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In:	**KSC-BC-2020-06**
	The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**The President of the Specialist Chambers**
	Judge Ekaterina Trendafilova
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Hashim Thaçi
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Public Redacted Version of

Thaçi Defence appeal against the "Decision on Hashim Thaçi's Application for Interim Release"

With Public Annexes 1 and 2

Specialist Prosecutor

Jack Smith

Counsel for Hashim Thaçi

David Hooper

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. Mr Hashim Thaçi appeals as of right[1] the "Decision on Hashim Thaçi's Application for Interim Release" ("Decision")[2] in which the PTJ refused Mr Thaçi's application for interim release.

2. In this Decision, the PTJ made a series of errors, encapsulated in the following two grounds of appeal, which are fundamental in nature and materially affect the Decision.

II. BACKGROUND

3. On 7 January 2011 the "Marty Report" was published,[3] alleging that Mr Thaçi was responsible for very serious crimes.

4. On 24 June 2020, the SPO issued a press statement announcing, *inter alia*, that:

> *[o]n 24 April 2020, […] [it had] filed a ten-count Indictment with the Kosovo Specialist Chambers (KSC) for the Court's consideration, charging Hashim THAÇI, Kadri VESELI, and others with a range of crimes against humanity and war crimes, including murder, enforced disappearance of persons, persecution, and torture. The Indictment alleges that Hashim THAÇI, Kadri VESELI, and the other charged suspects are criminally responsible for nearly 100 murders. The crimes alleged in the Indictment involve hundreds of known victims of Kosovo Albanian, Serb, Roma, and other ethnicities and include political opponents.*[4]

5. On 26 October 2020, the PTJ confirmed the Indictment against Mr Thaçi,[5] issued

[1] Article 45(2), KSC Law; Rule 58(1), RPE.
[2] KSC-BC-2020-06/F00177, Decision on Hashim Thaçi's Application for Interim Release, 22 January 2021.
[3] https://www.scp-ks.org/sites/default/files/public/coe.pdf.
[4] https://www.scp-ks.org/en/press-statement.
[5] KSC-BC-2020-06/F00045/A03, Further redacted Indictment, 4 November 2020.

an arrest warrant,[6] and ordered his transfer to the KSC's detention facilities.[7]

6. On 5 November 2020, Mr Thaçi resigned as President of the Republic of Kosovo, voluntarily surrendered to KSC officials in Kosovo and, thereafter, was transferred to the KSC's detention facilities in The Hague.[8]

7. On 4 December 2020, Mr Thaçi applied for interim release in the Request. On 16 December 2020, the SPO filed its Response. On 7 January 2021, the defence filed its Reply to the Response. On 22 January 2021, the Decision refusing Mr Thaçi's application for interim release was issued.

III. STANDARD OF REVIEW

8. The Court of Appeals Panel has determined that the standard of review applicable to interlocutory appeals is the standard provided for appeals against judgments, as specified in the KSC Law.[9]

9. The Court of Appeals Panel further specified that:

a. In relation to an error of law, a party "must identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision. An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground. However, even if the party's arguments are insufficient to support the

[6] KSC-BC-2020-06/F00027/A01/RED, Public Redacted Version of Arrest Warrant for Hashim Thaçi, 26 October 2020.
[7] KSC-BC-2020-06/F00027/A02, Order for Transfer to the Detention Facilities of the Specialist Chambers, 26 October 2020.
[8] KSC-BC-2020-06/F00065/Red, Report on the Arrest and Transfer of Hashim Thaçi to the Detention Facilities, 8 November 2020, paras.3-7.
[9] *Gucati* Appeals Decision, para.10.

contention of an error, the Panel may find for other reasons that there is an error of law";[10]

b. In relation to an error of fact, a party must demonstrate that no reasonable trier of fact could have made the impugned finding and only an error that has caused a miscarriage of justice will cause the Panel to overturn a decision;[11] and

c. In relation to a discretionary decision, a party must demonstrate that the lower panel has committed a discernible error in that the exercise of discretion is based on an erroneous interpretation of the law; it is exercised on a patently incorrect conclusion of fact; or where the decision is so unfair and unreasonable as to constitute an abuse of discretion. The Court of Appeals Panel will also consider whether the lower panel has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.[12]

IV. GROUNDS OF APPEAL

A. GROUND 1: ERRORS IN FINDING THAT THE ARTICLE 41(6)(b) CRITERIA WERE MET

(i) Ground 1.1: Error in relation to the evaluation of risk

10. In the Decision, the PTJ erred in law by failing properly to articulate and apply the correct legal standard for the evaluation of risk for the purposes of determining whether the Article 41(6)(b) criteria were met.[13] Given that the satisfaction of the

[10] *Gucati* Appeals Decision, para.12.
[11] *Gucati* Appeals Decision, para.13.
[12] *Gucati* Appeals Decision, para.14.
[13] A similar error has been identified by Mr Veseli's defence. *See* KSC-BC-2020-06/IA001/F00001, Defence Request to Appeal the "Decision on Kadri Veseli's Application for Interim Release", 1 February 2021, paras. 55-58.

criteria depends on the evaluation of risk under each limb, this error invalidates the decision.

11. This error can be discerned in the following findings. First, in the brief discussion on the threshold for detention, the PTJ found that "*the specific articulable grounds must support the "belief" that the risks under any of the three limbs of Article 41(6)(b) of the Law exist, denoting the acceptance of the possibility, not the inevitability, of a future occurrence. In simple terms, while suspicion simpliciter is not enough, certainty is not required.*"[14] No further elaboration on the threshold or level of risk which required to be attained was provided. However, the PTJ then proceeded in the body of the Decision, expressly but erroneously, to require Mr Thaçi to demonstrate that all risk had been "*eliminated*" or "*negated*" for release to be granted.[15]

12. These findings do not specify the correct legal test. While "*inevitability, of future occurrence*"[16] is plainly not necessary, it is equally the case that a mere possibility that one of the identified risks might eventuate is insufficient to satisfy the statutory test and strip an accused of his liberty. Instead, and as supported by the international jurisprudence, the risk must be a real risk and more than being fanciful or a mere possibility.[17]

13. However, nowhere in the PTJ's findings does he evaluate or weigh the likelihood of the risk at issue materialising. Instead, under each limb of the Article 41(6)(b) test, the PTJ simply finds that "*a risk*" exists;[18] whether it is a "*real*" risk or a mere possibility is not explained. The threshold which the risk has attained remains unspecified and, thus, could encompass a very low threshold, just above suspicion.

[14] Decision, para.20 (footnotes omitted).
[15] Decision, paras.32,49.
[16] *Gucati* Appeals Decision, para.67.
[17] *Katanga* Judgment, paras.21,24; *Merabishvili* Judgment, para 229; *Ilijkov* Judgment, para.84; *Jarzyński* Judgment, paras. 43,46; *Samoylov* Judgment, paras.109,119 – 120.
[18] Decision, paras.34,44,50.

14. That said, the PTJ's findings that Mr Thaçi had to "*eliminate*" or "*negate*" all risk, no matter how unlikely, appears to evidence that any risk above suspicion, no matter how remote, was considered sufficient by the PTJ to continue Mr Thaçi's detention. These findings were erroneous. The exclusion of all risk is impossible. The exclusion of all risk also sets a standard which would be incompatible with the right to provisional release pending trial enshrined in Article 5 of the ECHR and Article 29 of the Kosovan Constitution and also the "*presumption…in favour of liberty*."[19] Rather, the standard which the PTJ should have properly directed himself to apply was an assessment of whether any concrete or real risk could be adequately mitigated by imposing conditions on Mr Thaçi's provisional release.

15. Accordingly, the PTJ erred by holding Mr Thaçi to a markedly higher and incorrect legal standard; namely whether he had demonstrated that any risk under any of the Article 41(6)(b) limbs had been totally eliminated.

(ii) Ground 1.2: Errors in finding a risk of flight

16. In finding that "*a risk of flight exists in relation to Mr Thaçi*",[20] the PTJ erred in law and fact, thus, invalidating and/or affecting the outcome of the Decision. First, contrary to the applicable legal standard, the PTJ failed to base his finding of a risk of flight on "*concrete grounds*". Second, in determining that Mr Thaçi is a flight risk, the PTJ failed to take account of a relevant consideration, namely the personal circumstances of the accused. Third, no reasonable trier of fact on the evidence adduced could have made the impugned finding.

[19] SCCC 26 April 2017 Judgment, para.115.
[20] Decision, para.34.

(a) Legal error - absence of "concrete grounds"

17. It is well-established that, to "*protect[] [an accused] against arbitrariness,…specific reasoning and concrete grounds…are required to be relied upon by any Panel in its decisions authorising detention on remand*".[21] Notwithstanding the PTJ's acknowledgement of this standard,[22] he failed to apply it in determining that Article 41(6)(b)(i) is satisfied in this case.

18. The determination that Mr Thaçi is a flight risk was made on two bases, neither of which is supported by the necessary "concrete grounds". First, the PTJ held that "*the nature and extent of the crimes charged, as progressively informed through disclosure of the full evidentiary record against the Accused, as well as the severity of a potential sentence, constitute important factors incentivising Mr Thaçi to abscond, should he be released.*"[23] The PTJ specifically noted the number of counts charged, the nature and factual scope of the charges and the fact that, if convicted, Mr Thaçi may receive a life sentence.[24] However, no "*concrete grounds*" were advanced to support this finding. In fact, the weight of the available evidence provides "*concrete grounds*" to show that the converse is true.

19. Specifically, the fact that he was a potential suspect in the commission of serious crimes has been apparent to Mr Thaçi since the 2011 publication of the Marty Report, as has the reality that his status might change from potential to actual suspect through the establishment of the KSC. It is difficult to understand what more information Mr Thaçi required to appreciate fully the gravity of the allegations being levelled against him and their likely consequence. Nevertheless, in so far as more factual information

[21] SCCC 26 April 2017 Judgment, para.115 (footnotes omitted).
[22] Decision, para.20.
[23] Decision, para.31.
[24] Decision, para.31. It is to be noted that the EULEX courts consider a sentence of 15 years to be the maximum sentence available in the relevant period.

was necessary, then most of the additional detail relied on by the PTJ was provided in the SPO press release in June 2020.

20. The PTJ's conclusion that the "*nature and extent of the crimes charged as progressively informed through disclosure*"[25] (emphasis added) somehow incentivises Mr Thaçi to flee cannot be reconciled with the reality of the Indictment when compared with the earlier rhetoric of the Marty Report or the SPO Press Release. Specifically, the relatively few number of times that Mr Thaçi is directly referenced in the Indictment is striking. Indeed, putting aside the introductory paragraphs about the personal and professional status of the accused, Mr Thaçi appears in only 24 out of the 173 paragraphs of the Indictment, including only four of the 115 paragraphs addressing the underlying crimes. On its face this perhaps suggests a more limited role than the hype of the June 2020 Press Release may have led him to understand.

21. The key point, however, is that none of this information regarding the charges, whether provided in 2011 or June 2020, prompted Mr Thaçi to abscond. Indeed, as the PTJ found with Mr Veseli, it is reasonable to assume that in June 2020, the SPO must have considered that Mr Thaçi did not pose a high risk of flight.[26] This view was proved correct (and, thus, should have been maintained). Mr Thaçi continued to cooperate with the KSC and voluntarily attended a third SPO interview on 13-16 July 2020 in The Hague. In November 2020, he was given notice of the confirmation of the indictment against him and the fact that an arrest warrant had been issued a full day before his voluntary surrender.[27] Again, there was no flight and no obstruction. Instead, on 5 November 2020, Mr. Thaçi announced his resignation as President, called for peace and unity, and surrendered himself to the KSC.[28] No attempt was made to

[25] Decision, para. 31.
[26] *Veseli* Decision, para.32.
[27] KSC-BC-2020-06/F00065-Red, Report on the Arrest and Transfer of Hashim Thaçi to the Detention Facilities, 18 November 2020.
[28] Request, para.38.

try to evade justice by utilising the legal and constitutional benefits and privileges of the Office of the President of Kosovo.

22. Crucially, none of this was acknowledged or considered by the PTJ. Given the unusual circumstances in this case which mean that Mr Thaçi has stood accused of serious crimes since the 2011 Marty Report, and has known that he faces a 10 count Indictment alleging responsibility for nearly 100 murders since June 2020, "*specific reasoning and concrete grounds*" were required by the PTJ to support his otherwise general finding that the nature of the charges and potential sentence were factors incentivising flight. The failure to provide these constitutes a material error.

23. The second base on which Mr Thaçi was held to be a flight risk stems from his former positions in the KLA and the PTJ's speculative conclusion that former subordinates and persons affiliated with the KLAWVA "*may*" be willing to give him access to resources and/or help him abscond.[29] The absence of evidence, *i.e.*, the necessary "*concrete grounds*", to support this finding is glaring. The PTJ's need to resort to the term "*may*" is unsurprising but insufficient. There is no evidence to show that Mr Thaçi has any position or link to the KLAWVA, or that he has used (or sought to use) such individuals or groups for wrongdoing in the past, or that there was a concrete risk that he would seek to do so if released. The PTJ's attempt to link Mr Thaçi's previous positions to a risk of flight amounts to unsupported conjecture and is unconnected to any specific act or conduct of Mr Thaçi himself.[30]

24. The PTJ's speculative finding is to be contrasted with other cases which were based on evidence. For example, in the *Bemba et al* case, the ICC Appeals Chamber rejected Mr Kilolo's contention that there was no evidence to show that he could use Mr Bemba's network to abscond by pointing to "*an indication that supporters of Mr*

[29] Decision, para.31.
[30] *Prlić* Decision, para.30 ("even if the accused continues to enjoy influence, it does not necessarily follow that he will exercise it unlawfully.")

Bemba had previously made money available to Mr Kilolo" and, thus, "*could also do so to allow him to evade justice.*"[31] Similarly, in *Gbagbo*, the ICC Appeals Chamber found that the Trial Chamber had not erred in relying on the support the accused enjoyed from political supporters in finding a risk of flight because in that case "*the supporters had been able to 'mobilise more than 140,000 telephone calls to the Court over a short time period in December 2011.'*"[32] It was this concrete example of past support that "*demonstrate[d] the capacity of the support network*",[33] and not its mere existence. No similar evidence provides concrete grounds for finding that Mr Thaçi is a flight risk based on access to a support network. The PTJ's finding in the absence of such evidence is a material legal error.

(b) Legal and factual errors by failing to consider Mr Thaçi's personal circumstances

25. The PTJ further erred by failing to consider a relevant consideration when determining whether Article 41(6)(b)(i) was satisfied. The international jurisprudence is clear that the "*[p]ersonal circumstances of the suspect such as the suspect's education, professional or social status may be relevant to assessing whether or not a suspect will appear before the Court.*"[34] However, no consideration was given to Mr Thaçi's personal circumstances in assessing whether or not he is a flight risk. This was a material omission amounting to an error of fact and law.

26. The information which the PTJ was invited, but failed, to take into account went beyond a personal assurance by Mr Thaçi that he will appear before the Court as and when directed and included information provided by respected third parties and is compelling in demonstrating that Mr Thaçi is someone whose word and undertakings can be given full weight. The information concerned: Mr Thaçi's general background

[31] *Bemba et al* OA2 Judgment, paras.104-105.
[32] *Gbagbo* Judgment, para.59.
[33] *Gbagbo* Judgment, para.59.
[34] *Bemba et al* OA2 Judgment, para.111; *Novikov* Judgment, para.46; *Becciev* Judgment, para.58.

and history; his good character, together with his behaviour over the past twenty years; the recognised steps that he has taken to bring his country to peace and independence; his actions seeking peace and reconciliation with Serbia; and the respect he has earned amongst the international community, including his nomination for the Nobel Peace Prize.[35] In relation to this latter point, of note is that Mr Thaçi still benefits from the confidence of prominent public figures, both at the national and international levels as attested to in his character references.[36]

27. It is acknowledged that, in the context of assessing risk of further criminality under Article 41(6)(b)(iii), the PTJ referred to the lack of evidence of criminality on the part of Mr Thaçi in the years since the indictment time period, Mr Thaçi's public calls for peace and reconciliation and the "*written assurances provided by the Defence*".[37] However, the PTJ was required to assess this evidence, not only under the third limb of the Article 41(6)(b) test, but also in determining the different question of whether or not Mr Thaçi would appear before the Court if released. Further, from the single reference in the Decision to the "*written assurances provided by the Defence*" it is clear that the PTJ failed to properly consider the entirety of the character evidence provided on Mr Thaçi's behalf.[38] The "*written assurances*" were only one aspect of the evidence contained within the character statements.

(c) No reasonable trier of fact could have found a risk of flight

28. Given the facts set out at paragraph 21 and 26 above, no reasonable trier of fact on the evidence adduced could have found that "*a risk of flight exists in relation to Mr Thaçi*".

[35] Request, para.61
[36] Reply, Annexes 1-3.
[37] Decision, para.49.
[38] Decision, para.49.

(iii) Ground 1.3: Errors in finding a risk of obstruction

29. Three legal errors invalidate the finding that "*there is a risk that Mr Thaçi will obstruct the progress of the SC proceedings*".[39]

30. First, there was no evidence before the PTJ that Mr Thaçi, either directly or indirectly, has influenced witnesses, or attempted to influence witnesses, contrary to Article 41(6)(b)(ii). This is because none exists. Instead, the PTJ again erroneously relied on "*Mr Thaçi's past and recent influential positions*" to conclude that this "*may trigger the mobilisation of a vast network of supporters*" with the aim of obstructing proceedings.[40] This is pure speculation. The PTJ surmised that the risk of mobilisation was particularly great due to the current stage in proceedings where Mr Thaçi is progressively informed of the evidence against him.[41] This reasoning, as evidenced by the continued reliance on "*may*", is erroneous. No "*concrete grounds*" were identified which fairly and reasonably link Mr Thaçi to "*the mobilisation of a vast network*" of unconnected and unidentified third parties whose purpose is to obstruct these proceedings. The absence of any "*concrete grounds*", *i.e.*, evidence, to support this element of the PTJ's assessment of the Article 41(6)(b)(ii) criteria constitutes a legal error.

31. Second, the PTJ failed to give adequate reasons to explain why: (i) the Letter;[42] (ii) the request allegedly made to [REDACTED]; and (iii) the reduction in sentences, "*militate in favour of a risk of obstruction*" because "*they show a pattern of consistently undermining the SC*".[43] This failure amounts to a lack of reasoned opinion and an error of law.[44]

[39] Decision, para.44.
[40] Decision, para.38 (emphasis added).
[41] Decision, para.38.
[42] As defined at Decision, para.40.
[43] Decision, para.40.
[44] *Milutinović* Decision, para. 6 ("A Trial Chamber…must…render a reasoned opinion. This obliges it to indicate all those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision.")

32. In relation to the Letter, the PTJ fails to engage in any critical assessment of this document or to provide any explanation as to how its content can be fairly construed as an attempt to undermine the KSC. Instead, the PTJ simply notes its timing, *i.e.*, a few days after Mr Thaçi was summonsed by the SPO.[45] This fact alone is not sufficient. This is particularly so given that, as noted in the Request, the Letter contains nothing improper and simply sets out the legitimate concerns held by the "*institutions of the Republic of Kosovo*" including, the direction the KSC was taking and its lack of progress, and visa problems affecting Kosovan citizens travelling to The Netherlands.[46]

33. As regards [REDACTED], the suggestion [REDACTED] is denied.[47] The defence drew the PTJ's attention to the problems presented [REDACTED].[48] However, rather than evaluate the reliability of the allegation in light of these specific problems, the PTJ simply summarily dismissed the problems because the issue was "*the detention or release of the Accused, [and] not to determine his guilt or innocence*".[49] No further reasoning was provided. With respect, when an accused's fundamental right to liberty is at issue, a critical evaluation of the evidence being relied on to detain him is required. The failure to provide any explanation as to why it was reasonable to rely on the [REDACTED] allegation regardless of the various problems affecting it constitutes a legal error.

34. A similar error arises in relation to the conclusion that the reduction in sentences of two former KLA members formed part of a pattern of undermining the KSC and, thus, was relevant to a finding that there was a risk of obstruction.[50] The commutations were lawful, did not result in release and were well within the applicable legal

[45] Decision, para.40.
[46] Request, para.24. *See also* Arrest Warrant Request, Annex 2.
[47] Reply, para.27.
[48] Reply, para.27.
[49] Decision, para.40.
[50] Decision, para.40.

parameters. How this act can possibly be construed as an act undermining the KSC is not explained in the Decision. If the PTJ simply adopted the SPO's position that the commutations "*signal[]*" Mr Thaçi's "*support for those who engage in retribution against perceived traitors*", then such a tacit adoption was not reasonably open to the PTJ.[51] This is because the SPO makes no link between the "*signal*" and the work of the KSC, nor was one reasonably available, given that the commutations highlighted by the SPO were not made in isolation. Mr Thaçi also commuted the sentences of Serbian prisoners.[52] Yet, no mention is made in the Decision of this relevant consideration which points away from any attempt to send "*signals*" or to undermine the KSC.

35. Third, in paragraph 41 of the Decision, the PTJ again errs in law by making findings without sufficient reasoning and/or evidence. In this paragraph, the PTJ relies on an alleged scheme of benefits offered to persons summonsed by the SPO or their family members, and the attempts to gain insight into or to influence the evidence given by these persons during their SPO interviews, including Mr Thaçi's possession of an SPO suspect interview.

36. The scheme of benefits relates to payments and/or recruitment concerning [REDACTED], Sylejman Selimi, Rrustem Mustafa, [REDACTED] and Haxhi Shala. Each allegation has been comprehensively rebutted.[53] Mr Thaçi had nothing to do with any payments or appointments. The defence notes and adopts the evidence produced and submissions made on behalf of Mr Veseli in respect of payments to [REDACTED].[54]

37. As to attempts to gain insight or to influence evidence, these allegations relate to:

[51] Response, para.23.
[52] Reply, para.30.
[53] Request, paras.54-56; Reply, paras.31-34.
[54] *Veseli* Reply, paras.21-28, referring to KSC-BC-2020-06/F00174/A06, statement of Abelard Tahiri, and KSC-BC-2020-06/F00174/A07, statement of Rodney Dixon QC.

a. Lajçi [REDACTED]: the matter has been extensively addressed in the Request and in evidence submitted on behalf of Mr Veseli.[55] Mr Thaçi played no part.

b. Lajçi [REDACTED]: this matter has also been addressed.[56] There is no evidence that Mr Thaçi [REDACTED].

c. Mr Thaçi seeking to influence the choice of a lawyer: the Request places this in context.[57]

d. [REDACTED]. The matter was addressed in the Reply.[58]

38. While the defence disputes any link between Mr Thaçi and the thrust of the above allegations, no reference is made by the PTJ as to which of these matters he relies upon and for what reason. It is not sufficient to refer merely to a "*pattern*" of incidents.[59] Notwithstanding these denials, the fundamental error in the PTJ's conclusion is the absence of any "*concrete grounds*" actually showing any influence or control by Mr Thaçi over "*witnesses, victims or accomplices*", as required by Article 41(6)(b)(iii). Put another way, what influence and control has Mr Thaçi concretely been shown to exert in the examples relied upon in relation to the conduct or progress of these proceedings? The answer is none. The examples – taken at their highest – are empty of any import or effect in respect of these proceedings. They do not provide the necessary "*concrete grounds*" to satisfy Article 41(6)(b)(ii).

[55] Request, paras.46-47; *Veseli* Request, paras.28-35, referring to KSC-BC-2020-06/F00151/A05, [REDACTED].
[56] Request, para.48.
[57] Request, paras.50-51.
[58] Reply, paras.37-41.
[59] Decision, para.41.

39. The erroneous approach taken in paragraph 41 equally infects the PTJ's finding of "*influence and control established through his official capacity*" in paragraph 42. As a result, it also falls to be dismissed. In any event, Mr Thaçi no longer holds any "*official capacity*" and, thus, reliance on this factor is irrelevant to any assessment of future risk.

40. Given that each element relied on by the PTJ to conclude that there was a risk of obstruction is flawed, as set out above, the "*ongoing climate of intimidation*",[60] as the *"sole [remaining] consideration"*,[61] must also be dismissed. As a result, there is no proper basis for finding that Article 41(6)(b)(ii) is satisfied.

(iv) Ground 1.4: Errors in finding a risk of committing further crimes

41. The PTJ erred in law in finding that "*there is a risk that Mr Thaçi will commit further crimes*"[62] by failing to interpret Article 41(6)(b)(iii) in accordance with its plain and ordinary meaning and by failing to provide any explanation for the adoption of a different, lesser standard. Alternatively, the PTJ erred in law and fact by failing to: (i) consider the "imminence" requirement; (ii) point to "*concrete grounds*" sufficient to establish that there is a risk that Mr Thaçi will commit crimes "*similar to the underlying acts charged*"; and (iii) give proper consideration to all relevant personal characteristics, circumstances and conduct as required. Satisfaction of Article 41(6)(b)(iii) was one of the bases on which release was denied. Therefore, these errors invalidate and/or affect the outcome of the Decision.

42. Article 41(6)(b)(iii) refers to the: *"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."* The reference to repeating *"the criminal offence"* (emphasis added) must refer to the criminal offences set out in the indictment. However, rather than give effect to the article's express terms, the PTJ erroneously found that there was "*a likelihood that Mr*

[60] Decision, para.43.
[61] *Geci* Decision, para.21.
[62] Decision, para.50.

Thaçi will…engage in or contribute to crimes similar to the underlying acts charged" (emphasis added). But a risk of involvement in "*similar*" crimes is not the test, nor is there any proper basis for concluding that it is.

43. Of concern is that the PTJ fails to explain the rationale or legal authority for diverging from the applicable legal standard. It is assumed that he has simply adopted the SPO's purported "*more logical interpretation of the provision*", that is "*that there must be a risk of the accused repeating the underlying criminal acts*".[63] If this is correct, then the PTJ has departed from the plain meaning of the provision with no analysis of the SPO's arguments and, as a result, no basis in law. In support of its interpretation, the SPO argues that "*it had to be plain to the drafters that any armed conflict or attack against the civilian population from the jurisdictional period would have ceased by the time of the accused's arrest some 15-20 years later.*"[64] However, this assertion is unsupported. It is simply the SPO's bald assertion when faced with a provision, the express terms of which it is unable to satisfy on the available evidence.

44. Further, Article 58(1)(b)(iii) of the Rome Statute demonstrates that, if drafters wished to encompass crimes broader than those specified in the indictment, then they could do so expressly. Article 58(1)(b)(iii) provides that the arrest of a person appears necessary: "*where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.*" The reference in this article to "*that crime*" (emphasis added) refers to the indicted crime but the additional reference to "*a related crime*" (emphasis added) broadens the scope of the provision. The absence of such wording in Article 41(6)(b)(iii) further undermines the interpretation adopted by the PTJ.

[63] Decision, para.46 citing to Response, paras.39,41.
[64] Response, para.39.

45. Even if, *arguendo*, the PTJ did not err in finding that a risk of committing crimes *similar* to the underlying acts charged is sufficient when assessing risk under Article 41(6)(b)(iii), the PTJ made the following series of errors.

46. In determining that Article 41(6)(b)(iii) was satisfied, the PTJ failed to consider the "imminence" requirement, in terms of which *"[p]reventive detention cannot reasonably be considered necessary unless a proper balance is struck between the importance in a democratic society of preventing an imminent risk of an offence being committed and the importance of the right to liberty*."[65] This is completely absent from the PTJ's reasoning.

47. The PTJ further erred by failing to point to "*concrete grounds*" sufficient to establish that there is a risk that Mr Thaçi will commit crimes similar to the underlying acts charged.

48. The only "evidence" relied on by the PTJ in support of his conclusion that Article 41(6)(b)(iii) was satisfied, even to the lesser standard than required by the strict terms of the provision, was his findings in relation to "*the course of conduct aimed at undermining the SC and SPO and the attempts to interfere with the proceedings*" combined with "*Mr Thaçi's prominent position in Kosovo and internationally*".[66] However, even ignoring the PTJ's erroneous findings on obstruction, none of the examples relied on could fairly and reasonably be considered as "*similar*" to the underlying acts charged. None involve any suggestion of physical violence or even the threat of physical violence. The examples concern a letter, an alleged request to an academic, commutations of sentences, an alleged scheme of benefits, and possession of an SPO interview. These acts could not be any more different from the crimes charged.

[65] Reply, para.13 citing to *I.S.* Judgment, para.56 and *Denmark* Judgment, para.161.
[66] Decision, para.48.

49. No answer to the PTJ's error is provided by his reliance on the "*prevalent practice of witness intimidation and interference in proceedings against former KLA members.*"[67] This is because there is no evidence linking Mr Thaçi to this practice. Each stage of the PTJ's reasoning is devoid of the necessary "*concrete grounds*" to justify Mr Thaçi's continued detention.

50. Finally, the PTJ failed to give proper consideration to all Mr Thaçi's relevant personal characteristics, circumstances and conduct as required under Article 41(6)(b)(iii). This is apparent from the PTJ's bare consideration in paragraph 49 of the Decision to Mr Thaçi's lack of criminality, public calls for peace and reconciliation and "written assurances". The "written assurances" were only one aspect of the evidence contained within the character statements and defence submissions.

B. GROUND TWO: ERROR IN THE ASSESSMENT OF THE PROPOSED CONDITIONS

51. Even if, *arguendo*, the PTJ correctly found that the Article 41(6)(b) criteria were met, the PTJ committed a "discernible error" in finding that no alternative measures could sufficiently mitigate the risks of obstructing SC proceedings or committing further crimes.[68] This conclusion was made without giving weight to relevant considerations and, as a result, is disproportionate, unfair and/or unreasonable so as to constitute an abuse of discretion.

52. When considering an application for interim release, a finding that the Article 41(6)(b) criteria are met is not an end to the matter. "*Article 41(12) of the Law provides that, in addition to detention on remand, other measures may be ordered to ensure the presence of an accused during proceedings, to prevent his or her reoffending, or to ensure the successful conduct of a criminal trial*."[69] Alternative measures can be imposed alongside any other condition a Panel might consider appropriate. These alternatives to detention conform

[67] Decision, para.48.
[68] Decision, para.58.
[69] SCCC 26 April 2017 Judgment, para.116.

with the proportionality assessment, which must be undertaken when considering an application for interim release.[70]

53. In the Decision, the PTJ found that the risk of flight could be mitigated by the Proposed Condition of house arrest in a third state with a cooperation agreement with the KSC.[71] However, the PTJ found that none of the Proposed Conditions, nor any additional limitations, could sufficiently manage the risks of obstruction or committing further crimes because they could not restrict "*Mr Thaçi's ability to communicate, through non-public means, with his community or support network*."[72] The PTJ further found that "*it is only through the communication monitoring framework applicable at the SC detention facilities that Mr Thaçi's communications can be effectively restricted and monitored*".[73]

54. In reaching this conclusion, the PTJ failed to consider the various straightforward restrictions which would have addressed the PTJ's identified concern, and provided a proportionate alternative to detention.

55. At a minimum, and with no requirement for further investigation, no consideration was given to Mr Thaçi being: (i) detained under house-arrest in a location with either no or limited internet access; and (ii) given access to a single mobile phone for limited communication purposes, such as with his legal team, the details of which he would provide to the Registry. Mr Thaçi's use of such a device could be monitored *via*, for example, reports provided by the relevant telecoms

[70] *Gucati* Appeals Decision, para.72.
[71] Decision, para.56.
[72] Decision, para.57.
[73] Decision, para.57.

provider to the Registry.[74] If any further information was required, the PTJ should have sought additional submissions on the issue.

56. The PTJ further erred in the exercise of his discretion by failing to give consideration to another relevant consideration, namely the operation of the strict protective measures regime which applies in Mr Thaçi's case, and how this is designed to mitigate the risk of obstruction and/or the commission of further crimes.[75]

57. In conclusion, the failure to correctly assess the Proposed Conditions as a result of each error means that each has affected the outcome.

V. RELIEF REQUESTED

58. As argued above, a series of fundamental errors materially affect the Decision. Accordingly, the defence respectfully requests the Appeals Chamber to:

REVERSE the Decision; and

GRANT the request for interim release upon such conditions as the Chamber considers necessary and appropriate.

[Word count: 5,861]

[74] Note the Veseli defence has provided evidence that the Kosovo Police has the capacity to monitor and enforce conditions of provisional release imposed by the KSC. *See Veseli* Decision, para.57 citing to *Veseli* Reply, paras55-61, Annexes 9-11. The defence adopts this evidence.
[75] KSC-BC-2020-06/F00133/COR/CONF/RED, Confidential Redacted Version of Corrected Version of First Decision on Specialist Prosecutor's Request for Protective Measures, filed on 14 December 2020.

Respectfully submitted,

David Hooper

Specialist Counsel for Hashim Thaçi

4 February 2021

At London, United Kingdom