

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 Hysni Gucati

Date: 17 February 2022

Language: English

Classification: Public

Defence Submissions on Detention Review

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I. INTRODUCTION

1. On 15 February 2022, the Trial Panel issued an Order for the Gucati Defence to respond to the SPO submission on the review of detention (the “SPO Submissions”)¹ if they so wished by 17 February 2022². The procedural background is set out in paragraphs 1- 6 thereof.
2. The Defence for Mr Gucati hereby responds to the SPO Submissions.

II. APPLICABLE LAW

3. 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 2021³.
4. 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

¹ KSC-BC-2020-07/F00558, *Prosecution consolidated submissions for review of detention*, 14 February 2022, Public

² KSC-BC-2020-07/F00559, *“Scheduling Order on Defence Submissions on Detention Review”*, Public at paragraph 9

³ KSC-BC-2020-07/F00390, *“Decision on Review of Detention of Hysni Gucati”*, Trial Panel II, 22 October 2021, Public

- c. It is not incumbent upon Mr Gucati to demonstrate the existence of reasons warranting his release⁴.

5. 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
 - c. The fact that Mr Gucati has been compliant throughout his arrest, detention and trial.

III. SUBMISSIONS

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

Risk of Flight

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

7. 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 measures⁵. Mr Gucati's continued detention may not be justified on the ground of risk of flight⁶. The Trial Panel is not in a position to evaluate how Mr Gucati may see his prospects at this stage⁷, and therefore cannot conclude that "the prospect of a conviction in the near future gives the highest incentive yet to flee"⁸.
8. The SPO has not demonstrated that detention is necessary on the basis of risk of flight.

Risk of Obstructing Proceedings/Commission of Further Crimes

9. Contrary to paragraphs 14, 15 and 16 of the SPO Submissions, no disclosure has been ordered which might prejudice ongoing SPO investigations⁹. 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.

⁵ 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

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

⁷ IT-03-66-T, Prosecutor v. Limaj et al., *Decision on Defence Renewed Motion for Provisional Release of Fatmir Limaj*, 26 October 2005 at paragraph 11

⁸ SPO Submissions at paragraph 10

⁹ 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

10. Regarding paragraph 15 of the SPO Submissions, DW1253's evidence concerned a completely different time period in Kosovo and does not demonstrate a current 'climate of intimidation of witnesses'.
11. Mr Gucati has attended every day of his trial and has continued to be cooperative and compliant throughout. He has already given evidence and answered every question asked of him.
12. 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).
13. The SPO has not demonstrated that detention is necessary on the basis that there is a risk of Mr Gucati obstructing proceedings or committing further crimes in the event that he is released.

Mitigation of the Risks Identified

14. The Defence maintains its position that the measures which can be implemented by the Kosovan Police can sufficiently mitigate any potential risk¹⁰.

¹⁰ KSC-BC-2020-07/F00499RED, "Public Redacted Version of Defence Submissions on the Kosovo Police and Registry Reports and on Detention Review", 31 January 2022, Public

Proportionality

15. 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 charged¹¹.
16. As demonstrated above, the SPO has not identified any Article 41(6) risks which cannot be adequately addressed by conditional release.
17. The assertion in paragraph 22 of the SPO Submissions that Mr Gucati faces a “lengthy custodial sentence if convicted” is made without reference to the support of any sentencing authority or authorities. Mr Gucati will have been in detention for 17 months by 21st February 2022. No sentence of that length has been imposed in any previous comparable case.
18. On the present timetable, and in accordance with Rule 159(1), pronouncement of Judgment in this case may not take place until 16th June 2022 – 4 months hence.
19. In the circumstances of this case, continuing detention pending Judgment, when weighed against the Article 41(6) risks and the circumstances of the case as a whole, is unreasonable.

IV. CONCLUSION

¹¹ ICC-01/05-01/13-969, 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*, 29 May 2015 at paragraph 45

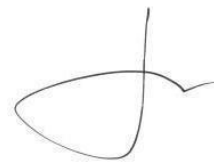
20. Mr Gucati's release from the Detention Unit, with or without conditions, should be ordered.

21. Mr Gucati will comply with any conditions imposed.

V. CLASSIFICATION

22. This filing is classified as public.

Word count: 1075 words



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17 February 2022

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