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 Kadri Veseli
Date:	1 February 2021
Language :	English
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Defence Request to Appeal the
"Decision on Kadri Veseli´s Application for Interim Release".

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I. INTRODUCTION

1. The Defence for Kadri Veseli files this appeal against the decision of the Pre-Trial Judge declining to order He provisional release pursuant to Article 41(2), (6) and (12) of the Law on Specialist Chambers and Specialist Prosecutors' Office ("the Law") and Rule 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("the Rules").

2. There are 11 grounds of appeal: they consist of a series of errors of law, including the adoption of an unfair procedure for resolving disputed issues of fact; a series of patent factual errors amounting to findings that were not reasonably open to the Judge on the evidence; a series of instances in which the Judge took account of irrelevant considerations, and failed to take account of relevant considerations; and, in consequence, a series of discernible errors in the exercise of the Judge's discretion.

II. PROCEDURAL BACKGROUND

3. On 5 November 2020, Kadri Veseli voluntarily surrendered following[1] an arrest warrant issued by the Pre-Trial Judge,[2] upon request[3] of the Specialist Prosecutor's Office ("SPO" and "Request", respectively), and further to the confirmation of an indictment.[4]

[1] Pre-Trial Judge, Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders, 26 October 2020.
[2] Pre-Trial Judge, Public Redacted Version of Arrest Warrant for Kadri Veseli, 26 October 2020.
[3] Specialist Prosecutor, Second Confidential Redacted Version of 'Request for Arrest Warrants and Related Orders', 28 May 2020.
[4] Pre-Trial Judge, Public Redacted Version of Decision on the Confirmation of the Indictment against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 26 October 2020.

4. On 15 December 2020, the Defence for Mr Veseli informed the Judge that it will file a request for interim release.[5]

5. On 16 December 2020, the Judge requested the SPO to respond by 4 January 2021 to the application for interim release to be filed by the Defence, and the latter to file its reply by 11 January 2021.[6]

6. On 17 December 2020, the Defence filed an application for interim release ("Application") and reiterated its request for an oral hearing in relation thereto.[7] On 4 January 2021, the SPO responded to the Request ("Response").[8]

7. On 13 January 2021, further to a decision extending the time limit for the reply,[9] the Defence replied to the Response ("Reply").[10]

8. On 22 January 2021, the Judge rendered its decision on the Application, rejecting it and the Defence request for an oral hearing.[11]

[5] Defence for Mr Veseli, Submissions of the Defence for Kadri Veseli-Status Conference, 17 December 2020, 15 December 2020, paras.6-7.
[6] Pre-Trial Judge, Decision on the Conduct of Detention Review and Varying the Deadline for Preliminary Motions, 16 December 2020, para.30(a),(c)-(d).
[7] Defence for Mr Veseli, *Application for Interim Release of Kadri Veseli*,17 December 2020, confidential, with Annexes 1-7, confidential ("Application").
[8] Specialist Prosecutor, Prosecution Response to Application for Interim Release on Behalf of Mr Kadri Veseli, 4 January 2021, confidential, with Annex 1, confidential; see also Specialist Prosecutor, Public Redacted Version of 'Prosecution Response to Application for Interim Release on Behalf of Mr Kadri Veseli', 15 January 2021.
[9] Pre-Trial Judge, Decision on Veseli Defence Request for Extension of Time Limit, 11 January 2021, confidential and ex parte.
[10] Defence for Mr Veseli, *Defence Reply to the SPO's Response to the Provisional Release Application of Kadri Veseli*, 13 January 2021, public, with Annexes 1-12 ("Reply").
[11] Pre-Trial Judge, Decision on Kadri Veseli´s application for Interim Release, 22 January 2021, public ("Decision").

III. APPLICABLE LAW

9. Article 41(10) of the Law provides that, final judgment or release, the parties may appeal against a ruling on detention to a Court of Appeals Panel. Article 45(2) of the Law and Rule 58(1) of the Rules confirm that interlocutory appeals lie as of right from decisions relating on detention.

10. The Court of Appeal in the Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention,[12] held that since neither the Law nor the Rules specify the grounds for interlocutory appeals, the Court of Appeal could, like the ICTY, ICTR, IRMCT, ICC, the SCSL and the STL, determine the standard of review applicable to interlocutory appeals.[13] The Court of Appeal decided to apply the standard provided for appeals against judgments in the Law, *mutatis mutandis* to interlocutory appeals[14] specifying that:

(a) With regards to an error of law, the party must identify the alleged error, present arguments in support of the claim and explain how the error of law invalidates the decision. If the error of law has no chance of changing the outcome of a decision it may be rejected on that ground;[15]

(b) In order to appeal successfully on the basis of an error of fact, the appellant must show that no reasonable trier of fact could have made the impugned finding on the basis of the evidence before the Court. In order to justify overturning a decision by a lower-level panel the error of fact

[12] *Special Prosecutor v Hysni Gucati*, KSC-C-2020-07, The Panel of the Court of Appeals Chamber, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("Gucati Appeals").
[13] Gucati Appeals, para.10.
[14] *Ibid*.
[15] I*bid*,para.12.

must have caused a miscarriage of justice (in the sense that it must be an error which would or could have affected the outcome).[16]

(c) When the appeal relates to a discretionary decision, the onus is on the appealing party to demonstrate that the lower-level panel committed a discernible error in the sense that the decision: (i) was based on an incorrect interpretation of the governing law; (ii) was based on a patently incorrect conclusion of fact; or (iii) was so unfair or unreasonable as to constitute an abuse of the lower-level panel's discretion.[17]

11. 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.[18]

IV. GROUNDS OF APPEAL

Matters not in dispute

12. The Defence does not address the errors in the Judge's reasoning concerning the risk of flight because these were not determinative of the outcome of the application. The Judge eventually ruled that the imposition of a condition of house detention, monitored and enforced by the Kosovo Police was sufficient to eliminate the risk that Mr. Veseli might abscond.

13. As regards general background risks, the Judge identified three relevant factors: (a) the gravity of the charges (b) the alleged prevalence of witness intimidation in Kosovo; and (c) the political profile of Mr. Veseli, his prior posts, and the fact

[16] *Ibid*,para.13.
[17] *Ibid*, para. 14.
[18] *Ibid*.

that he has a network of supporters. For the reasons elaborated by the Defence, the Judge was right to conclude that these background considerations, though relevant, were not sufficient to justify detention.

14. Before such factors can be invoked in support of the risks identified in Article 46, there must first be a concrete basis (apart from those background considerations) for concluding that the *individual accused* poses a risk of interference. This proposition is amply supported by ICTY jurisprudence:

(a) In *Prosecutor v Stanisic*, the ICTY applied the decision of the ECHR in *Ilijkov v Bulgaria* to the effect that "the gravity of the charges cannot be itself serve to justify long periods of detention on remand;"[19]

(b) *In Prosecutor v Haradinaj*, the ICTY held that there mere fact that there was a climate of witness insecurity and intimidation in Kosovo was not sufficient to justify detention in the absence of any basis for connecting such allegations to the specific accused whose case is being considered;[20] and

(c) In *Prosecutor v Prlic*, the ICTY pointed out that "even if the accused continues to enjoy influence, it does not necessarily follow that he will exercise it unlawfully.[21]"

[19] ICTY, *Prosecutor v.Stanisic,* Case no.IT-03-69-PT, *Decision on Provisional Release*, 28 July 2004, para.22, fn.29.
[20] ICTY, *Prosecutor v.Haradinaj et al.* Case no.IT-04-84-PT, Decision on Ramush Haradinaj´s Motion for Provisional Release, 6 June 2005("Haradinaj decision"), para. 45 and 47.
[21] *Prosecutor v.Prlic et al*., Case no.IT-04-74-PT, *Order on Provisional Release of Jadranko Prlic*, 30 July 2004, para.30.

15. As regards the individualised elements relied upon by the SPO to substantiate the risks alleged against Mr. Veseli:

(a) The Judge found that there was no evidence that Mr. Veseli had ever sought to interfere with the course of justice or intimidate witnesses, even after he was made aware of the indictment against him in June 2020.[22]

(b) The Judge agreed with the Defence that the fact that the SPO chose to announce in June 2020 that Mr. Veseli had been indicted necessarily meant that he was not, at that time, considered by the SPO to represent a risk either of flight or of interference with justice.[23] Although he did not say so in his judgment, the Judge authorised the SPO to name Mr. Veseli prior to the confirmation of the Indictment.[24] It follows that neither the SPO nor the Judge considered that Mr. Veseli posed a threat to witnesses at that time.

(c) The Judge rejected the SPO's argument that Mr. Veseli's failure to publicly condemn the actions of the Veterans Association in publishing confidential documents could contribute to an assessment that he posed a risk of interference with justice. There was nothing to connect him to that event.[25]

(d) Similarly, the Judge held that there was no basis for inferring that Mr. Veseli had taken part in the 2017 attempt to abolish the KSC. Indeed, he had actively opposed the measure.[26]

[22] Decision,paras.32,41-42,47-48.
[23] Decision,paras.30-32.
[24] Pre-Trial Judge, *Decision on Specialist Prosecutor's Urgent Request*, 23 June 2020.
[25] Decision,para.33.
[26] Decision,para.42.

(e) Lastly the Judge rightly held that one allegation that was wholly redacted could not be taken into account because the Defence had no opportunity to respond to it.[27]

Ground 1

16. In concluding that Mr. Veseli's past relationship and alleged pattern of communications with Driton Lajci[28] was evidence from which it was possible to infer an articulable risk that Mr. Veseli would interfere with the course of justice or commit further offences, the Judge erred in law and made findings of fact that were patently wrong or unavailable to him on the evidence.

17. The finding was not reasonably open to him on the evidence for two independent reasons. First, the Judge was not, as a matter of law, entitled to reach the primary factual finding that was the basis for his conclusion (namely that Mr. Veseli had "given instructions" to Mr. Lajci, a Government employee with responsibility for liaising with the KSC and SPO)[29] because of the procedure he adopted for determining the issue. The Defence had adduced direct evidence in the form of witness statements from Mr. Lajci and the Minister of Justice at the time, Abelhard Tahiri which, if accepted as true, established that no such instructions had been given.[30] The Judge concluded that it was unnecessary to hear oral testimony from the witnesses, or for them to be cross-examined by the SPO, because there were no issues to be resolved

[27] Decision,para.41.
[28] Decision,para.44.
[29] Decision,para.44.
[30] Response paras.26,28, 31,33,21,25; Response Annex 6 to reply (Tahiri); Response,Annex 7; Reply, para.31,33,21,25(Tahiri); Application, paras.29,30,31,32,33 (Lajci); Application,Annex 5.

as to the credibility of their evidence.[31] Having reached that view, it was not open to the Judge, as a matter of law, to reach a contrary finding of fact.[32] Alternatively, he failed to provide adequate (or any reasons) for reaching a contrary view, despite having accepted the evidence of these witnesses as credible.[33]

18. Secondly, even if the Judge had been entitled to reach that primary conclusion of fact, it was not reasonably open to him to reach the conclusion that this was evidence supporting the existence of an articulable risk that Mr. Veseli would interfere with the course of justice or commit further offences.[34] Indeed, the Judge had already found as a fact that there was no evidence of Mr. Veseli having ever given Mr. Lajci instructions to do anything improper.[35] Against that background, the evidence that there had been innocent communication between the two men could not amount (or contribute) to an articulable risk that Mr. Veseli would interfere with the course of justice or commit further offences.[36] In light of his own finding of fact this consequential conclusion was not reasonably open to the Judge on the evidence.[37]

Ground 2

19. The Judge erred in law and in fact in holding that a "disproportionate" payment of legal expenses by the Government of Kosovo to Lahi Brahimaj was evidence from which it was possible to infer an articulable risk that Mr. Veseli would interfere with the course of justice, or commit further offences.[38]

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[31] Decision,para.63.
[32] Decision,para.44.
[33] Decision,para.44.
[34] Decision,para.44.
[35] *Ibid*;Reply, paras.30-33;Reply,Annex 2, pp.1-2; Reply,Annex 6, paras.9-10.
[36] Decision para.44; Reply,paras 30-33; Annex 2, pp.1-3; Reply,Annex 6, paras.9-10.
[37] Reply,paras.30-33; Reply,Annex 2, pp.1-3; Reply,Annex 6, paras.9-10.
[38] Decision,paras.45,47.

20. The finding was not reasonably open to the Judge on the evidence adduced before him for two reasons. First, the Judge was not reasonably entitled on the evidence to reach the primary conclusion that this payment had been a bribe to induce Mr. Brahimaj not to testify for the SPO, or answer questions in interview (which is the underlying allegation)[39] because of the procedure he adopted for determining the issue.

21. The Defence had adduced witness statements from Rodney Dixon QC (Mr. Brahimaj's Specialist Defence Counsel) and the Minister of Justice Tahiri which, if accepted as true, entirely disproved the allegation that the payment was a bribe for that purpose.[40] In particular, the evidence of Mr. Dixon established that Mr. Brahimaj's decision not to answer questions from the SPO had been taken weeks before the payment was even requested, and was taken on the basis of unequivocal legal advice from Mr. Dixon, given solely for the purpose of protecting Mr. Brahimaj's interests.[41] The evidence of Abelhard Tahiri explained precisely how the payment had come to be made, namely that it was an exceptional process in which the Prime Minister, Ramush Haradinaj (who is Mr. Brahimaj's nephew) tabled the proposal from the special fund set aside for unforeseen expenses.[42]

22. Accordingly, the causative link alleged by the SPO (and apparently accepted by the Judge) between the payment of "disproportionate" legal expenses and Mr. Brahimaj's decision not to testify was conclusively disproved. In the absence of such a causative link the payment was of no significance to the issues the Judge had to decide.

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[39] *Ibid*.
[40] Reply,paras.21,25,26,28,31,33; Reply,Annex 7.
[41] Reply,paras.21,25,26,28,31,33; Reply,Annex 7.
[42] Application,Annex 6 (Tahiri).

23. The burden of proof was on the SPO to prove the link alleged, and it was plainly unable to do so in the light of the evidence of Mr. Dixon and Mr. Tahiri, unless their evidence was disputed and disproved. However, despite the Defence request that the witnesses should give oral evidence if their testimony was disputed,[43] the Judge concluded it was unnecessary to hear oral testimony from the witnesses, or for them to be cross-examined by the SPO, because there were no issues to be resolved as to the credibility of their evidence.[44] Having reached the view that the Defence witnesses were credible, it was not then open to the Judge, as a matter of law, to conclude that this payment was a bribe. Even though he did not say so expressly, unless it was a bribe for the purpose alleged by the SPO, it was wholly irrelevant. In addition, the Judge failed to provide any reasons for reaching the view that this payment was relevant despite having accepted the evidence of Mr. Dixon and Tahiri as credible.

24. Secondly, even if the Judge had been entitled to find that the payment was a bribe, he was not reasonably entitled to attribute responsibility to Mr. Veseli for the Government's payment to Mr. Brahimaj.[45] In his ruling the Judge expressly accepted that there was no evidence to implicate Mr. Veseli in the decision to make this payment.[46] His basis for treating it as evidence that Mr. Veseli posed an articulable risk of interference or the commission of further offences[47] depended upon a patent error of fact (see Ground 6 below). On the basis of his finding that Mr. Veseli had played no part in the payment, it was not reasonably open to the Judge to take it into consideration as contributing to an articulable risk that Mr. Veseli would interfere with the course of justice of commit further offences.[48]

[43] Application, para.70;Reply,para.73.
[44] Decision,para.63.
[45] *Ibid.*
[46] *Ibid.*
[47] *Ibid.*
[48] Decision,para.46-27.

Ground 3

25. The Judge erred in law and in fact in holding that the appointment of Syleman Selimi as adviser to the Prime Minister of Kosovo was evidence which could reasonably justify (or contribute to) an assessment that there was an articulable risk that Mr. Veseli would interfere with the course of justice or commit further offences.[49]

26. The finding was not reasonably open to the Judge on the evidence adduced before him for two reasons. First, the Judge's reasoning involved a reversal of the burden of proof. It was for the Prosecution to prove that the job offer was a bribe by demonstrating that there was no other reasonable explanation for Mr. Selimi's appointment. However, there was an equally consistent alternative explanation, namely that it was favour from the Prime Minister to a former KLA comrade who had recently left prison and was without work.[50] In a classic example of "third cause fallacy",[51] the Judge fell into the error of equating correlation with causation (*cum hoc ergo propter hoc*). The Judge's reasoning assumed that it was for the Defence to prove that the job offer was *not* a bribe.[52] This process of reasoning was therefore both unlawful and illogical and was not a conclusion reasonably open to the Judge on the evidence.

27. Even if (which is denied) the Judge had been entitled to find as a fact that the job offer to Mr. Selimi was a bribe by the Prime Minister, he was not reasonably entitled to attribute responsibility to Mr. Veseli. In his ruling the Judge expressly accepted that there was no evidence to implicate Mr. Veseli in the

[49] Decision,paras.46,47.
[50] Decision,para.46;Reply,paras.35-37.
[51] Reply,paras.35-37.
[52] Decision,para.46,47.

decision to appoint Mr. Sylemi to a Government advisory role[53] which was in the sole discretion of the Prime Minister.[54]

28. The Judge's basis for treating it as evidence that Mr. Veseli posed an articulable risk of interference or the commission of further offences depended upon a patent error of fact (see Ground 6 below). Having concluded that Mr. Veseli had played no part in this offer of employment, it was not reasonably open to the Judge to take it into consideration as contributing to an articulable risk that Mr. Veseli would interfere with the course of justice or commit further offences.[55]

Ground 4

29. The Judge found as a fact that the incidents involving Mr. Brahimaj and Mr. Selimi (above) did not directly implicate Mr. Veseli, but nonetheless held that they indicated "a contemporary climate of attempted interference with SPO investigations and SC proceedings within the Kosovo Government which was, at that time, supported by Mr. Veseli as a member of the Kosovo Assembly, as well as the PDK parliamentary group."[56]

30. The Judge concluded that this "climate" indicated "a risk of obstruction by Mr. Veseli" because he "supported" the Government by virtue of his position as a Parliament.[57] This finding was not open to the Judge for two reasons. The primary factual findings that the payment to Mr. Brahimaj and the job offer to Mr. Selimi were bribes by the Government to induce them not to co-operate with the SPO were not reasonably open to the Judge (and involved errors of

[53] Decision,para.47.
[54] *Ibid*.
[55] *Ibid*.
[56] *Ibid*.
[57] Decision,paras.47,48,49.

both fact and law) for the reasons outlined in Ground 2 and 3 above.

31. Even if it had been open to the Judge to conclude that both incidents were bribes (which it was not), it was certainly not reasonably open to him on the evidence to conclude that either of these incidents demonstrated an articulable ground to believe that Mr. Veseli would interfere with witnesses or commit further offences.[58] The reasons he gave for connecting these events to Mr. Veseli were based on patent errors of fact.

32. Firstly, the fact that Mr Veseli was a member of the Kosovo Assembly and the PDK parliamentary party was not a sufficient basis to conclude that he "supported" the Prime Minister in authorising the payment to Mr. Brahimaj or offering a job to Mr. Selimi.[59] Indeed, there was no evidence that Mr. Veseli even knew about these events at the time.

33. The Judge's use of the word "support" introduced an ambiguity that led him to reach an irrational conclusion.[60] A finding that Mr. Veseli "supported" the Government in general, is plainly insufficient. In order to have any relevance to Mr. Veseli's provisional release, the SPO would have needed to establish that he "supported" the Government (or the Prime Minister) in relation to *these two particular decisions* in issue.[61] The Judge accepted that there was no evidence to support that proposition.[62]

34. According to the witness statement of Mr. Tahiri[63] (which the Judge accepted as true)[64] both instances were exclusively attributable to decisions of the Prime

[58] Decision,paras.47,53.
[59] Decision,paras.47,52.
[60] Decision,para.47.
[61] *Ibid.*
[62] *Ibid.*
[63] Reply,paras.21,25,31,33;Reply,Annex 6.
[64] Decision,para.47.

Minister at the time, Ramush Haradinaj. Mr. Haradinaj is not, and never had been in the same political party as Mr. Veseli. He is the leader of an opposition party (the AAK) which was at the time in a coalition Government with the PDK and others.

35. Moreover, the Judge's reliance on the fact that Mr. Veseli was a Member of the Kosovo Assembly is entirely unreasonable in itself as the basis for a finding that he was somehow vicariously liable for the actions of the Government and Prime Minister.[65] This would carry the implication that all members of the Assembly were somehow responsible for acts that were within the exclusive executive responsibility of the Prime Minister.[66] There was simply no evidence to justify attributing either of these events to Mr. Veseli. He had no personal connection to either of them (as Judge made clear in his reasons).[67]

Ground 5

36. The factors identified above in Grounds 1 to 4 were the *only* grounds specific to Mr. Veseli that the Judge identified as justifying his conclusion that Mr. Veseli posed an articulable risk of obstructing justice or committing further offences.

37. The Judge accepted in terms that the evidence of general context (see Ground 4 above) were not sufficient, in themselves to justify detention,[68] and rejected in terms that the other specific allegations advanced by the SPO. It follows that the errors identified in Grounds 1 to 4 were decisive to the outcome of this application, that the Judge took into account considerations that he should have disregarded; and that he adopted an unlawful procedure in that he refused the

[65] *Ibid.*
[66] Decision,paras.32,47,52.
[67] Decision,para.47.
[68] Decision,paras.47,48.

Defence request for the key witnesses to be questioned at an oral hearing if there was any dispute over their testimony. Having accepted the credibility of their testimony, it was a discernable error to exercise his discretion as he did.[69]

38. Taken together, these flaws amount to an abuse of a discretion and the Pre-Trial Judge's decision should be set aside.

Ground 6

39. The risk identified by the Judge as the decisive basis for ordering detention was not a risk that Mr. Veseli would personally interfere with the administration of justice or commit further offences[70] but rather the risk that Mr. Veseli could communicate in a clandestine way with his supporters if granted provisional release.[71] The Judge purported to find that the risk he had identified could *only* be adequately mitigated by custody in the KSC Detention Unit[72] because it was only under those conditions that Mr. Veseli's non-privileged communications could be effectively monitored, thereby preventing from him issuing clandestine instructions to his supporters to interfere with the course of justice or inciting them to commit further offences.[73]

40. This finding was not reasonably open to the Judge on the evidence, on the only evidence before him, was in flat contradiction. The Defence adduced a statement from the Minister of Justice, Selim Selimi, attaching a letter from the Acting Director of the Kosovo Police Service, unequivocally confirming that the Kosovo Police has the capacity to monitor and enforce *any order* the KSC

[69] Decision,para.47.
[70] Decision,paras.25,59.
[71] Decision,para.59.
[72] Decision,paras.60,61.
[73] Decision,para.59.

considers necessary as a condition of provisional release.[74] In fact, they routinely monitor conditions of provisional release ordered by the Kosovo courts, even in the most serious criminal cases, including war crimes cases.[75] The SPO adduced no evidence as to the capacity of the Kosovo Police to monitor and enforce conditions of provisional release.[76]

41. As with all the Defence witness evidence, if there was any dispute about this evidence, the Judge should order an oral hearing not only to resolve issues of credibility, but also any dispute about the testimony of the witnesses.[77] The Judge concluded that it was unnecessary to hear oral testimony from the Minister of Justice or the Director of the Kosovo Police, or for them to be cross-examined by the SPO, because there were no issues to be resolved as to the "credibility" of their evidence.[78]

42. However, despite accepting the Defence evidence,[79] it subsequently became apparent from the Judge's ruling that the scope and extent of the facilities and resources available to the Kosovo Police Service was a matter in dispute.[80] Without affording any prior notice to the parties of his intended approach, or raising the effectiveness of the restrictions on communication as a question that required to be addressed, the Judge rested his entire ruling to order detention on his own unsubstantiated finding that a condition prohibiting Mr. Veseli from contacting witnesses or persons connected with the case "can neither be enforced nor monitored, whether such bar refers to in-person contacts or communication through electronic devices"[81] The Defence was given no

[74] Decision,para.56;Response, paras 45-46, Reply,paras.57,58;Reply,Annex 1(exhibit).
[75] Reply,paras.57,58;Reply,Annex 1(exhibit).
[76] Decision,para.56;Response, paras.45,46;*Contra* Reply,paras.57,58;Reply,Annex 1(exhibit).
[77] Application,para.70;Reply,para.73.
[78] Decision,para.63.
[79] Decision,para.58,63.
[80] Decision,para.55,56.
[81] Decision,para.59.

opportunity to address him on an opinion formed directly inconsistent with the uncontested evidence.

43. If the Judge wanted additional information, he could have requested it either by hearing their evidence on oath, as requested by the Defence, or by a written investigation. Either way, in the absence of *any* additional evidence, the unqualified assurances given by the relevant officials, on its face, extended to restrictions on visitors and a prohibition on telephone or internet communications, coupled with a power to monitor communications from or to Mr. Veseli's home.[82]

44. This finding that the Kosovo Police lacked the necessary resources to effectively enforce a prohibition on contact with witnesses or others was the sole basis given by the Judge to justify his conclusion that the imposition of conditions would not be sufficient to mitigate the risk of clandestine communications.[83]

45. This flaw at the heart of the Judge's reasoning vitiates the entire ruling. It a paradigmatically unfair conclusion.

46. The only conceivable risk which might not be addressed by the conditions the judge could impose (as suitably monitored and enforced by the Kosovo Police) might be a risk that Mr. Veseli's wife and children could smuggle secret messages out of the house for him. Whilst it is not necessary for the Judge to address every argument in his written ruling, it is most certainly incumbent upon him to address any reason that is decisive to his decision. If the risk of communications being smuggled out by Mr. Veseli's wife and children was the real concern of the Judge, then he was obliged to address it directly; to consider whether alternative arrangements could be made (such as monitoring of the

[82] Reply,paras.57,58;Reply,Annex 1(exhibit).
[83] Decision,para.59.

phones of his wife and adult son); and to explain his reasoning on the point. He apparently neither addressed his mind to these issues, nor addressed them in his reasoning.

47. As regards the risk of flight, he held that the imposition of home detention and other measures, monitored by the Kosovo Police *were* sufficient to eliminate the risk.[84] Having reached that conclusion, based on his apparent acceptance of the evidence of Minister of Justice and Director of the Kosovo Police, it was not reasonably open to him to reach a contrary conclusion as regards the risk of interference without having first made further enquiries of those witnesses.

Ground 7

48. The Judge failed to take account of a consideration that was highly relevant to the exercise of his discretion, namely the statement Mr. Veseli made to his supporters on the day he surrendered to EULEX and SPO custody actively encouraging full co-operation with the KSC and the SPO.[85] Given that the sole basis for the Judge's decision was an identified risk that Mr. Veseli would be able, if conditionally released, to secretly incite his supporters to interfere with the course of justice or commit further offences, it was essential for him to identify the factors that pointed in the opposite direction.

49. The Judge did identify one factor pointing in the opposite direction – the fact that there was no evidence that Mr. Veseli had ever done anything to interfere with justice or intimidate witnesses, despite having known about the allegations him from mid-June to early November 2020.

[84] Decision,para.58.
[85] Application,para.6,7,8; Application,Annex 3.

50. However, he failed to make any mention in his reasons of the statement made by Mr. Veseli upon his surrender, in which he called upon everyone in Kosovo to co-operate with the KSC and strongly discouraged any form of interference with the SPO's investigations.[86] From the failure to mention this, it is reasonable to infer that the Judge failed to take account of, or to give due weight to, a highly relevant consideration.

Ground 8

51. The Judge erred in law by adopting an unfair procedure for reaching the findings he did. The Defence adduced witness evidence directly addressing the issues in Grounds 1 to 7 which, if accepted as true in their entirety, would inevitably have led to a different outcome. On the Judge's reasoning, the testimony of those witnesses was crucial to his findings throughout. Their testimony provided a complete rebuttal of all of the issues the Judge relied upon.

52. The Defence was alert to the need to ensure, that if there was any dispute about any of this evidence, the witness(es) concerned could be heard by the Judge at an oral hearing and subjected to cross-examination so that the Judge could reach an informed view not just of the credibility of the evidence, but also of its reliability and significance. A formal request to this effect was included in the reply brief where the witness evidence was adduced to address the SPO´s points.

53. For the reasons above, it was not lawfully open to the Judge to reach conclusions contrary to that evidence because (a) he expressly accepted it as credible and (b) he refused the Defence request for the witnesses to be called to

[86] Application,para.6,7,8; Application,Annex 3;Reply, paras.63,64.

testify and, if appropriate, challenged as to the reliability and implications of their evidence.

54. That was the only fair and lawful course open to the Judge if he was contemplating making findings that were inconsistent with their testimony. Having decided not to hold a hearing, and having concluded that all the witnesses were credible, he was bound as a matter of law to take their evidence at its highest in favour of the Defence. Had he done so, he could not have ordered detention on the basis of the findings he had made.

Ground 9

55. The Judge adopted inconsistent (and in some instances legally incorrect) standards for evaluation of risk. He stated that the test of "articulable grounds to believe" that one of the relevant risks existed meant that an accused had to be detained pending trial unless the risk concerned had been extinguished.[87] Mitigation of risk, he said, was insufficient.[88] Similarly, in his overview of the law, he stated that the standard under Article 41(6)(b) denote "the acceptance of a possibility" of a future event occurring.[89]

56. This is not the correct legal test. The mere possibility that a future event will occur is not sufficient to justify detention. The exclusion of all risk is impossible. The likelihood of the identified risk materialising must be assessed by reference to evidence specific to the particular accused, and must be evaluated to be a sufficiently significant risk to justify depriving a person presumed innocent of their liberty, despite the mitigating factors. However, to require those factors to eliminate risk entirely involves an interpretation of Article 41(6)(b) that is

[87] Decision, para.16,21,51.
[88] See Decision para.33, various factors pointing in Mr. Veseli's favour "only diminish, but *do not eliminate* the risk" (emphasis added).
[89] Decision,para.21.

incompatible with the right to provisional release pending trial enshrined in Article 5 of the ECHR, including a presumption in favour of conditional release.

57. The Judge confused the matter further when he said that in applying Article 41(6)(b) "while suspicion simpliciter is not enough, certainty is not required".[90] This language conflates the standard of proof necessary to reach a finding of fact, with the process of risk assessment and evaluation. Applied to risk assessment, however, it is consistent with the Judge's apparent view (above) that unless a risk can be entirely eliminated, the accused must remain in custody. Mere suspicion that a risk *might* materialise would not be enough on the Judge's test, but anything above the level of mere suspicion, including a minor but identifiable risk, would be. Again, that interpretation is incompatible with Article 5 ECHR.

58. This interpretation of the Judge's approach is also reflected in the language he used in his decisive finding that "there is a risk that Mr. Veseli will obstruct the progress of the SC proceedings". The Judge did not consider it necessary evaluate or weigh the likelihood of that risk materialising, otherwise he would have said so. For the Judge, the mere existence of an identified risk, however slight, is sufficient. That is plainly wrong.

Ground 10

59. In conducting his assessment of the proportionality of detention, the Judge declined to consider the likely length of the pre-trial phase of the proceedings, noting that "any discussion as to the expected total length of Mr. Veseli's detention is premature and speculative."[91] In so doing, he failed to account for a relevant consideration. As the ICTY had pointed out, protective measures

[90] Decision,para.21.
[91] Decision,para.61.

granted must be considered in the assessment of risk because "these measures [are] a contribution to witness security, and an additional safeguard for the protection of potential witnesses concerned with the accused's provisional release."[92] The weight of this factor is a matter for the first instance Judge to determine. But he is not lawfully entitled to ignore a relevant consideration altogether in his reasons.

Ground 11

60. The Judge failed to take into account or to address the fact that he has granted extensive protective measures in order to protect a significant number of witnesses, some of whose identities are to be withheld from the Accused until shortly before trial. Whilst this is only a mitigating factor, and not one that can exclude all risk of interference, it was undoubtedly a factor which the Judge was obliged to consider. As the ICTY has observed, it is mandatory to make a preliminary evaluation of the likely length of detention, in order to assess its proportionality.[93] That proposition is, in reality, self-evident.

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[92] Haradinaj decision, para.49.
[93] Reply,para.70.