

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 Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

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I. INTRODUCTION

1. In its Order for Submissions on the Kosovo Police and Registry Reports and on Detention Review,¹ the Trial Panel ordered the Defence to submit observations on the Reports and respond to the submissions of the Specialist Prosecutor's Office ("SPO") on continued detention, if they so wish, by 16 December 2021.
2. The Defence for Mr. Haradinaj hereby responds to the SPO submissions² and Reports³ and renews its application for provisional release of Mr. Haradinaj for the remainder of the proceedings as continued detention has no justification in law or fact, in particular following the closure of the prosecution case.⁴

II. SUBMISSIONS

A. No grounded suspicion under Article 41(6)(a)

3. At paragraphs 3-4 of its submission, the SPO refers to the Trial Panel's Decision rejecting the dismissal of the charges against the Defendants for its

¹ KSC-BC-2020-07/F00472 at para. 12(b).

² KSC-BC-2020-07/F00490.

³ KSC-BC-2020-07/F00452 (Registry Report); F00449 (Kosovo Police Report).

⁴ Rule 129 of the Rules of Procedure and Evidence; Trial Transcript, 8 November 2021, at p. 2030.

proposition that a grounded suspicion continues to exist.⁵ However, no such determination was made in the Decision; no mention of “suspicion” was made whatsoever.

4. The trial has now progressed significantly. Most of the evidence has been heard and the SPO case has long closed. The Defence maintains that the SPO evidence, taken at its best, has undermined any previously held suspicion that the Defendants can be held criminally responsible for any of the charges.⁶

B. No Necessity for detention

5. The SPO claims that all risks continue to exist under Article 41(6)(b) of the Law.⁷ The Defence for Mr. Haradinaj rejects such submissions in their entirety and addresses the various risks below.

1. No risk of flight

6. According to the SPO, the opposition of the Defendants to the Specialist Court gives them the “*means, incentive and opportunity to flee.*”⁸ The Defence strongly opposes such immeasurable interferences, taken from the expression of the free opinions that the Defendants are entitled to hold. The Defendants expressed such opinions long before they were being charged, arrested, and

⁵ KSC-BC-2020-07/F00490 at para 3-4; KSC-BC-2020-07/F00450, at para. 88.

⁶ KSC-BC-2020-07/F00440.

⁷ KSC-BC-2020-07/F00490, at paras. 5-6.

⁸ KSC-BC-2020-07/F00490, at para. 7.

brought to trial and before they knew holding an opinion would keep them from being provisionally released. Therefore, reliance on opinions to say they are a risk of flight from a Court they are being tried at is vastly exaggerated and blown out of all proportion.

7. Then, at paragraph 8 of its submission, the SPO once again highlights that Mr. Haradinaj was allegedly particularly “*evasive*” during his arrest.⁹ This is not accepted and this is a preposterous proposition that has been consistently countered by the Haradinaj Defence,¹⁰ by the Defendant himself¹¹ and recently in witness evidence for the Defence.¹² In short, in full knowledge that Hysni Gucati had been arrested at the WVA, Mr. Haradinaj travelled to the site of Mr. Gucati’s arrest. This does not show an intention to evade or escape arrest. Therefore, it is denied that there is a risk of flight.

2. No risk of obstruction of proceedings

8. The SPO maintains its previous hypothetical allegations that the Defendant continues to pose a risk by obstructing the proceedings at the SC if released.¹³
9. The Defence for Mr. Haradinaj points out that the trial proceedings have demonstrated his behaviour thus far would indicate the opposite. Mr.

⁹ KSC-BC-2020-07/F00490, at para. 8.

¹⁰ See, e.g., KSC-BC-2020-07/F00371.

¹¹ See, e.g., KSC-BC-2020-07/F00490.

¹² See, e.g., Statement of Hysni Gucati, DHG0485, at para. 55; Statement of Metush Kryeziu, DHG0217, at para. 21.

¹³ KSC-BC-2020-07/F00490, at paras. 10-11.

Haradinaj has consistently attended the trial proceedings, even when unwell, after having contracted and recovered from COVID-19. He has not obstructed or disrupted the trial from going forward in an efficient and effective way and has done nothing that could be construed as seeking to “*obstruct*” these legal proceedings against him, nor any other proceedings at the SC.

10. To the contrary, Mr. Haradinaj is acting respectfully, is engaged in his Defence and adamant about understanding the process as it unfolds in the courtroom. Such compliance should not be punished by baseless allegations he poses a risk to further obstruct when released, pending a judgment in his case. Rather this behaviour shows that being faced with criminal proceedings, he is taking them seriously and does *not* seek to obstruct the SC in any way. Furthermore, one cannot equate (a) expressing opinions about a selective and deficient institution with (b) obstructing one’s own criminal case. They are two distinct matters. The Defendant’s approach to either is not comparable; nor does his behaviour in relation to one inform his behaviour in relation to the other.
11. The SPO further makes the rather preposterous allegation that the Defendant would use disclosed material and disseminate it if he were released.¹⁴ The Defence received disclosures it was entitled to in order to prepare its Defence; disclosures which had thus previously been wrongly withheld by the SPO.¹⁵

¹⁴ KSC-BC-2020-07/F00490, at para. 13.

¹⁵ KSC-BC-2020-07/F00413, at para. 48.

Using the fact that these disclosures were given to the Defendants cannot be a ground to withhold the right to provisional release. Following that logic of the SPO, the Defendant could never be released. This argument is therefore rejected in the strongest of terms.

3. No risk of committing further offences

12. At paragraph 13, the SPO argues that both Defendants vowed to further disseminate information. The SPO referred to the trial hearing transcript of 6 December 2021 but the responses from Mr. Gucati in that transcript do not support this.¹⁶ Any statement the SPO referred to has been made before the Defendants were charged and arrested for alleged conduct they genuinely deemed and continue to believe to be legal, justifiable and in the public interest.

13. It is submitted that the SPO submissions that there is a risk of further obstruction if the Defendant were to be released, is hypothetical and baseless.

C. Conditions sufficiently mitigate risks identified

1. Conditions are sufficient

14. The SPO makes the following absolute statement in paragraph 14 of its submission. It *“remains clear that no conditions of release in Kosovo can*

¹⁶ KSC-BC-2020-07/F00490, at para. 13, Transcript of Hearing, 6 December 2021, p. 2219; 081344-02-TR-ET Revised, p.4.

mitigate the particular risks; argue that if deemed sufficient the KP “cannot effectively enforce them.”¹⁷ (emphasis added)

15. From the SPO submissions it is clear that *no conditions for release in Kosovo whatsoever* are sufficient in the SPO’s view. What the SPO’s arguments boil down to is that it considers any measures less than those in place at the Detention Centre to be inadequate.¹⁸ For example, the SPO compares the number of proposed Kosovo Police officers as not being sufficient compared to the officers at the Detention Unit.¹⁹ The same arguments are made regarding measures for the supervision of visits.²⁰ In simple terms, the SPO would request for a Detention Centre to be built around the Defendant’s home and despite provisional release on paper, to continue *de facto* imprisonment. This is not the purpose of provisional release.

16. Moreover, some of the SPO’s suggestions of measures to be imposed on provisional release even go beyond restrictions imposed at the Detention Centre. For example, regarding monitoring inside the residence.²¹ The SPO suggests family members also ought to be monitored,²² and is in effect trampling on the right to privacy and confidential communication by seeking

¹⁷ KSC-BC-2020-07/F00490, at para. 14.

¹⁸ KSC-BC-2020-07/F00490, at para. 17ff.

¹⁹ KSC-BC-2020-07/F00490, at para. 17.

²⁰ KSC-BC-2020-07/F00490, at para. 18.

²¹ *Ibid.*, at para. 19

²² *Ibid.*

to impose even more stringent measures on communication than those that are in place at the Detention Centre. Even at the Detention Centre it is recognised that Defendants are entitled to minimum confidentiality and privacy. If the SPO were to have it their way, no such protections would apply. Such an approach and legal understanding by the SPO when it comes to matters for the Accused is yet again deeply concerning.²³ Ironically, on the other hand, the SPO does appear very concerned about privacy rights of neighbours under the ECHR.²⁴

17. The SPO's objections to the Kosovo Police measures²⁵ and their counter-proposals for more stringent conditions are thus clearly blown out of all proportion, with extensive prejudice to the Defendant.

2. The Kosovo Police can enforce the conditions

18. At paragraph 24, the SPO relies on allegations of involvement in organised crime involving a defence witness and [REDACTED], and [REDACTED], claimed known loyalists of [REDACTED]. The SPO takes these allegations further, speaking of general corruption within the Kosovo Police,²⁶ arguing their objectivity cannot be assured.²⁷ The Haradinaj Defence categorically

²³ KSC-BC-2020-07/F00413, at para. 48.

²⁴ KSC-BC-2020-07/F00490, at para. 20.

²⁵ KSC-BC-2020-07/F00449.

²⁶ KSC-BC-2020-07/F00490, at para. 23-24.

²⁷ KSC-BC-2020-07/F00490, at para. 28.

rejects such submissions as both unfounded allegations and as allegations that the Trial Panel cannot base itself on as established facts.

19. The SPO closes with the exclamation, at paragraph 29 of its submission, that provisional release would create an “*existential threat to fair and expeditious conduct of this case and others before this Court.*”²⁸ This ought to be rejected as another statement of hyperbole categorically blown out of proportion combined with baseless allegations of implications for other cases.

D. Detention does not remain proportionate

20. The Defendant has now been imprisoned for fourteen months of which, for significant periods he had little or no access to family visits.
21. The length of detention must be balanced against the Article 41(6) risks. This length of detention, given the risks alleged by the SPO are not present, is submitted to not be proportionate anymore at this stage.

III. RELIEF SOUGHT

²⁸ KSC-BC-2020-07/F00490, at para. 29.

22. For the foregoing reasons the Defence requests the provisional release of Mr. Haradinaj. Conditions are not necessary given the risks claimed by the SPO are not present.

23. However, if conditions are deemed necessary by the Trial Panel, the Panel is invited to be guided by the Report of the Kosovo Police.²⁹

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²⁹ KSC-BC-2020-07/F00449.