



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:** Court of Appeals Panel  
Judge Michèle Picard  
Judge Kai Ambos  
Judge Nina Jørgensen

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 11 March 2022

**Language:** English

**Classification:** Public

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**Response to Haradinaj Defence Appeal of February 2022 Detention Decision**

**with one public annex**

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**Specialist Prosecutor**

Jack Smith

**Counsel for Mr Gucati**

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**Counsel for Mr Haradinaj**

Toby Cadman

## I. Introduction

1. The Court of Appeals Panel ('Appeals Panel') should reject the Haradinaj Appeal<sup>1</sup> in its entirety for the same reasons as its heavily overlapping December 2021 Haradinaj Appeal.<sup>2</sup> No discernible error is identified across the repetitive grounds raised. The discretionary determinations made by the Trial Panel under Article 41(6)<sup>3</sup> must be given deference on appeal,<sup>4</sup> and the Decision<sup>5</sup> correctly extended the detention of Mr Haradinaj.

## II. Procedural background

2. On 25 September 2020, Haradinaj was arrested.<sup>6</sup> A request for Haradinaj's immediate release was denied on 27 October 2020.<sup>7</sup>

3. On 14 December 2020, the Pre-Trial Judge confirmed the indictment in this case,<sup>8</sup> concluding there to be a well-grounded suspicion that Haradinaj is responsible for the crimes charged.<sup>9</sup>

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<sup>1</sup> Appeal against Decision F00563 Denying Provisional Release of Nasim Haradinaj, KSC-BC-2020-07/IA008/F00001, 2 March 2022 ('Haradinaj Appeal').

<sup>2</sup> Appeal against Decision F00507 Denying Provisional Release of Nasim Haradinaj, KSC-BC-2020-07/IA007/F00001, 31 December 2021, Confidential ('December 2021 Haradinaj Appeal').

<sup>3</sup> Article 41(6) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

<sup>4</sup> Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, para.14.

<sup>5</sup> Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00563, 21 February 2022 ('Decision').

<sup>6</sup> Public Redacted Version of 'Corrected Report on the Arrest and Transfer of Nasim Haradinaj to the Detention Facilities', filing KSC-BC-2020-07/F00026/COR dated 28 September 2020, KSC-BC-2020-07/F00026/COR/RED, 14 October 2020.

<sup>7</sup> Decision on Request for Immediate Release of Nasim Haradinaj, KSC-BC-2020-07/F00058, 27 October 2020.

<sup>8</sup> Public Redacted Version of Decision on the Confirmation of the Indictment, KSC-BC-2020-07/F00074/RED, 11 December 2020 (public redacted version notified 22 December 2020) ('Confirmation Decision').

<sup>9</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 128, 132, 137, 141, 145, 149.

4. On 24 December 2020, Haradinaj's detention was reviewed and extended.<sup>10</sup> This decision was later confirmed on appeal.<sup>11</sup>
5. Mr Haradinaj's detention was subsequently reviewed several times with no appeal<sup>12</sup> until the Trial Panel's review in December 2021.<sup>13</sup>
6. On 31 December 2021, the Haradinaj Defence filed the December 2021 Haradinaj Appeal. The grounds of appeal included allegations of errors concerning the findings on: (i) the risk of obstructing the proceedings;<sup>14</sup> (ii) the risk of committing further offences,<sup>15</sup> and (iii) the conditions of release.<sup>16</sup> The SPO responded to this appeal,<sup>17</sup> and its resolution is pending.
7. On 21 February 2022, following submissions from the SPO<sup>18</sup> and Haradinaj Defence,<sup>19</sup> the Decision was issued.
8. On 2 March 2022, the Haradinaj Appeal was filed. Three grounds of appeal are alleged, claiming that: (i) Haradinaj does not present a material risk of obstructing proceedings; (ii) Haradinaj does not present a material risk of committing further

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<sup>10</sup> Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00094, 24 December 2020.

<sup>11</sup> Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, KSC-BC-2020-07/IA002/F00005, 9 February 2021 ('Haradinaj Appeals Decision').

<sup>12</sup> Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00144, 24 February 2021; Public Redacted Version of the Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00189/RED, 23 April 2021; Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00246, 23 June 2021; Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00280, 23 August 2021; Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00391, 22 October 2021.

<sup>13</sup> Public Redacted Version of Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00507/RED, 21 December 2021.

<sup>14</sup> December 2021 Haradinaj Appeal, KSC-BC-2020-07/IA007/F00001, para.2(a), (c).

<sup>15</sup> December 2021 Haradinaj Appeal, KSC-BC-2020-07/IA007/F00001, para.2(d).

<sup>16</sup> December 2021 Haradinaj Appeal, KSC-BC-2020-07/IA007/F00001, para.2(e).

<sup>17</sup> Response to Haradinaj Defence Appeal of December 2021 Detention Decision, KSC-BC-2020-07/IA007/F00003, 14 January 2022, Confidential (with one public annex).

<sup>18</sup> Prosecution consolidated submissions for review of detention, KSC-BC-2020-07/F00558, 14 February 2022.

<sup>19</sup> Defence Response to Prosecution Consolidated Submissions for Review of Detention, KSC-BC-2020-07/F00560, 17 February 2022.

offences; and (iii) the existence of any material risk can be managed by proper conditions.<sup>20</sup>

### III. Submissions

9. Preliminarily, the Appeals Panel has previously determined that the lower panel should not be expected to entertain arguments that have already been addressed in previous decisions.<sup>21</sup>

10. This same principle should apply to the Appeals Panel's consideration of arguments in the Haradinaj Appeal which repeat those of the December 2021 Haradinaj Appeal. There is substantial overlap in the Haradinaj Defence's argumentation across his two appeals, such that the resolution of the grounds of the December 2021 Haradinaj Appeal will necessarily resolve the grounds of this appeal. This is true even regarding the outstanding Article 41(6)(a) grounded suspicion appellate ground not formally raised in this appeal.<sup>22</sup> Despite the Haradinaj Defence indicating that it would not repeat the December 2021 Haradinaj Appeal on this point,<sup>23</sup> many of the same arguments concerning Article 41(6)(a) from that appeal feature prominently in Ground 1 of this appeal.<sup>24</sup>

11. The Haradinaj Defence is entitled to an appellate review of detention rulings, but the Appeals Panel cannot reasonably be expected to give full consideration to duplicative arguments which could simply be repeated *ad nauseam* every two months.

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<sup>20</sup> Haradinaj Appeal, KSC-BC-2020-07/IA008/F00001, paras 19, 30, 57.

<sup>21</sup> *Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention, KSC-BC-2020-06/IA010/F00008/RED, 27 October 2021, para.20; *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, para.17.

<sup>22</sup> December 2021 Haradinaj Appeal, KSC-BC-2020-07/IA007/F00001, paras 2(b), 12-21.

<sup>23</sup> Haradinaj Appeal, KSC-BC-2020-07/IA008/F00001, paras 17-18, 29.

<sup>24</sup> Haradinaj Appeal, KSC-BC-2020-07/IA008/F00001, paras 32-35.

12. This entire appeal could be summarily resolved on the basis of the resolution of the December 2021 Haradinaj Appeal. Nevertheless, and for completeness, the SPO briefly addresses the latest appellate grounds below.

A. THE RISKS OF OBSTRUCTING THE PROCEEDINGS AND COMMITTING FURTHER OFFENCES WERE FULLY JUSTIFIED (GROUNDS 1-2)

13. The Trial Panel specified that the risks under Article 41(6)(b)(ii)-(iii) were premised on the findings underlying the crimes charged – all concerning offences against public order and the administration of justice – Haradinaj’s past conduct, the confidential information accessible to him, and his means to obstruct the proceedings.<sup>25</sup> The Trial Panel also noted in particular Haradinaj’s testimony of 13 January 2022, where he ultimately says the following in response to the question ‘[s]o you would do what you did again if more documents arrived?’:

If you bring them, I will act the same, because I am convinced that I acted rightly and I did it in the interest of informing the public and for the sake of transparency. I think that, I have that conviction, that it was appropriate.<sup>26</sup>

14. These considerations were concrete, specific, and reasonable.<sup>27</sup> They unambiguously establish the Article 41(6)(b)(ii)-(iii) risks.

15. The facts for which a well-grounded suspicion exists in this case – supporting counts of obstructing official persons, intimidating/retaliating against witnesses, and violating the secrecy of proceedings - show a clear risk under Article 41(6)(b)(ii)-(iii). It was reasonable to take these findings into account in the Trial Panel’s Article 41(6)(b) assessments. The Trial Panel must take into account all factors which reflect the risks at

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<sup>25</sup> Decision, KSC-BC-2020-07/F00563, paras 36-40, 43.

<sup>26</sup> Transcript of Hearing, 13 January 2022, T.3024.

<sup>27</sup> *Contra* Haradinaj Appeal, KSC-BC-2020-07/IA008/F00001, para.43.

issue, and there is no reason why the same findings could not be relevant for both the Article 41(6)(a) and (b) assessments.<sup>28</sup>

16. There is no reason why the risks found by the Trial Panel cannot continue to exist after the conclusion of the SPO's case.<sup>29</sup> The facts for which a well-grounded suspicion exists show a clear risk of obstruction to the entirety of the proceedings, noting further the highly sensitive information disclosed to the Accused in this case.<sup>30</sup> That Mr Haradinaj received this information through the statutory disclosure process does not change the reality that he has the means to realise his threats to obstruct the proceedings and commit further offences.<sup>31</sup>

17. The argument that the Article 41(6)(b)(ii)-(iii) risks are unjustified because the batches of documents underlying the crimes charged were taken from Haradinaj<sup>32</sup> is baseless and was specifically rejected in the Decision.<sup>33</sup> The Accused has been disclosed significant confidential information in this trial, any of which could be used to further obstruct the proceedings or commit further offences.<sup>34</sup> This includes many pages of the

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<sup>28</sup> *Contra* Haradinaj Appeal, KSC-BC-2020-07/IA008/F00001, para.33. Though no authority is given for this proposition, it appears to have been derived from prohibitions of double-counting factors during sentencing which do not translate to the detention context. *See generally* ICC, *Prosecutor v. Bemba et al.*, Public Redacted Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute", ICC-01/05-01/13-2276-Red, 8 March 2018, para.112; ICTR, *Nzabonimana v. Prosecutor*, Judgement, ICTR-44D-A, 29 September 2014, para.464.

<sup>29</sup> *See* ICC, *Prosecutor v. Bemba*, Decision on "Defence Urgent Motion for Provisional Release", ICC-01/05-01/08-3221, 23 December 2014, paras 38-51 (*adding* risk of obstructing the court proceedings to grounds of detention after closure of evidence presentation), *confirmed on appeal in* ICC, *Prosecutor v. Bemba*, Public redacted version of Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 23 December 2014 entitled "Decision on 'Defence Urgent Motion for Provisional Release'", ICC-01/05-01/08-3249-Red, 20 May 2015, paras 66-71. *See also* ICTY, *Prosecutor v. Prlić et al.*, Decision on "Prosecution's Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Petković* Dated 31 March 2008", IT-04-74-AR65.7, 21 April 2008, para.17.

<sup>30</sup> *Contra* Haradinaj Appeal, KSC-BC-2020-07/IA008/F00001, para.39.

<sup>31</sup> *Contra* Haradinaj Appeal, KSC-BC-2020-07/IA008/F00001, para.40.

<sup>32</sup> Haradinaj Appeal, KSC-BC-2020-07/IA008/F00001, paras 38, 45-50.

<sup>33</sup> Decision, KSC-BC-2020-07/F00563, para.37.

<sup>34</sup> Decision, KSC-BC-2020-07/F00563, para.37.

original batches that were confidentially disclosed and admitted during trial, defeating the very premise of this argument.<sup>35</sup>

18. The Trial Panel's reasoning took great pains to avoid any pre-judging, or even perception of pre-judging, the case against the Accused, making express reference to his presumption of innocence in the Decision's applicable law and reasoning.<sup>36</sup> No inference of pre-judgment can be reasonably made from the length of detention in the case thus far.<sup>37</sup> The Trial Panel also did not ignore the effects of the passage of time in making any of these findings,<sup>38</sup> dedicating a separate section of its decision specifically to the question of the proportionality of detention.<sup>39</sup>

19. The Haradinaj Defence merely disagrees with the Trial Panel's conclusions on these points,<sup>40</sup> and no discernible error is identified.

#### B. CONDITIONAL RELEASE WAS PROPERLY BALANCED AGAINST THE RISKS (GROUND 3)

20. The Haradinaj Defence presents no independent substantiation for its allegations of error in the Trial Panel's conditional release assessment.<sup>41</sup> The only reason put forward as to why the 'risk posed by Haradinaj whilst on bail is negligible'<sup>42</sup> is because of the asserted errors across Grounds 1-2 of the appeal. The reasoning in the Decision is not even referenced, and no error is identified in the Trial Panel's conditional release assessment.<sup>43</sup>

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<sup>35</sup> For Batch 1: P00093; P00094; P00095; P00096; P00097; For Batch 2: P00104. For Batch 3: P00106; P00107; P00108; P00109; P00110; P00111; P00112; P00113; P00114; P00115; P00116; P00117; P00118; P00119.

<sup>36</sup> Decision, KSC-BC-2020-07/F00563, paras 22, 36.

<sup>37</sup> *Contra* Haradinaj Appeal, KSC-BC-2020-07/IA008/F00001, para.42.

<sup>38</sup> *Contra* Haradinaj Appeal, KSC-BC-2020-07/IA008/F00001, para.36.

<sup>39</sup> Decision, KSC-BC-2020-07/F00563, paras 60-63.

<sup>40</sup> Haradinaj Appeals Decision, KSC-BC-2020-07/IA002/F00005, para.64 ('an appellant's mere disagreement with the conclusions that the first instance panel drew from the available facts or the weight it accorded to particular factors is not enough to establish an error').

<sup>41</sup> Haradinaj Appeal, KSC-BC-2020-07/IA008/F00001, paras 51-53.

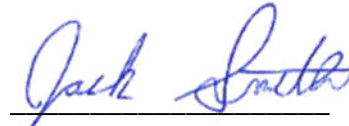
<sup>42</sup> Haradinaj Appeal, KSC-BC-2020-07/IA008/F00001, para.51.

<sup>43</sup> Decision, KSC-BC-2020-07/IA002/F00005, paras 45-57.

#### IV. Conclusion

21. For the foregoing reasons, the Panel should deny the Haradinaj Appeal in its entirety.

**Word count: 1896**



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**Jack Smith**  
**Specialist Prosecutor**

Friday, 11 March 2022

At The Hague, the Netherlands.