



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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 Prosecutor

Date: 11 June 2021

Language: English

Classification: Public

Prosecution consolidated submissions for review of detention

with public Annex 1

Specialist Prosecutor's Office

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1. The continued detention of Hysni GUCATI and Nasim HARADINAJ (collectively, the 'Accused') remains necessary.¹ There has been no relevant change in circumstances detracting from the established reasons for detention.² Once again, the Article 41(6)(b) risks have increased since the latest review decisions.³
2. The Pre-Trial Judge previously found: (i) a grounded suspicion that the Accused committed offences against the administration of justice within the jurisdiction of the Specialist Chambers ('KSC');⁴ (ii) articulable grounds to believe that the Accused constitute a flight risk,⁵ will obstruct the progress of criminal proceedings, and will

¹ *Contra* Submissions on the Fourth Review of Detention, KSC-BC-2020-07/F00214, 1 June 2021 ('Gucati Submissions'). The Haradinaj Defence did not file an initial submission, but the present filing extends to both accused. *See* Order on Submissions on the Next Review of Nasim Haradinaj's Detention, KSC-BC-2020-07/F00222, 7 June 2021.

² *See* Article 41(10) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Rule 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'); Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention, KSC-BC-2020-07/IA002/F00005, 9 February 2021, para.55 ('[t]he competent panel has an obligation to review the reasons or circumstances underpinning detention and determine whether these reasons continue to exist under Article 41(6) of the Law. The competent panel is not required to make findings on the factors already decided upon in the initial ruling on detention but must examine these reasons or circumstances and determine whether they still exist. What is crucial is that the competent panel is satisfied that, at the time of the review decision, grounds for continued detention still exist.'). All references to 'Article' or 'Articles' herein refer to articles of the Law, and all references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

³ Decision on Review of Detention of Hysni Gucati, KSC-BC-2020-07/F00188, 23 April 2021 ('April 2021 Gucati Review Decision'); Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00189, 23 April 2021, Confidential ('April 2021 Haradinaj Review Decision'). *See also* Decision on Review of Detention of Hysni Gucati, KSC-BC-2020-07/F00143, 24 February 2021; Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00144, 24 February 2021; Decision on Review of Detention of Hysni Gucati, KSC-BC-2020-07/F00093, 24 December 2020; Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00094, 24 December 2020; Decision on Request for Immediate Release of Nasim Haradinaj, KSC-BC-2020-07/F00058, 27 October 2020; Decision on Request for Arrest Warrant and Transfer Orders, KSC-BC-2020-07/F00012, 24 September 2020.

⁴ April 2021 Gucati Review Decision, KSC-BC-2020-07/F00188, paras 11-12; April 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00189, paras 14-15.

⁵ April 2021 Gucati Review Decision, KSC-BC-2020-07/F00188, paras 15-16 (though finding risk of flight could be mitigated by conditions); April 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00189, paras 18-22.

repeat or attempt to repeat the criminal offences;⁶ and (iii) that the release conditions proposed by the Accused insufficiently mitigated the Article 41(6)(b) risks.⁷

3. These findings continue to be true in all respects. In its latest submissions, the GUCATI Defence repeats past arguments already rejected by the Pre-Trial Judge.⁸ In particular, the Pre-Trial Judge has already concluded that:

- (i) The SPO's evidence establishes the commission of the charged offences to a higher threshold than the grounded suspicion required under Article 41(6)(a) of the Law.⁹
- (ii) The Accused's character and compliant conduct during his arrest and detention do not change the risk of him obstructing the proceedings.¹⁰
- (iii) Through the disclosure process, GUCATI has access to evidence, classified as confidential, including information 'about the confidential nature of the leaked documents and witness contacts'.¹¹
- (iv) Previously proposed conditions of release do not sufficiently mitigate the Article 41(6)(b) risks.¹²

4. The SPO has now filed its Pre-Trial Brief, list of witnesses, and list of exhibits. The GUCATI Defence's assertion that there is no 'imminent trial date'¹³ is contradicted

⁶ April 2021 Gucati Review Decision, KSC-BC-2020-07/F00188, paras 17-21; April 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00189, paras 23-28.

⁷ April 2021 Gucati Review Decision, KSC-BC-2020-07/F00188, paras 23-26; April 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00189, paras 30-32.

⁸ See Gucati Submissions, KSC-BC-2020-07/F00214, paras 6, 13 (incorporating prior submissions by reference).

⁹ April 2021 Gucati Review Decision, KSC-BC-2020-07/F00188, para.11. *Contra* Gucati Submissions, KSC-BC-2020-07/F00214, paras 6-8.

¹⁰ April 2021 Gucati Review Decision, KSC-BC-2020-07/F00188, para.19. *Contra* Gucati Submissions, KSC-BC-2020-07/F00214, para.12.

¹¹ April 2021 Gucati Review Decision, KSC-BC-2020-07/F00188, para.18. *Contra* Gucati Submissions, KSC-BC-2020-07/F00214, paras 15-16. The Gucati Defence disputes the confidential classifications in the case record, but it cannot change them absent a justified request under Rule 82(5).

¹² April 2021 Gucati Review Decision, KSC-BC-2020-07/F00188, paras 24-25. *Contra* Gucati Submissions, KSC-BC-2020-07/F00214, para.11.

¹³ Gucati Submissions, KSC-BC-2020-07/F00214, para.17.

by the Pre-Trial Judge's revised calendar which aims to transmit this case to the trial panel in less than a month.¹⁴

5. The Accused's network of KLA war veterans remains ready and willing to obstruct the proceedings,¹⁵ such that the Article 41(6)(b) risks would become entirely unmanageable if the Accused were to be released from detention. On 4 June 2021, Faton KLINAKU, the acting chairman of the KLA War Veterans Association ('KLA WVA') gave an interview whereby he promised he would publish more confidential KSC documents if he obtained them.¹⁶ This is extraordinary, noting that Mr KLINAKU is the acting chairman because GUCATI and HARADINAJ are being prosecuted before the KSC for identical conduct. That the law is no constraint for the acting head of the KLA WVA is emblematic of the lengths the Accused's supporters are willing to go to obstruct these proceedings, and indeed this court.

6. As to the proportionality of detention, the length of pre-trial detention must be balanced against the Article 41(6) risks and the circumstances of the case as a whole, including the potential penalties for the crimes charged.¹⁷ The Accused are facing charges which include sentences of up to 10 years.¹⁸ The case is proceeding expeditiously, and is about to be sent to a Trial Panel. Adverse disclosure rulings –

¹⁴ Revised Calendar for the Remainder of the Pre-Trial Proceedings and Order Setting the Date for the Sixth Status Conference, KSC-BC-2020-07/F00224, 9 June 2021, para. 29(d).

¹⁵ See April 2021 Gucati Review Decision, KSC-BC-2020-07/F00188, para.18; April 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00189, para.20.

¹⁶ Annex 1, Faton Klinaku interview with KlanKosovaTv, 4 June 2021, 100911-100915 ('[w]e, as a Veterans Association, have opposed the Special Court because it is a monoethnic court and prosecutes only the KLA, after they were served the files by Serbia, like UNMIK and EULEX did earlier, and they do not deal with the crimes and massacres committed by the Serb occupier during the war in Kosovo. As we have been against this Court, we will make public any material we receive that is in everybody's interest').

¹⁷ See ICC, *Prosecutor v. Bemba et al.*, Judgment on the appeals against Pre-Trial Chamber II's decision regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, 29 May 2015, ICC-01/05-01/13-969, para.45.

¹⁸ Article 387 of Code No.06/L-074, Criminal Code of the Republic of Kosovo, 14 January 2019 (charged in Count 3).

particularly on novel procedures such as Rule 102(3) – cannot be equated with a lack of diligence.¹⁹

7. The GUCATI Defence’s insistence that pre-trial proceedings are now too long conveniently ignores the Defence’s own responsibility in this regard. The Pre-Trial Judge extended the intended date for transmitting the case to trial by two days after the Defence requested an extension of time to file their pre-trial briefs.²⁰ The Defence has made no effort to attempt to reach any agreed facts which might expedite trial proceedings, even on proposed facts such as the Accused’s date and place of birth. Both Defence teams in this case have also made submissions that they have not received sufficient disclosure in order to meaningfully prepare, repeatedly failing to appreciate the volume of what has been disclosed and the marginal information at issue in all recent disclosure litigation.²¹

8. Nothing indicates that the Accused’s detention thus far is or is approaching being unreasonable.²² There have not been any unjustified delays. The Accused’s rights have been fully respected. Defence arguments on the proportionality of detention must therefore be rejected.

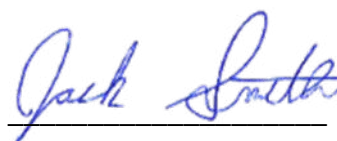
¹⁹ See ICC, *Prosecutor v. Ruto and Sang*, Decision on Ruto Defence Request for the Appointment of a Disclosure Officer and/or the Imposition of Other Remedies for Disclosure Breaches of 9 January 2015 (ICC-01/09-01/11-1774-Conf), ICC-01/09-01/11-1774-Red, 16 February 2015, para.47 (‘[r]easonable people could disagree on whether the [...] material was disclosable in this case, and not every adverse ruling from a Chamber can be equated with the Prosecution having not diligently discharged its disclosure obligations’). *Contra* Gucati Submissions, KSC-BC-2020-07/F00214, para.9.

²⁰ KSC-BC-2020-07/F00224, paras 19-22, 29(d). The transmission date had previously been 30 June 2021. Consolidated Calendar for the Remainder of the Pre-Trial Proceedings, KSC-BC-2020-07/F00148, 8 March 2021, para.6(c).

²¹ By definition, all recent Rule 102(3) disclosure litigation concerns materials which are: (i) not being relied upon by the SPO as evidence at trial; and (ii) not potentially exculpatory. Were this not the case, the materials would have been affirmatively disclosed under Rules 102(1)(b) or 103, respectively.

²² *Contra* Gucati Submissions, KSC-BC-2020-07/F00214, paras 3, 9, 11, 17.

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At The Hague, the Netherlands