

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

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Defence Reply to Specialist Prosecutor's Response to

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

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I. INTRODUCTION AND PRELIMINARY POINTS

1. We respectfully invite the Court of Appeal Panel ('Panel') to dismiss the arguments put forward by the Specialist Prosecutor's Office ('SPO') as set out in their Response of 15 January 2021 to the Defence's Appeal of the Decision on Review of Detention of Nasim Haradinaj ('Appeal') in their entirety as without merit or proper foundation and grant the Appeal.
2. This Reply is not intended to restate the arguments already made in the Appeal, as the SPO has failed to engage in the substantive argument to any reasonable extent, if at all.
3. This Reply will focus on disposing of the manifestly erroneous statements and misleading arguments put forward by the SPO. In particular, the Appellant would seek to argue that the entirety of the SPO's submissions relies on a fundamentally misconceived narrative, that being that the Appellant's grounds for appeal essentially constitute a "disagreement" with, rather than identifying an "error" in the Pre-Trial Judge's Decision dated 24 December 2020 ('Decision').¹

¹ "Decision on Review of Detention of Nasim Haradinaj" KSC-BC-2020-07/F00094

4. The Panel is invited to disregard such a narrative when considering the Appeal and consider the cumulative arguments set forth in the Appeal and below.
5. In our submission, the Appeal establishes there were several **errors** with the Decision on Pre-Trial Detention and that the procedure adopted in arriving at that Decision is fundamentally at odds with the procedures required under the applicable national and international legal and regulatory framework.
 - a. Contrary to what the SPO argues, the Appeal was lodged in time and in front of the correct panel [**SPO Response 15 January 2020 - paras. 21-22**]. The Appeal against the Decision was lodged on 4 January 2020 in accordance with 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'). This is set out in more detail in the Appeal and does not need to be repeated here.
 - b. The SPO further seeks to argue that the Appeal should be dismissed *in limine* in that it seeks to challenge earlier rulings [**para. 22**]. It is noted that the Appeal raises a number of challenges as to the procedures adopted in the present case that stem from the moment of

apprehension and initial detention that have impacted the entirety of the proceedings and is not limited to a single act or decision. It stems from a fundamental misapplication of the rules of international human rights law that form an integral part of domestic law.

- c. The SPO argues that the First Ground seeking to challenge the legality of detention has been improperly raised in the Appeal as not having been raised before [para. 23]. In this regard, it is noted that the question of legality of detention is subject to continual review and the Panel is invited to dismiss the SPO's submissions in this regard.

II. FIRST GROUND: THE INITIAL DETENTION WAS NOT IN ACCORDANCE WITH ARTICLE 5(3) OF THE CONVENTION

6. The SPO argues that the Appellant's arrest was pursuant to Rule 53 instead of 52(2) RPE [para. 25]. No issue is taken in regard to this point.
7. The SPO submits that the Appellant's initial detention was lawful and he was not arrested pursuant to Rule 52(2) and therefore it is not correct to argue that detention was arbitrary under Article 5(3) of the Convention on the basis that the Pre-Trial Judge issued an Arrest Decision and Arrest Warrant the day before the arrest [para. 28]. The SPO seeks to argue that under Rule 53 the Panel "would have already made the necessary findings in relation to the

detention” [para. 27]. The effect of this is that the first appearance, according to the SPO’s logic, was satisfied by the issuance of an Arrest Warrant. Such a position is illogical and fundamentally misrepresents the procedural requirements under Article 5(3) of the Convention. To argue that the Appellant was ‘entitled’ to challenge the lawfulness of arrest, transfer order and conditions of detention fails to comply with the procedural requirements. Far from being “inapposite,” as the SPO alleges, the reference to the Convention and the jurisprudence of the European Court of Human Rights is directly relevant and an integral part of the Constitution of the Republic of Kosovo. Therefore, it is not only appropriate; it is required.

8. The SPO’s *ex parte* application to a Single Judge to issue an arrest warrant without any submissions and affording no opportunity to challenge is not compliant with the requirements of Article 5(3) and (4) of the Convention.
9. The SPO wrongly terms the Appellant’s submissions regarding the refusal of the Pre-Trial Judge to hear about lawfulness of detention “misleading” [para. 31].
10. At the Initial Appearance – on 18 December 2020, as with the First Appearance, the Pre-Trial Judge made clear he would not be dealing with anything other than the warrants served, everything else has to be in writing.²

² KSC-BC-2020-07, Transcript, Initial Appearance of Nasim Haradinaj, 18/12/2020 at 49/15 - 50/8.

At the First Appearance – on 29 September 2020, the Single Judge, as he was then, noted that it was not a trial and no evidence would be presented or debated and that it would be conducted solely according to Article 41 and Rule 55.

11. At no stage during the First Appearance did the Single Judge permit the Appellant, through his Counsel, to challenge the legality of his arrest and/or continued detention or to hear an application for bail after hearing any objections to provisional release from the SPO.
12. At the hearing, the Court Officer read out that there was a grounded suspicion of having committed an offence of attempted intimidation, an offence of retaliation, an offence of violating the secrecy of proceedings, and that there are articulable grounds that there is (a) a risk of flight; (b) he has the incentive, means and opportunity to obstruct the proceedings; and (c) he will attempt to repeat the criminal offences. The Single Judge then stated in unequivocal terms that it was not the time to contest the reasons for his arrest, merely to confirm that he had been informed of the reasons and that he could challenge in writing. He did not address the articulable grounds or invite any submissions other than making reference to the arrest warrant.
13. The SPO claims the first ruling on custody of Mr. Haradinaj was on 24 September 2020 by way of the issuance of the Arrest Decision and Arrest

Warrant [para. 32]. The SPO also argues that the Appellant was brought before a judge without undue delay and his rights were respected [para. 33]

14. It is repeated that the adopted procedure falls far short of that required under Article 5(3) of the Convention as set out in the Appeal.
15. The SPO declares that the Appellant has failed to establish an error of law invalidating the decision, an error of fact occasioning a miscarriage of justice, or an error of the Pre-Trial Judge's discretion [para. 34]. The Panel is invited to dismiss such an assertion as illogical and lacking in any merit and further invites the Panel to take its own decision based on the submissions of the parties.
16. The SPO repeats its argument that this ground of appeal advanced by the Appellant represents mere "disagreements" with the Decisions which are not "errors" [para. 36]. This is simply incorrect and represents a fundamental lack of understanding of the strict application of the Convention to these proceedings.

III. SECOND GROUND: THE PROCESS OF REVIEW OF DETENTION VIOLATED ARTICLE 5(4) ECHR

17. The SPO submits that the Decision addressed the Appellant's submissions on lawfulness of detention and the SPO again repeats its argument that it is a "disagreement" rather than an "error" [para. 37-39] Once again, we invite the Panel to disregard such an unsubstantiated narrative and to make its own decision based on the merits of the Appeal.

IV. THIRD GROUND: THE PROCESS WAS PROCEDURALLY UNFAIR

18. The SPO asserts that the review procedure adopted by the Pre-Trial Judge in arriving at the Decision was fair but recognises the Single Judge has "significant discretion in manner and procedure for seeking relevant information to conduct the required review" [para. 40]. The Appellant argues that irrespective of discretion that procedure must be Article 5 compliant.
19. The SPO maintains that the Appellant was not at a "significant disadvantage" to the SPO and that the material available to the Appellant were his Arrest Decision and Arrest Warrant, the confirmed indictment and the opportunity to provide submissions [para. 41]. The Appellant maintains that this falls far short of the procedural requirements imposed by Articles 5(3) and (4) of the Convention.
20. The SPO suggests that its submissions are "not essential" to the Appellant [para. 43]. This fundamentally misconstrues the adversarial judicial process.

The Appellant cannot possibly respond to objections *in abstracto*. To be clear, the grounds for detention were read out by the Court Officer with little or no specificity and no reference to discernible facts that would amount to ‘relevant and sufficient reasons.’

21. The SPO maintains that the objection to the Pre-Trial Judge’s finding that he had sufficient information to make a ruling and no further submissions were necessary is a mere “disagreement” and not an “error” [para. 44]. Further, the SPO rejects the European Court jurisprudence and declares, without any substance or proper basis, that the Appellant was not prejudiced by the Decision [para. 45].
22. To be clear, the test is not whether the Single Judge considered that he had enough information to make a decision, but whether the Appellant was afforded an effective opportunity to be heard personally and to have a reasoned decision with reference to ‘relevant and sufficient reasons.’

V. FOURTH GROUND: THE DECISION OF THE PRE-TRIAL JUDGE WAS NOT REASONED

23. The SPO merely states that the Appellant failed to establish the Decision was not reasoned [paras. 46-48]. The Appellant maintains the position as set out in the Appeal and repeats that the Single Judge has failed to address any of

the arguments put forward by the Appellant prior to issuing a decision extending detention.

VI. FIFTH GROUND: THE DECISION MUST BE BASED ON REAL AND RELEVANT CONSIDERATIONS

24. The SPO makes the unsupported assertion that this ground is a “disagreement” with the Decision rather than an “error” [para. 49]. The Appellant maintains the position as set out in the Appeal and repeated in this Reply.

VII. SIXTH GROUND: THE PRE-TRIAL JUDGE HAS MIS-DIRECTED HIMSELF

25. The SPO claims that the Appellant is merely repeating unsuccessful arguments that were made before the Pre-Trial Judge [para. 51], reiterates that a decision as to whether there should be an oral hearing is one of discretion [para. 52] and claims that the Appellant has failed to demonstrate how it would have led to different decision [para. 53]. In response, it is not one of blanket discretion. Further, it is repeated that any decision must be Article 5

compliant and the Pre-Trial Judge's decision runs contrary to that what is required.

VIII. CONCLUSION

26. The Appellant maintains the position as set out in the Appeal and repeated in this Reply. The Decision falls far short of that which is required under Article 5 of the Convention and there are clear and manifest errors of law and fact.
27. The Panel is invited to allow the Appeal and return the matter to the Pre-Trial Judge for an oral redetermination of pre-trial detention.

Word Count: 1935 words



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