

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: 17th December 2020

Language: English

Classification: Public

Submissions on the Review of Detention by 27th December 2020

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INTRODUCTION

1. By order dated 9 December 2020, the Pre-Trial Judge requested the parties to file written submissions by Friday, 18 December 2020, on whether reasons for the continued detention of Mr Gucati still exist or whether his detention should be terminated¹.
2. On behalf of Mr Gucati, it is submitted that detention should be terminated and Mr Gucati released, with or without conditions.

BACKGROUND

3. On 14th December 2020, notice was given that the Pre-Trial Judge has now confirmed an indictment against Mr Gucati². The indictment alleges six offences contrary to Article 15(2) and 16(3) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ('Law') and Articles 401, 387, 388 and 392 of the Criminal Code of the Republic of Kosovo, Code No.06/L-074 (2019) ('KCC 2019')³.
4. The evidentiary material in support of the indictment, required to be provided to the Pre-Trial Judge by Article 38(4) of the Law and Rule 86(3) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ('Rules'), has not been served upon Mr Gucati. The defence are unable in those circumstances

¹ "Order for Submissions on the Review of Detention", KSC-BC-2020-07/F00073 at paragraph 11

² "Submission of Confirmed Indictment with strictly confidential Annexes 1 and 2", KSC-BC-2020-07/F00075 and KSC-BC-2020-07/F00075/A01

³ Note: Article 15 of the Law incorporates Chapters XXXII, XXXIII and XXXIV of the Kosovo Criminal Code 2012, Law No04/L-082.

to make submissions in relation to the strength of that evidentiary material at the present review.

5. Indeed, no information at all has been provided in relation to the following paragraphs of the Statement of Facts in the indictment in any form – paragraphs 5, 11, 12, 16, 20, 21, 22, 29, 32, 35.
6. Moreover, in relation to Count 1 of the Indictment (obstructing official persons in performing official duties by serious threat), there is nothing in the statement of facts even which provides a basis for a count alleging that Mr Gucati used a serious threat towards one of the official persons set out in Article 401(5) KCC 2019 (Article 409(5) KCC 2012).
7. Mr Gucati pleads not guilty to the six counts on the indictment and he is to be presumed innocent.
8. As of the review target date of 27th December 2020, Mr Gucati will already have been in detention for a total of 94 days (or 3 months and 3 days). By the next review date, two months thereafter, Mr Gucati will have been in custody for over 5 months.
9. The longer a person remains in pre-trial detention, the higher the burden on the Specialist Chambers to justify continued detention⁴. The clear presumption is in favour of the accused being at liberty.
10. Detention can only be extended (i) where the strict conditions in Article 41(6) of the Law continue to be met *and* (ii) detention remains strictly necessary and

⁴ “Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention”, KSC-BC-2020-07/IA0001/F00005 at paragraph 73

proportionate having considered whether other, less stringent measures than detention could be sufficient⁵.

SUBMISSIONS

11. Article 41(6)(b) 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.

12. Article 41(12) of the Law provides that the Specialist Chambers may order a range of measures including bail, conditions of residence including house

⁵ *“Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention”*, KSC-BC-2020-07/IA0001/F00005 at paragraphs 51 and 72

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.

13. In the present case, Mr Gucati has previously proposed release on conditions⁶.
14. The Single Judge accepted that the proposed conditions adequately addressed the risk of flight⁷, but found that there remained a risk that Mr Gucati may obstruct the progress of proceedings and/or commit further crimes⁸.
15. It is submitted that any risk that Mr Gucati may obstruct the progress of proceedings and/or commit further crimes can be adequately met by conditions.
16. In the first instance, the extent of any such risk is to be properly assessed in the following circumstances (addressing the material upon which the Arrest Warrant was issued and which has been disclosed, namely the 'rough' transcripts of the press conferences on 7th, 16th and 21st September 2020).
17. At the press conference on 7th September 2020, Mr Gucati said little and disclosed no witness details. The material had only been delivered that morning and Mr Gucati had not been through it⁹.

⁶ "Application for Bail" KSC-BC-2020-07/F00038 at paragraph 5

⁷ "Decision on Application for Bail" KSC-BC-2020-07/F00059 at paragraphs 15 and 16

⁸ "Decision on Application for Bail" KSC-BC-2020-07/F00059 at paragraphs 18 and 20

⁹ "Annex 1 to Request for arrest warrants and related orders" KSC-BC-2020-07/F00009/CONF/RED/A01
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18. On the same date, the Single Judge authorised the seizure of the Documents received by the KLA WVA that day, and ordered Mr Gucati, 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 content¹⁰. The Single Judge also cautioned Mr Gucati from obstructing the execution of the present decision or violating its conditions¹¹. Mr Gucati was not present, however, when the seizure was effected and the order and caution directed at Mr Gucati was not conveyed to him¹². 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.

19. On 16th September 2020, further material was unexpectedly delivered to the KLA WVA HQ¹³. Mr Gucati again said little and disclosed no witness details. Indeed, there were no witness names in the documents (to Mr Gucati's knowledge, at least)¹⁴. Mr Gucati invited the authorities to seize the material¹⁵.

20. 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 seizure¹⁶. There has been no breach of the order at paragraph 22 or the caution at paragraph 25 of the Decision Authorising a Seizure dated 17th September 2020.

¹⁰ "Decision Authorising a Seizure" KSC-BC-2020-07/F00001 at paragraph 22

¹¹ "Decision Authorising a Seizure" KSC-BC-2020-07/F00001 at paragraph 25

¹² "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

¹³ "Annex 1 to Request for arrest warrants and related orders" KSC-BC-2020-07/F00009/CONF/RED/A01 page 7

¹⁴ "Annex 1 to Request for arrest warrants and related orders" KSC-BC-2020-07/F00009/CONF/RED/A01 page 8

¹⁵ "Annex 1 to Request for arrest warrants and related orders" KSC-BC-2020-07/F00009/CONF/RED/A01 page 13

¹⁶ "Decision Authorising a Seizure" KSC-BC-2020-07/F00007 at paragraphs 22 and 25

21. On 22nd September 2020, further documents were delivered unexpectedly to the KLA WVA HQ. At the third press conference, Mr Gucati called upon the authorities to investigate the disclosure, stated that the KLA WVA were not going to reveal any names contained within the documents¹⁷ 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’¹⁸).
22. The documents received at the KLA WVA HQ on 22nd September 2020 were seized by the SPO the same day¹⁹. 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”²⁰. The SPO had not requested an order in those terms previously, and in fact, no such order was made by the Single Judge.

¹⁷ “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

¹⁸ “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

¹⁹ “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

²⁰ “Prosecution Notice and Related Request” KSC-BC-2020-07/F00010/RED at paragraph 7

23. 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 public²¹. In relation to Mr Gucati specifically, the only two names mentioned by Mr Gucati during the press conferences of 7th, 16th and 22nd September were those of the deputy prosecutor of the Special Court of Serbia and the general director of police in Serbia, both public figures to whose roles confidentiality does not attach²².
24. 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 Mr Gucati's actions.
25. Mr Gucati is a man of hitherto good character and has been compliant throughout his arrest and transport, and subsequently during his detention²³.
26. He has, as the Single Judge has acknowledged, strong family and community ties in his hometown²⁴. Mr Gucati is a family man, and his responsibilities include those towards his elderly mother who is unwell and vulnerable during these difficult times.

²¹ *"Annex 2 to Request for Arrest Warrants and Related Orders"* KSC-BC-2020-07/F00009/CONF/RED/A02 at page 7

²² *"Annex 1 to Request for arrest warrants and related orders"* KSC-BC-2020-07/F00009/CONF/RED/A01 page 8

²³ *"Report on the Arrest and Transfer of Hysni Gucati to the Detention Facilities"* KSC-BC-2020-07/F00031/RED at paragraph 8

²⁴ *"Decision on Application for Bail"* KSC-BC-2020-07/F00059 at paragraph 14

27. The conditions hitherto proposed, it is submitted, address any residual risk of Mr Gucati receiving and disseminating confidential and non-public information by communicating with the media or KLA veterans or by publishing the material himself. If required by the Pre-Trial Judge, those conditions could be adapted and made of wider scope – to include a requirement, for example:

- a. that Mr Gucati does not enter Pristina, and/or
- b. that he has access to a single electronic device for communication only, the details of which he is to provide to the SPO, and/or
- c. that Mr Gucati resides outside Kosovo, to live and sleep each night at the following home in [REDACTED] (subject to third party state consent) belonging to his relative, [REDACTED] (and at which [REDACTED] and his family reside):

[REDACTED],

[REDACTED],

[REDACTED].

28. Such conditions, physically distancing Mr Gucati from Pristina/Kosovo and limiting his means to communicate electronically, would mean (i) that he physically would not be in a position to receive, without oversight, confidential and non-public information about the SC/SPO, (ii) greatly restrict his means to

disseminate information and (iii) prevent any direct or indirect contact with witnesses in Kosovo (acknowledging that no such contact is in fact alleged)²⁵.

29. Mr Gucati has no contact details for, and no means of contacting, the unknown individuals who delivered the disclosures to the KLA WVA HQ²⁶. Indeed, Mr Gucati has called upon the SPO to identify and investigate those persons²⁷.

30. In the circumstances, it is submitted that the Pre-Trial Judge should accordingly terminate Mr Gucati's detention and release him with or without conditions.

REQUEST FOR ORAL HEARING

31. Pursuant to rule 75(3) of the Rules, the Pre-Trial Judge is requested to order an oral hearing on the review of detention before 27th December 2020²⁸, for oral argument to supplement written submissions.

32. The review concerns the issue of the deprivation of Mr Gucati's liberty and the severe restriction of his fundamental rights²⁹.

33. The burden sits with the Specialist Prosecutor, and thereafter the Specialist Chambers, to justify continued detention³⁰. Yet, Mr Gucati has had no advance notice of the submissions on the review of detention to be made by the Specialist Prosecutor (the SPO being directed to file their written submissions

²⁵ "Decision on Application for Bail" KSC-BC-2020-07/F00059 at paragraph 17

²⁶ "Annex 1 to Request for arrest warrants and related orders" KSC-BC-2020-07/F00009/CONF/RED/A01 at pages 2, 7

²⁷ "Annex 1 to Request for arrest warrants and related orders" KSC-BC-2020-07/F00009/CONF/RED/A01 page 14

²⁸ Counsel proposes a video-link hearing on one of the following dates 21, 22 or 23rd December 2020

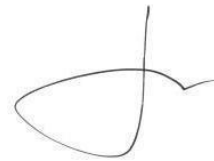
²⁹ "Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention", KSC-BC-2020-07/IA001/F00005 at paragraphs 22 and 73

³⁰ "Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention", KSC-BC-2020-07/IA001/F00005 at paragraph 73

on whether reason for the continued detention of Mr Gucati still exist or whether his detention simultaneously on 18th December 2020³¹). As the Pre-Trial Judge has stated, Mr Gucati has the right to be provided with all essential information in order to be able to obtain an effective review of his detention³².

34. An oral hearing will provide Mr Gucati with a fair opportunity to respond orally to the written submissions of the SPO (and indeed will permit the SPO to respond to any of the submissions made herein), allow all parties to directly respond to any questions from the Pre-Trial Judge and assist in the just and effective determination of this review.

Word count: 2478 words



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³¹ "Order for Submission on the Review of Detention", KSC-BC-2020-07/F00073 at paragraph 11

³² "Order for Submissions on the Conduct of Proceedings Concerning the Review of the Indictment", KSC-BC-2020-07/F00065 at paragraph 10

17th December 2020

Cardiff, UK