

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

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Submissions on the Sixth Review of Detention

Specialist Prosecutor

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I. INTRODUCTION

1. On 23rd August 2021 the Trial Panel issued its Decision on Review of Detention of Hysni Gucati and ordered Mr Gucati to file submissions on the next review of detention by Friday 15 October 2021¹.
2. In accordance with the Trial Panel's order, the Defence make the following submissions on behalf of Mr Gucati.

II. APPLICABLE LAW²

3. Article 41(10) of the Law provides that:

Until a judgement is final or until release, upon the expiry of two (2) months from the last ruling on detention on remand, the Pre -Trial Judge or Panel seized with the case shall examine whether reasons for detention on remand still exist and render a ruling by which detention on remand is extended or terminated. The parties may appeal against such a ruling to a Court of Appeals Panel.

4. Rule 57(2) of the Rules states:

After the assignment of a Pre -Trial Judge pursuant to Article 33(1)(a) of the Law and until a judgment is final, the Panel seized with a case shall review

¹ *Decision on Review of Detention of Hysni Gucati*, KSC-BC-2020-07/F00279 at paragraph 33.c

² *Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention*, KSC-BC-2020-06/IA008/F00004/RED at paragraphs 11 and 12

a decision on detention on remand upon the expiry of two (2) months from the last ruling on detention, in accordance with Article 41(6), (10), (11) and (12) of the Law or at any time upon request by the Accused or the Specialist Prosecutor, or proprio motu, where a change in circumstances since the last review has occurred.

5. In the Haradinaj Appeal Decision issued by the Court of Appeals Panel on Haradinaj's appeal against the first decision of the Pre-Trial Judge on review of Haradinaj's detention, the Panel found that:

The 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.

6. The Court of Appeals Panel in the Decision on Kadri Veseli's Appeal Against Decision on Review of Detention said that to determine whether the circumstances underpinning detention "still exist" it had to assess whether it is still satisfied that, at the time of the review and under the specific circumstances of the case when the review takes place, the detention of the Accused remains warranted. It also said that the duty to determine whether the circumstances underpinning detention "still exist" is not a light one.³

³ *Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention*, KSC-BC-2020-06/IA008/F00004/RED at paragraph 14

7. Detention can only be extended (i) where the strict conditions in article 41(6) of the Law continue to be met⁴ and (ii) detention remains strictly necessary and proportionate having considered whether other, less stringent measures than detention could be sufficient⁵.
8. Further, the Trial Panel should consider whether there are any new circumstances that have a bearing on the decision as to detention⁶.

III. SUBMISSIONS

9. There is a clear presumption in favour of the accused being at liberty. Deprivation of liberty is the exception and not the rule⁷.
10. The circumstances underpinning the detention of Mr Gucati do not “still exist”. The Accused has been in custody for over 12 months. The Trial began on 7 October 2021. The SPO will not, and cannot, call a single witness at trial 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. Indeed, the “Contact Notes” allegedly containing such complaints were denied admission. The SPO also seeks to rely on unreliable hearsay evidence to prove the contents of the undisclosed Batches of documents. This evidence cannot be tested in cross-examination against the actual documents because the documents have

⁴ *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*

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

⁶ *Detention Appeal Judgment at paragraph 52*

⁷ *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*

been withheld by the SPO. It is, and will be, submitted that the SPO cannot prove the offences alleged at trial.

11. The Trial Panel on 7 September 2021⁸ and 7 October 2021⁹ ordered the SPO to file updated Rule 102(3) Notices. This constitutes a new circumstance since the last review. The material appears to be highly relevant, and prima facie disclosable. Accordingly it should have been listed on the Rule 102(3) Notice when it was first requested in February 2021¹⁰ or as soon as it came to light. Now almost 8 months later, the SPO has (reluctantly) notified the Defence of its existence. Had disclosure taken place earlier the proceedings may have been progressed sooner. Even now significant disclosure issues remain outstanding on the eve of evidential proceedings commencing.

12. 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 previously¹¹.

13. In addition to the conditions proposed previously, the Accused requests the Trial Panel to consider granting his release on the same conditions requested by Mr Veseli at paragraph 36 in the filing entitled "Public Redacted Version of Veseli Defence Submissions on Detention Review with Confidential Annexes

⁸ *Order on the Updated Rule 102(3) Detailed Notice*, KSC-BC-2020-07/F00304, paragraph 26.a

⁹ *Order for an Addendum to the Updated Rule 102(3) Detailed Notice*, KSC-BC-2020-07/F00354, at paragraph 12.a

¹⁰ *Written Submissions on behalf of Hysni Gucati for the Second Status Conference and Related Matters*, KSC-BC-2020-07/F00137

¹¹ *Application for Bail*, KSC-BC-2020-07/F00038 at paragraph 5; *Submissions on the Review of Detention by 27th 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

A to C (F00341 dated 4 June 2021)".¹² Mr Gucati is not a founding member of the KLA and does not have an intelligence background¹³, and he has been deprived of any meaningful disclosure. Accordingly the Defence sees no reason why the same relief should not be granted to Mr Gucati namely that further enquiries should be made into the enforceability of these measures by the Kosovan police.¹⁴

14. The Pre-Trial Judge and the Trial Panel have already found that any residual risk of flight can be adequately met by conditions.
15. 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.
16. 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.
17. 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.

¹² *Public Redacted Version of Veseli Defence Submissions on Detention Review with Confidential Annexes A to C (F00341 dated 4 June 2021)*, KSC-BC-2020-06/F00341/RED, paragraph 36

¹³ *Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention*, KSC-BC-2020-06/IA008/F00004/RED, 1 October 2021 at paragraph 46

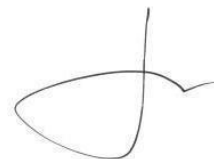
¹⁴ *Ibid* at paragraph 53

18. Mr Gucati has now been in detention for over 12 months. The Trial Panel is asked to reconsider whether the detention is now necessary and proportional in the current circumstances.

IV. CONCLUSION

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

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