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 Nasim Haradinaj
Date:	4 January 2021
Language:	English
Classification:	**Public**

Notice of Interlocutory Appeal against the Decision on Pre-Trial Detention on behalf of Nasim Haradinaj

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Specialist Prosecutor

Jack Smith

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

Counsel for Hysni Gucati

Jonathan Elystan Rees QC

Huw Bowden

INTRODUCTION

1. On 18 December 2020, Mr. Nasim Haradinaj ('the Appellant') filed submissions,[1] as directed by the Order of the Pre-Trial Judge dated 9 December 2020,[2] addressing whether the reasons for the continued detention of the Appellant still exist, or whether his detention should be terminated.

2. On 24 December 2020 the Pre-Trial Judge issued his decision following the review of the ongoing detention of the Appellant.[3]

3. As per that decision, the Pre-Trial judge refused to release the Appellant, ordering:

   a. That his detention was to continue;

   b. That his request for an oral hearing was denied; and

   c. That he was to file submissions on the next review of detention by Monday, 1 February 2021.

4. Pursuant to Article 41(10) and 45(2) of the Law on Specialist Chambers and Specialist Prosecutor's Office Law No.05/L-053 (the 'Law'), and Rule 58(1), (2), and Rule 170, of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers KSC-BD-03/Rev3/2020 (the 'Rules'), the Appellant

[1]

[2] "Order for Submissions on the Review of Detention", KSC-BC-2020-07/F00073

[3] "Decision on Review of Detention of Nasim Haradinaj" KSC-BC-2020-07/F00094

appeals against the decision of the Single Judge dated 24 December 2020 refusing to release the Appellant from detention on remand. It is respectfully submitted that the Pre-Trial Judge has failed to properly consider the matters put before him, has failed to properly direct himself as to the requirements of the legal and constitutional framework, in particular the direct application of the European Convention on the Protection of Human Rights and Fundamental Freedoms ('ECHR') under Article 22(2) of the Constitution and Article 3(2)(e) of the Law.

Right of Appeal

5. Article 41(1) of the Law provides that, until final judgment or until release, the parties may appeal against a ruling on detention on remand to a Court of Appeals Panel.

6. Article 45(2) of the Law confirms that "*interlocutory appeals shall lie as of right from decisions or orders relating to detention on remand*".

7. Further, Rule 58(1) of the Rules reaffirms "*appeals before the Court of Appeals against decisions relating to detention on remand shall lie as of right pursuant to Article 45(2) of the Law*".

8. Rule 58(2) of the Rules affirms "*Rule 170 shall apply to an appeal against a decision to detain a person on remand*".

9. Rule 170(1) provides "*Where an appeal lies as of right, the Appellant may file an appeal within ten (10) days of the impugned decision.'*

10. The Appellant is currently held in detention, and the impugned decision for the purposes of this submission, is that decision on whether detention ought to be extended or otherwise; accordingly, the Appellant can appeal that decision as of right.

BACKGROUND

11. On 22 September 2020, the Specialist Prosecutor's Office ('SPO') requested the arrest of Hysni Gucati, and the Appellant, 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, and sought their transfer to the detention facilities of the Kosovo Specialist Chambers ('KSC').[4]

12. On 24 September 2020, the Single Judge issued arrest warrants for Mr Gucati and the Appellant in connection with allegations of attempted intimidation of witnesses, retaliation, and violation of secrecy proceedings, and ordered their transfer to the KSC detention facilities.[5]

[4] KSC-BC-2020-07, F00009/RED
[5] KSC-BC-2020-07, F00012

13. The Appellant was arrested on 25 September 2020 and held in detention in Kosovo until the following day when he was transferred to the KSC detention facilities.

14. It is noted that he was not brought before a judge or other officer authorised by law as required by Article 5(3) of the ECHR upon his arrival at the KSC detention facilities.

15. On 29 September 2020, the Appellant appeared before the Pre-Trial Judge and on the same date Duty Counsel filed a request for his immediate release from detention.[6] It is noted that at this hearing, the Pre-Trial Judge refused to hear submissions on any other matter than that contained in Article 41 of the Law and Rule 55 of the Rules, thereby declining to hear submissions or rule on any challenge as to the lawfulness of detention or any application for provisional release, directing Duty Counsel to submit a written request, which Duty Counsel confirmed had been filed prior to the hearing. It is noted in this regard, that by refusing to hear any application as to the lawfulness of detention or any application for provisional release, it cannot be said that the Appellant was brought before a judge or other officer of the court for the purposes of Article 5(3) of the ECHR.

[6] KSC-BC-2020-07, F00030

16. On 27 October 2020, the Single Judge rendered a decision rejecting this request.[7] In this regard, it is noted that this is the first ruling on the Appellant's custody, some thirty-one (31) days after his arrest.

17. On 30 October 2020, the SPO submitted an indictment for confirmation against the Appellant and Mr. Gucati.[8]

18. On 9 December 2020, the Pre-Trial Judge requested the Parties to file written submissions on the Appellant's continued detention, the deadline being 18 December 2020.[9]

19. On 11 December 2020, the Pre-Trial Judge confirmed, in part, the Indictment, and ordered the SPO to submit a revised indictment as confirmed.[10]

20. On 14 December 2020, the SPO submitted the Confirmed Indictment with redactions.[11]

21. On 18 December 2020, the Appellant was produced before the Pre-Trial Judge where a 'first appearance' hearing was held.

22. At the first appearance hearing, appointed Counsel sought an extension of five (5) days to file written submissions on the pre-trial detention, having just

[7] KSC-BC-2020-07, F00058
[8] KSC-BC-2020-07, F00063
[9] KSC-BC-2020-07, F00073
[10] KSC-BC-2020-07, F00074/RED
[11] KSC-BC-2020-07, F00075

been appointed as Specialist Counsel just before the hearing. The Pre-Trial Judge refused the request. Counsel subsequently requested, an extension of one working day to submit a request, arguing that the SPO had not objected to the short extension and there could be no prejudice considering that a decision had to be made by 27 December 2020. The Pre-Trial Judge refused the request for any adjournment.

23. At the hearing of 18 December 2020, Counsel made an application for an oral hearing on the determination of continued pre-trial detention.

24. On 18 December 2020, the Appellant filed 'Submissions on the Review of Detention by 27 December 2020' and repeated its request for an extension of time and/or an oral hearing.[12] The SPO filing its 'consolidated submissions on review of detention' on the same day.[13]

25. On 24 December, the Pre-Trial Judge refused the Appellant's application for release.[14] It is respectfully submitted that in that decision the Pre-Trial has failed to address adequately, if at all, any of the concerns raised by the Appellant.

Preliminary Submission

[12] KSC-BC-2020-07, F00090
[13] KSC-BC-2020-07, F00088
[14] KSC-BC-2020-07, F00094

26. The basis of this Appeal is grounded both within the Law and Rules of Evidence and Procedure specific to the KSC, but also, relevant provisions contained in international human rights treaties to which the KSC is bound as an institution of the Republic of Kosovo.

27. Accordingly, we ought in brief, to consider the applicability of the provisions of international human rights law to the Chamber and its processes and decisions rendered.

28. Article 3(2)(e) of the Law reads:

> *"2. The Specialist Chambers shall adjudicate and function in accordance with,*
>
> *(e) international human rights law which sets criminal justice standards including the European Convention on Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, as given superiority over domestic laws by Article 22 of the Constitution*." (emphasis added)

29. Accordingly, it is clear that any and all decisions of the KSC must be rendered both in accordance with the Law, and the Rules of Evidence and Procedure of the Chamber itself, but also, by virtue of Article 3 of that Law (and Article 22 of the Constitution), in accordance with those international rules and conventions.

30. It is therefore respectfully submitted that the ECHR has direct application to the Chamber, the procedures it adopts, and the decisions rendered.

SUBMISSIONS

31. The Appellant is conscious that in submitting an application to appeal, it is not merely an opportunity to rehearse his application for release, and therefore not a *de novo* application, but rather, that it must be demonstrated that the Pre-Trial Judge has, in adopting the position outlined by the Appeals Chamber in its decision following submissions made by Mr. Gucati,[15] reached a decision that is:

a. Based on an incorrect interpretation of governing law;

b. Based on patently incorrection conclusion of fact; or

c. So unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.

32. At its most simplistic, the Appellant respectfully submits that the decision on the Pre-Trial Judge subject to this application for appeal, was both based on an incorrect interpretation of governing law, and/or so unfair or unreasonable to constitute an abuse of discretion.

[15] KSC-BC-2020-07/IA001/F00005

33. The Appellant submits his appeal ostensibly on the following grounds:

a. That the initial detention of the Appellant was not in accordance with Article 5(3) of the ECHR, and therefore the Appellant has not been detained in accordance with the law.

b. That the process of review of that detention adopted by the Chamber was not in accordance with Article 5(4) of the Convention, and therefore not in accordance with the law;

c. That the process of review of that detention was procedurally unfair in terms of the Appellant not being provided with notice of the submissions of the SPO and not being permitted to respond to the same, and therefore the procedure adopted violates Articles 5(3) and 6(1) of the Convention;

d. That the decision of the Pre-Trial Judge in terms of the detention of the Appellant was not 'reasoned' in that relevant arguments submitted in that review were seemingly not addressed and/or considered, and therefore in violation of Article 6 of the Convention;

e. That the Pre-Trial Judge failed to consider the requirement that the SPO must demonstrate 'relevant and sufficient' reasons to justify continued detention and that a decision refusing provisional release must be based on such 'relevant and sufficient' considerations;

f. That the Pre-Trial Judge applied the wrong test when determining whether to grant an Oral Hearing as applied for, and in doing so has adopted a process contrary to Article 6(1) of the ECHR.

The initial detention was not in accordance with Article 5(3) of the Convention

34. It is respectfully submitted that Article 5(3) imposes two conditions: prompt access to a judicial authority and consideration by the judicial authority of the merits of the detention. It provides a specific (and freestanding) right for those persons detained under Article 5(1)(c)[16] and that the review must be automatic, i.e. not based upon application or petition.[17]

35. The Appellant would submit that his initial detention, and the inability to challenge that detention until the decision entered on 27 October 2020, having regard to the fact that the Appellant was detained on 25 September 2020, a period of thirty-one (31) days, violates his rights under Article 5(3).

36. Rule 52(2) of the KSC Rules of Evidence and Procedure reads:

> "*in accordance with Article 41(3) of the Law, any person arrested pursuant to this Rule shall be brought before a Panel within forty-eight (48) hours of his or her arrest. The Panel shall satisfy itself that the person has been informed of the reasons for his or her arrest as provided for in Article 41(6)*

[16] See e.g. De Jong, Baljet & Van Den Brink v. the Netherlands, 22 May 1984, para. 44, 51, Series A. No. 77 and Schabas, W. A., The European Convention on Human Rights: A Commentary (2015), p.247.
[17] Ibid. para. 51

of the Law and of his or her rights under the Law and the Rules. The Panel shall decide on the continued detention or release of the person, within forty-eight (48) hours from the moment the detained person was brought before it"

37. On 26 September 2020,[18] notification was received confirming the reception of the Appellant in the detention facilities of the KSC.

38. In accordance with the Rules therefore, the Appellant ought to have been brought before the Chamber and a decision on his ongoing detention made, within 48 Hours of that reception.

39. On 28 September 2020, and therefore within the 48-hour time period prescribed, the Single Judge issued an 'Order for a New Case File'.[19]

40. Further on that date, the Single Judge issued an order notifying the Appointment of Counsel.[20]

41. Further on that date, the Single Judge issued its 'Decision Setting the Date for the First Appearance of Nasim Haradinaj'.[21]

42. On Tuesday 29 September 2020, the Appellant appeared before the Chamber and the Single Judge by way of 'First Appearance', however, no submissions on detention were heard on that occasion, the Single Judge making it quite

[18] KSC-BC-2020-07/F00020
[19] KSC-BC-2020-07/F00001
[20] KSC-BC-2020-07/F00024
[21] KSC-BC-2020-07/F00023

clear that he would not hear such submissions and they were to be made in writing.

43. It would appear, that no decision was made on the continued detention of the Appellant, or otherwise, until the order of 27 October 2020.[22] There does not appear to be any justification for such an inordinate delay.

44. Having regard to the above, it would appear clear that the detention of the Appellant was not considered within the 48 hours proscribed by the Law, and in waiting approximately one month to make that decision, the process has violated the Appellant's rights as per Article 5(3) of the Convention and accordingly, the Appellant has not been lawfully detained.

45. Further, it is not enough that a detained individual, and therefore the Appellant had the ability to demand a review at some point, the judicial control upon arrest and detention must be automatic per *De Jong, Baljet and Van den Brink*. In the instant case, quite clearly, that review has not been automatic.

46. It is respectfully submitted that Article 5(3) provides 'little flexibility in interpretation, otherwise there would be a serious weakening of a procedural

[22] KSC-BC-2020-07/F00058

guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision.'[23]

47. The Strasbourg organs have held that a period of four days is likely to breach the provision,[24] although a period of less than four days may constitute a breach depending upon the circumstances and whether a reasonable explanation as to the delay can be given. In the present circumstances there does not appear to be any reason given as to why the Appellant was not brought before a judge.

48. It is important to note that in order for the requirement to be strictly complied with the Appellant must be brought before a judge, which is reinforced by the wording of Rule 52(2), meaning physically produced before the judge and that the judge must (a) have the legal authority to review the grounds for detention and have the legal authority to release the Appellant; and (b) must consider the merits of the detention and issue a reasoned decision.

49. It is quite clear that the failure by the Pre-Trial Judge to determine the legality of detention and whether there existed relevant and sufficient reasons to justify continued detention constitutes a breach of Article 5(3) of the ECHR.

[23] Eur. Court HR, McKay v. the United Kingdom, Grand Chamber, No. 543/03, para. 34, ECHR 2006-X
[24] Eur. Court HR, Brogan & Others v. the United Kingdom, 29 November 1988, para. 58, Series A no. 145-B

50. The Chamber will note that in examining the lawfulness of detention consideration must be given to whether the detention conforms with the substantive and procedural rules of domestic law and, even if in compliance, whether detention is nonetheless arbitrary.[25]

51. It is submitted that in respect of the first limb of Article 5(3), the European Court has laid down certain criteria for determining whether the person before whom a persons is brought is considered to be a judge (or other officer authorised by law) for the purpose of the provision including:

a. independence from the executive and from the parties;

b. the officer is obliged to hear personally the applicant brought before him; and

c. there is a substantive requirement which places the officer under an obligation to review 'the circumstances militating for or against detention' and to decide 'by reference to legal criteria whether there are justifications for maintaining detention' and, if there are not, to order the release.

52. In this regard, it is not alleged that the Pre-Trial Judge lacks independence or impartiality; however, it is argued that the Pre-Trial Judge, by failing to

[25] Eur. Court HR, Kemmache v. France (No. 3), judgment of 24 November 1994, Series A no. 296-C, paras. 36-37.

review 'the circumstances militating for or against detention' until the order of 27 October 2020 is in contravention of the provision.

53. In respect of the second limb of Article 5(3) the Pre-Trial Judge failed to consider whether the grounds put forward by the SPO were 'relevant and sufficient' to justify continued detention. It is quite clear that the mere reciting of permissible grounds under the Law is not sufficient.

54. In Prosecution consolidated submissions on the review of detention,[26] it is argued that the same grounds remain as there has been no change of circumstances. The SPO relies on the prior ruling by the Pre-Trial Judge that there existed a grounded suspicion that the Appellant had committed certain offences against the administration of justice, there was a risk of flight, risk of obstructing the proceedings, a risk of repeating further offences and the conditions put forward do not eliminate such risks. The SPO goes on to state that following the confirmation of a six-count indictment charging the Appellant with offences against the administration of justice and public order as well as a grounded suspicion of having committed the offence of obstructing official persons in performing official duties. The SPO seeks to argue, without reference to any discernible facts, that the risks have increased

[26] KSC-BC-2020-07/F00088

since the last riling on detention and will continue as the proceedings progress.

55. The Chamber will recall that the persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the validity of continued detention, but, after a certain lapse of time, it no longer suffices. The Chamber must then establish whether the SPO has cited grounds that are 'relevant and sufficient' to justify continued deprivation of liberty, and as proceedings continue whether 'special diligence' has been displayed in the conduct of the proceedings and whether the subject matter for consideration is particularly complex in nature. In this regard, merely citing the gravity of the offences, risk of flight, risk of obstructing the proceedings and risk of repeating further offences without reference to greater specificity will not satisfy the requirement.

That the Process of Review of Detention violated Article 5(4)

56. The Appellant submitted detailed arguments on 18 December 2020, concerning the lawfulness of detention, and further, the lawfulness of that detention in accordance with Article 5 of the ECHR.

57. It is of note however, that in the decision of 24 December 2020, the Pre-Trial Judge has not addressed those arguments and therefore appears to have dismissed them summarily.

58. It is accepted that there is no requirement to address each and every argument contained within the submissions. However, the Pre-Trial Judge was required to address those arguments that seek to challenge the lawfulness of detention and the requirement to continue to detain the Appellant for a further period of two months. The protection of such a fundamental right as the right to liberty requires a thorough assessment of the necessity of detention with specific reference to the grounds relied upon by the SPO with reference to the ECHR.

59. Accordingly, if, as is argued in the instant case, that the Court fails to give adequate reasons, or gives repeated decisions that do not answer the specifics of the argument presented, it may constitute a violation of the substance of Article 5(4).[27]

60. Further, although substantively dealt with in subsequent grounds of appeal, the failure of the Pre-Trial Judge to allow the Appellant to have sight of the objections to be raised by the SPO and respond, again, in our submission, violates the substance of Article 5(4).

That the Process was Procedurally Unfair

[27] Eur. Court HR, G.B. & Others v. Turkey, No. 4633/15, paras 174-179.

61. The Appellant submits that the procedure to be adopted was procedurally unfair and/or in violation of Article 6 of the Convention.

62. The Rules of Evidence and Procedure, as a general position provide for a party being able to respond to the submission being made by the other party.

63. By way of example, on the issue of appeal, Rule 170 provides for the opposing party having ten (10) days post the filing of any interlocutory appeal to submit a response, and the appellant having five (5) days thereafter to file a reply to that response.

64. Further, it is perhaps an ordinarily accepted rule that where a party makes an application, the 'other party' is given the opportunity to respond to that application before a determination is made.

65. The issue of detention would appear to fall outside of these commonly accepted provisions for the purposes of the KSC. In terms of the instant case, the Appellant was not given opportunity to consider the objections that were to be made by the Prosecution prior to the filing of his submissions, further, the Appellant was not given opportunity to respond to the submissions of the Prosecution.

66. Accordingly, the procedure is not 'fair', and further, is in violation of a fundamental protection guaranteed under Article 6(1).

67. The proceedings are adversarial in their nature, and having regard to the Judgment on Appeal of *Prosecutor v. Bemba et al* ICC-01/05-01/13-558, in order to ensure both equality of arms and an adversarial procedure, the defence must, to the largest extent possible, be granted access to documents that are essential in order to effectively challenge the lawfulness of detention.

68. The procedure adopted by the Pre-Trial Judge does not adhere to the above.

69. As referred to earlier, this position reflects the position under Article 6 of the ECHR, in that the principle of the 'Equality of Arms', is an inherent feature of a fair trial, requiring that parties be given a reasonable opportunity to present their case under circumstances that do not place them at a significant disadvantage vis-à-vis their opponent,

70. The failure to allow the Appellant to respond to the position of the SPO places the Appellant at a significant disadvantage.

71. Further, as per *Brandstetter v. Austria*,[28] the right to an adversarial hearing means that parties have the opportunity for parties to the proceedings to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision.

[28] Eur. Court HR, judgment of 28 August 1991, App. Nos. 11170/84, 12876/87, 12368/87

72. The above did not occur, and thus it is submitted that the violation of this principle constitutes a violation of Article 6(1) of the ECHR on the basis of it lacking a fair and transparent process.

73. Similar findings have been made in the cases of *Borgers v. Belgium*[29] where the applicant was prevented from replying to the submissions made by the *avocat general* before the Court of Cassation and had not been given a copy of the submission beforehand and *Zahirovic v. Croatia,*[30] where there was a failure to communicate the higher prosecutor's observations on appeal to the defence.

74. There would appear to be no good reason why the position before the Chamber ought to be held to any higher standard than that elucidated above, and further, why the determination of detention should adopt a different procedure in the context of submissions, when compared to the procedure adopted for the filing of other applications and the responses thereto.

75. Finally, having regard to the Decision on Appeal of Gucati,[31] there is reference to consideration being given to whether the Prosecution has been prejudiced by not having sight of an application or submission made by the Defence in their reply to the response of the SPO on appeal.

[29] Eur. Court HR, judgment of 30 October 1991, App. No. 12005/86
[30] Eur. Court HR, judgment of 25 April 2013, App. No. 58590/11
[31] KSC-BC-2020-07/IA001/F00005

76. At paragraph 21 of that decision the Appeals Chamber notes "*the Court of Appeals Panel finds that these arguments should have been provided in the Appeal and not raised for the first time in reply, so that the opposing party is not deprived of an opportunity to respond.*"

77. Further, at paragraph 76, "*The Panel further observes that the Request for Hearing was presented by Gucati in the Reply rather than in the Appeal, thus depriving the SPO of an opportunity to respond in this respect. The Panel will nonetheless rule on this request, as its ruling will not prejudice the SPO.*"

78. Accordingly, the Appeals Chamber notes the requirement, and importance, of a party being given the opportunity to respond to submissions being made by that other party.

79. This did not occur in terms of the Appellant's application for release in the instant case, and further, it is submitted that there was clear prejudice, and still further, there is no justification, as previously noted, for the question of detention and the procedures adopted existing outside of the commonly accepted framework for submissions before the Chamber.

That the decision of the Pre-Trial Judge was not Reasoned

80. The decision of the Pre-Trial judge dated 24 December 2020 in which further detention was authorised was not 'reasoned' to the extent that it was compliant with Article 6.

81. Further, the position in respect of a reasoned decision, is referenced in the Gucati appeal judgment, where attention is drawn to ICC jurisprudence, noting that the obligation to provide reasons "*will not necessarily require reciting each and every factor that was before the [relevant chamber] to be individually set out, but [requires the relevant chamber] to identify which facts it found to be relevant in coming to its conclusion.*" [32]

82. Again, as previously acknowledged, there is no requirement to provide a detailed answer to every argument raised, however, it must be clear from the decision that the essential issues of the case have been addressed, particularly when the issue raised is in respect of a right protected by the ECHR.

83. The failure to provide appropriate reasons can constitute a violation of Article 6(1) therefore, and it is submitted that the Pre-Trial Judge has failed to provide a reasoned decision in respect of certain arguments made by the Appellant in his 'Submissions on the Review of Detention'.

84. Within those submissions, the Appellant specifically raised the issue of not having sight of the Prosecution position in terms of release, further, whether the procedure was compatible with Article 5, and further, that an oral

[32] ICC-02/05-01/20-177 Prosecutor v. Abd-Al-Rahman

hearing was required as per Article 5 of the Convention and without such a hearing, it constituted a violation of Article 5(3) of the ECHR.

85. The Pre-Trial Judge fails to address these arguments in passing or at all.

86. Further, at paragraph 48 of the Pre-Trial Judge's determination he states "*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-month detention review process. For the same reasons, Mr. Haradinaj's request for an oral hearing is denied. In these circumstances, the Pre-Trial finds that he has sufficient information to use the present decision and no further submissions, whether written or oral, are warranted at this stage.*"

87. This does not constitute a reasoned decision, and further, it relies on a previous decision in respect of a different defendant.

88. It is a central principle that any and all decisions are fact specific and ought to be judged on their own merit; it is respectfully submitted to be purely irrelevant and quite inappropriate to rely on a determination in respect of a wholly different defendant, separately represented, making different submissions.

89. Further, as noted above, the decision does not refer to the arguments made in relation to Article 5 obligations, which are submitted to be central

arguments in terms of the issue raised, and thus the decision of the Pre-Trial Chamber is deficient, and thus in violation of Article 6(1) of the Convention.

That the Decision must be Based on Real and Relevant Considerations

90. When considering the risk posed by an individual, that risk must be real, and identifiable, it cannot merely be one that is raised in the abstract.

91. In the instant case, there has been no assessment of whether the Appellant poses an identifiable danger to any victim or witness, rather, the pre-Trial Judge appears to be content to accept at face value that which has been submitted by the SPO without that position being the subject of scrutiny or challenge.

92. A concrete danger must be identified as per *Prosecutor v. Haradinaj,* wherein the Chamber noted:

> *"In determining whether to grant provisional release to an accused, it is for the Trial Chamber to consider the particular circumstances of each case. When assessing the likelihood that an accused will appear for trial, Trial Chambers have regularly given significant weight to guarantees provided by the State or entity the accused sought to be released to. In terms of reviewing whether there is any danger posed by an accused, if released, to victims, witnesses or any other person, one of the factors previously considered by other Trial Chambers was whether there was any suggestion that an accused*

had interfered with the administration of justice in any way since the date when an indictment was confirmed against him. The assessment whether the accused would pose a danger cannot be made only in abstracto; a concrete danger has to be identified."[33]

93. The SPO has not submitted any evidence to suggest that the above has been demonstrated, and in any event, where the SPO has been deemed to have demonstrated the same, in the absence of the Appellant being given the opportunity to respond, the position of the SPO has not been subject to challenge.

That the Pre-Trial Judge has mis-directed himself

94. The Appellant submits that the Pre-Trial Judge has misdirected himself in terms of the correct test to be applied when determining whether to grant an oral hearing or otherwise.

95. In the first instance, as noted above, the Pre-Trial Judge has not ruled specifically on the facts of the Appellant's case, or on the submissions the Appellant makes, but rather relying on the decision in respect of another case and another Defendant.

[33] ICTY, Decision on Ramush Haradinaj's Motion on Provisional Release, 6 June 2005, https://www.icty.org/x/cases/haradinaj/tdec/en/050606.htm

96. Secondly, the decision is also made on the basis that the Pre-Trial Judge finds that he has "*sufficient information to issue the present decision and no further submissions, whether written or oral, are warranted at this stage*".

97. As much as it is accepted that an oral hearing need not be scheduled as of right, the Appellant would submit that in the instant case it ought to have been. Further, it is not a question of whether the Pre-Trial Judge considers he has sufficient information to make a decision, the question is whether there has been an adversarial process in which the Appellant has been able to put forward argument and respond to those of the Prosecutor.

98. An oral hearing ought to be granted where fairness demands it, and further, taking into account the position in the instant case, where the individual has not been given adequate opportunity to put forward his case in writing and to challenge the evidence against him.

99. On the basis that the Appellant has not seen the evidence against him, nor has he seen the basis of the objection of the SPO at that time, it is respectfully submitted to be wholly inappropriate for the application for oral hearing to be refused.

100. Further, even where ordinarily, the issue could normally be decided without an oral hearing, the circumstances of the case may warrant, as a matter of fair

trial, the holding of an oral hearing, per *Ozmurat Isaat Elektrik Nakliyat Temizlik San. Ve TIC. Ltd. Sti. V. Turkey.*[34]

101. Again, we refer to the already argued position in terms of the submissions that the process is not compatible with Article 5, and the fact that the Appellant had not had sight of the SPO position or given opportunity to respond to the same. These points were raised in the original submissions and ought to have been considered by the Pre-Trial Judge, whereas on the face of it, they have not been.

102. To re-iterate that which was argued in the original submissions on detention, and as per *Nikolova v. Bulgaria*[35] (2001) 31 EHRR 64 [Grand Chamber], where an individual's detention falls within the ambit of Article 5(1), a hearing is required.

103. 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,[36] at this stage, no such evidence has been provided, similarly in terms of the risk

[34] Eur. Court HR, judgment of 28 November 2017 App. No. 48657/06
[35] Eur. Court HR, (2001), 31 EHRR 64 [Grand Chamber]
[36] Eur. Court HR, *Becciev v. Moldova,* App. 9190/03

of pressure being exerted upon witnesses, this must be linked to specific facts.[37]

104. Without that oral hearing, it is respectfully submitted that the Appellant was prevented from being 'heard', as he was prevented from responding to that which may be adduced by the SPO.

105. 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.

106. Accordingly, it is respectfully submitted that the failure to grant an oral hearing in the instant case would constitute a violation of Article 5(3) and (4) of the ECHR.

Conclusion

107. As has consistently been referred to within this appeal, as much as the KSC is bound by its own Law, and its own Rules of Evidence and Procedure, it also bound to the same extent, by those international conventions, and established

[37] Eur. Court HR, *Merabishvili v. Georgia*, [2017] ECHR 1070, App. No. 72508/13

international human rights law as referred to within Article 3(2)(e) of the Law and Article 22 of the Constitution.

108. The procedure(s) adopted in terms of the Appellant's detention, production before the Chamber, and review of detention thereafter, falls far short of the procedural requirements under Articles 5 and 6 of the ECHR, nor is it in accordance with its own rules in terms of the filing of submissions and the ability or lack thereof, to respond to the submissions made.

109. This appeal therefore ought to be allowed and referred back to the Pre-Trial Chamber to be reheard with the following directions:

a. That an oral hearing is granted so as to ensure compliance with Articles 5 and 6 of the ECHR;

b. That the SPO is to file its submissions/observations/evidence in support first with the Appellant being afforded 10 days thereafter to file its own submissions on detention;

110. The above would ensure the fairness of proceedings, the equality of arms between the parties, and ensure that the Appellant's rights are fully respected, noting that the Appellant's case is one involving a fundamental issue, namely that of liberty.

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Toby Cadman

Specialist Counsel

Carl Buckley

Specialist Co-Counsel