

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

**Before:** Pre-Trial Judge

**Registrar:** Dr Fidelma Donlon

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

**Date:** 1 February 2021

**Language:** English

**Classification:** Public

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**Defence Submissions on Second Review of the Detention 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

## I. INTRODUCTION

1. On 24 December 2020, the Pre-Trial Judge rendered his Decision on Review of Detention of Nasim Haradinaj (the 'Decision').<sup>1</sup> At paragraph 50 of the Decision, Mr. Haradinaj was directed to file submissions on whether reasons for his continued detention still exist by 1 February 2021.
2. As per previous submissions, it is not accepted that there existed any proper basis upon which Mr. Haradinaj ought to be detained; in any event, and having regard to the decision of the Pre-Trial Judge of 24 December 2021, it is further submitted that those reasons found on that occasion, no longer exist, based on both the position previously advanced by the Specialist Prosecutor's Office (SPO), having regard to a detailed account given by Mr. Haradinaj about his arrest, as set forth in this submission.
3. Specifically, it is challenged that Mr. Haradinaj tried to flee and thus remains a flight risk. The suggestion that Mr. Haradinaj sought to evade arrest and detention, was not, and continues not to be accepted; now, having regard to the detailed account regarding the circumstances of his arrest taken from Mr. Haradinaj, an account that has not been challenged by way of evidence

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<sup>1</sup> Decision on Review of Detention of Nasim Haradinaj KSC-BC-2020-07/F00094, 24 December 2020

adduced by the SPO, it is submitted that the previous finding of the Pre-Trial Judge can no longer be maintained.

4. Accordingly, the grounds for the existence of a flight risk under Article 41(6)(b)(i) of the Law, as held at paragraph 31 of the Decision, cannot be upheld. Counsel for Mr. Haradinaj therefore request the termination of his detention on remand and his unconditional release pending trial.

## II. BACKGROUND

5. 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').<sup>2</sup>
6. 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.<sup>3</sup>

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<sup>2</sup> KSC-BC-2020-07, F00009/RED

<sup>3</sup> KSC-BC-2020-07, F00012

7. 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.
8. On 29 September 2020, the Appellant filed a request for his immediate release from detention.<sup>4</sup>
9. On 27 October 2020, the Single Judge rendered a decision rejecting this request.<sup>5</sup>
10. On 30 October 2020, the SPO submitted an indictment for confirmation against the Appellant and Mr. Gucati.<sup>6</sup>
11. 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.<sup>7</sup>
12. On 11 December 2020, the Pre-Trial Judge confirmed, in part, the Indictment, and ordered the SPO to submit a revised indictment as confirmed.<sup>8</sup>

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<sup>4</sup> KSC-BC-2020-07, F00030

<sup>5</sup> KSC-BC-2020-07, F00058

<sup>6</sup> KSC-BC-2020-07, F00063

<sup>7</sup> KSC-BC-2020-07, F00073

<sup>8</sup> KSC-BC-2020-07, F00074/RED

13. On 14 December 2020, the SPO submitted the Confirmed Indictment with redactions.<sup>9</sup>
14. On 18 December 2020, the Appellant was produced before the KSC where a 'first appearance' was held.
15. On 18 December 2020, the Appellant filed 'Submissions on the Review of Detention by 27 December 2020',<sup>10</sup> the SPO filing its 'consolidated submissions on review of detention' on the same day.<sup>11</sup>
16. On 24 December 2020, the Pre-Trial Judge refused the Appellant's application for release.<sup>12</sup> In his Decision, the Pre-Trial Judge ordered a two-month review of Mr. Haradinaj's detention, with fresh submissions by the Defence to be filed by 1 February 2021.
17. It is respectfully submitted that the Pre-Trial Judge's Decision of 24 December 2020 failed to establish whether relevant and sufficient reasons existed for continued detention as is required by Article 5(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention).

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<sup>9</sup> KSC-BC-2020-07, F00075

<sup>10</sup> KSC-BC-2020-07, F00090

<sup>11</sup> KSC-BC-2020-07, F00088

<sup>12</sup> KSC-BC-2020-07, F00094

18. It is confirmed simply for the purposes of clarity, that the referred to decision upon detention is currently the subject of Appeal, and an Appeals Panel has been constituted to consider the Appeal.

19. This does not however have any bearing on these submissions.

### **III. THE LAW**

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

- a. There is a risk of flight;
- b. He or she will destroy hide, change or forge evidence of a crime or specific circumstances indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices; or
- c. The seriousness of the crime, or the manner or circumstances in which it was committed and his or her personal characteristics, past conduct, the environment and conditions in which he or she lives or other personal circumstances indicate a risk that he or she will repeat the criminal offence, complete an attempted crime or commit a crime in which he or she has threatened to commit.

21. Further, Article 41(12) of the Law makes provision for a number of measures to be imposed so as to *“ensure the presence of the accused during proceedings, to prevent re-offending or to ensure successful conduct of criminal proceedings”*.
22. It is submitted that in the instant case, conditions allay any concerns that the Court may have.
23. It is further submitted that reasonable suspicion of having committed an offence within the jurisdiction of the Court may constitute a reasonable ground for arrest and initial detention, but after the passage of time it no longer suffices as justification for continued detention. Continued detention must be on the basis of articulable grounds to believe that one or more of the identified justifications in Article 41(6)(b) exist.
24. The mere citation of one or more of the grounds will not be sufficient as the test is the existence of ‘relevant and sufficient’ reasons and that it cannot be gauged solely on the gravity of the offence or the severity of any sentence. In *Wemhoff v. Germany*, it was made clear that the Court:

*“...must judge whether the reasons given by the national authorities to justify continued detention are relevant and sufficient to show that detention*

*was not unreasonably prolonged and contrary to article 5(3) of the Convention.”<sup>13</sup>*

25. Furthermore, it is clear that the mere citation of grounds, effectively rubber stamping what is set out in the Law, will not constitute ‘relevant and sufficient’ reasons. The Court must examine all the circumstances arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release.<sup>14</sup>
26. In this regard it is noted that the SPO’s insistence on the nature of the allegations, being offences against the administration of justice, being sufficient to justify continued detention falls some way short of the required standard. The SPO is reminded that Mr. Haradinaj is entitled to the full protection of the presumption of innocence and that a reasonable suspicion of having committed a serious offence against the administration of justice whilst it may be sufficient for arrest and initial detention it ceases to be a

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<sup>13</sup> Eur. Court HR, judgment of 27 June 1968, Series A no. 7, para. 12

<sup>14</sup> Eur. Court HR, *Toth v. Austria*, judgment of 25 November 1991, Series A no. 224, para. 67 and *Neumeister v. Austria*, judgment of 7 May 1974, Series A No. 8, p.37, paras. 4-5



sufficient ground after the passage of time, and in this matter, the passage of more than three months.

#### **IV. THE OBJECTIONS**

27. It is anticipated that the SPO will offer the same objections to release as that previously submitted, namely:

- a. That Mr. Haradinaj is a flight risk;
- b. That Mr. Haradinaj would obstruct the progress of proceedings; and
- c. That there is a risk of Mr. Haradinaj committing further offences.

28. As per the previous submissions on detention, the SPO has not demonstrated how those objections are to be realised, and specifically, in terms of the submission that Mr. Haradinaj is a flight risk, the SPO is advancing a factual outline in terms of that objection that is demonstrably inaccurate, as per the below. This does not approach the proper test of demonstrating 'relevant and sufficient' reasons for extending detention.

#### **V. NASIM HARADINAJ'S ACCOUNT OF HIS ARREST**

29. Counsel for Mr. Haradinaj have now had the opportunity to take detailed instructions in respect of the circumstances surrounding his arrest and detention, and in particular, Mr. Haradinaj's movements on the day of his arrest.

30. It is important to highlight that these instructions could not be advanced prior to the previous decision on detention given the very limited deadline for those submissions, taking into account that Counsel was only formally appointed to this case moments before the hearing, and Co-Counsel appointed shortly thereafter, the same which the Pre-Trial Judge had set as a deadline for submission. Mr. Haradinaj's counsel were therefore required to file written submissions without having had the basis to take detailed instructions and without having had the opportunity to take possession of the case file from the previously instructed counsel due to the delay in the appointment process.
31. Mr. Haradinaj's account of his arrest demonstrates that he did not attempt to escape arrest as alleged by the SPO and determined by the Pre-Trial Judge.<sup>15</sup> Accordingly, the Pre-Trial Judge's finding that he constitutes a flight risk on the basis of his conduct during the arrest cannot be upheld and his continued detention is not justified. In terms of that which occurred on the day of arrest and detention, Mr. Haradinaj will state the following.

*The raid on the KLA WVA offices*

32. At the time of the 'raid' on the offices of the KLA WVA offices, Mr. Haradinaj describes that he was at his home in Daichan on 25 September 2020, which he

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<sup>15</sup> Decision on Review of Detention of Nasim Haradinaj KSC-BC-2020-07/F00094, 24 December 2020, at para. 31

says is about 100km away from Prishtinë. He first found out about the raids happening at the KLA WVA' offices on that day through the media. As soon as he heard about them, Mr. Haradinaj made several calls to his secretary at the KLA WVA offices and to the lawyer of the association, to ascertain what was happening. The secretary advised that she was prevented from going upstairs in the office block and stated that access was being denied to certain floors.

33. Mr. Haradinaj made several calls to the Veteran Association's lawyer, again, in an effort to ascertain what was happening.
34. Having spoken to the lawyer, who was not able to clarify the position, Mr. Haradinaj asked him to contact Mr. Gucati, who he had also attempted to contact but to no avail.
35. At the same time, Mr. Haradinaj was called several times by journalists because given his capacity as 'spokesperson' for the KLA WVA, as they too were trying to find out what was happening at the association offices.

*On the way to Prishtinë*

36. Mr. Haradinaj then made the decision to attend the offices.
37. During the journey Mr. Haradinaj received a call from Mr. Gucati, wherein Gucati told him that the offices were being were searched and that Mr.

Haradinaj had to come and be present given that Mr. Gucati was to be arrested and to be taken to The Hague.

38. Mr. Haradinaj reassured Mr. Gucati that he was on his way and he would be there as soon as he could.

39. At this point therefore, Mr. Haradinaj was aware that arrests were being made, and yet continued his journey to the offices despite there being ample opportunity for him abscond.

40. On his way there, Mr. Haradinaj continued to receive calls from journalists including from the news anchor [Arsim Larnë] of T7, a significant media and tv outlet, at around 13:00.

41. Mr. Haradinaj was asked whether he could come to their tv studio at 17:00 for an interview on that which was happening at the offices. Mr. Haradinaj agreed because he said he assumed that whatever was happening would be over by then.

42. Just prior to his arrival in Prishtinë, Mr. Haradinaj received a call from the Association's lawyer to inform him that Mr. Gucati had been arrested.

43. Again, Mr. Haradinaj continued to the offices.

*At the raided KLA WVA offices*

44. When Mr. Haradinaj arrived at the KLA WVA offices, he was met by several members of the Association's presidency. He describes the street as being full of journalists and Kosovo law enforcement.
45. Mr. Haradinaj then met the Vice-President of the Association, who is unable to talk following a stroke, and who had, for some inexplicable reason, been left helpless on the stairs, and passed on a number of occasions by EULEX police who were inside the Association's offices.
46. Kosovo police outside asked Mr. Haradinaj to speak to journalists and veterans and assist in clearing the road given it was creating a hazard. Mr. Haradinaj complied and people indeed eventually dispersed and cleared the streets. At this point, a journalist identifying himself as being from Euronews requested an interview with Mr. Haradinaj. Mr. Haradinaj stated that it would need to be before 17:00, as he had already arranged an interview for that time.
47. Mr. Haradinaj then sought to enter the offices so as to ascertain what was happening as it was still unclear. Mr. Haradinaj describes that the door opened and individuals in combat fatigues directed their guns towards him.
48. Importantly, at no stage did anyone try to detain Mr. Haradinaj, nor did Mr. Haradinaj seek to disguise or conceal his presence at the scene or his identity.

49. Mr. Haradinaj describes that he was at the offices until approximately 16:30 where he continued to try and calm veterans and civilians present given the provocation of EULEX officers. Mr. Haradinaj recalls that there is CCTV footage of the events that day that would support this fact. Mr. Haradinaj also highlights that the Kosovan police present expressed their gratitude given his assistance; again, these are not the actions of an individual seeking to disguise or conceal his presence at the scene.

*On the way to the T7 TV station, followed by EULEX cars*

50. Mr. Haradinaj, aware that he was running late for the pre-arranged interview as referred to above, and not having been contacted by the authorities, sought a taxi to take him to the TV station.

51. In the taxi and on the way to the tv station, Mr. Haradinaj then described being at an intersection where they were to drive to the left. From the right, he saw two EULEX SUV vehicles, around 50-60 metres away.

52. Mr. Haradinaj stated that initially he did not realise they were being followed by them. Only after a couple of turns did he realise they were making the same turns.

53. At no stage however did anyone seek to cause Mr. Haradinaj to stop, nor had anyone at any time either sought to prevent him from leaving the vicinity of the offices, or asked him to remain at the offices.

54. In short, there was no attempt to detain or arrest Mr. Haradinaj and therefore there is no basis upon which to suggest that he sought to evade apprehension.
55. According to Mr. Haradinaj, there were no flashing blue light or demands for them to stop. When Mr. Haradinaj's taxi was approaching the Ministry of Justice, Mr. Haradinaj asked the driver to signal to the left to verify if the EULEX cars were following them. The taxi turned on to the road where the TV station is located, and the EULEX cars were still right behind them. When Mr. Haradinaj's taxi stopped, Mr. Haradinaj paid for the taxi. The people in the EULEX car did not get out. Mr. Haradinaj then got out to go to the TV station, and the EULEX officers ran in front of him and told him to stop, an order with which Mr. Haradinaj complied.

*Mr. Haradinaj's Arrest*

56. When the officer took off his mask, Mr. Haradinaj realised it was the same officer who had come to the offices on a previous occasion to collect the material leaked from the office of the SPO.
57. The officer addressed Mr. Haradinaj in Swedish, advising that he was under arrest.
58. Mr. Haradinaj accepts that he told the officers that he does not recognise the KSC or recognise their authority to arrest; however, at no time did he seek to evade arrest or apprehension.

59. Given the actions of Mr. Haradinaj, it is abundantly clear, that if any individual had taken any steps to arrest or detain Mr. Haradinaj at the offices of the Veterans' Association, or at any point during his journey either to the offices or to the TV station, he would have complied with any request, just as he complied when he was eventually approached.
60. It is of further note that at no stage was Mr. Haradinaj handcuffed, and thus the suggestion that he was or is a flight risk does not appear to be made out on the evidence.
61. In fact, it was not until Mr. Haradinaj arrived in the Netherlands that he was handcuffed.
62. It is presumed that Mr. Haradinaj's movements whilst in the vicinity of the Veterans' Association Offices, and thereafter, that which occurred during the journey to the TV station, and outside of the TV station can be readily verified by viewing any CCTV evidence, and by asking those officers present, and further, those officers detaining Mr. Haradinaj, to provide an account.
63. It is notable that the SPO have not sought to do any such thing and have merely relied upon the fact that Mr. Haradinaj left the scene, which at this point he was wholly entitled to do given that no one had communicated with him regarding a warrant of arrest, as being evidence of him being a flight risk.



64. The reality is that the facts as recounted by the SPO is not a true depiction of that which occurred.

## **VI. SUBMISSIONS**

65. It is submitted on the basis of the detailed account given by Mr. Haradinaj above, that throughout the day of his arrest, Mr. Haradinaj acted in a manner that does not support a finding that he is a flight risk. Very much to the contrary, Mr. Haradinaj was responsible, disciplined, co-operative and calm.

66. Mr. Haradinaj may have indicated that he does not recognise the KSC/SPO nor does he recognise its power of arrest or detention. That is his right and he is perfectly entitled to express that opinion. The issue is whether he is a flight risk as a result of that opinion and to that the SPO has provided no evidential basis to reach such a conclusion. Further, Mr. Haradinaj intends, and has every interest, in challenging the charges and establishing his innocence.

67. First, instead of seeking to distance himself from the EULEX officers and the raid on the KLA WVA offices, which would be the expected behaviour of someone trying to escape, Mr. Haradinaj drove 100km to go precisely to the scene.

68. Second, Mr. Haradinaj's behaviour was clearly motivated by an intention to find out what was happening and fulfil his duties and responsibilities as a spokesperson, including speaking to journalists and preparing for an

interview by investigating the scene and talking to people. This also does not suggest that he wanted or attempted to escape.

69. Third, taken together, his movements that day, namely that he travelled 100km to the scene of the raid at the KLA WVA offices, tried to go inside where EULEX officers were, left to go to the T7 TV station for a scheduled interview and made no attempts to escape from the taxi when he realised that he was being followed persistently by two EULEX SUV vehicles, also do not indicate he was seeking to evade detection, but conversely, he was going about his business, attending a pre-arranged appointment.

70. Fourth, Mr. Haradinaj acted calmly and in a co-operative spirit during the day. It is recalled that he was thanked for his co-operation both at the scene of the raid, by the Kosovan police and by EULEX, upon his arrest. Further, he was not handcuffed at any time in Kosovo when being arrested which demonstrates this was not necessary given his co-operation. He also did not need to be handcuffed whilst awaiting the arrival of Kosovan police at the scene of his arrest. Again, this is not the behaviour of a person who wants to escape, nor are those measures taken with respect of someone trying to flee.

71. Fifth, Mr. Haradinaj has the right to freedom of opinion and freedom of expression. He has the right to express that he does not recognise the jurisdiction and enforcement powers of the KSC or EULEX. During his arrest,

he voiced this opinion, as he has done in the past. Notably, however, despite him voicing this opinion, he did not attempt to escape or run away from the EULEX officers. Rather, he co-operated entirely with the process and demonstrated that he respected the position of those detaining him. Therefore, it cannot be concluded that his opposition to the KSC jurisdiction and EULEX enforcement powers necessarily mean he would try to escape.

72. Sixth and related to the fifth point, Mr. Haradinaj, as a war veteran and former military officer has decades of experience with the enforcement system in his country, including the relationship between the military and the police. Mr. Haradinaj's behaviour shows he is a disciplined and responsible veteran. He may question the authority of the KSC and EULEX, but he did not question his arrest after it was confirmed by the authorities; quite the opposite, He complied and co-operated. Therefore, his opinions and beliefs do not support a finding of a flight risk.

73. Altogether, these submissions are in line with Mr. Haradinaj's previous submissions that any finding that he is a flight risk is wholly unsubstantiated and without foundation. It is further repeated that Mr. Haradinaj resides in Kosovo with his family and has not sought to disguise or conceal his whereabouts and therefore, is not a flight risk.<sup>16</sup>

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<sup>16</sup> KSC-BC-2020-07, F00090, para. 34(a)

74. At paragraph 31 of the Decision, the Pre-Trial Judge noted that Mr. Haradinaj had submitted that earlier findings concerning his flight risk are unsubstantiated “*without providing any arguments in support of his claim.*”<sup>17</sup> While this is respectfully denied, it is noted that further substantial arguments have now been given with Mr. Haradinaj’s detailed personal account of his arrest. Given that the Pre-Trial Judge considered there to be no arguments when taking his Decision, the findings should be wholly reconsidered in light of Mr. Haradinaj’s account which proves he is not a flight risk.
75. It is respectfully submitted that the burden is *not* on Mr. Haradinaj to prove that he is not a flight risk, or whether any other articulable ground applies, the burden very clearly is on the prosecution to prove that there is such a risk with reference to credible and reliable evidence. They have failed to do so.
76. In *Ilijkov v. Bulgaria*, the European Court noted:

“Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the

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<sup>17</sup> Decision on Review of Detention of Nasim Haradinaj KSC-BC-2020-07/F00094, 24 December 2020 at para. 31.

right to liberty and one that is only permissible in exhaustively enumerated and strictly defined circumstances.”<sup>18</sup>

77. It is for the SPO to establish that one or more of the grounds apply and any shifting of the burden on to the defence to establish why Mr. Haradinaj should be released will be in breach of Article 5(4) of the Convention as *Ilijkov* confirms.
78. Further, the position as advanced by the SPO is now fundamentally undermined to such an extent, that it can no longer be held to be a credible basis upon which to object to the release of Mr. Haradinaj.
79. Any refusal to release Mr. Haradinaj on the ground that there exists a risk of flight must be based on a well-founded fear that he would fail to surrender and that refusal to release must be based on a whole set of circumstances<sup>19</sup> and that the severity of the sentence and the gravity of the charges, though relevant and important to the question of flight, do not constitute an independent ground and cannot either individually or collectively constitute grounds for refusal of bail.<sup>20</sup>

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<sup>18</sup> Eur. Court HR, [2001] 35 E.H.R.R. App. 33977/96, para. 85

<sup>19</sup> Eur. Court HR, *Stogmuller v. Austria* (1979-1980) 1 E.H.R.R. 155, para. 15

<sup>20</sup> *Ilijkov v. Bulgaria*, paras. 80-81

**VII. That there is a Risk of Further Offences/Obstruction of Justice**

80. The submissions made in the previous filing dated 18 December 2020 are reiterated on this point in that the Defence would maintain that the objections raised by the SPO on this point are without foundation.

81. For completeness we repeat those submissions below with relevant additions.

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

83. On the date of the 'first press conference', that being 7 September 2020, the Single Judge authorised the seizure of the documents received by the KLA. Those documents were seized, and thus the order of Court respected.

84. Further, the second tranche of documents disclosed on 16 September 2020, were the subject of a further seizure order dated 17 September 2020; again, that order was respected.

85. Still further, on 22 September 2020, a third tranche of documents were disclosed, those being seized by the SPO the same day.

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

87. The Defendant did not facilitate the leaking of these documents, nor is it suggested that he sought to obtain them by any means, nor is it suggested that any threats were used to obtain those documents.
88. Taking the SPO's case at its highest, it is argued that documents were 'leaked' from the SPO by persons other than the defendant(s). This is an issue for the SPO and their security protocols rather than the Defendant, and accordingly, there is no basis upon which it can be suggested that the Defendant would seek to obstruct the investigation.
89. If one is to accept the SPO's case, it is the SPO in allowing three separate leaks to occur that has put investigations and/or prosecutions at risk. At this stage it is not even subject to scrutiny whether the leaked material was confidential or protected, as the SPO has refused to disclose the material to the defence to examine its contents.
90. It is noted that the individual(s) responsible for the three separate breaches of security protocols, despite the existence of CCTV evidence, are yet to be prosecuted and/or identified, despite this being entirely within the mandate of the SPO.
91. In an interview with the Kosovo media outlet KOHA, the Specialist Prosecutor, Mr. Jack Smith, declares:

“We have analysed this incident in detail. I can say with conviction that no document was issued as a result of any violation by the employees of the SPO.”<sup>21</sup>

92. To re-iterate, Mr. Haradinaj did not solicit any documents, he did not facilitate their leak, nor did he take any steps to come into possession of them. The Specialist Prosecutor now seems to suggest that the documents were not even from within his Office.
93. Accordingly, it is wholly unclear upon what basis the SPO suggests that Mr. Haradinaj will take any steps to obstruct proceedings.
94. It is clear that such a risk, if one existed at all, will diminish over time,<sup>22</sup> that a generalised risk is insufficient and that the risk must be identifiable on the facts of the case and there must be evidence in support.<sup>23</sup>
95. The ground of committing further offences likewise cannot be generalised and must be “a plausible one” and considered “in the light of the circumstances of

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<sup>21</sup> <https://www.koha.net/arberi/256502/smith-akuzat-jane-kunder-individeve-jo-kunder-uck-se-e-as-kunder-kosoves/>

<sup>22</sup> Eur. Court HR, *Letellier v. France* (1992) 14 E.H.R.R. 83, para. 15.

<sup>23</sup> Eur. Court HR, *Tomasi v. France* (1993) 15 E.H.R.R. 1, paras. 84 and 91.



the case and, in particular, the past history and the personality of the person concerned".<sup>24</sup>

96. There are a number of considerations that the European Court has concluded are not relevant considerations for the withholding of bail. The severity of the sentence and the gravity of the charges, as noted earlier, whilst they may be relevant to the risk of flight, they are not sufficient grounds for refusing bail. Further, the fact that an indictment has been filed,<sup>25</sup> or a lack of demonstrated confidence in the justice system<sup>26</sup> will not constitute grounds for refusal.
97. It is respectfully submitted that the point was raised in the previous application for provisional release that it is for the SPO to raise objections to release, grounded on relevant and sufficient reasons with reference to a proper evidential basis rather than a generalised assertion, upon which the defence would have an opportunity to respond.
98. The SPO has failed to advance any articulable grounds consistent with the procedural requirements of Article 5 and has advanced grounds that amount to little more than generalised statements that are not identifiable to the specific facts of the case and provide no evidence in support.

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<sup>24</sup> Eur. Court HR, *Muller v. France* [1997] ECHR 1, paras. 84 and 91.

<sup>25</sup> Eur. Court HR, *Aliyev v. Azerbaijan* (2010) ECHR App. 37138/06, paras. 173-178.

<sup>26</sup> Eur. Court HR, *Getos-Magdic v. Croatia* (2010) ECHR App. 58305/08/06.

## VIII. CONCLUSION

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

- a. That his passport is surrendered, and he does not leave Kosovo subject to listed Court appearances;
- b. That he reside at his given address and does not seek to change that address without leave of the Court;
- c. That any electronic device used for communication is registered with the Court;
- d. That he reports to a nominated local police station at a frequency to be determined;
- e. That he refrain from contact with his co-defendant, subject to inadvertent contact during court proceedings;
- f. That he undertakes to not communicate directly with the media, or seek to publish any information concerning his, or any other matter currently before the Court; and
- g. Any other condition that the Pre-Trial Chamber deems fit to impose.

100. The Pre-Trial Judge is hereby respectfully requested to review his previous Decision on Mr. Haradinaj's detention on remand, in accordance with Rule 57(2) of the Rules, and make a finding that:

- a. Mr. Haradinaj's detention on remand be terminated;
- b. Mr. Haradinaj is allowed to return home to await trial; and
- c. appropriate measures under Article 41(12) of the Law be considered instead, if necessary.

Word Count: 5345 words



**Toby Cadman**

**Specialist Counsel**



**Carl Buckley**

**Specialist Co-Counsel**