PUBLIC
Date original: 08/12/2021 18:20:00
Date public redacted version: 06/04/2022 23:52:00

In:	**KSC-BC-2020-06**
	Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**President of the Kosovo Specialist Chambers**
	Judge Ekaterina Trendafilova
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Rexhep Selimi
Date:	6 April 2022
Language:	English
Classification:	Public

Public Redacted Version of Selimi Defence Appeal against "Decision on Remanded Detention Review and Periodic Review of Detention of Rexhep Selimi" with Confidential Annexes 1-2, KSC-BC-2020-06/IA015/F00001, dated 8 December 2021

Specialist Prosecutor
Jack Smith

Counsel for Victims
Simon Laws

Counsel for Hashim Thaçi
Gregory Kehoe

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Rexhep Selimi
David Young

Counsel for Jakup Krasniqi
Venkateswari Alagendra

I. INTRODUCTION

1. Pursuant to Article 45(1) of the Law[1] and Rule 170(2) of the Rules[2] the Defence for Mr. Selimi ("Defence") hereby files this Appeal against the Decision on Remanded Detention Review and Periodic Review of Detention of Rexhep Selimi, issued by the Pre-Trial Judge on 26 November 2021 ("Impugned Decision"), which denied Mr. Selimi's request for interim release,[3] which was filed on 13 October 2021 ("Detention Request").

2. The Pre-Trial Judge's denial of the Detention Request,[4] contains legal and factual errors which invalidate the decision. The Pre-Trial Judge misapplies and misunderstands the applicable test as remanded by the Appeals Panel and abused his discretion in how he applied it to the Detention Request. In so doing, the Pre-Trial Judge has unequivocally demonstrated his inability to comprehend or apply the express instructions of the Appeals Panel in a neutral, thorough and comprehensive manner. The Appeals Panel must therefore immediately reverse the Impugned Decision and directly order the interim release of Mr. Selimi.

II. STANDARD OF APPELLATE REVIEW & SCOPE OF APPEAL

3. Applying the prior jurisprudence of the Appeals Panel,[5] the grounds of appeal identified below constitute either: (1) an error on a question of law invalidating the decision;[6] (2) an error of fact which has occasioned a miscarriage of justice;[7] or (3) unfair or unreasonable as to constitute an abuse of the lower-level panel's discretion, including whether the Pre-Trial Judge has given weight or sufficient weight to relevant considerations in reaching his decision. [8]

[1] Law No.05/L-053 on SC and SPO, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.
[2] RPE before the KSC, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.
[3] F00523, Selimi Defence Submissions on Review of Detention and Response to Order of the Pre-Trial Judge, KSC-BC-2020-06/F00514, 13 October 2021.
[4] See IA007/F00005, Court of Appeals Panel, Decision on Rexhep Selimi's Appeal Against Decision on Review of Detention, 1 October 2021, paras. 4 ("Detention Appeal Decision") referring to the Proposed Conditions and "Additional Proposed Conditions" as addressed by the Pre-Trial Judge in F00372, Decision on Review of Detention of Rexhep Selimi, 30 June 2021, paras. 58-59, 63. To assist the Appeals Panel, these are set out in Annex 1 as one numbered list of conditions and referred to herein as "Release Conditions".
[5] KSC-BC-2020-07/IA001/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("Gucati Appeal Decision"), paras 4-13; KSC-BC-2020-07/IA002/F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021 ("Haradinaj Appeal Decision"), paras 11-13.
[6] Article 46(4) of the Law.
[7] Article 46(5) of the Law.
[8] *Gucati* Appeal Decision, para. 14; *Haradinaj* Appeal Decision, para. 14.

4. Further, while the Defence does not concede that any of the Rule 41(6)(i)-(iii) risks have materialised in relation to Mr Selimi, no further submissions on these risks were made before the Pre-Trial Judge[9] and the Pre-Trial Judge's findings on these issues[10] will not form part of this Appeal.

III. GROUNDS OF APPEAL

A. Ground One: The Pre-Trial Judge erred in understanding and applying the directions of the Appeals Panel

5. The Pre-Trial Judge held that "the Court of Appeals determined that, while the list of conditions proposed by the Selimi Defence in relation to the Second Detention Decision was detailed and may, in the abstract, restrict and monitor his communications, it remains to be assessed whether such measures can be effectively enforced by the Kosovo Police."[11]

6. However, instead of limiting the assessment to whether such measures can be effectively enforced by the Kosovo Police, the Pre-Trial Judge added an additional element, namely whether "(i) these conditions sufficiently mitigate these risks."[12]

7. The Pre-Trial Judge therefore went beyond the specific issue remanded by the Appeals Panel as previously explained by the Defence."[13]

8. This is reinforced by the later finding by the Appeals Panel that:

> "the Pre-Trial Judge abused his discretion when concluding that none of the Additional Proposed Conditions nor any other additional condition could mitigate the identified risks without first seeking additional submissions from the Police Director."[14]

9. Indeed, even the SPO correctly noted the issue that was remanded to the Pre-Trial Judge by the Appeals Panel, was whether the Release Conditions could be enforced.[15]

[9] Detention Request, para. 5.
[10] Impugned Decision, paras 28-29, 32-37 and 40-45.
[11] Impugned Decision, para. 55 citing to Second Court of Appeals Decision, paras 54-58.
[12] Impugned Decision, para. 55.
[13] Detention Request, para. 8.
[14] Impugned Decision, para. 57. See also paras 54, 55 and 58 cited in Detention Request, para. 7.
[15] F00562, Prosecution response to Kosovo Police submissions on detention with public Annex 1, 8 November 2021 ("SPO Submissions"), para. 4.

10. Accordingly, if he found the continued existence of at least one of the Article 41(6)(b) criteria, the Pre-Trial Judge's task in this regard was limited to assessing whether the Kosovo Police have the capacity to effectively implement the Release Conditions. The Appeals Chamber had already resolved the issue of whether the Release Conditions were sufficient to mitigate the risks identified by the Pre-Trial Judge by holding that they "may, in the abstract, restrict and monitor his communications."[16] However, by re-addressing this question, the Pre-Trial Judge circumvented the ruling of the Appeals Panel and acted beyond his authority.

B. Ground Two: The Pre-Trial Judge erred in comparing the conditions in the Detention Unit with proposed conditions of Interim Release

11. Throughout the Impugned Decision, the Pre-Trial Judge compared the applicable regime at the SC Detention Facilities based on the Registry's submissions[17] with the Release Conditions, on the issues of: (1) monitoring of in person and video visits,[18] (2) management of the SC Detention Facilities and [REDACTED][19] and: (3) the secure nature of the SC Detention Facilities vis-à-vis Mr. Selimi's residence.[20]

12. Most importantly, assessing a purportedly decisive issue, [REDACTED], the Pre-Trial Judge held that [REDACTED].[21]

13. The Pre-Trial Judge has therefore simply compared the regime in place at the KSC Detention Facilities with the potential regime that would apply in Kosovo on interim release and found that the former provides a greater level of protection. However, any detention regime will always provide more restrictions on movements and communications than interim release.

14. As held by the Appeals Panel,[22] the obligation on the Pre-Trial Judge in assessing requests for interim release is to determine whether any available conditions imposed would effectively mitigate the Article 41(6)(b) risks identified with the burden on the party seeking

[16] Detention Appeal Decision, para. 54.
[17] F00536, Registry Submissions Pursuant to the Order to Provide Information on the Detention Regime (F00522), 20 October 2021, ("Registry Submissions").
[18] Impugned Decision, para. 58, referring to Registry Submissions, paras 31-33.
[19] Ibid, para. 59.
[20] Id, para. 60.
[21] Id, para. 61 [emphasis added].
[22] IA003/F00005, Decision on Rexhep Selimi's Appeal Against Decision on Interim Release, 30 April 2021, para. 86 ("First Appeals Detention Decision").

continued detention, in this case the SPO, bearing the burden of demonstrating that such conditions do not exist. It is not simply to trumpet the sufficiency and efficacy of the monitoring regime at the SC Detention Facilities and to observe that the accused has more restrictions when detained than when on release.[23]

15. The Pre-Trial Judge thereby erred in relying on bald comparisons between the Detention Facilities and Release Conditions when assessing whether Mr. Selimi could be released rather than independently assessing whether the Release Conditions were sufficient to mitigate the Article 41(6)(b) risks.

C. Ground Three: The Pre-Trial Judge abused his discretion in how he sought information from the Kosovo Police on the enforcement of the Release Conditions

16. The Pre-Trial Judge abused his discretion in not requiring the Kosovo Police to respond to questions by the parties, either orally or in writing, while making decisive findings on issues contrary to the KP's written response.

17. The Appeals Panel held:

> "if the Pre-Trial Judge considered, and as he did in fact, that the response from the Kosovo Police was not sufficiently satisfactory, he should then have enquired with the Police Director to obtain the detailed response he found was lacking, especially as he was expressly invited to do so by Selimi."[24]

18. The Appeals Panel also held that the authority to make such enquiries was derived from Article 39(13) of the Law and that such information would have put the Pre-Trial Judge in a position to assess whether the Kosovo Police can effectively enforce these measures, including the ones he suggested and would give him a more complete and solid factual basis to assess the feasibility of such.[25]

19. The Pre-Trial Judge's Order to the Kosovo Police on 8 October 2021[26] in which he sought responses to 46 questions may have appeared, superficially, to have implemented that obligation. However, the nature of the questions and the way the responses were assessed demonstrates the contrary. As noted before the Pre-Trial Judge, the level of specific detail

[23] Impugned Decision, para. 59.
[24] Detention Appeal Decision, para. 56.
[25] Ibid, paras 56-57.
[26] F00513, Pre-Trial Judge, Order to the Kosovo Police to Provide Information ("Order to KP"), 8 October 2021.

requested from the Kosovo Police was far greater that any equivalent request for State observations on interim release."[27]

20. Yet despite the detailed, fifteen-page response provided by the Kosovo Police, the Pre-Trial Judge found that on at least four occasions it had not provided the information sought:

> [REDACTED].[28]
>
> [REDACTED].[29]
>
> [REDACTED].
>
> [REDACTED].[30]

21. Despite these findings, the Pre-Trial Judge subsequently held that "the Kosovo Police have had ample opportunity to provide the required information and any additional information would not assist the Pre-Trial Judge any further in relation to this matter."[31] Both cannot be true. Either the information above is relevant to the enforceability of the Release Conditions and he should have verified it to resolve any ambiguity, or it was not relevant and it should not have appeared either in the list of 46 questions or in the Impugned Decision.

22. Indeed, the Pre-Trial Judge's justification of not seeking further information from the Kosovo Police because they had been "approached on three separate occasions and the Pre-Trial Judge has formulated a detailed list of questions, which also left room for the Kosovo Police to provide any additional information considered to be relevant for the present determination"[32] is similarly unwarranted. The questions from the Pre-Trial Judge had only been recently posed to the Kosovo Police and sought far more information than the Selimi and Veseli Defence.

23. The Director of the Kosovo Police and Mr. Selimi and are not synonymous. Any perceived failure to provide all desired information by the former must not be held against the latter. The purpose of the Appeals Panel remanding the issue to the Pre-Trial Judge to seek the requisite information from the Kosovo Police was to ensure that all the relevant facts were known on the capacity of the Kosovo Police to enforce the Release Conditions. The Pre-

[27] Detention Request, para. 9.
[28] Impugned Decision, para. 62 [emphasis added].
[29] Ibid [emphasis added].
[30] Id, para. 65 [emphasis added].
[31] Id, para. 70.
[32] Id.

Trial Judge's failure to grasp that opportunity, to the severe detriment of Mr. Selimi, constitutes a clear abuse of his discretion.

D. Ground Four: The Pre-Trial Judge committed multiple errors of fact and/or abused his discretion in assessing the sufficiency and enforceability of the Release Conditions

24. The Pre-Trial Judge repeatedly erred in fact, or abused his discretion, in incorrectly assessing the sufficiency of the Release Conditions to mitigate the risks he identified and their enforceability by the Kosovo Police.

25. First, the Pre-Trial Judge held that [REDACTED][33] and [REDACTED], "Mr Selimi could ask a family member to pass on a message orally or to use a device belonging to a third person to do so, or that he could transmit covert messages for the purposes of obstructing SC proceedings or committing further crimes"[34] This was contrasted with the regime at the KSC Detention Facilities, where "unmonitored communications are strictly limited considering that detainees are only allowed unmonitored "private visits" for certain close family members and within limited time periods.[35]

26. However, the reality is that [REDACTED]. While Article 24(1) of the applicable Practice Direction[36] does limit such visits to three hours every three months, this is the absolute minimum that is required. In practice, many more private visits occur for all detainees at the KSC Detention Facilities. The limitations on private visits therefore appear to be based more on resource and organisational limitations.

27. Despite recognising that such unmonitored communications are indeed entirely permitted at the KSC Detention Facilities and accepting that "the risk of illicit messages and instructions cannot be entirely eliminated",[37] the Pre-Trial Judge fails to draw the necessary consequences from this finding, namely that the Release Conditions actually mitigate the risk in this regard to no lesser degree than the KSC Detention Facilities. In so doing, the Pre-Trial Judge therefore abuses his discretion.

[33] Impugned Decision, para. 57.
[34] Ibid.
[35] Impugned Decision, para. 58 citing to Second Court of Appeals Decision, footnote 125.
[36] Registry Practice Direction on Detainees Visits and Communications, KSC-BD-09/Rev1/2020, 23 September 2020.
[37] Impugned Decision, para. 64.

28. The same arguments apply directly to the Pre-Trial Judge's finding that [REDACTED][38] which is again speculative and hypothetical. It also ignores the fact that such monitoring goes beyond the applicable regime for visitors to Mr. Selimi in the KSC Detention Facilities which [REDACTED]. Conspicuously, this was not mentioned at all by the Pre-Trial Judge.

29. Second, the Pre-Trial Judge suggests that Mr. Selimi could use "coded or obscure language" [REDACTED][39] [REDACTED]. Again, this finding is nothing more than speculation that could apply equally to his present detention whether during private visits, or overtly during monitored visits. Using codes or obscure language, would, by definition, [REDACTED]. Conversely, if the codes employed were too simplistic, [REDACTED]. In either scenario, the Pre-Trial Judge has not demonstrated how the risk of such codes being used by Mr. Selimi substantially increases if granted interim release.

30. Moreover, either in relation to the use of code or the transmission of messages, the Pre-Trial Judge is suggesting, with no foundation whatsoever, that Mr. Selimi would incite [REDACTED] who would be permitted to visit him, to commit contempt, potentially punishable with a prison sentence of 10 years under Articles 390 to 407 of the Kosovo Criminal Code 2012 or a fine of 125,000 euros[40] with no evidence or foundation.

31. Third, although not determinative, Pre-Trial Judge also relies on three different contextual considerations to "strengthen the finding that the proposed measures would not adequately mitigate the risks of obstruction and/or further crimes being committed."[41]

32. [REDACTED] is irrelevant in this context as the Pre-Trial Judge has repeatedly held that the conditions proposed by the Defence in relation to Mr. Selimi a full year ago, were sufficient to mitigate the risk of flight. [REDACTED]. The factual finding that "a seeming lack of coordination and cooperation between the Ministry of Justice and the Directorate of Police that would be prejudicial to the enforcement of any form of house arrest"[42] is consequently both unsupported and irrelevant.

33. The Pre-Trial Judge also failed to demonstrate why the "persisting climate of intimidation of witnesses and interference with criminal proceedings against former KLA members in

[38] Id, para. 62.
[39] Impugned Decision, paras 57, 58 and 61.
[40] Article 6(2) of the Law.
[41] Impugned Decision, para. 68.
[42] Id.

Kosovo"[43] is relevant not only to the existence of Article 41(6)(b) risks, but also whether conditions are sufficient to mitigate them.[44] It is not.

Two other factual assertions relied upon by the Pre-Trial Judge are similarly superficial, and/or irrelevant. Simply because [REDACTED][45]. [REDACTED],[46] [REDACTED].

34. Fourth, in this regard, the Pre-Trial Judge adopted wholesale the submissions of the SPO[47] on the purported corruption within the Kosovo Police[48] without even a recognition of the Defence arguments as to the relevance or probative value of any of these points.[49] The reports cited by the SPO, and ingested by the Pre-Trial Judge, actually relate to criticisms of sentences imposed by Kosovo judges in relation to organised crime and corruption, or Government actions in relation to the Head of an ineffective anti-corruption body.[50] As such, the sources relied upon had no expressed relevance to the issue, which was limited to the ability of the Kosovo Police to enforce the Release Conditions. The subsequent finding [REDACTED][51] is thus a factual error on an irrelevant factor.

35. Two other factual assertions relied upon by the Pre-Trial Judge are similarly superficial and/or irrelevant. Simply because [REDACTED][52]. [REDACTED],[53] [REDACTED].

E. Ground Six: The Pre-Trial Judge erred in assessing all available conditions as ordered by the Appeals Chamber

36. While the Defence reiterates that the Release Conditions are sufficient to mitigate any identified Article 41(6)(b) risks, the Pre-Trial Judge erred or otherwise abused his discretion in failing to properly consider all other alternative conditions before rejecting Mr. Selimi's request for interim release.

---

[43] Id, para. 34.
[44] Id, para. 67.
[45] Ibid, referring to Law No. 04/L-274 on Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo, 23 April 2014, p. 9.
[46] Impugned Decision, para. 61. Footnotes omitted.
[47] SPO Submissions, Fn. 19-21.
[48] Impugned Decision, para. 67 referring to Footnote 147.
[49] F00567, Selimi Defence Submissions on the Kosovo Police Response to the Pre-Trial Judge's Order to Provide Information, 12 November 2021, para. 13 ("Selimi Observations").
[50] Ibid.
[51] Impugned Decision, para. 61.
[52] Ibid, referring to Law No. 04/L-274 on Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo, 23 April 2014, p. 9.
[53] Impugned Decision, para. 61. Footnotes omitted.

37. As previous held by the Appeals Panel, "any analysis of pre-trial detention must take the presumption of innocence as its starting point […] pre-trial detention cannot be maintained lightly [and] the burden of demonstrating that pre-trial detention is necessary is on the SPO."[54] The same panel also recalled that "to fully comply with the constitutional standards, a panel must consider more lenient measures when deciding whether a person should be detained"[55] and interpreted this to mean that "the Pre-Trial Judge is required, *proprio motu*, to inquire and evaluate all reasonable conditions that could be imposed on an accused and not just those raised by the Defence."[56]

38. Having considered that the proposed Release Conditions would not, in his view, "adequately mitigate the risks of obstruction and/or further crimes being committed in relation to Mr. Selimi specifically"[57], the Pre-Trial Judge then dedicated less than one generic paragraph to examining whether other measures were available and could be enforced. This was both procedurally and substantively lacking.

39. First, in terms of identifying possible additional conditions, the Pre-Trial Judge refused to consider any, on the twin basis that he had already requested the Kosovo Police to "provide any additional information that is considered to be relevant in relation to the enforcement of conditional release"[58] which they had failed to provide and that the Kosovo Police's undertaking to "ensure the strict enforcement of any SC decisions does not, in and of itself, provide a sufficient basis for the Pre-Trial Judge to *proprio motu* order any additional measures to mitigate the identified risks."

40. The abdication of legal responsibility by the Pre-Trial Judge on this point is breath-taking. Essentially, the Pre-Trial Judge is blaming the Kosovo Police for not knowing what the Pre-Trial Judge was thinking and then blithely dismissing Kosovo Police guarantees about the enforcement of such conditions if ordered.

41. Indeed, had the Pre-Trial Judge properly undertaken his task, he could and should have identified specific possible additional conditions himself, rather than shifting the burden on to the Kosovo Police, and then could have sought any necessary follow up information from

[54] First Appeals Detention Decision, para. 37.
[55] Ibid, para. 85 referring to KSC-CC-PR-2020-09, F00006, Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020, 26 May 2020, para. 70.
[56] Id, para. 86 referring to IA001/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention.
9 December 2020, para. 73.
[57] Impugned Decision, para. 68.
[58] Impugned Decision, para. 69 referring to Order to KP, para. 8; Annex to Order to KP, para. 12.

the Kosovo Police or other relevant entity, either in writing or orally as required. The absolute refusal to even consider such additional measures, makes a mockery of the process for assessing detention.

42. Secondly, in terms of the possible additional measures that could and should have been considered by the Pre-Trial Judge to mitigate specific Article 41(6)(b)(ii) and (iii) risks that he identified, the following three additional conditions could and should have been considered:

a. Designated monitored room for non-family visits

43. Designating one specific room in Mr. Selimi's residence for non-family visits directly addresses the Pre-Trial Judge's concern that messages, or other information, could somehow be transmitted by Mr. Selimi which would fall outside of the monitoring of the Kosovo Police. Any meetings in the designated room would be conducted within the direct sight and general hearing of the Kosovo Police member guarding the residence who would be able to intervene and stop the meeting in case any documents were transmitted or if coded or obscure language was used and would also be able to follow the content of the conversation, given the language it would take place in. This designated room could effectively replicate the meeting room facilities and regime currently in place at the KSC Detention Facilities.

44. Moreover, by subjecting the meetings to videorecording, if specifically required by the Pre-Trial Judge, which could be transmitted back to the Registry directly, this would allow them to conduct any required after-the fact-listening.[59] Indeed, it would also be possible, if required, to install a live video stream of the meetings to the Registry to ensure live review and monitoring of meetings with non-family members, in a similar manner to meetings with family members over Zoom which have helpfully been facilitated by the Registry throughout Mr. Selimi's detention.[60] This would also ensure that if any codes or obscure language were used by Mr. Selimi or the individual with whom he was meeting, either the Kosovo Police could intervene directly or could be directed to do so by monitoring which was carried out by the Registry. This would also allow for simultaneous monitoring by both the Kosovo Police and the SC Registry.

[59] Impugned Decision, para. 58.
[60] Registry Submissions, paras 31-34.

45. Furthermore, ensuring that all non-family visits take place under the live remote monitoring by the KSC [REDACTED]. [REDACTED].

46. [REDACTED].

b. Enhanced monitoring for family members of Mr. Selimi

47. [REDACTED].[61] However, the existence of this risk could be sufficiently mitigated by additional measures.

48. [REDACTED].

49. [REDACTED].

50. In this regard, as set out previously by the Defence, the severity of the required condition to mitigate a risk must be directly assessed against the likelihood of the risk materializing.[62] At no point in his multiple decisions on interim release did the Pre-Trial Judge previously identify any specific concrete risk in relation to Mr. Selimi using his family to transmit such messages, such as allegations or evidence that such actions had occurred while in detention. As such, these specific and concrete proposed measures in relation to Mr. Selimi [REDACTED] would be more than sufficient to mitigate the general and hypothetical risk identified by the Pre-Trial Judge.

c. Involvement of EULEX and the SC

51. The Pre-Trial Judge found that a decisive factor was that, contrary to the KSC Registry, [REDACTED][63] [REDACTED].[64] [REDACTED].[65]

52. [REDACTED].

53. First, EULEX could be ordered to provide the necessary supervision, training or assistance to the designated Kosovo Police Officers [REDACTED]. EULEX's presence in Kosovo is currently implemented through two pillars, the Monitoring and Operations Pillars.[66]

[61] Impugned Decision, paras 57, 62.
[62] IA007-F00001, Appeal against Decision on Review of Detention of Rexhep Selimi, 8 July 2021, paras 34-40.
[63] Impugned Decision, para. 61.
[64] Ibid. See also para. 63.
[65] Ibid, paras. 61 & 63.
[66] Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, (EULEX Kosovo), Official Journal of the European Union L 42/92 (16 February 2008), Article 2 and 3 (a); Council Decision 2021/904/CFSP Of 3 June 2021 Amending Joint Action 2008/124/CFSP On The European Union Rule Of Law Mission In Kosovo (EULEX Kosovo), Official Journal of the European Union L 197/114 (4 June 2021) Article 1 (3).

Through the Monitoring Pillar, EULEX monitors and assesses selected cases and trials in the Kosovo criminal justice system[67] through robust systemic and thematic monitoring of selected cases at the entire chain of the criminal justice system, namely on police, prosecutorial and judicial levels.[68] Through the Operations Pillar, EULEX engages in joint trainings with Kosovo Police and KFOR[69] and assists the SC and SPO with logistic and operational support in line with relevant Kosovo legislation.[70] Notably, EULEX's Formed Police Unit is currently Kosovo's second security responder (Kosovo Police being the first), and regularly trains to maintain its rapid intervention capacity.[71] EULEX therefore has the necessary knowledge of [REDACTED] and authority to assist the Kosovo Police with the implementation of the Release Conditions.

54. Second, either the SPO[72] or the Registry could be ordered to provide any necessary information or training to EULEX and/or the Kosovo Police to allow either to properly monitor and supervise the Release Conditions. [REDACTED]. No reason has been identified by the Pre-Trial Judge as to why it should not happen in the current case.

55. Third, as suggested above, the exclusive use of a private room for all non-family visits, under the remote, contemporaneous review by the SC Registry, and also recorded for subsequent review, could mean that [REDACTED]. The Kosovo Police could therefore be immediately alerted and required to intervene if any information was being improperly shared.

F. Ground Seven: The Pre-Trial Judge erred and/or abused his discretion when assessing the proportionality of detention

56. Despite recognising the importance of the proportionality principle in the determination of the reasonableness of pre-trial detention[73] the Pre-Trial Judge held that "the period that Mr. Selimi has spent in pre-trial detention, which slightly exceeds one year, is not

[67] EULEX Kosovo, 'Monitoring' << https://www.eulex-kosovo.eu/?page=2,58>> accessed 6 December 2021.
[68] Ibid.
[69] EULEX Kosovo, 'Operations Pillar' << https://www.eulex-kosovo.eu/?page=2,59>> accessed 6 December 2021.
[70] Council Decision 2016/947/CFSP of 14 June 2016 amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo (EULEX Kosovo), Official Journal of the European Union L 157/26 (15 June 2016).
[71] EULEX Kosovo, 'EULEX Formed Police Unit, Kosovo's second security responder', << https://www.eulex-kosovo.eu/?page=2,11,1197>> accessed 6 December 2021.
[72] Selimi Observations, paras 31-32 referred to in Impugned Decision, para. 53.
[73] Impugned Decision, para. 76.

unreasonable"[74] and further, that "while no start date for the trial has been established at this point in time, Mr Selimi's detention shall be reviewed every two months […] [and therefore] at the present stage, any discussion as to the expected total length of Mr. Selimi's pre-trial detention remains premature and speculative."[75]

57. As such, the Pre-Trial Judge erred and abused his discretion in refusing to take into any consideration the likely future date of commencement of Mr. Selimi's trial and in how he considered other factors in assessing Rule 56(2).

58. First, Rule 56(2) specifically requires that the relevant Panel "ensure that a person is not detained for an unreasonable period prior to the opening of the case." The use of the word "ensure" requires that steps be taken at all stages to both prevent future unreasonable detention as well as to mitigate detention that has already become unreasonable. This is further supported by the present tense "is" in establishing a requirement to prevent unreasonable detention, rather than the past tense in ensuring that a person "has not been detained."

59. Second, while the Defence does not necessarily dispute that the proceedings are grave or complex as the Pre-Trial Judge suggests,[76] simply repeating the same factors, without anything more, violates Article 5 of the ECHR on right to liberty and security.[77] This applies directly to the issue of Mr. Selimi being progressively informed of the evidence underpinning the charges against him, which has been repeated in the First,[78] Second[79] and Third[80] decisions denying interim release.

60. The proportionality of detention is vital to ensure it is not arbitrary. It has not been applied correctly by the Pre-Trial Judge.

[74] Ibid, para. 82.
[75] Ibid, para. 84.
[76] Id, paras 78-79.
[77] ECtHR, *Mansur v Turkey,* Judgment of 8 June 1995, paras 52-55.
[78] F00179, Decision on Rexhep Selimi's Application for Interim Release, 22 January 2021, paras 31 & 48.
[79] F00372, Decision on Review of Detention of Rexhep Selimi, 25 June 2021, para. 25.
[80] F00372, Decision on Remanded Detention Review and Periodic Review of Detention of Rexhep Selimi, 26 November 2021, para. 28.

IV. RELIEF REQUESTED

61. Mr. Selimi has been detained for over thirteen months at the SC Detention Facilities without incident. While his family have been able to visit him, he is still incarcerated, often with extra restrictions due to the Covid pandemic which limit his interactions with co-accused, other prisoners, or more importantly, his family and friends.

62. The Pre-Trial Judge was specifically remanded the issue of whether the Release Conditions as well as any other potential conditions, could mitigate against these risks by the Appeals Panel. Unfortunately, he has demonstrated an inability to do so effectively. Remanding any issue back to the Pre-Trial Judge at this stage would lead to further delay, obfuscation and unwarranted speculation. Only immediate and decisive intervention by the Appeals Panel would effectively protect Mr. Selimi's rights.

63. For the reasons set out herein, the Defence therefore requests the Appeals Panel to:

    (i) Reverse the Impugned Decision; and,

    (ii) Order the immediate release of Mr. Selimi, subject to the Release Conditions at Annex 1 together with those additional conditions set out in Annex 2 if considered necessary and appropriate.

Word count: 4967

Respectfully submitted on 6 April 2022,

DAVID YOUNG
Lead Counsel for Rexhep Selimi

GEOFFREY ROBERTS
Co-counsel for Rexhep Selimi