

In: KSC-BC-2020-07

The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: Pre-Trial Judge

Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

Date: 1st June 2021

Language: English

Classification: Public

Submissions on the Fourth Review of Detention

Specialist Prosecutor

Jack Smith

Counsel for Hysni Gucati

Jonathan Elystan Rees QC

Huw Bowden

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

I. INTRODUCTION

1. On 23rd April 2021 the Pre-Trial Judge issued his Decision on Review of Detention of Hysni Gucati of the same date and ordered Mr Gucati to file submissions on the next review of detention by Tuesday 1 June 2021¹.
2. In accordance with the Pre-Trial Judge's order, the defence make the following submissions on behalf of Mr Gucati.

II. SUBMISSIONS

3. The defence repeat that the longer a person remains in pre-trial detention, the higher the burden on the Specialist Chambers to justify continued detention². The clear presumption is in favour of the accused being at liberty. Deprivation of liberty is the exception and not the rule³. Detention can only be extended (i) where the strict conditions in Article 41(6) of the Law continue to be met⁴ and (ii) detention remains strictly necessary and proportionate having considered whether other, less stringent measures than detention could be sufficient⁵.

¹ *Decision on Review of Detention of Hysni Gucati*, KSC-BC-2020-07/F00188 at paragraph 30.b

² *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, KSC-BC-2020-07/IA0001/F00005 at paragraph 73

³ *Decision on Application for Interim Release*, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08-321, Pre-Trial Chamber III, 16 December 2008 at paragraph 31

⁴ *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*, ICC-01/05-01/08 OA 4, The Appeals Chamber, 19 November 2010 ("Detention Appeal Judgment") at paragraph 52

⁵ *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, KSC-BC-2020-07/IA0001/F00005 at paragraphs 51 and 72

4. Further, the Pre-Trial Judge should consider whether there are any new circumstances that have a bearing on the decision as to detention⁶. It is submitted that there have been a number of changes of circumstances in the present case.
5. The Prosecution bears the burden of proof under to establish that the law is met in article 41(6).⁷
6. The submissions at paragraphs 4 to 8 of the Submissions on the Third Review of Detention, KSC-BC-2020-07/F00170 are maintained and repeated. Whilst it is acknowledged that the evidentiary threshold for the purpose of assessing Article 41(6) of the Law is lesser than the evidentiary threshold to establish guilt at trial, where there is a grounded suspicion but the SPO *cannot* prove guilt at trial, the Pre-Trial Judge should act accordingly and release the detainee, as continued detention in those circumstances cannot be proportionate.
7. The SPO has repeatedly claimed that no further Rule 102(1) material is expected (or at least of any different nature). On reflection, therefore, the SPO has made clear that, at trial, it will not, and cannot, produce in evidence a single document which they allege Mr Gucati was responsible for disseminating which was not already in the public domain. Similarly, on reflection, the SPO has also now made clear that, at trial, it will not, and cannot, call a single witness to say in evidence that they were threatened or intimidated, or that they faced other serious consequences, as a result of the actions of Mr Gucati.

⁶ *Detention Appeal Judgment* at paragraph 52

⁷ *Ibid* at paragraph 32

8. Given that the SPO does not have the means to prove the offences at trial - and with no prospect that it will obtain the means to prove the offences at trial - release from detention should be ordered.
9. The Pre-Trial Judge in his decision on the review of detention of 23rd April 2021, assessed the proportionality of detention⁸. This was based on the “significant steps taken for the preparation of the case for trial” said to have been taken by that time. It is now clear that due to repeated disclosure failures on behalf of the SPO, the case is not likely to be listed for trial until much later this year. This constitutes a material change in circumstances.
10. The Pre-Trial Judge has already found that any residual risk of flight can be adequately met by conditions.
11. In light of the above, it is submitted that the continued detention of Mr Gucati can no longer be considered to be both necessary and proportionate, and that release should be ordered immediately, with or without any of the conditions proposed previously⁹.
12. The court is reminded that Mr Gucati is a man of hitherto good character and has been compliant throughout his arrest and transport, and subsequently during his detention. He has, as the Pre-Trial Judge has acknowledged, strong family and community ties in his hometown.
13. The submissions made at paragraphs 27, 28 and 29 of the Submissions on the Review of Detention by 27th December 2020¹⁰ are maintained and repeated in

⁸ *Decision on Review of Detention of Hysni Gucati*, KSC-BC-2020-07/F00188 at paragraph 28

⁹ *Application for Bail*, KSC-BC-2020-07/F00038 at paragraph 5; *Submissions on the Review of Detention by 27th December 2020*, KSC-BC-2020-07/F00087 at paragraph 27; *Submissions on the Second Review of Detention of Hysni Gucati*, KSC-BC-2020-07/F00112 at paragraph 9

¹⁰ *Submissions on the Review of Detention by 27th December 2020*, KSC-BC-2020-07/F00087

relation to any residual risk of the dissemination of confidential and non-public material, in the new context that the SPO will not, and cannot, produce in evidence at trial a single document which they allege Mr Gucati was responsible for disseminating which was not already in the public domain.

14. The lack of any meaningful disclosure means that Mr Gucati is not in a position to obstruct the progress of criminal proceedings.

15. Whereas during the course of these proceedings the SPO has repeatedly categorised material of no actual sensitivity whatsoever as 'confidential', during the course of these proceedings no 'witness' identities have been disclosed to the defence and nothing from batches 1-3 has been disclosed, save for material that was already, and remains, in the public domain.

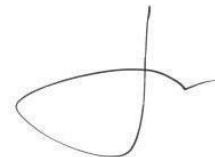
16. Certainly, there is nothing disclosed to the defence in these proceedings that has been classified as 'confidential' which is of such sensitivity that the protection of it could properly be said to justify the continuing detention of Mr Gucati as necessary and proportionate.

17. Mr Gucati has now been in detention for approximately 8 months, with no imminent trial date. The Pre-Trial Judge is asked to reconsider whether the detention is necessary and proportionate in the current circumstances.

III. CONCLUSION

18. It is submitted that Mr Gucati should be released immediately, with or without conditions.

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JONATHAN ELYSTAN REES QC

Specialist Counsel for Mr Gucati

HUW BOWDEN

Specialist Co-Counsel for Mr Gucati

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Cardiff, UK