

**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 Guenael Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Nasim Haradinaj

**Date:** 15 October 2021

**Language:** English

**Classification:** **Public**

---

**Defence Submissions on 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. This is an application for provisional release for the remainder of the trial proceedings.
2. In the Order of 23 August 2021,<sup>1</sup> the Trial Panel invited submissions from the Defendant, to be filed by 15 October 2021, in respect of whether the ongoing detention of the Defendant was still necessary.
3. The Defendant continues to maintain the position that the ongoing detention is not necessary, and further, the position of the Specialist Prosecutor's Office ("SPO") is akin to a rehearsed rhetoric, rather than providing demonstrable evidence that the risks alleged are indeed substantiated thereby setting out 'relevant and sufficient reasons' for maintaining detention.
4. It is therefore submitted that, taking these factors into consideration, it is clearly established that the SPO has failed to establish that there is a substantial risk and that the Defendant may be considered a suitable candidate for provisional release.

---

<sup>1</sup> KSC-BC-20202-07/F00280, *Decision on Review of Detention of Nasim Haradinaj*

5. It is hereby requested that the Trial Panel grants the application and orders that the Defendant be remanded on unconditional bail for the remainder of these proceedings.

## II. BACKGROUND

6. The background and chronology to this issue have already been outlined, and consistently maintained throughout the Defence's previous submissions. It is therefore unnecessary to repeat these again for the purposes of this application.
7. Although it is acknowledged that the trial is indeed underway, the SPO's reliance on this fact as a justification for the continued detention of the Defendant is entirely unacceptable, as is its reference to various statements given by those persons who are not on trial. Further, such reasoning is irrelevant and has no founding in law.

## III. THE LAW

8. As the SPO's position in its Prosecution Consolidated Submission for Review of Detention<sup>2</sup> confuses the commencement of the trial with that of justified

---

<sup>2</sup> KSC-BC-2020-07/F00356, Prosecution Consolidated Submission for Review of Detention, 14 October 2021, Public

reasons for detention, it is hereby appropriate to once again remind the SPO of the requirements of Article 41(6)(b).<sup>3</sup>

9. As per Article 41(6)(b),<sup>4</sup> an individual can only be detained in custody 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.

---

<sup>3</sup> Law No. 05/L-53

<sup>4</sup> *Ibid*

10. Further, Article 41(12) of the Law<sup>5</sup> 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*”.
11. It is submitted that in the instant case, as it has been submitted previously, the articulable grounds for the refusal of temporary release have not been made out, and where they are deemed to have been made out, conditions will allay any concerns that the Court may have.

#### IV. SUBMISSIONS

12. In the Prosecution consolidated submissions on the review of detention,<sup>6</sup> it is argued that the same grounds remain, as there has been no material change of circumstances. The SPO relies on the prior ruling by the Pre-Trial Judge that there existed a grounded suspicion that the Defendant had committed certain offences against the administration of justice, there was a risk of flight, risk of obstructing the proceedings, a risk of repeating further offences and the conditions put forward do not eliminate such risks.<sup>7</sup> The SPO seeks to

---

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

<sup>6</sup> KSC-BC-2020-07/F00356

<sup>7</sup> Arrest Decision, KSC-BC-2020-07/F00012, Section IV(B)(2); GUCATI Decision, KSC-BC-2020-07/F00059, paras 14-21; HARADINAJ Decision, KSC-BC-2020-07/F00058, paras 21, 24, 26-27, and

argue, without reference to any discernible facts, that the risks have increased since the last ruling on detention and will continue as the proceedings progress.<sup>8</sup>

13. The Defendant has been detained since his arrest on 25 September 2020, that is a period of twelve (12) months and twenty (20) days. It is noted that the persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the validity of continued detention, but, after a certain lapse of time, it no longer suffices.<sup>9</sup> The Chamber must then establish whether the SPO has cited grounds that are 'relevant and sufficient' to justify continued deprivation of liberty, and as proceedings continue whether 'special diligence' has been displayed in the conduct of the proceedings, and whether the subject matter for consideration is particularly complex in nature.<sup>10</sup> In this regard, merely citing the gravity of the offences, risk of flight, risk of obstructing the proceedings and risk of repeating further

---

HARADINAJ Decision, KSC-BC-2020- 07/F00058, paras 31-32. See also Appeal Decision, KSC-BC-2020-07/IA001/F00005, paras 57-67

<sup>8</sup> KSC-BC-2020-07/F00356

<sup>9</sup> KSC-BC-2020/IA0002/F00001, Notice of Interlocutory Appeal against the Decision on Pre-Trial Detention on behalf of Nasim Haradinaj, 4 January 2021, Public

<sup>10</sup> *Ibid.*

offences without reference to greater specificity will not satisfy the requirement.

14. When considering the risk posed by an individual, that risk must be *real*, and *identifiable*, it cannot merely be one that is raised in the abstract.<sup>11</sup>
15. In the instant case, there has been no assessment of whether the Defendant poses an identifiable danger to any victim or witness, rather, the Trial Panel, and the Pre-Trial Judge before, has been content to accept at face value that which has been submitted by the SPO without that position being the subject of scrutiny or challenge.
16. A concrete danger must be identified, as per *Prosecutor v. Ramush Haradinaj*, wherein the Trial Chamber noted:

*“In determining whether to grant provisional release to an accused, it is for the Trial Chamber to consider the particular circumstances of each case. When assessing the likelihood that an accused will appear for trial, Trial Chambers have regularly given significant weight to guarantees provided by the State or entity the accused sought to be released to. In terms of reviewing whether there is any danger posed by an accused, if released, to victims,*

---

<sup>11</sup> *Ibid.*

*witnesses or any other person, one of the factors previously considered by other Trial Chambers was whether there was any suggestion that an accused had interfered with the administration of justice in any way since the date when an indictment was confirmed against him. The assessment whether the accused would pose a danger cannot be made only in abstracto; a concrete danger has to be identified.”<sup>12</sup>*

17. The SPO has not submitted any evidence to suggest that the above has been demonstrated.
18. Further, the protection of such a fundamental right as the right to liberty, as guaranteed by Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), incorporated in Part II of the Constitution of the Republic of Kosovo, requires a thorough assessment of the necessity of detention with specific reference to the grounds relied upon by the SPO.
19. Accordingly, if, as is argued in the instant case, the Trial Panel fails to give adequate reasons, or gives repeated decisions that do not answer the specifics

---

<sup>12</sup> ICTY Trial Chamber, Decision on Ramush Haradinaj’s Motion on Provisional Release, 6 June 2005, <https://www.icty.org/x/cases/haradinaj/tdec/en/050606.htm>



of the argument presented, it may constitute a violation of the substance of Article 5(4) of the ECHR.<sup>13</sup>

20. However, there are certain points raised in the SPO's most recent submission that fall to be addressed or repeated.

21. The SPO has placed much reliance on the critical remarks of Faton Klinaku,<sup>14</sup> and has done so, in the Defence's submission, inappropriately, recalling that Klinaku is an individual who:

- a. Has not been charged (despite being named in the indictment); and
- b. Is not facing proceedings in this trial;

and therefore, his actions fail to serve as a further basis for the continued detention of the Defendant.

22. Further, the SPO is reminded of its Opening Statement given orally on 7 October 2021,<sup>15</sup> where it confirmed its position that it is 'respectful and accepting of comments that openly criticise the working of the Kosovo Specialist Chambers', in the spirit of 'tolerance towards freedom of speech'.

---

<sup>13</sup> Eur. Court HR, *G.B. & Others v. Turkey*, No. 4633/15, paras 174-179.

<sup>14</sup> KSC-BC-2020-07/F00356

<sup>15</sup> KSC-BC-2020-07 – SPO Opening Statement, Provisional Transcript, , 7 October 2021, Public, page 787, lines 1-20

This position is not however compatible, in any sense, with the arguments given in its most recent Submissions on Detention, wherein it seeks to justify the ongoing detention.

23. The above demonstrates a clear lack of consistency in approach.
24. Further, for the SPO to attribute the comments of another, no matter their relation to the Defendant, as bearing significance on establishing the allegations against the Defendant, indicates its bias and complete disregard for due process.
25. For the SPO to liken such comments as amounting to an 'obstruction' on the proceedings is therefore an imaginative creation, and exacerbates the reality of their importance, the reality being that such comments are simply an expression of free speech and expression, by a person not charged, something fundamental in any democratic state, and one that a purported creation of a democratic institution ought to support and applaud.
26. The SPO has made additional assertions that the trial is moving expeditiously.<sup>16</sup> However, facts indicate quite the opposite to be true. The commencement of the trial has been delayed to a significant extent, and all

---

<sup>16</sup> KSC-BC-2020-07/F00356

delays thus far have been as a direct result of the SPO's apathetic approach to disclosure. A fact evidenced as recently as 12 October 2021 with Disclosure 48, and further, the anticipated disclosure of the updated Rule 102(3) notice, issues that ought to have been finalised many months ago, rather than at the eleventh hour whilst the trial is ongoing.<sup>17</sup>

27. Accordingly, given the ongoing opacity and apathy, the Defendant cannot be expected to know with *any* precision, let alone a 'greater' precision, as to what evidence will be presented.
28. Therefore, when considering the risk posed by an individual given that the decision must be based on real and relevant considerations that can be demonstrated, the test cannot be said to have been satisfied.
29. Further, although it may be expected that the trial is to be 'short', it is reminded that proceedings are currently listed to continue until at least December 2021. This is a further two months, at a minimum, by which the Defendant is unnecessarily deprived of his liberty. It should not be taken so lightly by the SPO, and equally, it fails in any legal system to sustain an

---

<sup>17</sup> KSC-BC-2020-07, ERN-103521-103542

argument that further detention should therefore be granted without proper scrutiny or challenge.

## V. CONCLUSION

30. It is respectfully submitted that there exists no proper basis upon which to further extend the detention of Mr. Haradinaj.
31. Having regard to the above, and what are submitted to be the entirely inadequate submissions of the SPO, the Trial Panel is invited to grant the application for provisional release of the Defendant immediately.

**Word count: 1,966**



**Toby Cadman**

**Specialist Counsel**



**Carl Buckley**

**Specialist Co-Counsel**