-BC-2020-07**
	The Prosecutor v. Hysni Gucati and Nasim Haradinaj
Before:	**Court of Appeals Panel**
	Judge Michèle Picard
	Judge Emilio Gatti
	Judge Kai Ambos
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Hysni Gucati
Date:	18th November 2020
Language:	English
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Appellant reply to Prosecution Response

Specialist Prosecutor

Jack Smith

Counsel for Hysni Gucati

Jonathan Elystan Rees QC

Huw Bowden

Counsel for Nasim Haradinaj

Bastiaan Martens

I. INTRODUCTION

1. Pursuant to Rule 170(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers KSC-BD-03/Rev3/2020 ("Rules"), the Appellant submits the following in reply to the Prosecution Response to Defence Appeal of Decisions Denying Release[1] ("Prosecution Response").

II. SUBMISSIONS IN REPLY

2. For detention to be lawful (under Article 29 of the Constitution and Article 5 of the Convention) it must be effected in conformity with the applicable substantive and procedural provisions[2].

3. Those substantive and procedural provisions are found in the Law on Specialist Chambers and Specialist Prosecutor's Office No.05/L-053 ("Law") and the Rules.

4. Where arrest and detention is not lawful, release must be ordered[3]. There is no residual discretion to continue a person's detention in those circumstances.

5. This appeal is brought as a matter of right, as it concerns one of the core fundamental human rights, namely the right to liberty[4], and it provides the

[1] KSC-BC-2020-07, IA001, F00003, *Prosecution Response to Defence Appeal of Decisions Denying Release*
[2] KSC-CC-PR-2020-09, F00006, *Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020*, The Specialist Chamber of the Constitutional Court at paragraph 65
[3] Article 41(2) of the Law
[4] KSC-BC-2020-07, IA001, F00002, *Decision Assigning a Court of Appeals Panel* 4 November 2020, The President of the Specialist Chambers at footnote 1

Court of Appeals Panel with the opportunity to provide guidance as to the applicable regime for arrest and detention during the investigative stage.

6. There is neither a previous decision of a Court of Appeals Panel of the Specialist Chambers on (i) the operation of the provisions of Articles 25, 33, 35, 38, 39, and 41 of the Law and Rules 53, 57 and 85 of the Rules and the applicable regime created for arrest and detention during the investigative stage, nor on (ii) the approach to be taken by a Court of Appeals Panel of the Specialist Chambers to an interlocutory appeal relating to a decision on detention arising during the investigative stage.

7. Decisions and jurisprudence of other international tribunals do not bind the Specialist Chambers[5].

8. The substantive and procedural provisions for arrest and detention in each of the ICTY[6] and the ICC[7] are different from the Specialist Chambers.

9. In particular, the decision as to whether the grounds for detention under Article 41(6) of the Law are met is not discretionary[8].

10. If the grounds for detention under Article 41(6) of the Law are not satisfied, then detention cannot be ordered.

[5] *Prosecutor v Delalic,* IT-96-21-T, Judgment 16 November 1998 at paragraph 167
[6] The Prosecution Response refers: at footnotes 56, 58 and 62 to the ICTY case *Prosecutor v Krajisnik,* IT-0039-A (an appeal against conviction); at footnote 58 to the MICT case of *Prosecutor v Oric*, MICT-14-79 (an appeal against a refusal to grant a stay of proceedings); and at footnotes 69-73 to the ICTY case of *Prosecutor v Mladic,* IT-09,92-AR65.1
[7] The Prosecution Response refers: at footnotes 58,70-73 to the ICC case of *Prosecutor v Abd-Al-Rahman*, ICC-02/05-01/20 OA2; and at footnote 75 to the ICC case of *Prosecutor v Gbagbo*, ICC-02/11-01/11-278-Red as referred to at footnotes
[8] In contrast to the operation of Rule 65B of the Rules of Procedure and Evidence of the ICTY

11. The same applies where the additional condition for detention during the investigative stage in Rule 57(1) of the Rules is engaged, namely "that each request for an extension shall be justified by investigative measures to be taken by the Specialist Prosecutor". Where that additional condition is not satisfied, an extension to detention during the investigative stage cannot be ordered.

12. Where the grounds for detention in Article 41(6) of the Law and Rule 57(1) of the Rules are not satisfied, release must be ordered.

13. Where measures can be taken which fully meet such concerns as would otherwise satisfy Article 41(6) of the Law in the absence of such measures, then release is not discretionary but mandatory as Article 41(6) of the Law is no longer satisfied[9].

14. Whether in all the circumstances the grounds for detention in Article 41(6) of the Law are met is a question of judgment, not an exercise of discretion. Where the judgment of a Single Judge on that question is wrong, the Court of Appeals Panel should intervene.

15. Even where the threshold concerns in Article 41(6)(b) would otherwise exist and cannot be fully met by conditions attached to release, then there remains a wide, unfettered discretion to release the detainee (including, but not exclusively, where the risks can be mitigated, even if not fully met, by additional measures).

16. It does not follow that where the grounds for detention in Article 41(6) are made out, that detention must be ordered. Deprivation of liberty is the

[9] As submitted to the Single Judge, Transcript 1 October 2020 pages 17 line 25 to 28 lines 1 to 4; see also *Gbagbo*, ante at paragraph 76 re the operation of article 58(1) of the Rome Statute.

exception rather than the rule[10] and detention prior to conviction is not penal in character (a principle particularly worth remembering when dealing with a suspect only and not an accused).

17. Even where the grounds for detention in Article 41(6) (and the additional ground in Rule 57(1), where it applies) are made out, then release should nevertheless be ordered where the balance between the public interest requirement relating to the proceedings (e.g. reflected in the nature and degree of the risks set out in Article 41(6) before/after mitigation by conditions, the severity of any likely sentence etc.) and respect for the right to liberty and the presumption of innocence (e.g. stage of the proceedings, length of pre-trial detention etc.) comes down firmly in favour of the individual.

18. Where a wrong exercise of discretion by a first instance tribunal causes injustice, the appellate court should intervene[11]. The Court of Appeals Panel should reject the invitation of the Specialist Prosecutor to fetter its own ability to do justice.

19. Therefore, the Appellant submits in the second ground of appeal that, for the reasons set out at paragraphs 32 to 58 of the Notice of Interlocutory Appeal on Behalf of Hysni Gucati ("Notice of Interlocutory Appeal"), the Single Judge was wrong to conclude that the grounds for detention were made out and that release should have been mandatory. Whether the grounds for detention in Article 41(6) of the Law were met is a question of judgment, not an exercise of

[10] See *Abd-Al-Rahman*, ante at paragraph 51

[11] see *McCann* (1991) 92 Cr App R 239, Court of Appeal (Criminal Division), England & Wales: "To reverse the judge's ruling it is not enough that the members of this court would have exercised their discretion differently. We must be clearly satisfied that the judge was wrong; but our power to review the exercise of his discretion is not limited to cases in which he has erred in principle or there is shown to have been no material on which he could properly have arrived in his discretion. The court must, if necessary, examine anew the relevant facts and circumstances to exercise a discretion by way of review if it thinks that the judge's ruling may have resulted in injustice to the appellants"

discretion. Where the judgment of a Single Judge on that question is wrong, as is submitted here, the Court of Appeals Panel should intervene.

20. Furthermore, to the extent that the Single Judge had any discretion in the matter, the balance of factors came firmly down in favour of release for the reasons set out at paragraphs 32 to 58 of the Notice of Interlocutory Appeal. To refuse release in those circumstances was unreasonable and certainly wrong, and the Court of Appeals Panel should act accordingly.

21. Moreover, and in any event, the first ground of appeal firmly raises error of law as an issue. The Appellant submits that the Single Judge erred in law (see paragraphs 8 to 31 of the Notice of Interlocutory Appeal).

22. Where error of law is raised, the appellate tribunal will not defer to the first instance tribunal's interpretation of the law. Rather it will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance tribunal misinterpreted the law[12].

23. It is correct that the Appellant submitted to the Single Judge that he was wrong in law, and the Appellant is entitled to put those submissions before the Court of Appeals Panel, on an interlocutory appeal as of right, and ask the Court of Appeals Panel to arrive at its own conclusion as to the appropriate law.

24. It was submitted before the Single Judge that:

    a. Article 39(3) does not provide a power to a judge other than the Pre-Trial Judge to issue a warrant for arrest and detention[13]

[12] See *Abd-Al-Rahman*, ante at paragraph 14
[13] KSC-BC-2020-07, F00034, *Challenge to the Lawfulness of the Arrest in Accordance with Article 41(2): The Arrest Warrant was Issued Without Lawful Authority* at paragraph 6

b. 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 which confirms that the functions in Article 39 of the Law are to be performed by a Pre-Trial Judge)[14]

c. Only after confirmation of an indictment may the reviewing judge issue a warrant of issue under Article 39(3), drawing support from Archbold International Criminal Courts: Practice, Procedure and Evidence 5th Edition at § 6-266[15].

25. The defence did *not* submit, and the Single Judge was wrong to suggest in his First Impugned Decision that it did, "that, in accordance with Article 39(3) of the Law and Rule 85(1) of the Rules: (i) the arrest and transfer of a person to the Specialist Chambers can only arise after an indictment has been filed; and (ii) only a Pre-Trial Judge can issue an arrest warrant"[16]. In fact, the defence submissions never went that far.

26. Indeed, the Appellant specifically referred to the power of the Specialist Prosecutor to order arrest under Article 38(2) of the Law[17].

27. The Appellant specifically acknowledged that Rule 57 of the Rules envisaged a suspect being in detention prior to the assignment of a Pre-Trial Judge[18].

[14] KSC-BC-2020-07, F00034, *Challenge to the Lawfulness of the Arrest in Accordance with Article 41(2): The Arrest Warrant was Issued Without Lawful Authority* at paragraph 7
[15] KSC-BC-2020-07, F00034, *Challenge to the Lawfulness of the Arrest in Accordance with Article 41(2): The Arrest Warrant was Issued Without Lawful Authority* at paragraph 11
[16] KSC-BC-2020-07, F00057, *Decision on Defence Challenges*, Single Judge at paragraph 28
[17] KSC-BC-2020-07, F00034, *Challenge to the Lawfulness of the Arrest in Accordance with Article 41(2): The Arrest Warrant was Issued Without Lawful Authority* at paragraph 13
[18] KSC-BC-2020-07, F00034, *Challenge to the Lawfulness of the Arrest in Accordance with Article 41(2): The Arrest Warrant was Issued Without Lawful Authority* at paragraph 15

28. The submission made was that 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[19].

29. The distinction properly made in the Law between the Specialist Prosecutor having the power to order arrest and detention during the investigative stage and not a Single Judge of the Specialist Chambers is neither illogical nor baseless (as rather desperately asserted by the Specialist Prosecutor). On the contrary, the distinction is made out in the Law, as demonstrated, and is perfectly logical.

30. It makes good sense that the power to arrest and detain, during the investigative stage, is in the hands of the Specialist Prosecutor, who is responsible for the conduct of investigations under Article 38(1) (rather than the Specialist Chambers which is not responsible for investigations under Article 38(1) and must remain independent and impartial).

31. Moreover, the distinction provides for a specific procedure when arrest and detention is deployed during the investigative stage, with additional protections for the suspect reflecting the fact that the suspect has not been charged with any offence.

32. Where arrest and detention is ordered by the Specialist Prosecutor during the investigative stage, the suspect must be brought before a Single Judge within 48 hours[20] and released unless, "in addition to the grounds provided for in

[19] KSC-BC-2020-07, F00034, *Challenge to the Lawfulness of the Arrest in Accordance with Article 41(2): The Arrest Warrant was Issued Without Lawful Authority* at paragraph 16
[20] See Articles 35(2)(h), 38(2) and 41(3) of the Law

Article 41(6) of the Law each request for an extension shall be justified by investigative measures to be taken by the Specialist Prosecutor"[21].

33. Further where a suspect is brought before the court having been arrested and detained during the investigative stage on the order of the Specialist Prosecutor, the Single Judge must make a decision on extending detention or release not later than 48 hours from the moment the detained person was brought before the court[22].

34. The Prosecution Response says nothing of substance about the point raised relating to Rule 57(1) of the Rules and the additional condition therein that must be satisfied where an extension to detention during the investigative stage is sought by the Specialist Prosecutor before the Single Judge.

35. Neither was any attempt made by the Specialist Prosecutor to justify an extension of the detention of the Appellant on 1st October 2020 on the basis of investigative measures to be taken under Rule 57(1)[23] nor in the Consolidated Prosecution Response to Defence Motions Challenging Lawfulness of Arrest and Requesting Release[24].

36. Although the Single Judge referred to Rule 57(1) in his First Impugned Decision[25], and indeed stated that his Second Impugned Decision was rendered pursuant to Rule 57(1)[26], in neither Impugned Decision did the Single Judge refer to the additional condition contained therein, namely that in addition to the grounds provided for in Article 41(6) of the Law each request for an

[21] See Rule 57(1) of the Rules
[22] See Article 41(3) of the Law
[23] KSC-BC-2020-07, Transcript 1 October 2020, public
[24] KSC-BC-2020-07, F00045, *Consolidated Prosecution Response to Defence Motions Challenging Lawfulness of Arrest and Requesting Release*, 9 October 2020
[25] KSC-BC-2020-07, F00057, *Decision on Defence Challenges*, at paragraphs 29 and 30
[26] KSC-BC-2020-07, F00059, *Decision on Application for Bail*, at page 1

extension shall be justified by investigative measures to be taken by the Specialist Prosecutor or address whether that condition was satisfied.

37. Further, whereas the Appellant was brought before the Single Judge on 1st October 2020 following his arrest, no decision on extending his detention or release was given by the Single Judge until 27th October 2020 - 26 days after the Appellant was brought before the court instead of within 48 hours of that court appearance as would have been required by Article 41(3) if the order for the arrest and detention of the Appellant during the investigative stage had been properly made by the Specialist Prosecutor using his powers under Articles 35(2)(h) and 38(2), rather than by the Single Judge wrongly usurping the powers of a Pre-Trial Judge under Article 39(3).

38. As a result of that error of law, as set out in paragraph 31 of the Notice of Interlocutory Appeal, the Appellant did not receive the additional protections that he was entitled to as a suspect during the investigative stage namely (i) a decision on the extension of his detention within 48 hours of appearance his before the Single Judge and (ii) extension of detention only where justified by investigative measures to be taken by the Specialist Prosecutor.

39. The Appellant repeats: for detention to be lawful (under Article 29 of the Constitution and Article 5 of the Convention) it must be effected in conformity with the applicable substantive and procedural provisions[27]. That has not happened in the present case, and the appeal should be allowed.

REQUEST FOR AN ORAL HEARING

[27] KSC-CC-PR-2020-09, F00006, *Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020*, The Specialist Chamber of the Constitutional Court at paragraph 65

40. The Appellant requests an oral hearing. It is acknowledged that Rule 170(3) provides that "unless otherwise decided by the Court of Appeals Panel, interlocutory appeals shall be determined on the basis of written submissions". It is submitted, however, that in the present case an oral hearing should be granted given that:

    a. The appeal concerns one of the core fundamental human rights, namely the right to liberty (see paragraph 5 above);
    b. It concerns a novel point (see paragraph 6 above); and
    c. A request for an oral hearing at first instance was refused by the Single Judge[28].

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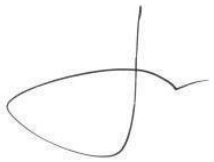

JONATHAN ELYSTAN REES QC
Specialist Counsel for Mr Gucati

HUW BOWDEN
Specialist Co-Counsel for Mr Gucati

19 November 2020
Cardiff, UK

[28] KSC-BC-2020-07, F00057, *Decisions on Defence Challenges*, Single Judge at paragraphs 9,11, 12 and 47