

**In:** KSC-BC-2018-01/IA007  
Specialist Prosecutor *v.* Isni Kilaj

**Before:** Court of Appeals Panel  
Judge Michèle Picard  
Judge Emilio Gatti  
Judge Nina Jørgensen

**Registrar:** Dr Fidelma Donlon  
**Filing Participant:** Specialist Counsel for Isni Kilaj  
**Date:** 7 May 2024  
**Language:** English  
**Classification:** Public

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**Public Redacted Version of Kilaj response to Prosecution appeal  
against Decision F00658 and request for suspensive effect**

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**Specialist Prosecutor's Office**  
Kimberly P. West

**Specialist Counsel for Isni Kilaj**  
Iain Edwards  
Joe Holmes

**Registry**  
Fidelma Donlon

**Detention Management Unit**  
Head of Detention Management Unit

## I. INTRODUCTION

1. At the conclusion of a lengthy, considered, and carefully crafted decision,<sup>1</sup> the Single Judge found that extending Isni Kilaj's detention, under the circumstances as the Single Judge found them to be, "would be unreasonable within the meaning of Rule 56(2) [of the Rules of Procedure and Evidence Before the Kosovo Specialist Chamber ("Rules")<sup>2</sup>]".
2. The Single Judge's conclusion was based upon an extensive and exhaustive assessment and balancing of relevant factors. Pivotal within that assessment were "recent developments [that] indicate that the opening of the case will not occur in the near future", referring to the SPO's notice that the indictment then under consideration was withdrawn – for the second time – and that an amended indictment would [REDACTED]. Given that the status of the indictment is the primary determinant of the "framework and calendar for pre-trial proceedings",<sup>3</sup> it was incumbent on the Single Judge to draw the conclusion he did about the impact of delaying the filing of what will be the third version of the indictment until [REDACTED]. He did so in the following terms, after an exhaustive examination of all relevant factors:

Having regard to all of the above factors and duly considering Mr Kilaj's presumption of innocence and right to liberty, the Single Judge finds that extending Mr Kilaj's detention under the present circumstances, namely considering the SPO's request to suspend consideration of the Revised Indictment which consequently cannot be confirmed in the near future, renders Mr Kilaj's detention unreasonable".<sup>4</sup>

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<sup>1</sup> Decision on Review of Detention of Isni Kilaj, KSC-BC-2018-01/F00658, 3 May 2024, confidential ("Decision").

<sup>2</sup> All references to "Rule" or "Rules" refer to the Rules unless otherwise stated.

<sup>3</sup> Decision, para. 61.

<sup>4</sup> Decision, para. 63.

3. Having determined that it would no longer be reasonable to detain Mr Kilaj,<sup>5</sup> the Single Judge had no option but to order his release. His obligation in this regard was clear, he “shall ensure that a person is not detained for an unreasonable period prior to the opening of the case”.<sup>6</sup> Discharging that duty he rightly ordered Mr Kilaj’s provisional release, albeit under strict conditions. Not only was the Decision reasonably open to the Single Judge, it was plainly correct.
4. The Single Judge’s assessment of the impact of the withdrawal of the revised indictment on the reasonableness and proportionality of Mr Kilaj’s continued pre-trial detention was irreproachable, and the Specialist Prosecutor’s Office (“SPO” or “Prosecution”) does not challenge it; nor could it have done given the thoroughness of the Single Judge’s approach, and the unmistakable sense of logic and fairness underpinning it. As Rule 56(2) makes clear, the unreasonableness of continued detention is a sufficient and standalone basis *per se* to order provisional release.
5. This is unchallenged in the SPO’s Appeal. As such, the SPO does not challenge the central premise for the Single Judge’s decision to grant provisional release, including the core finding that, whereas releasing Mr Kilaj may carry some risk, “under the present circumstances, the existence of these risks does not outweigh [his] fundamental right to liberty.”<sup>7</sup> The SPO has brought no complaint before the Court of Appeal Panel (“Panel”) that the Judge’s exercise of discretion in respect of this key finding was erroneous or flawed or unreasonable. Importantly, the SPO does not ask the Panel to quash the Decision and extend Mr Kilaj’s detention. Instead, the complaint relates

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<sup>5</sup> Decision, paras 63-64.

<sup>6</sup> Rule 56(2).

<sup>7</sup> Decision, para. 63.

exclusively to the conditions that the Single Judge imposed on Mr Kilaj's release, or to put it in other terms, the way in which the Decision will be executed.

6. For the reasons set out below, the Defence for Mr Kilaj ("Defence") submits that the conditions the Single Judge decided to attach to Mr Kilaj's release are strict and carefully calibrated "with a view towards minimising any risks [of obstruction and the commission of "further" offences] as much as possible"<sup>8</sup> and, more importantly, fall squarely within the reasonable exercise of the Single Judge's discretion. Consequently, the SPO's complaints are misplaced and without merit. Similarly lacking merit is the Prosecution request for suspensive effect. The appeal should be dismissed in its entirety, clearing the way for Mr Kilaj to be released and reunited with his family without further delay.

## II. PROCEDURAL HISTORY

7. On 3 November 2023, the Specialist Prosecutor's Office ("SPO") submitted a request for Mr Kilaj's continued detention ("SPO Request").<sup>9</sup> The following day, Mr Kilaj had his First Appearance Hearing, during which the SPO and the Defence made submissions on the SPO Request.<sup>10</sup>

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<sup>8</sup> Decision, para. 65.

<sup>9</sup> Prosecution Request for Continued Detention of Isni Kilaj, KSC-BC-2018-01/F00496, 3 November 2023, strictly confidential and *ex parte*, with Annexes 1-2, strictly confidential and *ex parte*. A public redacted version of the request was filed on 7 November 2023.

<sup>10</sup> First Appearance Transcript, pp 171-184.

8. Later on 4 November 2023, the Defence filed its Response to the SPO Request, applying for Mr Kilaj's immediate release ("Defence Response").<sup>11</sup> On 5 November, the SPO filed a Reply to the Defence Response ("SPO Reply").<sup>12</sup>
9. On 6 November 2023, the Single Judge rendered his Decision on Continued Detention,<sup>13</sup> with reasons following on 9 November 2023.<sup>14</sup> In the six months since that decision, Mr Kilaj has remained in custody.
10. On 15 December 2023, the SPO submitted a first iteration of its indictment against Mr Kilaj for confirmation, which fact was disclosed to the Defence one month later, on 15 January 2024.<sup>15</sup>
11. On 5 March 2024, the Single Judge ordered Mr Kilaj's continued detention.<sup>16</sup>
12. On 11 March 2024, the Prosecution submitted for confirmation a strictly confidential and *ex parte* second iteration revised indictment ("Revised Indictment").<sup>17</sup> The Defence was not informed.

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<sup>11</sup> Corrected Version of Kilaj Defence Response to "Confidential Redacted Version of 'Prosecution Request for Continued Detention of Isni KILAJ'", KSC-BC-2018-01/F00497/COR, 4 November 2023, confidential. A public redacted version was filed on 8 November 2023.

<sup>12</sup> Prosecution Reply to F00497, KSC-BC-2018-01/F00498, 5 November 2023, confidential. A public redacted version was filed on 7 November 2023.

<sup>13</sup> Decision on Continued Detention, KSC-BC-2018-01/F00499, 6 November 2023.

<sup>14</sup> Reasons for Continued Detention, KSC-BC-2018-01/F00503, 9 November 2023, confidential. A public redacted version was filed on 13 November 2023.

<sup>15</sup> Prosecution Response to Defence Request F00548, KSC-BC-2018-01/F00549, 15 January 2024 ("F00549"). *See also* Prosecution Supplemental Notice, KSC-BC-2018-01/F00654, 2 May 2024, confidential ("Supplemental Notice"), para. 4.

<sup>16</sup> Decision on Review of Detention of Isni Kilaj, KSC-BC-2018-01/F00603, 5 March 2024, confidential ("Third Detention Decision"). A public redacted version was issued on 11 March 2024.

<sup>17</sup> Supplemental Notice, para. 3.

13. On 15 March 2024, the Defence submitted a request seeking *inter alia* the reclassification of F00549 as public.<sup>18</sup> On 4 April 2024, the SPO notified the Single Judge that it did not intend to file a response and that it did not object *inter alia* to the reclassification of F00549 as public.
14. On 15 April 2024, the SPO filed its latest submissions for the review of Mr Kilaj's detention.<sup>19</sup>
15. The Single Judge granted the Reclassification Request on 17 April 2024.<sup>20</sup>
16. On 19 April 2024, the Prosecution filed a notice advising that the 15 December 2023 first iteration indictment need not be considered further by the Single Judge for confirmation, and that it intended to file an amended indictment, without giving any indication when the Amended Indictment might be submitted.<sup>21</sup> No mention was made in the First Notice about the existence of the Revised Indictment of 11 March 2024.
17. On 24 April 2024, the Defence filed its response to the SPO Submissions and First Notice.<sup>22</sup> The Prosecution did not reply.
18. On 2 May 2024, the SPO filed the Supplemental Notice.

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<sup>18</sup> Kilaj Request for Reclassification of Two Filings, and for Lesser Redacted Version of One Decision, KSC-BC-2018-01/F00620, 15 March 2024 ("Reclassification Request"). A corrected version was filed on 2 April 2024, F00620/COR.

<sup>19</sup> Prosecution Submissions on Review of Detention, KSC-BC-2018-01/F00633, 15 April 2024, confidential, with Annexes 1-2, confidential ("SPO Submissions"). A public redacted version was filed on 17 April 2024.

<sup>20</sup> Decision on Request for Reclassification and Lifting of Redaction, KSC-BC-2018-01/F00635, 17 April 2024.

<sup>21</sup> Prosecution Notice, KSC-BC-2018-01/F00636, 19 April 2024, confidential ("First Notice"), para. 1.

<sup>22</sup> Kilaj Consolidated Response to (1) Prosecution Submissions on Review of Detention, and (2) Prosecution Notice, KSC-BC-2018-01/F00644, 24 April 2024, confidential.

19. The next day, 3 May 2024, the Single Judge delivered the Decision.
20. On 6 May 2024, the Prosecution filed its appeal against the Decision as of right.<sup>23</sup>

### III. APPELLATE REVIEW OF DISCRETIONARY DECISIONS INVOLVING PROVISIONAL RELEASE

21. The Panel has on many occasions set out the standard of review to be applied in interlocutory appeals.<sup>24</sup>
22. Regarding challenges to a decision that is, as in the instant case, a discretionary decision, the Panel has held that:

a party must demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion. The Court of Appeals Panel will also consider whether the lower level 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.<sup>25</sup>

23. Among the extensive international criminal jurisprudence cited by the Panel in distilling the principles to apply in discretionary decision appeals, particularly those involving provisional release, was the IRMCT Appeals

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<sup>23</sup> Prosecution appeal against Decision F00658 and request for suspensive effect, KSC-BC-2018-01/IA007/F00004, 6 May 2024, confidential (“SPO Appeal”).

<sup>24</sup> See eg Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020 (“Gucati Appeal Decision”), paras. 4-14; Decision on Kadri Veseli’s Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA001/F00005, 30 April 2021 (“Veseli Appeal Decision”), paras 4-7.

<sup>25</sup> Gucati Appeal Decision, para. 14 (footnotes omitted).

Chamber decision in the case of Marie-Rose Fatuma, parts of paragraph 5 of which merit citing in full:

*The Appeals Chamber recalls that a decision on provisional release is discretionary. In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Single Judge has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of discretion. The Appeals Chamber will also consider whether the Single Judge has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching the decision. The relevant inquiry is whether the Single Judge has correctly exercised his discretion in reaching the decision, not whether the Appeals Chamber agrees with it.<sup>26</sup>*

24. The Panel in the Gucati Appeal Decision specifically addressed the question of the “fact-specific nature of provisional release decisions”:

Discretion is a rules-based concept, it does not allow for lawless, arbitrary decisions. Thus, in the case at hand, the Judge has the discretion to evaluate the circumstances of a detained person who applies for provisional release. The weight to be attributed to guarantees such as the Proposed Conditions may depend on numerous factors. Because of the fact-specific nature of provisional release decisions, the Single Judge is better placed to assess these factors. Accordingly, the Court of Appeals Panel will not intervene, unless the appellant demonstrates the existence of a discernible error decision.<sup>27</sup>

25. For the sake of completeness, regarding claims of an error of law, the Panel has held that:

It is not any and every error of law or fact that will cause the Court of Appeals Panel to overturn an impugned decision. A party alleging an error of law 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 contention of an error, the Panel may find for other reasons that there is an error of law.<sup>28</sup>

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<sup>26</sup> IRMCT, *Prosecutor v. Turinabo et al*, MICT-18-116-AR68.2/3, Decision on Prosecution Appeal Against the Decision Granting Fatuma Provisional Release, 9 August 2019, para. 5 (emphasis added).

<sup>27</sup> Gucati Appeal Decision, para. 49 (footnotes omitted).

<sup>28</sup> Gucati Appeal Decision, para. 12 (footnotes omitted).



26. Regarding claims of an error of fact, the Panel has held that:

The Court of Appeals Panel will only find the existence of an error of fact when no reasonable trier of fact could have made the impugned finding. It is not any error of fact that will cause the Panel to overturn a decision by a lower level panel, but only one that has caused a miscarriage of justice. In determining whether a finding was reasonable, the Panel will not lightly overturn findings of fact made by a lower level panel.<sup>29</sup>

#### IV. THE CONTEXT IN WHICH THE SINGLE EXERCISED HIS DISCRETION

27. The Single Judge carefully considered and weighed in the balance a number of factors before exercising his discretion to find that extending Mr Kilaj's detention *under the present circumstances* is unreasonable.<sup>30</sup> It is worth examining, therefore, the procedural context in which the Single Judge came to the Decision.

28. As mentioned at paragraph 12 above, four days before the Reclassification Request was filed, on 11 March 2024, the Prosecution submitted the Revised Indictment for confirmation *ex parte*. It will be noted that, in contrast to its readiness on 15 January 2024 to advise the Defence of the progress of its case against Mr Kilaj, the Prosecution – for reasons that remain opaque – chose to keep even the existence of the Revised Indictment secret.

29. The first time the existence of the Revised Indictment was made known to the Defence was on 2 May 2024 with the filing of the Supplemental Notice. Only on 2 May 2024 did the Prosecution finally explain that it intended to file the third iteration Amended Indictment (without explaining what distinguishes

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<sup>29</sup> Gucati Appeal Decision, para. 13 (footnotes omitted).

<sup>30</sup> Decision, para. 63.

a revised indictment from an amended indictment) [REDACTED].<sup>31</sup>  
[REDACTED].

30. It is clear, though unarticulated, that the Prosecution's position is that every time a new iteration of its indictment is submitted to the Single Judge for confirmation, the six-month chronograph provided by Rule 85(5) is reset to zero. It is clear, though unarticulated, that the Prosecution's position is that, since it can submit as many revised, or amended, or improved, or reworked indictments – without the Single Judge's leave – as it likes, any unindicted suspect should remain remanded in custody until such time as the SPO alights on a version of an indictment with which it is satisfied, subject to the one-year limit as provided for by Rule 57(1).
31. This is the context in which the Single Judge delivered the Decision. This is the background to the Single Judge's reasonable and undoubtedly correct finding that, "recent developments indicate that the opening of a case will not occur in the near future",<sup>32</sup> and which – in combination with the other factors enumerated in paragraph 62 of the Decision – justified his conclusion that extending Mr Kilaj's detention would be unreasonable.<sup>33</sup>

## V. SUBMISSIONS

*(i) No error has been identified in respect of the adequacy of the imposed conditions*

32. The SPO complains in Ground One that the Single Judge released Mr Kilaj on conditions that were more lenient than those previously proposed by the

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<sup>31</sup> Supplemental Notice, para. 4.

<sup>32</sup> Decision, para. 62.

<sup>33</sup> Decision, para. 63.

Defence.<sup>34</sup> However, the Prosecution fail to demonstrate that the Single Judge erred in imposing the conditions he did (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) in a way that was so unfair or unreasonable as to constitute an abuse of the his discretion. A judge's decision on what conditions to attach to provisional release is a paradigm example of the exercise of judicial discretion in which the Panel will not intervene absent the demonstration of a discernible error. Here, the SPO has made no such demonstration.

33. The SPO fails to take into account the Single Judge's singular familiarity with the conditions previously proposed by the Defence, and his understanding, as a highly experienced Pre-Trial Judge, of what conditions are and are not appropriate.
34. The SPO fails to explain how the Single Judge's discretionary decision not to restrict Mr Kilaj's use or access to means of communication as a factor mitigating any risk of [REDACTED] is unreasonable or appreciably adds to the far broader prohibition imposed on Mr Kilaj from contacting [REDACTED], directly or indirectly, and *through any means*, as set out in paragraph 65(e) of the Decision.
35. Similarly, the SPO fails to explain how the Single Judge's discretionary decision not to restrict Mr Kilaj's physical movements by placing him under "house arrest" was unreasonable. Firstly, the Single Judge did restrict Mr Kilaj's movements by ordering him to reside at an address to be notified, and to require permission from the Specialist Chambers prior to any change of

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<sup>34</sup> SPO Appeal, para. 15.

residence,<sup>35</sup> and to not leave the territory of Kosovo without permission.<sup>36</sup> These are proper conditions reasonably available to the Single Judge, and the SPO has failed to show that he abused his discretion in not going further in restricting Mr Kilaj's movements.

36. Secondly, the SPO ignores the fact that the Single Judge himself noted "prior rulings in Case 06, which established that the Kosovo Police does not have the capacity to implement measures that sufficiently mitigate existing risks."<sup>37</sup> It is irrational and absurd for the SPO to criticise the Single Judge for deciding in his discretion not to impose a condition that he already found would be ineffectual – a finding that the Single Judge was urged to make by the SPO itself.<sup>38</sup> To the contrary, the Defence submits that precisely because of his past findings, the Single Judge would be exposed to a well-founded allegation of unreasonableness had he imposed a condition of "house arrest" with an electronic monitoring tag knowing that doing so would be meaningless.

37. The Single Judge was under no obligation to canvass the suitability of any proposed address in Kosovo with the SPO before delivering the Decision. The judicial decision-making process is not one of consultation or negotiation with any Party. The Parties must have an opportunity to be heard and to advance their arguments, of course, but that is where their input ends. In any event, the Prosecution has known for well over six months that Mr Kilaj has two addresses in Kosovo that are available to him should he be granted conditional release. The SPO has had every opportunity to express its

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<sup>35</sup> Decision, para. 65(c).

<sup>36</sup> Decision, para. 65(a).

<sup>37</sup> SPO Submissions, para 27, citing Decision on Review of Detention of Isni Kilaj, KSC-BC-2018-01/F00547, 5 January 2024, confidential, para. 64.

<sup>38</sup> See eg Prosecution submissions on review of detention with confidential annexes 1 and 2, KSC-BC-2018-01/F00538, 15 December 2024, confidential, para. 26.

concerns, if any, about the suitability of either residence as a potential bail address in any of its previous submissions on Mr Kilaj's continued detention over the last half-year, but has never done so. The SPO fails to demonstrate an error on the part of the Single Judge for not engaging in a consultation process, and fails to point to any Rule or Regulation or principle of law obliging him to do so.

38. However, whilst not conceding that it has any obligation to provide the following details for the purpose of this appeal, the Defence can advise that Mr Kilaj has nominated his home in [REDACTED] as the address at which he will reside for the duration of the judicial proceedings. The GPS coordinates of this address have been sent to the Registrar, along with the GPS coordinates of the nearest police station, which is [REDACTED] kilometres away from his home, or about [REDACTED] minutes by car.
39. The Single Judge, rightly, ordered the Registry, not the SPO, to support him in the administration and execution of the Decision. This is wholly consistent with Article 3(5) of the Law,<sup>39</sup> which provides that “[t]he Specialist Chambers shall be supported by a Registry, which will also administer all necessary and auxiliary functions, including detention facilities as provided for by this Law.”
40. The criticism that there is a complete absence of information about the source of the funds advanced by way of a security is unfounded.<sup>40</sup> The SPO has repeatedly advanced speculative arguments that, [REDACTED], “it is likely that any cash bail amount could be covered by associates whose interests are

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<sup>39</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 (“Law”). All references to “Article” or “Articles” refer to articles of the Law unless otherwise stated.

<sup>40</sup> SPO Appeal, paras 15, 20-23.

closely aligned in this instance – as such, it would provide limited, if any, disincentive from violation of conditions imposed.” The Single Judge has never attached weight to these arguments, and did not do so in the Decision.<sup>41</sup> Not only was it eminently reasonable for the Single Judge to decline to engage in the same speculation that the SPO was prepared to engage in, it would have amounted to an abuse of discretion had he done otherwise.

41. However, in the interests of transparency, and whilst not conceding that it has any obligation to provide the following details for the purpose of this appeal, the Defence can advise that: (i) the Registry has confirmed that the full financial security in the amount of €30,000 was received [REDACTED] this afternoon;<sup>42</sup> and (ii) the funds came exclusively from members of Mr Kilaj’s family.
42. The SPO points to no legal obligation of the Single Judge to fix any “requirement or timeline for any entity to report [...] on KILAJ’s compliance with the conditions”<sup>43</sup> because the Single Judge has no such obligation. The SPO therefore fails to establish any error in the Single Judge’s reasoning. The Registrar will designate procedures for Mr Kilaj’s weekly reporting to a local police station in Kosovo, for example, which no doubt will include procedures for the police to notify the Registry if ever Mr Kilaj fails to report. It is unreasonable to presume that no such procedures will be put in place.

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<sup>41</sup> Decision, para. 55; *see also* Third Detention Decision, para. 44.

<sup>42</sup> Email from Immediate Office of the Registrar, 7 May 2024, 18:31 CET, confidential

<sup>43</sup> SPO Appeal, para. 19.

(ii) No error has been identified in respect of the weight given to the established risks

43. Ground Two is similarly without merit. The Prosecution again fails to demonstrate that the Single Judge erred in failing to give sufficient weight to his previous finding that no modalities of conditional release are sufficient to mitigate the existing risks. Again, the Prosecution fails to identify any error (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) that was so unfair or unreasonable as to constitute an abuse of his discretion.

44. In the Decision, the Single Judge carefully and exhaustively examined the claimed risks associated with Mr Kilaj's release and the modalities of conditional release offered by the Defence. However, the SPO overstates the precise finding made in the Decision:

For the foregoing reasons, the Single Judge finds that none of the conditions put forth by the Defence, nor any other conditions imposed by the Single Judge, could *fully* restrict Mr Kilaj's ability to obstruct the progress of SC proceedings and commit further offences.<sup>44</sup>

45. The Single Judge's finding was moderate, realistic and reasonable. It was no more and no less than a finding of the obvious. No conditions imposed on a suspect's provisional release can ever *fully* restrict his or her ability to interfere with proceedings or commit further offences. A suspect determined to commit further offences will always have the ability to do so. Bail conditions can only ever attempt to reduce that risk to an acceptable level.

46. The Single Judge plainly recognised this reality and imposed a number of strict conditions. The mere fact that they are not as strict as the SPO would

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<sup>44</sup> Decision, para. 57 (emphasis added)

have liked does not equate to an abuse of Single Judge's discretion. In concluding by stating that: "[a] sufficient weighing of the above factors should have tipped the scales in favour of more rigorous modalities of provisional release",<sup>45</sup> the SPO betrays its position as being nothing more than a disagreement with the Single Judge's choice of conditions.

*(iii) The conditions are not inadequately reasoned*

47. The SPO itself acknowledges that there is no expectation or requirement that the Single Judge exhaustively list every possible condition, and/or justify his adoption or rejection of each, so long as he indicates with sufficient clarity the basis for his decision.<sup>46</sup> In the *Veseli* Appeal Decision, it was recalled that, "while a panel must provide reasoning in support of its findings on the substantive considerations relevant for a decision, it is not required to articulate every step of its reasoning and to discuss each submission."<sup>47</sup>
48. The Single Judge explained that the conditions he chose to attach to Mr Kilaj's provisional release were designed to minimize the identified risks as much as possible.<sup>48</sup> It will be noted that the Single Judge did not suggest that the conditions were designed to neutralise these risks. That would, of course, be impossible.
49. The Single Judge, in the exercise of his discretion, found that the strict conditions he decided to attach to Mr Kilaj's provisional release, while perhaps not the very strictest that were available to him, were adequate. The

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<sup>45</sup> SPO Appeal, para. 27.

<sup>46</sup> SPO Appeal, para. 28.

<sup>47</sup> *Veseli* Appeal Decision, para. 72.

<sup>48</sup> Decision, para. 65.



condition designed to meet the risk of greatest concern to the SPO and the Single Judge himself was of contacting [REDACTED]. The “not to contact” condition set out in paragraph 65(e) is wide-ranging and comprehensive. It is well within the range of reasonable conditions that could be applied to deal with the identified risk. The SPO once again merely disagrees with the Single Judge’s choice.

50. Finally, the SPO make a passing reference to other conditions available to the Single Judge in Article 41(12) of the Law that were potentially applicable, without bothering to explain which of these conditions it has in mind. The Defence will simply state that the conditions set out in Article 41(12)(d) and (e) apply in circumstances where an accused consents to attend proceedings by VTC. These conditions do not apply to Mr Kilaj, and so it cannot be said that the Single Judge erred in not considering them.

*(iv) No error was committed by the Single Judge choosing not to seek additional information*

51. The SPO makes reference to a sub-Rule, Rule 57(3), that does not exist.<sup>49</sup> Neither Rule 56(3) nor Rule 57(1) appear to apply to the point the Prosecution seeks to make.
52. In any event, the SPO acknowledges that the Single Judge was under no obligation to receive additional information from any other source. In such circumstances, the Prosecution cannot identify an erroneous finding (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) that was so unfair or unreasonable

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<sup>49</sup> SPO Appeal, para. 32.

as to constitute an abuse of his discretion. The SPO may have wished to be consulted before bail was granted, but that is an inadequate basis for demonstrating that the Single Judge fell into error or abused his discretion. As argued at paragraph 37 above, the judicial decision-making process is not one of consultation or negotiation.

*(v) There are no exceptional grounds justifying suspensive effect*

53. The SPO requests that the Panel grant suspensive effect of the Decision. Suspensive effect, specifically in appeals against decisions on detention on remand, is an “exceptional measure”.<sup>50</sup> Therefore, the circumstances justifying suspensive effect must be exceptional as assessed against the category of decisions on detention on remand. Suspensive effect must be the exception, not the rule, because Mr Kilaj’s continued detention has, subject only to the outcome of this appeal, been found to be unreasonable and therefore contrary to his right to liberty. Unless the Decision is executed immediately, he will remain in KSC detention notwithstanding a finding by the Single Judge that his continuing detention is in breach of his right to liberty.

54. In this context, the European Convention on Human Rights guarantees that “[e]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided *speedily* by a court *and his release ordered if the detention is not lawful*”.<sup>51</sup> The European Court of Human Rights has found that “speedily” in these circumstances requires that “since the liberty of an individual is at stake [court] proceedings are conducted as quickly as possible”.<sup>52</sup> Pursuant to that

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<sup>50</sup> Rule 58(4).

<sup>51</sup> European Convention on Human Rights, Art. 5(4) (emphasis added).

<sup>52</sup> ECHR, App. No. 16483/12, *Khlaifia and Others v Italy*, Judgment, 15 December 2016, para. 131.

objective, “[p]roceedings concerning issues of deprivation of liberty require particular expedition and any exceptions to the requirement of ‘speedy’ review of the lawfulness of a measure of detention call for strict interpretation”.<sup>53</sup> Suspensive effect of an order to release an unreasonably detained person would be an exception to the rule that an appeal such as this should be disposed of speedily, and the detainee’s release ordered. The criteria for ordering suspensive effect must therefore be strictly and narrowly construed and it is incumbent upon the SPO to establish those criteria.

55. The Prosecution fails to establish the existence of such exceptional circumstances. It is submitted that, for the exceptionality requirement to have any meaning in practice, it is not enough, as do the SPO, simply to repeat the objections to provisional release in the Appeal. These are not exceptional but are by definition routine features of any application to remand a suspect in custody (or to challenge a first instance decision to grant provisional release).
56. Not only does the SPO need to demonstrate exceptionality, but also that the “implementation of the Decision could potentially defeat the purpose of the appeal or would lead to consequences that may be irreversible.”<sup>54</sup> By contrast, the SPO merely repeats its objections to bail, principally based on the risks of obstructing the progress of proceedings, and committing “further” offences. In so doing, the SPO ignores the powerful disincentives at play that serve to ensure that Mr Kilaj would not contact [REDACTED], even if *arguendo* he had the slightest inclination to do so.

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<sup>53</sup> *Ibid.*

<sup>54</sup> Rule 171.

57. Mr Kilaj – a man whose only prior experience of any criminal justice system was 32 years ago when he was convicted of offences relating to political activities under the Milošević regime<sup>55</sup> – has been in KSC custody, uncharged and without a clear understanding of the allegations against him, for the last six months. He was torn from his home and family in Kosovo, weeks from his 60<sup>th</sup> birthday. As Mr Kilaj knows, and has been advised, any attempt to contact [REDACTED], directly or indirectly, would result in the immediate rescission of his provisional release and loss (again) of liberty, without any realistic prospect of a second chance to obtain provisional release. Mr Kilaj has no intention of placing himself in that position. The potent disincentive against contacting [REDACTED], combined with the Court's ability to immediately issue a warrant for Mr Kilaj's re-arrest and return to KSC custody, precludes any realistic potential that irreversible adverse consequences will materialise if the Decision is executed immediately.
58. Moreover, the Defence underscores that this is an SPO appeal against the conditions attached to, and the modalities of the execution of, the Decision, not against the Single Judge's principal finding in the Decision that continued detention was unreasonable. The best result for the SPO would be the Panel acceding to its request that the matter be remanded back to the Single Judge for further consideration. Given the particular circumstances of Mr Kilaj's case, there is no likelihood of the Single Judge reversing his principal finding, and the SPO does not ask that he does.
59. The most that the Prosecution might hope for is a revised decision from the Single Judge augmenting the current conditions attached to Mr Kilaj's provisional release. This is provided for by the terms of the last condition at

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<sup>55</sup> Annex 1 to SPO Submissions, transcript of SPO interview with Mr Kilaj, 2 November 2023, page 11.

paragraph 65(j): “Mr Kilaj shall abide by any other decision or order of the SC.” In that eventuality, it may be a simple matter of communicating those augmented conditions to him in Kosovo, something the Registry will easily be able to achieve. There exist no exceptional circumstances that could make it proportionate for the Panel to order that Mr Kilaj remain – unreasonably – in custody pending resolution of this appeal.

60. Finally, whilst confident that the Panel will assess and rule on this appeal as a matter of priority, the Defence respectfully invites it to give serious consideration to communicating its ultimate finding to the Parties as soon as possible, with written reasons to follow. Even if the SPO succeeds in convincing the Panel of the correctness of its position, the Single Judge must be permitted to give further consideration to the release conditions without delay in order that Mr Kilaj in turn might be released without delay. Conversely, if Mr Kilaj prevails, there is no advantage to his remaining in custody awaiting a potentially lengthy, fully reasoned and footnoted written judgment.

## **VI. CONCLUSION**

61. For the foregoing reasons, the Panel should dismiss both the request for suspensive effect and the substantive appeal.

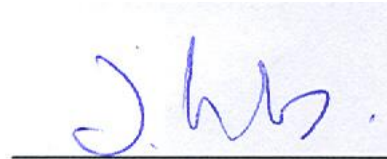
Respectfully submitted,

**Word count: 5,823**



**Iain Edwards**

**Counsel for Isni Kilaj**



**Joe Holmes**

**Co-Counsel for Isni Kilaj**

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Abidjan, Côte d'Ivoire