



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: **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 Prosecutor
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Prosecution consolidated submissions for review of detention

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I. INTRODUCTION

1. Following further *inter-partes* discussions, the SPO files its consolidated detention submissions in accordance with the order of the Trial Panel.¹

2. The continued detention of Hysni Gucati and Nasim Haradinaj (collectively, the 'Accused') remains necessary. The established reasons for detention all continue to exist.² No conditional release regime can sufficiently mitigate the risks involved or be effectively enforced by the Kosovo Police. In light of the closing of the evidence in the case³ and the impending trial judgment, the Article 41(6)(b) risks justifying detention⁴ remain as high as ever and no conditions can sufficiently mitigate them.

II. SUBMISSIONS

3. For purposes of a detention review under Rule 57(2), the reasons or circumstances underpinning detention must be reviewed in order to determine whether these reasons continue to exist under Article 41(6) of the Law.⁵ Whether or

¹ Order Varying the Time Limit for Submissions for the Next Detention Review, KSC-BC-2020-07/F00537, 28 January 2022, para.12(b).

² See Article 41(10) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Rule 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'); Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention, KSC-BC-2020-07/IA002/F00005, 9 February 2021, para.55 ('[t]he 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'). See also *Prosecutor v. Thaçi et al.*, 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, paras 13-16. All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified. The same applies with references to 'Rule' or 'Rules' vis-à-vis the Rules.

³ Decision on the Closing of the Evidentiary Proceedings and on Submissions Pursuant to Rules 134(b), (d) and 159(6) of the Rules, KSC-BC-2020-07/F00553, 3 February 2022.

⁴ Public Redacted Version of Decision on Review of Detention of Hysni Gucati, KSC-BC-2020-07/F00506/RED, 21 December 2021 ('December 2021 Gucati Decision'); Public Redacted Version of Decision on Review of Detention of Nasim Haradinaj Specialist Prosecutor, KSC-BC-2020-07/F00507/RED, 21 December 2021 ('December 2021 Haradinaj Decision').

⁵ Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention, KSC-BC-2020-07/IA002/F00005, 9 February 2021, para.55.

not circumstances have changed since the last review is a relevant consideration and can be determinative.⁶ The Trial Panel should not be expected to entertain submissions that merely repeat arguments that have already been addressed in previous decisions.⁷

A. GROUNDED SUSPICION UNDER ARTICLE 41(6)(A)

4. The Trial Panel has previously found there to be grounded suspicion within the meaning of Article 41(6)(a),⁸ following the Pre-Trial Judge's finding of an even higher 'well-grounded suspicion' in the Confirmation Decision⁹ as corroborated by the Rule 130 Decision.¹⁰

5. Since the last detention review, all remaining evidence has been presented. Nothing in this remaining evidence vitiates the clear conclusion that a grounded suspicion exists within the meaning of Article 41(6)(a).

B. NECESSITY OF DETENTION

6. Articulate grounds remain for the continued detention of the Accused. The applicable standard is less than certainty, but more than a mere possibility of a risk materialising.¹¹ Thus, based on the evidence available, the specific articulable grounds must support the belief that any of the risks under Article 41(6)(b) of the Law exists. It

⁶ *Prosecutor v. Shala*, Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Review of Detention, KSC-BC-2020-04/IA003/F00005/RED, 11 February 2022, para.18.

⁷ *Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Review of Detention, KSC-BC-2020-06/IA006/F00005/RED, 1 October 2021 ('Krasniqi Appeal Decision'), para.17.

⁸ December 2021 Gucati Review Decision, KSC-BC-2020-07/F00506/RED, paras 24-26; December 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00507/RED, paras 24-27.

⁹ Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2020-07/F00074/RED, 11 December 2020 (redacted version notified 22 December 2020) ('Confirmation Decision').

¹⁰ Decision on the Defence Motions to Dismiss Charges, KSC-BC-2020-07/F00450, 26 November 2021 ('Rule 130 Decision').

¹¹ *Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Review of Detention, KSC-BC-2020-06/IA007/F00005/RED, 1 October 2021, para.19.

is sufficient for one of the risks to be met for detention to be maintained, as the conditions set forth in Article 41(6)(b) are alternative to one another.¹²

7. All risks under Article 41(6)(b) continue to be met for the reasons set forth below.

1. Risk of flight

8. Noting the Trial Panel's previous findings,¹³ a risk of flight exists for both Accused. Given Mr Haradinaj's testimony following the last review, now both Accused have testified that they made public the batches underlying the charges in this case ('Batches') because they are opposed to the KSC¹⁴ and do not recognise it.¹⁵

9. In their capacity as the former Head and Deputy Head of the KLA WVA – estimated as having over 10,000 members¹⁶ – each can call upon the resources of the organisation to assist in any attempt to flee. The KLA WVA members who testified in this case share the same anti-KSC bias as the Accused.¹⁷ In an interview given on the first day of Mr Haradinaj's testimony, Faton Klinaku promised to publish further materials like the Batches.¹⁸ These supporters of the Accused remain active and can provide both the means and opportunity to facilitate the flight of the Accused.

¹² Krasniqi Appeal Decision, KSC-2020-06/IA006/F00005/RED, para.37.

¹³ December 2021 Gucati Review Decision, KSC-BC-2020-07/F00506/RED, paras 30-31; December 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00507/RED, paras 31-32.

¹⁴ DW1249, T.2875-76; DW1240, T.2174-75, 2179, 2181, 2195.

¹⁵ DW1249, T.2954 ('[a]nd you are pretending to be a court of my country. I do not recognise you'); DW1240, T.2206. *See also* P00025ET, pp.1-2.

¹⁶ DW1240, pp.2529-30.

¹⁷ *Egs* DW1243, T.2533, 2537-38 (from 2537: 'Q. And were you happy that statements of protected witnesses had been made public that day, Mr. Marashi? A. Yes, I remain happy to this day.');

¹⁸ Kanal 10 Interview, 11 January 2022, 104516-01-TR-ET ('Journalist: You have also seen that the court has used several interviews of Mr HARADINAJ, including his interview in this programme, in which he proudly says that he will publish everything that he receives, the more information that comes in... Faton KLINAKU: Not that Nasim said so, but I have said it continuously, I say it tonight as well; let them bring in more and I will reveal them [...]').

10. Each Accused now knows that the trial judgment in this case is imminent. The prospect of a conviction in the near future gives the highest incentive yet to flee.¹⁹

11. For Mr Haradinaj in particular, his behaviour during his arrest further suggests he is a flight risk. Haradinaj's evasive manoeuvres and uncooperative conduct upon arrest are recounted in the Registry's report previously given weight by the Trial Panel.²⁰ Mr Haradinaj's testimony of his own conduct during his arrest repeats submissions raised by his counsel and rejected in previous detention reviews.²¹

12. These considerations, in conjunction with the upcoming trial judgment and the possibility of a serious sentence in the event of a conviction, may provide the necessary incentive for the Accused to obtain funds and means to travel and eventually evade KSC proceedings. Risk of flight exists for both Accused, and at this point in the proceedings this risk cannot be mitigated by conditions for either of them.

2. Risk of obstructing the progress of KSC proceedings

13. The Trial Panel has found a risk of obstructing the progress of KSC proceedings exists for both Accused that persisted after the closure of the SPO's evidence.²² The determination of the guilt or innocence of the Accused must wait until the Trial Panel's

¹⁹ See similarly ICTY, *Prosecutor v. Limaj et al.*, Decision on Defence Renewed Motion for Provisional Release of Fatmir Limaj, IT-03-66-T, 26 October 2005, para. 11 ('[i]n indeed, in-so-far as the prospects of conviction and punishment may well encourage flight by the Accused, it should be noted that, at this stage, the Accused has heard all the evidence and submissions. It is likely to be his personal evaluation of prospects of conviction which would influence his conduct, rather than this Chamber's ultimate appreciation of the law and the evidence. The Chamber is not in a position to evaluate how the Accused might see his prospects at this stage. Hence, it has been held that proximity to judgement is a factor which might militate against an order for provisional release. Depending on the assessment of an accused of his prospects of conviction, the risk of flight may well be at its highest at this stage of the proceedings').

²⁰ December 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00507/RED, para.31.

²¹ DW1249, T.2792-94, 2802-08; See Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00280, 23 August 2021, paras 21-24.

²² December 2021 Gucati Review Decision, KSC-BC-2020-07/F00506/RED, paras 34-37; December 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00507/RED, paras 35-38. The SPO closed its evidence presentation on 10 November 2021. Prosecution notice of the closing of its case, KSC-BC-2020-07/F00431, 10 November 2021.

judgment, but the evidence led on the conduct of the Accused in September 2020 shows that their willingness and ability to obstruct the progress of KSC proceedings is real. From the nature of the risks involved, and noting in particular that Batch 3 is internal work product analysing evidence in relation to the four Accused in the *Thaçi et al.* case,²³ the Accused pose a risk of obstructing KSC proceedings beyond the present case.

14. The Accused are aware of the full case against them, including all confidential information received to date in this trial. They now have the maximum means and opportunity to obstruct the proceedings.

15. The fate of witnesses in former KLA trials further demonstrate the risks posed by the easily mobilised supporters and sympathisers of the Accused.²⁴ When these factors are considered against the climate of intimidation of witnesses in previous Kosovo cases,²⁵ the risk of the Accused disseminating confidential information has never been higher. As Haradinaj Defence expert witness DW1253 recently testified about Kosovo:

Q. Yes. And you say that it was quite frightening, that you have never seen anything like that, and there is a fear that was ingenerated in the society. Can you elaborate on that?

A. Yeah, I mean, it's as if you're a traitor to the cause. And, yeah, that was -- it was the -- always the undertone. And, I mean, you can speak with any of the trial attorneys that worked on the cases or the investigators who worked on the cases, and they would go and speak to a witness one day and they would go back another day and the witness had either gone out of the country

²³ See, e.g., P00106.

²⁴ See Prosecution consolidated submissions for review of detention, KSC-BC-2020-07/F00356, 8 October 2021, para.3 (and further citations therein).

²⁵ See DW1240, T.2310-18. See generally, egs, P00166, ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Judgement, 3 April 2008, para. 6; ICTY, *Prosecutor v. Beqaj*, IT-03-66-T-R77, Judgement on Contempt Allegations, 27 May 2005; ICTY, *Prosecutor v. Haxhiu*, IT-04-84-R77.5, Judgement on Allegations of Contempt, 24 July 2008; ICTY, *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4-A, Judgement, 23 July 2009; UNMIK, *Prosecutor v. Balaj et al.*, PN.222/2002, Detention Decision of Supreme Court of Kosovo, 13 September 2002, p.3 (upholding an extension of detention in light of '[t]he long list of threats directed mainly against the life and safety of witnesses'); OSCE, *Kosovo's War Crimes Trials: An Assessment Ten Years On (1999-2009)*, May 2010, at <https://www.osce.org/kosovo/68569?download=true>, p.26.

or they refused to be interviewed any further. [... I'm not pointing the finger at any one individual or organisation, but it was just an undercurrent that was there.²⁶

3. Risk of committing further crimes

16. There remains a risk that the Accused will commit further crimes, as previously found by the Trial Panel.²⁷ The conduct charged in this case amounts to obstruction of the proceedings, and the vow of both Accused to continue to disseminate SITF/SPO information²⁸ demonstrates that such incidents would continue if the Accused are released. Considering what the Accused have done previously when given confidential information, there is every reason to believe detention remains necessary to prevent the commission of further offences.

C. NO CONDITIONS SUFFICIENTLY MITIGATE THE RISKS IDENTIFIED

17. In the last review of detention, the Trial Panel enquired into the enforceability of measures alternative to detention following submissions of both the Kosovo Police²⁹ and the Registry³⁰ The SPO recalls its previous submissions that the conditions proposed are insufficient and the Kosovo Police cannot effectively enforce them.³¹ These submissions remain applicable in the present review.

18. The Trial Panel rejected the conditional release regime proposed by the Kosovo Police, focusing on, *inter alia*, these considerations:

²⁶ DW1253, T.3306-07.

²⁷ December 2021 Gucati Review Decision, KSC-BC-2020-07/F00506/RED, para.40; December 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00507/RED, para.41.

²⁸ DW1249, T.3024; DW1240, T.2219; P00002ET, p.4.

²⁹ Reply to Request number KSC-BC-2020-07, dated 22 October 2021, KSC-BC-2020-07/F00449/eng, 2 December 2021, Confidential (Albanian version notified 25 November 2021).

³⁰ 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.

³¹ Public redacted version of Prosecution consolidated submissions for review of detention, KSC-BC-2020-07/F00490/RED, 10 December 2021, (redacted version notified 21 January 2022; with one public annex), paras 15-30.

- i. The conditions proposed do not allow for adequate monitoring of communications at the residence or place of house arrest of the Accused.³²
- ii. The Kosovo Police are not in a position to scrutinise any intended media communications with a view to preventing obstruction of KSC proceedings.³³
- iii. The conditions proposed do not sufficiently mitigate the risk of transmitting coded or obscure language at external medical facilities, noting also the potentially highly intrusive measures and resulting interference with the privacy rights of third persons.³⁴
- iv. Though not a dispositive consideration, it cannot be excluded 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 a view to interfere with the course of justice at the KSC.³⁵
- v. No further additional measures could be imposed to mitigate the risks at issue and, given the ample opportunity the Kosovo Police have had to make submissions already, no additional information would be of assistance.³⁶

19. Since the last review, nothing has changed that would affect these considerations or the conclusion that the proposed conditions are insufficient to mitigate the risks presented under Article 41(6)(b). It is only through the communication monitoring framework applicable at the KSC's detention facilities that the communications of the Accused could be effectively controlled with a view to sufficiently mitigate the risks.³⁷

³² December 2021 Gucati Review Decision, KSC-BC-2020-07/F00506/RED, paras 58-70; December 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00507/RED, paras 56-68.

³³ December 2021 Gucati Review Decision, KSC-BC-2020-07/F00506/RED, paras 71-74; December 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00507/RED, paras 69-72.

³⁴ December 2021 Gucati Review Decision, KSC-BC-2020-07/F00506/RED, paras 75-78; December 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00507/RED, paras 73-76.

³⁵ December 2021 Gucati Review Decision, KSC-BC-2020-07/F00506/RED, paras 81-83; December 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00507/RED, paras 79-81.

³⁶ December 2021 Gucati Review Decision, KSC-BC-2020-07/F00506/RED, paras 85-87; December 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00507/RED, paras 83-85.

³⁷ December 2021 Gucati Review Decision, KSC-BC-2020-07/F00506/RED, paras 88-89; December 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00507/RED, paras 86-87.

D. DETENTION REMAINS PROPORTIONATE

20. The length of detention must be balanced against the Article 41(6) risks and the circumstances of the case as a whole, including the potential penalties for the crimes charged.³⁸

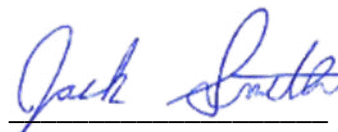
21. The Trial Panel previously found in December 2021 that detention was proportionate,³⁹ and this trial continued to move expeditiously since then. The evidence presentation closed and, noting especially Rule 159(1), the trial judgment is expected shortly.

22. Nothing indicates that detention thus far is or is approaching being unreasonable. Significant further detention will not be necessary in order to resolve the charges against the Accused. There have not been any unjustified delays, and the rights of the Accused have been fully respected. Given, *inter alia*, the closing of the evidence, the lengthy custodial sentence if convicted, and the heightened risks if released, detention continues to be reasonable and proportionate.

III. RELIEF REQUESTED

23. For the foregoing reasons, the detention of the Accused should be extended.

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Monday, 14 February 2022
At The Hague, the Netherlands

³⁸ See ICC, *Prosecutor v. Bemba et al.*, Judgment on the appeals against Pre-Trial Chamber II's decision regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, ICC-01/05-01/13-969, 29 May 2015, para.45.

³⁹ December 2021 Gucati Review Decision, KSC-BC-2020-07/F00506/RED, paras 92-94; December 2021 Haradinaj Review Decision, KSC-BC-2020-07/F00507/RED, paras 90-92.