



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA 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: 24 December 2020

Language: English

Classification: **Public**

Decision on Review of Detention of Hysni Gucati

Specialist Prosecutor
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THE PRE-TRIAL JUDGE,¹ pursuant to Article 41(10) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 22 September 2020, the Specialist Prosecutor's Office ("SPO") requested the arrest of Hysni Gucati ("Mr Gucati") and Nasim Haradinaj ("Mr Haradinaj") for alleged dissemination of confidential information relating to the work of the Special Investigative Task Force ("SITF") and/or the SPO at three press conferences held on 7, 16, and 22 September 2020 (referred to, respectively, as "First Press Conference", "Second Press Conference", and "Third Press Conference") and sought their transfer to the detention facilities of the Specialist Chambers ("SC").²
2. On 24 September 2020, the Single Judge issued arrest warrants for Mr Gucati and Mr Haradinaj for attempted intimidation of witnesses, retaliation and violation of secrecy of proceedings, and ordered their transfer to the SC detention facilities ("Decision on Arrest and Transfer").³
3. On 25 September 2020, Mr Gucati was arrested⁴ and transferred to the detention facilities of the SC in The Hague, the Netherlands.⁵

¹ KSC-BC-2020-07, F00061, President, *Decision Assigning a Pre-Trial Judge*, 29 October 2020, public. Prior to this decision, the President had assigned the same Judge as Single Judge; see KSC-BC-2020-07, F00003, President, *Decision Assigning a Single Judge Pursuant to Article 33(2) of the Law*, 29 May 2018, public.

² KSC-BC-2020-07, F00009/RED, Specialist Prosecutor, *Urgent Request for Arrest Warrants and Related Orders*, filing KSC-BC-2020-07/F0009 dated 22 September 2020, 22 September 2020, public, paras 1, 35(a), with Annexes 1-2, public.

³ KSC-BC-2020-07, F00012, Single Judge, *Decision on Request for Arrest Warrants and Transfer Orders* ("Decision on Arrest and Transfer"), 24 September 2020, public, para. 36, with Annexes 1-4, public.

⁴ KSC-BC-2020-07, F00012/A01/RED, Single Judge, *Public Redacted Version of Arrest Warrant for Hysni Gucati* ("Arrest Warrant"), 24 September 2020, public; F00015, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 25 September 2020, public.

⁵ 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; F00018, Registrar, *Notification of* KSC-BC-2020-07

4. On 29 September 2020, Mr Gucati filed an “Application for Bail”.⁶ On 27 October 2020, the Single Judge rejected this application (“First Detention Decision”).⁷
5. On 30 October 2020, the SPO submitted for confirmation a strictly confidential and *ex parte* indictment (“Indictment”) against Mr Gucati and Mr Haradinaj, together with evidentiary material supporting the facts underpinning the charges and a detailed outline demonstrating the relevance of each item of evidentiary material to each allegation.⁸
6. On 9 December 2020, the Court of Appeals Panel rendered a decision denying, *inter alia*, Mr Gucati’s appeal of the First Detention Decision.⁹ That same day, the Pre-Trial Judge requested that the Parties file written submissions on Mr Gucati’s continued detention by 18 December 2020.¹⁰
7. On 11 December 2020, the Pre-Trial Judge confirmed, in part, the Indictment and ordered the SPO to submit a revised indictment, as confirmed (“Confirmed Indictment”).¹¹
8. On 14 December 2020, the SPO submitted the Confirmed Indictment,¹² with redactions as authorised by the Pre-Trial Judge.¹³ The Confirmed Indictment

the Reception of Hysni Gucati in the Detention Facilities of the Specialist Chambers, 25 September 2020, public, with Annex 1, confidential.

⁶ KSC-BC-2020-07, F00038, Defence, *Application for Bail*, 29 September 2020, public.

⁷ KSC-BC-2020-07, F00059, Single Judge, *Decision on Application for Bail* (“First Detention Decision”), 27 October 2020, public.

⁸ 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 and 2, strictly confidential and *ex parte*.

⁹ KSC-BC-2020-07/IA001, F00005, Court of Appeals Panel, *Decision on Hysni Gucati’s Appeal on Matters Related to the Arrest and Detention* (“Decision on Appeal of First Detention Decision”), 9 December 2020, public, para. 78.

¹⁰ KSC-BC-2020-07, F00073, Pre-Trial Judge, *Order for Submissions on the Review of Detention*, 9 December 2020, public.

¹¹ KSC-BC-2020-07, F00074/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on the Confirmation of the Indictment* (“Confirmation Decision”), 11 December 2020, public.

¹² KSC-BC-2020-07, F00075, Specialist Prosecutor, *Submission of Confirmed Indictment*, 14 December 2020, public, with Annex 1 (“Confirmed Indictment”), strictly confidential, and Annex 2, (“Public Redacted Confirmed Indictment”), public.

¹³ Confirmation Decision, para. 155(c).

charges Mr Gucati and Mr Haradinaj with offences under Articles 387, 388, 392 and 401 of the 2019 Kosovo Criminal Code (“KCC”), by virtue of Article 15(2) of the Law.¹⁴

9. On 17 December 2020, Mr Gucati provided his “Submissions on the Review of Detention by 27th December 2020”.¹⁵

10. On 18 December 2020, the “Prosecution consolidated submissions on review of detention” was filed by the SPO.¹⁶

II. SUBMISSIONS

11. Mr Gucati submits that his detention should be terminated and that he should be released with or without conditions.¹⁷ Mr Gucati challenges the existence of the risks in relation to the obstruction of the proceedings or the commission of further crimes.¹⁸ In the alternative, Mr Gucati submits that, in addition to any conditions hitherto proposed (“Proposed Conditions”),¹⁹ any risk that he may obstruct the progress of proceedings and/or commit further crimes can be adequately met by the following additional conditions: (i) a prohibition on entering Pristina; (ii) use of a single electronic device for communications only, the details of which are to be provided to the SPO; and/or (iii) residing outside Kosovo (“Additional Conditions”).²⁰

¹⁴ Public Redacted Confirmed Indictment, para. 48.

¹⁵ KSC-BC-2020-07, F00087/RED, Defence, *Submissions on the Review of Detention by 27th December* (“Defence Submission”), 17 December 2020, public.

¹⁶ KSC-BC-2020-07, F00088, Specialist Prosecutor, *Prosecution Consolidated Submissions on Review of Detention* (“SPO Submission”), 18 December 2020, public.

¹⁷ Defence Submission, paras 2, 30.

¹⁸ Defence Submission, paras 16-26.

¹⁹ Defence Submission, para. 27; Previously proposed conditions included bail of EUR 5,000, surrender of passport, living and sleeping at his home address, daily reporting to the European Union Rule of Law Mission in Kosovo police headquarters, restriction of contacts, and a prohibition on going to the offices of the Kosovo Liberation Army War Veterans Association, See First Detention Decision, para. 6.

²⁰ Defence Submission, paras 27-29.

Mr Gucati also requests an oral hearing to supplement his written submissions and respond to the SPO's submissions.²¹

12. The SPO submits that continued detention remains necessary as there is no change in circumstance distracting from the established reasons for detention.²² The SPO further submits that the Article 41(6)(b) risks have increased since the last ruling on detention.²³ The SPO points to the fact that there is now the additional finding of grounded suspicion that Mr Gucati committed the offence of obstructing official persons in performing their official duties under Article 401 of the KCC.²⁴ The SPO also submits that the Confirmed Indictment alleges conduct beyond that addressed in the Arrest Warrant and the First Detention Decision thereby elucidating the seriousness of the charges and making more concrete the possibility of conviction.²⁵ The SPO contends that such ever increasing risks can only be effectively managed from the SC's detention facilities.²⁶

III. APPLICABLE LAW

13. Article 41(6) of the Law provides that the SC shall only order the arrest and detention of a person when there is a grounded suspicion that the person has committed a crime within the jurisdiction of the SC; and there are articulable grounds to believe that the person (i) is a flight risk; (ii) will destroy, hide, change or forge evidence or specific circumstances indicate that the person will obstruct the progress of criminal proceedings; or (iii) will repeat the criminal offence, complete an attempted crime or commit a crime which he or she has threatened to commit the criminal offences.

²¹ Defence Submission, paras 31-34.

²² SPO Submission, para. 1.

²³ SPO Submission, para. 1.

²⁴ SPO Submission, para. 3.

²⁵ SPO Submission, para. 4.

²⁶ SPO Submission, paras 4-5.

14. Article 41(10) of the Law provides that, until judgement is final or until release, upon the expiry of two (2) months from the last ruling on detention on remand, the Pre-Trial Judge or Panel seized with the case shall examine whether reasons for detention on remand still exist and render a ruling by which detention on remand is extended or terminated.

15. Article 41(12) of the Law provides that, in addition to detention on remand, the following measures may be ordered to ensure the presence of the accused, to prevent reoffending or ensure successful conduct of criminal proceedings: summons, arrest, bail, house detention, promise not to leave residence, prohibition on approaching specific places or persons, attendance at police station or other venue, and diversion.

16. Pursuant to Rule 57(2) of the Rules, the Pre-Trial Judge shall review a decision on detention on remand upon expiry of two (2) months from the last ruling on detention.

IV. DISCUSSION

17. Article 41(10) of the Law obliges the Pre-Trial Judge to examine whether reasons for detention on remand still exist, including the grounds set out in Article 41(6) of the Law, namely whether (i) there is grounded suspicion that the person committed the crime(s) and (ii) there are articulable grounds to believe that any of the requirements set out in Article 41(6)(b) of the Law has been fulfilled. The following decision addresses the requirements of Article 41(6) of the Law within the framework of the submissions made by the Parties.

A. GROUNDED SUSPICION

18. Under the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123, the evidentiary threshold of “grounded suspicion” is defined as “knowledge of information which would satisfy an objective observer that a criminal offence has

occurred, is occurring or there is a substantial likelihood that one will occur and the person concerned is more likely than not to have committed the offence".²⁷

19. The Pre-Trial Judge notes, at the outset, Mr Gucati's submission that he is unable to assess the strength of the evidentiary material in support of the Confirmed Indictment because such material has yet to be disclosed and the Confirmed Indictment on its own does not provide a basis for such an assessment.²⁸

20. As noted by Mr Gucati, the strength of the supporting material has not been tested. The Pre-Trial Judge notes, however, that the process of evaluating the evidence in support of the SPO's allegations, as set out in the Confirmed Indictment, starts with the disclosure of evidence pursuant to Rule 102(1)(a) of the Rules and will continue during the trial phase of the proceedings when Mr Gucati's guilt or innocence with respect to the charged offences is being determined. For the purposes of determining whether detention is appropriate, it is sufficient that, at this stage of the proceedings, Mr Gucati has the material provided in support of the Arrest Warrant.

21. The Pre-Trial Judge recalls that, when confirming the Indictment, he found that there is a well-grounded suspicion that Mr Guacti committed offences within the jurisdiction of the SC, namely: (i) obstructing official persons in performing official duties by serious threat; (ii) obstructing official persons in performing official duties by common action of a group; (iii) intimidation during criminal proceedings; (iv) retaliation; (v) violating the secrecy of proceedings through unauthorised revelation of protected information; and (vi) violating the secrecy of proceedings through

²⁷ Decision on Arrest and Transfer, para. 18. See also Article 5(1)(c) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms European, as interpreted by the European Court of Human Rights, *Fox, Campbell and Hartley v. United Kingdom*, no. 12244/86; 12245/86; 12383/86, Judgment, 30 August 1990, vol. 182, Series A, p. 16, para. 32; *K.-F. v. Germany*, no. 144/1996/765/962, Judgment, 27 November 1997, Reports 1997-VII, para. 57; *Labita v. Italy*, no. 26772/95, Judgment, 6 April 2000, para. 155; *Berkday v. Turkey*, no. 22493/93, Judgment, 1 March 2001, para. 199; *O'Hara v. United Kingdom*, no. 37555/97, Judgment, 16 October 2001, para. 34.

²⁸ Defence Submission, paras 3-6.

unauthorised revelation of the identity and/or personal data of protected persons in violation of Articles 387, 388, 392 and 401 of the KCC, by virtue of Article 15(2) of the Law.²⁹

22. As to Mr Gucati's assertion that in actual fact no threats were uttered nor were there any actual harm or force used,³⁰ the Pre-Trial Judge notes that such arguments were raised and dismissed in the First Detention Decision³¹ and therefore will only be assessed, below, to the extent that these arguments relate to the assessment of the Article 41(6)(b) risks.

23. The Pre-Trial Judge accordingly finds that Article 41(6)(a) of the Law continues to be met.

B. NECESSITY OF DETENTION

24. Once the threshold in Article 41(6)(a) of the Law is met, the grounds that allow the Pre-Trial Judge to deprive a person of his or her liberty must be articulable.³² In this regard, it is recalled that determining the existence of either risks under Article 41(6)(b)(i)-(iii) of the Law, so as to make the detention of the person necessary, is a matter of assessing the possibility, as opposed to the unavailability that such risks materialise.³³

²⁹ Confirmation Decision, paras 103, 109, 113, 117, 121, 125.

³⁰ Defence Submission, para. 24;

³¹ First Detention Decision, para. 24.

³² Article 19.1.9 of the Kosovo Criminal Procedure Code.

³³ Decision on Appeal of First Detention Decision, para. 67; Decision on Arrest and Transfer, para. 19. Similarly, ICC, *Prosecutor v. Bemba Gombo et al.*, ICC-01/05-01/13-558, Appeals Chamber, [Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled "Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba'"](#), 11 July 2014, para. 107.

1. Risk of Flight

25. With regard to flight risk, Mr Gucati notes that: (i) he has been cooperative throughout his arrest, transfer, and detention; (ii) has strong family and community ties in his hometown; and (iii) has responsibilities towards his elderly and unwell mother.³⁴ The SPO argues that the existing risk of flight has increased since the First Detention Decision and will continue to increase as the proceedings progress.³⁵

26. While the Pre-Trial Judge previously found that the Proposed Conditions could address the risk of flight, the Pre-Trial Judge considers it necessary to reassess this risk according to circumstances in which Mr Gucati currently finds himself. In this regard, the Pre-Trial Judge notes that, since the First Detention Decision, the SPO has filed the Confirmed Indictment. This factor supports the Pre-Trial Judge's prior assessment that there is a risk that Mr Gucati may flee. This risk will be assessed against the proposed conditions in section C, below.

27. The Pre-Trial Judge accordingly finds that there remains a risk that Mr Gucati will flee.

2. Obstruction of the Progress of Criminal Proceedings

28. As concerns the risk that Mr Gucati will obstruct proceedings by disseminating confidential and non-public information, Mr Gucati asserts that: (i) he did not name any individuals or publish any files,³⁶ other than the names of two public officials;³⁷ (ii) it is unclear the extent to which the information concerned was not already public;³⁸ (iii) there was no breach of the Single Judge's

³⁴ See Defence Submission, paras 25-26.

³⁵ SPO Submission, paras 3-4.

³⁶ Defence Submission, paras 17, 19, 21.

³⁷ Defence Submission, para. 23.

³⁸ Defence Submission, para. 23.

orders;³⁹ and (iv) there is no suggestion of any actual force, threat, or harm as a result of Mr Gucati's actions.⁴⁰ The SPO argues that the existing risk of obstruction has increased since the First Detention Decision and will continue to increase as the proceedings progress.⁴¹

29. At the outset, the Pre-Trial Judge recalls his finding that Mr Gucati participated in the unauthorised dissemination of confidential and non-public information.⁴²

30. Regarding the names of individuals, at the First Press Conference, Mr Gucati handed the floor to his deputy, Mr Haradinaj, who, in the presence of Mr Gucati, announced the names and personal information of potential witnesses.⁴³ At the Second Press Conference, Mr Gucati named two persons who had cooperated with the SITF.⁴⁴ At the Third Press Conference, with respect to the names of individuals, Mr Gucati explicitly acknowledged that he had not been authorised to reveal any names.⁴⁵ Mr Gucati then handed the floor to his deputy, Mr Haradinaj, who in his presence, named potential accused persons, a potential witness by name, and other persons and locations from the relevant documents.⁴⁶ In his Submissions, Mr Gucati misrepresents the factual record. He released the names of individuals whose cooperation with the SITF and/or the SPO, regardless of whether they held public office or not, was considered confidential and non-public information.⁴⁷

³⁹ Defence Submission, paras 18, 20, 22.

⁴⁰ Defence Submission, para. 24.

⁴¹ SPO Submission, para. 4.

⁴² Decision on Arrest and Transfer, para. 29.

⁴³ KSC-BC-2020-07, F0009/RED/A01, Specialist Prosecutor, *Annex 1 to Request for Arrest Warrants and Related Orders* ("Annex 1 to Request for Arrest Warrants"), 1 October 2020, public, pp. 3-4, 6.

⁴⁴ Annex 1 to Request for Arrest Warrants, pp. 8, 11.

⁴⁵ Annex 1 to Request for Arrest Warrants, pp. 13-14.

⁴⁶ Annex 1 to Request for Arrest Warrants, pp. 14-15.

⁴⁷ KSC-BC-2020-07, F00005, Single Judge, *Urgent Decision Authorising a Seizure* ("First Order"), 7 September 2020, public, paras 11-13; KSC-BC-2020-07, F00007, Single Judge, *Decision Authorising a Seizure* ("Second Order"), 17 September 2020, public, paras 11-13.

31. As regards the publication of the confidential and non-public information, Mr Gucati encouraged the media to publish confidential information by stating “you have the material in front of you, just as you made public the names of fake veterans, take the same courage”.⁴⁸ Mr Gucati was also present when his deputy, Mr Haradinaj, stated that the Kosovo Liberation Army War Veterans Association (“KLA WVA”) would disseminate the confidential or non-public information⁴⁹ or stated that such documents were available for the taking.⁵⁰

32. As to the lack of clarity regarding the confidential nature of information in question, Mr Gucati acknowledged at the time the confidential and non-public nature of the information he and Mr Haradinaj were disclosing and the lack of authorisation to for such disclosure.⁵¹ Furthermore, the Single Judge’s orders, which were addressed and/or served upon⁵² Mr Gucati and the KLA WVA, explicitly recognised the confidential and non-public nature of the information in question.⁵³

33. With regard to a breach of the Single Judge’s orders, the Pre-Trial Judge notes that the dissemination of confidential and non-public information persisted even after Mr Gucati was ordered on two occasions to refrain from doing so.⁵⁴ In fact, after the issuance of these orders, Mr Gucati publicly stated that he and the KLA WVA would continue to publish all documents they receive⁵⁵ and encouraged members of the media to do the same.⁵⁶ Contrary to Mr Gucati’s assertions, the

⁴⁸ Annex 1 to Request for Arrest Warrants, p. 24.

⁴⁹ Annex 1 to Request for Arrest Warrants, pp. 2, 4-6.

⁵⁰ Annex 1 to Request for Arrest Warrants, p. 10.

⁵¹ Annex 1 to Request for Arrest Warrants, pp. 13-14. *See also*, Annex 1 to Request for Arrest Warrants, pp. 5, 10.

⁵² KSC-BC-2020-07, F00008, Specialist Prosecutor, *Prosecution report pursuant to decision KSC-BC-2018-01/F00121*, 21 September 2020, confidential, with Annex 1, confidential; KSC-BC-2020-07, F00028, Specialist Prosecutor, *Prosecution Report Pursuant to Decision KSC-BC-2018-01-F00123*, 29 September 2020, confidential, paras 2, 5, with Annex 1, confidential.

⁵³ First Order, paras 11-13, 21-22; Second Order, paras 11-13, 21-22.

⁵⁴ First Order, para. 22; Second Order, para. 22.

⁵⁵ Annex 1 to Request for Arrest Warrants, p. 14.

⁵⁶ Annex 1 to Request for Arrest Warrants, p. 24.

Single Judge's orders, did not only relate to the seizure of particular documents, but also acknowledged the sensitive nature of information from SITE/SPO investigations and warned that such documents, and/or their contents, should not be disseminated.⁵⁷

34. Furthermore, with respect to the alleged lack of use of actual force, threats, or harm the Pre-Trial Judge notes that, at the First Press Conference, Mr Haradinaj, in Mr Gucati's presence, acknowledged the harm and risks to potential witnesses posed by unauthorised dissemination of confidential and non-public information.⁵⁸ More specifically, Mr Haradinaj queried, in Mr Gucati's presence, "how the safety of the witnesses may be guaranteed when their names may be read by anyone" and further stated that he did not "care about the witnesses of the Hague court" and "would publish the data of all the witnesses of this court".⁵⁹ The Pre-Trial Judge considers that such queries, made during a press conference, amount to veiled threats to the safety of potential witnesses.

35. The Pre-Trial Judge recalls his finding that, if released, Mr Gucati would be in a position to receive, without oversight, confidential and non-public information.⁶⁰ As head of the KLA WVA, Mr Gucati would also have the means to disseminate such information by communicating freely with the media or his network of KLA veterans or publishing the material himself.⁶¹ Any personal assurances to refrain from such conduct cannot be relied upon in light of his public statements vowing to continue to disclose confidential and non-public information⁶² and his failure to abide by the orders of the Single Judge.⁶³

⁵⁷ First Order, paras 21, 22, 25; Second Order, paras 21, 22, 25.

⁵⁸ Annex 1 to Request for Arrest Warrants, pp. 5-6.

⁵⁹ Annex 1 to Request for Arrest Warrants, pp. 6.

⁶⁰ First Detention Decision, para. 17.

⁶¹ First Detention Decision, para. 17.

⁶² First Detention Decision, para. 17; Annex 1 to Request for Arrest Warrants, p. 13.

⁶³ First Detention Decision, para. 17; First Order, paras 11-13, 21-22; Second Order, paras 11-13, 21-22.

36. The Pre-Trial Judge accordingly finds that there remains a risk that Mr Gucati may obstruct the progress of proceedings.

3. Risk of Committing Further Offences

37. As regards the risk that Mr Gucati may commit further offences, for the reasons discussed above with regard to the obstruction of proceedings, the Pre-Trial Judge finds that the risk that Mr Gucati may commit further offences by threatening, intimidating, or putting at risk (potential) witnesses through the disclosure or dissemination of confidential and non-public information remains.

4. Conclusion

38. The Pre-Trial Judge concludes that there remains a risk that Mr Gucati will flee, obstruct the progress of proceedings, or commit further offences. The Pre-Trial Judge will assess below whether these risks can be adequately addressed by the Proposed Conditions and/or the Additional Conditions.

C. CONDITIONAL RELEASE

39. Mr Gucati submits that any risk that he may obstruct the progress of proceedings and/or commit further crimes can be adequately met by the Proposed Conditions, broadened by the Additional Conditions.⁶⁴ Mr Gucati asserts that living outside Kosovo and limiting his means to communicate electronically would mean that he would not be in a position to receive or disseminate confidential or non-public information and would prevent any direct or indirect contact with witnesses.⁶⁵

⁶⁴ Defence Submission, paras 15, 27-30.

⁶⁵ Defence Submission, para. 28.

40. The Pre-Trial Judge recalls that, with respect to flight risk, it was found that Mr Gucati's strong family and community ties in his hometown was a mitigating factor and that the Proposed Conditions could adequately address this risk.⁶⁶ With respect to Mr Gucati's current submissions, the Pre-Trial Judge notes favourably the following additional mitigating factors: (i) Mr Gucati's cooperation throughout his arrest, transfer, and detention⁶⁷ and (ii) his responsibilities towards his elderly and unwell mother.⁶⁸

41. The Pre-Trial Judge accordingly finds that the risk of flight continues to be adequately addressed by the Proposed Conditions.

42. With respect to the risk of obstructing the progress of proceedings or the commission of further offences, the Pre-Trial Judge considers that living outside of Kosovo does not adequately address the risk that Mr Gucati may obstruct the progress of proceedings. Mr Gucati could receive electronically, or through the mail, confidential or non-public information and could disseminate such information through the same means, whether living inside or outside of Kosovo. Furthermore, limiting access to a single electronic device cannot be monitored or enforced, even when the details of such a device are provided to the SPO.

43. The Pre-Trial Judge considers that the risks of obstructing proceedings or committing further offences can only be effectively managed from detention. This is particularly so in light of Mr Gucati's public statements vowing to continue to disclose confidential and non-public information⁶⁹ and his failure to abide by the orders of the Single Judge.⁷⁰ In these circumstances, the Pre-Trial Judge finds that

⁶⁶ First Detention Decision, paras 14-15.

⁶⁷ KSC-BC-2020-07, F00031/RED, Registrar, *Public Redacted Version of 'Report on the Arrest and Transfer of Hysni Gucati to the Detention Facilities'*, Filing KSC-BC-2020-07/F00031 dated 30 September 2020, 14 October 2020, public, para. 8.

⁶⁸ Defence Submission, para. 26. The Pre-Trial Judge notes that Mr Gucati does not request temporary release on the basis of compelling humanitarian grounds pursuant to Rule 56(3) of the Rules.

⁶⁹ First Detention Decision, para. 17; Annex 1 to Request for Arrest Warrants, p. 13.

⁷⁰ First Detention Decision, para. 17; First Order, paras 11-13, 21-22; Second Order, paras 11-13, 21-22.

conditional release would be insufficient to overcome the Article 41(6)(b) risks identified above.

44. The Pre-Trial Judge accordingly finds the Proposed Conditions and Additional Conditions insufficiently mitigate the risks of obstructing the progress of proceeding or committing further offences.

D. PROPORTIONALITY OF DETENTION

45. Mr Gucati submits that the longer a person remains in pre-trial detention the higher the burden on the SC to justify continued detention.⁷¹

46. As to length of pre-trial detention, the Pre-Trial Judge notes in this regard that the Court of Appeals Panel found that Mr Gucati's pre-trial detention of more than two months, even in the absence of a confirmed indictment against him, remained proportional at this early stage of the proceedings.⁷² While at the time of writing this decision Mr Gucati has been in detention for 3 months, there is now a confirmed indictment against him. Against this backdrop, and the fact that the risks of obstruction and the commission of further offences remain and cannot be mitigated by conditions, the Pre-Trial Judge finds that Mr Gucati's detention is necessary and proportional in the current circumstances.

E. REQUEST FOR AN ORAL HEARING

47. Mr Gucati requests an oral hearing to supplement his written submissions and reply to the SPO's submissions.⁷³

48. The Pre-Trial Judge recalls his decision, rendered on 18 December 2020, denying Mr Gucati's request for an oral hearing in relation to the current two-

⁷¹ Defence Submission, paras 7-10.

⁷² Decision on Appeal of First Detention Decision, para. 73.

⁷³ Defence Submission, paras 31-34.

month detention review process.⁷⁴ Mr Gucati has not presented any new arguments warranting the reconsideration of the decision concerned.

49. The Pre-Trial Judge emphasises that, while the request for an oral hearing was denied, Mr Gucati is not precluded from submitting separate challenges on detention or applications for interim or conditional release under Article 41(2) and (12) of the Law and Rules 56(3) and 57(2) of the Rules in the intervening time period between the requisite two-month reviews of detention.

50. Finally, in order to facilitate the next two-month review of detention, the Pre-Trial Judge orders Mr Gucati to file submissions on whether reasons for his continued detention still exist by Monday, 1 February 2021. Responses and replies to this submission shall follow the timeline set out in Rule 76 of the Rules.

V. DISPOSITION

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

- a. **ORDERS** Mr Gucati's continued detention; and
- b. **ORDERS** Mr Gucati to file submissions on the next review of detention by Monday, 1 February 2021.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Thursday, 24 December 2020

At The Hague, the Netherlands

⁷⁴ KSC-BC-2020-07, F00089, Pre-Trial Judge, *Order Setting the Date for the Plea Hearing and the First Status Conference and on Related Matters*, 18 December 2020, public, paras 3, 16-17.