



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: Court of Appeals Panel
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 14 January 2022

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Response to Haradinaj Defence Appeal of December 2021 Detention Decision

with one public annex

Specialist Prosecutor

Jack Smith

Counsel for Mr Gucati

Jonathan Elystan Rees

Counsel for Mr Haradinaj

Toby Cadman

I. Introduction

1. The Court of Appeals Panel ('Panel') should reject the Haradinaj Appeal¹ in its entirety since it raises arguments inadmissible on appeal and fails to identify any discernible error. The discretionary determinations made by the Trial Panel must be given deference on appeal,² and the Decision³ correctly extended the detention of Mr Haradinaj.

II. Procedural background

2. On 25 September 2020, Haradinaj was arrested.⁴ A request for Haradinaj's immediate release was denied on 27 October 2020.⁵

3. On 14 December 2020, the Pre-Trial Judge confirmed the indictment in this case,⁶ concluding there to be a well-grounded suspicion that Mr Haradinaj is responsible for the crimes charged.⁷

4. On 24 December 2020, Haradinaj's detention was reviewed and extended.⁸ This decision was later confirmed on appeal.⁹

¹ Appeal against Decision F00507 Denying Provisional Release of Nasim Haradinaj, KSC-BC-2020-07/IA007/F00001, 31 December 2021, Confidential ('Haradinaj Appeal').

² Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, para.14.

³ Public Redacted Version of Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00507/RED, 21 December 2021 ('Decision').

⁴ Public Redacted Version of 'Corrected Report on the Arrest and Transfer of Nasim Haradinaj to the Detention Facilities', filing KSC-BC-2020-07/F00026/COR dated 28 September 2020, KSC-BC-2020-07/F00026/COR/RED, 14 October 2020.

⁵ Decision on Request for Immediate Release of Nasim Haradinaj, KSC-BC-2020-07/F00058, 27 October 2020.

⁶ Public Redacted Version of Decision on the Confirmation of the Indictment, KSC-BC-2020-07/F00074/RED, 11 December 2020 (public redacted version notified 22 December 2020) ('Confirmation Decision').

⁷ Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 128, 132, 137, 141, 145, 149.

⁸ Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00094, 24 December 2020.

⁹ Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, KSC-BC-2020-07/IA002/F00005, 9 February 2021 ('Haradinaj Appeals Decision').

5. Mr Haradinaj's detention was subsequently reviewed several times with no appeal,¹⁰ most recently in a Trial Panel decision of 22 October 2021 ('October 2021 Decision').¹¹

6. On 26 November 2021, the Trial Panel rejected Defence requests to dismiss the charges pursuant to Rule 130 ('Rule 130 Decision').¹²

7. On 21 December 2021, following submissions from the Kosovo Police,¹³ Registry,¹⁴ SPO,¹⁵ and Haradinaj Defence,¹⁶ the Decision was issued.

III. Submissions

8. Preliminarily, it bears emphasis that the appellant is required to demonstrate that the arguments raised on appeal were first put to the Trial Chamber in the submissions considered in the Decision.¹⁷ As is the case with many parts of the Haradinaj Appeal, failure to do so warrants summary dismissal.

¹⁰ Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00144, 24 February 2021; Public Redacted Version of the Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00189/RED, 23 April 2021; Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00246, 23 June 2021; Decision on Review of Detention of Nasim Haradinaj, Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00280, 23 August 2021.

¹¹ Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00391, 22 October 2021 ('October 2021 Detention Decision').

¹² Decision on the Defence Motions to Dismiss Charges, KSC-BC-2020-07/F00450, 26 November 2021. *See also* Rule 130 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

¹³ Reply to Request number KSC-BC-2020-07, dated 22 October 2021, KSC-BC-2020-07/F00449/eng, 25 November 2021, Confidential (translation notified 2 December 2021).

¹⁴ Registry Submissions Pursuant to the Trial Panel's Order to Provide Information on the Detention Regime (F00393), KSC-BC-2020-07/F00452, 26 November 2021, Confidential.

¹⁵ Prosecution consolidated submissions for review of detention, KSC-BC-2020-07/F00490, 10 December 2021, Confidential (with one public annex).

¹⁶ Defence Submissions on Detention, KSC-BC-2020-07/F00500, 16 December 2021, Confidential ('Haradinaj Defence Submissions').

¹⁷ Decision on the Defence Appeals Against Decision on Preliminary Motions, KSC-BC-2020-07/IA004/F00007, 23 June 2021, para.15.

A. THE RISK OF OBSTRUCTING THE PROCEEDINGS PERSISTS BEYOND THE SPO'S CASE
(GROUND 1)

9. The Haradinaj Defence never argued before the Trial Panel that the risk of obstruction was affected by the closing of the SPO's case.¹⁸ This is a new argument raised on appeal and should be dismissed accordingly. Even if entertained on the merits, there is no statutory limit on the application of the risk in Article 41(6)(b)(ii) of the Law¹⁹ – it is a risk of obstructing the 'progress of the criminal proceedings' in whole. There is no reason why this risk cannot continue to exist after the conclusion of the SPO's case.²⁰ The facts for which a well-grounded suspicion exists in this case – supporting counts of obstructing official persons, intimidating/retaliating against witnesses, and violating the secrecy of proceedings - show a clear risk of obstruction to the entirety of the proceedings, noting further the highly sensitive information the Accused have recently acquired.²¹

10. Arguments that the SPO has failed to establish that the Mr Haradinaj has threatened or interfered with witnesses/victims do not assert an error.²² The Haradinaj Defence merely disagrees with the well-grounded suspicion that the Accused committed the crimes charged²³ which was taken into account in the Trial Panel's findings.²⁴

¹⁸ Compare Haradinaj Appeal, KSC-BC-2020-07/IA007/F00001, para.9 *against* Haradinaj Defence Submissions, KSC-BC-2020-07/F00500, paras 8-11.

¹⁹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

²⁰ See ICC, *Prosecutor v. Bemba*, Decision on "Defence Urgent Motion for Provisional Release", ICC-01/05-01/08-3221, 23 December 2014, paras 38-51 (*adding* risk of obstructing the court proceedings to grounds of detention after closure of evidence presentation), *confirmed on appeal in* ICC, *Prosecutor v. Bemba*, Public redacted version of Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 23 December 2014 entitled "Decision on 'Defence Urgent Motion for Provisional Release'", ICC-01/05-01/08-3249-Red, 20 May 2015, paras 66-71. See also ICTY, *Prosecutor v. Prlić et al.*, Decision on "Prosecution's Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Petković* Dated 31 March 2008", IT-04-74-AR65.7, para.17.

²¹ Decision, KSC-BC-2020-07/F00507/RED, paras 35-37.

²² Haradinaj Appeal, KSC-BC-2020-07/IA007/F00001, para.10.

²³ See especially Haradinaj Appeal, KSC-BC-2020-07/IA007/F00001, para.10, n.9.

²⁴ Decision, KSC-BC-2020-07/F00507/RED, para.35.

B. THE TRIAL PANEL MAY RELY ON PREVIOUS FINDINGS IN ITS ASSESSMENT (GROUNDS 2-3)

11. The Haradinaj Defence did not argue in its submissions leading up to the Decision that the Confirmation Decision or Rule 130 Decision would be improperly relied upon, precluding it from raising such arguments on appeal. Further, the Trial Panel has consistently relied upon the Pre-Trial Judge's well-grounded suspicion in the Confirmation Decision, most recently in the October 2021 Detention Decision.²⁵ These Trial Panel rulings were not appealed, and the Trial Panel does not have to re-reason its factual findings.²⁶ Grounds 2 and 3 of the Haradinaj Appeal are out of time as the Trial Panel relying on the Confirmation Decision is not an issue first arising from the Decision.

12. Even if the Confirmation Decision arguments are considered on their merits, the Haradinaj Defence's arguments are tantamount to a requirement that the Trial Panel give a full complement of preliminary factual findings in its detention review decision. Such a position overstates the required standard and the reasoning necessary to meet it.²⁷

13. As to the reference to the Rule 130 Decision in the Article 41(6)(a) finding, the Trial Panel found that this decision corroborated and supported its findings on grounded suspicion.²⁸ Contrary to the Haradinaj Defence submissions, reliance on the recent Rule 130 Decision demonstrates that the Trial Panel was considering all evidence presented before it when making its findings.²⁹ Reliance on the findings in the Rule 130 Decision was entirely appropriate, and in any event could not have impacted the result of the Trial

²⁵ October 2021 Detention Decision, KSC-BC-2020-07/F00391, paras 15, 22, 24.

²⁶ Haradinaj Appeals Decision, KSC-BC-2020-07/IA002/F00005, para.55.

²⁷ See similarly 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').

²⁸ Decision, KSC-BC-2020-07/F00507/RED, para.25.

²⁹ *Contra* Haradinaj Appeal, KSC-BC-2020-07/IA007/F00001, para.14.

Panel's determination because other factors – like the factual findings underpinning the Confirmation Decision - independently supported the Article 41(6)(a) finding.³⁰

14. There is no indication that the Trial Panel failed to consider any relevant evidence in making its risk assessments, and no discernible error is identified.

C. MR HARADINAJ'S VOW TO CONTINUE TO DISCLOSE FURTHER MATERIALS WAS FAIRLY CONSIDERED (GROUND 4)

15. The Trial Panel was required to find articulable grounds to believe the Accused would commit further offences, and made such a finding.³¹ Reliance on the vow of the Accused to continue to disclose materials was one of the factors considered, and obviously so in the Article 41(6)(b)(iii) context. Making evidentiary inferences favourable to the Accused in relation to this vow is the standard for evaluating circumstantial evidence at trial, and is not the same as the required standard for detention.³² The Haradinaj Defence merely disagrees with the Trial Panel's assessment of the relevant evidence, and no discernible error is identified.

D. CONSIDERATIONS RELATED TO THE KOSOVO POLICE WERE PROPERLY WEIGHED (GROUND 5)

16. There was ample evidence before the Trial Panel to conclude that certain individuals within or associated with the Kosovo Police, who are connected to the Accused in this case, may be inclined to resort to corrupt or questionable practices with

³⁰ *Contra* Haradinaj Appeal, KSC-BC-2020-07/IA007/F00001, paras 18, 20.

³¹ Decision, KSC-BC-2020-07/F00507/RED, para.41.

³² *Contra* Haradinaj Appeal, KSC-BC-2020-07/IA007/F00001, paras 26-30. There is also no basis for such an inference – the Accused is quite clear he is willing to repeat the conduct for which he is criminally charged. *See* Transcript of Hearing, 13 January 2022, T.3024 ('No, don't ask the question. If you bring them, I will act the same, because I am convinced that I acted rightly and I did it in the interest of informing the public and for the sake of transparency. I think that, I have that conviction, that it was appropriate'); P35ET_RED, 082136-01-TR-ET REVISED RED, p.13 ('If I was working in the media, you would see if I dared or not. You think you will scare me with ten years! Even if you sentence me to 300 years, I will still disclose them. I am speaking on my behalf and on the behalf of the whole presidium').

a view to interfere with the course of justice at the KSC.³³ However, the Trial Panel did not actually make this finding outright, instead concluding it could not exclude this possibility and gave it weight only as a contextual consideration.³⁴ The Trial Panel made it clear that this consideration was not dispositive in its assessment.³⁵

17. The evidence presented regarding the Kosovo Police was carefully considered and fairly relied upon. Noting that the Trial Panel must be given deference in its discretionary considerations, no discernible error is identified.

IV. Conclusion

18. For the foregoing reasons, the Panel should deny the Haradinaj Appeal in its entirety.³⁶

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Jack Smith
Specialist Prosecutor

Friday, 14 January 2022
At The Hague, the Netherlands.

³³ *Contra* Haradinaj Appeal, KSC-BC-2020-07/IA007/F00001, paras 31-33.

³⁴ Decision, KSC-BC-2020-07/F00507/RED, para.80.

³⁵ Decision, KSC-BC-2020-07/F00507/RED, para.81.

³⁶ The present submission is submitted confidentially pursuant to Rule 82(4). The SPO requests that this filing be reclassified as public.