

In: KSC-BC-2020-07
The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: **Trial Panel II**
Judge Charles L. Smith III, Presiding Judge
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

Date: 4 August 2021

Language: English

Classification: Public

Defence Submissions for Review of Detention

Specialist Prosecutor

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I. INTRODUCTION

1. In the Order of 23 June 2021, the Pre-Trial Judge invited submissions from the Defendant, to be filed by 4 August 2021, in respect of whether the ongoing detention of the Defendant was still necessary.¹
2. The Defendant maintains his position as he has throughout the entire proceedings, that the ongoing detention of the Defendant is not necessary, and further, the Specialist Prosecutor's Office ("SPO") remains unable to demonstrate that the risks alleged are substantiated risks. To date, the SPO has alluded to arguments in the abstract or has referred to the nature and gravity of the charges. The Trial Panel will be quite aware that this is not sufficient.
3. Accordingly, the Defendant ought to be granted provisional release.

II. BACKGROUND

4. The background and chronology to this issue has already been outlined on a number of occasions, and therefore is not repeated here, save to highlight that

¹ KSC-BC-2020-07/F00246, Decision on Review of Detention of Nasim Haradinaj, 23 June 2021, Public.

the case has now been transferred to the Trial Panel,² an initial Case Status hearing having been scheduled for 1 and 2 September 2021.³

III. THE LAW

5. As per Article 41(6) of the Law on the Specialist Chambers and Specialist Prosecutor's Office, Law No. 05/L-053 ("Law"), an individual can only be detained in custody when "there is a grounded suspicion that he or she has committed a crime within the jurisdiction of the Specialist Chambers"⁴ and where there are articulable grounds to believe that:⁵

- 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,

² KSC-BC-2020-07/F00265, Decision Transmitting Case File to Trial Panel II, 16 July 2021, Public.

³ KSC-BC-2020-07/F00267, Order for Submissions and Scheduling the Trial Preparation Conference, 21 July 2021, Public.

⁴ Article 41(6)(a).

⁵ Article 41(6)(b).

the environment, and conditions in which he or she lives or other personal circumstances indicate a risk that he or she will repeat the criminal offence, complete an attempted crime, or commit a crime in which he or she has threatened to commit.

6. 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”*.
7. It is submitted that in the instant case, as it has been submitted previously, conditions may be safely imposed that allay any concerns that the Court may have.

IV. SUBMISSIONS

8. There has been no change in the Defendant’s position, and therefore no ‘new’ submissions are to be made, and previous submissions are maintained.⁶
9. However, the fact that there has been no change in circumstance does not preclude the review of detention, despite the position of the SPO on the last

⁶ KSC-BC-2020-07/F00239, Defence Submissions for Review of Detention, 17 June 2021, Public.

occasion⁷ which was tantamount to reading into the test a further limb, that being whether there was a ‘change in circumstances’ or otherwise.

10. This is simply incorrect, as per the submissions filed on 17 June 2021, there is no 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.⁸
11. The Defence have not had sight of any submissions to be filed by the SPO⁹ and therefore it is unclear as to whether this issue will be raised again, however, it is respectfully submitted that the position is clear, and if it is that the same or similar submissions are to be advanced by the SPO, then such a point ought to be rejected.
12. It is anticipated that the SPO will seek to maintain its previous submission that ‘risks have now increased’.¹⁰

⁷ KSC-BC-2020-07/F00239, Defence Submissions for Review of Detention, 17 June 2021, Public, at para. 20.

⁸ See e.g., KSC-BC-2020-07/F00239, Defence Submissions for Review of Detention, 17 June 2021, Public, at para. 20.

⁹ In a previous detention review, the Pre-Trial Judge recognised that it was for the SPO who “bears the burden of showing that the detention of Mr Haradinaj is necessary” and was therefore ordered to make first submissions to which Mr. Haradinaj was to respond. See KSC-BC-2020-07/F00246, Decision on Review of Detention of Nasim Haradinaj, 23 June 2021, Public, at para. 9.

¹⁰ KSC-BC-2020-07, F00228, Prosecution Consolidated Submissions for Review of Detention (“SPO Submission”), 11 June 2021, public, with Annex 1, Public, at para. 1.

13. As per previous submissions,¹¹ there is no basis, evidential or otherwise, to make such a submission, and thus it is merely supposition and conjecture without foundation.
14. It is accepted that members of the KLA WVA not subject to indictment have made comments in the press regarding the disclosure of documents, however, there is no evidence to suggest that such comments were made at the behest of, or with the support of Mr. Haradinaj.¹²
15. Accordingly, and as per the previous submissions, the Defendant is not and cannot be held responsible for the actions of others.
16. In short therefore, the actions of others in the context being discussed, do not increase, or decrease any risk that may or may not be apparent.
17. Further to the above two points, it is anticipated that the SPO will offer the same objections to provisional release as that 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.

¹¹ KSC-BC-2020-07/F00239, Defence Submissions for Review of Detention, 17 June 2021, Public, at para. 23.

¹² KSC-BC-2020-07/F00239, Defence Submissions for Review of Detention, 17 June 2021, Public, at para. 23.

18. As per the previous submissions on detention,¹³ and as already alluded to above, the SPO has not demonstrated how these objections are to be realised, and further, has failed to adduce any evidence to substantiate its objections other than making reference to the gravity of the allegations and the manner in which they allege the offences were committed.

That the Defendant is a Flight Risk

19. Detailed submissions have previously been filed in terms of the arrest of the Defendant and the disparity in the account of the SPO and the Defendant.¹⁴

20. Those same submissions are maintained here, and further, the Defence would again draw attention to the fact that the SPO unfortunately has not been in a position to disclose video evidence of the entire arrest, only video evidence of the very end portion of the arrest.

21. It is therefore unfortunate that the SPO has not been in a position to disclose any evidence that suggests that the Defendant tried to evade arrest. It is respectfully submitted that this is a crucial aspect of whether it can be said that the Defendant was seeking to flee or evade arrest.

¹³ KSC-BC-2020-07/F00239, Defence Submissions for Review of Detention, 17 June 2021, Public, at para. 16.

¹⁴ KSC-BC-2020-07/F00111, Defence Submissions on Second Review of the Detention of Nasim Haradinaj, 1 February 2021, Public, at para. 29ff.

22. The position therefore is that a determination is to be made as to whether the account of the SPO is correct, in that the Defendant sought to evade arrest, and effectively 'run away', or rather, the account of the Defendant is correct, in that he was on his way to attend an appointment at a local television station where he was to be interviewed and incidentally, where he was arrested and detained. It is the Defendant's position that the SPO account is wholly illogical and misguided, as the Defendant had driven some distance from outside Prishtinë towards the capital. Logic would suggest if he was seeking to evade arrest, he would not have returned to a TV station in Prishtinë to give an interview on the nature and substance of the prosecution case.
23. It is of note that there was no attempt to detain the Defendant at the offices of the KLA WVA, despite the Defendant's visible presence, and despite the fact that officers of the SPO were aware that he was making his way to the offices, noting that the Defendant travelled over 100km to the KLA WVA offices when he received a phone call making him aware of the presence of officers.
24. If he sought to evade arrest and/or detention, it is respectfully submitted that the Defendant would not have undertaken that journey.
25. The reality of the matter is that the Defendant, upon being aware that officers were to arrest him, remained stationary and did not seek to evade arrest, but rather, wanted to wait for local police to be present also. This is not

tantamount to the Defendant seeking to evade arrest or demonstrable of him being a flight risk, but rather, it demonstrates that he sought to protect himself by having Kosovo Police present to ensure that the process was undertaken properly and in accordance with national law and procedures.

26. Following his arrest on 25 September 2020, there has been no evidence to suggest that the Defendant would not attend trial if released, nor has there been any evidence to suggest that he would otherwise seek to evade the ongoing process. To the contrary, the Defendant is adamant that he is innocent of all allegations and looks forward to adducing the same at trial.

That the Defendant Would Further Seek to Obstruct Proceedings

27. There is no basis upon which this allegation can be substantiated, noting further that it is for the SPO to justify its position.
28. It is wholly unclear upon what basis the Defendant would seek to obstruct the progress of proceedings, or indeed *how* this could happen even if it were his intention, taking into account the nature of the offences contained within the indictment, and the statement of facts adduced.
29. On the date of the 'first press conference', that being 7 September 2020, the Single Judge authorised the seizure of the documents received by the KLA WVA. Those documents were seized, and thus the order of the Court respected.

30. Further, the second tranche of documents disclosed on 16 September 2020, were the subject of a further seizure order dated 17 September 2020; again, that order was respected.
31. Still further, on 22 September 2020, a third tranche of documents were disclosed, those being seized by the SPO the same day.
32. Accordingly, the documentation noted within the indictment has been seized.
33. The Defendant did not facilitate the disclosure of these documents, nor is it suggested that he sought to obtain them by any means, nor is it suggested that any threats were used to obtain those documents.
34. Accordingly, there is no basis upon which the Defendant would be in a position to obstruct proceedings even if the SPO could demonstrate the intention to do so, which, it is respectfully submitted, it cannot.
35. It is submitted that it is insufficient for the SPO to merely raise the allegation without it being substantiated, as it has done on each and every occasion in which the question of prolonging detention has been considered.

That there is a Risk that the Defendant will Commit Further Offences

36. As per previous submissions,¹⁵ and those submissions made above, there is no evidence to substantiate this position.
37. The Defendant denies all counts on the indictment, and since his arrest of 25 September 2020, there has been no incident to suggest that he would commit further offences.
38. It is anticipated that the SPO will seek to rely upon the comments of Faton Klinaku, the acting Secretary of the KLA WVA, made in an interview of 4 June 2021.¹⁶
39. The Defence can make no comment in respect of that interview, as the Defendant quite clearly is not responsible for the actions of another, nor can he be held responsible where there is no evidence, nor assertion, that that interview was given at the behest of the Defendant.
40. To accept the SPO's position on this point would in effect be to punish the Defendant for the actions of others, which respectfully, is a wholly unjustified position to take.

¹⁵ KSC-BC-2020-07/F00239.

¹⁶ KSC-BC-2020-07, F00228, Prosecution Consolidated Submissions for Review of Detention ("SPO Submission"), 11 June 2021, public, with Annex 1, Public, at para. 5ff.

V. CONCLUSION

41. It is respectfully submitted that there exists no basis upon which to further extend the detention of the Defendant.

42. In making the above 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 or sought to threaten, intimidate or cause fear to any 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, we would again refer to the fact that the SPO has unfortunately not been able to disclose the entire video of the arrest to substantiate their position, as the body-cam footage disclosed is not of the full incident.
- 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 conditions that the Chamber may seek to impose.

43. Having regard to the above, and what are submitted to be 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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