



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: **KSC-CA-2022-01**

Before: **A Panel of the Court of Appeals Chamber**
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Fidelma Donlon

Date: 28 July 2022

Original language: English

Classification: **Public**

Decision on Specialist Prosecutor's Office Request to Maintain Detention

Specialist Prosecutor's Office:
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Counsel for Hysni Gucati:
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Counsel for Nasim Haradinaj:
Toby Cadman

THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively)¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 172 of the Rules of Procedure and Evidence (“Rules”) is seised of the “Prosecution notification and request to maintain detention”, filed on 17 June 2022 (“Request”).²

I. BACKGROUND

1. On 25 September 2020, Mr Hysni Gucati (“Gucati”) and Mr Nasim Haradinaj (“Haradinaj”) (collectively, “Accused”) were arrested in Kosovo pursuant to arrest warrants issued by a Single Judge.³ They were transferred to the detention facilities of the Specialist Chambers in The Hague on 25 and 26 September 2020, respectively.⁴

2. On 18 May 2022, the trial panel assigned to Case No. KSC-BC-2020-07 (“Trial Panel”) issued a judgment finding both Accused guilty of five of the six counts

¹ F00011, Decision Assigning a Court of Appeals Panel, 21 June 2022.

² F00010, Prosecution notification and request to maintain detention, 17 June 2022 (distributed on 20 June 2022) (“Request”).

³ KSC-BC-2020-07, F00015, 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/A01/RED, Public Redacted Version of Arrest Warrant for Hysni Gucati, 25 September 2020; 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. 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).

⁴ KSC-BC-2020-07, F00018, Notification of the Reception of Hysni Gucati in the Detention Facilities of the Specialist Chambers, 25 September 2020 (strictly confidential and *ex parte*, reclassified as public on 15 October 2020); KSC-BC-2020-07, F00020, Notification of the Reception of Nasim Haradinaj in the Detention Facilities of the Specialist Chambers, 26 September 2020 (strictly confidential and *ex parte*, reclassified as public on 15 October 2020). See also KSC-BC-2020-07, F00012/A02/RED, Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers, 25 September 2020 (strictly confidential and *ex parte* version filed on 24 September 2020, reclassified as confidential and *ex parte* on 9 October 2020); KSC-BC-2020-07, F00012/A04/RED, Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers, 26 September 2020 (strictly confidential and *ex parte* version filed on 24 September 2020, reclassified as confidential and *ex parte* on 9 October 2020).

charged, and sentencing each of them to four and a half years of imprisonment, with credit for the time served, and to a fine of one hundred euros ("Trial Judgment").⁵

3. On 17 June 2022, the Accused filed their notices of appeal.⁶ On the same day, the Specialist Prosecutor's Office ("SPO") filed its Request, notifying the President that it does not intend to seek an appeal of the Trial Judgment and requesting that, if the Accused seek to appeal the Trial Judgment, their detention be maintained by the Appeals Panel.⁷

4. On 22 June 2022, the Presiding Judge of the Panel invited the Accused to file their respective response to the Request, if any, within ten days of its distribution and the SPO to file its reply, if any, within five days of the responses.⁸

5. On 30 June 2022, Gucati filed his response to the Request.⁹ Haradinaj did not respond.¹⁰ The SPO did not reply.

II. DISCUSSION

A. SUBMISSIONS OF THE PARTIES

6. The SPO submits that the Trial Panel's findings are well beyond the grounded suspicion standard under Article 41(6)(a) of the Law, and the Article 41(6)(b) risks

⁵ KSC-BC-2020-07, F00611/RED, Public Redacted Version the Trial Judgment, 18 May 2022 (confidential version filed on 18 May 2022) ("Trial Judgment"), paras 1012-1017.

⁶ See F00008, Haradinaj Defence Notice of Appeal of Trial Judgement, 17 June 2022 (distributed on 20 June 2022); F00009/RED, Public Redacted Version of Gucati Notice of Appeal re Trial Judgment KSC-BC-2020-07/F00611 ("Judgment") Pursuant to Art. 46(1)(a), (b) and (c) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 176(2) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), 17 June 2022 (distributed on 20 June 2022; confidential version filed on 17 June 2022).

⁷ Request, paras 1, 4. See also Request, para. 2.

⁸ F00012, Order Scheduling a Pre-Appeal Conference and on Related Matters, 22 June 2022 ("Scheduling Order"), paras 8, 11.

⁹ F00024, Response to Prosecution Request to Maintain Detention, 30 June 2022 ("Gucati Response"). Due to an administrative oversight, the filing was distributed on 5 July 2022. See Transcript, Pre-Appeal Conference, 5 July 2022, p. 8 line 24 - p. 10 line 22.

¹⁰ Cf. F00015, Haradinaj Defence Notification of Agenda Items ahead of the Pre-Appeal Conference of 5 July 2022, 27 June 2022, para. 10.

found by the Trial Panel are at their highest following the conviction of the Accused. According to the SPO, there continue to be no conditions which could sufficiently mitigate these risks and there is no question of proportionality given the expeditiousness of the trial, the lengthy sentence imposed, and the strict timelines governing appellate proceedings.¹¹

7. Gucati responds that, as there is presently no application to either the Trial Panel or the Court of Appeals Panel for an order requesting the Accused's release, he makes no substantive response in relation to the Request, which neither seeks nor requires any order or relief.¹² He submits, however, that he reserves the right to apply for an order under Article 46(8) of the Law for release from custody at any stage of the appellate proceedings.¹³

B. ASSESSMENT OF THE COURT OF APPEALS PANEL

8. Pursuant to Article 46(8) of the Law, unless the Trial or Court of Appeals Panel orders otherwise, a convicted person shall remain in custody pending an appeal.¹⁴ It follows from this provision that, once a person has been convicted, his or her detention is the rule and release the exception. The Panel further notes that, according to Rule 174 of the Rules, Rules 56 to 60 concerning detention, with the exception of Rule 58, shall apply *mutatis mutandis* to proceedings before the Appeals Panel. The interpretation of these Rules shall be guided by the presumption of detention which follows, as explained above, from Article 46(8) of the Law. The Panel finally notes in this context that the Law – *in casu* Article 46(8) – prevails over the Rules in case of conflict.¹⁵ Against this background, the Panel considers that contrary to the phase prior

¹¹ Request, para. 3.

¹² Gucati Response, paras 5-6.

¹³ Gucati Response, para. 7.

¹⁴ See Scheduling Order, para. 8. See also F00020/RED, Public Redacted Version of Decision on Gucati's Third Request for Temporary Release on Compassionate, 04 July 2022 (confidential and *ex parte* version filed on 30 June 2022), para. 17.

¹⁵ See Rule 4(2) of the Rules. See also Article 19(3) of the Law; KSC-BC-2020-07, IA001/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, para. 30.

to conviction on first instance, where a pre-trial judge or a trial panel are required, pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules, to conduct automatically a bi-monthly review of detention, this is no longer required during the appellate proceedings post-conviction.

9. The distinction between the pre- and the post-conviction stages in relation to detention is consistent with Article 5 of the European Convention on Human Rights (“ECHR”),¹⁶ which is closely reflected in Article 29 of the Constitution of Kosovo.¹⁷ According to Article 5(1)(a) of the ECHR, no one shall be deprived of his or her liberty save, *inter alia*, in the case of lawful detention of a person after conviction by a competent court. This is to be understood as conviction by a court of first instance, since that is the time when the protection under Article 5(1)(c) and (3) of the ECHR ends.¹⁸ Such protection includes a regular review of detention and requires an accused’s provisional release once his or her continuing detention ceases to be reasonable, as prior to conviction by a first instance court there is a presumption in favour of release.¹⁹

10. The above interpretation is also consistent with the Kosovo Criminal Procedure Code.²⁰ Further, it is not prejudicial to the Accused, since he remains entitled to request a review of his detention at any time.²¹

¹⁶ See ECtHR, *Wemhoff v. Germany*, no. 2122/64, Judgment, 27 June 1968 (“*Wemhoff v. Germany* Judgment”), pp. 19-20, para. 9.

¹⁷ See also Article 53 of the Constitution of Kosovo (providing that human rights and fundamental freedoms guaranteed by the Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights).

¹⁸ See e.g. ECtHR, *Selahattin Demirtaş v. Turkey*, no. 14305/17, Judgment, 22 December 2020, para. 290; ECtHR, *Štvrtecký v. Slovakia*, no. 55844/12, Judgment, 5 June 2018, para. 55; *Wemhoff v. Germany* Judgment, pp. 19-20, para. 9.

¹⁹ See ECtHR, *Bykov v. Russia*, no. 4378/02, Judgment, 10 March 2009, para. 61.

²⁰ Compare Article 193 of the Criminal Procedure Code of the Republic of Kosovo, Law No. 04/L-123, 13 December 2012 (“Kosovo Criminal Procedure Code”) (providing for an automatic bi-monthly review of detention until the conclusion of the main trial) with Article 389(5) of the Kosovo Criminal Procedure Code (providing for a one-time review by the reporting judge within five days of receiving the case file in relation to appeals against judgments).

²¹ See Article 41(2) of the Law.

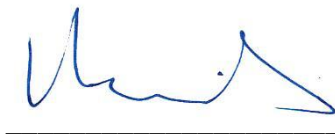
11. In light of the above, the Panel agrees with Gucati's assertion that the Request does not require any order or relief.²²

III. DISPOSITION

12. For these reasons, the Court of Appeals Panel:

DECLARES the Request moot; and

CONFIRMS that the Accused shall remain in detention pending their appeals, unless the Panel orders otherwise.



**Judge Michèle Picard,
Presiding Judge**

Dated this Thursday, 28 July 2022

At The Hague, the Netherlands

²² See Gucati Response, para. 6.