

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: 15 February 2021

Language: English

Classification: Confidential

Defence reply to Prosecution Consolidated Response for Review of Detention

Specialist Prosecutor

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I. INTRODUCTION

1. On 12 February 2021, the SPO filed its 'Prosecution consolidated response for review of detention'.¹
2. The Defence for Mr. Haradinaj seeks to reply to the consolidated response, noting that any such reply ought to be limited to issues raised within the response.
3. On that basis, the Defence, without prejudice to that which has been previously submitted and argued concerning whether detention of Mr. Haradinaj is warranted or otherwise, seek to limit its submissions to the position adopted by the SPO in terms of the allegation that Mr. Haradinaj sought to evade arrest, as one of the grounds for challenging provisional release.
4. By way of preliminary argument, the Defence once again reiterates the point **[Defence Submissions paras. 74-79]** that the burden is on the SPO **not** the Defence and the ordinary course of events is that the SPO sets out their objections to provisional release, the Defence responds and thereafter the decision is made by the Pre-Trial Judge. To reverse the process and transfer the burden, as argued previously, does not satisfy the procedural guarantees under Article 5(4) of the European Convention for the Protection of Human

¹ KSC-BC-2020-07/F00124

Rights and Fundamental Freedoms ('Convention'), to which the Court, as a domestic judicial organ of the Republic of Kosovo is bound by virtue of Chapter II of the Constitution.

II. BACKGROUND

5. The relevant background has, it is submitted, already been adequately highlighted in the substantive submissions concerning detention, and therefore, there is no intention to rehearse the same within this reply.

III. THE LAW

6. Similar to the position adopted in terms of paragraph 4 above, the relevant 'law' has already been highlighted in the previous and substantive submission, and therefore, there is no intention to rehearse the same here.

IV. SUBMISSIONS

(a) *Whether Nasim Haradinaj represents a 'flight risk'*

7. The Defence have already made submissions on whether Mr. Haradinaj represents a flight risk, and within those most recent submissions, have

provided a detailed account and timeline of the events leading up to his arrest and detention.

8. It is of note that the SPO has previously maintained that Mr. Haradinaj sought to evade capture and escape those that sought to arrest and detain him.
9. Having had the benefit of being able to take full instructions from Mr. Haradinaj on that issue, detailed submissions have now been filed.
10. The position of the SPO, at paragraph 5 of its response is that those submissions are "*distorted and selective*". That is not accepted.
11. The SPO then goes on to note what it says is the correct course of events, and refers to the 'Report on Arrest and Transfer'.²
12. It is of importance to highlight the fact that the supporting material to that report, namely Annex 1, 'Arrest-Transfer File', was filed *confidential ex parte* and it would appear to have remained so.
13. Accordingly, the Defence have at no time, had opportunity to scrutinise the formal account of arrest over and above rejecting the position advanced by the SPO.

² KSC-BC-2020-07/F00026/COR/RED

14. Having now had the opportunity to submit a detailed account of Mr. Haradinaj's position, the parties have reached an impasse in terms of the account to be adopted.
15. In the interests of procedural fairness, and so as to give Mr. Haradinaj the opportunity to effectively challenge the grounds advanced justifying his ongoing detention, the Pre-Trial Judge is requested to order that a statement be disclosed from the arresting officers, providing a detailed account of the circumstances of arrest and detention as well as any supporting evidence to substantiate the contrary account.
16. It is respectfully submitted that there is nothing investigatory 'sensitive' in terms of the arrest given that it happened in public, in full view of numerous members of the public, and is a matter of public record.
17. Therefore, it is unclear as to why a specific account, provided by those officers in attendance, was in the first instance submitted *ex parte*, and thereafter, remains so.
18. The Defendant at this stage simply doesn't have the opportunity to effectively challenge the basis of his detention, as the court is relying on the submission of the SPO, and a submission that cannot be effectively challenged without the evidential basis for that challenge being disclosed.

19. Attention is drawn to 'Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention',³ wherein, at paragraph 43, the Appeals Chamber rules:

"Although the Specialist Chambers' legal framework does not prescribe a specific procedure for the review of detention by the Pre-Trial Judge, according to Article 5(4) of the ECHR, the proceedings must ensure equality of arms between the parties, that is, both the prosecution and the accused must have the opportunity to present their case and have knowledge of and comment on the observations made or evidence adduced by either party. The Panel further notes that if parties are unable to respond to each other's arguments, those arguments are shielded from the scrutiny of the other party which in turn may affect the Pre-Trial Judge's determination of the issues raised."

20. It is respectfully submitted that with the SPO maintaining their position in terms of the circumstances of arrest and detention, and further, seeking to suggest that the submissions of the Defence are a "*distorted and selective account of the arrest of Mr. Haradinaj*",⁴ the Defence are not, without disclosure of a statement of arrest by those officers present and being offered the opportunity to comment, or challenge the evidence being adduced.

³ KSC-BC-2020-07/IA002/F00005

⁴ KSC-BC-2020-07/F00124

21. With respect, the submissions of the SPO do not constitute evidence, and therefore, the evidence remains undisclosed, and therefore by extension, remain 'shielded from scrutiny', and thus the position being adopted violates the principle of the 'Equality of Arms', and in doing so, constitutes a breach of Article 5, in conjunction with Article 6, of the Convention.
22. Further, it is not enough for the SPO to maintain that there are other grounds upon which release is opposed, as they continue to rely upon the risk of absconding as being one of those principal grounds, and therefore, the Defence must be given the opportunity to appropriately engage.

VII. CONCLUSION

23. For the reasons set out above, namely, to ensure that the basis of the submissions of the SPO do not remain shielded from scrutiny, the Pre-Trial Judge is requested to order that any statement of the arresting and detaining officer(s), be disclosed, as well as any other statements taken, having regard to fact that it is wholly unlikely that such statements are procedurally or investigatory sensitive, and should be capable of being scrutinised and where appropriate, challenged.

24. The Defence would further request ten (10) days from the date of disclosure of that statement, to file further submissions on the issue of there being a risk of absconding.
25. Finally, it is noted that this request has not been made previously, however, it was not known as to whether the SPO would now accept Mr. Haradinaj's version of events.
26. In any event, the SPO is not prejudiced by this application on the basis that the information requested has already been filed *ex parte*, and is therefore at no disadvantage.

Word Count: 1199 words



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