

**In:** KSC-BC-2020-07

**The Prosecutor v. Hysni Gucati and Nasim Haradinaj**

**Before:** The Trial Panel

Judge Charles Smith III

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Hysni Gucati

**Date:** 5 August 2021

**Language:** English

**Classification:** Public

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**Corrected Version of Submissions on the Fifth Review of Detention**

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## I. INTRODUCTION

1. On 23<sup>rd</sup> June 2021 the Pre-Trial Judge issued his Decision on Review of Detention of Hysni Gucati of the same date and ordered Mr Gucati to file submissions on the next review of detention by Wednesday 4 August 2021<sup>1</sup>.
2. In accordance with the Pre-Trial Judge's order, the defence make the following submissions on behalf of Mr Gucati.

## II. SUBMISSIONS

3. The defence repeat that the longer a person remains in pre-trial detention, the higher the burden on the Specialist Chambers to justify continued detention<sup>2</sup>. The clear presumption is in favour of the accused being at liberty. Deprivation of liberty is the exception and not the rule<sup>3</sup>. Detention can only be extended (i) where the strict conditions in article 41(6) of the Law continue to be met<sup>4</sup> and (ii) detention remains strictly necessary and proportionate having considered whether other, less stringent measures than detention could be sufficient<sup>5</sup>.

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<sup>1</sup> *Decision on Review of Detention of Hysni Gucati*, KSC-BC-2020-07/F00245 at paragraph 32.b

<sup>2</sup> *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, KSC-BC-2020-07/IA0001/F00005 at paragraph 73

<sup>3</sup> *Decision on Application for Interim Release*, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08-321, Pre-Trial Chamber III, 16 December 2008 at paragraph 31

<sup>4</sup> *Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence*, ICC-01/05-01/08 OA 4, The Appeals Chamber, 19 November 2010 ("Detention Appeal Judgment") at paragraph 52

<sup>5</sup> *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, KSC-BC-2020-07/IA0001/F00005 at paragraphs 51 and 72

4. Further, the Trial Panel should consider whether there are any new circumstances that have a bearing on the decision as to detention<sup>6</sup>. It is submitted that there have been a number of changes of circumstances in the present case.
5. The Prosecution bears the burden of proof under to establish that the law is met in article 41(6)<sup>7</sup>.
6. The submissions at paragraphs 4 to 8 of the *Submissions on the Third Review of Detention*, KSC-BC-2020-07/F00170 are maintained and repeated. Whilst it is acknowledged that the evidentiary threshold for the purpose of assessing Article 41(6) of the Law is lesser than the evidentiary threshold to establish guilt at trial, where there is a grounded suspicion but the SPO *cannot* prove guilt at trial, the Trial Panel should act accordingly and release the detainee, as continued detention in those circumstances cannot be proportionate.
7. The SPO has repeatedly claimed that no further Rule 102(1) material is expected (or at least of any different nature). On reflection, therefore, the SPO has made clear that, at trial, it will not, and cannot, produce in evidence a single document which they allege Mr Gucati was responsible for disseminating which was not already in the public domain. Similarly, on reflection, the SPO has also now made clear that, at trial, it will not, and cannot, call a single witness to say in evidence that they were threatened or intimidated, or that they faced other serious consequences, as a result of the actions of Mr Gucati.

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<sup>6</sup> *Detention Appeal Judgment* at paragraph 52

<sup>7</sup> *Ibid* at paragraph 32

8. Given that the SPO does not have the means to prove the offences at trial - and with no prospect that it will obtain the means to prove the offences at trial - release from detention should be ordered.
9. The Pre-Trial Judge in his Decision on the Review of Detention of 23<sup>rd</sup> June 2021, assessed the proportionality of detention<sup>8</sup>. This was based in part on the “the significant steps [that] have been taken for the preparation of the case for trial”<sup>9</sup>. Although a Trial Panel has now been assigned, there is still no date for trial. Trial preparation conferences have been ordered but these are not scheduled to take place until September. The date of second of the two conferences is currently provisional<sup>10</sup>. Furthermore, the SPO stated at the last Status Conference that “in its experience it would seem that perhaps the trial could start early November”<sup>11</sup>. These delays are significant.
10. In addition, on 29 July 2021 the Defence joined the Rule 20 Application and adopted the submissions made in the filing KSC-BC-2020-07/F00268 dated 26 July 2021 (the “Application”)<sup>12</sup>. This matter has the potential to cause further delays to the proceedings. It is important to raise at this stage that Mr Gucati should not suffer any prejudice in the form of continued detention due to delays caused by an Application that he was forced to make to ensure the protection of his fair trial rights.

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<sup>8</sup> *Decision on Review of Detention of Hysni Gucati*, KSC-BC-2020-07/F00245 at paragraph 31

<sup>9</sup> *Ibid* at paragraph 29

<sup>10</sup> *Order for Submissions and Scheduling the Trial Preparation Conference*, KSC-BC-2020-07/F00267 at paragraphs 34.h and l.

<sup>11</sup> *Transcript of Sixth Status Conference*, 14 July 2021, page 375 at lns 16-17

<sup>12</sup> *Application for the Recusal of the President of the Specialist Chambers, Judge Ekterina Trendafilova, and the Vice President of the Specialist Chambers, Judge Charles L. Smith, Presiding Judge of Trial Panel II*, KSC-BC-2020-07/F00268; *Public Redacted Version of Application for the Recusal of the President of the Specialist Chambers, Judge Ekterina Trendafilova, and the Vice President of the Specialist Chambers, Judge Charles L. Smith, Presiding Judge of Trial Panel II*, KSC-BC-2020-07/F00268/RED

11. The delays outlined in paragraph 9 constitute material changes in circumstances. The subject matter of the Application as well as any delay resulting from the same also constitute material changes in circumstances.
12. The Pre-Trial Judge has already found that any residual risk of flight can be adequately met by conditions.
13. In light of the above, it is submitted that the continued detention of Mr Gucati can no longer be considered to be both necessary and proportionate, and that release should be ordered immediately, with or without any of the conditions proposed previously<sup>13</sup>.
14. The court is reminded that Mr Gucati is a man of hitherto good character and has been compliant throughout his arrest and transport, and subsequently during his detention. He has, as the Pre-Trial Judge has acknowledged, strong family and community ties in his hometown.
15. The submissions made at paragraphs 27, 28 and 29 of the Submissions on the Review of Detention by 27<sup>th</sup> December 2020<sup>14</sup> are maintained and repeated in relation to any residual risk of the dissemination of confidential and non-public material, in the new context that the SPO will not, and cannot, produce in evidence at trial a single document which they allege Mr Gucati was responsible for disseminating which was not already in the public domain.
16. The lack of any meaningful disclosure means that Mr Gucati is not in a position to obstruct the progress of criminal proceedings.

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<sup>13</sup> *Application for Bail*, KSC-BC-2020-07/F00038 at paragraph 5; *Submissions on the Review of Detention by 27<sup>th</sup> December 2020*, KSC-BC-2020-07/F00087 at paragraph 27; *Submissions on the Second Review of Detention of Hysni Gucati*, KSC-BC-2020-07/F00112 at paragraph 9

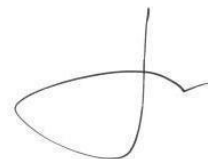
<sup>14</sup> *Submissions on the Review of Detention by 27<sup>th</sup> December 2020*, KSC-BC-2020-07/F00087

17. Whereas during the course of these proceedings the SPO has repeatedly categorised material of no actual sensitivity whatsoever as 'confidential', during the course of these proceedings no 'witness' identities have been disclosed to the defence and nothing from batches 1-3 has been disclosed, save for material that was already, and remains, in the public domain.
18. Certainly, there is nothing disclosed to the defence in these proceedings that has been classified as 'confidential' which is of such sensitivity that the protection of it could properly be said to be justify the continuing detention of Mr Gucati as necessary and proportionate.
19. Mr Gucati has now been in detention for approximately 8 months, with no imminent trial date. The Trial Panel is asked to reconsider whether the detention is now necessary and proportional in the current circumstances.

### III. CONCLUSION

20. It is submitted that Mr Gucati should be released immediately, with or without conditions.

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