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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: 17 June 2021

Language: English

Classification: **Confidential**

Defence Submissions for Review of Detention

Specialist Prosecutor

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I. INTRODUCTION

1. In the Order of 7 June 2021,[1] the Pre-Trial Judge noted that the review of detention at two month intervals was automatic,[2] the burden of showing that continued detention is necessary falls on the Prosecution[3] and the Defence is not required to demonstrate the existence of reasons warranting release..[4]

2. In the Order of 7 June 2021, the Pre-Trial Judge invited submissions from the Specialist Prosecutor's Office ("SPO") to be filed on 11 June 2021 in respect of whether the ongoing detention of the Defendant was still necessary and further invited submissions from the Defence to be filed on 17 June 2021.

3. The SPO filed its submissions as directed.

4. In this submission, the Defendant argues that detention is not necessary, that the SPO remain unable to demonstrate that the risks alleged are properly substantiated with reference to the evidence, and thus, there is no basis upon which the Defendant ought not be granted provisional release.

II. BACKGROUND

[1] KSC-BC-2020-07/F00222
[2] KSC-CC-PR-2020-09/F00006
[3] KSC-BC-2020-06, IA004, F00005/RED
[4] KSC-CC-PR-2017-01/F0004

5. The background and chronology to this issue has already been outlined on a number of occasions, and therefore, is not repeated here. The submissions served previously in respect of provisional release are maintained in their entirety.

III. THE LAW

6. As per the position in respect of the Chronology of events, the law in respect of the detention or provisional release of a Defendant, is likewise clear, and has been outlined on a number of occasions previously, including within previous submissions in respect of the review of detention.

7. Again therefore, the appropriate legal framework to be applied by the Pre-Trial Judge in determining the question of provisional release is not rehearsed here, save to maintain the position that the procedure to be applied must be fully compatible with Articles 5(3) and 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), in particular the burden on the SPO of establishing relevant and sufficient reasons for ordering the continued detention.

8. The Pre-Trial Judge is reminded that Article 41(6)(b) of the Law sets out the articulable grounds upon which release may be refused and Article 41(12) sets out the measures that can be imposed if conditional release is granted.

IV. SUBMISSIONS

9. It is respectfully submitted that the Defendant can be appropriately and unconditionally released from detention. If the Pre-Trial Judge considers that appropriate conditions are to be imposed, the Defendant will abide by any reasonable and necessary conditions.

10. It is submitted that whilst reasonable suspicion of having committed an offence within the jurisdiction of the Court may constitute a reasonable ground for arrest and initial detention, 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.

11. 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 and in cannot be argued in the abstract. 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."[5]

12. Furthermore, 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.[6]

13. 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 woefully short of the required threshold. 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, ceases to be a

[5] Eur. Court HR, judgment of 27 June 1968, Series A no. 7, para. 12

[6] 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 some months.

14. It has been argued previously that the Specialist Chambers has adopted an incompatible approach to its obligations in applying the procedural guarantees under Articles 5(3) and 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') by requiring an accused to set out an application for provisional release in the absence of specific objections by the prosecution to respond to, and further to reverse the burden of proof on the establishment of grounds for release. It is not for Mr. Haradinaj to establish that there are sufficient grounds for him to be released, it is for the SPO to establish that there are sufficient grounds for him to be detained. In that regard, the Defence for Mr. Haradinaj is grateful for the Order that was made on 7 June 2021, which finally appears to recognise this most basic and fundamental principle.

15. The SPO offers the same generalised objections to release as 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.

16. 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 incorrect, as per the below.

17. This does not come close to demonstrating 'relevant and sufficient' reasons for extending detention.

18. The position of the SPO, in opposing any grant of release is, in short, that there has been "*no relevant change in circumstances detracting from the established reasons for detention*", and further, that "*Once again, the Article 41(6)(b) risks have increased since the latest review decisions*", and accordingly, detention is still necessary.

19. In the first instance, the SPO appear to again be attempting to read into the Law, a further limb to the test upon considering whether the Defendant can be appropriately released or otherwise.

20. There is <u>no</u> requirement that there be a 'change in circumstances', the test is whether the reasons for previous detention still exist, and further, having regard to the law, where there is a risk, whether that risk can be mitigated by the imposition of conditions.

21. This can clearly be interpreted as a 'change', however, the phraseology of the SPO in its submissions are suggestive of it being a specific requirement, it is not.

22. As per previous submissions, the Law, and the Rules of Evidence and Procedure are clear as to the circumstances where Detention is justified, and where it is not.

23. Secondly, there is no evidence to suggest the risks submitted by the SPO have increased, the SPO seek to rely upon the actions of others not subject to proceedings before the Chamber, despite there being no suggestion that any such actions have been taken at the behest of, or with the support of, Mr. Haradinaj.

24. The Defendant <u>is not</u> responsible for the actions taken by others, nor should he be held responsible for them.

25. The SPO submits at paragraph 4 of its filing that "*the Gucati Defence's assertion that there is no 'imminent trial date' is contradicted by the Pre-Trial Judge's revised calendar which aims to transmit this case to the trial panel in less than a month*".

26. The SPO, with respect, is wrong in its suggestion that this renders the assertion inaccurate.

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27. No trial date *has* been fixed; no potential trial date has even been mooted. Accordingly, the submission remains accurate, there is no imminent trial date.

28. Further, as much as the there is a suggestion of when the matter *might* be transferred to a Trial Panel, it has not been transferred thus far, further, there are outstanding matters before the Court of Appeals Panel, further, there are still outstanding disclosure issues that have not been resolved, and therefore regardless of the submissions of the SPO, this case is currently not ready for any such transfer.

29. At paragraph 5, the SPO refers to the actions of **Faton Klinaku**, and an interview given on 4 June 2021.

30. With the greatest respect to the SPO, and the Court, this is entirely irrelevant. The Defendant cannot, and should not, be held responsible for the conduct or omissions of other persons not party to the proceedings.

31. The Defence can make no comment in respect of that interview, as the Defendant, as already highlighted above, is not responsible for the acts or omissions of others, nor can he be held responsible for those acts or omissions.

32. There is no evidence, nor assertion, that such an interview was given at the behest of the Defendant, accordingly, the SPO are asking the Court in effect, rather improperly, to punish the Defendant for the acts of others, which respectfully, is a preposterous position to take.

33. The SPO, as a final point, now seeks to 'shift' the responsibility for their perceived delay in the progress of this case to the Defence.

34. To be clear, it was the SPO that, as matters now appear, prematurely sought the arrest and indictment of the Defendant far in advance of being properly ready to do so. As noted during the fifth status conference, this has become a rather worrying trend and the learned Pre-Trial Judge will take note, the SPO has indicated at each and every status conference since February 2021, that disclosure is complete only for it to serve further material, in the thousands of pages in the time period leading up to the following status conference. It is the SPO, and the SPO alone, that needs to take responsibility for this matter not being trial ready.

35. Such a submission by the SPO is without merit, groundless, and misconceived.

36. The responsibility for progress at this point falls solely on the SPO and its mismanagement of the disclosure process.

37. It is not the Defendant who disclosed over 25,000 pages of evidence in the last weeks, it is not the Defendant who inaccurately submitted at the second status conference that the disclosure process was almost complete, it is not the Defendant who have been reluctant to disclose that which ought to have been

disclosed at the outset, and it is not the Defendant that has managed this case with a clear theme of hesitancy and cynical opacity.

38. At paragraph 7 of the SPO filing, reference is drawn to the Pre-Trial Judge extending "*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*".

39. To suggest that this is demonstrative of the Defence delaying proceedings is quite frankly ludicrous and not deserving further comment.

40. The Defence were wholly intent on filing its pre-trial brief on the date per the original consolidated calendar, as at that time, based upon the submissions of the SPO, which were taken in good faith, there was no difficulty. That position has now changed to the detriment of the Defendant.

41. However, as noted, it is the SPO that deemed it appropriate to serve over 25,000 pages of disclosure in recent weeks when there appears to be no justifiable reason as to why such disclosure could not have been made at an earlier juncture. If it is the case that the disclosure of material from third parties has taken considerablye more time than envisaged, this is a matter that the SPO should have contemplated when it carried out the arrest of the Defendant more than eight (8) months previously.

42. Responsibility for delay therefore is solely that of the SPO, and its cavalier attitude towards disclosure and management of this case, an attitude that has

resulted in the Defendant remaining in custody for far longer than is warranted.

43. Further, whether the Defendants have listed any 'agreed' facts or otherwise has not contributed to any delay, and to suggest that it has, is entirely without foundation, given that such an issue has not had any effect on the SPO's preparation of this case, and further, has not informed the disclosure process at any level.

44. The simple fact of the matter is that the SPO appears to be adopting the position, as it has throughout these proceedings, that it is the arbiter of what needs to be disclosed and what the Defendant is entitled to consider, quite clearly it is not, and it should not.

45. The SPO is forgetting its obligation both to the Court, and the Defendant.

46. The overriding principle is that proceedings must be 'fair' to the Defendant, and if the Defendant cannot be guaranteed a fair trial, then there ought to be no trial. That is a question that is being repeatedly argued time and again in this matter. It is a clear principle of international human rights law, that runs though these proceedings as a fundamental rule, that if the Defendant cannot be guaranteed a fair trial, then he should not stand trial, as to do so would constitute an abuse of process.

47. Having regard to the above, the previous submissions of the Defendant are maintained, in that he can be appropriately released subject to conditions as deemed appropriate by the Chamber.

48. In making those submissions the Defendant specifically highlights the following:

a. No evidence has been disclosed from any witness that indicates that the Defendant threatened or otherwise intimidated that witness;

b. No evidence has been disclosed that would suggest that the Defendant would seek to leave the jurisdiction, or otherwise seek to evade any eventual trial. In making this submission the previous submissions of the SPO in terms of the circumstances of arrest are noted, however, the SPO have failed to counter the position adopted by the Defendant that he was going to a pre-arranged appointment and upon being told by previously unidentified individuals that he was to be arrested, he immediately complied. It is of note that the 'body-cam' footage disclosed by the SPO only covers the very end of the arrest, this is unfortunate as it fails to substantiate the case as alleged by the SPO, that failure, taking account of the burden of proof, must be balanced in favour of the Defendant;

c. No evidence has been disclosed to suggest that the Defendant would commit further offences or otherwise seek to obstruct proceedings, noting that the actions of others are not the responsibility of the Defendant; and

d. No evidence has been disclosed to suggest that the Defendant would fail to comply with any reasonable and necessary conditions that the Chamber may seek to impose.

49. Having regard to the above, and the meritless submissions of the SPO it is submitted that the Defendant can, and ought to, be appropriately released subject to conditions.

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