In:	**KSC-BC-2020-07**
	The Prosecutor v. Hysni Gucati and Nasim Haradinaj
Before:	**Court of Appeals Panel**
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Nasim Haradinaj
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Classification:	**Confidential**

Appeal against Decision F00507

Denying Provisional Release of Nasim Haradinaj

Specialist Prosecutor

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I. INTRODUCTION

1. Pursuant to Article 41(1)(i) of the of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law")[1] and Rules 58(2) and 170 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"),[2] the Defence for Mr. Haradinaj ("Haradinaj Defence") hereby appeals the Trial Panel II's eighth decision on the review of detention of Nasim Haradinaj of 21 December 2021 denying provisional release ("Impugned Decision").[3]

2. The Defence raises the following five grounds of appeal:

   a. **Ground 1:** The Trial Panel has erred in fact and abused its discretion by reaching the unreasonable and illogical conclusion that there is a risk that Mr Haradinaj will, if released, obstruct the present proceedings by destroying, hiding, changing or forging the evidence already submitted to the Trial Panel in the prosecution case.

   b. **Ground 2:** The Trial Panel, was not, as a matter of law, entitled to rely on the Pre-Trial Judge findings in the Confirmation Decision or on its own findings in the Rule 130 Decision in reaching the conclusion that

[1] Law on the Specialist Chambers and Specialist Prosecutor's Office, 05/L-053

[2] Rules of Procedure and Evidence before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020

[3] KSC-BC-2020-07/F00507, Trial Panel II, *Decision on Review of Detention of Nasim Haradinaj*, 21 December 2021, Public ("Impugned Decision").

there is a grounded suspicion that Mr. Haradinaj committed a criminal offence,[4] instead of itself proceeding to a *de novo* assessment of *all* of the evidence adduced in the case to date in line with Article 41(6)(a) and Article 41 (10) of the Law.

c. **Ground 3:** The Trial Panel erred in law in relying on the Pre-Trial Judge findings in the Confirmation Decision in reaching the conclusion that there are articulable grounds to believe that, if released, Mr. Haradinaj will obstruct the proceedings, instead of itself proceeding to a *de novo* assessment of *all* of the evidence adduced in the case to date in line with Article 41(10) of the Law.

d. **Ground 4:** The Trial Panel erred in fact in failing to consider an inference which favours the accused, choosing instead to rely on the unsupported allegations of the SPO to reach the conclusion that Mr Haradinaj's alleged vow to continue to disclose any further materials amount to intent to commit further crimes.

e. **Ground 5:** The Trial Panel erred in fact in finding that there is a possibility that certain individuals within or associated with the Kosovo Police, who may be connected to the Accused may be inclined

[4] *Impugned Decision*, Para 80-82

to resort to corrupt or questionable practices with a view to interfere with the course of justice.

II. LAW

3. The Court of Appeals held that since neither the Law nor the Rules specify the grounds for interlocutory appeals, it could, like the ICTY, ICTR, IRMCT, ICC, the SCSL and the STL, determine the standard of review applicable.[5] The Court of Appeals decided to apply the standard provided for appeals against judgments in Law, *mutatis mutandis* to interlocutory appeals such that:

a. With regards to an error of law, the party must identify the alleged error, present arguments in support of the claim and explain how the error of law invalidates the decision. If the error of law has no chance of changing the outcome of a decision it may be rejected on that ground;[6]

b. In order to appeal successfully on the basis of an error of fact, the appellant must show that no reasonable trier of fact could have made

[5] KSC-C-2020-07/IA001/F00005, Panel of the Court of Appeals Chamber, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, 9 December 2020 ("Gucati Appeals"), paras 9-10, PUBLIC

[6] *Ibid*. para 12

the impugned finding on the basis of the evidence before the Court. In order to justify overturning a decision by a lower-level panel, the error of fact must have caused a miscarriage of justice in the sense that it must be an error which would or could have affected the outcome;

c. When the appeal relates to a discretionary decision, the onus is on the appealing party to demonstrate that the lower-level panel committed a discernible error in the sense that the decision: (i) was based on an incorrect interpretation of the law, (ii) was based on a patently incorrect conclusion of fact, or (iii) was so unfair or unreasonable as to constitute an abuse of discretion.

4. The Court of Appeals Panel will also consider whether the lower-level panel has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.

5. Article 41 (10) of the Law states that:

Until a judgment is final or until release, upon 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

terminations. The parties may appeal against such a ruling to a Court of Appeals Panel."

6. Article 41(6) of the Law provides:

"The Specialist Chambers or the Specialist Prosecutor shall only order the arrest and detention of a person when:

a. *there is a grounded suspicion that he or she has committed a crime within the jurisdiction of the Specialist Chambers; and*

b. *there are articulable grounds to believe that:*

i. *there is a risk of flight;*

ii. *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*

iii. *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 which he or she has threatened to commit."

7. Article 19 of the Kosovo Code on Criminal Procedure[7] defines "grounded suspicion" as follows:

"1.9. Grounded Suspicion - knowledge of information which would satisfy an objective observer that a criminal offence has occurred, is occurring or there is a substantial likelihood that one will occur and the person concerned is more likely than not to have committed the offence. Grounded suspicion must be based upon articulable evidence."

8. Rule 130 (3) of the Rules of Procedure states on dismissal of charges:

"Having heard the Parties and, where applicable, Victims' Counsel, the Panel may dismiss some or all charges therein by oral decision, if there is no evidence capable of supporting a conviction beyond reasonable doubt on the particular charge in question."

[7] Criminal Procedure Code of the Republic of Kosovo, No. 04/L- 123, adopted on 13 December 2012 ("KCPC").

III. SUBMISSIONS

Ground 1

9. The Trial Panel has erred in fact and abused its discretion by reaching the unreasonable and illogical conclusion that Mr Haradinaj will, if released, obstruct the present proceedings even though the SPO case has been concluded and all the witnesses they proposed to call have already given evidence on the record. This finding was not reasonably open to the Judge since, even in the event of any dissemination of information disclosed to Mr Haradinaj in the context of the preparation of his defence,[8] or of facilitation of such dissemination (which is denied), Mr Haradinaj would not be able to destroy, hide, change or forge the evidence already submitted before the Trial Panel. As a matter of fact, no action or inaction of Mr Haradinaj, or indeed of anyone else, whether alleged accomplice or not, would prevent the prosecution case against Mr Haradinaj from going ahead.

10. The Haradinaj Defence further submits that the SPO has failed to this day to adduce any evidence that Mr Haradinaj has threatened, interfered with or contacted any witnesses or victims.[9] This confirms Mr. Haradinaj's

[8] *Impugned Decision*, paras 36-37.

[9] KSC-BC-2020-07/F00440, *Defence Motion under Rule 130 'Dismissal of Charges'*, 17 November 2021, paras. 13, 34, 52, 54 (citing KSC-BC-2020-07, Trial Transcript of 18 October 2021, at pages 930-932), 75 (citing KSC-BC-2020-07, Trial Transcript of 26 October 2021, at pages 1482, 1484, 1485, 1488-1490), 101-103 (citing KSC-BC-2020-07, Trial

submission that the disclosure was in fact in the public interest. The conclusion that Mr Haradinaj would obstruct proceedings is therefore a baseless logical impossibility.

11. In light of the above, and considering that, the burden to establish the persistence of 'relevant and sufficient' reasons justifying continued detention falls on the SPO,[10] that it is not incumbent upon Mr. Haradinaj to demonstrate the existence of reasons warranting his release,[11] and that the risk of an accused hindering proceedings cannot be relied on *in abstracto* but has to be supported by factual evidence,[12] the Haradinaj Defence submits that this conclusion constitutes a fundamental error occasioning a blatant miscarriage of justice.

Ground 2

Transcript of 18 October 2021, at pages 850-851), 112, 117 (citing KSC-BC-2020-07, Trial Transcript of 7 October 2021, at page 790, line 8), 120 (citing KSC-BC-2020-07, Trial Transcript of 27 October 2021, at pages 1584, lines 3-9, page 1588, lines 3-5, page 1601, lines 1-7, page 16-2, lines 15-21, page 1603, lines 18 – page 1604, line 6, page 1605, lines 11-15, page 1609, lines 4-13, page 1612, lines 7-14, page 1613, lines 19-25, page 1626, lines 21-24, page 1629, lines 2-6, page 1640, lines 16- 18), 122-124, 165-166 (citing KSC-BC-2020-07, 081344-02-TR-ET, at page 7, KSC-BC-2020-07, 089919-089927, at page 9, KSC-BC-2020-07, 081979-07-TR-ET, at page 3, KSC-BC-2020-07, 082010-082013 RED, at para. 9)

[10] ECtHR, *Merabishvili v Georgia*, Grand Chamber, App. No. 72508/13, 18 November 2017, para 234.

[11] Seventh Detention Decision, para. 13. *See also* KSC-CC-PR-2017-01, F00004, Specialist Chamber of the Constitutional Court, *Judgment on the Referral ofthe Rules ofProcedure and Evidence Adopted by Plenary on 17 March 2017* ("SCCC 26 April 2017 Judgment"), 26 April 2017, para. 115.

[12] ECtHR, *Becciev v Moldova*, Fourth Section, App. No. 9190/03, 4 October 2005, para 59.

12. The Trial Panel, was not as a mater of law, entitled to rely on the Pre-Trial Judge's findings in the Confirmation Decision[13] or on its own findings in the Rule 130 Decision in reaching the conclusion that there is a grounded suspicion that Mr. Haradinaj committed a criminal offence,[14] instead of itself proceeding to a *de novo* assessment of *all* of the evidence adduced in the case to date in line with Article 41(10) of the Law.

13. Firstly, Article 41(10) of the Law, which sets out the standard of review for the two month review of detention on remand, does not require a change in circumstances,[15] but rather demands of the "*Panel seized with the case*" itself to proceed to a *de novo* assessment of "*whether reasons for detention on remand still exist.*"

14. Secondly, this assessment must be conducted based on *all* the evidence before the Panel at the time of the review. If some relevant facts that would have or could have affected the outcome of the decision were ignored, leading to a miscarriage of justice, the resulting decision would be flawed.[16]

[13] *Impugned Decision*, at para 38.

[14] *Impugned Decision*, at para 80-82.

[15] *Impugned Decision*, at para 19.

[16] ICC, Prosecutor v Katanga & Ngudjolo Chui, *Decision on the Application for Interim Release of Mathieu Ngudjolo Chui*, ICC-01/04-01/07-344, 27 March 2008, confirmed on Appeal by Judgment of 9 June 2008, ICC-01/04-01/07-572, para 61. See also Gucati Appeals para 12

15. Considering that the SPO has now closed its case, the Trial Chamber has a clearer picture of the SPO's entire evidence against Mr. Haradinaj than the Pre-Trial Judge did at the time of the Confirmation Decision. It is therefore in a better position than the Pre-Trial Judge to assess the existence of a "grounded suspicion" pursuant to Article 41(6)(a) of the Law.[17]

16. The Haradinaj Defence submits on the first hand, contrary to the position adopted by the Trial Panel, that "*the evaluation of the evidence admitted at trial takes place at the conclusion of the trial*,"[18] the Trial Panel is required to consider whether the SPO has adduced sufficient evidence to prove all the elements of the crimes even before the presentation of the Defence case. This is particularly relevant since the SPO has entirely failed to substantiate some of the allegations in the Indictment.[19] The Defence submits that any reasonable trier of fact would have conducted this assessment of the SPO case as is, and that a failure to do so by the Trial Panel amounts to disregarding relevant facts that are central to a determination under Article 41(6)(a) and Article 41(10) of the Law.

[17] KSC-BC-2020-06/IA008/F00004/RED, *Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention*, 1 October 2021, Public, at para. 24.

[18] *Impugned Decision*, at para 26.

[19] KSC-BC-2020-07/F00440, *Defence Motion under Rule 130 'Dismissal of Charges'*, 17 November 2021

17. In addition, the Haradinaj Defence submits that a re-evaluation is required irrespective of the Rule 130 assessment by the Trial Panel[20] because the determination under Article 41(6)(a) does not apply the same legal threshold.

18. The Trial Panel explained that the underlying test for a dismissal of the charges is "*not whether the Panel* would *in fact enter a conviction on the SPO evidence, if accepted, but whether it* **could.**"[21] (emphasis added) The Dismissal Decision defined "capability" as follows: "*if* ***one possible view of the facts could support a conviction***."[22] (emphasis added) In proceeding to this assessment, it found *that " the Accused had a* ***case to answer*** *in relation to all six counts of the Indictment*"[23] (emphasis added).

19. By contrast, the legal standard for a "grounded suspicion" under Article 41(6)(a) is much higher: it is to "***satisfy an objective observer***" that a person is "***more likely than not***" to have committed an offence.[24]

[20] KSC-BC-2020-07/F00450, Trial Panel II, *Decision on the Defence Motions to Dismiss the Charges*, 26 November 2021, Public ("Dismissal Decision").

[21] Impugned Decision, at para. 25.

[22] Dismissal Decision, at para. 18.

[23] Impugned Decision, at para. 25.

[24] Criminal Procedure Code of the Republic of Kosovo, No. 04/L- 123, adopted on 13 December 2012 ("KCPC"), Article 19. For the KCPC definition of "well-grounded suspicion," which requires an even higher standard, *see* above at paras 17-18.

20. The legal threshold not to dismiss the charges is therefore much lower than the threshold of a "grounded suspicion" that a person has committed an offence under Article 41(6)(a). A finding in the positive of the lower threshold does not exclude a finding in the negative of the higher threshold. Consequently, it follows that the mere fact that the Trial Panel has found that Mr Haradinaj has a case, which is not accepted, to answer on either one of the charges does not mean that there is a grounded suspicion that he has committed a crime under Article 41(6). A decision on the Defence's Rule 130 Application can therefore not substitute the required *de novo* assessment under Rule 41(6)(a).

21. In failing to conduct a *de novo* an evaluation of whether there is a grounded suspicion that Mr. Haradinaj committed the alleged crimes itself and instead unconditionally importing the findings of the Pre-Trial Judge in the Confirmation Decision as a factor to rely on in determining the existence of a risk of obstruction, the Trial Panel has incorrectly applied the legal standard outlined in Article 41(10) and reached a decision that is patently wrong.

Ground 3

22. The Trial Panel, was not as a matter of law, entitled to rely on the Pre-Trial Judge findings in the Confirmation Decision[25] in reaching the conclusion that there are articulable grounds to believe that, if released, Mr Haradinaj will obstruct the proceedings, instead of itself undertaking to a *de novo* assessment of *all* of the evidence adduced in the case to date in line with Article 41(10) of the Law.

23. Firstly, as argued above in paragraphs 15 and 17, considering that the SPO has now closed its case, the Trial Chamber has a clearer picture of the SPO's entire evidence against Mr Haradinaj than the Pre-Trial Judge did at the time of the Confirmation Decision. It is therefore in a better position than the Pre-Trial Judge to assess the existence of a "grounded suspicion" pursuant to Article 41(6)(a) of the Law[26] which it relies on for its determination of the second limb of Article 41(6)(b) (to establish the existence of articulable grounds to believe that the accused will obstruct proceedings).

24. In relying on the partial and outdated assessment of the Pre-Trial Judge in the Confirmation Decision, the Trial Panel fails to address relevant facts that materially affect the decision namely, whether the SPO has been able to

[25] *Impugned Decision*, at para 38.

[26] KSC-BC-2020-06/IA008/F00004/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention*, 1 October 2021, Public, at para. 24.

submit admissible, reliable and credible evidence to support every element of the offence(s) that it needs to prove. In this case, the Defence submits that the SPO has failed to prove that Mr Haradinaj has interfered or threatened witnesses as alleged, or at all.[27]

25. Since this is not an assessment that the Pre-Trial Judge has engaged in at the time of the Confirmation hearing (where the standard was merely one of well-grounded suspicion that only considered the *"possession of admissible evidence"* according to Article 19 of the Kosovo Code on Criminal Procedure),[28] in ignoring the evidence submitted to it to date, in the course of the Article 41(6)(b) assessment, the Trial Panel's decision is fatally flawed in that it fails to consider relevant information that materially affects the decision.

Ground 4

26. The Trial Panel erred in fact in failing to consider an inference which favours the Accused,[29] choosing instead to rely on the unsupported allegations of the SPO to reach the conclusion that Mr Haradinaj's alleged vow to continue to disclose any further materials amount to intent to commit further crimes.

[27] *Op. cit., fn 9*

[28] Criminal Procedure Code of the Republic of Kosovo, No. 04/L- 123, adopted on 13 December 2012 ("KCPC").

[29] Prosecutor v Vasiljevic, Appeal Judgment, 25 February 2004, para 12; Prosecutor v Blaskic, Appeal Judgment 29 July 2004 para 13, Prosecutor v Kunarac Appeal Judgment 12 June 2002, paras 304-306, Prosecutor V Niyitegeka, Appeal Judgment 9 July 2004 para 10.

27. The only two factors that the Trial Panel considered in reaching this conclusion are Mr. Haradinaj's prior conduct and his alleged vow to continue to publish SITF/SPO information.[30] The Defence submits, firstly, as argued above at paragraphs 15 to 16 and 23 to 25, that the Trial Panel has erred in failing to consider the complete picture of the SPO case submitted before it in assessing whether the previous conduct of Mr. Haradinaj, choosing instead to evaluate all the evidence and arguments at the end of the trial.[31]

28. Secondly, the Defence submits that Mr Haradinaj's alleged vow to continue to disclose SITF/SP information has been taken out of context and assessed without taking into consideration the fact that it has been comprehensively argued throughout the proceedings that the disclosure was in fact in the public interest.[32] The fact that the SPO has not submitted any evidence to support the allegation that Mr. Haradinaj's past conduct interfered or threatened witnesses or victims further supports this assertion. The Defence submits that in light of the fact that the criminal intent of the previous disclosure of Mr Haradinaj is in dispute, and in the absence of direct evidence to the contrary, the Trial Panel has acted unreasonably in failing to consider

[30] *Impugned Decision*, at para 41.

[31] *Impugned Decision*, at para 41.

[32] KSC-BC-2020-07/F00260, *Submission of Interim Pre-Trial Brief on Behalf of the Defence for Nasim Haradinaj*, 12 July 2021, paras. 283-298.

an inference which favours the accused,[33] choosing instead to rely on the unsupported allegations of the SPO to reach the conclusion that the alleged vow to continue to disclose any further materials he received as an intent to commit further criminal offences.

29. It is important to point out here that had Mr Haradinaj wanted to interfere with the proceedings before the KSC (which is denied), he could have instead kept the materials he received secret and approached witnesses anonymously to threaten them. His conduct in disclosing the material to the media and indeed his alleged vow to continue to do so, in fact point to his commitment to transparency, something for which he has criticised the SPO for failing to adhere.

30. The Defence submits that, in the absence of direct evidence by the SPO pointing to the criminal intent of the disclosure to threaten and interfere with witnesses, the Trial Panel has misappreciated the circumstantial evidence in favour of the accused thereby resulting in fundamental error occasioning a miscarriage of justice.

Ground 5

[33] Prosecutor v Vasiljevic, Appeal Judgment, 25 February 2004, para 12; Prosecutor v Blaskic, Appeal Judgment 29 July 2004 para 13, Prosecutor v Kunarac Appeal Judgment 12 June 2002, paras 304-306, Prosecutor V Niyitegeka, Appeal Judgment 9 July 2004 para 10.

31. The Trial Panel has erred in fact in finding that there is a possibility that certain individuals within or associated with the Kosovo Police, who are, or may be, connected to the Accused may be inclined to resort to corrupt or questionable practices with a view to interfere with the course of justice. It is submitted that such an unsupported allegation of another state institution is wholly improper.

32. Firstly, the Trial Panel relied on a combination of secondary sources that it admits it has not been able to verify, and anecdotal accounts to put into question the reliability of the Kosovo Police to implement the Proposed Regime of alternative measures to Detention. It is important to note that while some public sources, point to corruption, others, deliberately excluded by the SPO, compliment the Kosovo Police for being professional such as a press reports from EULEX and UNMIK[34] or the press statement in which President Trendafilova refers to the contribution of the Kosovo Police as "*outstanding and highly professional*".[35]

33. Even if these accounts of misconduct were to be considered credible, which is denied, the SPO and indeed the Trial Panel has failed to attribute any of the

[34] See, for example https://www.eulex-kosovo.eu/?page=2,10,1502, https://unmik.unmissions.org/unmik-chief-briefs-un-security-council-kosovo-1, https://news.un.org/en/story/2006/03/172312-kosovo-police-lauded-major-operation-assume-increasingly-important-role-un,

[35] See Interview of KSC President Trendafilova to "Klan Kosova" on 17 May 2021, https://www.scp-ks.org/sites/default/files/public/content/20210517_klan-kosova_interviewweb.pdf

incidents of corruption mentioned to Mr Haradinaj, let alone to connect Mr Haradinaj and any of the individuals alleged to have been involved in the incidents of corruption and questionable practices outlined by the SPO. As such the Defence submits that the finding of the Trial Panel that there is a *"possibility that certain individuals within or associated with the Kosovo Police, who are connected to the Accused may be inclined to resort to corrupt of questionable practices with a view to interfere with the course of justice"* is entirely based on errors of fact. There is simply no evidence to justify attributing any of these incidents to Mr Haradinaj or indeed for the Trial Panel to make such a finding on the Kosovo Police's integrity or capacity.

IV. RELIEF SOUGHT

34. For the foregoing reasons, the Defence for Mr. Haradinaj invites the Court of Appeals Panel:

a. to find that there was an error in law, in fact and that the Trial Panel abused its discretion in reaching the conclusion that, if released, Mr Haradinaj will, obstruct the present proceedings;

b. to find that the Trial Panel erred in law in relying on the Pre-Trial Judge findings in the Confirmation Decision[36] or on its own findings in the Rule 130 Decision in reaching the conclusion that there is a grounded suspicion that Mr Haradinaj committed a crime;

c. to find that the Trial Panel erred in law and in fact in to find that the Trial Panel erred in law in relying on the Pre-Trial Judge findings in the Confirmation Decision in reaching the conclusion that there are articulable grounds to believe that, if released, Mr Haradinaj will obstruct the proceedings;

d. to find that the Trial Panel has acted unreasonably in failing to consider an inference which favours the accused in determining that Mr Haradinaj would commit further offences if released;

e. to find that the Trial Panel erred in fact in finding that there is a possibility that certain individuals within or associated with the Kosovo Police, who are connected to the Accused may be inclined to resort to corrupt of questionable practices with a view to interfere with the course of justice; and

[36] *Impugned Decision*, at para 38.

f. pursuant to Article 46(4) of the Law, to return the case to the Trial Panel to review its findings and conduct a re-evaluation of the Article 41(6)(a) and (b) requirements.[37]

V. CLASSIFICATION

35. This filing is submitted Confidentially on the basis of the classification of the *Impugned Decision*. However, there is nothing contained within this submission that requires a Confidential classification and it is submitted that it may be classified as Public with no redactions required.

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[37] Article 46(4) of the Law.