

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 Nasim Haradinaj

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Defence Reply to Prosecution Consolidated Submissions for Review of Detention

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I. INTRODUCTION

1. The Defence for Mr. Nasim Haradinaj (“Haradinaj Defence”) seeks to reply to the consolidated submissions for review of detention filed by the Specialist Prosecutor’s Office (“SPO”) on 7 April 2022 (“Consolidated Submissions”).¹

II. APPLICABLE LAW

2. According to Article 41(6) of the Law on the Specialist Chambers and Specialist Prosecutor’s Office (“Law”), an individual shall only be detained in the following situations:
 - 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

¹ KSC-BC-2020-07/F00586, *The Prosecutor v. Hysni Gucati and Nasim Haradinaj*, Prosecution consolidated submissions for review of detention, 7 April 2022.

- iii. 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 which he or she has threatened to commit.
3. Pursuant to Article 3(2)(e) of the Law, the Kosovo Specialist Chambers (“KSC”) shall adjudicate and function in accordance with international human rights law, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) as well as the International Covenant on Civil and Political Rights (“ICCPR”) as given superiority over domestic laws by Article 22 of the Constitution.

III. SUBMISSIONS

4. The continued detention of Mr. Haradinaj is unnecessary and disproportionate. The European Court of Human Rights has held that every detention prior to conviction entails a serious departure from the rules of respect for individual liberty and of the presumption of innocence.² Under

² European Court of Human Rights, *Stögmüller v. Austria*, Appl. no. 1602/62, 10 November 1969, para 4.

the European Court's jurisprudence, a genuine requirement of public interest must exist in order to justify the continued detention and to outweigh the rule of respect for individual liberty.³

5. For the purposes of clarity, the following submissions correspond to those made by the SPO in its Consolidated Submissions.

A. Grounded Suspicion under Article 41(6)(a)

6. Under Article 5(3) of the ECHR, the case of *Labita v. Italy*⁴ makes it clear that the persistence of reasonable suspicion constitutes a *conditio sine qua non* for the lawfulness of the continued detention. However, after a certain lapse of time, it no longer suffices. More specifically, continued detention can be justified only if “*there are actual indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty*” and it implies the requirement to give relevant as well as sufficient reasons for the detention in addition to the persistence of reasonable suspicion.⁵
7. In the jurisprudence of the International Tribunal for the Former Yugoslavia (“ICTY”), particularly in *Prosecutor v. Delalic et al.*, additional evidence as to

³ European Court of Human Rights, *Smirnova v. Russia*, Appl. nos. 46133/99 and 48183/99, 24 July 2003, paras 61-62.

⁴ European Court of Human Rights, *Labita v. Italy*, Appl. no. 26772/95, 6 April 2000, para 153.

⁵ European Court of Human Rights, *Buzadji v. The Republic of Moldova*, Appl. no. 23755/07, 5 July 2016, paras 90 and 102.

“irrefutable facts” adduced by the Accused in the course of the trial is to be included among the facts and circumstances to be considered within the context of the review of the continued necessity for detention, though this is done “*in a cursory manner, keeping in mind that this is not the proper time to consider the merits of the case*”.⁶

8. It is respectfully submitted that under this heading, the SPO has provided neither relevant nor sufficient reasons for the continued detention of Mr. Haradinaj. Conversely, it continues to make submissions that are worded in abstract, repetitive and formulaic terms.

B. NECESSITY OF DETENTION

9. It is respectfully submitted that the obligation to avoid abstract and stereotypical reasoning is closely associated with the duty to consider alternatives to the continued detention of an accused person, hence sufficient and relevant reasons should be given in order to rule out any possibility of alternative non-custodial measures.⁷

Risk of flight

10. It is reiterated that the SPO seeks to justify the continued detention of Mr. Haradinaj by deploying repetitive and formulaic terms particularly in relation

⁶ ICTY, *Prosecutor v. Delalic et al.*, IT-96-21-T, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalic, 25 September 1996, para 24.

⁷ European Court of Human Rights, *Giorgi Nikolaisvili v. Georgia*, Appl. no. 37048/04, 13 January 2009, para 79.

to the imminence of the trial judgment. Although this is acknowledged, the SPO should take under scrutiny that the danger of absconding cannot be inferred solely on the grounds of the severity of the sentence risked, but other relevant factors must be assessed particularly in relation to the following: the individual's character, morals, home, occupation, assets, family ties and "*all kinds of links with the country in which he is being prosecuted*".⁸

11. Mr. Haradinaj has a considerable number of protective factors that subsequently preclude him from absconding: firstly, he is a family, from whom he has been separated from throughout the proceedings; secondly, he is of good character; thirdly, he is a notable figure in Kosovo; and fourthly, he has a network of close associates both within and outside of the KLA WVA. The SPO has sought to use his association to the KLA WVA as an aggravating factor, failing to appreciate that he has served as its Vice President in such a manner consistent with consideration to the application of the rule of law. It is quite clear that his conduct as a senior member of such an organisation supports the contention that he may safely be granted provisional release.
12. Further to the above, the expectation of a "*heavy sentence*" and the weight of evidence may be relevant indeed, but "*is not as such decisive and the possibility of obtaining guarantees may have to be used to offset any risk*".⁹

⁸ European Court of Human Rights, *Becciev v. Moldova*, Appl. no. 9190/03, 4 October 2005, para 58.

⁹ *Ibid*, para 58.

13. It is respectfully submitted that the risk of flight decreases with the passage of time spent in detention.¹⁰ Although, according to the European Court's case-law, the expression "*the state of evidence*" may be a relevant factor for the existence and persistence of serious indications of guilt, it alone cannot justify lengthy detention.¹¹
14. The SPO's repetitive submission as far as membership of the KLA WVA is concerned, according to paragraph 8 of the Consolidated Submissions, Mr. Haradinaj's right to freely express his opinions with regards to the operation of the KSC is a right to which he is entitled in a democratic society.
15. In this regard, the SPO fails to consider Mr. Haradinaj's demeanour throughout the trial, including his good character, thereby continuing to refer to "evasive manoeuvres and uncooperative conduct upon arrest", as per paragraph 10 of the Consolidated Submissions, without providing any evidentiary basis. More specifically, Mr. Haradinaj continues to deny the aforementioned assertion. On the contrary, Mr. Haradinaj demonstrated, at all times, his cooperation not only during the arrest¹² but also during the entire investigation.¹³ As a result, these can indeed be described as "irrefutable

¹⁰ European Court of Human Rights, *Neumeister v. Austria*, Appl. no. 1936/63, 27 June 1968, para 10.

¹¹ European Court of Human Rights, *Dereci v. Turkey*, Appl. no. 77845/01, 24 May 2005, para 38.

¹² KSC-BC-2020-07, Transcript 12 January 2022, p. 2805, l.14-25, p.2806, l.1-25, p.2807, l.1-25, p.2808, l.1-7.

¹³ KSC-BC-2020-07-094543-094543 RED, SPO Official Note, 23 March 2021; KSC-BC-2020-07, Transcript 6 December 2021, p.2196, l.9-24; KSC-BC-2020-07-101129-101131 RED, Scan of Notebook with handwriting, 17 September 2020; KSC-BC-2020-07, Transcript 18 October 2021, p.853, l.1-4, p.912, l.11- 18, p.914 l.5-19; KSC-BC-2020-07, Transcript 26 October 2021, p.1447, l.7- 21, p.1448, l.3-25, p.1149 l.2- 24, p.1450, l.10-24.

facts”, according to the ICTY in *Prosecutor v. Delalic et al.*¹⁴, referred to above in paragraph 7 respectively.

16. Furthermore, it is incontrovertible that Mr. Haradinaj had been cooperative throughout the proceedings and that he had given his evidence *viva voce* without interfering with the proper administration of justice.

Risk of obstructing the progress of KSC proceedings

17. It is respectfully submitted that the danger of the accused’s hindering the proper conduct of the proceedings cannot be relied upon *in abstracto*, but it has to be supported by factual evidence.¹⁵ Nevertheless, the risk of pressure upon witnesses can be accepted at the initial stages of the proceedings¹⁶, but it cannot be based solely on the likelihood of a severe penalty and must be therefore linked to specific facts.¹⁷
18. The SPO fails in this regard in that it merely refers to the “climate of intimidation of witnesses in previous Kosovo cases”, hence based on a broad and generalised assertion by referring to facts that are effectively historical without taking into account the discrepancies presented by Witness W04842 in particular, who contradicted himself multiple times as a result.¹⁸

¹⁴ ICTY, *Prosecutor v. Delalic et al.*, IT-96-21-T, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalic, 25 September 1996, para 24.

¹⁵ European Court of Human Rights, *Becciev v. Moldova*, Appl. no. 9190/03, 4 October 2005, para 59.

¹⁶ European Court of Human Rights, *Jarzyński v. Poland*, Appl. no. 15479/02, 4 October 2005, para 43.

¹⁷ European Court of Human Rights, *Merabishvili v. Georgia*, Appl. no. 72508/13, 28 November 2017, para 224.

¹⁸ KSC-BC-2020-07, Transcript 4 November 2021, pp.1841-1873, p.1879, l.16-25, p.1880, l.1-25, p.1881, l.1-10.

Risk of committing further crimes

19. It is respectfully submitted that the continued detention of Mr. Haradinaj based on the risk of committing further crimes should entail a danger that is plausible in the light of the circumstances of the case, in particular the past history and the personality of the person concerned.¹⁹
20. The SPO's submissions in this regard are based on abstract concerns, continuing to refer to concerns related to the risks of disseminating information to which Mr. Haradinaj has no access and in which he certainly has no interest.

C. NO CONDITIONS SUFFICIENTLY MITIGATE THE RISKS IDENTIFIED

21. As previously submitted, Mr. Haradinaj is of good character and the SPO's reasons are merely insufficient. Therefore, the above submissions in relation to the European Court's jurisprudence are reiterated here.

D. DETENTION REMAINS PROPORTIONATE

22. It is respectfully submitted that detention is disproportionate and unreasonable. The reasoning given by the SPO under this ground has already been deployed previously, without providing any substance. Instead, the SPO is perpetually carrying out a predictive assessment as to the length of the

¹⁹ European Court of Human Rights, *Clooth v. Belgium*, Appl. no. 12718/87, 12 December 1991, para 40.

final sentence, thereby implying a judgment of guilt. It has been a common theme throughout these proceedings where the SPO has shown complete disregard for the presumption of innocence, both during the trial and in briefings outside the courtroom.

23. In this respect, whilst the length of Mr. Haradinaj's detention must be balanced against the Article 41(6) risks as well as the circumstances of the case, which includes potential penalties for the crimes charged, as per paragraph 20 of the Consolidated Submissions, the SPO fails to consider that the proportionality of the interference with the right to liberty is contingent on its relationship to the legitimate interest pursued. There is nothing that indicates a high probability that Mr. Haradinaj would take any steps to interfere with this legitimate interest.

IV. CONCLUSION

24. In light of the above, it is submitted that the SPO has failed to identify the risk factors posed by Mr. Haradinaj and there has been no evidence disclosed that would preclude him from being granted provisional release, either with appropriate and reasonable conditions or without conditions.
25. Therefore, there exists no proper basis upon which to further extend the detention of Mr. Haradinaj and he can safely be granted provisional release.

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