



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 3 December 2020

Language: English

Classification: Confidential

**Decision on Proceedings Concerning the Review of Detention and
Setting a Target Date for a Decision Pursuant to Article 39(2)**

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THE PRE-TRIAL JUDGE,¹ pursuant to Articles 41 and 39(2) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 57, 85(5) and 86 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby issues the following decision.

I. PROCEDURAL BACKGROUND

1. On 24 September 2020, the Single Judge issued, upon request,² Arrest Warrants against Hysni Gucati ("Mr Gucati") and Nasim Haradinaj ("Mr Haradinaj") (collectively, "Suspects"), as well as orders for their transfer to the Specialist Chambers' detention facilities in The Hague, the Netherlands ("SC Detention Facilities").³

2. On 25 September 2020, the Suspects were arrested in Kosovo.⁴ Mr Gucati and Mr Haradinaj were transferred to the SC Detention Facilities on 25 and 26 September 2020, respectively.⁵

¹ KSC-BC-2020-07, F00061, President, *Decision Assigning a Pre-Trial Judge*, 29 October 2020, public.

² KSC-BC-2020-07, F00009RED, Specialist Prosecutor, *Public Redacted Version of 'Urgent Request for Arrest Warrants and Related Orders', filing KSC-BC-2020-07-F0009 dated 22 September 2020*, 1 October 2020, public, with Annexes 1-2, public.

³ KSC-BC-2020-07, F00012/A01/RED, Single Judge, *Public Redacted Version of Arrest Warrant for Hysni Gucati ("Arrest Warrant for Mr Gucati")*, 24 September 2020, public; KSC-BC-2020-07, F00012/A03/COR/RED, Single Judge, *Public Redacted Version of the Corrected Version of Arrest Warrant for Nasim Haradinaj ("Arrest Warrant for Mr Haradinaj")*, 24 September 2020, public; 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, F00012/A04/RED, Single Judge, *Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers*, 24 September 2020, public.

⁴ KSC-BC-2020-07, F00015, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 25 September 2020, public; KSC-BC-2020-07, F00016, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 25 September 2020, public.

⁵ 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; KSC-BC-2020-07, 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.

3. On 29 September 2020 and 1 October 2020, Mr Haradinaj and Mr Gucati made their respective first appearances (collectively “First Appearances”), during which they were informed of the reasons of their arrest.⁶ During the first appearance of Mr Haradinaj, the Specialist Prosecutor’s Office (“SPO”) indicated that it anticipated filing an indictment against the Suspects within 30 days.⁷

4. On 27 October 2020, the Single Judge issued the “Decision on Defence Challenges”.⁸ That same day, he issued the “Decision on Request for Immediate Release of Nasim Haradinaj” and the “Decision on Application for Bail”, dismissing Defence challenges to the Suspects’ continued detention.⁹

5. On 30 October 2020, the SPO filed a strictly confidential and *ex parte* indictment against the Suspects (“Indictment”), seeking its confirmation by the Pre-Trial Judge.¹⁰

6. On 11 November 2020, the Pre-Trial Judge sought submissions from the Parties on the prospect of making available (a redacted version of) the Indictment to the Defence and permitting the latter to make submissions thereon while it is being reviewed by the Pre-Trial Judge (“Order for Submissions”).¹¹

⁶ KSC-BC-2020-07, Transcript, 29 September 2020, public; KSC-BC-2020-07, Transcript, 1 October 2020, public.

⁷ KSC-BC-2020-07, Transcript, 1 October 2020, public, p. 15. *See also* KSC-BC-2020-07, Transcript, 29 September 2020, public, pp. 12-13.

⁸ KSC-BC-2020-07, F00057, Single Judge, *Decision on Defence Challenges*, 27 October 2020, public.

⁹ KSC-BC-2020-07, F00058, Single Judge, *Decision on Request for Immediate Release of Nasim Haradinaj*, 27 October 2020, public, para. 33; KSC-BC-2020-07, F00059, Single Judge, *Decision on Application for Bail*, 27 October 2020, public, para. 25.

¹⁰ KSC-BC-2020-07, F00063, Specialist Prosecutor, *Submission of Indictment for Confirmation and Related Requests*, 30 October 2020, strictly confidential and *ex parte*, with Annexes 1-2, strictly confidential and *ex parte*.

¹¹ KSC-BC-2020-07, F00065, Pre-Trial Judge, *Order for Submissions on the Conduct of Proceedings Concerning the Review of the Indictment*, 11 November 2020, confidential.

7. On 16 November 2020, the Gucati Defence and the Haradinaj Defence made written submissions.¹² The SPO did so on 17 November 2020.¹³

8. On 25 November 2020, the Gucati Defence filed a request for directions on proceedings concerning the review of detention (“Request for Directions”).¹⁴

II. SUBMISSIONS

9. The Gucati Defence submits that it be given access to the Indictment and its annexes, and be permitted to make submissions on it while it is being reviewed.¹⁵ Moreover, the SPO should propose categories of redactions to the Indictment, to which the Defence would respond.¹⁶

10. The Haradinaj Defence submits that, in order to prepare for the next hearing on detention, the Defence should be given unredacted access to the Indictment and all supporting material.¹⁷ It also asks for these documents to be reclassified as “Public”.¹⁸

¹² KSC-BC-2020-07, F00066, Gucati Defence, *Submissions on the Conduct of Proceedings Concerning the Review of the Indictment* (“Gucati Defence Submissions”), 16 November 2020, confidential; KSC-BC-2020-07, F00067, Haradinaj Defence, *Submissions on the Conduct of Proceedings Concerning the Review of the Indictment* (“Haradinaj Defence Submissions”), 16 November 2020, confidential.

¹³ KSC-BC-2020-07, F00068, Specialist Prosecutor, *Prosecution Submissions on the Conduct of Proceedings Concerning the Review of the Indictment* (“SPO Submissions”), 17 November 2020, confidential.

¹⁴ KSC-BC-2020-07, F00069, Gucati Defence, *Request for Directions: Re Conduct of Proceedings Concerning the Review of Detention*, 25 November 2020, confidential.

¹⁵ Gucati Defence Submissions, para. 6. The Pre-Trial Judge clarifies for the Defence’s benefit that the filing, as cited in footnote 10 above, contains just two annexes. The Order for Submissions erroneously stated that the SPO filing contained “Annexes 1-3, confidential and *ex parte*”, see Order for Submissions, fn. 10.

¹⁶ Gucati Defence Submissions, para. 7.

¹⁷ Haradinaj Defence Submissions, paras 1-2, 4-5. While in the final two paragraphs of the submissions the Haradinaj Defence requests access to the “full and unredacted Indictment and all supporting materials”, earlier in the filing it phrases the request even more widely to encompass “the full an unredacted indictment and all materials collected by the SPO in the case; see Haradinaj Defence Submissions, paras 2, 4-5.

¹⁸ Haradinaj Defence Submissions, para. 5.

11. The SPO opposes making the Indictment available to the Defence prior to its confirmation¹⁹ arguing that: (i) the Law and Rules do not provide for making the Indictment available to the Defence at this stage and there are no reasons to proceed differently in the present case;²⁰ (ii) the Suspects' detention is based on the Arrest Warrants, to which they have had access, such that Defence access to the contents of the Indictment is unnecessary for and irrelevant to challenging their detention;²¹ and (iii) making the Indictment available to the Defence may adversely impact the integrity of evidence and may prejudice ongoing investigations.²² In the alternative, the SPO accepts that the Indictment be made available to the Defence, but requests that the "Statement of Facts" be redacted in its entirety from the Indictment, and that the Defence not be allowed to make any submissions on the Indictment while it is being reviewed by the Pre-Trial Judge.²³

12. Finally, recalling that Mr Gucati has been in detention for two months since his arrest,²⁴ the Gucati Defence requests the Pre-Trial Judge to give directions on the conduct of the review of Mr Gucati's detention, including making the Indictment available to the Defence and thereafter the exchange of submissions on the review of detention.²⁵

III. APPLICABLE LAW

13. Pursuant to Rule 57(2) of the Rules, after the assignment of a Pre-Trial Judge pursuant to Article 33(1)(a) of the Law and until a judgment is final, the Panel seized with a case shall review a decision on detention on remand upon the expiry of two months

¹⁹ SPO Submissions, para. 1.

²⁰ SPO Submissions, paras 1, 10-12.

²¹ SPO Submissions, paras 1, 13-14.

²² SPO Submissions, paras 1, 15-18.

²³ SPO Submissions, paras 1-2, 21-27.

²⁴ Request for Directions, paras 7-8.

²⁵ Request for Directions, para. 9.

from the last ruling on detention, in accordance with Article 41(6), (10), (11) and (12) of the Law or at any time upon request by the Accused or the Specialist Prosecutor, or *proprio motu*, where a change in circumstances since the last review has occurred.

14. Pursuant to Rule 85(5) of the Rules, the target date for the Pre-Trial Judge's decision on the confirmation or dismissal of an indictment shall be, subject to the specificities of the case, no later than six months from the filing of the indictment and all supporting material.

IV. DISCUSSION

15. Turning first to the Gucati Defence request for directions on the review of detention, the Pre-Trial Judge recalls that, pursuant to Rule 57(2) of the Rules, a decision on detention on remand must be reviewed upon expiry of two months "from the last ruling on detention". The two month period runs from 27 October 2020, when the last decisions concerning detention were issued in this case, meaning that the Pre-Trial Judge must review the Suspects' detention again by 27 December 2020. In advance of this review, the Pre-Trial Judge will seek submissions from the Parties.²⁶ Detention on remand may also be reviewed at any time upon request of the Defence, the Specialist Prosecutor, or *proprio motu*, where a change of circumstances since the last review has occurred.²⁷

16. Turning next to the issue of making the unconfirmed Indictment available to the Defence, the Pre-Trial Judge notes the rights of detained persons, as set out in Article 5 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and the jurisprudence of the European Court of Human Rights

²⁶ See e.g. KSC-BC-2020-05, F00048, Pre-Trial Judge, *Order for Submissions on the Review of Detention*, 16 November 2020, public.

²⁷ The Pre-Trial Judge notes that, although Rule 57(2) of the Rules refers to "the Accused", it must necessarily be interpreted to also include a suspect who is in detention while an indictment is being reviewed (and therefore after the assignment of a Pre-Trial Judge), as in the present case.

("ECtHR"). Specifically, pursuant to Article 5(2) of the ECHR, an arrested and/or detained person²⁸ must be told – in simple, non-technical language that can be easily understood – the essential legal and factual grounds for the arrest and/or detention, so as to be able, if he or she sees fit, to apply to a court to challenge its lawfulness in accordance with Article 5(4) of the ECHR.²⁹ While Article 5(2) of the ECHR does not require that the detained person be given access to the entire case file, the latter must nonetheless receive sufficient information so as to be able to argue the review of lawfulness provided for in Article 5(4) of the ECHR.³⁰ Whether the content of the information provided was sufficient must be assessed in light of the features of each case.³¹

17. Article 5(2) of the ECHR does not require that, at the moment when a person is arrested on suspicion of having committed a crime, he or she be given the necessary information in a particular form, nor does it require that this information consist of a complete list of the charges held against the arrested person.³² However, this line of jurisprudence does not support the proposition that additional information on the

²⁸ See e.g. ECtHR, *Athary v. Turkey*, no. 50372/09, Judgment ("*Athary Judgment*"), 11 December 2012, para. 35; *Abdolkhani and Karimnia v. Turkey*, no. 30471/08, Judgment ("*Abdolkhani and Karimnia Judgment*"), 22 September 2009, para. 136; *Shamayev and Others v. Georgia and Russia*, no. 36378/02, Judgment ("*Shamayev and Others Judgment*"), 12 April 2005, para. 414.

²⁹ See e.g. ECtHR, *Musaev v. Turkey*, no. 72754/11, Judgment, 21 October 2014, para. 34; *T. and A. v. Turkey*, no. 47146/11, Judgment, 21 October 2014, para. 65; *Athary Judgment*, para. 35; *X. v. France*, no. 20335/04, Judgment ("*X. v. France Judgment*"), 20 November 2008, para. 59; *H.B. v. Switzerland*, no. 26899/95, Judgment ("*H.B. v. Switzerland Judgment*"), 5 April 2001, para. 47; *Abdolkhani and Karimnia Judgment*, para. 136; *Shamayev and Others Judgment*, para. 413; *Fox, Campbell and Hartley v. The United Kingdom*, nos 12244/86, 12245/86, 12383/86, Judgment ("*Fox, Campbell and Hartley Judgment*"), 30 August 1990, para. 40; *Čonka v. Belgium*, no. 51564/99, Judgment ("*Čonka Judgment*"), 5 February 2002, para. 50; ECtHR, *Danov v. Bulgaria*, no. 56796/00, Judgment ("*Danov Judgment*"), 26 October 2006, para. 67.

³⁰ *Shamayev and Others Judgment*, para. 427; see also *Danov Judgment*, para. 69.

³¹ See e.g. *Athary Judgment*, para. 35; *X. v. France Judgment*, para. 59; *H.B. v. Switzerland Judgment*, para. 47; *Abdolkhani and Karimnia Judgment*, para. 136; *Shamayev and Others Judgment*, para. 413; *Fox, Campbell and Hartley Judgment*, para. 40; *Čonka Judgment*, para. 50; *Danov Judgment*, para. 67.

³² ECtHR, *Nowak v. Ukraine*, no. 60846/10, Judgment, 31 March 2011, para. 53; *X. v. Federal Republic of Germany*, no. 8098/77, Commission Decision, 13 December 1978, pp. 111, 113; *X. v. The United Kingdom*, no. 4220/69, Commission Decision, 3 February 1971.

charges need not be given at any stage subsequent to the moment of the arrest, as in the present case.

18. Therefore, in the present case, the Defence could be provided with sufficient information to put them in a position to challenge the legal and factual grounds for the Suspects' continuing detention. Access of the Defence to relevant information in the Indictment would allow them to make meaningful submissions on the review of the Suspects' detention.

19. That being said, the Pre-Trial Judge informs the Parties that the decision on the review of the Indictment will be issued on Friday, 11 December 2020. If the Indictment is confirmed, the Defence will be given access to it shortly thereafter. As the next review of the Suspects' detention would have to be completed by 27 December 2020, the Defence would be able to make submissions thereon after being given access to the confirmed Indictment, if any.

20. Consequently, given the timing of the upcoming decision on the review of the Indictment and the ensuing Defence access to the confirmed Indictment, and the deadline for the next review of the Suspects' detention, the Pre-Trial Judge considers that it is unnecessary in the present circumstances to decide on the access of the Defence to relevant information in the Indictment. Therefore, the Pre-Trial Judge also need not rule on the scope of any submissions which the Defence would have been permitted to make had they been given access to the Indictment, nor on the Defence's access to any material supporting the Indictment.

V. DISPOSITION

21. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a) **DETERMINES** that a decision pursuant to Article 39(2) of the Law will be issued on Friday, 11 December 2020.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Thursday, 3 December 2020
At The Hague, the Netherlands.