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 Counsel for Nasim Haradinaj
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Defence Reply to SPO Response Regarding Submissions for Review of Detention

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I. INTRODUCTION

1. The Defence for Mr. Haradinaj seeks to reply to the Response of the Special Prosecutor's Office ("SPO") Regarding Submissions for Review of Detention, as filed on 10 August 2021 ("Response").[1]

II. BACKGROUND

2. The background and chronology to this issue has already been outlined on a number of occasions and is therefore not repeated here.

III. THE LAW

3. As recalled by the Defence for Mr. Haradinaj in his original submissions, issues of provisional release are dealt with by Article 41(6) of the Law on the Specialist Chambers and Specialist Prosecutor's Office, Law No. 05/L-053 ("Law"), pursuant to which an individual can only be detained in custody when "*there is a grounded suspicion that he or she has committed a crime within the*

[1] *Prosecutor v. Hysni Gucati and Nasim Haradinaj*, KSC-BC-2020-07, Prosecution Consolidated Submissions for Review of Detention with Public Annex 1, 10 August 2021 (public).

jurisdiction of the Specialist Chambers" and 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 criminal offence, complete an attempted crime, or commit a crime in which he or she has threatened to commit.

4. 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*".

5. According to Article 3(2)(e) of the Law, the Kosovo Specialist Chambers ("Specialist Chambers" or "KSC") is obliged to function in accordance with *"international human rights law which sets criminal justice standards including the European Convention on Human Rights and Fundamental Freedoms and the*

International Covenant on Civil and Political Rights, as given superiority over domestic laws by Article 22 of the Constitution." (emphasis added)

6. Interpretations and applications of the bail provisions in Article 41(6) must therefore be interpreted concurrently with, at a minimum, the standards laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), and the International Covenant on Civil and Political Rights ("ICCPR").

7. Further, as the Pre-Trial Judge determined in the Order of 7 June 2021,[2] the review of detention at two-month intervals is automatic,[3] the burden of showing that continued detention is necessary falls on the Prosecution[4] and the Defence is not required to demonstrate the existence of reasons warranting release.[5]

8. The Defence has repeatedly argued, as was made clear in the Defence Submissions of 15 July 2021,[6] and maintained throughout these proceedings, that requiring the Defence to argue why the Defendant should be released in advance of the Prosecution setting out its grounds for why the Defendant

[2] KSC-BC-2020-07/F00222

[3] KSC-CC-PR-2020-09/F00006

[4] KSC-BC-2020-06, IA004, F00005/RED

[5] KSC-CC-PR-2017-01/F0004

[6] KSC-BC-2020-07/F00239

should not be released, is an improper reversal of the burden. The appropriate legal framework to be applied by the Specialist Chambers, as noted by the Pre-Trial Judge in his decision of 7 June 2021,[7] in determining the question of provisional release is that the procedure to be applied must be fully compatible with Articles 5(3) and 5(4) of the ECHR, in particular the burden on the SPO of establishing relevant and sufficient reasons for ordering the continued detention.

9. Article 5 ECHR guarantees the right to liberty and security. In accordance with Article 5(3), those detained are entitled to trial within a reasonable time or to release pending trial. To be clear, this is not a question of either or. It is a question of ensuring that certain procedural safeguards are ensured where a person is detained pre-trial, such as demonstrating that 'relevant' and 'sufficient' reasons exist.

10. In this regard, it is important to recall that the protections in Article 5(3) ECHR can be split into two phases, which include: (a) the early stages following an

[7] KSC-BC-2020-07/F00222. See also KSC-BC-2020-06, IA004, F00005/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release*, 30 April 2021, public, para. 17; KSC-BC-2020- 06, IA001, F00005, Court of Appeals Panel, *Decision on Kadri Veseli's Appeal Against Decision on Interim Release*, 30 April 2021, public, para. 14; KSC-BC-2020-06, IA003, F00005/RED, Court of Appeals Panel *Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Interim Release*, 30 April 2021, public, para. 37; KSC-BC-2020-06, IA002, F00005/RED, Court of Appeals Panel, *Public Redacted Version ofDecision on Jakup Krasniqi's Appeal Against Decision on Interim Release*, 30 April 2021, public, para. 23. See also KSC-BC-2020-07, F00144, Pre-Trial Judge, *Decision on Review of Detention of Nasim Haradinaj*, 24 February 2021, public, para. 16.

arrest on suspicion of having committed an offence; and (b) the following period pending trial.[8]

11. During the initial stage following arrest, a person's detention may be justified, *inter alia*, by the existence of a reasonable suspicion that they have committed a criminal offence. As the European Court of Human Rights has held,[9] the persistence of ***reasonable suspicion*** that the person arrested has committed an offence is a condition *sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices and the court is required to assess whether such grounds relied upon are 'relevant' and 'sufficient', and whether the competent national authorities displayed 'special diligence' in the conduct of the proceedings. As time continues, reasonable suspicion alone will not suffice as a justification for continued detention, nor will the gravity of any charge, such that the detainee will benefit from a presumption in favour of bail unless and until further 'relevant' and 'sufficient' reasons can be shown justifying continued detention.[10] In this way, if the risk of absconding can be avoided by providing guarantees, the accused must be released.[11]

[8] *McKay v. the United Kingdom* (application no. 543/03) (Judgment), para. 31.

[9] *Assenov and Others v. Bulgaria, judgment of 28 October 1998, Report 1998-VIII*, p. 3300, para. 154

[10] *Muşuc v. Moldova* (application no. 42440/06) (Judgment), para. 42.

[11] *Vrenčev v. Serbia* (application no. 2361/05) (Judgment), para. 76

12. The burden is on the SPO to demonstrate why the Defendant cannot be safely released on provisional release. To do otherwise effectively shifts the burden of proof to the Defendant, contrary to the very procedure that the Specialist Chambers has determined, which, it is respectfully submitted, "*is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases*."[12]

13. To satisfy this burden, the SPO must set out substantiated grounds as to why the Defendant cannot be subject to provisional release. A strong suspicion that the detainee has committed the crime in question is relevant, but insufficient in this regard,[13] as is any reference to a detainee's antecedents,[14] although it is recognised that the Defendant is a man who comes before this court, as a man of good character.

14. Further, where continued detention is justified on the basis of the risk of absconding, that danger "*cannot be gauged solely on the basis of the severity of the sentence risked*",[15] and "*should be assessed with reference to various factors, especially those relating to the character of the person involved, his morals, his home,*

[12] *Ilijkov v. Bulgaria* (application no. 33977/96) (Judgment), para. 85

[13] *Van Der Tang v. Spain* (application no. 19382/92) (Judgment), para. 63.

[14] *Muller v. France* (application no. 21802/93) (Judgment), para. 44.

[15] *Tomasi v France* (application no. 12850/87) (Judgment), para. 98.

his occupation, his assets, his family ties and all kinds of links with the country in which he is being prosecuted."[16] In this regard, as the Specialist Chambers is a domestic institution of the Republic of Kosovo it is reference to Kosovo that is relevant, ***not*** the Netherlands or any other State.

15. In this respect, the SPO must substantiate its allegations that the Defendant is at risk of absconding, rather than using "*stereotyped terms, such as 'having regard to the nature of the offence, the state of the evidence and the content of the case file'*".[17] The SPO has sought to suggest that the Defendant, by not recognising the legitimacy of the Specialist Chambers, which he is entitled to do, and by seeking to evade arrest, which the SPO is unable to prove, that he is a flight risk against which reasonable conditions could not mitigate. Such unsubstantiated arguments are merely made in the abstract and should be disregarded.

16. The presumption in favour of bail and the principle that the continuation of pre-trial detention after the initial hours of arrest requires more than the strong suspicion of an offence, even a serious one, is now well established in the case law of the European Court of Human Rights.[18]

[16] *Grishin v. Russia* (application no. 14807/08), (Judgment) para. 143.

[17] *Cahit Demirel v. Turkey* (application no. 18623/03) (Judgment) paras. 24-25.

[18] *Tomasi v France* (application no. 12850/87) (Judgment), para. 89. This is also reinforced by Article 9(3) ICCPR, see Human Rights Committee, General Comment No. 8, para. 3 in which it is stated that "*pre-trial detention should be*

IV. SUBMISSIONS

17. The Defence for Mr. Haradinaj maintains its submissions filed on 4 August 2021.[19] It does not seek to rehearse the same arguments and instead focusses on relevant aspects of the SPO Response that require a reply, although the vast majority of which should be disregarded as mere hyperbole.

The SPO fails to respect the presumption in favour of bail

18. In its Response, the SPO recalls the prior determination of the Pre-Trial Judge that Mr. Haradinaj was not suitable for bail in light of the accusations against him, the alleged inability to manage his risks in the community, and his alleged risk of absconding. It then goes on to note that whilst it accepts that the question of bail reassessment does not depend upon the existence of 'changed circumstances', "*the Defence generally repeat arguments raised previously*" and that "*[t]he Haradinaj Defence goes so far as to concede that no changed circumstances have arisen since the last review*."[20]

an exception and as short as possible" and that "bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the state party" (Human Rights Committee Communication No. 526/1993, *Hill v. Spain*, para. 12.3).

[19] *Prosecutor v. Hysni Gucati and Nasim Haradinaj*, KSC-BC-2020-07, Defence Submissions for Review of Detention, 4 August 2021 (Public).

[20] Response, para. 5.

19. It is accepted that there has been no material change of circumstances, but noted nonetheless that the proceedings have advanced to a stage where the Defendant can now safely be committed to bail. The following factors are relevant:

a. The Trial Panel is now seized of the matter;

b. The trial is anticipated to commence before the end of 2021;

c. The SPO has served its evidence and there is no possibility of evidence being destroyed;

d. The SPO is not relying on any witnesses of fact and therefore no risk of influencing the two SPO witnesses to be called at trial.

20. The SPO has been unable (or unwilling) to discharge its burden by addressing any of these issues in order to justify ongoing detention.

21. When discharging this burden, the SPO must take into account that Mr. Haradinaj benefits from a presumption in favour of bail, which grows stronger as his pre-trial detention continues. As such, even if the SPO was correct in its assessment that the relevant risk factors previously assessed had not materially changed, those risk factors would nonetheless have to be assessed, and Mr. Haradinaj's continued detention justified, in light of the

higher justificatory threshold which now exists as a result of that ongoing detention.

22. In its submissions, the SPO fails to discharge this obligation, relying instead on prior assessments and findings of the Specialist Chambers, which were conducted at a time when Mr. Haradinaj had been detained for a shorter period, prior to completing its disclosure, and at which, as a result, the threshold for his continued detention was lower.

The actions of Others are irrelevant to an assessment of Mr. Haradinaj's risk factors

23. The SPO seeks to argue that detention should be ordered on the basis of the words and deeds of persons other than Mr. Haradinaj without producing any evidence as to why Mr. Haradinaj is in any way responsible.

24. The SPO argues that "*the Article 41(6)(b) risks would become entirely unmanageable if the Accused were to be released from detention*."[21] In making this bold assessment, the SPO makes specific reference to the fact that there is allegedly a "*network of KLA war veterans"* that is *"ready and willing to obstruct proceedings*".[22] Specific reference in this regard is made to the fact that *"[o]n 4 June 2021, Faton Klinaku, the acting chairman of the KLA War Veterans Association*

[21] Response, para. 4.

[22] *Ibid*.

('KLA WVA') gave an interview whereby he promised he would publish more confidential KSC documents if he obtained them."[23]

25. It is respectfully submitted that the actions and/or risk factors posed by others may be relevant to, but cannot be determinative of, the risk factors posed by Mr. Haradinaj, as to do so is to determine the appropriateness of his ongoing detention in light of factors that are entirely beyond his control.

26. In any case, it is also notable that in focussing upon such risks of obstruction, the SPO fails to engage with the fact that Mr. Haradinaj has no possession of the documents concerning the instant matters, all of which, it is the SPO's case, have been seized. Indeed, the contingency of having possession of those documents was even acknowledged in the comments made by Mr. Klinaku, who only threatened to *"publish more confidential KSC documents <u>if he obtained them</u>"*[24] (emphasis added). Accordingly, unless the SPO has evidence that it is failing to disclose regarding further leaks from its Office, the risk posed by further potentially obstructive actions is at this stage entirely abstract, such that relying upon that risk as reason to deny Mr. Haradinaj's bail breaches the obligation to only continue that detention in light of real and substantiated risk factors.

[23] *Ibid*.

[24] *Ibid*.

27. One must question the SPO's submissions that confidential information, if disclosed, would "*pose a risk to the conduct of the proceedings*"[25] as the seriousness or gravity of a risk is irrelevant unless and until it is established, and substantiated, that the risk in question arises in the current proceedings.

28. As such, contrary to the allegations of the SPO, nothing in the comments of Mr. Klinaku, or the abstract risk of potential obstructive activities is sufficient to justify Mr. Haradinaj's ongoing detention.

The likelihood of proving the case is relevant but insufficient to justify detention

29. In support of Mr. Haradinaj's continued detention, the SPO recalls the Pre-Trial Judge's prior determination that there is a "*well grounded suspicion that that accused has committed the crimes charged*"[26] and goes on to note the fact "*[t]hat 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*."[27] The SPO also notes that "*[n]othing has changed in the SPO's evidence or intended evidence presentation to justify revisiting the Article 41(6)(a) finding*".[28]

[25] Response, para. 10.

[26] Response, para. 7.

[27] *Ibid*.

[28] *Ibid*.

30. The Defence repeats its argument that reasonable suspicion is not sufficient to justify continued detention after the passage of time.[29]

Evidence of previous issues is relevant but insufficient to justify detention

31. In assessing the Defence submissions, the SPO argues that "*[t]he 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*."[30] In that respect, the SPO therefore argues that evidence relating to the charges alleged and the nature of the case is sufficient to justify Mr. Haradinaj's ongoing detention.

32. To be clear, it is not.

33. It is a matter of well settled law, detaining authorities are obliged to refrain from using "*stereotyped terms, such as 'having regard to the nature of the offence, the state of the evidence and the content of the case file'*"[31] when assessing the risk(s) posed by an individual seeking bail.

34. As already outlined, the seriousness of the offence and the length of sentence risked are not sufficient grounds to justify continued detention.

[29] *Vrenčev v. Serbia* (application no. 2361/05) (Judgment), para. 76.

[30] Response, para. 9.

[31] *Cahit Demirel v. Turkey* (application no. 18623/03) (Judgment) paras. 24-25.

35. The SPO has failed to conduct a fresh assessment centred around the risks posed by Mr. Haradinaj *presently*. The SPO adopts a vague approach relying upon the 'nature of the case' and the 'evidence potentially available at trial'.

V. CONCLUSION

36. In light of the above, it is submitted that the SPO has identified no substantiated risk factors posed by Mr. Haradinaj that could not be managed by appropriate bail conditions. Consequently, it is submitted that the position previously relied upon by the Defence for Mr. Haradinaj continues to stand, in that there has been no evidence disclosed that would preclude him from being safely granted bail, either unconditionally, or if the Court is so minded, with appropriate conditions.

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