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 Nasim Haradinaj
Date:	17 February 2022
Language:	English
Classification:	**Public**

Defence Response to Prosecution Consolidated Submissions for Review of Detention

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I. INTRODUCTION

1. The Defence for Mr. Nasim Haradinaj ("Haradinaj Defence") seek to Reply to the Consolidated Submissions of the Special Prosecutor's Office ("SPO") Regarding Submissions for Review of Detention, as filed on 14 February 2022 ("Consolidated Submissions").[1]

II. BACKGROUND AND CHRONOLOGY

2. The background and chronology to this issue has already been outlined on a number of occasions and is therefore not repeated here.

III. THE LAW

3. For the purposes of a detention review under Rule 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), the necessity and proportionality of continuing to detain an accused is assessed per the provisions of Article 41(6) of the Law on the Specialist Chambers and Specialist Prosecutor's Office, Law No. 05/L-053 ("Law").

[1] *Prosecutor v. Hysni Gucati and Nasim Haradinaj*, KSC-BC-2020-07, Prosecution Consolidated Submissions for Review of Detention, 14 February 2022.

4. Pursuant to Article 41(6), an individual can only be detained when "*there is a grounded suspicion that he or she has committed a crime within the jurisdiction of the Specialist Chambers*" and where there are articulable grounds to believe that:

   a. there is a risk of flight;

   b. 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

   c. 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 in which he or she has threatened to commit.

5. As per Article 3(2)(e) of the Law, the Kosovo Specialist Chambers and Specialist Prosecutors Office ("KSC") is obliged to function in accordance with:

> *"international human rights law which sets criminal justice standards including the European Convention on Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, as given superiority over domestic laws by Article 22 of the Constitution."* (emphasis added)

6. Interpretations and applications of the bail provisions in Article 41(6) must therefore be interpreted concurrently with, at a minimum, the standards laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), and the International Covenant on Civil and Political Rights ("ICCPR").

7. The review of detention at two-month intervals is automatic,[2] and the burden of showing that continued detention is lawful falls to the SPO.[3] Where the SPO is unable to show that continued detention is necessary, Mr. Haradinaj must benefit from the presumption in favour of bail.[4]

IV. SUBMISSIONS

8. Given that the burden lies with the SPO to demonstrate why Mr. Haradinaj should continue to be detained (the presumption otherwise being that he should not), the submissions made here respond exclusively to those made by the SPO in its consolidated submissions. Those submissions are therefore as follows:

[2] KSC-CC-PR-2020-09/F00006

[3] KSC-BC-2020-06, IA004, F00005/RED; KSC-CC-PR-2017-01/F0004.

[4] Eur. Court HR. *Tomasi v. France* (application no. 12850/87) (Judgment), para. 89. This is also reinforced by Article 9(3) ICCPR, see Human Rights Committee, General Comment No. 8, para. 3 in which it is stated that "*pre-trial detention should be an exception and as short as possible*" and that "bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the state party" (Human Rights Committee Communication No. 526/1993, *Hill v. Spain*, para. 12.3).

a. that the SPO fail to qualify the importance of the existence of a 'grounded suspicion' in justifying Mr. Haradinaj's detention;

b. that Mr. Haradinaj's continuing detention is unnecessary;

c. that the risk posed by Mr. Haradinaj could be adequately managed by bail conditions; and

d. that Mr. Haradinaj's continued detention is disproportionate.

The SPO fail to qualify the importance of the existence of a 'grounded suspicion'

9. Whilst it is understood that the existence of a 'grounded suspicion' is necessary to justify ongoing detention, it is recalled that this is ultimately insufficient to justify that detention in and of itself. In *Podvezko v. Ukraine*,[5] the European Court held that the reasons given by the national authorities as acceptable reasons for detention, "*cannot be gauged solely on the basis of the severity of the sentence risked*", as other factors must be considered, too. In making such a determination, the Court is required to consider 'relevant and sufficient reasons'.

10. In *Wemhoff*,[6] the European Court stated that the Court:

[5] Eur. Court HR, *Podvezko v. Ukraine*, Application No. 74297/11, judgment of 12 February 2015, para. 20 (see also *Letellier v. France*, judgment of 26 June 1991, Series A No. 207).

[6] Eur. Court HR, *Wemhoff v. Germany*, judgment of 27 June 1968, Series A No. 7, para. 12.

> "*must judge whether the reasons given by the national authorities to justify continued detention are relevant and sufficient to show that detention was not unreasonably prolonged and contrary to article 5(3) of the Convention*."

11. The SPO's submissions fail to highlight that the right to liberty encompassed by Article 5 ECHR, which affords Mr. Haradinaj a presumption in favour of bail, can be split into two phases, which include: (a) the early stages following an arrest on suspicion of having committed an offence; and (b) the following period pending trial or prior to conviction.[7]

12. During the initial stage following arrest, a person's detention may be justified, *inter alia*, by the existence of a reasonable suspicion that they have committed a criminal offence.[8]

13. However, whilst the persistence of that reasonable suspicion is a condition *sine qua non* for the validity of continued detention, as time progresses the justificatory threshold for continued detention becomes steadily more difficult to satisfy.[9] Accordingly, reasonable suspicion alone will not suffice to justify continued detention, nor will the gravity of any charge, such that the detainee will benefit from a presumption in favour of bail unless and until

[7] Eur. Court HR, *McKay v. the United Kingdom* (application no. 543/03) (Judgment), para. 31.

[8] Eur. Court HR, *Assenov and Others v. Bulgaria, judgment of 28 October 1998, Report 1998-VIII*, p. 3300, para. 154

[9] Eur. Court HR, *Assenov and Others v. Bulgaria, judgment of 28 October 1998, Report 1998-VIII*, p. 3300, para. 154

further 'relevant' and 'sufficient' reasons can be shown justifying continued detention.[10]

14. This is relevant for two reasons.

15. Firstly, whilst it is accepted that the SPO raise grounds in addition to the existence of a reasonable suspicion, it is highlighted that the existence of this suspicion is merely a condition that is necessary, but at this stage in the trial, now insufficient, to justify ongoing detention. This remains so regardless of the SPO's attempts to recalibrate this reasonable suspicion into a legally nebulous and supposedly "*even higher 'well-grounded suspicion'*".[11]

16. Secondly, when considering the SPO's submissions, it is imperative to take into account as a contextualising factor that given the length of time in which Mr. Haradinaj has been in detention, the burden on the SPO is now higher than it has ever been before to justify his continued detention.

17. It is submitted that the SPO has not, and, in light of factual realities, cannot, justify this threshold.

Mr. Haradinaj's continuing detention is unnecessary

18. It is submitted that none of the factors relied upon by the SPO in fact justify the necessity of Mr. Haradinaj's continued detention.

[10] Eur. Court HR, *Muşuc v. Moldova* (application no. 42440/06) (Judgment), para. 42.

[11] Consolidated Submissions, para. 4.

Mr. Haradinaj does not pose an unmanageable flight risk

19. When addressing the issue of Mr. Haradinaj's flight risk, the SPO reference the fact that "*[e]ach Accused now knows that the trial judgment in this case is imminent*"[12] and is aware of "*the possibility of a serious sentence in the event of a conviction*",[13] which supposedly gives Mr. Haradinaj "*the highest incentive yet to flee*".[14]

20. At no stage in these proceedings has the SPO ever demonstrated that the risk of flight is anything other than meaningless rhetoric. There is no evidence before the Panel to suggest that there is a risk, real or otherwise, that Mr. Haradinaj would seek to flee the jurisdiction.

21. Whilst it is accepted that the trial judgment is imminent, it is recalled that the danger of absconding "*cannot be gauged solely on the basis of the severity of the sentence risked*",[15] and "*should be assessed with reference to various factors, especially those relating to the character of the person involved, his morals, his home, his occupation, his assets, his family ties and all kinds of links with the country in which he is being prosecuted.*"[16] In this regard, as the Specialist Chambers is a

[12] *Ibid*, para. 10.

[13] *Ibid*, para. 12.

[14] *Ibid*, para. 10.

[15] Eur. Court HR, *Tomasi v France* (application no. 12850/87) (Judgment), para. 98.

[16] *Grishin v. Russia* (application no. 14807/08), (Judgment) para. 143.

domestic institution of the Republic of Kosovo, it is reference to Kosovo that is relevant, ***not*** the Netherlands or any other State.

22. It is recalled that Mr. Haradinaj has a significant number of protective factors mitigating his risk of flight from Kosovo, including his family, whom he has been separated from throughout trial proceedings, and a network of close associates, both within and outside of the KLA-WVA.

23. The SPO consider none of these factors.

24. Instead, when attempting to carry out this applied assessment, the SPO stress primarily the fact that:

> *"[i]n their capacity as the former Head and Deputy Head of the KLA WVA – estimated as having over 10,000 members - 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. In an interview given on the first day of Mr Haradinaj's testimony, Faton Klinaku promised to publish further materials like the Batches. These supporters of the Accused remain active and can provide both the means and opportunity to facilitate the flight of the Accused."*[17]

25. It bears repeating that membership of the KLA-WVA and the expression of legitimate and well evidenced opposition to the operation of the KSC is not a

[17] Consolidated Submissions, para. 9.

crime; Mr. Haradinaj was entitled to hold his position as Deputy Head of the KLA-WVA and he and his members are entitled to express their views on the KSC. It is thus a non-sequitur to suggest that either of these factors materially increase the likelihood that Mr. Haradinaj would attempt to abscond or be assisted in the same by his membership.

26. Taking this submission further, it is also stressed that the comments of Mr. Klinaku or any other KLA-WVA member may be relevant to, but cannot be determinative of, the risk factors posed by Mr. Haradinaj, as to do so is to determine the appropriateness of his ongoing detention in light of factors that are entirely beyond his control.

27. Finally, it is also noted that Mr. Haradinaj continues to deny seeking, and the SPO are unable to prove that he sought, to evade arrest, such that submissions regarding the same cannot be dispositive as to the propriety of his continued detention.

28. It is therefore submitted that the SPO's submissions regarding Mr. Haradinaj's supposed risk of flight are speculative and draw together factors which do not materially increase this risk. In fact, taken at their very highest those submissions raise only a "*mere possibility of [that] risk materialising*", which, as noted by the SPO itself,[18] is insufficient to justify ongoing detention.

[18] Consolidated Submissions, para. 6.

Mr. Haradinaj does not pose a risk of obstructing proceedings

29. In addressing Mr. Haradinaj's supposed risk of obstructing proceedings, the SPO allege that:

> "*the evidence led on the conduct of [Mr. Haradinaj] in September 2020 shows that [his] 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*."[19]

30. This generalised reference to the conduct and content of proceedings manifestly fails to present a substantiated risk that Mr. Haradinaj is in fact at risk of obstructing proceedings if provisionally released, instead presenting only "*stereotyped terms, such as 'having regard to the nature of the offence, the state of the evidence and the content of the case file'*",[20] contrary to the settled jurisprudence of the ECtHR.

31. Further, and in any case, these submissions fail to engage with the fact that Mr. Haradinaj has no possession of the documents concerning the instant matters, all of which, it is the SPO's case, have been seized.

[19] *Ibid*, para. 13.

[20] Eur. Court HR., *Cahit Demirel v. Turkey* (application no. 18623/03) (Judgment) paras. 24-25.

32. Indeed, the contingency of having possession of those documents was even acknowledged in the comments made by Mr. Klinaku, who only threatened to "*publish more confidential KSC documents if he obtained them*"[21] (emphasis added).

33. Mr. Haradinaj has made clear throughout these proceedings that any act which he undertook was solely in the interests of full transparency and in the public interest.

34. Mr. Haradinaj, in his evidence at trial made the point very clear when he was questioned on the point by confirming that any public disclosures, protected as public interest disclosures, were logically dependent upon the SPO's leak of material, which, it is alleged, was formed part of conduct by the SPO that amounts to police incitement or entrapment. Furthermore, when questioned on the point, as noted at the relevant part of trial transcript, Mr Haradinaj's question was whether the SPO intended to make further leaks.[22]

35. Accordingly, unless the SPO has evidence that it is failing to disclose regarding further leaks from its Office, the risk posed is at this stage entirely abstract and again raises only a "*mere possibility of [that] risk materialising*", such that relying upon that risk as reason to deny Mr. Haradinaj's provisional

[21] *Ibid*.

[22] Transcript, 13 January 2022 (Public Redacted), p. 3022, lines 5-8.

release breaches the obligation to only continue that detention in light of real and substantiated risk factors.

36. In a related submission, the SPO also seek to suggest that Mr. Haradinaj's awareness of "*the full case against [him], including all confidential information received to date in this trial*" means that he now has "*the maximum means and opportunity to obstruct the proceedings*."[23]

37. No reference is made, however, as to how Mr. Haradinaj would, or could, seek to do so without access to any of that information, or the documents with which the instant proceedings are concerned, and in light of the fact that full protection measures were granted to those witnesses in respect of whom it was deemed necessary.

38. The SPO also fail to take into account that the supposedly confidential information that it is concerned about relates to proceedings which are now before the Trial Chamber for adjudication, thus all but extinguishing the already entirely abstract possibility that Mr. Haradinaj would even have the means necessary to conduct any obstructive actions.

39. Instead, the SPO make oblique reference to "*the climate of intimidation of witnesses in previous Kosovo cases*"[24], thus again raising abstract concerns which, taken at their highest, amount only to a "*mere possibility of [that] risk*

[23] Consolidated submissions, para. 14.

[24] Ibid, para. 15.

materialising", which cannot outweigh Mr. Haradinaj's presumption in favour of bail.

Mr Haradinaj does not present a risk of the commission of further crimes

40. Under this ground, the SPO merely repeats its abstract concerns regarding the risk that Mr. Haradinaj will disseminate information to which he has no access. To the extent that these concerns have been dealt with above, they are not further addressed here.

Mr. Haradinaj's risk factors could be managed by appropriate conditions

41. For the reasons noted above, it is submitted that Mr. Haradinaj's risk is manageable on unconditional bail: he is a man otherwise of good character with several protective factors in Kosovo, where he is well known. He also maintains a strong public position against the manner in which the SPO operates, not the Specialist Chambers as was made clear throughout his evidence at trial, and sees the manner in which the SPO has operated in this case as an indictment on the institution itself, which extinguishes his interest in escaping from the allegations against him, which he maintains are an attempt to silence his legitimate publication of information in the public interest as a whistle-blower.

42. Should it be necessary to impose conditions, however, it is maintained that it would take the minimum possible resources to do so in light of the minimal nature of the risks posed by Mr. Haradinaj.

Mr. Haradinaj's continued detention is disproportionate

43. The SPO seek to suggest that Mr. Haradinaj's continued detention remains proportionate due to the allegedly expeditious nature of the case against him.

44. However, these submissions ignore the fact that a proportionality assessment is not an assessment of or indictment upon the efficiency of proceedings.

45. Mr. Haradinaj benefits from the right to liberty and a concomitant presumption in favour of bail which has been, and is being., interfered with by his detention.

46. Whilst the length of his detention is relevant to the scale of the interference with his right to liberty, the proportionality of this interference is conditional upon its relationship to the legitimate interest pursued: the greater the risk of interference with the legitimate interest, the higher the likelihood that an interference with a detainee's right will be deemed proportionate.

47. Whilst it is not disputed that the confidentiality of proceedings is vitally important, for the reasons noted above, the likelihood that Mr. Haradinaj would, or in fact even could, take any steps to interfere with this interest is minimal.

48. Accordingly, his detention is unnecessary in order to safeguard that interest, and is disproportionate.

V. CONCLUSIONS

49. In light of the above, it is submitted that the SPO has identified no substantiated risk factors posed by Mr. Haradinaj that could not be managed by appropriate bail conditions. Consequently, there has been no evidence disclosed that would preclude him from being safely granted bail, either unconditionally, or if the Court is so minded, with appropriate conditions.

Word Count: 3,223 words

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