

**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

**Language:** English

**Classification:** Public

---

**PUBLIC REDACTED VERSION OF F00186**

**Defence Reply to Prosecution Consolidated Response for Review of Detention**

---

**Specialist Prosecutor**

Jack Smith

**Counsel for Nasim Haradinaj**

Toby Cadman

Carl Buckley

**Counsel for Hysni Gucati**

Jonathan Elystan Rees QC

Huw Bowden

## I. INTRODUCTION

1. On 15 April 2021 the Specialist Prosecutor's Office ('SPO') filed its consolidated response to the Defendant(s) submissions on Detention.<sup>1</sup>
2. The Defence for Mr. Haradinaj now seek to reply to that response as set out below.
3. As per previous replies, the Defence do not seek to rehearse the background and chronology already outlined in the substantive filing and simply rely on those submissions already before the Pre-Trial Judge.

## II. SUBMISSIONS

### *Change in Circumstances*

4. In the first instance, despite the submissions by the SPO, there is no requirement for there to be a 'change in circumstance' prior to the decision on detention being reviewed, as the ongoing review of detention is not only an obligation of the Chamber in any event, but is explicitly referred to within Rule 57(2) of the Rules of Procedure and Evidence. Further, as an institution of the Republic of Kosovo, there is an obligation to apply the national

---

<sup>1</sup> Prosecution Consolidated Response for Review of Detention, KSC-BC-2007-07/F00184.

legislative and constitutional framework to these proceedings, specifically the inclusion of the international treaty obligations set out under Chapter II of the Constitution.

5. Article 22 of the Constitution provides:

“[human] rights and fundamental freedoms guaranteed by the following international agreements and instruments are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:

(2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.”

6. Articles 5(3) and 5(4) of the ECHR provides the procedural guarantees to ensure regular review as to the ‘lawfulness’ and ‘necessity’ of continued detention.
7. The change in circumstances element within Rule 57(2), it is submitted, relates to circumstances where a review of detention is requested outside of the provided for 2-month period.
8. Paragraph 1 of the SPO response is therefore wholly irrelevant on this issue.
9. In any event, there has been a clear and demonstrable change in personal circumstances given the prognosis in respect of [REDACTED], as clearly

outlined within the substantive submissions, and therefore again, the response of the SPO on this point is inaccurate.

*That the Risk has Increased*

10. Further at paragraph 1 of its response, and again at paragraph 5 and 6 of that response, the SPO seeks to submit that the risks have in fact increased, and yet provides no evidence to justify this position.
11. Instead, the SPO suggest that the fact that the pre-trial brief has now been disclosed, and the fact that the matter is to be sent to the trial panel,<sup>2</sup> is determinative that the risks have increased. To hold such a position runs contrary to the jurisprudence of the European Court and is wholly unsustainable. First, any allegation that the Defendant will interfere with the administration of justice must be supported by factual evidence,<sup>3</sup> and in this regard it is submitted that reliance cannot be based solely on the nature of the charges faced, and that any justification of detention based on the investigation will diminish over time,<sup>4</sup> not increase. It is noted that any arguments put forward against provisional release must be not be 'general and abstract'<sup>5</sup> and that the burden of proof cannot be reversed so as to require the defendant to demonstrate cause for why he should be released.<sup>6</sup> On a comparable note, where a Russian court had refused repeated applications for release based on

---

<sup>2</sup> It ought to be noted that no date has been fixed for when the case is to be transferred to the trial panel, nor has any trial been fixed.

<sup>3</sup> *Becciev v. Moldova*, no. 9190/03, , §59, 4 October 2005

<sup>4</sup> *Clooth v. Belgium*, 12 December 1991, §44, Series A no. 255.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Aleksanyan v. Russia*, no. 46468/06, §179, 22 December 2008.

the gravity of the charges and the likelihood of flight, as well as concerns about obstruction the course of justice and exerting pressure on witnesses, the European Court of Human Rights noted the judicial decisions merely listed these grounds, omitting to substantiate them with relevant and sufficient reasons. The European Court further noted that there was a failure to consider whether these grounds remained valid after the passage of time.<sup>7</sup>

12. In the instant case, the opposition put forward by the SPO is not supported by any evidence at all and is merely supposition by the SPO rather than a position that is grounded in fact, and therefore is one that ought to be rejected at the outset.
13. Further, the SPO submits that “*their trial imminently approaches*”.<sup>8</sup> The SPO must clearly be aware of information not yet disclosed to the Defence teams, as no trial date has been fixed, and further, the case has not been transferred from the Pre-Trial Chamber as yet, and therefore it is factually inaccurate to suggest that the trial is imminent.
14. It is provisionally envisaged that the case will be assigned until a Pre-Trial Chamber at some point after 30 June 2021. However, due to the fact that the current COVID-19 restrictions are having a detrimental impact on the ability of the Defence to adequately prepare its case and that the translation of documents in a language which the Defendant understands is running at a delay of close to three (3) months,

---

<sup>7</sup> *Bykov v. Russia* [GC], no. 4378/02, §65, 10 March 2009.

<sup>8</sup> KSC-BC-2007-07/F00184 at paragraph 5

to suggest that this matter is trial ready is a gross misrepresentation of how matters currently stand.

*No New Circumstances in Respect of the Risk of Flight*

15. Again, the SPO refers to a change in circumstance, and that the challenges raised by the Defendant do not raise a relevant change.<sup>9</sup>
16. As previously submitted above, there is no requirement for there to be a change in circumstances, the Defendant is able to proffer whatever argument he seeks to raise to challenge the position, it is for the pre-trial judge to determine the issue and whether a risk exists or otherwise.
17. The Defendant does and will continue to challenge the narrative in terms of the allegation that he sought to evade arrest, as he does not accept the way in which the arrest has been characterised by the SPO.
18. Further, it is noted that the SPO was not forthcoming in terms of the disclosure of the arresting officer's statement, and the CCTV evidence, and in any event failed to disclose this evidence until relatively recently, and therefore the issue remains a 'live' issue.
19. Finally, it is noted that the CCTV disclosed does not actually cover the arrest itself, and as much as the Defence accept that there is no strict requirement for there to be corroboration of the officers account, it is most disconcerting that the actual arrest of the Defendant appears not to have been recorded, nor does the period leading up to

---

<sup>9</sup> *Ibid* at paragraph 7

his arrest, and therefore the alleged attempts to evade arrest are not properly made out.

20. It is respectfully submitted that the SPO has put forward an entirely unsupported allegation of evading arrest. That account is not accepted by the Defence and is prepared to call oral evidence in the form of a witness to demonstrate that the SPO's account is inaccurate and unreliable. The Court is being asked to accept the SPO's version of events at face value without further scrutiny.
21. In terms of the factors noted by the SPO at paragraph 11 of its response, the position remains as that which has been submitted previously, in that the SPO relies on supposition rather than any actual evidence.

*Humanitarian Grounds*

22. The position of the Defendant remains as per the substantive filing, and at the risk of rehearsing the position, there is a clear basis to release the Defendant on humanitarian grounds, and the position of the SPO ought to be roundly rejected.
23. [REDACTED] is quite unwell following a diagnosis of [REDACTED] and requires surgery. Evidence can be called to substantiate the [REDACTED] state of health. The SPO appears to callously dismiss this allegation on the basis that "...even [REDACTED] are not sufficient, in and of themselves, to justify release on humanitarian grounds." In support of this contention, the SPO cites the Decision on the urgent Defence request for a custodial visit on

compassionate grounds in *Prosecutor v. Al Hassan*.<sup>10</sup> In response, the Defence for Mr. Haradinaj notes that the balancing exercising in *Al Hassan* was very different to the present case, notably the security situation in Mali that included extreme threat of terrorism and criminality, substantial threat of civil unrest, a recent military coup, alleged incidents of prisoner/hostage exchanges and the risk of second wave of COVID-19 infections. If one was to compare the situation in Mali to the situation in Kosovo, where EULEX and KFOR maintain a significant presence, a recently peaceful election and smooth transition of constitutional authority to the newly elected government, one could not imagine a more stark contrast. Further, if the Defendant were to be provisionally released on humanitarian or compassionate grounds, it would be to accompany [REDACTED] whilst [REDACTED] in [REDACTED] undertaking surgery. To compare the situation in Mali with Sweden as in and of themselves comparable situations borders on the absurd.

*Detention Remains Proportionate*

24. The SPO continues to maintain that the case is “*about to be sent to the Trial Panel*”.<sup>11</sup>
25. The case has not been sent, nor has a date been fixed for when it is to be sent, the SPO is therefore making an unfounded argument.

---

<sup>10</sup> ICC-01/12-01/18-1227-Red, 23 December 2020 (redacted version notified 18 January 2020)

<sup>11</sup> *Ibid* at paragraph 14



26. The case will be sent when all interlocutory matters, including appeals, have been resolved.
27. The SPO is aware that there are two matters that are subject to appeal and are yet to be considered by the Appeals Chamber.
28. Further, there remain issues of disclosure that have not as yet been resolved fully, and therefore the SPO is mischaracterising the position in seeking to suggest by inference that the proceedings will be concluded imminently.
29. The case will proceed to the trial panel when it is ready to proceed and not before.
30. Further, even if one were to accept the position that the case is trial ready, as already noted that would not be a sufficient justification for refusing a request for provisional release.
31. Finally, and as noted earlier and in the substantive application, the burden is not on the Defendant to establish grounds for why he should be provisionally released, it is for the SPO to put forward grounds, determined by the Court to be 'relevant and sufficient', grounded in fact and not merely general assertions in the abstract and merely a recitation of the grounds in the law for detaining an individual pre-trial.

### **III. CONCLUDING REMARKS**

32. The SPO has failed to satisfy the requirement of 'relevant and sufficient reasons' as required.

33. The Defendant can be appropriately admitted to bail for the reasons already noted, and further, on the basis that clear humanitarian grounds exist for doing so.

Word Count: 1926 words



**Toby Cadman**

**Specialist Counsel**



**Carl Buckley**

**Specialist Co-Counsel**