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In:	**KSC-BC-2020-06** **Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**
Before:	**President of the Kosovo Specialist Chambers,** Judge Ekaterina Trendafilova
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Rexhep Selimi
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Public Redacted Version of Appeal against Decision on Rexhep Selimi's Application for Interim Release, KSC-BC-2020-06/IA003-F00001, dated 3 February 2021

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I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law[1] and Rules 58(1) and 170 of the Rules,[2] The Defence for Mr. Rexhep Selimi hereby files this Appeal against the Decision on Rexhep Selimi's Application for Interim Release, issued by the Pre-Trial Judge on 22 January 2021 ("Decision"), to deny the Application for Interim Release filed on 7 December 2021 ("Application).

2. The Decision contains a series of legal errors which invalidate the decision. It impermissibly places the burden on the Defence to justify Mr. Selimi's release and erroneously applies the incorrect assessment of risk to Article 41(6)(b) to maintain Mr. Selimi in detention. It also contains legal errors in relation to the level of risk for obstruction, the level of participation in obstructing proceedings or committing future crimes as well as the nature of the potential future crimes.

3. Far from an individualized assessment of Mr. Selimi's circumstances and actions, the Decision is predominantly based on vague and unspecified assertions which could apply to any accused brought before the Chambers. Even where specific allegations against Mr. Selimi are assessed, the evidential analysis is cursory, failing to identify concrete evidence which is relevant and probative of the allegations to the appropriate standard. While all decisions on release involve an element of prediction, the Decision relies on unfounded speculation, to the detriment Mr. Selimi and impermissibly places the burden onto the Defence to disprove this speculation.

4. None of the three conditions of Article 41(6)(b) are met and Mr. Selimi should be released unconditionally. In the alternative, the reasonable conditions proposed by the Defence would be sufficient to eliminate the risk that any would be fulfilled.

II. SUBMISSIONS

A. Standard of Review

[1] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.
[2] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

5. The Appeals Chamber held in *Gucati* that "decisions on pre-trial detention and provisional release are traditionally characterised as discretionary."[3] For discretionary decisions, "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 [or] […] 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."[4] The grounds of appeal set out herein allege one of these errors.

B. Legal errors invalidating the Decision

6. It is noted that the applicable legal framework before the KSC must "reflect the highest standards of international human rights law including the ECHR and ICCPR with a view to ensuring a fair and expeditious trial."[5] Article 29(2) of the Constitution provides that "[n]o one shall be deprived of liberty except in the cases foreseen by law and [….] when deprivation of liberty is reasonably considered necessary to prevent commission of another criminal act, and only for a limited time before trial." Any restrictions on liberty ordered by the Pre-Trial Judge must strictly comply with the fundamental principle of proportionality.[6] The Judge must "provide a reasoned opinion"[7] and must clearly identify all the relevant factors upon which his decision was based.[8]

7. Translating these principles into practice in decisions on applications for interim release is far from straightforward. In light of the fact that such decisions "are fact intensive

[3] KSC-BC-2020-07, IA001/F00005, Court of Appeals Chamber, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention ("Gucati Appeals Decision"), 9 December 2020, public, para 44.
[4] Ibid, para 14.
[5] Article 19(2) of the Law.
[6] Gucati Appeals Decision, paras 72-73. See also Prosecutor v. Jadranko Prlić et al., Case No. IT-04-74-T, Order on Provisional Release of Jadranko Prlić, 30 July 2004, in paras. 15 and 16 which specifies that this is necessary to ensure that
[7] *Prosecutor v. Šainović & Odjanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, paras. 6 and 7; *Prosecutor v Mićo Stanišić,* Case No. IT-04-79-AR65.1*,* Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005, para 8.
[8] Ibid.

and cases are considered on an individual basis . . . in light of the particular circumstances of the individual accused,"[9] it requires a complex discretionary judicial risk assessment on the existence, nature and scope of different risks in relation to the criteria set out in Article 41(6)(b) to be undertaken by the Pre-Trial Judge. However, in light of this discretion, it is vital that the Pre-Trial Judge strictly applies the applicable legal texts and underlying legal principles underpinning interim release and resolves any ambiguity or doubt in favour of the accused. For the reasons set out below, the Pre-Trial Judge has failed to do so.

1. Erroneous application of the burden on the SPO

8. According to the Referral Judgement by the Specialist Chamber of the Constitutional Court in relation to accused brought before the KSC the "presumption must be in favour of liberty."[10] This reflects the wording of Article 41(6) which specifies that arrest and detention of a person shall only be ordered when the criteria set out therein are fulfilled as set out in the Application. As a consequence of this principle, the Pre-Trial Judge was obliged to ensure that the SPO bore the burden at all times of demonstrating that at least one of the Article 41(6) conditions is fulfilled, namely flight, obstruction or re-offending to detain an accused to justify detention and that this burden was never shifted to the Defence to disprove the existence of one of these conditions. The burden also remained on the SPO to establish that the detention of the Accused is necessary.[11] The Pre-Trial Judge failed to do so throughout the Decision.

9. First, the Pre-Trial Judge referred to Article 41(2) which allows an accused to "challenge the lawfulness of his or her arrest and the conditions of detention, and […] his or her release ordered if the detention is not lawful." According to the Decision, this includes the grounds set out in Article 41(6) of the Law.[12] This suggests that the right of an accused to be released is not derived from a fundamental right to liberty and the presumption of innocence as set out in Article 21(3), but is instead a procedural avenue

[9] Id.
[10] SCCC 26 April 2017 Judgment, para 115.
[11] Decision, para 18.
[12] Decision, para 17.

derived specifically from Article 41(2) which the moving party, namely the accused, bears the burden of justifying. By interpreting Article 41(2) to encapsulate requests for interim release, the Pre-Trial Judge improperly shifts the burden onto the accused to challenge the grounds for his detention rather than the SPO justifying them.

10. This is not a mere semantic difference. By placing the burden on the Defence to challenge whether the Article 41(6) criteria are met pursuant to Article 41(2), the Pre-Trial Judge forces the Defence into the position of being the moving party, seeking the affirmative relief of the interim release of the accused, instead of being able to respond to the SPO's arguments and evidence as should have occurred. The Defence is obliged to shadow box, responding to arguments that have not yet been made by the SPO.

11. Second, while recognizing that the arrest warrant was issued *ex parte* but that an application for interim release would require him to "inquire anew into the existence of facts justifying detention in light of the arguments advanced by the Parties,"[13] the Pre-Trial Judge impermissibly relied on two findings of fact from the Arrest Warrant Decision, namely Mr. Selimi's "influence as a former and current political leader and Head of the KLA Operational Directorate"[14] and the "general, well-established, and ongoing climate of intimidation of witnesses and interference with criminal proceedings against former KLA members."[15] Both of these factors appeared to be significant for the Pre-Trial Judge's determination that the Article 41(6)(b) risks were fulfilled. Yet, the SPO was not required by the Pre-Trial Judge to prove the existence of these factors and he simply referred back to the Arrest Warrant Decision on their submissions. This demonstrates that on crucial issues before the Pre-Trial Judge, Mr. Selimi was required to disprove findings that were made before he was a party to proceedings.

12. In this regard, the Defence notes the Pre-Trial Judge's finding that he "may refer to previous decisions and material or evidence already before him, without this affecting the de novo character of the present decision.[16] This was based on the Decision by the Pre-Trial upon the findings before the ICC in *Gbagbo*, which held that "in proceedings

[13] Decision, para 17.
[14] Decision, para 31, citing to Decision on Arrest and Detention, para. 37.
[15] Decision, para 42 citing to Decision on Arrest and Detention, para. 41.
[16] Decision, para 26.

under article 60 (3) of the Statute, although the Prosecutor does not have to re-establish circumstances that have already been established."[17] However, the legal framework at the ICC is wholly different from that at the KSC. There is no presumption of release at the ICC. Nor can it be said that circumstances have been "established" by the Decision on Arrest and Detention, when this has not been on the basis of *inter partes* proceedings. As such, the Pre-Trial Judge committed an error in the governing law by placing the burden on the Defence.

2. Erroneous identification and application of the evidentiary threshold

13. The Decision failed to articulate and apply an appropriate, concrete and objective evidentiary threshold for assessing the risks under Article 41(6)(b). This must be rectified by the Appeals Chamber and an appropriate test applied to Mr. Selimi.

14. Relying upon the text of Article 41(6)(b), the Pre-Trial Judge held that the grounds justifying detention must be articulable in the sense that they must be specified in detail, rely on specific reasoning and concrete grounds which support the belief that the risks under any of the three limbs of Article 41(6)(b) of the Law exist. Based on this analysis by the Pre-Trial Judge, "this denotes an acceptance of the possibility, not the inevitability, of a future occurrence."[18]

15. It is not disputed that certainty of one of the Article 41(6)(b) risks materializing is not required. As the Pre-Trial Judge is essentially predicting the future actions of Mr. Selimi, rather than assessing his past actions, it is impossible for such a finding of certainty to ever be made. As such, a standard less than certainty is appropriate for Article 41(6)(b). However, it appears that the Pre-Trial Judge misunderstood the finding of the Appeals Chamber regarding the possibility of the fulfilment of one of the Article 41(6)(b) risks to suggest that <u>any</u> possibility of a risk materializing is sufficient to justify detention. This was not the finding and cannot be the intention of the Appeals Chamber.

[17] Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled "Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute", para 36.
[18] Decision, para 19.

The Appeals Chamber simply addressed the issue of whether a standard less than certainty was appropriate, but did not further define how the belief of the Pre-Trial Judge, regarding how these risks will materialize, should be defined.

16. Indeed, it was incumbent upon the Pre-Trial Judge in the Decision to explain and justify what level of probability, namely to what evidentiary threshold the SPO's allegations and evidence needed to reach to reach "articulable grounds to believe." This was neither accomplished in the abstract or in relation to the specific enumerated conditions in the Decision.

17. The Pre-Trial Judge explained that the risks must be articulable in the sense that they must be specified in detail, rely on specific reasoning and concrete grounds which support his belief. This interpretation appears to be based exclusively[19] on the definition set out in Article 19.1.30 of the Kosovo Procedure Code, which provides that "when information or evidence must be articulable, the party offering the information or evidence must specify in detail the information or evidence being relied upon." However, this definition, while of superficial assistance, does not provide an evidential threshold, but simply some basic guidance as to the procedural requirements for issuing a decision ordering detention. Other provisions of the same Criminal Procedure Code should instead have been relied upon when determining the risk of future events occurring.

18. Articles 19.1.8, 19.1.9 and 19.1.10 define a "reasonable suspicion", "a grounded suspicion" and "a grounded cause" respectively, as knowledge of information which would satisfy an objective observer of a substantial likelihood that a future criminal offence will occur. This demonstrates that the requirement of 'substantial likelihood' is known and applied under Kosovo law and is appropriate for assessing the probability of a future risk being fulfilled.

19. Articles 19.1.9 and 19.1.10 also require that grounded suspicion and grounded cause must both be based on articulable evidence. Again, these provisions support the argument that articulable is not therefore an evidential threshold but an explanation of the form of evidence required to meet the appropriate ground.

[19] Decision, Fn. 28.

20. This requirement of a 'substantial likelihood' threshold, when determining whether prosecution grounds were met, as opposed to simply finding 'a risk', appears to appropriately implement the requirement that the Pre-Trial Judge be 'satisfied' of the existence of this risk[20] a standard that is applied at both the ICC and ICTY.[21]

21. The failure by the Pre-Trial Judge to establish a clear and objective standard resulted in flawed findings in relation to each of the Article 41(6)(b) grounds. The Pre-Trial Judge found each of them satisfied, but only on the basis of the following vague assertions:

    a. The Pre-Trial Judge "considers that some factors support a finding that Mr Selimi has an incentive to flee" and "finds that a risk of flight exists in relation to Mr Selimi"[22];
    b. "Taken together, these factors militate in favour of a risk that Mr Selimi will obstruct SC proceedings"[23] and the "Pre-Trial Judge accordingly finds that there is a risk that Mr Selimi will obstruct the progress of SC proceedings"[24]; and,
    c. The Pre-Trial Judge "accordingly finds that there is a risk that Mr Selimi will commit further crimes."[25]

22. None of these findings demonstrate that an appropriate standard has been assessed and support the argument that the existence of any risk, however small and unsubstantiated, is sufficient for the continued detention of Mr. Selimi.

23. The failure to establish and apply an objective and appropriate evidentiary threshold for assessing the Article 41(6)(b) criteria is therefore a legal error invalidating the Decision. The Appeals Chamber should therefore apply the correct standard to the Article 41(6)(b) conditions, and determine whether, in Mr Selimi's case, there is a 'substantial' likelihood that he posed the risks alleged. If there are no substantial grounds to conclude he poses the risks alleged, then he should be allowed interim release, with or without conditions, as deemed appropriate.

[20] Gucati Appeals Decision, para 51.
[21] ICC Article 60(2); ICTY Rule 65(B).
[22] Decision, para 33.
[23] Decision, para 40.
[24] Decision para 43.
[25] Decision para 49.

3. Erroneous application of the test for obstruction of proceedings

24. Despite recognising that there is a clear difference in the wording between Article 41(6)(b)(ii) relating to whether Mr. Selimi "will" obstruct proceedings and Articles 41(6)(b)(i) and (iii), which specifically refer to the risk of Mr. Selimi fleeing or reoffending, the Pre-Trial Judge erroneously held that this "linguistic difference"[26] had no impact, relying upon the *Gucati* decision.[27]

25. However, the Appeals Chamber simply refers to both provisions in the context of whether there was an error in the Pre-Trial Judge's reliance on "allegations presented by the SPO and on Gucati's position" to demonstrate the likelihood of reoffending or obstruction. No challenge was raised by the Defence in *Gucati* as to the difference between these provisions. It cannot therefore serve to decide this issue.

26. The Pre-Trial Judge fails to provide any reasoning as to why the clear difference between the provisions should not be considered to be a deliberate choice. There is no reason why a different standard could not apply to the three different Article 41(6)(b) criteria and why a higher threshold may need to apply to one of these conditions.

27. This refusal to give the text of Article 41(6)(b)(ii) its clear and unambiguous meaning, is a clear error in the Decision which means that the Pre-Trial Judge applied the incorrect test to whether Mr. Selimi would obstruct proceedings. It must be reversed and the Appeals Chamber must apply the facts to this correct standard.

4. Error in relation to the level of participation required for obstruction of proceedings and future crimes

28. The Pre-Trial Judge held for both obstruction of proceedings under Article 41(6)(b)(ii) and the commission of future crimes under Article 41(6)(b)(iii), it is sufficient to demonstrate that Mr. Selimi could simply "contribute"[28] to these acts for these criteria to be fulfilled and interim release denied on this basis. These findings set out an

[26] Decision, para 20.
[27] Gucati Appeals Decision, para 63 referred to in Decision, para 20.
[28] Decision, paras 23, 3 & 47.

impermissibly low standard of participation in either obstruction or future crimes. According to the natural consequences of these findings, the Pre-Trial Judge could rely on a contribution to obstruction of proceedings or a future crime, even if this contribution was not criminal.

29. In this regard, the Pre-Trial Judge's earlier finding that "the risks may materialise as a result of the Accused's acts or omissions, but do not require physical execution on his or her part"[29] is noted. However, these acts or omissions must still amount to criminal participation in the obstruction or proceedings or future crime under a recognisable mode of liability for interim release to be denied on this basis. The decision by the Pre-Trial Judge to widen the scope of participation further is an error of law which must be reversed.

5. Error in relation to the nature of the future crime

30. The Pre-Trial Judge erroneously held that ordering detention pursuant to Article 41(6)(b)(iii), the future underlying crime "need not be identical to those included in the charges or occurring in the same (possibly no longer existing) context as the one for which the Accused is prosecuted" but it is sufficient if the engaged will likely "engage in or contribute to crimes similar to the underlying acts charged."[30] This finding again ignores the text of Article 41(6)(b)(iii) which specifically refers to three different possible future crimes.

31. First, the accused may be detained if there is a risk of him "repeating the criminal offence." From the text of the provision, this relates directly to the crime in Article 41(6)(a) which is set out in the Indictment against Mr. Selimi. This may not be artificially extended beyond those offences.

32. Second, detention may be ordered if the accused seeks to "complete an attempted crime", thereby clearly referring to a crime that has already been attempted. This can

[29] Decision, para 24.
[30] Decision, paras 23, 47.

be different from the crime for which the accused has been indicted by the KSC but it must be in progress.

33. Third, detention may be ordered if there is a risk that he will commit a crime which he or she has threatened to commit. Again, this crime need not be the same crime for which he is being prosecuted before the KSC but must have been specifically threatened.

34. The text of each provision is clear. These are three separate sub-conditions for Article 41(6)(b)(iii). Each one must be individually fulfilled in order to justify detention. For example, as appears to be the case, to detain Mr. Selimi based on the risk of him repeating the crime for which he has been indicted, the potential future crime must be both: (1) all but identical to the alleged crime previously committed; and (2) based on the same or more serious form of liability.

35. The standard applied by the Pre-Trial Judge of being satisfied that "there is a likelihood that Mr Selimi will, under any form of responsibility, engage in or contribute to crimes similar to the underlying acts charged against those perceived as being opposed to the KLA, including witnesses due to appear before the SC"[31] is therefore an incorrect legal standard which impermissibly combines the separate sub-conditions of Article 41(6)(b)(iii). No explanation has been provided by the Pre-Trial Judge as to how the alleged future crimes are similar to those set out in the indictment, nor any explanation as to which form of liability would be applicable to Mr. Selimi. It is an error which invalidates the Pre-Trial Judge's findings on this issue.

6. Error in relation to expected duration of pre-trial proceedings

36. The Pre-Trial Judge held that, in light of Mr. Selimi's date of arrest and the potential sentence of life imprisonment he faces, any discussion as to the expected total length of his pre-trial detention is "premature and speculative at the present stage."[32] This is a demonstrable error.

[31] Decision, para 47.
[32] Decision, para 57.

37. When assessing applications for interim release, the duration of proceedings will clearly impact upon the likelihood of any of the Article 41(6)(b)(i)-(iii) criteria being fulfilled. The materialisation of each of these risks is directly affected by this duration. It is clearly a relevant factor to be considered and by excluding it completely from his assessment of these criteria the Pre-Trial Judge committed a discernible error which must be reversed by the Appeals Chamber.

C. Specific errors in relation Article 41(6)(b) criteria

38. The Pre-Trial Judge held that the evaluation of Article 41(6)(b) criteria "must be based on the facts of the case and must be undertaken on an individual basis in light of the personal circumstances of each Accused."[33] The Decision also specified that "contextual factors alone are not sufficient to demonstrate a risk." Despite these findings, it is evident from the Decision that the Pre-Trial Judge erroneously described contextual factors as individual factors and gave them undue weight.

39. For example, in relation to the risk of flight, the Pre-Trial Judge relies on Mr. Selimi's awareness of the confirmed charges against him and possible lengthy resulting prison sentence as well as his ongoing knowledge about the evidence to be presented in relation to the crimes allegedly committed by him through the ongoing disclosure process as factors justifying his detention. These are presented as individual factors pertinent to Mr. Selimi but actually they simply reflect the jurisdiction of the KSC, as well as its system of providing evidence to the accused. Any accused brought before the Tribunal faces serious charges of international crimes. They also follow the disclosure process set out in the Rules. These are not therefore individual factors but generic factors applicable to all accused brought before the Tribunal. If interim release could be based on these systemic factors which require no evidential showing of acts or omissions on behalf of Mr. Selimi, this would denude the presumption of release of any meaning.

[33] Decision, para 21.

40. Similarly, even when relying on a contextual factor, the Pre-Trial Judge had to identify the link between the contextual factor and Mr. Selimi. Otherwise it would not be a relevant factor to be considered. For example, the Pre-Trial Judge relied heavily upon the alleged ongoing climate of intimidation of witnesses and interference with criminal proceedings against former KLA members to justify detaining Mr. Selimi due to the risk of obstruction of proceedings, as well as the risk of Mr. Selimi reoffending. However, the Pre-Trial Judge failed to identify any concrete link between Mr. Selimi and this climate of intimidation.

41. As explained elsewhere by the Pre-Trial Judge, his obligation to evaluate the Article 41(6)(b) criteria on an "individual basis in light of the personal circumstances of each Accused" means that contextual factors may be relevant for one accused and not for others. The only way to demonstrate such relevance is by specifically linking the contextual factor to Mr. Selimi. By repeatedly failing to do so, the Pre-Trial Judge committed multiple errors which must be reversed by the Appeals Chamber.

1. Risk of flight

42. The Defence notes that the Pre-Trial Judge held that the conditions proposed by the Defence were sufficient to mitigate the risk of Mr. Selimi fleeing proceedings.[34] However, the errors in reasoning in relation to the existence of this risk are addressed below for completeness, partly because some of the same factors also appear to be relied upon by the Pre-Trial Judge in relation to other Article 41(6)(b) criteria, such as the supposed support network benefitting Mr. Selimi.

43. When assessing the risk of flight, the Pre-Trial Judge must identify factors which relate both to an accused's incentive to flee as well as his capacity to do so. Proof of one without the other is insufficient to justify detention on this ground.

44. The first two factors identified by the Pre-Trial Judge to support his alleged incentive to flee, namely the seriousness of crimes in the indictment and the disclosure of evidence against him, could apply to any accused before the KSC addressed above.

[34] Decision, para 54.

They are nothing more than generic contextual factors which do not specifically relate to Mr. Selimi. There is also no specific reasoning as to how this information affects Mr. Selimi's incentive to flee, especially in light of the fact that he took no steps at all to do so despite his extensive interviews by the SPO in November 2019 and February 2020, which clearly indicated to him the nature and scope of the allegations against him.

45. As for Mr. Selimi's capacity to flee, the Pre-Trial Judge specifically relies upon Mr Selimi's influence as a former and current political leader and Head of the KLA Operational Directorate as a relevant factor in assessing the risk that individuals in his support network, who share his firm opposition to the SC, may be willing to give him access to assets and/or help him abscond. Yet the Pre-Trial Judge failed to identify who is in Mr. Selimi's supposed support network or what level of control he supposedly maintains over it, seemingly relying upon the SPO's unfounded submissions in this regard. Nor did the Pre-Trial Judge explain how they would be able to provide funds to Mr. Selimi and assist him to abscond even if there was a demonstrable desire on their part to do so. Without this most basic of findings, the Pre-Trial Judge has failed to meet the requirement of specifying in detail the evidence against Mr. Selimi in relation to this condition.

46. Further, although the Pre-Trial Judge identified the relevant factors reducing both Mr. Selimi's capacity and incentive to flee, no analysis or explanation of these factors and how they related to the factors he relied upon in support of the risk of flight identified above was set out. As such, in the absence of such information, the finding in the decision that these were responsible for "diminishing, but not eliminating, the risk of flight" demonstrates that they were not given sufficient weight. These factors, which all relate directly and personally to Mr. Selimi rather than generic contextual factors, clearly render the likelihood that Mr. Selimi will flee to be negligible. This is accentuated by the fact that the Pre-Trial Judge did not consider Mr. Selimi's limited direct financial means, of which he is well aware,[35] as a relevant factor when assessing his risk of flight.

[35] [REDACTED].

2. Obstruction of proceedings

47. The Pre-Trial Judge appears to rely upon Mr Selimi's key functions in the KLA at the time of the alleged joint criminal enterprise, his role as a former and current prominent politician, as well as his opinions or past statements regarding the KSC as relevant factors when assessing whether he would obstruct proceedings due to the fact they "may mobilise support networks, including present and former subordinates."[36]

48. However, again the Pre-Trial Judge speculates as to the support networks over which Mr. Selimi allegedly has influence. It is explicitly accepted by the Pre-Trial Judge that "the SPO adduced no concrete evidence of specific influence exerted by Mr Selimi on individuals within the support network of the KLA War Veterans Association"[37] yet the Pre-Trial Judge still relies upon his supposed support network implicitly drawn from the ranks of the KLA. No specific subordinates, or even groups of subordinates were identified by the Pre-Trial Judge who have been involved in obstruction of proceedings which could provide the necessary relevance to this factor. It is evidently an extraneous or irrelevant consideration and was impermissibly relied upon by the Pre-Trial Judge.

49. Further, although popular and well known in Kosovo, Mr. Selimi has only been a Member of the Kosovo Assembly for a relatively brief period, namely since 2010, having eschewed politics for a decade after the end of the conflict. He has not occupied a senior Government position since being named to the Provisional Government over twenty years ago. His alleged "multitude of positions of authority"[38] actually only includes that of the Commander of the Defense Academy (2000-2003) over seventeen years ago. The Pre-Trial Judge therefore significantly overstates and places undue weight upon his prominence.

50. Moreover, the Pre-Trial Judge also implicitly accepts that there is no evidence that Mr. Selimi has actually interfered personally or directly with proceedings but instead suggests that it is sufficient that he "instigate or contribute in any way to the materialisation of the aforementioned risk." As explained above, no jurisprudential or

[36] Decision, para 37.
[37] Ibid.
[38] Id.

textual support is provided for this wide-ranging finding, which, if upheld would permit continued detention based on the most peripheral and tangential of actions.

51. As regards the [REDACTED], the Defence accepts that these are of more *prima facie* relevance when assessing Mr. Selimi's interim release. However, the Pre-Trial Judge may not reasonably find that Mr. Selimi [REDACTED][39] and [REDACTED].[40] There is insufficient evidence to make a central finding against Mr. Selimi and the Pre-Trial Judge both committed a patently incorrect conclusion of fact by making this finding and abused his discretion by relying on it.

52. Moreover, the Pre-Trial Judge further committed an error when finding that the vulnerability of SPO witnesses to intimidation is a factor that must be borne in mind when assessing other relevant factors.[41] Without specifying how or why this factor is relevant, and to which other supposedly relevant factors it relates, it is wholly vague. In the absence of such an explanation, the Pre-Trial Judge abused his discretion by placing any weight at all on this factor.

53. The remaining factors identified by the Pre-Trial Judge to order detention under Article 41(6)(b)(ii) have been addressed above, apart from Mr. Selimi's inclusion in the United States sanctions list, which the Judge ascribes limited weight. None of the other factors can be given any more than minimal weight when assessing the risk of Mr. Selimi obstructing proceedings in this case and could not, either individually or together, meet the applicable evidentiary threshold for detention under this provision.

3. Repetition of the crime

54. The factors identified by the Pre-Trial Judge in relation to the risk of repetition of crime all appear to be the same as those for which detention was already ordered pursuant to Articles 41(6)(b)(i) and (ii) and have all been addressed above. The generic nature of supposed contextual findings such as a climate of witness intimidation in Kosovo and the fact that Mr. Selimi is progressively being informed of the evidence underpinning

[39] Decision, para 38.
[40] Application, paras 38, 41.
[41] Decision, para 39.

the charges against him is insufficient to ground a finding of the repetition of crimes. The Pre-Trial Judge has also given too much weight to [REDACTED].

55. As regards the serious allegations made against Mr. Selimi in the Indictment, while the Pre-Trial Judge may rely on factors which are relevant for one Article 41(6)(b) condition as equally relevant for another, that does not mean that it can rely upon a finding under Article 41(6)(a) of "a grounded suspicion that he or she has committed a crime within the jurisdiction of the Specialist Chambers" in support of the finding that he or she would re-commit the same crime. To do so, would undermine the very purpose of the test in Article 41(6) which requires the fulfilment of conditions under both subparagraphs (a) and (b) as it would mean that as soon as an indictment was confirmed against an accused, interim release could not be granted as the act of confirming an indictment would also fulfil Article 41(6)(b)(iii).

4. Conditions to mitigate the risks of Articles 41(6)(b)(i)-(iii)

56. The burden on the SPO to demonstrate that detention was necessary, requires the SPO to convince the Pre-Trial Judge that none of the conditions available to him would suffice to adequately remove the risk of the Article 41(6)(b) conditions being fulfilled. This implements the finding that the SPO bears the burden for establishing that the detention of the Accused is necessary[42] by demonstrating that only detention could mitigate the risks.

57. In this regard, while the Defence may propose conditions that could apply, the Pre-Trial Judge was required to *proprio motu* raise and evaluate all reasonable conditions that could be imposed on an accused and not just those referred to by the Defence. This did not occur.

58. The Pre-Trial Judge held that while conditions on Mr. Selimi's interim release may mitigate the risk of flight they could not mitigate the risk of him obstructing proceedings or committing future crimes.

[42] Decision, para 18.

59. While the Defence contests whether the Article 41(6)(b)(i) and (ii) conditions are fulfilled, even if they are, the Decision failed to explain or justify why measures restricting his communications could not be applied to Mr. Selimi while on interim release.

60. For example, the Pre-Trial Judge, should have considered whether a prohibition on Mr. Selimi using the internet or any other communication system would have been sufficient to effectively mitigate the risks found. This could have been enforced through a keylogger or some other monitoring process. Mr. Selimi could also be subject to regular visits by local police authorities to ensure compliance with these conditions. Similarly, the Pre-Trial Judge could have imposed a requirement of his communication devices being subject to monitoring so that his contacts could be reviewed and verified.

61. By simply stating in bald terms that no conditions were sufficient to mitigate the risks of Mr. Selimi obstructing proceedings or committing future crimes, without explaining how the proposed conditions failed to do so or analysing additional conditions, the Pre-Trial Judge failed to properly assess whether detention was necessary as being the least restrictive means of protecting the objectives of Article 41(6)(b).

III. CONCLUSION AND RELIEF SOUGHT

62. In light of the foregoing, the Defence therefore requests the Appeals Chamber to:
    a. Reverse the Decision of the Pre-Trial Judge denying Mr. Selimi's application for Interim Release; and
    b. Order the Interim release of Mr. Selimi, either with, or without, conditions assessed to be appropriate in his particular circumstances.

Respectfully submitted on 3 February 2021,

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