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In:	**KSC-BC-2020-06**
	Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Court of Appeals Panel**
	Judge Michèle Picard
	Judge Emilio Gatti
	Judge Kai Ambos
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Rexhep Selimi
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Public Redacted Version of Selimi Defence Reply to the SPO Response to the Appeal against "Decision on Remanded Detention Review and Periodic Review of Detention of Rexhep Selimi", KSC-BC-2020-06/IA015/F00004, dated 28 December 2021

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I. INTRODUCTION

1. The Selimi Defence files this Reply to the Specialist Prosecutor's Office ("SPO") Response[1] to the Appeal[2] filed pursuant to Article 45(1) of the Law[3] and Rule 170(2) of the Rules[4] against the Decision issued by the Pre-Trial Judge[5] which denied Mr. Selimi's request for interim release.[6] The SPO has failed to put forward any reason why the Appeal should be dismissed, instead misrepresenting Defence arguments, transposing the contradictions in the Impugned Decision on to the Defence and speculating wildly as to the demonstrable gaps in the Pre-Trial Judge's reasoning.

II. SUBMISSIONS

A. Nature and relationship between Grounds One and Two

2. At the outset the SPO appears to be confused as to the relationship between Grounds One and Two of the Appeal, claiming that in the latter the Defence is alleging an error in conducting an assessment that it had already argued should never have been conducted under the former. Clearly the SPO is unaware of the concept of arguing in the alternative. The Defence does indeed consider that the issue remanded to the SPO was limited to the enforceability of the Release Conditions and not their sufficiency as set out in Ground One. However, in the alternative, if this ground of appeal is not upheld by the Appeals Panel, then the assessment of the enforceability of conditions should be carried out thoroughly and through a detailed assessment of all relevant factors, as set out in Ground Two, rather than undertaking a simplistic comparison of the Release Conditions with the conditions applied at the KSC Detention Facilities.

3. The nature of Grounds One and Two is also specifically identified in the Appeal contrary to the SPO Response.[7] Ground One is an error of law as the Pre-Trial Judge acted beyond

[1] IA015/F00003, Response to Selimi Defence Appeal of November 2021 Detention Decision with public Annex 1, 20 December 2021 ("Response").
[2] IA015/F00001, Selimi Defence Appeal against "Decision on Remanded Detention Review and Periodic Review of Detention of Rexhep Selimi", 8 December 2021 ("Appeal").
[3] 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.
[4] RPE before the KSC, KSC-BD-03/Rev3/2020, 2 June 2020 ("Rules"). All references to 'Rule(s)' herein refer to the Rules, unless otherwise specified.
[5] F00580, Decision on Remanded Detention Review and Periodic Review of Detention of Rexhep Selimi, 26 November 2021 ("Impugned Decision").
[6] 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.
[7] Response, para. 10, Footnote 19.

his authority in interpreting the Appeals Panel's Decision.[8] Ground Two alleges an abuse of discretion in how the Pre-Trial Judge carried out his assessment of the conditions.[9] It does not allege that the Pre-Trial Judge was prohibited entirely from taking the situation at the KSC Detention Facilities into account, but by doing so in isolation, he abused his discretion. This is self-evident from a holistic review of the Appeal.

B. The Pre-Trial Judge's analysis of the Release Conditions remains deeply flawed

4. Contrary to the position of the SPO, the Pre-Trial Judge failed to conduct an individualised assessment of the effectiveness of the Release Conditions in relation to the concrete and articulable Article 41(6)(b) risks that he identified in relation to Mr. Selimi.

5. First, the SPO fails to overcome the clear error by the Pre-Trial Judge which treats prospective unmonitored private visits [REDACTED] of Mr. Selimi while on interim release in a vastly different manner to such visits in The Hague when there is simply no concrete difference between the two situations.

6. The SPO's claim that the Pre-Trial Judge "identified specific additional safeguards at the SC Detention Facilities that can be imposed to ensure that unmonitored communications are strictly limited"[10] relate to monitored visits by individuals other than Mr. Selimi's close family members. The only additional safeguard relating to unmonitored close family visits, is that they are "within limited time periods"[11], which is a limitation that would not prevent anyone intent on sharing such information. [REDACTED][12] [REDACTED]. Had the Pre-Trial Judge properly individualised his decision in relation to Mr. Selimi, the absence of any concerns relating to these repeated unmonitored visits, would have been considered and specifically referred to in the Impugned Decision.

7. Second, the training of Kosovo Police officers as opposed to the guards of the KSC Detention Facilities, was not correctly weighed as suggested in the SPO Response.[13] While the Defence training may be a relevant factor to be considered by the Pre-Trial Judge, the inquiry should not have stopped there. Instead, the Pre-Trial Judge was obliged

[8] Appeal, paras 7, 10.
[9] Ibid, para. 15.
[10] Response, para.16, Fn. 34 referring to Impugned Decision paras 58, 59, 61.
[11] Impugned Decision, para. 58.
[12] Annex 1.
[13] Response, para. 29.

to verify whether it would be reasonable for such training to have been provided to the Kosovo Police. Training is not some privilege to be jealously guarded by the KSC but instead something which can easily, if deemed necessary, be provided by the KSC to the Kosovo Police, either with or without the assistance of EULEX if so ordered by the Pre-Trial Judge.

8. Third, the "[REDACTED] between the Detention Centre and the KP, within which the languages spoken formed part" referred to by the SPO[14] also seems to fundamentally misunderstand the capacity of the guards at the KSC Detention Facilities. Even where monitored meetings take place between Mr. Selimi and his visitors in the sight and under the hearing of the guards, there is no requirement that the guards speak Albanian and therefore understand what is being said. Even if the guards at the KSC Detention Facilities may therefore theoretically immediately terminate a visit "to prevent the unauthorised disclosure of confidential information or, if it is perceived that a detainee is using coded language"[15] any guard understanding the language spoken by the people they are monitoring must be in a better position to identify whether improper behaviour is occurring in front of them. To hold otherwise, as the Pre-Trial Judge implicitly did, is wholly unreasonable and an abuse of discretion.

9. Indeed, the Pre-Trial Judge seemed to have improperly and unreasonably accorded far more weight to his own choice to only [REDACTED][16] than the actual ability of the guards at the KSC Detention Facilities to effectively monitor the conversations between Mr. Selimi and his visitors by understanding what they are actually saying.

C. The Pre-Trial Judge failed to proactively analyse all available conditions

10. Despite the clear legal obligation weighing on the Pre-Trial Judge "*proprio motu*, to inquire and evaluate all reasonable conditions that could be imposed on an accused"[17] the SPO simply asserts that "there is also every indication that the Pre-Trial Judge considered measures other than those proposed by the KP."[18] Yet this single reference to the

[14] Ibid, para. 28.
[15] Impugned Decision, para. 58.
[16] Ibid, para. 59.
[17] IA003/F00005, Decision on Rexhep Selimi's Appeal Against Decision on Interim Release, 30 April 2021, para. 86 referring to IA001/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, para. 73.
[18] Response, para. 30.

Impugned Decision cannot raise to the level of "every indication" and is speculative at best. The fact that the SPO can't even identify how the Pre-Trial Judge carried out this assessment by reference to specific paragraphs of the Impugned Decision demonstrates this beyond any doubt.

11. This finding also answers the wrong question. There is no requirement for the Kosovo Police to have confirmed that it can enforce other conditions before the Pre-Trial Judge may consider them. That places an additional condition on the exercise of the Pre-Trial Judge's assessment of possible conditions which does not appear in the Appeals Panel's decision remanding the issue to the Pre-Trial Judge. It also means that Kosovo Police are being unfairly criticised for failing to explain how they would enforce measures which the Pre-Trial Judge has not even specified.

12. Further, even following the Pre-Trial Judge's flawed approach, the wholesale dismissal of the Kosovo Police's guarantee to enforce the strict enforcement of any conditions, without any further explanation, remains wholly unreasonable.

13. Simply put, for any potential additional condition that could reasonably mitigate the Article 41(6)(b) risks, the Pre-Trial Judge was obliged to (1) identify the condition; (2) assess whether it could mitigate the specific risk in relation to Mr. Selimi, and (3) determine whether the condition could be effectively enforced, and include his full analysis. The SPO's suggestion that the Appeals Panel and the Defence should simply take the Pre-Trial Judge's word for the fact that he considered such additional conditions undermines the entire basis for remanding the issue back to the Pre-Trial Judge for his initial failure to do so.

14. In this regard, the SPO criticisms[19] of the Additional Conditions proposed in Annex 2 to the Appeal are misplaced. The Defence has not invented such conditions and does not suggest that these Additional Conditions are necessary to mitigate the Article 41(6)(b) risks as the Release Conditions are more than sufficient in that regard. However, having decided that the Release Decisions were insufficient, the Pre-Trial Judge was obliged to assess all other possible conditions, such as these three concrete and reasonable additional conditions

[19] Response, paras 31-32.

15. By refusing to do so in such stark, superficial and blanket terms, the Pre-Trial Judge not only failed to fulfil his obligation to thoroughly assess such conditions, but also underlined why remanding the issue back to the Pre-Trial Judge for further assessment at this stage would be futile. The Appeals Panel should respectfully decide upon the enforceability (and, if necessary, the sufficiency) of all potential conditions,[20] and render such a decision accordingly, to avoid further delay and prejudice to Mr. Selimi given the Pre-Trial Judge's repeated failures to do so.

D. The Pre-Trial Judge erroneously assessed the proportionality of detention

16. The Defence recognises that not basing the proportionality assessment on a 'speculative' trial date is not an error in the abstract.[21] However, this ignores the fact that by the date of the Impugned Decision, the SPO had already filed its preliminary list of witnesses and committed to filing its pre-trial brief by the end of the year and the Pre-Trial Judge was therefore in a far better position to be able to assess when the trial would actually commence and was obliged to have taken that updated information into account when assessing the progress of proceedings. What may have been speculative in July 2021 was far from speculative four months later.

17. The underlying prejudice caused by the Pre-Trial Judge's absolute refusal to take into account the likely date of trial when assessing the proportionality of detention is that it requires Mr. Selimi's detention to be excessive before any remedy can be accorded to him. Essentially it requires that a violation of his rights occur before it can be rectified, whereas a proper interpretation of Rule 56, as set out in the Appeal,[22] requires proactive steps to be taken by the Pre-Trial Judge to prevent such a violation, whenever it becomes clear that the duration of pre-trial detention will be disproportionate, as it has in this case.

[20] For the Appeals Panel's authority to directly decide upon the release of Mr. Selimi, see ICTY, *Prosecutor v. Ivan Cermak and Mladen Markac*, Case No.: IT-03-73-AR65.1, Decision on Interlocutory Appeal against Trial Chamber's Decision Denying Provisional Release, 2 December 2004.
[21] Response, para. 35.
[22] Appeal, para. 58.

III. RELIEF REQUESTED

18. 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 appropriate conditions.

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Respectfully submitted on 7 April 2022,

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