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In:	**KSC-BC-2020-07**
	The Prosecutor v. Hysni Gucati and Nasim Haradinaj
Before:	**Court of Appeals Panel**
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Nasim Haradinaj
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Appeal against Decision F00563

Denying Provisional Release of Nasim Haradinaj

Specialist Prosecutor

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I. INTRODUCTION

1. The Defence for Mr. Haradinaj ("Haradinaj Defence") seek to appeal the Trial Panel's Decision on Review of Detention of Nasim Haradinaj, rendered on 21 February 2022 ("Impugned Decision").[1]

II. BACKGROUND

2. On 25 September 2020, Nasim Haradinaj was arrested in Kosovo.[2] On 26 September 2020, he was transferred to the Detention Management Unit ("DMU") in The Hague.[3]

3. Mr. Haradinaj has been in detention ever since, and has therefore been subjected to over 522 days of detention.

4. On 07 September 2021, the trial in the present case was opened by the Specialist Prosecutor's Office ("SPO").[4]

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[1] KSC-BC-2020-07/ F00563 , Decision on Detention of Nasim Haradinaj, 21 February 2022.

[2] KSC-BC-2020-07/F00016, *Notification of Arrest Pursuant to Rule 55(4)*, 25 September 2020 (strictly confidential and *ex parte*, reclassified as public on 15 October 2020); KSC-BC-2020-07/F00012/A03/COR/RED, *Public Redacted Version of Corrected Version of Arrest Warrant for Nasim Haradinaj*, 26 September 2020 (original version filed on 24 September 2020). *See also* KSC-BC-2020-07/F00012, *Decision on Request for Arrest Warrants and Transfer Orders*, 24 September 2020 (strictly confidential and *ex parte*, reclassified as public on 9 October 2020).

[3] *Ibid*.

[4] KSC-BC-2020-07, Trial Transcript, 7 September 2021.

5. On 08 November 2021, the Trial Panel declared that the presentation of the SPO evidence before the Trial Panel had concluded.[5]

6. On 26 November 2021, the Trial Panel rendered its Decision on the Defence Motions to Dismiss the Charges, denying the dismissal of any of the charges ("Dismissal Decision").[6]

7. On 21 December 2021, the Trial Panel rendered the eighth decision on the review of detention of Nasim Haradinaj, denying provisional release of the Defendant ("Eighth Detention Decision").[7]

8. An appeal was filed by the Defence for Mr. Haradinaj on 31 December ("Outstanding Appeal").[8]

[5] KSC-BC-2020-07, Trial Transcript, 8 November 2021, page 2030, lines 6-10. *See also* KSC-BD-03/Rev2/2020, Rules of Procedure and Evidence, adopted on 5 May 2020, Rule 129 ("Rules of Procedure and Evidence" or "Rules").

[6] KSC-BC-2020-07/F00450, Trial Panel II, *Decision on the Defence Motions to Dismiss the Charges*, 26 November 2021, Public ("Dismissal Decision").

[7] KSC-BC-2020-07/F00507, Trial Panel II, *Decision on Review of Detention of Nasim Haradinaj*, 21 December 2021, Public ("Impugned Decision").

[8] KSC-BC-2020-07, *Appeal against Decision F00507 Denying Provisional Release of Nasim Haradinaj*, 31 December 2021.

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9. On 28 January 2022, in view of an upcoming decision of the Court of Appeals Panel, the Trial Panel issued an order varying the time limit for submissions set out in its 21 December 2021 decisions ("Order").[9]

10. In the Order, the Panel directed the SPO to file its submissions on detention within three days of the decision of the Court of Appeals Panel or at the latest by 14 February 2022, and the Defence to respond by 17 February 2022, if they so wished.[10]

11. In the event that no decision of the Court of Appeals Panel was rendered or notified by 11 February 2022, the Panel ordered the Parties to submit, by 14 February 2022, a joint request or separate requests as regards any variation of the two-month interval.[11]

12. No decision of the Court of Appeals Panel was rendered or notified by 11 February 2022. That decision remains outstanding.

13. On 14 February 2022, the SPO filed its consolidated submissions for review of detention ("SPO Submission").[12]

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[9] F00537/CORR, Panel, *Corrected Version of the Order Varying the Time Limit for Submissions for the Next Detention Review* ("Order"), 28 January 2022.

[10] Order, para. 12(b) and (c).

[11] Order, para. 13.

[12] F00558, Specialist Prosecutor, *Prosecution Consolidated Submissions for Review of Detention* ("SPO Submission"), 14 February 2022

14. On 17 February 2022, the Haradinaj Defence responded to the SPO Submission ("Haradinaj Submission").[13]

15. On 21 February 2022, the Trial Panel rendered the Impugned Decision, denying Mr. Haradinaj's provisional release. In doing so, it found that:

 a. there was a 'well-grounded suspicion' against Mr. Haradinaj, which was necessary, but insufficient for his continued detention;

 b. the risk of Mr. Haradinaj fleeing could be mitigated by a set of alternative measures, and his testimony regarding his reasons for making the batches public, and his opinion of the Court, did not show an increased risk of flight;

 c. the risk of Mr. Haradinaj taking steps to obstruct proceedings could not be adequately mitigated by the imposition of alternative measures; and

 d. the risk of Mr. Haradinaj committing further steps could not be adequately mitigated by the imposition of alternative measures

16. Pursuant to Rules 58(2) and 170 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules")[14] and Article 46(1)(i) of the Law of

[13] F00560, Haradinaj Defence, *Defence Response to Prosecution Consolidated Submissions for Review of Detention* ("Haradinaj Submission"), 17 February 2022.

[14] KSC-BD-03/Rev2/2020, Rules of Procedure and Evidence, adopted on 5 May 2020.

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the Kosovo Specialist ("Law") Chambers and Specialist Prosecutor's Office,[15] the Haradinaj Defence appeals the Impugned Decision.

17. It is noted that issues relating to the existence, application, and consequences of a "well-grounded suspicion" in relation to Mr. Haradinaj's ongoing detention are addressed extensively in the Outstanding Appeal.

18. Those submissions, in as far as they retain relevance to discussions in the Impugned Decision, are therefore not repeated here, although Mr. Haradinaj maintains his reliance upon those submissions in this appeal.[16]

19. With this appeal, the Defence for Mr. Haradinaj invites the Court of Appeals Panel to find that:

a. there was an error in the Impugned Decision, in that the Trial Panel failed to identify, accurately or at all, concrete reasons supporting Mr. Haradinaj's risk of obstructing proceedings if provisionally released;

b. there was an error in the Impugned Decision, in that the Trial Panel failed to identify, accurately or at all, concrete reasons supporting Mr. Haradinaj's risk of offending if provisionally released; and

[15] The Law on the Specialist Chambers and Specialist Prosecutor's Office, Law No. 05/L-053, adopted on 3 August 2015.

[16] Outstanding Appeal, para. 7(i).

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c. there was an error in the Impugned Decision, in that the Trial Panel failed properly consider the benefit of appropriate conditions.

III. THE LAW

20. The Court of Appeals Panel previously decided to apply *mutatis mutandis* to interlocutory appeals the standard of review provided for appeals against judgements under Article 46(1) of the Law.[17]

21. Article 46(1) of the Law specifies the grounds on which appeals against judgement can be filed:

(i) an error on a question of law invalidating the judgement;

(ii) an error of fact which has occasioned a miscarriage of justice; or

(iii) [an error in sentencing].

22. Article 46(4) of the Law states in relation to errors of law that:

"When the Court of Appeals Panel determines that a Trial Panel has made an error of law in a judgement arising from the application of an incorrect legal standard, the Court of Appeals Chamber shall articulate the correct

[17] KSC-BC-2020-07/F00005, Pre-Trial Judge, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, 9 December 2020, Public, at paras. 4-13.

legal standard and apply that standard to the evidence contained in the trial record to determine whether to sustain, enter or overturn a finding of guilty on appeal. Alternatively, if the Trial Panel is available and could more efficiently address the matter, the Court of Appeals Panel may return the case to the Trial Panel to review its findings and the evidence based on the correct legal standard."[18]

23. Pursuant to Article 41(6)(a) and (b) of the Law, the Kosovo Specialist Chambers ("KSC") may only detain a person when:

"*a. there is a grounded suspicion that he or she has committed a crime within the jurisdiction of the Specialist Chambers; and*

b. there are articulable grounds to believe that:

i. there is a risk of flight;

ii. 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

iii. the seriousness of the crime, or the manner or circumstances in which it was committed and his or her personal characteristics,

[18] Article 46(4) of the Law.

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 which he or she has threatened to commit."

24. Article 41(12) of the Law provides for alternative measures to prevent or mitigate these risks, including, *inter alia*, bail, house detention, promise not to leave residence and prohibition on approaching specific places or persons.

IV. GROUNDS OF APPEAL

25. In cases of continued detention, the persistence of a "reasonable" or "grounded suspicion" that a person has committed an offence is a condition *sine qua non* for the validity of his continued detention.[19]

26. However, Article 41(6)(a) provides that detention can only continue where a "grounded suspicion" **and** articulable grounds pursuant to Article 41(6)(b) of the Law exist.

27. The requirements of Article 41(1)(6) are therefore cumulative and necessitate the existence of either an unmanageable risk of flight or of the commission or

[19] ECtHR, CE:ECHR:2017:1128JUD007250813v, *Merabishvili v. Georgia*, Judgment, 28 November 2017, at para. 222.

completion of criminal actions, without which the detention of an individual will be without lawful basis, and arbitrary.

28. It is recalled that when receiving submissions on appeal, "*the Panel should not be expected to entertain submissions that merely repeat arguments that have already been addressed in its previous decisions*."[20]

29. As noted above, in the absence of a determination on the issues relating to the existence and application of a well-grounded suspicion when reviewing the legality of Mr. Haradinaj's continued detention, the Defence do not seek to rehearse these issues, but continue to rely on the same and note the relevance on those issues to discussion in the Impugned Decision.

30. The Grounds of Appeal relied upon herein therefore include that:

   a. Mr. Haradinaj does not present a material risk of obstructing proceedings;

   b. Mr. Haradinaj does not present a material risk of committing further offences; and

   c. the existence of any material risk can be managed by proper conditions.

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[20] KSC-BC-2020-06, IA006/F00005/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Review of Detention,* 1 October 2021, para. 17.

Ground 1: Mr. Haradinaj does not present a material risk of obstruction

31. In the Impugned Decision, the Trial Panel considered that, whilst necessarily couched in light of Mr. Haradinaj's presumption of innocence, it was relevant that there existed a well-grounded suspicion that he:

> *"(i) intentionally participated in the unauthorised dissemination of protected information and threatened (potential) information providers; (ii) published on repeated occasions SPO/SITF-related documents received by the KLA WVA, which contained, inter alia, names of (potential) information providers; (iii) made various accusations regarding such persons for having allegedly interacted with the SITF/SPO; (iv) encouraged others to disseminate such information and declared that he sought to discredit the work of the SC; (v) repeatedly stated that he would continue to disseminate SPO/SITF-related documents, despite the Single Judge's orders to the KLA WVA forbidding such dissemination."*[21]

32. Whilst it is noted that the observations of the Trial Chamber in this regard were explicitly couched within the context of Mr. Haradinaj's presumption of innocence, it remains unclear precisely what weight the existence of this well-grounded suspicion was given in refusing his provisional release.

[21] Impugned Decision, para. 26.

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33. This is submitted to have given rise to a very real concern that there has been an element of 'double counting', in that the Trial Chamber have used the existence of a 'well-grounded suspicion' to satisfy Article 41(6)(a) of the Law, and then taken into account the same to satisfy Article 41(6)(b)(ii), thereby eliminating the distinction between those sub-Articles.

34. The result is that Mr. Haradinaj's provisional release appears to have been refused, to some material extent, on findings regarding suspicion made before this issue even reached the Trial Panel.

35. This poses an all but insurmountable threshold to Mr. Haradinaj, as, if it is that the finding of the Pre-Trial Judge regarding the existence of a well-grounded suspicion is sufficient to satisfy the burden of keeping him in detention throughout the trial, then his fate has been sealed since that ruling was made.

36. This not only renders detention review processes essentially academic, in fact meaningless, but also ignores the fact that as time progresses (as it certainly has over the course of the course of Mr. Haradinaj's 522 day custodial remand) the justificatory threshold for continued detention becomes steadily more difficult to satisfy, and will demand steadily more concrete and weighty reasons as to why the individual cannot be released.[22]

[22] Impugned Decision, para. 25.

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37. Having addressed this issue, the Trial Panel goes on to note that:

> "[*a*]*s regards the Haradinaj Defence's argument that Mr Haradinaj has no possession of the documents concerning the instant matters, because they have been seized by the SPO, the Panel reminds the Haradinaj Defence that Mr Haradinaj, by virtue of his participation to the trial, is now aware of the details of a large body of confidential information, including evidence received through the testimony of witnesses in private session, confidential exhibits and the material which has been disclosed to him through the disclosure process. In this regard, the Panel recalls the statement, made by Mr Haradinaj during his testimony, that he would make public any SITF, SPO or SC materials that would arrive at the KLA WVA· The Panel is mindful that the weight of this statement will have to be assessed with the totality of evidence at the end of the trial. That being said, for the purpose of ascertaining a risk under Article 41(6)(b)(ii), the Panel views this statement as a confirmation of the vows expressed earlier by Mr Haradinaj and noted by the Pre-Trial Judge and this Panel in previous detention decisions.*"[23]

38. The manner in which this consideration is dealt with does not lessen the merit of the submission that the only tangible documents alleged to have been in Mr. Haradinaj's possession, or that of the KLA-WVA, have now been seized

[23] Impugned Decision, para. 37.

in their entirety. There is therefore no demonstrable, concrete risk that Mr. Haradinaj's provisional release would lead to further allegations of criminality in respect of those documents.

39. Further, and in any case, it is noted that both the Prosecution and Defence have now closed the evidential aspect of their cases, with only closing arguments to be heard by the Trial Panel. All witnesses have been heard, and all documents and exhibits considered and filed. It is therefore entirely unclear how, even if he would, Mr. Haradinaj *could* use that which he and all other parties in the proceedings have heard to prejudice the same.

40. Mr. Haradinaj has a right to be present at and to participate in proceedings against him, and it cannot be the case that what he hears and sees in those proceedings can properly be used as a basis on which to lawfully interfere with his right to liberty and his presumption in favour of bail.

41. It is noted in this regard that, given that a judgment is yet to be handed down, Mr. Haradinaj may yet be acquitted; if he is acquitted, then what he has seen and heard in proceedings will return with him to Kosovo.

42. There must therefore be a degree of pragmatism as the proceedings progress, so as to avoid an inference that Mr. Haradinaj's provisional detention is being continued until his inevitable custodial sentence, which, regrettably, is presently being created by the approach of the Trial Chamber and SPO.

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43. For those reasons, it is submitted that the Trial Chamber erred in its judgment by relying on 'generalised' and 'speculative' reasons to conclude that Mr. Haradinaj could have, or in fact has, information that he could use to obstruct proceedings, contrary to its obligation to "*provide specific reasoning and rely on concrete grounds when authorising continued detention*."[24]

Ground 2: Mr. Haradinaj does not present a material risk of committing further offences

44. Further to the above, the Trial Panel goes on to recall that:

> "*[t]he SPO submits that the vow of Mr Haradinaj to continue to disseminate SITF/SPO information demonstrates that such incidents would continue if he were to be released. Considering Mr Haradinaj's previous conduct when given confidential information, the SPO argues that there is every reason to believe that detention remains necessary to prevent the commission of further offences*."
>
> and
>
> "*its findings regarding the risk of obstructing the proceedings and, more specifically, Mr Haradinaj's past conduct, including his recent vow during his testimony to continue to publish SITF/SPO/SC-related information, and*

[24] Impugned Decision, para. 29.

finds that there remain articulable grounds to believe that, if released, Mr Haradinaj will commit offences <u>either in repetition of those charged</u> or <u>which he has previously threatened to commit</u>. The Panel reiterates that this finding, based on the threshold of articulable grounds to believe, is without prejudice to the determination it will make in relation to the charges after having assessed all relevant evidence and arguments put forth by the Parties at trial."[25]

45. It is noted that specific reference is not made by the Trial Panel as to precisely which crimes Mr. Haradinaj is said to be capable of committing if provisionally released. It is assumed, however, that those crimes ('threatened' or otherwise) relate to the potential disclosure of '*SITF/SPO information'*.

46. It is repeated in this regard that even if he were he minded to, which is not accepted, Mr. Haradinaj <u>could not</u> commit any further offences in this way, given that the SPO have now seized all such documents from him and from the KLA-WVA.

47. It bears highlighting that the situation before the Court is not one in which Mr. Haradinaj has sought out the documents he is alleged to have disclosed,

[25] Impugned Decision, para. 43.

or in which he has a relationship with an individual capable within the SPO willing to transfer more documents to him.

48. As such, now that those documents have been seized and the SPO has conducted the internal investigations it deems necessary, to the extent it deems necessary (no comment being made here as to the adequacy of these investigations), there should be no further grounds to believe that Mr. Haradinaj is or will come into possession of tools capable of allowing him to repeat the actions alleged against him in these proceedings.

49. Unless the SPO are failing to disclose the fact of a new leak from their office, or the extent of the prior leak, any supposed 'risk' as to the disclosure of SITF/SPO information is thus entirely speculative, with no basis to even suspect that Mr. Haradinaj presently has the capability to commit any offences in relation to them.

50. As above in relation to Ground 1, it is therefore submitted that the Trial Panel erred in its judgment by relying on 'generalised' and 'speculative' reasons to conclude that Mr. Haradinaj could commit further offences, contrary to its obligation to "*provide specific reasoning and rely on concrete grounds when authorising continued detention*."[26]

[26] Impugned Decision, para. 29.

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Ground 3: The existence of any material risk can be managed by proper conditions

51. For the reasons noted above, it is submitted that the risk posed by Mr. Haradinaj whilst on bail is negligible, in light of the resources and information available to him, as contextualised by the stage of the trial.

52. Were they necessary, however, proper conditions could mitigate any latent risk by numerous conditions, including, *inter alia*, by restricting Mr. Haradinaj's contact with the places and persons said to be associated with this alleged offending, including members of the KLA-WVA.

53. It is submitted that in overstating the extent of the risk he posed when provisionally released, the potential merit of these measures was not properly considered by the Trial Panel, which therefore erred in finding that there were articulable and unmanageable grounds on which Mr. Haradinaj should continue to be detained.

Material Effect of Error in the Impugned Decision

54. It is recalled that "*an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision*."[27]

[27] ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-1019, *Appeal Judgment against "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence"*, 19 November 2010, at para. 69.

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55. Most apparently, the material effect of the Trial Panel's failure to properly and accurately assess the articulable risk(s) posed by Mr. Haradinaj is to keep him in detention for at least a further two months, meaning that, by the time judgment is rendered, he will have been in detention for a massive and unnecessarily elongated period of time.

56. The errors in the Impugned Decision also serve to compound one another: as such, by failing to properly assess the gravity of the risk posed by Mr. Haradinaj if provisionally released, the Trial Panel created, improperly, a level of risk that cannot be managed by appropriate conditions. This is entirely divorced from the reality of the matter.

V. RELIEF SOUGHT

57. For the foregoing reasons, the Defence for Mr. Haradinaj invites the Court of Appeals Panel:

a. to find that there was an error in the Impugned Decision, in that the Trial Panel failed to identify, accurately or at all, concrete reasons supporting Mr. Haradinaj's risk of obstructing proceedings if provisionally released;

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b. to find that there was an error in the Impugned Decision, in that the Trial Panel failed to identify, accurately or at all, concrete reasons supporting Mr. Haradinaj's risk of offending if provisionally released;

c. to find that there was an error in the Impugned Decision, in that the Trial Panel failed properly consider the benefit of appropriate conditions; and

d. pursuant to Article 46(4) of the Law, to return the case to the Trial Panel to review its findings and conduct a re-evaluation as to whether Mr. Haradinaj is in fact unsuitable for provisional release.

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