



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. The continued detention of Hysni Gucati and Nasim Haradinaj (collectively, the 'Accused') remains necessary. The established reasons for detention all continue to exist.¹ 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 case² and the impending trial judgment, the Article 41(6)(b) risks justifying detention³ remain as high as ever and no conditions can sufficiently mitigate them.

II. SUBMISSIONS

2. 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.⁴ Whether or not circumstances have changed since the last review is a relevant consideration and can be determinative.⁵ The Trial Panel should not be expected to entertain submissions

¹ 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.

² Transcript of Hearing 17 March 2022, T.3855.

³ Decision on Review of Detention of Hysni Gucati, KSC-BC-2020-07/F00562, 21 February 2022 ('February 2022 Gucati Decision'); Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00563, 21 February 2022 ('February 2022 Haradinaj Decision').

⁴ Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention, KSC-BC-2020-07/IA002/F00005, 9 February 2021, para.55.

⁵ Consolidated Decision on Nasim Haradinaj's Appeals Against Decisions on Review of Detention, KSC-BC-2020-07/IA008/F00004, 6 April 2022 ('April 2022 Haradinaj Appeals Decision'), para.28.

that merely repeat arguments that have already been addressed in previous decisions.⁶

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

3. The Trial Panel has previously found there to be grounded suspicion within the meaning of Article 41(6)(a),⁷ following the Pre-Trial Judge's finding of an even higher 'well-grounded suspicion' in the Confirmation Decision⁸ as corroborated by the Rule 130 Decision.⁹

4. Since the last detention review, all remaining evidence has been presented and the case is closed. 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

5. Articulable 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.¹⁰ 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 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.¹¹

⁶ *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.

⁷ February 2022 Gucati Review Decision, KSC-BC-2020-07/F00562, paras 26-27; February 2022 Haradinaj Review Decision, KSC-BC-2020-07/F00563, paras 26-28, *confirmed by* April 2022 Haradinaj Appeals Decision, KSC-BC-2020-07/IA008/F00004, paras 29-33.

⁸ 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').

⁹ Decision on the Defence Motions to Dismiss Charges, KSC-BC-2020-07/F00450, 26 November 2021 ('Rule 130 Decision').

¹⁰ *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.

¹¹ Krasniqi Appeal Decision, KSC-2020-06/IA006/F00005/RED, para.37.

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

1. Risk of flight

7. Noting the Trial Panel's previous findings,¹² a risk of flight exists for both Accused. Both Accused have testified that they made public the batches underlying the charges in this case ('Batches') because they are opposed to the KSC¹³ and do not recognise it.¹⁴

8. In their capacity as the Head and Deputy Head of the KLA WVA – estimated as having over 10,000 members¹⁵ - 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.¹⁶ These supporters of the Accused remain active and can provide both the means and opportunity to facilitate the flight of the Accused.¹⁷

9. Each Accused now knows that the trial judgment in this case is imminent. The prospect of a conviction in the near future – not to mention the six year sentences requested by the SPO¹⁸ - gives the highest incentive yet to flee.¹⁹

¹² February 2022 Gucati Review Decision, KSC-BC-2020-07/F00562, paras 31-32; February 2022 Haradinaj Review Decision, KSC-BC-2020-07/F00563, paras 32-33.

¹³ DW1249, T.2875-76; DW1240, T.2174-75, 2179, 2181, 2195.

¹⁴ 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.

¹⁵ DW1240, pp.2529-30.

¹⁶ *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.');

¹⁷ *See* 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 [...]').

¹⁸ Public Redacted Version of 'Prosecution Final Brief', KSC-BC-2020-07/F00565/RED, 3 March 2022 (with annex; redacted version notified 4 March 2022), para.432.

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.

10. 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

11. 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

12. The Trial Panel has found a risk of obstructing the progress of KSC proceedings 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 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.

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 February 2022 Gucati Review Decision, KSC-BC-2020-07/F00562, paras 35-39; February 2022 Haradinaj Review Decision, KSC-BC-2020-07/F00563, paras 36-40, *confirmed by* April 2022 Haradinaj Appeals Decision, KSC-BC-2020-07/IA008/F00004, paras 39-48. 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.

²³ See, e.g., P00106.

13. 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.

14. 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.

3. Risk of committing further crimes

15. There remains a risk that the Accused will commit further crimes, as previously found by the Trial Panel.²⁶ The conduct charged in this case amounts to obstruction of the proceedings, and the vow of both Accused to continue to disseminate SITF/SPO information²⁷ demonstrates that such incidents would continue if the Accused are released. Neither Accused expressed anything approaching remorse for their actions in their final statements to the Trial Panel,²⁸ with Haradinaj going so far as to defiantly allege that it is in fact the SPO which should be charged with intimidating witnesses.²⁹

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; DW1253, T.3306-07. 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.

²⁶ February 2022 Gucati Review Decision, KSC-BC-2020-07/F00562, para.42; February 2022 Haradinaj Review Decision, KSC-BC-2020-07/F00563, para.43.

²⁷ DW1249, T.3024; DW1240, T.2219; P00002ET, p.4.

²⁸ Transcript of Hearing, 17 March 2022, pp.3848, 3852-53.

²⁹ Transcript of Hearing, 17 March 2022, p.3853.

16. 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 its December 2021 review of detention, the Trial Panel enquired into the enforceability of measures alternative to detention following submissions of both the Kosovo Police³⁰ and the Registry³¹. The Trial Panel rejected the conditional release regime proposed by the Kosovo Police and considered that no additional measures could sufficiently mitigate the existing risks.³²

18. The SPO recalls its previous submissions that the conditions proposed are insufficient and the Kosovo Police cannot effectively enforce them.³³ These submissions remain applicable in the present review.

19. Since the last review, nothing has changed that would affect the Trial Panel's prior 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.

³⁰ 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).

³¹ 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.

³² February 2022 Gucati Review Decision, KSC-BC-2020-07/F00562, paras 48-56; February 2022 Haradinaj Review Decision, KSC-BC-2020-07/F00563, paras 49-57, *confirmed by* April 2022 Haradinaj Appeals Decision, KSC-BC-2020-07/IA008/F00004, paras 54-57.

³³ 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.

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.³⁴

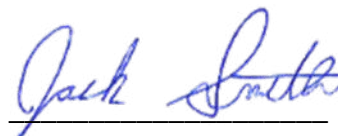
21. The Trial Panel previously found in February 2022 that detention was proportionate,³⁵ and this trial continued to move expeditiously since then. The case closed and, noting especially Rule 159(1), the trial judgment is expected shortly.

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 case, the lengthy custodial sentence requested for a conviction, 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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Thursday, 7 April 2022

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³⁴ 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.

³⁵ February 2022 Gucati Review Decision, KSC-BC-2020-07/F00562, paras 59-62; February 2022 Haradinaj Review Decision, KSC-BC-2020-07/F00563, paras 60-63.