

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: 25 June 2021

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PUBLIC REDACTED VERSION OF F00173

Defence Submissions on Third Review of Detention of Nasim Haradinaj

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I. INTRODUCTION

1. On 25 February 2021 the Pre-Trial Judge rendered his Decision on the Review of Detention of Nasim Haradinaj (the 'Decision').¹
2. Mr. Haradinaj was directed to file further submissions on whether reasons for his continued detention still exist by 1 April 2021.
3. As per previous submissions, it is not accepted that there existed any proper basis upon which Mr. Haradinaj ought to be detained in the first instance, thus the previous submissions are maintained and adopted for the purposes of this submission.
4. It is further submitted that a significant period of time has elapsed since Mr. Haradinaj's arrest, the investigation by the Special Prosecutor's Office ('SPO') appears to have reached a conclusion and therefore any grounds previously considered for detention, albeit not accepted by the Defence as 'relevant and sufficient reasons', clearly no longer suffice after the passage of time.
5. Further, we seek to draw the attention of the Pre-Trial Judge to recent developments in terms of the health of [REDACTED], details of which are outlined below.

¹ Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00144, 25 February 2021, Public.

6. Again further, we have now had sight of the statement of the arresting officer, and the video of the detention of Mr. Haradinaj which unfortunately, does not cover the entire arrest, and merely details the last minutes of the arrest and detention, and in any event, does not evidence the submission of the SPO that Mr. Haradinaj sought to evade arrest and detention.

7. It is respectfully submitted that the position advanced by the SPO in this regard hinges on the existence of facts not in evidence and strongly contested. The SPO has repeatedly put forward a narrative that is not supported by any independent evidence other than the statement of the arresting officer that falls far short of that which should be required. In particular, there are no statements from any person other than the arresting officer, such as the driver of the vehicle Mr. Haradinaj was in, any officer of the Kosovo Police, nor is there a statement from the person who Mr. Haradinaj had planned to meet. There is not even, as one might expect, the video footage from the dashboard camera footage of the SPO vehicle that is alleged to have pursued Mr. Haradinaj.

8. In any event, it is submitted that Mr. Haradinaj can be appropriately released from detention.

II. BACKGROUND

9. The chronology is of specific importance in terms of these submissions and therefore the same is repeated in full.
10. On 22 September 2020, the SPO requested the arrest of Hysni Gucati and Nasim Haradinaj, for alleged dissemination of confidential information relating to the work of the SITF and/or the SPO at three press conferences held on 7, 16, and 22 September 2020, and sought their transfer to the detention facilities of the KSC.²
11. On 24 September 2020, the Single Judge issued arrest warrants for Mr. Gucati and Mr. Haradinaj in connection with allegations of attempted intimidation of witnesses, retaliation, and violation of secrecy proceedings, and ordered their transfer to the KSC detention facilities.³

² Urgent Request for Arrest Warrants and Related Orders, KSC-BC-2018-01, F00125, Strictly Confidential and *ex parte*, with Strictly Confidential and *ex parte* Annexes 1-2, 22 September 2020. A supplement to the Request was submitted on 23 September 2020, Prosecution Notice and Related Request, KSC-BC-2018-01, F00126, Strictly Confidential and *ex parte*, 23 September 2020, with Annex 1, Strictly Confidential and *ex parte*.

³ Annex 2 - Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers, KSC-BC-2020-07, F00012, Public, 24 September 2020.

12. On 25 September 2020, Mr. Haradinaj was arrested and held in detention in the Republic of Kosovo until the following day when he was transferred to the KSC detention facilities.
13. On 29 September 2020, Mr. Haradinaj filed a request for his immediate release from detention.⁴
14. On 27 October 2020, the Single Judge rendered a decision rejecting this request.⁵
15. On 30 October 2020, the SPO submitted an indictment for confirmation against Mr. Haradinaj and Mr. Gucati.⁶
16. On 9 December 2020, the Pre-Trial Judge requested the Parties to file written submissions on Mr. Haradinaj's continued detention, the deadline being 18 December 2020.⁷

⁴ Initial appearance, preliminary motion to dismiss the charges and motion for immediate release, KSC-BC-2020-07, F00030, Public, 29 September 2020.

⁵ Decision on Request for Immediate Release of Nasim Haradinaj, KSC-BC-2020-07, F00058, Public, 27 October 2020.

⁶ Submission of Indictment for Confirmation and Related Requests, KSC-BC-2020-07, F00063, Strictly Confidential and *ex parte*, 30 October 2020.

⁷ Order for Submissions on the Review of Detention, KSC-BC-2020-07, F00073, Public, 9 December 2020.

17. On 11 December 2020, the Pre-Trial Judge confirmed, in part, the indictment, and ordered the SPO to submit a revised indictment as confirmed.⁸
18. On 14 December 2020, the SPO submitted the Confirmed Indictment with redactions.⁹
19. On 18 December 2020, Mr. Toby Cadman was appointed as new Specialist Counsel to Mr. Haradinaj.¹⁰ On the same day, the withdrawal of previous Specialist Counsel was confirmed.¹¹
20. On 18 December 2020, Mr. Haradinaj was produced before the KSC where an 'initial appearance' was held.¹²

⁸ Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2020-07, F00074/RED, Public, 11 December 2020.

⁹ Submission of confirmed Indictment with strictly confidential Annexes 1 and 2, KSC-BC-2020-07, F00075, Public, 14 December 2020.

¹⁰ Notification of the Appointment of Counsel to Nasim Haradinaj with one confidential Annex, KSC-BC-2020-07, F00086, Public, 18 December 2020.

¹¹ Decision Approving the Withdrawal of Counsel, KSC-BC-2020-07, F00084, Public, 18 December 2020.

¹² Initial Appearance of Nasim Haradinaj, Transcript, KSC-BC-2020-07, 18 December 2020.

21. On 18 December 2020, Mr. Haradinaj filed 'Submissions on the Review of Detention by 27 December 2020',¹³ the SPO filing its 'consolidated submissions on review of detention' on the same day.¹⁴
22. On 23 December 2020, the appointment of Specialist Co-Counsel for Mr. Haradinaj, Mr. Carl James Buckley, was confirmed.¹⁵
23. On 24 December 2020, the Pre-Trial Judge refused Mr. Haradinaj's application for release.¹⁶
24. On 5 January 2021, the Defence for Mr. Haradinaj filed a Notice of Appeal of the Decision on Detention of 24 December 2020 before the Court of Appeals Panel.¹⁷
25. On 4 January 2021, the SPO claims to have made its Rule 102(1)(a) disclosure.¹⁸

¹³ Submissions on the Review of Detention by 27 December 2020, KSC-BC-2020-07, F00090, Public, 18 December 2020.

¹⁴ Prosecution consolidated submissions on review of detention, KSC-BC-2020-07, F00088, Public, 18 December 2020.

¹⁵ Notification of Approval of Co-Counsel for Nasim Haradinaj with one confidential Annex, KSC-BC-2020-07, F00092, Public, 23 December 2020.

¹⁶ Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07, F00094, Public, 24 December 2020.

¹⁷ Notice of Interlocutory Appeal against the Decision on Pre-Trial Detention on behalf of Nasim Haradinaj, KSC-BC-2020-07/IA002/F00001, Public, 4 January 2021 (notified 5 January 2021).

¹⁸ Prosecution Submissions for first Status Conference, KSC-BC-2020-07, F00096, Public, 5 January 2021.

26. On 6 January 2021, the President of the KSC constituted an Appeals Panel for the Defence Appeal against the Decision on Detention.¹⁹
27. On 6 January 2021, a Decision was made to order Mr. Haradinaj to attend the first part of the first Status Conference in order to enter a plea.²⁰
28. On 8 January 2021, the first Status Conference took place.²¹
29. On 15 January 2021, the SPO filed its Response to the Defence Appeal against the Decision on Detention of Nasim Haradinaj.²²
30. On 20 January 2021, the Defence filed its Reply to the SPO Response regarding the Appeal against the Decision on Detention.²³
31. On 9 February 2021, the Appeals Panel ruled on the detention of Mr. Haradinaj and declined to uphold the Appeal.²⁴

¹⁹ Decision Assigning a Court of Appeals Panel, KSC-BC-2020-07, IA002-F00002, Public, 6 January 2021.

²⁰ Decision on Defence Request to Hold Hearing in the Absence of the Accused, KSC-BC-2020-07, F00097, Public, 6 January 2021.

²¹ Status Conference, Transcript, KSC-BC-2020-07, 8 January 2021.

²² Prosecution response to Defence appeal of decision on review of detention of Nasim Haradinaj, KSC-BC-2020-07, IA002-F00003, Public, 15 January 2021.

²³ Defence Reply to Specialist Prosecutor's Response to Appeal against the Decision on Pre-Trial Detention on behalf of Nasim Haradinaj, KSC-BC-2020-07, IA002-F00004, Public, 20 January 2021.

²⁴

32. On 25 February 2021, the Single-Judge rejected the second review of detention of Mr. Haradinaj but ordered that the SPO disclose any statement of arrest and detention, along with any supporting video evidence.²⁵
33. On 12 March 2021, the same was disclosed to the Defence.

III. THE LAW

34. As per Article 41(6)(b), an individual can only be detained in custody where there are articulable grounds to believe that:
- a. There is a risk of flight;
 - b. He or she will destroy, hide, change or forge evidence of a crime or specific circumstances indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices; or
 - c. The seriousness of the crime, or the manner or circumstances in which it was committed and his or her personal characteristics, past conduct, the environment and conditions in which he or she lives, or other personal circumstances indicate a risk that he or she will repeat the

²⁵ Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00144, 25 February 2021, Public.

criminal offence, complete an attempted crime or commit a crime in which he or she has threatened to commit.

35. Further, Article 41(12) of the Law makes provision for a number of measures to be imposed so as to *“ensure the presence of the accused during proceedings, to prevent re-offending or to ensure successful conduct of criminal proceedings”*.
36. It is submitted that in the instant case, the imposition of conditions will allay any concerns that the Court may have.
37. It is further submitted that reasonable suspicion of having committed an offence within the jurisdiction of the Court may constitute a reasonable ground for arrest and initial detention, but 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.
38. 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."²⁶

39. 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.²⁷

40. 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 it ceases to be a

²⁶ Eur. Court HR, judgment of 27 June 1968, Series A no. 7, para. 12

²⁷ 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 three months.

IV. THE OBJECTIONS

41. 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.
42. It is anticipated that the SPO will offer 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.

43. 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.
44. This does not come close to demonstrating 'relevant and sufficient' reasons for extending detention.

V. SUBMISSIONS

That Mr. Haradinaj is a Flight Risk

45. A detailed chronology of events in terms of the arrest has already been provided, and that same chronology is adopted for the purposes of this submission.
46. It is noted on that last occasion that the Pre-Trial Judge ordered that a statement from the arresting officer and video evidence be disclosed.
47. This has now been received and reviewed.
48. The statement of the arresting officer provides an insufficient basis in that it is not accepted that Mr. Haradinaj sought to evade arrest and there is no independent corroborative evidence to establish this contested fact.

49. The video disclosed does not show the actual arrest and detention in the initial stages, it begins part way through.
50. Firstly, the Defence would request that the SPO confirm that this was the point at which the camera was turned on, or whether there exists any other recording that shows the detention and arrest from the outset; the video as it currently stands, does not at any stage demonstrate that which is being alleged by either the SPO or the officer who has provided the statement.
51. On examining the video evidence, it shows Mr. Haradinaj with officers, conversing normally and relaxed.
52. Further, there has been no need to restrain Mr. Haradinaj or take any other action to ensure that he does not attempt to flee.
53. The video does not demonstrate that Mr. Haradinaj is a flight risk.
54. Further, and as has been submitted previously, it ought to be noted that Mr. Haradinaj attended the offices and spoke to officers present voluntarily; if there was an intention to flee the jurisdiction or at least absent himself, he had ample opportunity to do so and did not.
55. Further, the SPO have not challenged the fact that Mr. Haradinaj was on his way to attend a TV station when he was detained, and therefore not the obvious location for an individual purportedly seeking to evade arrest.

56. The SPO do not appear to have questioned any other person to establish the narrative they are now advancing. It is respectfully submitted that this account by the SPO does not stand up to scrutiny and does not contradict the credible account put forward by Mr. Haradinaj by failing to produce any video footage to show that he was trying to flee, by failing to produce a statement from any independent witness that corroborates the arresting officer's account such as the driver of Mr. Haradinaj's vehicle, one of the many individuals standing in the vicinity of where the arrest took place, or a statement from the person that Mr. Haradinaj had arranged to meet for an interview.

57. Accordingly, it is submitted that the objection on the basis that Mr. Haradinaj remains a flight risk is not made out.

That there would be an attempt to obstruct progress of proceedings/commit further offences

58. The two grounds are combined for the purposes of this submission given that obstruction would potentially amount to the commission of further offences.

59. Those submissions already made in December and February on the first and second review of detention are re-iterated here.

60. The SPO have consistently maintained the abstract position that by virtue of the fact that the offences for which Mr. Haradinaj is charged, there is a risk that further like offences will be committed.
61. The SPO are yet to demonstrate how, or offer any evidence that would suggest that this would occur, instead, as noted, relying on the indictment itself.
62. With respect, this is not enough, particularly taking into account that Mr. Haradinaj is hitherto of good character, and remains of good character, noting the principle of the presumption of innocence. It is a well established principle of international human rights law that the gravity of the offence is not a sufficient basis to order (or continue) detention.²⁸
63. The position therefore is that any risk posed is a generalised risk, and that such a risk is any event insufficient; it having to be identifiable on the facts of the case and there must be evidence in support.²⁹
64. The ground of committing further offences likewise cannot be generalised and must be “a plausible one” and considered “in the light of the circumstances of

²⁸ Eur. Court HR, *Idalov v. Russia* (2012) Grand Chamber, Application No. 5826/03 15, judgment of 22 May 2012, para. 145.

²⁹ Eur. Court HR, *Tomasi v. France* (1993) 15 E.H.R.R. 1, paras. 84 and 91.

the case and, in particular, the past history and the personality of the person concerned".³⁰

65. There are a number of considerations that the European Court has concluded are not relevant considerations for the withholding of bail. The severity of the sentence and the gravity of the charges, as noted earlier, whilst they may be relevant to the risk of flight, they are not sufficient grounds for refusing bail. Further, the fact that an indictment has been filed,³¹ or a lack of demonstrated confidence in the justice system³² are not justifiable grounds for refusal.
66. In terms of an allegation of obstruction, these grounds cannot be argued *in abstracto*, but must be supported by credible evidence.³³ The SPO has made reference to the state of the evidence, but as noted in *Dereci v. Turkey*, it does not provide a sufficient basis to prolong detention.³⁴
67. It is respectfully submitted that the point was raised in the previous application for provisional release that it is for the SPO to raise objections to release, grounded on relevant and sufficient reasons with reference to a

³⁰ Eur. Court HR, *Muller v. France* [1997] ECHR 1, paras. 84 and 91.

³¹ Eur. Court HR, *Aliyev v. Azerbaijan* (2010) ECHR App. 37138/06, paras. 173-178.

³² Eur. Court HR, *Getos-Magdic v. Croatia* (2010) ECHR App. 58305/08/06.

³³ Eur. Court HR, *Beciev v. Moldova*, Application No. 9190/03, judgment of 4 January 2006, para. 59.

³⁴ Eur. Court HR, *Dereci v. Turkey*, Application No. 77845/01, judgment of 24 August 2005, para. 38.

proper evidential basis rather than a generalised assertion, upon which the defence would have an opportunity to respond.

68. The SPO has failed to advance articulable grounds consistent with the procedural requirements of Article 5 and has advanced grounds that amount to little more than generalised statements that are not identifiable to the specific facts of the case and provide no evidence in support.

Other Basis for Granting Bail

69. Further to the above responses to the objections raised, the Defence would seek the release from detention on what are effectively, humanitarian grounds, as per Rule 56(3).
70. As per the annex submitted, [REDACTED] is unwell, and [REDACTED].
71. As a consequence, [REDACTED] is awaiting surgery.
72. The prognosis is unclear at this stage, however, the fact that Mr. Haradinaj has been held in detention for a number of months has caused significant stress upon the family and [REDACTED], and has exacerbated the situation.
73. Further, given this development, it is respectfully submitted that this further alleviates any risk that Mr. Haradinaj would either abscond, and/or commit any further offences given that his focus is [REDACTED].

74. The attached annex is written confirmation of the diagnosis and thus we anticipate that there will be no dispute as to the submission.
75. In the circumstances, the Pre-Trial judge is respectfully requested to order temporary release.

V. Conclusion

76. The Defence maintain that the objections of the SPO are not made out on the facts and/or that evidence that has been adduced.
77. Further, the Defence request that Mr. Haradinaj be released in light of the aforementioned, and on humanitarian grounds as noted at paragraph 69-75.
78. In all the circumstances, Mr. Haradinaj can be appropriately released, and should the Court deem appropriate, released with appropriate conditions for example:
- a. That his passport is surrendered and that he does not leave a designated area subject to listed Court appearances;
 - b. That he resides at his given address and does not seek to change that address without leave of the Court;

- c. That any electronic device used for communication is registered with the SPO;
 - d. That he reports to a nominated local police station at a frequency to be determined;
 - e. That he refrains from contact with his co-defendant, subject to inadvertent contact during court proceedings;
 - f. That he undertakes to not communicate with the media, or seek to publish any information concerning his, or any other matter currently before the Court; and
 - g. Any other condition that the Pre-Trial Chamber deems fit to impose.
79. The Pre-Trial Judge is hereby respectfully requested to review his previous Decision on Mr. Haradinaj's detention on remand, in accordance with Rule 57(2) of the Rules, and make a finding that:
- a. Mr. Haradinaj's detention on remand be terminated;
 - b. Mr. Haradinaj is allowed to return home to await trial; and
 - c. appropriate measures under Article 41(12) of the Law be considered instead, if necessary.

Word Count: 3809 words



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