

**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 Hysni Gucati

**Date:** 31 January 2022

**Language:** English

**Classification:** Public

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**Public Redacted Version of Defence Submissions on the Kosovo Police and  
Registry Reports and on Detention Review**

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## I. INTRODUCTION

1. On 6 December 2021, the Trial Panel issued its Order for Submissions on the Kosovo Police and Registry Reports and on Detention Review ("Order")<sup>1</sup>. The procedural background is set out in paragraphs 1 to 5 thereof.
2. At paragraph 12(a) of the Order, the SPO were ordered to submit observations, if it so wished, on the Kosovo Police and Registry Reports and to file submissions on the necessity of continued detention by 10 December 2021. The Defence received notification of the SPO's observations and submissions on 10 December 2021 ("SPO Submissions")<sup>2</sup>.
3. At paragraph 12(b) of the Order, the Defence were ordered to submit observations on the Reports and to respond to the SPO submissions on continued detention, if they so wish, by 16 December 2021.
4. In accordance with paragraph 12(b) of the Order, the Defence makes the following observations and submissions.

## II. APPLICABLE LAW

5. The applicable law is as set out in paragraphs 9 to 13 of the Decision on Review of Detention of Hysni Gucati of 22 October 2021<sup>3</sup>.

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<sup>1</sup> KSC-BC-2020-07/F00472, "Order for Submissions on the Kosovo Police and Registry Reports and on Detention Review", Trial Panel II, 6 December 2021, Public

<sup>2</sup> KSC-BC-2020-07/F00490, "Prosecution consolidated submissions for review of detention", Prosecution, 10 December 2021, Confidential

<sup>3</sup> KSC-BC-2020-07/F00390, "Decision on Review of Detention of Hysni Gucati", Trial Panel II, 22 October 2021, Public

6. In particular, it is to be stressed that:
- a. Any analysis of continued detention must accept the presumption of innocence as its starting point;
  - b. The burden to demonstrate that detention is necessary is on the SPO;  
and
  - c. It is not incumbent upon Mr Gucati to demonstrate the existence of reasons warranting his release<sup>4</sup>.
7. Moreover, while not required to make findings on the factors already decided upon in the initial ruling on detention, the Panel must examine the reasons or circumstances and determine whether they still exist to satisfy itself that, at the time of the review decision, grounds for continued detention still exist. The circumstances will include those submitted previously on behalf of Mr Gucati which support interim release. The Defence accordingly incorporate herein those submissions made previously on his behalf and place reliance on the following factors in particular:
- a. Mr Gucati's strong family and community ties to his hometown;
  - b. Mr Gucati's good character; and

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<sup>4</sup> KSC-BC-2020-07/F00390, "Decision on Review of Detention of Hysni Gucati", Trial Panel II, 22 October 2021, Public at paragraph 13

- c. The fact that Mr Gucati has been compliant throughout his arrest and detention.

### III. SUBMISSIONS

8. The continued detention of Mr Gucati is neither necessary nor proportionate.

#### *Risk of Flight*

9. Both the Pre-Trial Judge and the Trial Panel have repeatedly found that any risk of flight in Mr Gucati's case can be adequately managed by alternative measures<sup>5</sup>. Mr Gucati's continued detention may not be justified on the ground of risk of flight<sup>6</sup>.

#### *Risk of Obstructing Proceedings/Commission of Further Offences*

10. No disclosure has been ordered which might prejudice ongoing SPO investigations<sup>7</sup>. Any disclosure ordered has been disclosed in a form (redacted or otherwise) which was designed not to, and did not, reveal anything the disclosure of which might prejudice ongoing SPO investigations, or negatively impact the security, well-being and privacy of witnesses and other individuals.

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<sup>5</sup> KSC-BC-2020-07/F00390, "Decision on Review of Detention of Hysni Gucati", Trial Panel II, 22 October 2021, Public at paragraphs 19 and 20

<sup>6</sup> KSC-BC-2020-07/F00390, "Decision on Review of Detention of Hysni Gucati", Trial Panel II, 22 October 2021, Public at paragraph 20

<sup>7</sup> KSC-BC-2020-07/F00413, "Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice", Trial Panel II, 3 November 2021, Confidential at paragraphs 66, 72; KSC-BC-2020-07/F00435, "Decision on the Prosecution Request Related to Rule 102(3) Notice Item 201", Trial Panel II, 15 November 2021, Confidential at paragraph 24

11. Re paragraph 12 of the SPO Submissions, the cases quoted in footnote 25 therein are old and do not demonstrate a current ‘climate of intimidation of witnesses’.
12. On closer scrutiny, they do not even demonstrate a previous climate of intimidation of witnesses:
- a. *Haradinaj* case – although there was complaint about witnesses being afraid to give evidence, the allegation in paragraph 6 of the Judgment does not allege intimidation to be the source of that fear; in the event few witnesses of significance were not heard at the original trial, and all testified in the retrial (see paragraphs 22 to 28 of the Judgment);
  - b. *Beqaj* case – despite the allegations made by the Prosecution, the Trial Chamber found that: (a) there was no evidence to support the allegations that the Accused had threatened potential witnesses; (b) there was no evidence to support the allegations that the Accused intimidated potential witnesses; and (c) there was no evidence to support the allegations that the Accused offered bribes to potential witnesses (see paragraph 51 of the Judgment);
  - c. *Haxhiu* case – although the journalist defendant was convicted of an offence relating to publication of the name of a protected witness in an article, the defendant was not sentenced for actually jeopardizing the security of the witness – only in relation to a potential risk (see paragraph 34);
  - d. *Haragija & Morina* case – Haragija’s conviction was quashed on appeal; in relation to Morina, although his appeal against conviction was

refused, the Prosecution's appeal against a sentence of 3 months' imprisonment was likewise refused. In fact, Morina had been granted provisional release by the Appeals Chamber ahead of the appeal on the basis that Morina would have served the entire sentence if there had not been an appeal (see paragraph 12).

13. Mr Gucati has attended every day of his trial, and has continued to be cooperative and compliant during the course of the trial itself. He has already given evidence and answered every question asked.

14. Despite the warning given at the outset of the trial, the Trial Panel has never had cause to exercise its powers under Rule 61(2) (temporary removal of the Accused from the courtroom due to disruptive conduct).

15. The stringent measures proposed to monitor and restrict communications under house arrest<sup>8</sup> are beyond proportionate to the level of any risk:

a. Monitoring of internet and mobile phone use by [REDACTED]<sup>9</sup>; or alternatively [REDACTED]<sup>10</sup>;

b. Personal searches, [REDACTED]<sup>11</sup>;

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<sup>8</sup> KSC-BC-2020-07/F00449/eng, "Reply to Request Number KSC-BC-2020-07, dated 22 October 2021", Kosovo Police, 25 November 2021, Confidential at pages 7 to 19

<sup>9</sup> KSC-BC-2020-07/F00449/eng, "Reply to Request Number KSC-BC-2020-07, dated 22 October 2021", Kosovo Police, 25 November 2021, Confidential at page 7

<sup>10</sup> KSC-BC-2020-07/F00449/eng, "Reply to Request Number KSC-BC-2020-07, dated 22 October 2021", Kosovo Police, 25 November 2021, Confidential at page 8, 11, 13, 17

<sup>11</sup> KSC-BC-2020-07/F00449/eng, "Reply to Request Number KSC-BC-2020-07, dated 22 October 2021", Kosovo Police, 25 November 2021, Confidential at page 8, 10, 11, 13, 15, 16, 18, 19

- c. 24/7 security surveillance, [REDACTED], to permit visits only by persons on a list pre-approved by the Court<sup>12</sup>; and
- d. Police monitoring [REDACTED]<sup>13</sup>.
16. Kosovo Police confirm that they have extensive experience of enforcing conditional interim release in cases of persons accused of offences against the administration of justice, in particular offences under Articles 387, 388, 392 and 401 of the Kosovo Criminal Code without any serious obstacle being encountered<sup>14</sup>.
17. Kosovo Police have confirmed that they are able to undertake any of the above measures on order by the KSC.
18. Kosovo Police have confirmed that they have the technological ability and capacity to enforce the same<sup>15</sup>.
19. Kosovo Police have confirmed that they will deploy sufficient numbers of police officers to enforce such conditions as are ordered (“the number of police officers involved shall be determined depending on the needs”<sup>16</sup>).
20. Kosovo Police have confirmed that they have appropriate arrangements to secure medical attention for an individual under house arrest, whilst

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<sup>12</sup> KSC-BC-2020-07/F00449/eng, “Reply to Request Number KSC-BC-2020-07, dated 22 October 2021”, Kosovo Police, 25 November 2021, Confidential at page 9, 12, 13, 15, 16, 17

<sup>13</sup> KSC-BC-2020-07/F00449/eng, “Reply to Request Number KSC-BC-2020-07, dated 22 October 2021”, Kosovo Police, 25 November 2021, Confidential at page 9

<sup>14</sup> KSC-BC-2020-07/F00449/eng, “Reply to Request Number KSC-BC-2020-07, dated 22 October 2021”, Kosovo Police, 25 November 2021, Confidential at pages 24-25

<sup>15</sup> KSC-BC-2020-07/F00449/eng, “Reply to Request Number KSC-BC-2020-07, dated 22 October 2021”, Kosovo Police, 25 November 2021, Confidential at page 23

<sup>16</sup> KSC-BC-2020-07/F00449/eng, “Reply to Request Number KSC-BC-2020-07, dated 22 October 2021”, Kosovo Police, 25 November 2021, Confidential at page 12

continuing to enforce the conditions of interim release through the use of a [REDACTED]<sup>17</sup>.

21. There is no reason why the [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED] cannot be made available to the SPO to exercise a supervisory role of the deployment of these measures by Kosovo Police, if reassurance is appropriate.
22. Whilst no system, including the system at the SC Detention Facilities, can entirely eliminate any risk of illicit messages, the measures proposed greatly restrict the risk of obstruction and commission of further offences and are a proportionate response to the level of risk (as demonstrated by the regular use of house arrest and conditional release in Kosovo in cases of persons accused of offences under Articles 387, 388, 392 and 401 of the Kosovo Criminal Code)<sup>18</sup>.
23. The question is not whether Kosovo Police can implement measures which match that of the SC Detention Facilities. The question is whether the measures which can be implemented which sufficiently mitigate any potential risk.
24. Mr Gucati's level of influence is nothing like that of others in detention.
25. The SPO assertion that Mr Gucati cannot be trusted to comply with any condition imposed is inconsistent with the repeated findings of the Pre-Trial Judge and the Trial Panel that any risk of flight in Mr Gucati's case can be sufficiently mitigated by the imposition of conditions to his interim release.

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<sup>17</sup> KSC-BC-2020-07/F00449/eng, "Reply to Request Number KSC-BC-2020-07, dated 22 October 2021", Kosovo Police, 25 November 2021, Confidential at page 20

<sup>18</sup> KSC-BC-2020-07/F00449/eng, "Reply to Request Number KSC-BC-2020-07, dated 22 October 2021", Kosovo Police, 25 November 2021, Confidential at page 25



26. The wide attack on Kosovo Police and Kosovo's criminal justice system, in a filing protected by confidentiality, that is set out in paragraphs 24-28 of the SPO Submissions is unjustified and not evidence-based.
27. The report F00449 has been prepared by [REDACTED], [REDACTED]. [REDACTED] is not mentioned in any of the materials included by the SPO in Annex 1 to the SPO Submissions.
28. It is unclear whether the SPO alleges that [REDACTED] has '[REDACTED]' (paragraph 24), and/or is involved in [REDACTED] (paragraph 25), had any involvement in '[REDACTED]' (paragraph 26), and has '[REDACTED]' (paragraph 27). The SPO neither states so or sets out any proper basis for so alleging.
29. If that is the allegation, the SPO ought to have made it explicitly, or else the Trial Panel ought to ignore the attack made on [REDACTED].
30. There is no good reason [REDACTED]:
- “[REDACTED].
- [REDACTED”<sup>19</sup>.

### *Proportionality*

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<sup>19</sup> KSC-BC-2020-07/F00449/eng, “Reply to Request Number KSC-BC-2020-07, dated 22 October 2021”, Kosovo Police, 25 November 2021, Confidential at page 22

31. Mr Gucati will have been in detention for 15 months by 22<sup>nd</sup> December, the equivalent stage at which he would be eligible for early release under Article 51 of the Law from a sentence of 22 months' imprisonment.

32. No sentence of that length has been imposed in any previous comparable case.

#### IV. CONCLUSION

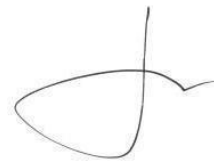
33. Mr Gucati's release from the Detention Unit, with or without conditions, should be ordered.

34. Mr Gucati will comply with any conditions imposed.

#### V. CLASSIFICATION

35. This filing is classified as confidential pursuant only to Rule 82(4) as it refers to the SPO Submissions which they deemed confidential. Both the SPO Submissions and this filing should be re-classified as public.

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