



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

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

**Before:** **Pre-Trial Judge**  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Date:** 23 April 2021

**Language:** English

**Classification:** **Public**

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**Decision on Review of Detention of Hysni Gucati**

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**THE PRE-TRIAL JUDGE**,<sup>1</sup> pursuant to Article 41(10) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 25 September 2020, Hysni Gucati ("Mr Gucati") and Nasim Haradinaj ("Mr Haradinaj") were arrested in relation to alleged dissemination of confidential and non-public information relating to the work of the Special Investigative Task Force and/or the Specialist Prosecutor's Office ("SPO").<sup>2</sup>

2. On 27 October 2020, the Pre-Trial Judge rejected Mr Gucati's application for bail,<sup>3</sup> which was upheld by the Court of Appeals Panel.<sup>4</sup> Detention of Mr Gucati was then reviewed and extended by the Pre-Trial Judge at regular intervals, namely on 24 December 2020<sup>5</sup> and 24 February 2021.<sup>6</sup>

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<sup>1</sup> KSC-BC-2020-07, F00061, President, *Decision Assigning a Pre-Trial Judge*, 29 October 2020, public. Prior to this decision, the President had assigned the same Judge as Single Judge; see KSC-BC-2020-07, F00003, President, *Decision Assigning a Single Judge Pursuant to Article 33(2) of the Law*, 29 May 2018, public.

<sup>2</sup> KSC-BC-2020-07, F00012/A01/RED, Single Judge, *Public Redacted Version of Arrest Warrant for Hysni Gucati*, 24 September 2020, public; F00015, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 25 September 2020, public; KSC-BC-2020-07, F00012/A02/RED, Single Judge, *Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers*, 24 September 2020, public; F00018, Registrar, *Notification of the Reception of Hysni Gucati in the Detention Facilities of the Specialist Chambers*, 25 September 2020, public, with Annex 1, confidential.

<sup>3</sup> KSC-BC-2020-07, F00059, Single Judge, *Decision on Application for Bail ("First Detention Decision")*, 27 October 2020, public.

<sup>4</sup> KSC-BC-2020-07, IA001/F00005, Court of Appeals Panel, *Decision on Hysni Gucati's Appeal on Matters Related to the Arrest and Detention ("Decision on Appeal of First Detention Decision")*, 9 December 2020, public, para. 78.

<sup>5</sup> KSC-BC-2020-07, F00093, Pre-Trial Judge, *Decision on Review of Detention of Hysni Gucati ("Second Detention Decision")*, 24 December 2020, public.

<sup>6</sup> KSC-BC-2020-07, F00143, Pre-Trial Judge, *Decision on Review of Detention of Hysni Gucati ("Third Detention Decision")* 24 February 2021, public.

3. On 1 April 2021, Mr Gucati filed submissions on his continued detention.<sup>7</sup> The SPO responded on 15 April 2021.<sup>8</sup>

## II. SUBMISSIONS

4. Mr Gucati submits that he should be released, with or without conditions, as his continued detention is no longer necessary or proportionate.<sup>9</sup> Mr Gucati argues that the alleged dissemination of non-public material and the risks related to its dissemination have been at the heart of the Pre-Trial Judge's previous decisions. In Mr Gucati's submission, it is now clear that the SPO cannot produce in evidence a single non-public document for the dissemination of which he was allegedly responsible.<sup>10</sup> Mr Gucati further asserts that it is also now clear that the SPO will have no witness to testify that they were threatened or intimidated, or faced other serious consequences as a result of his actions.<sup>11</sup> Lastly, Mr Gucati recalls his good character, compliant conduct during his arrest and detention, and strong ties in his hometown.<sup>12</sup>

5. The SPO responds that the continued detention of Mr Gucati remains necessary as there has been no relevant change in the circumstances.<sup>13</sup> The SPO argues that neither the grounded suspicion required for Mr Gucati's detention, nor the well-grounded suspicion required for confirmation of the charges relied on such items. The SPO also indicates that it has been necessary to withhold items subject to court granted

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<sup>7</sup> KSC-BC-2020-07, F00170, Defence, *Submissions on the Third Review of Detention* ("Defence Submission"), 1 April 2021, public.

<sup>8</sup> KSC-BC-2020-07, F00184/RED, Specialist Prosecutor, *Public Redacted Version of Prosecution Consolidated Response for Review of Detention* ("SPO Submission"), 15 April 2021, public.

<sup>9</sup> Defence Submission, paras 7, 9 (with references to KSC-BC-2020-07, F00038, Defence, *Application for Bail*, 29 September 2020, public, para. 5; KSC-BC-2020-07, F00087/RED, Defence, *Submissions on the Review of Detention by 27<sup>th</sup> December*, 17 December 2020, public, paras 27-29; KSC-BC-2020-07, F00112, Defence, *Submissions on the Second Review of Detention of Hysni Gucati*, 2 February 2021, public, para. 9).

<sup>10</sup> Defence Submission, paras 4-5, 9.

<sup>11</sup> Defence Submission, para. 6.

<sup>12</sup> Defence Submission, para. 8.

<sup>13</sup> SPO Submission, paras 1-2, 3-5.

protective measures due to a risk of further crimes by Mr Gucati.<sup>14</sup> Further, the SPO contends that the Article 41(6)(b) risks have increased as the SPO has now filed its Pre-Trial Brief, list of witnesses, list of exhibits, and the Rule 102(3) list, and Mr Gucati knows that his trial imminently approaches.<sup>15</sup>

### III. APPLICABLE LAW

6. Article 41(6) of the Law provides that the Specialist Chambers (“SC”) shall only order the detention of a person when there is a grounded suspicion that the person has committed a crime within the jurisdiction of the SC; and there are articulable grounds to believe that the person (i) is a flight risk; (ii) will destroy, hide, change or forge evidence of a crime; or specific circumstances indicate that the person will obstruct the progress of criminal proceedings; or (iii) will repeat the criminal offence, complete an attempted crime or commit a crime which he or she has threatened to commit.

7. Article 41(10) of the Law provides that, until a judgment is final or until release, upon the expiry of two (2) months from the last ruling on detention on remand, the Pre-Trial Judge or Panel seized with the case shall examine whether reasons for detention on remand still exist and render a ruling by which detention on remand is extended or terminated.

8. Article 41(12) of the Law provides that, in addition to detention on remand, the following measures may be ordered to ensure the presence of the accused, to prevent reoffending or ensure successful conduct of criminal proceedings: summons, arrest, bail, house detention, promise not to leave residence, prohibition on approaching specific places or persons, attendance at police station or other venue, and diversion.

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<sup>14</sup> SPO Submission, para. 6.

<sup>15</sup> SPO Submission, paras 1 *in fine*, 5.

9. Pursuant to Rule 57(2) of the Rules, the Pre-Trial Judge shall review a decision on detention on remand upon the expiry of two (2) months from the last ruling on detention.

#### IV. DISCUSSION

10. With regard to the review of detention, Article 41(10) of the Law requires the Pre-Trial Judge to examine whether the reasons for detention on remand still exist, including the grounds set out in Article 41(6) of the Law, namely whether (i) there is a grounded suspicion that the person has committed the crime(s), and (ii) there are articulable grounds to believe that any of the risks set out in Article 41(6)(b) of the Law has been fulfilled. The SPO bears the burden of establishing that the detention of the Accused is necessary.<sup>16</sup> This decision addresses the requirements of Article 41(6) of the Law with due regard to the submissions made by the Parties.

##### A. GROUNDED SUSPICION

11. As regards Mr Gucati's allegation about the absence of certain items from the evidence or witnesses to be called by the SPO at trial, the Pre-Trial Judge recalls that the evidentiary threshold, against which the facts are assessed to establish a grounded suspicion in Article 41(6)(a) of the Law, is not the same as that for a conviction or even

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<sup>16</sup> KSC-CC-PR-2017-01, F00004, Specialist Chamber of the Constitutional Court, *Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office*, 26 April 2017, para. 115. Similarly, for example, ICC, *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-208, Appeals Chamber, [Judgment on the Appeal of Mr Laurent Gbagbo Against the Decision of Trial Chamber I of 8 July 2015 Entitled "Ninth Decision on the Review of Mr Laurent Gbagbo's Detention Pursuant to Article 60\(3\) of the Statute"](#) ("Gbagbo 8 September 2015 Appeal Judgment"), 8 September 2015, para. 36; *Prosecutor v. Bemba*, ICC-01/05-01/08-1019, Appeals Chamber, [Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against the Decision of Trial Chamber III of 28 July 2010 Entitled "Decision on the Review of the Detention of Mr Jean-Pierre Bemba Gombo Pursuant to Rule 118\(2\) of the Rules of Procedure and Evidence"](#), 19 November 2010, para. 51; *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-330, Pre-Trial Chamber I, [Decision on the Powers of the Pre-Trial Chamber to Review Proprio Motu the Pre-Trial Detention of Germain Katanga](#), 18 March 2008, p. 7.

the bringing of charges.<sup>17</sup> The Pre-Trial Judge further recalls that the process of evaluating the evidence in support of the SPO's allegations, as set out in the confirmed Indictment, started with the disclosure of evidence and will continue during the trial phase of the proceedings when Mr Gucati's guilt or innocence with respect to the charged offences is being determined. The alleged absence of certain evidentiary material does not negate the existence of grounded suspicion. In any event, the Pre-Trial Judge recalls that, when confirming the charges against Mr Gucati, the Pre-Trial Judge has found an even higher threshold of suspicion against Mr Gucati than the one in Article 41(6)(a) of the Law, namely a well-grounded suspicion, as regards the offences under Articles 387, 388, 392 and 401 of the Kosovo Criminal Code, as set out in Article 15(2) of the Law.<sup>18</sup>

12. The Pre-Trial Judge thus finds that the requirement in Article 41(6)(a) of the Law continues to be met.

#### B. NECESSITY OF DETENTION

13. Once the *sine qua non* requirement in Article 41(6)(a) of the Law is met, the grounds that allow the Pre-Trial Judge to deprive a person of his or her liberty must be articulable in the sense that they must be specified in detail.<sup>19</sup> In this regard, it is recalled that determining the existence of either risks under Article 41(6)(b)(i)-(iii) of the Law – so as to make the detention of the person necessary – is a matter of assessing the possibility, as opposed to the unavailability that such risks materialise.<sup>20</sup>

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<sup>17</sup> See ECtHR, *Murray v. the United Kingdom*, 28 October 1994, Series A no. 300-A, para. 55; *Yüksel and Others v. Turkey*, nos. 55835/09 and 2 others, 31 May 2016, para. 52.

<sup>18</sup> KSC-BC-2020-07, F00074/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on the Confirmation of the Indictment*, 11 December 2020, public, paras 103, 109, 113, 117, 121, 125.

<sup>19</sup> See Article 19.1.9 of the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123. Article 19.1.30 of the Code defines "articulable" as "the party offering the information or evidence must specify in detail the information or evidence being relied upon".

<sup>20</sup> Decision on Appeal of First Detention Decision, para. 67; KSC-BC-2020-07, F00012, Single Judge, *Decision on Request for Arrest Warrants and Transfer Orders* ("Decision on Arrest and Transfer"), 24 September 2020, public, para. 19, with Annexes 1-4, public. Similarly, ICC, *Prosecutor v. Bemba Gombo*

14. The SPO argues that continued detention of Mr Gucati is necessary due to the risk of flight, the risk of obstruction of the proceedings, and the risk of committing further offences.<sup>21</sup> The Pre-Trial Judge turns to the assessment of these risks argued by the SPO as to whether they indeed still exist, necessitating Mr Gucati's continued detention.

### **1. Risk of Flight**

15. The Pre-Trial Judge recalls his previous findings that there remains a risk that Mr Gucati will flee,<sup>22</sup> but that such a risk could be sufficiently addressed by a set of conditions ("Proposed Conditions").<sup>23</sup> Insofar as the SPO argues that the risk of flight has increased due to the advancement of the proceedings,<sup>24</sup> the Pre-Trial Judge is not persuaded that, even if there were such an increase, the application of proposed or other conditions would be insufficient.

16. The Pre-Trial Judge accordingly sees no reason to alter his previous finding as regards the risk of flight.

### **2. Risk of Obstructing the Proceedings**

17. The Pre-Trial Judge recalls that there are reasons to believe that Mr Gucati intentionally participated in and continued with the unauthorised dissemination of confidential and non-public information and threatened potential witnesses.<sup>25</sup>

18. The alleged past conduct by Mr Gucati indicates that he may equally obstruct the progress of the criminal proceedings through dissemination of confidential

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*et al.*, ICC-01/05-01/13-558, Appeals Chamber, [\*Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled "Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba'"\*](#), 11 July 2014, para. 107.

<sup>21</sup> SPO Submission, paras 1-2.

<sup>22</sup> Third Detention Decision, para. 22; Second Detention Decision, para. 27.

<sup>23</sup> Third Detention Decision, para. 36; Second Detention Decision, paras 40-41.

<sup>24</sup> SPO Submission, para. 5.

<sup>25</sup> Third Detention Decision, paras 25-28; Decision on Arrest and Transfer, para. 29.

and non-public information, which furthermore may jeopardise the safety of witnesses. As regards Mr Gucati's argument as to what evidence the SPO may or may not present at trial,<sup>26</sup> it is recalled that, currently, Mr Gucati has access, through the disclosure process, to the evidence, classified as confidential, including information about the confidential nature of the leaked documents and witness contacts.<sup>27</sup> It is also relevant that, Mr Gucati, as head of the KLA War Veterans' Association, has the means to disseminate such information by communicating with the media or his network of KLA veterans.<sup>28</sup> In addition, he would be in a position to receive, without oversight, confidential and non-public information,<sup>29</sup> which he may also disseminate.

19. The Pre-Trial Judge is not persuaded that Mr Gucati's character or his compliant conduct during the arrest and detention indicate that Mr Gucati will not obstruct the proceedings. In particular, the Pre-Trial Judge recalls that this risk is predicated, *inter alia*, on Mr Gucati's vow to continue to disclose confidential and non-public information<sup>30</sup> and his failure to abide by the orders of the Single Judge.<sup>31</sup> In this regard, the Pre-Trial Judge also considers that Mr Gucati's new awareness of the full account of the SPO case and the approaching trial further confirms the risk that he will obstruct the proceedings.

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<sup>26</sup> Defence Submission, paras 4-6, 9.

<sup>27</sup> KSC-BC-2020-07, F00141, Pre-Trial Judge, *Decision on Disclosure of Certain Documents Seized from the KLA War Veterans Association*, 23 February 2021, confidential; F00136, Pre-Trial Judge, *Decision on Non-Disclosure of Certain Witness Contacts*, 22 February 2021, confidential.

<sup>28</sup> Third Detention Decision, para. 29; First Detention Decision, para. 17.

<sup>29</sup> Third Detention Decision, para. 29; Second Detention Decision, para. 35; First Detention Decision, para. 17.

<sup>30</sup> Third Detention Decision, para. 30; First Detention Decision, para. 17; KSC-BC-2020-07, F0009/A01/RED, Specialist Prosecutor, *Annex 1 to Request for Arrest Warrants and Related Orders* ("Annex 1 to SPO Request for Arrest Warrants"), 1 October 2020, public, p. 13.

<sup>31</sup> Third Detention Decision, para. 30; First Detention Decision, para. 17; KSC-BC-2020-07, F00005, Single Judge, *Urgent Decision Authorising a Seizure* ("First Order"), 7 September 2020, public, paras 11-13, 21-22; KSC-BC-2020-07, F00007, Single Judge, *Decision Authorising a Seizure* ("Second Order"), 17 September 2020, public, paras 11-13, 21-22.



20. In that light, the Pre-Trial Judge finds that the risk that Mr Gucati will obstruct the progress of the proceedings remains.

### **3. Risk of Committing Further Offences**

21. For the above reasons, the Pre-Trial Judge finds that the risk that Mr Gucati may commit further offences by threatening, intimidating, or putting at risk (potential) witnesses through the disclosure or dissemination of confidential and non-public information remains.

### **4. Conclusion**

22. The Pre-Trial Judge concludes that there remains a risk that Mr Gucati will obstruct the progress of proceedings or commit further offences. The Pre-Trial Judge will assess below whether these risks can be adequately addressed by the Proposed Conditions or any other conditions.

#### **C. CONDITIONAL RELEASE**

23. Mr Gucati reiterates his earlier submissions proposing alternative measures to detention in view of the new context that the SPO did not produce for trial the documents allegedly disseminated.<sup>32</sup> The SPO submits that Mr Gucati proposes no new conditions that could mitigate the risks.<sup>33</sup>

24. The Pre-Trial Judge recalls his previous findings that the risks of obstructing the progress of proceedings or committing further offences are insufficiently mitigated by the same conditions.<sup>34</sup> In particular, the Pre-Trial Judge observes that

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<sup>32</sup> Defence Submission, paras 7, 9 (with references to KSC-BC-2020-07, F00038, Defence, *Application for Bail*, 29 September 2020, public, para. 5; F00087/RED, Defence, *Submissions on the Review of Detention by 27<sup>th</sup> December*, 17 December 2020, public, paras 27-29; F00112, Defence, *Submissions on the Second Review of Detention of Hysni Gucati*, 2 February 2021, public, para. 9).

<sup>33</sup> SPO Submission, para. 3.

<sup>34</sup> Second Detention Decision, paras 40-44.

Mr Gucati could easily obtain access to various means of communication in order to disseminate or receive electronically, or through the mail, confidential or non-public information.<sup>35</sup> Insofar as the Pre-Trial Judge could order Mr Gucati to refrain from such actions, the Pre-Trial Judge is not persuaded that Mr Gucati would actually comply given his earlier disregard for the Pre-Trial Judge's orders.

25. It follows that the risks of obstructing the proceedings and committing further offences can only be effectively managed at the SC detention facilities. Being released under the Proposed Conditions or any other condition provided for by Article 41(12) of the Law, such as house detention in Kosovo or elsewhere, with or without additional restrictions as to movement or use of devices, does not adequately address the risk that Mr Gucati may obstruct the progress of proceedings. This is particularly so in the light of Mr Gucati's public statements vowing to continue to disclose confidential and non-public information<sup>36</sup> and his failure to abide by the orders of the Single Judge.<sup>37</sup>

26. In these circumstances, the Pre-Trial Judge finds that Mr Gucati's continued detention is necessary in order to avert the Article 41(6)(b)(ii) and (iii) risks identified above.

#### D. PROPORTIONALITY OF DETENTION

27. Mr Gucati repeats his previous submission that the longer a person remains in pre-trial detention the higher the burden on the SC to justify continued detention.<sup>38</sup>

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<sup>35</sup> Third Detention Decision, para. 37; Second Detention Decision, para. 42.

<sup>36</sup> Third Detention Decision, para. 38; First Detention Decision, para. 17; Annex 1 to SPO Request for Arrest Warrants, p. 13.

<sup>37</sup> Third Detention Decision, para. 38; First Detention Decision, para. 17; First Order, paras 11-13, 21-22; Second Order, paras 11-13, 21-22.

<sup>38</sup> Defence Submission, para. 3.

28. As to the length of pre-trial detention, the Pre-Trial Judge notes that, since the last review of detention,<sup>39</sup> significant steps have been taken for the preparation of the case for trial. In particular, on 9 April 2021, the SPO filed its Pre-Trial Brief.<sup>40</sup> The Pre-Trial Judge has also set a date for the filing by Defence of its Pre-Trial Brief, namely by 14 June 2021, as well as a tentative date for the transmission of the case file to a Trial Panel, namely on 30 June 2021.<sup>41</sup>

29. Against this backdrop, and the fact that the risk of obstruction of the proceedings and the risk of commission of further offences exist and cannot be sufficiently addressed by the application of conditions, the Pre-Trial Judge finds that Mr Gucati's detention for a further two months is necessary and proportional in the specific circumstances of the case.

## V. DISPOSITION

30. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **ORDERS** Mr Gucati's continued detention; and
- b. **ORDERS** Mr Gucati to file submissions on the next review of detention by **Tuesday, 1 June 2021**, with responses and replies following the timeline set out in Rule 76 of the Rules.



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**Judge Nicolas Guillou**  
**Pre-Trial Judge**

Dated this Friday, 23 April 2021

At The Hague, the Netherlands

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<sup>39</sup> Third Detention Decision, para. 41.

<sup>40</sup> KSC-BC-2020-07, F00181, Specialist Prosecutor, *Submission of Pre-Trial-Brief, Witness and Exhibit Lists, and Rule 109(c) Chart with Confidential Annexes 1-4*, 9 April 2021, public.

<sup>41</sup> KSC-BC-2020-07, F00148, Pre-Trial Judge, *Consolidated Calendar for the Remainder of the Pre-Trial Proceedings*, 8 March 2021, public, para. 6.