



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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

Before: **Court of Appeals Panel**
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 15 January 2021

Language: English

Classification: Public

**Prosecution response to Defence appeal of decision on review of detention of
Nasim Haradinaj**

Specialist Prosecutor's Office

Jack Smith

Counsel for Hysni Gucati

Jonathan Elystan Rees

Counsel for Nasim Haradinaj

Toby Cadman

I. INTRODUCTION

1. The Court of Appeals Panel ('Panel')¹ should summarily dismiss the Appeal² because it is ill-grounded and founded on unsubstantiated arguments incapable of demonstrating any error in the Decision.³

2. Even if the Appeal were to be considered on its merits, the Decision, which followed a fair procedure, addressed relevant Defence arguments and was reasoned, should be affirmed. The Pre-Trial Judge⁴ weighed relevant considerations and, in the proper exercise of his discretion and in accordance with the applicable law and rules, decided that Mr HARADINAJ's continued detention is necessary. Having found that the requirements of Article 41(6) of the Law⁵ for arrest and detention were satisfied, the Pre-Trial Judge correctly determined that the release conditions proposed by the Defence did not adequately address concrete risks that Mr HARADINAJ will flee, obstruct the progress of proceedings and commit further crimes.

II. BACKGROUND AND PROCEDURAL HISTORY

3. The SPO has previously set out a detailed background and history in relation to the events leading to Mr HARADINAJ's arrest.⁶

4. As a result of such events, on 22 September 2020, the SPO requested, *inter alia*, the arrest of Mr HARADINAJ, arguing that the evidence showed that, alone or in co-perpetration or in agreement with others, he committed, incited or assisted in the

¹ Decision Assigning a Court of Appeals Panel, KSC-BC-2020-07/IA002/F00002, Public, 6 January 2021.

² Notice of Interlocutory Appeal against the Decision on Pre-Trial Detention on behalf of Nasim Haradinaj, KSC-BC-2020-07/IA002/F00001, Public, 4 January 2021 (notified 5 January 2021) ('Appeal'). The SPO notes that, in several cases, the Appeal fails to cite authorities, in particular, relevant paragraph and page numbers, in accordance with the requirements of Article 32(2) of the Registry Practice Direction: Files and Filings before the Kosovo Specialist Chambers, KSC-BD-15. *See, for example*, Appeal, KSC-BC-2020-07/IA002/F00001, paras 28, 45, 67, 73, 100, 102-103.

³ Decision on review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00094, Public, 24 December 2020 ('Decision').

⁴ Prior to his appointment as Pre-Trial Judge pursuant to Decision Assigning a Pre-Trial Judge, KSC-BC-2020-07/F00061, Public, 29 October 2020, the same Judge served as Single Judge.

⁵ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

⁶ Prosecution response to Defence appeal of decisions denying release, KSC-BC-2020-07, Public, 13 November 2020, Section II(A)-(C).

commission of, or attempted to commit, the crimes of intimidation during criminal proceedings, retaliation and violating the secrecy of proceedings.⁷

5. On 24 September 2020, the Single Judge issued an arrest warrant for Mr HARADINAJ.⁸

6. On 25 September 2020, after attempting to evade arrest by SPO officers, Mr HARADINAJ was arrested in Pristina at 16:29 and transferred to the Registry's secure facility in Pristina where he spent the night.⁹

7. On 26 September 2020, Mr HARADINAJ was transferred to The Netherlands where he was placed in the custody of the Detention Management Unit at 17:20.¹⁰

8. On 28 September 2020, the Single Judge decided to convene the hearing for Mr HARADINAJ's first appearance on 29 September 2020.¹¹ In scheduling the first appearance, the Single Judge considered the dates of Mr HARADINAJ's arrest and transfer and took into account constraints relating to COVID-19.¹²

9. On 29 September 2020, the Defence filed a request (submitted at 13:29 and notified at 14:03) challenging the SC's jurisdiction and the validity and necessity of Mr HARADINAJ's arrest, and seeking immediate dismissal of the charges and probational release pending trial.¹³

10. On 29 September 2020, at 15:00, Mr HARADINAJ appeared before the Single Judge for his first appearance.¹⁴ The Single Judge ascertained that Mr HARADINAJ

⁷ Request for Arrest Warrants and Transfer Orders, KSC-BC-2020-07/F00009/RED, 22 September 2020, Public ('Arrest Request').

⁸ Decision on Request for Arrest Warrants and Transfer Orders, KSC-BC-2020-07/F00012, Public, 24 September 2020 ('Arrest Decision'); Public Redacted Version of Corrected Version of Arrest Warrant for Nasim Haradinaj, KSC-BC-2020-07/F00012/A03/COR/RED, Public, 24 September 2020 ('Arrest Warrant').

⁹ Public Redacted Version of "'Corrected Report on the Arrest and Transfer of Nasim Haradinaj to the Detention Facilities'", filing KSC-BC-2020-07/F00026/COR dated 28 September 2020', KSC-BC-2020-07/F00026/COR/RED, Public, 14 October 2020, paras 3-15 ('Report on Arrest and Transfer').

¹⁰ Report on the Arrest and Transfer, KSC-BC-2020-07/F00026/COR/RED, paras 16-27.

¹¹ Decision Setting the Date for the First Appearance of Nasim Haradinaj, KSC-BC-2020-07/F00023, Public, 28 September 2020 ('Decision Setting the Date for the First Appearance').

¹² Decision Setting the Date for the First Appearance, KSC-BC-2020-07/F00023, para.9.

¹³ Initial appearance, preliminary motion to dismiss the charges and motion for immediate release, KSC-BC-2020-07/F00030, Public, 29 September 2020 ('29 September 2020 Request').

¹⁴ Transcript, KSC-BC-2020-07, 29 September 2020.

had been informed of the reasons of his arrest and detention, and of his rights, including his right to challenge the lawfulness of his arrest and request review of decisions on his detention.¹⁵ The Single Judge invited the Parties to raise any other matter by way of a filing and noted that the Defence had submitted a request just before the hearing.¹⁶ The Defence then repeated much of the argument contained in the filing submitted just before the hearing; the Single Judge took note of this and directed the SPO to file a response by 2 October 2020 in view of the urgency of the Defence request.¹⁷

11. On 27 October 2020, the Single Judge rejected the 29 September 2020 Request.¹⁸

12. On 30 October 2020, the SPO filed a strictly confidential and *ex parte* indictment before the Pre-Trial Judge for confirmation.¹⁹

13. On 9 December 2020, the Pre-Trial Judge requested the Parties to file written submissions, by 18 December 2020, on whether reasons for the continued detention of Mr HARADINAJ and Mr GUCATI still exist.²⁰

14. On 11 December 2020, the Pre-Trial Judge issued a decision largely confirming the indictment against Mr HARADINAJ and Mr GUCATI.²¹

15. On 14 December 2020, the SPO filed strictly confidential²² and (public) redacted²³ versions of the confirmed indictment.

¹⁵ Transcript, KSC-BC-2020-07, 29 September 2020, pp.6-12, 19.

¹⁶ Transcript, KSC-BC-2020-07, 29 September 2020, p.6.

¹⁷ Transcript, KSC-BC-2020-07, 29 September 2020, pp.14-15.

¹⁸ Decision on Defence Challenges, KSC-BC-2020-07/F00057, Public, 27 October 2020 ('Decision on Defence Challenges'); Decision on Request for Immediate Release of Nasim Haradinaj, KSC-BC-2020-07/F00058, Public, 27 October 2020 ('Decision on Request for Release').

¹⁹ Submission of Indictment for Confirmation and Related Requests, KSC-BC-2020-07/F00063, Strictly Confidential and *Ex Parte*, 30 October 2020.

²⁰ Order for Submissions on the Review of Detention, KSC-BC-2020-07/F00073, Public, 9 December 2020 ('Order for Submissions').

²¹ Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2020-07/F00074/RED, Public, 11 December 2020.

²² Annex 1 to Submission of confirmed Indictment, KSC-BC-2020-07/F00075/A01, Strictly Confidential, 14 December 2020.

²³ Annex 2 to Submission of confirmed Indictment, KSC-BC-2020-07/F00075/A02, Public, 14 December 2020.

16. On 18 December 2020, Mr HARADINAJ appeared before the Pre-Trial Judge.²⁴ During this appearance, the Defence requested a five-day extension for the filing of the submissions on review of detention,²⁵ which were due that day.²⁶ The Pre-Trial Judge rejected this request on the basis, *inter alia*, that a ruling was due on the matter by 27 December 2020 and the Parties had previously been informed of the deadline for submissions.²⁷ After making this ruling, the Pre-Trial Judge noted that nothing prevented the Defence, at a later stage, from filing an application for interim release.²⁸ The Defence then requested a three-day extension of the deadline.²⁹ The Pre-Trial Judge rejected this request, noting that the order for submissions was public and, while understanding that current Counsel for Mr HARADINAJ had been appointed that same day, it was the duty of previous Counsel to prepare such submissions and the Pre-Trial Judge needed to be briefed in order to issue his decision.³⁰ The Pre-Trial Judge reiterated that Mr HARADINAJ could challenge his detention on remand in accordance with Rule 57 of the Rules.³¹ The Defence noted that it joined the request by Counsel for Mr GUCATI for an oral hearing.³²

17. On 18 December 2020, the SPO filed submissions on the review of Mr HARADINAJ's detention.³³

²⁴ Transcript, KSC-BC-2020-07, 18 December 2020.

²⁵ Transcript, KSC-BC-2020-07, 18 December 2020, p.61.

²⁶ See Order for Submissions, KSC-BC-2020-07/F00073.

²⁷ Transcript, KSC-BC-2020-07, 18 December 2020, pp.61-62.

²⁸ Transcript, KSC-BC-2020-07, 18 December 2020, p.62.

²⁹ Transcript, KSC-BC-2020-07, 18 December 2020, p.63.

³⁰ Transcript, KSC-BC-2020-07, 18 December 2020, pp.63-64.

³¹ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified; Transcript, KSC-BC-2020-07, 18 December 2020, p.65.

³² Transcript, KSC-BC-2020-07, 18 December 2020, p.66.

³³ Prosecution consolidated submissions on review of detention, KSC-BC-2020-07/F00088, Public, 18 December 2020 ('Prosecution submissions on detention').

18. On 18 December 2020, the Defence also filed submissions on the review of Mr HARADINAJ's detention, reiterating the request for an extension of time for these submissions, requesting an oral hearing, and arguing for Mr HARADINAJ's release.³⁴

19. On 24 December 2020, the Pre-Trial Judge issued the Decision.

20. On 5 January 2021, the Appeal was notified. It challenges the: (i) legality of the initial and continued detention ('First Ground');³⁵ (ii) failure of the Pre-Trial Judge to address Defence arguments ('Second Ground');³⁶ (iii) fairness of the procedure for the review of Mr HARADINAJ's detention ('Third Ground');³⁷ (iv) Pre-Trial Judge's failure to give reasons ('Fourth Ground');³⁸ (v) failure to identify a concrete danger ('Fifth Ground');³⁹ and (vi) the basis on which the request for an oral hearing was rejected ('Sixth Ground').⁴⁰

III. SUBMISSIONS

A. THE APPEAL SHOULD BE SUMMARILY DISMISSED

21. The Appeal is based on deficient, ill-grounded, evidently unfounded and unsubstantiated, submissions that do not justify detailed analysis by the Panel and should be summarily dismissed in the interest of fair, efficient, and effective

³⁴ Submissions on the Review of Detention by 27 December 2020, KSC-BC-2020-07/F00090, Public, 18 December 2020. On 21 December 2020, the Defence filed a corrected version of these submissions, *see* Corrected Submissions on the Review of Detention by 27 December 2020, KSC-BC-2020-07/F00090/COR, Public, 21 December 2020 ('Corrected Submissions on Detention').

³⁵ Appeal, KSC-BC-2020-07/IA002/F00001, paras 34-55 (under the heading 'The initial detention was not in accordance with Article 5(3) of the Convention').

³⁶ Appeal, KSC-BC-2020-07/IA002/F00001, paras 56-60 (under the heading 'That the Process of Review of Detention violated Article 5(4)').

³⁷ Appeal, KSC-BC-2020-07/IA002/F00001, paras 61-79 (under the heading 'That the Process was Procedurally Unfair').

³⁸ Appeal, KSC-BC-2020-07/IA002/F00001, paras 80-89 (under the heading 'That the decision of the Pre-Trial Judge was not Reasoned').

³⁹ Appeal, KSC-BC-2020-07/IA002/F00001, paras 90-93 (under the heading 'That the Decision must be Based on Real and Relevant Considerations').

⁴⁰ Appeal, KSC-BC-2020-07/IA002/F00001, paras 94-106 (under the heading 'That the Pre-Trial Judge has misdirected himself').

proceedings.⁴¹ In particular, as set out below,⁴² the Appeal: (i) merely repeats arguments that were unsuccessful before the Pre-Trial Judge, without demonstrating that their rejection constituted an error warranting the Panel's intervention; (ii) ignores express provisions of the Law and the Rules; (iii) misrepresents and ignores relevant parts of the factual record and Decision; and (iv) otherwise fails to substantiate alleged errors and demonstrate how they materially affected the Decision.⁴³

22. Further, while the Defence expressly states that the Appeal is against the Decision,⁴⁴ the First Ground primarily concerns the 24 September 2020 Arrest Decision, Arrest Warrant, the 27 October 2020 Decision on Defence Challenges, and/or the Decision on Request for Release.⁴⁵ Accordingly, to the extent that the Appeal challenges any rulings other than those contained in the Decision, it should be dismissed *in limine* since it is late. While Article 45(2) provides that interlocutory appeals shall lie as of right from decisions or orders relating to detention on remand, pursuant to Rules 58(1) and (2) and 170(1) such an appeal must be filed within ten days of the impugned decision.

⁴¹ See ICTY, Appeals Chamber, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009 ('*Krajišnik Appeal Judgment*'), para.16.

⁴² See paras 25-53.

⁴³ See, similarly, *Krajišnik Appeal Judgment*, paras 17-27; IRMCT, Appeals Chamber, *Prosecutor v. Orić*, MICT-14-79, Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015, 17 February 2016, para.14; ICC, Appeals Chamber, *Prosecutor v. Abd-Al-Rahman*, ICC-02/05-01/20 OA2, Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled 'Decision on Defence Request for Interim Release', 8 October 2020 ('*Abd-Al-Rahman Decision*'), para.16; See also Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, Public, 9 December 2020 ('*Appeal Decision*'), paras 19, 22.

⁴⁴ Appeal, KSC-BC-2020-07/IA002/F00001, para.4.

⁴⁵ See Appeal, KSC-BC-2020-07/IA002/F00001, paras 34-52.

23. Moreover, the First Ground, challenging the legality of the Appellant's initial detention, was not raised as such before the Pre-Trial Judge,⁴⁶ is therefore improperly raised before this Panel, and should be summarily dismissed.⁴⁷

24. Should the Panel consider the Appeal on its merits, the Decision should be affirmed, including for the following reasons.

B. FIRST GROUND: THE INITIAL AND CONTINUED DETENTION OF MR HARADINAJ ARE LAWFUL

25. Mr HARADINAJ's initial detention was lawful.⁴⁸ The only argument put forward by the Defence to show the contrary is based on a fundamental misunderstanding of the applicable legal framework and, as such, must fail.

26. Mr HARADINAJ was not, as asserted by the Defence, arrested pursuant to Rule 52(2), dealing with arrests pursuant to orders by the Specialist Prosecutor.⁴⁹ Rather, as patently obvious by the circumstances and as explicitly set out in the Arrest Warrant,⁵⁰ Mr HARADINAJ was arrested pursuant to an arrest warrant issued by the Single Judge and, thus, under Rule 53.

27. In cases when a person is deprived of his or her liberty without an order from the SC, Article 41(3) and Rule 52(2) require, *inter alia*, that such person be brought before a Panel within forty-eight hours of his or her arrest and that such Panel shall decide on the continued detention or release of the person within forty-eight hours from the moment the detained person was brought before it. Such provisions both expressly and logically do not apply to arrests pursuant to Rule 53 since, in issuing

⁴⁶ In passing, the Defence referred generally to the 'length of time it took for him to be produced before a judge before pre-charge detention was ordered' as support for his release, but did not refer to, develop, or substantiate this argument elsewhere in its submissions before the Pre-Trial Judge. See Corrected Submissions on Detention, KSC-BC-2020-07/F00090/COR, para.3.

⁴⁷ See the authorities cited in fn.43 above.

⁴⁸ *Contra* Appeal, KSC-BC-2020-07/IA002/F00001, paras 34-52.

⁴⁹ Appeal, KSC-BC-2020-07/IA002/F00001, paras 36, 38, 44, 48.

⁵⁰ The opening language in the Arrest Warrant, KSC-BC-2020-07/F00012/A03/COR/RED, reads 'I, Judge Nicolas Guillou, Single Judge [...] ISSUE AN ARREST WARRANT FOR [...]', the third paragraph explicitly refers to Rule 53, and the warrant is signed by the Single Judge. The Arrest Decision also refers to Rule 53, see Arrest Decision, KSC-BC-2020-07/F00012, para.11.

the order for arrest, the Panel would have already made the necessary findings in relation to detention. Indeed, in the Arrest Decision, the Single Judge, *inter alia*, set out the applicable law, established that the SC had jurisdiction, and found that the requirements under Article 41(6) were met. This is also mirrored in the Arrest Warrant, which explicitly informed Mr HARADINAJ, *inter alia*, that, upon arrest, he had the right to challenge, pursuant to Article 41(2) and (5), the lawfulness of his arrest, the transfer order and the conditions of detention before the Single Judge.⁵¹

28. In this context, the Defence's references to Article 5(3) of the European Convention on Human Rights (ECHR) and reliance on jurisprudence concerning this article⁵² is inapposite. The purpose of the safeguard under Article 5(3) is to protect the individual from arbitrary detention by ensuring that the act of deprivation of liberty is subject to independent judicial scrutiny.⁵³ The issuing of the Arrest Decision and Arrest Warrant, by an independent member of the judiciary,⁵⁴ the very day before the arrest took place, ensured that Mr HARADINAJ's liberty was not arbitrarily deprived.⁵⁵

29. In cases, such as Mr HARADINAJ's, when an arrest has been ordered by a Panel, it is Article 41(5) and Rule 55(6) which govern the arrestee being brought before a Panel. Such appearance, per Rule 55(6), is necessary in order for the Panel to ascertain that the person has been informed of the reasons for his or her arrest and of his or her rights under the Law and the Rules. Article 41(5) refers to being brought before a Judge 'without delay', while Rule 55(6) refers to this being done 'without undue delay'.

⁵¹ Arrest Warrant, KSC-BC-2020-07/F00012/A03/COR/RED, para.10.

⁵² Appeal, KSC-BC-2020-07/IA002/F00001, paras 34-35, 44-53.

⁵³ See ECtHR, *McKay v UK*, 543/03, Judgement (Grand Chamber), 3 October 2006, paras 30-31; ECtHR, *Niedbala v Poland*, 27915/95, Judgement (First Section), 4 July 2000, para.48.

⁵⁴ The Defence does not challenge the Pre-Trial Judge's independence or impartiality, *see* Appeal, KSC-BC-2020-07/IA002/F00001, para.52.

⁵⁵ Appeal Decision, KSC-BC-2020-07/IA001/F00005, paras 37-39 (finding, *inter alia*, that 'by requesting the act of deprivation of liberty to be scrutinised and supervised by an independent judicial authority, the SPO went above and beyond what was required by the Law and acted in accordance with the very purpose of Article 5 of the ECHR, namely to protect the individual from arbitrariness').

30. As set out above,⁵⁶ less than four days in total elapsed from the moment of Mr HARADINAJ's arrest to his first appearance before the Single Judge. This included the day it took for Mr HARADINAJ to be transferred from Kosovo to The Netherlands and, in setting the date for the first appearance, the Single Judge considered the dates of Mr HARADINAJ's arrest and transfer and took into account the constraints relating to COVID-19, which, *inter alia*, requires testing and restricted movement of newly arriving detainees.⁵⁷ At the hearing, Mr HARADINAJ confirmed he had received a copy of the Arrest Warrant in a language he understands, the reasons for his arrest were read out by the Court Officer, and Mr HARADINAJ confirmed he had been informed of such reasons.⁵⁸

31. The Defence assertion that the Single Judge refused, during the first appearance, to hear an application as to the lawfulness of detention or provisional release⁵⁹ is misleading. During the hearing, which started at 15:00, just over an hour after the filing of the 29 September 2020 Request, the Single Judge expressly took note of the request,⁶⁰ the Defence repeated much of the arguments contained in the request, which oral submissions the Single Judge stated that he took note of, and the Single Judge asked the SPO to file a response by 2 October 2020 'given the urgency of the request'.⁶¹

32. Further, and again contrary to the Defence assertion,⁶² the first ruling on Mr HARADINAJ's custody in fact took place by way of the 24 September 2020 Arrest Decision and Arrest Warrant, which provided him with a concise statement of facts underpinning his arrest, a legal finding that the criteria enumerated under article 41(6) of the Law were met, and his rights upon arrest.⁶³ Indeed, Mr HARADINAJ

⁵⁶ See paras 6-10.

⁵⁷ Decision Setting the Date for the First Appearance, KSC-BC-2020-07/F00023, para.9.

⁵⁸ Transcript, KSC-BC-2020-07, 29 September 2020, pp.6-9.

⁵⁹ Appeal, KSC-BC-2020-07/IA002/F00001, para.15.

⁶⁰ Transcript, KSC-BC-2020-07, 29 September 2020, p.6.

⁶¹ Transcript, KSC-BC-2020-07, 29 September 2020, pp.14-15.

⁶² See Appeal, KSC-BC-2020-07/IA002/F00001, paras 16, 35.

⁶³ See Arrest Decision, KSC-BC-2020-07/F00012; Arrest Warrant, KSC-BC-2020-07/F00012/A03/COR/RED; See also Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.37.

challenged his detention through the 29 September 2020 Request, which was supplemented during his appearance that same day.

33. Accordingly, it is clear that Mr HARADINAJ was brought before a Panel without undue delay and that his rights were fully respected.

34. To the extent that the First Ground also challenges Mr HARADINAJ's continued detention, the Defence fails to establish that there was any error on a question of law invalidating the Decision, an error of fact which has occasioned a miscarriage of justice, or a discernible error in the exercise of the Pre-Trial Judge's discretion.⁶⁴

35. In the Decision, the Pre-Trial Judge noted that Mr HARADINAJ did not challenge the existence of a grounded suspicion that offences were committed and recalled his finding, in the decision confirming the indictment, that there was a well-grounded suspicion that Mr HARADINAJ had committed offences within the SC's jurisdiction and found that Article 41(6)(a) continued to be met.⁶⁵ The Pre-Trial Judge then carefully assessed the requirements of Article 41(6)(b), finding that there are concrete risks that he will flee, obstruct proceedings and commit further crimes,⁶⁶ and then that the conditions proposed by the Defence did not adequately address risks that Mr HARADINAJ will flee, obstruct proceedings or commit further crimes.⁶⁷

36. As set out in the response to the Second Ground,⁶⁸ the Decision also addressed relevant arguments and provided valid reasons for the findings contained therein. The Defence's mere disagreement with the conclusions that the Pre-Trial Judge drew from the available facts or the weight he accorded to particular factors is not enough to establish a clear error.⁶⁹

⁶⁴ See Appeal Decision, KSC-BC-2020-07/IA001/F00005, paras 5, 10, 12-14.

⁶⁵ Decision, KSC-BC-2020-07/F00094, paras 27-28. In this regard, as previously articulated by the Single Judge, 'well-grounded suspicion' is more onerous than 'grounded suspicion', see Decision on Defence Challenges, KSC-BC-2020-07/F00057, para.29, fn.40.

⁶⁶ Decision, KSC-BC-2020-07/F00094, paras 31-33, 35-39, 41-42.

⁶⁷ Decision, KSC-BC-2020-07/F00094, paras 44-46.

⁶⁸ See paras 37-38.

⁶⁹ See Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.64.

C. SECOND GROUND: THE PRE-TRIAL JUDGE CONSIDERED RELEVANT ARGUMENTS

37. Contrary to the Defence assertion,⁷⁰ the Decision addressed Defence arguments on the lawfulness of detention. Indeed, the Pre-Trial Judge summarised, evaluated, and then dismissed, such arguments, providing valid reasons.⁷¹

38. In reaching his decision, the Pre-Trial Judge noted, *inter alia*: (i) Mr HARADINAJ's attempt to evade arrest, his non-recognition of the SC, and the fact that the confirmed indictment constituted an added incentive for him to flee;⁷² and (ii) Mr HARADINAJ's public assertions that he would continue to disseminate confidential and non-public information and his failure to comply with orders of the Single Judge.⁷³ Indeed, the Defence submissions on this ground are entirely unsubstantiated, failing to concretely identify any arguments regarding lawfulness of detention which it contends were not considered and/or addressed by the Pre-Trial Judge.

39. Once again, the Defence merely expresses its disagreement with the Decision rather than establishing any error therein.

D. THIRD GROUND: THE PROCESS OF REVIEW OF DETENTION WAS FAIR

40. The process through which the Pre-Trial Judge reviewed Mr HARADINAJ's detention was fair.⁷⁴

41. The Order for Submissions was correctly issued pursuant to Article 41(1) and Rule 57(2).⁷⁵ Neither provision explicitly mandates the procedure to be followed by a Panel in this regard, merely necessitating a review of a decision on detention on remand⁷⁶ which review must encompass an examination of whether reasons for detention on remand still exist.⁷⁷ The procedure adopted by the Pre-Trial Judge

⁷⁰ Appeal, KSC-BC-2020-07/IA002/F00001, paras 56-59.

⁷¹ See Decision, KSC-BC-2020-07/F00094, paras 15, 27-28, 30-46.

⁷² Decision, KSC-BC-2020-07/F00094, paras 31-32, 44.

⁷³ Decision, KSC-BC-2020-07/F00094, paras 35, 38, 45.

⁷⁴ *Contra* Appeal, KSC-BC-2020-07/IA002/F00001, paras 33(c), 61-79.

⁷⁵ Order for Submissions, KSC-BC-2020-07/F00073, p.1, paras 7-9.

⁷⁶ Rule 57(2).

⁷⁷ Rule 41(10).

satisfied these requirements. Importantly, the Rule 57(2) review procedure is a Panel-driven one, rather than one involving a moving party, and the Pre-Trial Judge has significant discretion in the manner and procedure for seeking relevant information to conduct the required review.

42. Mr HARADINAJ had access to the material relevant to challenge his detention, in particular the Arrest Request, Arrest Decision, Arrest Warrant, and the confirmed indictment, and was given the opportunity to provide written submissions, which were filed by the Defence prior to the Decision being issued and were considered therein. The SPO's submissions on detention were filed publicly and were notified to the Defence;⁷⁸ as such, the Defence was provided notice of these submissions.⁷⁹ Contrary to Defence submissions,⁸⁰ Mr HARADINAJ was not at a 'significant disadvantage' to the SPO; both parties were subject to the same concurrent briefing schedule.

43. Moreover, the SPO's submissions cannot be considered essential to Mr HARADINAJ's challenge to his continued detention.⁸¹ The submissions did not contain any argument which could not have been foreseen by the Defence, or that could in any way be considered novel; the SPO simply noted the lack of change in circumstances, recalled the Pre-Trial Judge's previous decisions on the need for detention, and highlighted that an indictment had since been confirmed, all facts well-known to both Parties by the 18 December 2020 filing deadline.⁸²

44. In the Decision, the Pre-Trial Judge found that he had sufficient information to issue that decision and no further submissions were warranted.⁸³ The Defence's mere disagreement with this finding does not warrant the Panel's intervention. The ECtHR jurisprudence cited by the Defence to support its argument⁸⁴ is inapposite. By way of

⁷⁸ See, e.g. Appeal, KSC-BC-2020-07/IA002/F00001, paras 24, 54, referring to the SPO's submissions.

⁷⁹ *Contra* Appeal, KSC-BC-2020-07/IA002/F00001, para.33(c).

⁸⁰ *Contra* Appeal, KSC-BC-2020-07/IA002/F00001, paras 69-70.

⁸¹ *Contra* Appeal, KSC-BC-2020-07/IA002/F00001, para.67.

⁸² Prosecution submissions on detention, KSC-BC-2020-07/F00088, paras 1-5.

⁸³ Decision, KSC-BC-2020-07/F00094, para.48.

⁸⁴ Appeal, KSC-BC-2020-07/IA002/F00001, paras 71, 73.

example, the *Brandstetter* case⁸⁵ concerned an appeal judgment of defamation which relied on submissions not provided to the applicant and the existence of which was not known to him.⁸⁶ This Appeal concerns a decision taken by the Pre-Trial Judge, not an Appeal Panel, and does not concern a determination of Mr HARADINAJ's guilt. Further, he was both notified of, and supplied with, the SPO's submissions.

45. Mr HARADINAJ's rights were in no way prejudiced by the Decision. In particular, as the Pre-Trial Judge explicitly stated in that Decision, the fact that no further submissions were warranted prior to reaching the Decision, did not preclude the Defence from submitting separate challenges on detention or applications for interim or conditional release under Article 41(2) and (12) and Rules 56(3) and 57(2) at any point in the intervening period between the requisite two-month reviews of detention.⁸⁷ That continues to be the case.

E. FOURTH GROUND: THE DECISION WAS ADEQUATELY REASONED

46. As recalled in the Appeal Decision, '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".'⁸⁸

47. The Defence fails to establish that the Decision was not reasoned⁸⁹ and misrepresents the contents of the Decision. In particular, contrary to the Defence

⁸⁵ Appeal, KSC-BC-2020-07/IA002/F00001, para.71, fn.28 citing ECtHR, *Brandstetter v Austria*, 11170/84, 12876/87, 13468/87, Judgement (Chamber), 28 August 1991 ('*Brandstetter* Judgement').

⁸⁶ See *Brandstetter* Judgement, paras 67, 69.

⁸⁷ Decision, KSC-BC-2020-07/F00094, para.49.

⁸⁸ Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.61, citing ICC jurisprudence.

⁸⁹ *Contra* Appeal, KSC-BC-2020-07/IA002/F00001, paras 80-89.

assertion,⁹⁰ the Decision specifically addressed the Defence request to respond to the SPO's submissions and for an oral hearing.⁹¹

48. The Defence stated that it was joining Mr GUCATI's request for an oral hearing or the opportunity to submit a response to the SPO's submissions on detention.⁹² The fact that the Pre-Trial Judge rejected this request by, *inter alia*, adopting⁹³ his reasoning in the decision addressing Mr GUCATI's request, which Mr HARADINAJ had joined, in no way prejudiced Mr HARADINAJ.⁹⁴ The decision on Mr GUCATI's request had been issued a few days earlier and was notified to Mr HARADINAJ.

F. FIFTH GROUND: THE PRE-TRIAL JUDGE CONSIDERED ALL RELEVANT REQUIREMENTS

49. In its Fifth Ground,⁹⁵ the Defence yet again merely disagrees with the conclusions that the Pre-Trial Judge drew from the available facts or the weight he accorded to particular factors, which does not suffice to establish a clear error.⁹⁶

50. The Decision makes it clear that the reasons why the requirements of Article 41(6)(b) are met in relation to Mr HARADINAJ are very real, including his attempt to actively evade arrest, his non-recognition of the SC, the fact that the confirmed indictment constituted an added incentive for him to flee,⁹⁷ his public

⁹⁰ Appeal, KSC-BC-2020-07/IA002/F00001, paras 84-85, 89.

⁹¹ See Decision, KSC-BC-2020-07/F00094, paras 47-49.

⁹² See Corrected Submissions on Detention, KSC-BC-2020-07/F00090/COR, paras 37-38 (stating, *inter alia*, 'Mr Haradinaj joins that application, and reaffirms the same.')

⁹³ See Decision, KSC-BC-2020-07/F00094, para.48, fn.71.

⁹⁴ *Contra* Appeal, KSC-BC-2020-07/IA002/F00001, paras 86-88, 95.

⁹⁵ Appeal, KSC-BC-2020-07/IA002/F00001, paras 90-93.

⁹⁶ See Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.64.

⁹⁷ Decision, KSC-BC-2020-07/F00094, paras 31-32, 44.

assertions that he would continue to disseminate confidential and non-public information, and his failure to comply with orders of the Single Judge.⁹⁸

G. SIXTH GROUND: THE PRE-TRIAL JUDGE CORRECTLY REJECTED THE REQUEST FOR AN ORAL HEARING

51. In asserting that the Pre-Trial Judge did not apply the correct test when rejecting its request for an oral hearing,⁹⁹ the Defence merely repeats arguments that were unsuccessful before the Pre-Trial Judge,¹⁰⁰ without demonstrating that their rejection constituted an error warranting the Panel's intervention.

52. The decision to grant an oral hearing is a matter of discretion.¹⁰¹ Such a request may be regarded as unnecessary when, as in the present case, the information before the Pre-Trial Judge was sufficient to enable the issuance of the Decision.¹⁰²

53. The Defence fails to demonstrate the added value of an oral hearing, namely the reasons why if granted, such a hearing could have led the Pre-Trial Judge to another conclusion.¹⁰³

IV. RELIEF REQUESTED

54. For the foregoing reasons, the Panel should dismiss the Appeal in its entirety.

⁹⁸ Decision, KSC-BC-2020-07/F00094, paras 35, 38, 45.

⁹⁹ Appeal, KSC-BC-2020-07/IA002/F00001, paras 94-106.

¹⁰⁰ *Compare* Corrected Submissions on Detention, KSC-BC-2020-07/F00090/COR, paras 41-44 with Appeal, KSC-BC-2020-07/IA002/F00001, paras 99, 101-102. Indeed, at paragraphs 101 and 102 of the Appeal, the Defence explicitly acknowledges it is reiterating that which it argued before the Pre-Trial Judge.

¹⁰¹ Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.77; ICTY *Prosecutor v. Limaj et al.*, IT-03-66-AR65, Decision on Fatmir Limaj's Request for Provisional Release, 31 October 2003, para.17 ('*Limaj Decision*').

¹⁰² Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.77; *Limaj Decision*, para. 17.

¹⁰³ *See Limaj Decision*, para. 17.

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Jack Smith

Specialist Prosecutor

Friday, 15 January 2021

At The Hague, the Netherlands.