

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

**Before:** Pre-Trial Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Nasim Haradinaj

**Date:** 21 December 2020

**Language:** English

**Classification:** Public

---

**CORRECTED**

**Submissions on the Review of Detention by 27 December 2020**

---

**Specialist Prosecutor**

Jack Smith

**Counsel for Nasim Haradinaj**

Toby Cadman

Carl Buckley

**Counsel for Hysni Gucati**

Jonathan Elystan Rees QC

Huw Bowden

## 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. Haradinaj still exist or whether his detention should be terminated.<sup>1</sup>
2. On behalf of Mr. Haradinaj, it is submitted that there is no proper justification for continued detention and therefore it should be terminated forthwith and Mr. Haradinaj released immediately, with or without any conditions the Pre-Trial Judge may deem appropriate to impose.
3. It is respectfully submitted that, due to the circumstances upon which Mr. Haradinaj was arrested, transferred and taken into custody, the length of time it took for him to be produced before a judge before pre-charge detention was ordered, and the failure to establish 'relevant and sufficient reasons' for detention he should be granted unconditional provisional release.

## BACKGROUND

---

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

4. On 14 December 2020, notice was given that the Pre-Trial Judge has now confirmed an indictment against Mr. Haradinaj.<sup>2</sup>
5. 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').<sup>3</sup> Whether the Special Chambers has jurisdiction for these offences will be argued at a later date and is not the subject of this submission.
6. 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 Haradinaj.
7. As a consequence, the defence are precluded from making any submissions regarding the veracity of that evidentiary material upon which the indictment is based.
8. Further, no information has been disclosed over and above that which is contained within the 'Statement of Facts' per the indictment, and thus that

---

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

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

statement of facts at this time remains unsupported and not capable of examination in terms of this review.

9. We do however note, that in terms of Count 1 of the indictment (the obstructions of official persons in performing official duties by serious threat), not even the Statement of Facts appears to support the Count, and thus the allegation that Mr. Haradinaj used a threat, serious or otherwise, within the meaning of Article 401(5) KCC 2019 (Article 409(5) KCC 2012), remains unsubstantiated to a further degree than the remaining 5 Counts at this point.
10. Mr. Haradinaj has not at this stage entered a plea in respect of any Counts on the indictment, and has not been in a position to consider his plea given that there has been a recent change in Specialist Counsel, the appointment of new counsel having only made prior to the scheduled hearing on first appearance of 18 December 2020, and therefore not in a position to advise Mr. Haradinaj appropriately. It is noted that Specialist Counsel with conduct of the case following appointment has not been provided with any documentation other than that publicly available.
11. The fact that a plea has not been entered at this stage is of little relevance however, given that Mr. Haradinaj enjoys the presumption of innocence in any event.

12. As of the review target date of 27 December 2020, Mr. Haradinaj will already have been in detention for a total of 94 days (or 3 months and 3 days), notably, much of that period was prior to any indictment being confirmed, and remains prior to any evidence being disclosed that would substantiate that indictment.
13. At the hearing of 18 December 2020, Specialist Counsel made an application to extend the deadline for the filing of submissions on detention by five (5) days. This was rejected by the Pre-Trial Judge. Subsequently, Specialist Counsel proposed a deadline of 21 December 2020; equating to one (1) additional working day. It is notable that prior to the hearing the Specialist Prosecutor was consulted and raised no objection to an extension of time taking into account the change of representation.
14. The application was made on the basis that having only been appointed less than one hour before the first appearance hearing and having received no documentation from previous Specialist Counsel, there was not enough time to take Mr. Haradinaj's instructions and prepare the necessary application. It was noted at the hearing that Specialist Counsel had spent no more than twenty (20) minutes with Mr. Haradinaj prior to the hearing.
15. Further, it was noted that regardless of whether previous Counsel had filed submissions or otherwise, Mr. Haradinaj ought not to be prejudiced by any failure.

16. It is respectfully submitted that an extension of 24 hours was reasonable in the circumstances and the only prejudice was to Mr. Haradinaj.

17. The Court refused that application.

## SUBMISSIONS

18. Mr. Haradinaj makes submissions on three (3) points:

- a. The application to extend the time period for the filing of submissions on detention be extended;
- b. Notwithstanding and without prejudice to the above, that Mr. Haradinaj can be appropriately made subject to release with or without conditions;  
and
- c. The review of detention should in any event be dealt with by way of Oral Hearing so as to allow full submissions to be made, and thus ensure that the review of detention is in accordance with Articles 5(3) and 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").

*That the deadline ought to be extended*

19. Prior to 17 December 2020, Mr. Haradinaj was represented by Mr. Bastiaan Martens.

20. On 17 December 2020, Mr. Haradinaj indicated that he wish to change his Counsel and appoint Mr. Cadman.
21. Mr. Cadman completed the necessary documentation for appointment during the course of the day on 17 December 2020. Due to the necessity to travel to the Netherlands for the hearing, and not wishing to inconvenience the court by seeking an adjournment, Mr. Cadman attended court on the basis that he would be appointed in due course. It is quite clear that he would not be able to meet Mr. Haradinaj to take instructions nor receive any court filings until he was formally appointed. It was noted that the Pre-Trial Judge had to approve the appointment and this was only confirmed at 10.14 CET on 18 December 2020.
22. As noted, Mr. Cadman had opportunity to meet Mr. Haradinaj on the morning of 18 December 2020, however, that meeting was brief in the extreme in that it took place just prior to the hearing of 18 December 2020.
23. As a consequence, Mr. Cadman has not had opportunity to take appropriate instructions from Mr. Haradinaj in terms of an application for release.
24. Further, there have been a matter of hours in between that hearing and the deadline for the filing of submissions concerning detention.
25. It is respectfully submitted that this is inadequate, and contrary to the principles of fairness.

26. It is accepted that it was the responsibility of previous Counsel up to the 17 December to file any relevant submissions, however, regardless of that obligation, it is respectfully submitted that Mr. Haradinaj ought not to be prejudiced by the failure to do so.

27. Further, having regard to the fact that the decision on detention is to be made by 27 December 2020, the previously requested extension to the time limit for the filing of submissions to Monday 21 December 2020 would not, and does not delay matters, nor does it prejudice either Mr. Haradinaj's co-defendant, or the Court.

28. Accordingly, that application is rehearsed, and the Court is respectfully requested to grant an extension so that supplementary submissions can be made.

*That Mr. Haradinaj can be released*

29. It is submitted that Mr. Haradinaj can be appropriately released from detention, either without conditions, or subject to those conditions that the Court deems appropriate to impose.

30. Per Article 41(6)(b), an individual can only be detained in custody where there are articulable grounds to believe that:

- a. There is a risk of flight;



- b. 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
- c. 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.

31. Further, Article 41(12) of the Law makes provision for a number of measures to be imposed so as to *“ensure the presence of the accused during proceedings, to prevent re-offending or to ensure successful conduct of criminal proceedings”*.

32. It is submitted that in the instant case, conditions allay any concerns that the Court may have.

33. It is noted in the first instance that Mr. Haradinaj is wholly unaware of the basis of the Prosecution objections, if any, as the Defence have not had sight of any submissions.

34. Mr. Haradinaj will any event say as follows:

- a. In terms of any objection on the basis that he is a flight risk, it is respectfully submitted that this is wholly unsubstantiated and without foundation, there being nothing to suggest the same;

Further, Mr. Haradinaj has resides in Kosovo along with his family and has not sought to disguise or conceal his whereabouts; there is nothing to suggest that this position would change.

In any event, a condition that he surrender his passport and/or a condition that he reside at a given address, would allay or assuage those concerns.

- b. In terms of any suggestion that Mr. Haradinaj would obstruct the progress of proceedings, again, it is respectfully submitted that such a suggestion is again unsubstantiated and without foundation.

It is wholly unclear upon what basis Mr. Haradinaj would seek to obstruct the progress of proceedings, or indeed *how* this could happen even if it were his intention, taking into account the nature of the offences contained within the indictment, and the statement of facts adduced, noting that the evidential basis is yet to be disclosed.

On the date of the 'first press conference', that being 7 September, the Single Judge authorised the seizure of the documents received by the

KLA. Those documents were seized, and thus the order of Court respected.

Further, the second tranche of documents disclosed on 16 September, were the subject of a further seizure order dated 17 September; again, that order was respected.

Still further, on 22 September, a third tranche of documents were disclosed, those being seized by the SPO the same day.

Accordingly, the documentation noted within the indictment has been seized.

The Defendant did not facilitate the disclosure of these documents, nor is it suggested that he sought to obtain them by any means, nor is it suggested that any threats were used to obtain those documents.

The reality of the matter is that documents were 'leaked' from the office of the SPO. This is an issue for the SPO and their security protocols rather than the Defendant, and accordingly, there is no basis upon which it can be suggested that the Defendant would seek to obstruct the investigation.

- c. In terms of the third limb of Article 41(6)(b), again, it is respectfully submitted that any objection cannot be substantiated.

Mr. Haradinaj is hitherto of good character, and thus there are no past conduct issues to take into account, further, the offence(s) for which he has been indicted cannot be used as the sole basis to detain in custody.

Mr. Haradinaj has strong family and community ties to his hometown and takes his responsibilities within both his family and community seriously, accordingly, it is submitted that there are no 'personal circumstances' that would cause concern.

Further, there is no suggestion, or proper basis, that Mr. Haradinaj would go on to commit further offences.

35. In all the circumstances, Mr. Haradinaj can be appropriately released, and should the Court deem appropriate, released with appropriate conditions for example:

- a. That a passport is surrendered and he does not leave Kosovo subject to listed Court appearances;
- b. That he reside at his given address and does not seek to change that address without leave of the Court;
- c. That any electronic device used for communication is registered with the SPO;
- d. That he report to a nominated local police station at a frequency to be determined;

- e. That he refrain from contact with his co-defendant, subject to inadvertent contact during court proceedings; and
- f. That he undertakes to not communicate with media, or seek to publish any information concerning his, or any other matter currently before the Court.

36. Such conditions secure his whereabouts, and prevent communication with relevant individuals, and further, prevent Mr. Haradinaj from disseminating any information or material that might be deemed to prejudice any ongoing or future matters.

*That there ought to be an Oral Hearing*

37. Counsel for Mr. Haradinaj's co-defendant has, on 17 December 2020, filed an application that the review of detention be undertaken by way of oral hearing, pursuant to rule 75(3) of the Rules so as to enable written submissions to be supplemented in oral argument.

38. Mr. Haradinaj joins that application, and reaffirms the same.

39. The issue concerns the ongoing deprivation of Mr. Haradinaj's liberty, and therefore a significant and absolute restriction on his fundamental rights and freedoms.

40. As noted, the burden lies with the SPO and thereafter, the Court to justify ongoing detention, and yet Mr. Haradinaj has not had sight of the basis upon

which the SPO may seek to continue that detention, accordingly, he is not in a position to respond to the specifics of any submissions made.

41. Mr. Haradinaj has the right to be provided with all essential information as to ensure that there is an effective review of his detention, and therefore, ensure that such a review is compatible with Article 5 of the ECHR.

42. In the absence of that information being provided, and in the absence of Mr. Haradinaj being afforded the opportunity to respond to that which may be raised by the SPO, any review will not be 'effective' within the meaning of the ECHR, and accordingly, will not be compliant with the procedural safeguards.

43. An oral hearing will afford Mr. Haradinaj with the opportunity to not only expand on the above submissions, but will allow him the opportunity to respond to the written and oral submissions of the SPO (and indeed will allow the SPO to respond to the submissions of Mr. Haradinaj), and thereafter, it will allow the parties to respond to any issues raised by the pre-Trial Judge.

44. As per *Nikolova v. Bulgaria* (2001) 31 EHRR 64 [Grand Chamber], where an individual's detention falls within the ambit of Article 5(1), a hearing is required.

45. It is of note, that where there is an allegation of a risk that an accused will hinder the proper conduct of proceedings, as appears to be the position in the instant case, such an allegation must be supported by factual evidence, as per *Becciev v. Moldova* (App. 9190/03), at this stage, no such evidence has been provided, similarly in terms of the risk of pressure being exerted upon witnesses, this

must be linked to specific facts as per *Merabishvili v. Georgia* (application no. 72508/13) [2017] ECHR 1070.

46. Without an oral hearing, it is respectfully submitted that Mr. Haradinaj will have been prevented from being 'heard', as he will be prevented from responding to that which may be adduced by the SPO.

47. Accordingly, it is respectfully submitted that in the absence of an oral hearing, the above requirements cannot be satisfied, and thus there would be a violations of Article 5(3) of the Convention.

48. The proceedings must always ensure the principle of 'equality of arms' between the parties.

49. This principle is not ensured if Mr. Haradinaj is denied access to those documents in the investigations file which are essential in order to effectively challenge the lawfulness of his detention, as per *Ovsjannikov v. Estonia* [2014] ECHR 187, *Fodale v. Italy* [2009] ECHR 1684, and *Korneykova v. Ukraine* [2016] ECHR 303. It is respectfully submitted that without an oral hearing, Mr. Haradinaj is being denied access on the basis that he is unaware of the basis of any and all objections that might be adduced by the SPO.

50. Finally, the right to adversarial proceedings means in principle that parties have the right to be informed of, address, and challenge where appropriate, any document or observation presented before the court for the purposes of influencing the decision of the Court, as per *Venet v. Belgium* application no.

27703/16, where an applicant was unable to reply to the oral submissions of the advocate-general.

51. The instant case is no different in that Mr. Haradinaj, without an oral hearing, is precluded from responding to that which may be adduced by the SPO.
52. Further, it will assist in the just and effective determination of the review of detention.
53. It is respectfully submitted that the procedure adopted by the Specialist Chambers must comply not only with the national legal framework, but also the Constitutional protections that include the ECHR. In this regard, Articles 5(3) and (4) of the ECHR provide a number of procedural safeguards and it is the duty of the judge to ensure that the procedure adopted is strictly compliant with those obligations. In particular the right to be brought promptly before a judge and to be entitled to a trial within a reasonable time or release pending trial.
54. Accordingly, it is respectfully submitted that failure to grant an oral hearing in the instant case would constitute a violation of Article 5(3) and (4) of the ECHR.

Word Count: 3060 words



**Toby Cadman**

**Specialist Counsel**



---

**CORRECTION**

---

1. A typographical error in paragraph 53 has been corrected in the last sentence.