In:	**KSC-BC-2020-06** **Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**
Before:	**Pre-Trial Judge** Judge Nicolas Guillou
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Kadri Veseli
Date:	13 January 2021
Language :	English
Classification :	Public

Defence Reply to the SPO's response to the Provisional Release Application of Kadri Veseli With Annexes 1 to 7

Specialist Prosecutor
Jack Smith

Counsel for Hashim Thaçi
David Hooper QC

Counsel for Kadri Veseli
Ben Emmerson CBE QC

Counsel for Rexhep Selimi
David Young QC

Counsel for Jakup Krasniqi
Venkateswari Alagendra

Introduction

1. The Veseli Defence adopts without repetition its previous submissions on the law. This reply is directed to three categories of consideration: Neutral considerations; the defence response to the SPO's specific objections; and the factors in favour of provisional release.

Neutral considerations

2. This section addresses arguments of neutral significance, involving considerations that are "relevant but not sufficient" in ECHR terms.

The gravity of the charges

3. The SPO is correct to say that the ECHR has recognised that the gravity of an offence and the likely penalty are *relevant*. But it has been equally clear in saying they are not sufficient in themselves, without independent evidence that the accused is likely to abscond or interfere with witnesses. In *Ilijkov v Bulgaria*, Judgment 26 July 2001, at para. 81, the Court observed that "the gravity of the charges cannot by itself serve to justify long periods of detention on remand". This observation was endorsed by the ICTY in *Prosecutor v Stanisic*[1] and in *Prosecutor v Haradinaj*.[2]

4. The charges against Ramush Haradinaj were at least as serious as those against Mr. Veseli. Nonetheless, the ICTY held that this was of neutral significance. After endorsing the statement of principle in *Ilijkov,* the Trial Chamber added and the same is true of the KSC:

[1] *Prosecutor v Stanisic*, IT-03069-PT, Decision on Provisional Release, 28 July 2004 at paragraph 22.
[2] Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, Prosecutor v Ramush Haradinaj and others, Case No. IT-04-4-PT, Annex 3 at paragraph 24.

> "The Trial Chamber further agrees that the expectation of a lengthy sentence cannot be held against an accused *in abstracto* because all accused before this Tribunal, if convicted, are likely to face heavy sentences."[3]

The alleged climate of witness intimidation in Kosovo

5. A general climate of witness intimidation is not sufficient to justify pre-trial detention, unless the Prosecution is able to link the individual accused to any proven attempt at witness intimidation.[4] Nor is it sufficient for the Prosecution to refer *in abstracto* to the fact that the witness has a network of support: "As stated by the Trial Chamber in *Prlic,* 'even if the accused continues to enjoy influence, it does not necessarily follow that he will exercise it unlawfully'."[5]

6. In its response to the provisional release application by Hashim Thaci, the SPO acknowledged that the alleged "climate of intimidation" cannot, in itself, be the basis for a decision to order pre-trial detention.[6]

Experience in intelligence

7. The SPO suggest that Mr. Veseli's background in intelligence would provide him with technical knowledge and a network that could be used to help him flee. He might have the capacity to flee, but that does not mean he will use it (see para 5 above).

[3] *Ibid,* Annex 3 at paragraph 24.
[4] *Ibid,* Annex 3 at paragraphs 46 to 48; quoted in full in Provisional Release application on behalf of Kadri Veseli, 17 December 2020, paragraph 15.
[5] *Ibid,* Annex 3 at paragraph 47.
[6] Prosecution response to Application for Interim Release on behalf of Mr. Hashim Thaci, 4 January 2021, at paragraph 8.

8. The SPO also implies that Mr. Veseli's position as leader of SHIK is evidence from which the Court could infer a propensity for witness intimidation.[7] The footnotes quote some contemporary reports. It is significant that none of these documents provides any evidence of criminal activity. Identifying perceived opponents during an armed conflict is not a crime.

Network of supporters and access to funds

9. Mr. Veseli had the same network of supporters, and the same access to funds, on 20 June 2020, when the Specialist Prosecutor chose to make it public that he had been indicted for numerous murders, and that the SPO considered it had sufficient evidence to convict him. If he was going to flee, that was the time to make use of his network, when he was not subject to any restrictions on his freedom of movement, and could have escaped to a country without extradition arrangements with Kosovo. The fact that he did not use his network then to evade justice, is the best possible evidence that he would not do so if granted provisional release subject to strict conditions enforced by the Kosovo Police Service.

Relevance of the fact that he is high profile politician

10. The fact that Mr. Veseli's is instantly recogniseable makes it less likely that he would be able to successfully evade justice. The three high-profile accused cited by the SPO were fugitives from justice.[8] They were not individuals subject to provisional release on strict conditions monitored by a national police force. It is artificial for the SPO to suggest a read-across.

[7] Ibid, paragraph 35.
[8] Prosecution response to Application for Interim Release on behalf of Mr. Hashim Thaci, 4 January 2021, at paragraph 11.

11. Moreover, as the Trial Chamber in the *Haradinaj* case pointed out, the fact that an accused is a senior politician with ambitions to return to public life is, in itself, a consideration that renders it less likely that he would abscond.[9]

Travel to places with no extradition arrangements

12. The SPO argues that there are over 180 countries to which Mr. Veseli could escape, which have no extradition arrangements with Kosovo. However, if he were granted provisional release on conditions (including the surrender of his passport and a prohibition on travel) the risk is almost non-existent in practice. Even assuming he obtained a false passport, he could not board a flight without being recognised and apprehended. Moreover, Kosovo is land-locked, so there is no option to escape by sea. The country borders on Serbia and Montenegro, Albania and Macedonia. Accordingly, if he wanted to escape, Mr. Veseli would need to do so overland via one of those destinations. He obviously could not travel to Serbia. He would be immediately recognised and arrested. For the same reason, he could not cross into Montenegro, which has extremely close security co-operation and extradition arrangements with Serbia. That leaves Macedonia and Abania. However, as the SPO acknowledges, Kosovo has policing co-operation and extradition arrangements with both Macedonia and Albania. The SPO's argument founders on the rocks of elementary geography.

Specific Objections

13. The SPO has made an important concession. According to the SPO response, Mr. Veseli's alleged "actions towards undermining the KSC's mandate are not specifically relied upon" by the SPO. This concession is unsurprising, since the

[9] Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, Prosecutor v Ramush Haradinaj and others, Case No. IT-04-4-PT, Annex 3 at paragraph 35.

evidence whatsoever to support the allegation. He was among the first to vote for the legislation establishing the KSC during the second reading of the Bill in 2005,[10] and he spoke out clearly and unequivocally against attempts by a group of deputies to abolish the KSC in 2017. There is nothing the SPO can identify to support an allegation that Mr. Veseli sought to undermine the KSC mandate, which is no doubt why this allegation is levelled at other accused, but not at him.

Alleged involvement in 2017 attempt to abolish

14. There is no evidential basis for imputing responsibility to Mr. Veseli for the 2017 attempt to abolish the KSC. The record speaks for itself. He opposed it publicly and in strong terms. The fact that, at the same time, he acknowledged that the KSC remains a controversial and divisive issue in Kosovo, does nothing to undermine the significance of his refusal to give his backing to the measure.

15. Mr. Veseli actively counselled his party members to be realistic and to abandon the measure. There were 43 signatories on the list (see Provisional Release application at Annex 2). Those names are broken down by political party in the schedule attached at Annex 5 to these submissions. As will be apparent, less than half of the signatories were members of PDK.

16. The tweet of the US Ambassador published on 17 January 2018 refers to political leaders (unnamed) who were leading the initiative despite their denials. Given the timing, this clearly does not refer to Mr. Veseli, since the Ambassador had previously singled Mr. Veseli out for praise for publicly opposing the initiative in a tweet published two weeks earlier, on 9 January 2018.

[10] See voting record: Provisional Release application on behalf of Kadri Veseli, 17 December 2020, Annex 1.

17. In the end, the SPO is driven (at paragraph 38 of its response) to acknowledge that Mr. Veseli opposed the measure, and so it has now re-framed its objection as a complaint that his opposition was not publicly expressed until the legislation was tabled before the Assembly. The SPO now rests its case on the following proposition (at paragraph 40):

> "Making selective public pronouncements in support of the KSC clearly does not preclude possible less publicised efforts to undermine it."

18. This amounts to saying that because the proven facts do not entirely exclude a contrary hypothesis, the Pre-Trial Judge should be "satisfied" that this alternative hypothesis represents the truth. The SPO is asking the Pre-Trial Judge to rely on the *absence* of evidence as the basis for a conclusion that runs contrary to the established facts. That is the epitome of an illogical non-sequitur. It is impossible, moreover, to reconcile with the concession recorded at paragraph 30.

Kosovo Veterans Association

19. Recognising that there is no evidence to connect Mr. Veseli to the actions of the Kosovo Veterans Association in publishing confidential KSC documents, the SPO falls back on the submission that his failure to publicly condemn those responsible should be taken as tacit approval (SPO response, paragraphs 22 to 26).

20. Again, the SPO is striving to make something out of nothing. When the disclosure was made public, Specialist Counsel Ben Emmerson QC strongly advised Mr. Veseli to say nothing in public, and to distance himself from the Veterans Association. Accordingly, there is a complete explanation for Mr. Veseli's silence, which has nothing at all to do with tacit consent.

Government payments to potential SPO witnesses

21. Attached to this submission at Annex 6 is a lengthy witness statement by Abelhard Tahiri who was the Minister of Justice between 9 September 2017 and 3 February 2020. It fully explains the system of government payments, and addresses the payments relied on by the SPO. Mr. Tahiri explains how his Ministry adopted a narrow interpretation of the funding legislation that had been passed by the Kosovo Assembly in August 2015. Having taken legal advice, he decided that on a correct interpretation of an apparently ambiguous provision, the legislation did not allow the Ministry of Justice to make payments to any person unless and until they had been indicted. Accordingly, the Ministry refused all such requests.

22. Although the Ministry could not provide financial assistance to any person summoned by the SPO, it was always open to any citizen to apply directly to the Government for the discretionary payment under the Government Reserve Fund, administered by the Office of the Prime Minister. This is known as the Unforeseen Expenses Programme, and can be used to make discretionary grants for any purpose to assist citizens.

23. A small number of payments were made under this scheme. Three payments were made in favour of three named individuals whose applications to the Ministry of Justice had been refused. They had each then renewed their request under the Unforeseen Expenses Programme. Following discussion by the full cabinet, they were each awarded an entirely reasonable sum in line with their likely legal expenses (slightly above or below €10,000).

24. The only sum awarded that was out of line with this average was an award of €40,000 to Lahi Brahimaj. By the time of Brahimaj's application, it was widely

known that the Ministry was unable to make payments of expenses to those called for interview by the SPO. Lahi Brahimaj's request for funding was therefore made directly to the Prime Minister, Ramush Haradinaj. Lahi Brahimaj is Mr. Haradinaj's uncle and was his co-accused in proceedings at the ICTY. Ramush Haradinaj tabled the proposal himself, and it was adopted unanimously by the cabinet. Given the family connection, Mr. Haradinaj recused himself from the decision, and it was signed by the Deputy Prime Minister on his behalf. Mr. Tahiri exhibits the decision to his statement.

25. Mr. Tahiri states categorically that the payment was made strictly for legal expenses. He points out that those present all assumed that Lahi Brahimaj was in particular jeopardy of being arrested and charged when he attended for interview, given his dual role as the Commander responsible for Jabllanice (which indeed forms part of the current indictment) and as a member of the KLA General Staff. The sum was therefore not calculated solely by reference to his attendance at interview in The Hague.

26. More importantly, the SPO suggestion that this was a bribe to persuade Mr. Brahimaj not to testify against his former colleagues can be conclusively disproved. However, attached to this submission at Annex 7 is a witness statement from Rodey Dixon QC, Specialist Defence Counsel for Mr. Brahimaj. He explains that he met with Mr. Brahimaj on 26 February 2020 in Pristina to discuss the SPO summons and his approach to interview. Mr. Dixon gave firm and unequivocal advice to Mr. Brahimaj that he was in serious jeopardy of prosecution, and that he should under no circumstances agree to answer questions from the SPO. This advice was given, he says, solely to protect Mr. Brahimaj's interests.

27. Mr Dixon states that Mr. Brahimaj immediately indicated that he had already reached that conclusion himself, and had no intention whatsoever of answering questions from the SPO. The important point is that the request for payment from the Unforeseen Expenses Programme was not made until three weeks later on 19 March 2020. The causal link suggested by the SPO is disproved.

28. Mr. Dixon states that there was no indication on 23 February 2020 that Mr. Brahimaj intended to apply for a Government grant. There was no fixed agreement for fees at that time, precisely because Mr. Dixon anticipated that he may have to deal with Mr. Brahimaj's arrest and early representation before the Pre-Trial Judge, as well as the SPO interview.

Driton Lacji

29. The SPO no longer relies on the fact that Mr. Lacji acted as an interpreter for Sami Lushtaku. It has now re-framed its objection to allege that Mr. Thaci and Mr. Veseli "put pressure" on Mr Lajci to "assist Mr. Lushtaku" in some unidentified way. Even if this allegation were true, it proves nothing, unless the SPO is able to establish that Mr. Veseli put pressure on Mr. Lushtaku to do something improper. The note by Kwai Hong Ip dated 29 December 2019 does not provide any evidence (or even allege) that Mr. Lajci was put under pressure to do anything improper.

30. The Veseli Defence has obtained a further statement from Mr. Lajci addressing Mr. Ip's evidence. He explains in detail how he came to be involved in assisting Mr. Lushtaku to find a lawyer because this was a core part of his job. He admits that he was under pressure of time, and may have said this to Mr. Ip, but categorically denies being asked to do anything improper.

31. The statement of Abelhard Tahiri corroborates this. He makes it clear that it was on his instructions that Mr Lajci was asked to attend the SPO interview of Sami Lushtaku in The Hague, in order to ascertain the procedure being adopted.

32. The SPO response also relies on a text message from Mr. Lajci to the Kosovo Ambassador in The Hague, concerning a decision of the Constitutional Chamber of the KSC. In the text message, Mr. Lajci refers to the fact that he was told to publicise the decision. As to this, Mr. Lajci states:

> "I fail to understand how the SPO can even suggest that publicising a decision of the Constitutional Court panel is capable of being evidence to interfere with the course of justice. The opposite is true – unless the SPO is suggesting that decisions of the Constitutional Court panel that go against the SPO should be kept secret. The SPO's argument that I was pressurised to do something improper is ridiculous."

33. It is quite clear from Mr. Tahiri's witness statement that Mr. Lajci had no involvement whatsoever in granting funds to any of the accused, including Lahi Brahimaj. All funding requests to the Ministry of Justice were refused, and Mr. Brahimaj did not apply to the Ministry of Justice, but went directly to the Prime Minister. Mr. Lajci had no role in this.

34. Finally, it is critical to point out that Mr. Lajci has not been charged or even interviewed by the SPO about any alleged interference with the course of justice, and the SPO has refused to articulate any allegations against him to his Defence counsel.

Syleman Selimi

35. The SPO's submissions concerning the employment of Syleman Selimi by the Prime Minister soon after his release from prison involve an elementary logical fallacy *cum hoc ergo propter hoc* ("correlation equals causation"). For the SPO's objection to have any logical relevance, it must be established that the job offer was caused by the SPO's interview request. However, it is at least equally likely that the job offer and the SPO interview request were both caused by Syleman Selimi's recent release from prison.

36. The SPO submission is thus a classic example of a "third cause fallacy" (in which a spurious relationship is confused for causation). It happens when one party asserts that X causes Y because they happen at the same time, when in reality X and Y are both caused by Z. For example, it is a statistically proven fact that during periods of time when people buy most ice cream, the number of people drowning in rivers is at its highest. However, despite the correlation of timing, these statistics are not a basis for inferring that ice cream causes people to drown in rivers. Both phenomena are are the result of a common third cause, namely the fact that they occur during periods of hot weather.

37. The SPO's submission is no different. The Prime Minister's decision to employ Syleman Selimi, and the SPO's decision to renew its efforts to interview him, were both obviously caused by the fact that he had just been released from prison. In the absence of additional evidence, it is a causation fallacy to argue that the interview summons was the cause of the job offer.

Rrustem Mustafa

38. The employment of Rrustem Mustafa is not relied upon by the SPO in relation to Mr. Veseli's provisional release application. This is no doubt because the SPO cannot connect it to Mr. Veseli. Nonetheless, for some unexplained reason, the SPO draws attention to the fact that Mr. Veseli met Mr. Mustafa on 21 January 2020. There is no evidence at all as to the nature of the meeting, or what was discussed. This evidence is therefore of entirely neutral significance.

Nazim Bllaca

39. The only evidence adduced by the SPO to suggest that SHIK officerss were involved in acts of unlawful violence against opponents comes from Nazim Bllaca. This is based on the undeniable fact that Bllaca himself committed at least one murder along with a group of other men. Bllaca pulled the trigger and then gave evidence for the Prosecution against his accomplices.

40. In his testimony, Bllaca (who was a paid Serbian intelligence asset) testified that he and his accomplices were all member of SHIK. This aspect of Bllaca's testimony was untrue and was disputed by his accompices.

41. Kadri Veseli was called by the Prosecution as a witness of truth. He explaimed in detail the formation of SHIK as a direct result of the Ramboullet agreements. He also testified that neither Bllaca nor any of the other accused were members of SHIK; that he had never met Bllaca; and that the murder was most certainly not a SHIK operation.

42. The SPO responds that Bllaca has been found to be a credible witness in various trials. This is an extremely misleading statement. He was found to be credible in

relation to his evidence that he pulled the trigger, and that the other men were his accomplices. But on the key question whether they were members of SHIK on active service, the Court expressly made no finding, noting that this aspect of his evidence was disputed and was not sufficiently convincing for the Court to make a finding one way or another.

43. For present purposes, the other crucial point is that Bllaca admitted that he had never met Mr. Veseli, and made no allegation (direct or indirect) against him.

Redacted allegation

44. In the original provisional release application, the Veseli Defence argued that, as a matter of law, it is impermissible for the Pre-Trial Judge to rely on an allegation that has not been disclosed to the Defence. The SPO disputes this, relying on the decision of the Grand Chamber of the ECHR in *A and others v United Kingdom*, 3455/05 Judgment 19 February 2009 at paras 205 to 208. The SPO submits that this decision "permits reliance on undisclosed evidence following a proper balancing exercise".

45. The SPO submission is seriously misleading. The actual finding of the Court was to the opposite effect. The Grand Chamber held that where a national court is called upon to determine whether a person who has not been convicted should be deprived of their liberty on the basis of a reasonable suspicion, reliance on undisclosed allegations was incompatible with the rights of the accused under article 5 of the ECHR, unless the unfairness was counterbalanced by two specific procedural safeguards. First the interests of the accused must be represented in closed adversarial proceedings through the appointment of a security-cleared "special counsel" whose functions are (a) to argue for greater disclosure to the accused and (b) to argue the merits of the point on the basis of the closed

material. Secondly, the State must disclose to the accused at least a gist of the allegation (a "core irreduceable minimum" of disclosure) to enable the accused to instruct "special counsel" to make informed representations. Under this system, the security of the information is preserved because the "special counsel" cannot communicate with the accused after seeing the closed material, without an order of the Court.

46. None of these protections apply in the present case. The ground which the Veseli Defence objects to has been wholly redacted, and there is no procedure for redressing the unfairness caused to the accused. The decision in *A and others,* and the basic principle of *audi altarem partem*, mean that this allegation must be ignored altogether. To do otherwise would be unlawful and in violation of article 5 of the ECHR. The Veseli Defence requests a specific ruling on this point.

Factors in favour

47. Having addressed each of the SPO's objections to provisional release, the final section of this reply answers the SPO's submissions about the points that firmly support the grant of provisional release.

Conduct after being named on 20 June 2020

48. The Veseli Defence relies heavily on the fact that the SPO disclosed the fact that Mr. Veseli had been indicted for multiple murders as war crimes and crimes against humanity, in a statement issued on 20 June 2020. This gives rise to two powerful points. First, the fact that he did not flee or interfere with witnesses between 20 June and 5 November is the best evidence of his likely future conduct. For reasons already explained, he could quite lawfully have left Kosovo

during that time and taken up residence in a country with no extradition arrangements.

49. However, the second point is equally important. Unless there was some overriding imperative to name Mr. Veseli on 20 June 2020, it must follow that neither the SPO nor the Pre-Trial Judge considered that he posed a flight risk or a risk of interference with justice at that time. It is inconceivable that the SPO and the Pre-Trial Judge did not address their respective minds to this question. The obvious inference is that, at that time, they considered that there was no such risk. This places an extremely heavy burden on the SPO to now explain why provisional release on strict conditions presents an unacceptable level of risk, when it clearly did not present such a risk between 20 June and 5 November 2020, even in the absence of enforceable restrictions.

50. Any other inference would only be possible if the decision to name Mr. Veseli was unavoidable, and taken due to some overriding imperative. Accordingly, the Veseli Defence formally requested disclosure of the SPO request for authorisation to name Mr Thaci and Mr Veseli, in apparent contradiction to the rules, and the Pre-Trial Judge's decision on that application. The Pre-Trial Judge's ruling contains no record of the considerations he took into account, simply referring back to the reasons given in the SPO's request. However, the SPO request refers only to the information that was subsequently contained in the *ex parte* arrest warrant application, which has been fully answered in the provisional release application and this submission.

51. Accordingly, the documents reveal no compelling reason why Mr. Veseli had to be named at that time. The only proper inference from the SPO's decision to name Mr. Veseli at that time, and the Pre-Trial Judge's decision to authorise this course, is that neither of them considered Mr. Veseli to pose a serious risk of

flight, or interference with the administration of justice – even in the absence of conditions that can now be imposed and enforced. This inevitably creates an extremely strong presumption that Mr. Veseli should be granted provisional release, unless the SPO can prove that something has happened since then which creates a risk that was not present at the time. In fact, the contrary is true. Mr. Veseli's conduct since that time has been exemplary.

Offer of surrender

52. The letter of 20 November 2020 is a further point that must weigh heavily in favour of provisional release. As the Trial Chamber observed in the *Haradinaj* provisional release ruling, a unilateral and voluntary offer from the accused to surrender to the Court (such as the letter to the SPO of 20 November 2020) will be a positive factor that should be weighed in the balance in favour of provisional release.[11]

53. The SPO fails to address this, other than to point out that it was before the Pre-Trial Judge when he issued the *ex parte* arrest warrant. As the Veseli Defence has previously pointed out above, this is entirely immaterial. The Pre-Trial Judge must consider the issue *de novo*, and take full account of all relevant evidence.

Ability of Kosovo Police Service to enforce conditions imposed by the KSC

54. Article 41(12) of the Law provides in terms that the KSC may impose a range of measures other than pre-trial detention, including home detention, home curfew, and prohibitions on approaching named places and people. As the ECHR jurisprudence shows, the Pre-Trial Judge is obliged to consider these

[11] *Ibid*, Annex 3 at paragraph 33.

alternatives to pre-trial custody, and only to order pre-trial detention if it is necessary, despite the availability of less intrusive measures.

55. The SPO asserts that it does not have the resources to monitor or enforce conditions of provisional release, and that this function is outside the mandate of EULEX. The SPO also asserts (without any evidence whatsoever) that the Kosovo Police Service lacks the necessary resources to monitor and enforce conditions of provisional release.

56. Prior to advancing this argument, the SPO apparently made no attempt to investigate the matter with the Kosovo Police Service or the Ministry of Justice. The Defence of Mr. Veseli has, however, made the necessary enquiries. Annex 1 to this submission contains a statement of the Minister of Justice which appends a written assurance from the Head of Kosovo Police Service.

57. The Minister of Justice, Selim Selimi, has provided a formal guarantee that the Kosovo Police Service has the capacity to monitor and enforce conditions of provisional release imposed by the KSC, and to ensure the accused's attendance at trial:

> "Moreover, referring to your question on the capacity of the Kosovo Police to ensure the enforcement of other conditions in case of eventual court order to issue one of the other alternative measures pursuant to article 41 of the law, please be aware that such duty of the Police is a legal that is stipulated in the applicable legislation, and moreover this practice is in place since 2004".

58. The Minister's statement appends a letter from the Director-General of the Police Service, Mr. Samedin Mehmeti which states:

> "I confirm that Kosovo Police is dedicated to fulfil all legal obligations

> as per our mandate and have the capacities to perform any task/duty as requested by the Prosecutors Office or Courts (including the SPO or KSC). It is part of our ordinary functions to supervise the implementation of conditions imposed on the provisional release of accused persons pending trial, even for the most serious offences, when this is ordered by a Court in Kosovo, and we routinely perform this function."

59. The SPO's flimsy argument that the KPS has limited capabilities is based exclusively on (a) the case one individual who twice absconded from a hospital where he was serving his sentence, and was almost immediately apprehended; and (b) another individual who failed to appear at an adjourned hearing, and absconded for several months before being apprehended. These minor incidents do not call into question the gurarantees furnished by the Minister of Defence and the Director-General of the Kosovo Police.

60. In the *Haradinaj* provisional release ruling, the ICTY emphasised that guarantees given by the State and its law enforcement agencies in connection with the monitoring and enforcement of conditional release should weigh heavily in the balance in favour of granting conditional release:

> "When assessing the likelihood that an accused will appear for trial, Trial Chambers have regularly given significant weight to guarantees provided by the State or entity the accused sought to be released to."[12]

61. The State concerned, and its law enforcement entities, need not be in a position to provide a complete guarantee of compliance. Limitations on resources may be relevant. It is sufficient if those entities provide an undertaking that they will be able to secure the accused's attendance at trial:

[12] *Ibid*, Annex 3 at paragraph 22.

> "There can of course never be *absolute* certainty that the actor providing the guarantees will be able to honour them, and certain limits apply to UNMIK's resources just as they do to the resources of states. However, all the Trial Chamber needs to be satisfied of, on the basis of the evidence before it, is that UNMIK will indeed be able to secure the accused's attendance before the Tribunal."[13]

Relevance of protective measures

62. The Pre-Trial Judge has granted extensive protective measures in this case, with the identity of certain witnesses being withheld until shortly before the start of the trial. This is a further factor in favour of provisional release. As the ICTY observed in *Haradinaj*, where similar protective measures were in force:

> "The Trial Chamber considers these measures to be a contribution to witness security, and an additional safeguard for the protection of potential witnesses concerned with the accused's provisional release."[14]

Statement made on arrest

63. The SPO dismisses the significance of the statement made by Mr. Veseli on his arrest, arguing (a) that it was made for the sole purpose of advancing an application for provisional release; and (b) that he has, on other occasions, described the KSC as an "injustice", and accordingly, his statement on arrest must be regarded as insincere.

[13] *Ibid*, Annex 3 at paragraph 40.
[14] *Ibid*, Annex 3 at paragraph 49.

64. There are two answers to the SPO's point. Firstly, the significance of the statement is that it was addressed to Mr. Veseli's supporters and strongly discouraged any attempts to obstruct the work of the KSC. In that sense, it speaks for itself. Its likely impact on his supporters does not depend on Mr. Veseli's private thoughts or intentions.

65. The second point is that there is no conflict between considering the KSC to be an injustice to Kosovo, and agreeing to co-operate with it. In its response to the Thaci provisional release application, the SPO specifically acknowledges that "Thaci does not have to politically support the KSC, and it is reasonably expected that he would be critical of any decision to indict him".

66. Ramush Haraddinaj made a very similar statement when surrendering to the ICTY (see Annex 3, para. 31). That statement contained the words "I feel offended with this process...I ask from all of you to accept something that is nearly impossible to accept". Nonetheless, the Trial Chamber cited this statement with approval noting that it contained a commitment to co-operate, and describing Mr. Haradinaj's conduct on surrender as "exemplary".

Absence of any other evidence

67. In relation to each of the other accused, the SPO either (a) relies on specific acts alleged to constitute interference with the course of justice, or to undermine the mandate of the KSC; or (b) relies on items of real evidence discovered during the searches of their homes or other premises. Whatever their merits, all of these allegations are at least individualised considerations directed to the conduct of particular accused.

68. In Mr. Veseli's case there is no such evidence. Nothing is relied upon from any of the searches to resist provisional release. The SPO explicity acknowledges that

it is not making any specific allegation that Mr. Veseli was responsible for seeking to undermine the mandate of the KSC. It is not in a position to allege any act attributable to Mr. Veseli that is capable of amounting to an attempt to interfere with the course of justice. And the direct evidence on flight risk is entirely favourable.

Trial Commencement Date

69. The SPO argues that the length of the pre-trial period is irrelevant. The SPO's position is that unless the delay is such as to breach the reasonable time guarantee, the likely duration of pre-trial incarceration has no bearing whatsoever on provisional release.

70. This submission is flatly contradicted by the relevant ICTY authorities, which make it quite clear that it is in fact *mandatory* to assess the anticipated length of the pre-trial detention when considering an application for provisional release. As the *Haradinaj* Trial Chamber emphasised, the Pre-Trial Judge must take fully into consideration the fact that the Defence has the right to "adequate time and facilities for the preparation of the defence case". That right is enshrined in article 6(3)(b) of the ECHR. The Court's official guidance to article 6 includes the following observations:[15]

> "392. The "rights of defence" of which article 6(3)(b) gives a non-exhaustive list, have been instituted above all to establish equality, as far as possible, between the prosecution and the defence."

71. A trial in six months' time is quite obviously impossible. The statistics from the ICTY and ICC set out in Mr. Veseli's provisional release application bear this

[15] See Annex 4

out[16]. The SPO suggestion that these statistics should be ignored is difficult to fathom – particularly since the SPO is not in a position to (and has not) provide any contrary evidence.

72. The likely duration of the pre-trial period is a relevant factor (and must therefore be considered by the Court and reflected in its reasons). [17]

Additional relief

73. If, and to the extent that, any of the witness evidence adduced in support of this application is disputed, the Veseli Defence renews its request for an oral hearing, in order to enable the witnesses to be examined in person.

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BEN EMMERSON

Lead Counsel for Kadri Veseli

[16] See Provisional Release application on behalf of Kadri Veseli, 17 December 2020, paragraphs 66 to 68.
[17] *Ibid,* Annex 3 at paragraph 29.