



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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 Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

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Prosecution consolidated submissions for review of detention

with public Annex 1

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I. Introduction

1. The continued detention of Hysni GUCATI and Nasim HARADINAJ (collectively, the 'Accused') remains necessary.¹ The established reasons for detention all continue to exist.² Once again, the Article 41(6)(b) risks have increased since the latest review decisions.³

2. The Pre-Trial Judge previously found: (i) a grounded suspicion that the Accused committed offences against the administration of justice within the jurisdiction of the Specialist Chambers ('KSC');⁴ (ii) articulable grounds to believe that the Accused constitute a flight risk,⁵ will obstruct the progress of criminal proceedings, and will

¹ *Contra* Corrected Version of Submissions on the Fifth Review of Detention, KSC-BC-2020-07/F00270/COR, 4 August 2021 (corrigendum dated 5 August 2021) ('Gucati Submissions'); Defence Submissions for Review of Detention, KSC-BC-2020-07/F00271, 4 August 2021 ('Haradinaj Submissions').

² See Article 41(10) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Rule 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'); Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention, KSC-BC-2020-07/IA002/F00005, 9 February 2021, para.55 ('Haradinaj Detention Appeals Decision') ('[t]he competent panel has an obligation to review the reasons or circumstances underpinning detention and determine whether these reasons continue to exist under Article 41(6) of the Law. The competent panel is not required to make findings on the factors already decided upon in the initial ruling on detention but must examine these reasons or circumstances and determine whether they still exist. What is crucial is that the competent panel is satisfied that, at the time of the review decision, grounds for continued detention still exist'). All references to 'Article' or 'Articles' herein refer to articles of the Law, and all references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

³ Decision on Review of Detention of Hysni Gucati, KSC-BC-2020-07/F00245, 23 June 2021 ('June 2021 Gucati Review Decision'); Decision on Review of Detention of Nasim Haradinaj, 23 June 2021, KSC-BC-2020-07/F00246 ('June 2021 Haradinaj Review Decision'). See also Decision on Review of Detention of Hysni Gucati, KSC-BC-2020-07/F00188, 23 April 2021; Public Redacted Version of Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00189/RED, 23 April 2021; Decision on Review of Detention of Hysni Gucati, KSC-BC-2020-07/F00143, 24 February 2021; Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00144, 24 February 2021; Decision on Review of Detention of Hysni Gucati, KSC-BC-2020-07/F00093, 24 December 2020; Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00094, 24 December 2020; Decision on Request for Immediate Release of Nasim Haradinaj, KSC-BC-2020-07/F00058, 27 October 2020; Decision on Request for Arrest Warrant and Transfer Orders, KSC-BC-2020-07/F00012, 24 September 2020.

⁴ June 2021 Gucati Review Decision, KSC-BC-2020-07/F00245, paras 9-10; June 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00246, paras 10-12.

⁵ June 2021 Gucati Review Decision, KSC-BC-2020-07/F00245, 12-13 (though finding risk of flight could be mitigated by conditions); June 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00246, paras 14-18.

repeat or attempt to repeat the criminal offences;⁶ (iii) that the release conditions proposed by the Accused insufficiently mitigated the Article 41(6)(b) risks;⁷ and (iv) that continued detention remained proportionate.⁸ These findings continue to be true in all respects.

II. Submissions

3. The case is now with the Trial Panel and trial is expected to commence in the near future. Proceedings are moving expeditiously and, with the Defence's disclosure appeal rejected, there are not currently any outstanding disclosure issues.⁹ The imminence of trial, coupled with all disclosure to date, increases all of the Article 41(6)(b) risks.¹⁰

4. The network of KLA war veterans remains ready and willing to obstruct the proceedings,¹¹ such that the Article 41(6)(b) risks would become entirely unmanageable if the Accused were to be released from detention. On 4 June 2021, Faton Klinaku, the acting chairman of the KLA War Veterans Association ('KLA WVA') gave an interview whereby he promised he would publish more confidential KSC documents if he obtained them.¹² When the SPO relied upon this interview to

⁶ June 2021 Gucati Review Decision, KSC-BC-2020-07/F00245, paras 14-20; June 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00246, paras 19-25.

⁷ June 2021 Gucati Review Decision, KSC-BC-2020-07/F00245, paras 22-26; June 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00246, paras 27-32.

⁸ June 2021 Gucati Review Decision, KSC-BC-2020-07/F00245, paras 27-31; June 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00246, paras 33-37.

⁹ Public Redacted Version of Decision on the Appeals Against Disclosure Decision, KSC-BC-2020-07/IA005/F00008/RED, 29 July 2021. The SPO remains waiting for additional information pursuant to a third party cooperation request. This may lead to additional disclosure at a later point, but it is noted in this regard that: (i) the SPO is aware that it would need to seek the Trial Panel's leave in order to add any newly disclosed material to its list of exhibits and, if necessary, (ii) the SPO has already indicated its readiness to commence trial without the information from this third party request. *See* Status Conference, 24 February 2021, p.150.

¹⁰ *Contra* Haradinaj Submissions, KSC-BC-2020-07/F00271, paras 12-13.

¹¹ *See* April 2021 Gucati Review Decision, KSC-BC-2020-07/F00188, para.18; June 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00246, paras 17, 22.

¹² 4 June 2021 Faton Klinaku interview with KlanKosovaTv, 100911-100915 (KSC-BC-2020-07/F00228/A01).

justify the continued detention of the Accused, Klinaku reiterated the threat to distribute further confidential information in reference to the SPO's arguments.¹³ Contextual considerations beyond the acts and conduct of the accused – such as the persistence of sympathisers willing to commit illegal acts for their benefit – are relevant in a detention assessment.¹⁴

5. In its latest submissions, the Defence generally repeat arguments raised previously.¹⁵ The Haradinaj Defence goes so far as to concede that no changed circumstances have arisen since the last review,¹⁶ and neither defence team is able to articulate any new conditions which could mitigate the risks found by the Pre-Trial Judge. The arguments raised are briefly addressed below, noting that the Pre-Trial Judge already rejected most of them and no justification is given for revisiting his assessment.

6. *Relevance of changed circumstances.*¹⁷ The Pre-Trial Judge has not imposed a 'changed circumstances requirement' in previous reviews, nor is the SPO arguing for one as a matter of law.¹⁸ The applicable standard is whether the reasons or

¹³ Annex 1, 101313-101321 (Klinaku explaining a Facebook post of 12 June 2021: "The specific reason [of posting the status] is to respond to their [SPO's] argument against the release of the two [GUCATI and HARADINAJ] on the grounds of their public appearances where they have stated that they would make the documents public. They are aware of our position. We have not taken any documents ourselves but in the eventuality of someone passing them to us, we will release them again", KLINAKU said. If they come in possession of other documents, KLINAKU added, they would do exactly what GUCATI and HARADINAJ did, which is why GUCATI and HARADINAJ are being held in detention of the Specialist Chambers in The Hague').

¹⁴ *Contra* Haradinaj Submissions, KSC-BC-2020-07/F00271, paras 14-16, 38-40, 42(c). As for the permissibility of relying on general considerations in a detention assessment, see *Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA002/F00005/RED, 30 April 2021, para.62

¹⁵ See Gucati Submissions, KSC-BC-2020-07/F00270/COR, para.6; *Contra* Haradinaj Submissions, KSC-BC-2020-07/F00271, paras 2, 7, 19-20 (incorporating prior arguments by reference).

¹⁶ Haradinaj Submissions, KSC-BC-2020-07/F00271, paras 8-9.

¹⁷ Haradinaj Submissions, KSC-BC-2020-07/F00271, paras 9-11.

¹⁸ When the Haradinaj Defence submits that '[h]owever, 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 occasion [footnote] which was tantamount to reading into the test a further limb, that being whether there was a "change in circumstances" or otherwise', the citation given is not to the SPO's submissions. It is rather to the Haradinaj Defence's previous detention submissions on the same point. See Haradinaj

circumstances justifying detention still exist.¹⁹ This said, determining whether these reasons or circumstances still exist inevitably concerns consideration of what has changed, if anything, since the previous ruling on detention. The Trial Panel is not required to make findings on the factors already decided upon in the previous rulings on detention,²⁰ and any Defence arguments suggesting otherwise must be rejected.

7. *Likelihood of proving the case at trial.*²¹ When rejecting these same Gucati Defence arguments in the past, the Pre-Trial Judge recalled his determination that there is a well-grounded suspicion that the Accused has committed the crimes charged.²² That a grounded suspicion exists under Article 41(6)(a) to justify continued detention is manifest, noting that this is an even lower standard than a well-grounded suspicion. Moreover, an Article 41(6) inquiry is fundamentally distinct from the assessment of evidence in the course of trial.²³ Nothing has changed in the SPO's evidence or intended evidence presentation to justify revisiting the Article 41(6)(a) finding. Rather, the Gucati Defence submissions betray an unduly narrow understanding as to how the charges in this case can be proven.²⁴

Submissions, KSC-BC-2020-07/F00271, para.9, *citing* Defence Submissions for Review of Detention, KSC-BC-2020-07/F00239, 17 June 2021.

¹⁹ June 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00246, para.9. *See also* Haradinaj Detention Appeals Decision, KSC-BC-2020-07/IA002/F00005, para.55.

²⁰ Haradinaj Detention Appeals Decision, KSC-BC-2020-07/IA002/F00005, para.55.

²¹ Gucati Submissions, KSC-BC-2020-07/F00270/COR, paras 6-8.

²² June 2021 Gucati Review Decision, KSC-BC-2020-07/F00245, paras 9-10.

²³ ICC, *Prosecutor v. Ongwen*, Decision on the "Defence Request for the Interim Release of Dominic Ongwen", ICC-02/04-01/15-349, 27 November 2015 (reclassified 24 March 2016), paras 7-13 (at para.7 - the ICC Statute's interim release framework 'cannot be understood to require, for the disposal of an application for interim release, an examination of the merits of the case with a view to determining whether there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court'); ICC, *Prosecutor v. Ntaganda*, Decision on the Defence's Application for Interim Release, ICC-01/04-02/06-147, 18 November 2013, para.47 ('[t]he purpose of an [interim release] assessment under article 60(2) of the [ICC] Statute differs from that required for the purpose of the confirmation of charges or making a finding on the merits upon trial. An assessment pursuant to article 60(2) of the Statute neither aims at confirming one or more charges nor at making a finding of guilt against an accused person, which require meeting a high evidentiary threshold').

²⁴ *See* Gucati Submissions, KSC-BC-2020-07/F00270/COR, para.7. The confidential information illegally distributed in this case has not been disclosed because it concerns internal work product and highly sensitive information. Its non-disclosure was duly authorized, with counter-balancing measures. Public

8. *Evidence presented beyond the gravity of the charges to justify detention.*²⁵ The Haradinaj Defence submission that no evidence beyond the gravity of the charges justifies detention is simply inaccurate. The Pre-Trial Judge clearly relied on the SPO arresting officer's evidence and a Registry report on Haradinaj evading arrest.²⁶ Strictly confidential orders to not disseminate confidential information were not respected;²⁷ Haradinaj revealed their existence on his Facebook page²⁸ and then further distributed such information.²⁹ Haradinaj has insisted he will not follow the orders of the KSC, even as his co-Accused was being arrested.³⁰

Redacted Version of Decision on Disclosure of Certain Documents Seized from the KLA War Veterans Association, KSC-BC-2020-07/F00141, 23 February 2021 (public redacted version notified 15 July 2021). W04841 will testify as to the confidential classification of this information. W04841 has also declared which media articles to be exhibited contain extracts of Batches 1 and 3, and in this respect the Gucati Defence is simply inaccurate in saying the SPO has not produced any confidential documents the Accused distributed into the public domain. 29 October 2020 Declaration of W04841, 084015-084026. As for not calling any witnesses who felt threatened or intimidated, the non-disclosure of these persons' identities has also been authorized, with counter-balancing measures. Public Redacted Version of Decision on Non-Disclosure of Certain Witness Contacts, KSC-BC-2020-07/F00136/RED, 22 February 2021 (public redacted version notified on 15 July 2021). Contacts on the state of mind of these persons are predominantly recorded in official notes on the SPO's exhibit list. The Trial Panel has invited the SPO to consider the possibility of filing bar table motions for, *inter alia*, its official notes. Order for Submissions and Scheduling the Trial Preparation Conference, KSC-BC-2020-07/F00267, 21 July 2021 (with annex), para.10. The SPO intends to accept this invitation, and will justify why the records of these contacts are admissible through the bar table without compromising the rights of the accused.

²⁵ Haradinaj Submissions, KSC-BC-2020-07/F00271, para.18, 21, 26-27, 35, 42(a)-(b), (d).

²⁶ June 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00246, para.15; *contra* Haradinaj Submissions, KSC-BC-2020-07/F00271, para.21. Haradinaj Defence submissions as to which account of evading arrest is 'correct' also misstate the standard for reviewing detention, which only requires that the evidence presented establish a risk of flight within the meaning of Article 41(6)(b)(i). *See* Haradinaj Submissions, KSC-BC-2020-07/F00271, paras 22-24. A similar inflation of the standard occurs when the Haradinaj Defence argues that the SPO has presented no incident since Haradinaj's arrest that he would commit further offences, even though the required standard only concerns the possibility, not the inevitability, of a future occurrence. Haradinaj Submissions, KSC-BC-2020-07/F00271, para.37. For this standard, *see* Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, para.67.

²⁷ *Contra* Haradinaj Submissions, KSC-BC-2020-07/F00271, paras 29-33.

²⁸ 9 September 2020 Nasim Haradinaj Facebook Post, SPOE00222202-SPOE00222202.

²⁹ *E.g.* KLA WVA Press Conference of 16 September 2020, 081344-02-TR-ET Revised (following order KSC-BC-2020-07/F00005). *See also* 29 October 2020 Declaration of W04841, 084015-084026, para.22.

³⁰ 25 September 2020 Euronews Interview with Nasim Haradinaj, 081991-03-TR-ET Revised, p.2 ('[o]n the way here, I found out through the media, that Mr Gucati has been taken away from here, so, from this moment on, I will not follow the orders of this Court. I feel ashamed and I do not recognise it. They could do whatever they please, and behave like they own the place, because this is the kind of State

9. These are just a few examples from the case record demonstrating the necessity of detention and the insufficiency of any judicially ordered conditions of release. The nature of the charges in this case means that the evidence ultimately being used at trial is also relevant in the Article 41(6)(b) context. The Haradinaj Defence advances a self-serving definition of 'evidence', such that none of the materials already in the case record qualify.

10. *Disclosure of sensitive material.*³¹ The Pre-Trial Judge has already concluded that dissemination of the confidential information disclosed in this case would pose a risk to the conduct of the proceedings.³² Confidential information disclosed in this case includes information on, *inter alia*, SPO staff members and investigative methods. Disclosed information also contains summaries of highly sensitive information.³³ The Gucati Defence misapprehends the nature of the information disclosed in this case.

11. *The recusal application constitutes a changed circumstance.*³⁴ Applications entirely lacking in substance cannot constitute changed circumstances.³⁵

12. *Gucati is a man of good character with community ties.*³⁶ The Pre-Trial Judge has credited Gucati's character and compliant conduct during arrest, but has considered these as not changing the result of the risk assessment.³⁷ There is no submission suggesting that any re-evaluation of these considerations is warranted.

that we have. But I will not follow the orders, nor would I recognise this Court, wherever it might be'); *contra* Haradinaj Submissions, KSC-BC-2020-07/F00271, para.27.

³¹ Gucati Submissions, KSC-BC-2020-07/F00270/COR, paras 15-18.

³² June 2021 Gucati Review Decision, KSC-BC-2020-07/F00245, para.17.

³³ 29 October 2020 Declaration of W04841, 084015-084026; Declaration of W04841 with two annexes, 095603-095653.

³⁴ Gucati Submissions, KSC-BC-2020-07/F00270/COR, para.10.

³⁵ Decision on the Application for Recusal or Disqualification, KSC-BC-2020-07/F00272, 6 August 2021 (pursuant to the procedure set in Rule 20(3) of the Rules, summarily dismissed application without convening a panel to hear it).

³⁶ Gucati Submissions, KSC-BC-2020-07/F00270/COR, para.14.

³⁷ June 2021 Gucati Review Decision, KSC-BC-2020-07/F00245, para.18.

13. *There remains no date set for trial.*³⁸ The Trial Panel's scheduling order for initial status conferences came within a week of its composition. A trial date must be set shortly after these status conferences.³⁹ Further, the Gucati Defence misrepresents the SPO's submission that its estimate of an early November 2021 trial date constituted a 'significant delay'.⁴⁰ This submission was based on how the Defence, particularly the Haradinaj Defence, was assessing its own trial readiness at the time of the last status conference. The SPO made clear it is ready to commence trial whenever the Trial Panel sees fit,⁴¹ and maintains this position.

14. *Detention is no longer proportionate.*⁴² The length of pre-trial detention must be balanced against the Article 41(6) risks and the circumstances of the case as a whole, including the potential penalties for the crimes charged.⁴³ The Accused are facing charges which include sentences of up to 10 years.⁴⁴ The case continues to move expeditiously, and has already been sent to a Trial Panel. For the Gucati Defence to conclude that no trial date is imminent is to be wilfully blind to recent developments.⁴⁵

15. Nothing indicates that detention thus far is or is approaching being unreasonable. There have not been any unjustified delays, and what extra time has been needed beyond the Pre-Trial Judge's original calendar is partially attributable to

³⁸ Gucati Submissions, KSC-BC-2020-07/F00270/COR, paras 9, 11.

³⁹ See Rule 118(3).

⁴⁰ Gucati Submissions, KSC-BC-2020-07/F00270/COR, para.9.

⁴¹ Status Conference, 14 July 2021, p.375 ('[i]n terms of when the SPO would be ready for trial as such. We will be ready when we are asked to be ready. We do note that, of course, a number of steps do have to take place as Your Honour noted both in his order and then already earlier today. It's not that a case is transferred and then a trial starts immediately. There are requirements pursuant to the rules that have to take place, and based on how things are going, in our experience it would seem that perhaps the trial could start early November. But as I said, the SPO is ready for trial when the Trial Panel calls it to be ready').

⁴² Gucati Submissions, KSC-BC-2020-07/F00270/COR, para.13.

⁴³ See ICC, *Prosecutor v. Bemba et al.*, Judgment on the appeals against Pre-Trial Chamber II's decision regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, 29 May 2015, ICC-01/05-01/13-969, para.45.

⁴⁴ Article 387 of Code No.06/L-074, Criminal Code of the Republic of Kosovo, 14 January 2019 (charged in Count 3).

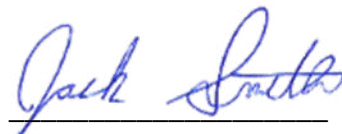
⁴⁵ Gucati Submissions, KSC-BC-2020-07/F00270/COR, para.19.

the Accused.⁴⁶ The rights of the Accused have been fully respected. Defence arguments on the proportionality of detention must therefore be rejected.

III. Relief sought

16. For the reasons above, and noting the previous findings of the Pre-Trial Judge, the detention of the Accused must be extended.

Word count: 3087



Jack Smith

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Tuesday, 10 August 2021

At The Hague, the Netherlands

⁴⁶ See June 2021 Gucati Review Decision, KSC-BC-2020-07/F00245, para.30; June 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00246, para.36; Revised Calendar for the Remainder of the Pre-Trial Proceedings and Order Setting the Date for the Sixth Status Conference, KSC-BC-2020-07/F00224, June 2021, paras 9, 19.