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SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In:	**KSC-BC-2020-06**
	Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Court of Appeals Panel** Judge Michèle Picard Judge Kai Ambos Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Prosecutor
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Response to Veseli Defence Appeal of Detention Decision

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I. Introduction

1. With regard to Article 41 of the Law[1] and Rules 57 and 170 of the Rules,[2] the Specialist Prosecutor's Office ('SPO') responds to the VESELI Appeal[3] against the Decision[4] which rejected the VESELI Release Request.[5]

2. The Court of Appeals Panel ('Panel') should deny the VESELI Appeal in its entirety. As set out in detail below, in the Decision: (a) the correct legal standards were applied; (b) the assessment was procedurally correct and properly individualised; (c) specific risk factors were weighed correctly; and (d) no conditions sufficiently mitigate the risks identified. In attempting to manufacture issues for appeal, the Defence misrepresents the Decision and misleadingly reframes findings.

II. Procedural background

3. On 28 May 2020, the SPO filed the Arrest Warrant Application.[6]

4. On 26 October 2020, the PTJ confirmed a ten-count indictment against the Accused which charged him with a range of crimes against humanity and war crimes, including murder, enforced disappearance of persons, persecution, and torture.[7]

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[1] Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

[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.

[3] Defence Request to Appeal the "Decision on Kadri Veseli´s Application for Interim Release", KSC-BC-2020-06/IA001-F00001, 1 February 2021 ('VESELI Appeal').

[4] Decision on Kadri Veseli's Application for Interim Release, KSC-BC-2020-06/F00178, 22 January 2021 ('Decision').

[5] Application for Interim Release of Kadri Veseli, KSC-BC-2020-06/F00151, 17 December 2020, Confidential (with seven annexes) ('VESELI Release Request').

[6] Public Redacted Version of 'Request for arrest warrants and related orders', filing KSC-BC-2020-06/F00005 dated 28 May 2020, KSC-BC-2020-06/F00005/ RED, 17 November 2020 ('Arrest Warrant Application').

[7] Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026/RED, 26 October 2020 (public version notified 30 November 2020).

5. That same day, the Arrest Warrant Application was granted.[8] The Accused went into custody on 5 November 2020 and was transferred to the seat of the KSC in The Hague.

6. On 17 December 2020, the Accused filed the VESELI Release Request, after which came the SPO Release Response[9] and VESELI Release Reply.[10]

7. On 22 January 2021, the PTJ rendered the Decision. The PTJ concluded that there is a risk that the Accused will abscond, obstruct the progress of KSC proceedings or commit further crimes against those who allege that KLA members committed crimes, including witnesses who provided or could provide evidence in the case and/or are due to appear before the KSC. The PTJ further concluded that no conditions would sufficiently mitigate the risks of the Accused obstructing KSC proceedings or committing further crimes.

8. On 1 February 2021, the Accused filed the VESELI Appeal against the Decision.

III. Standard of review

9. When rendering discretionary decisions, like provisional release decisions, the weight given to relevant considerations may depend on numerous factors.[11] Because of the fact-specific nature of provisional release decisions, the lower level panel is better placed to assess these factors.[12] Accordingly, the Panel must not intervene unless the

[8] Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders, KSC-BC-2020-06/F00027/RED, 26 October 2020 (public version notified 26 November 2020).
[9] Public Redacted Version of 'Prosecution response to Application for Interim Release on behalf of Mr Kadri Veseli', KSC-BC-2020-06/F00161/RED, 4 January 2021 (with annex; public version notified 15 January 2021) ('SPO Release Response').
[10] Defence Reply to the SPO's Response to the Provisional Release Application of Kadri Veseli, KSC-BC-2020-06/F00174, 13 January 2021 (with seven annexes) ('VESELI Release Reply').
[11] *Prosecutor v. Gucati and Haradinaj*, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, Public ('*Gucati* Appeals Decision'), paras 44, 49.
[12] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.49.

appellant demonstrates the existence of a discernible error in that the Decision was based on an error of law, error of fact, or abuse of discretion.[13] A mere disagreement with the conclusions that the first instance panel drew from the available facts or the weight it accorded to particular factors is not enough to establish a clear error.[14]

10. Alleging an error of law requires identifying the alleged error, presenting arguments in support of the claim, and explaining how the error invalidates the decision.[15] An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.[16]

11. An error of fact can only be found if no reasonable trier of fact could have made the impugned finding.[17] In determining whether a finding was reasonable, the Panel will not lightly overturn findings of fact made by a lower level panel.[18]

12. Finding an abuse of discretion requires that the Decision was so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.[19]

IV. Submissions

A. THE CORRECT LEGAL STANDARDS WERE APPLIED

13. The arguments in Ground 9 of the VESELI Appeal are based on a misrepresentation of the PTJ's findings and should be rejected.

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[13] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, paras 14, 49. *Prosecutor v. Gucati and Haradinaj*, Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention, KSC-BC-2020-07/IA002/F00005, 9 February 2021, Public ('*Haradinaj* Appeals Decision'), para.14.
[14] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.64.
[15] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.12.
[16] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.12.
[17] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.13.
[18] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.13.
[19] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.14; *Haradinaj* Appeals Decision, KSC-BC-2020-07/IA002/F00005, para.14.

14. Article 41(6)(b) of the Law requires there to be 'articulable grounds to believe' that the risks identified in Article 41(6)(b)(i)-(iii) are established. The PTJ held that the grounds must be 'articulable' in the sense that they must be specified in detail, meaning that specific reasoning and concrete grounds are required in deciding to continue detention.[20] The PTJ further concluded that specific articulable grounds must support the 'belief' that the risks under Article 41(6)(b)(i)-(iii) exist, denoting an acceptance of the possibility, not the inevitability, of a future occurrence.[21]

15. This Panel has already concluded that an interim release inquiry involves a risk assessment.[22] In particular, the Panel concluded that determining the necessity of detention revolves around the 'possibility, not the inevitability, of a future occurrence'.[23] This was not an idle reference to something less than certainty being required; the Panel framed the relevant determination in these exact words and favourably cited ICC jurisprudence using that same language.[24]

16. Proposing additional or different thresholds of what the PTJ must find does not advance the matter.[25] The degree of certainty required follows naturally from the 'articulable grounds to believe' language in Article 41(6)(b). This interpretation has already been settled by the Panel, and the PTJ did not articulate an inconsistent or incorrect legal standard.[26]

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[20] Decision, KSC-BC-2020-06/F00178, para.21.
[21] Decision, KSC-BC-2020-06/F00178, para.21.
[22] *See Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, paras 51, 63, 67, 69.
[23] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.67.
[24] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.67, *citing* ICC, *Prosecutor v. Mbarushimana,* Judgment on the Appeal of Mr Callixte Mbarushimana Against the Decision of Pre-Trial Chamber I of 19 May 2011 entitled "Decision on the 'Defence Request for Interim Release'", ICC-01/04-01/10-283, 14 July 2011, para.60.
[25] *Contra* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, para.56 ('sufficiently significant risk'). *See also Haradinaj* Appeals Decision, KSC-BC-2020-07/IA002/F00005, para.64 and fn.119.
[26] *Contra.* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, paras 55-58.

17. Instead, the Defence submissions misrepresent the PTJ's findings. At no point did the PTJ say that the risks have to be completely extinguished, or that mitigation is insufficient.[27] Rather, in the paragraph of the Decision relied upon by the Defence,[28] the PTJ held that (i) the grounds must be 'articulable' in the sense that they must be specified in detail, meaning that specific reasoning and concrete grounds are required in deciding to continue detention;[29] and (ii) continued detention must be the only means of mitigating those risks.[30] This is virtually the opposite of what the Defence attempts to portray. The reference to paragraph 33 of the Decision is equally inapposite. There, far from stating that mitigation is insufficient,[31] the PTJ merely indicates that the particular conditions proposed diminished, but did not eliminate, the risk of flight, before—significantly—proceeding in the following paragraph to weigh the risks which had been found to exist against the degree of mitigation provided by the factors which had been outlined by the Defence. The language used by the PTJ is perfectly appropriate, and does not denote an incorrect standard.

18. To assert that the PTJ's overall assessment did not evaluate or weigh the likelihood of the risks materialising is simply inaccurate.[32] The PTJ consistently identified factors militating both for and against continued detention. The PTJ's conclusion that the current risk of flight is sufficiently mitigated by the Accused's proposed conditions is clear proof in itself that such an assessment was made.[33]

B. THE ASSESSMENT WAS PROCEDURALLY CORRECT AND PROPERLY INDIVIDUALISED

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[27] *Contra*. VESELI Appeal, KSC-BC-2020-06/IA001-F00001, para.55.
[28] Paragraphs 16 and 51 of the Decision, which are also cited to, merely summarise party submissions, rather than containing any finding by the PTJ.
[29] Decision, KSC-BC-2020-06/F00178, para.21.
[30] Decision, KSC-BC-2020-06/F00178, para.21.
[31] *Contra* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, para.55.
[32] *Contra* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, para.58.
[33] *See* Decision, KSC-BC-2020-06/F00178, para.58.

19. This section addresses Grounds 5 and 8 of the VESELI Appeal. It also sets out why Grounds 1-4 should be dismissed, with further arguments arising from those grounds addressed in Section C below.

1. The Defence misapprehends the meaning of an individualised assessment[34]

20. It is not disputed that the PTJ's assessment must be undertaken on an individual basis in light of the personal circumstances of each Accused.[35] Within this individualised assessment, and with reference to a wide array of jurisprudence, the PTJ distinguished individual and contextual risk factors as follows:

> [F]actors may be individual, such as the nature and scope of the crimes allegedly committed by the Accused and the potential punishment that he or she is facing, his or her age, (past) position(s), occupation, family ties, health condition, assets, conduct and statements, international contacts and ties, and existence of support networks that may facilitate the materialisation of a risk. Relevant factors may also be contextual, such as the environment and conditions in which the Accused lives, or the particular stage of the ongoing proceedings.

21. This distinction is meaningful, as contextual risk factors alone are not sufficient to justify a risk necessary to continue detention.[36] As outlined below, the VESELI Appeal deliberately misapplies this distinction in an attempt to evade clear findings of risk.

22. The gravity of the charges and the potential penalties which may be imposed are individual risk factors.[37] Such considerations are particular to the individual charged, and were therefore correctly considered by the PTJ as individual risk factors contributing to each of the Article 41(6)(b) risks.[38] It is misplaced to suggest that, because the KSC's core

[34] *In response to* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, Grounds 1-5.
[35] Decision, KSC-BC-2020-06/F00178, para.22.
[36] Decision, KSC-BC-2020-06/F00178, para.22.
[37] *Contra* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, para.13.
[38] Decision, KSC-BC-2020-06/F00178, paras 32 (noting the nature and extent of crimes charged of which the Accused is being progressively informed through disclosure, as well as the severity of the potential sentence, and detailing the specific nature of the charges), 39 (cross-referring to para.32, and noting again the Accused's progressive knowledge of the evidence underpinning the charges), 52 (incorporating the findings related to obstruction of proceedings, and again noting the 'seriousness of the crimes').

mandate concerns serious international crimes, these factors should not be given much weight. As the Panel has held, they are important factors to consider when determining whether detention is necessary in the circumstances of a specific case.[39]

23. The political profile of the Accused and his prior posts are likewise individual considerations.[40] In making his findings for each of the Articles 41(6)(b) risks,[41] the PTJ correctly placed significant weight on the Accused's former influential leadership positions in the KLA and government of Kosovo, particularly as concerns VESELI's past as an experienced intelligence officer.[42]

24. An individual's experience in intelligence is potentially relevant to all three risk factors.[43] VESELI is one of the most experienced intelligence officials in Kosovo, the previous head of the KLA intelligence services and the Kosovo Intelligence Service ('SHIK'). The functions of VESELI's intelligence services during the charged timeframe included identification and investigation of perceived opponents, the very victims of the crimes charged in this case.[44] VESELI has all the experience, skills, and network necessary to target witnesses against him, including through clandestine means which would be difficult to trace. The VESELI Appeal ignores the impact of this important individual factor.

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[39] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.72.
[40] *Contra* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, para.13.
[41] Decision, KSC-BC-2020-06/F00178, paras 32 (detailing the Accused's influential roles and intelligence background), 34 (referring to the Accused's status and high profile and extensive intelligence background), 39 (cross-referring to para.32, and noting again the Accused's public stature and influential positions, including his intelligence background), 43 (addressing specifically the Accused's intelligence background, including as Head of SHIK), 52 (incorporating the findings related to obstruction of proceedings, and again noting the Accused's prominent position in Kosovo).
[42] Decision, KSC-BC-2020-06/F00178, paras 39, 43.
[43] *Prosecutor v. Mustafa*, Decision on Review of Detention, KSC-BC-2020-05/F00052, 23 November 2020, paras 22-23, 27, 31. This factor is even more significant in the present context. Salih MUSTAFA was only a mid-level intelligence officer, whereas VESELI is a former head of intelligence.
[44] SPO Release Response, KSC-BC-2020-06/F00161/RED, para.35, *citing* [REDACTED].

25. An Accused's available support networks is also a risk factor particular to the individual. In respect of each of the Article 41(6)(b) risks,[45] the PTJ concluded that the Accused had access to and could mobilise a network of supporters, including former subordinates and persons affiliated with the KLAWVA. It was entirely reasonable for the PTJ to reach the conclusion that this risk supported the necessity of continued detention in light of the ample evidence of such a support network, the active interference which they have already undertaken,[46] and, as noted by the PTJ, the Accused's particular access and influence over them by virtue of his profile and specific prior positions of authority.

26. In an attempt to evade the implications of the clear findings made on each of these factors, the VESELI Appeal mischaracterises them as 'general background risks' or 'context',[47] and claims that the PTJ's findings of risk specific to the Accused were based only on the incidents addressed in Grounds 1-4 of the VESELI Appeal.[48] Both of these assertions are inaccurate. Each of the findings outlined above are findings of risk on factors individual and specific to the Accused, and which, taken together, would in themselves be more than sufficient to support the necessity of the Accused's detention.

27. Ground 5 therefore both misrepresents the Decision and misapprehends the relevant requirements. It consequently must fail. Moreover, as noted, analysis of the Decision reveals that the PTJ's actual findings on each of the three Article 41(6)(b) risk factors were firmly grounded on multiple unassailable factors individual to the

[45] Decision, KSC-BC-2020-06/F00178, paras 32 (detailing the Accused's influence and authority in particular in relation to former subordinates and persons affiliated with the KLAWVA), 39 (cross-referring to para.32, and noting again that the Accused's past positions, public stature and influence enable him to have particular access to and to mobilise a network of supporters, including former subordinates and persons affiliated with the KLAWVA), 52 (incorporating the findings related to obstruction of proceedings, and noting the risk that the Accused would instigate or assist individuals in his support network).
[46] The publication of confidential SPO documents by the KLAWVA in particular demonstrates the motivation and capability of this support network and its direct link to the present proceedings.
[47] VESELI Appeal, KSC-BC-2020-06/IA001-F00001, paras 13, 37.
[48] VESELI Appeal, KSC-BC-2020-06/IA001-F00001, para.36.

Accused.[49] As such, even if Grounds 1-4 had any merit—which, as explained below, they do not—they would have had no impact on the PTJ's finding regarding the existence of Article 41(6)(b) risks in this case.[50]

28. Relatedly, throughout Grounds 2-4, the Defence repeatedly argues that there is insufficient evidence of a link between the Accused's acts/conduct and the risk factors identified by the PTJ.[51] However, there is no requirement that every factor considered in a risk assessment relate directly to the Accused's own acts and conduct. In particular, contextual factors are frequently relevant and may be considered.[52] The PTJ's finding in relation to the incidents addressed in Grounds 2 and 3 was that they 'indicate the existence of a contemporaneous climate of attempted interference with SPO investigations and SC proceedings within the Kosovo Government […]'.[53] This was a correct and reasonable conclusion. Moreover, it was a relevant factor to note that the Accused was a prominent and influential member of that Government.[54] These findings contain no discernible error.

2. The credibility of witnesses was properly assessed[55]

29. In a refrain across the VESELI Appeal, but particularly in Ground 8, VESELI argues that the PTJ failed to properly consider the credibility of the witnesses he provided, or that having found there to be no issues to be resolved regarding the credibility of their evidence he was not entitled to reach contrary findings of fact.[56]

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[49] *See* paras 22-25 above.
[50] *Contra.* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, para.37.
[51] VESELI Appeal, KSC-BC-2020-06/IA001-F00001, Ground 1: para.18, Ground 2: para.24, Ground 3: paras 27-28; Ground 4: paras 31, 35.
[52] Decision, KSC-BC-2020-06/F00178, para.22 (and jurisprudence cited thereon). *As also acknowledged in* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, para.13.
[53] Decision, KSC-BC-2020-06/F00178, para.47.
[54] Decision, KSC-BC-2020-06/F00178, para.47.
[55] *In response to* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, Grounds 1, 2, 4, and 8.
[56] VESELI Appeal, KSC-BC-2020-06/IA001-F00001, paras 17, 20-21, 41, 51-54.

VESELI links these arguments to the PTJ's decision not to hold an oral hearing, arguing that an improper procedure was adopted by making adverse findings without first hearing VESELI's witnesses.[57] Again, these grounds of appeal are premised on a misrepresentation of the Decision.

30. The Decision did not find the Defence witnesses to be fully credible and then make contrary factual findings.[58] Rather, the PTJ found that an assessment of their credibility was not necessary to the findings being made in the Decision. Specifically, he stated that 'for the purposes of the present decision, an assessment on the credibility of any Defence witness evidence is not required'.[59] The finding could scarcely have been clearer.

31. Indeed, it is apparent from the reasoning throughout the Decision that the PTJ's factual findings were not based on matters to which the VESELI Defence witnesses spoke, either because they were not addressed at all by the witnesses or were not addressed in a contradictory manner by them.

32. For example, contrary to the Defence submissions,[60] the PTJ's finding that VESELI gave instructions to LAJÇI was not based on the incident relating to LAJÇI's attendance at an SPO interview, which LAJÇI and TAHIRI submitted evidence on. Rather, it was based on [REDACTED] presented by the SPO relating to an entirely separate incident.[61] The Defence, and LAJÇI, had the opportunity to address this incident in the VESELI Release Reply. There, they did not dispute the allegation in question, and merely submitted that the instruction did not relate to doing anything 'improper'.[62] As such, the PTJ's finding – which did not rest upon the instruction from VESELI being 'improper'[63] –

[57] VESELI Appeal, KSC-BC-2020-06/IA001-F00001, paras 41, 52-53.
[58] *Contra.* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, paras 17, 23, 53-54.
[59] Decision, KSC-BC-2020-06/F00178, para.63.
[60] *Contra* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, para.17.
[61] *See* Decision, KSC-BC-2020-06/F00178, fn.99 (citing to SPO Release Response, KSC-BC-2020-06/F00161/RED, para.31)
[62] VESELI Release Reply, KSC-BC-2020-06/F00174, para.32; Annex 2 of the VESELI Release Reply.
[63] *See* fn.55 above.

was not contrary to, and did not require an assessment of the credibility of, the witnesses' evidence. Moreover, this finding was just one of several factors – uncontradicted by Defence witness evidence - demonstrating the long-standing (subordinate) relationship which LAJÇI had to the Accused.[64]

33. As addressed in detail in Sections C and D below, the Defence evidence relied upon for both the payment to Mr BRAHIMAJ and for Kosovo's ability to enforce provisional release conditions was similarly irrelevant to the PTJ's actual conclusions.[65]

34. Consequently, it was entirely possible for the PTJ—or any reasonable judge—to have taken the Defence witnesses' evidence at its highest[66] and still made the findings that were made.

35. Finally, it should be noted that it is not erroneous for a PTJ to conclude that 'articulable grounds to believe' that Article 41(6)(b) risks exist without attempting to resolve all conflicting evidence underlying each of those risks. Moreover, hearing witnesses orally in an interim release inquiry is a discretionary decision of the PTJ,[67] and from the nature of the PTJ's findings in this case an oral hearing was indeed unnecessary.

C. SPECIFIC RISK FACTORS WERE WEIGHED CORRECTLY

36. The additional specific risk factors challenged by the Accused are addressed below. Although clearly not determinative to the Decision,[68] this section responds to all remaining arguments in Grounds 1-4 of the VESELI Appeal; as well as to Grounds 7, 10, and 11.

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[64] Decision, KSC-BC-2020-06/F00178, para.44.
[65] Paragraphs 40-41, 53 below.
[66] VESELI Appeal, KSC-BC-2020-06/IA001-F00001, paras 17, 51, 54.
[67] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.77; *Haradinaj* Appeals Decision, KSC-BC-2020-07/IA002/F00005, para.41.
[68] *See* paras 26-27 above. *See also* paras 28-35.

1. Appointments of SPO interviewees, disproportionate legal assistance, and Driton LAJÇI[69]

37. There is significant evidence that the Kosovo government offered several persons benefits or disproportionate legal assistance contemporaneous with the SPO summonsing them for interviews.[70] This included Syljeman SELIMI and Lahi BRAHIMAJ, who are named members of the joint criminal enterprise ultimately charged. The PTJ relied upon these incidents to conclude the existence of a contemporaneous climate of attempted interference with SPO investigations and KSC proceedings within the Kosovo government.[71]

38. First, with respect to Syljeman SELIMI's appointment to a high government position shortly after his SPO summons,[72] the Defence incorrectly frames the relevant assessment. For the purposes of establishing an Article 41(6)(b) risk, it is not necessary to demonstrate that 'there was no other reasonable explanation' for the appointment,[73] rather the relevant assessment is whether it was reasonable for the PTJ to conclude that – together with other similar occurrences[74] – the incident indicates the existence of a contemporaneous climate of attempted interference with SPO investigations and KSC proceedings, contributing to a risk of obstruction by the Accused.[75] In the context - including especially the specific timing, background and pattern, each as noted by the PTJ - the finding was entirely reasonable. Moreover, it is apparent that other possible

[69] *In response to* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, Grounds 1-4.
[70] SPO Release Response, KSC-BC-2020-06/F00161/RED, paras 27-35.
[71] Decision, KSC-BC-2020-06/F00178, para.47.
[72] Ground 3 of the VESELI Appeal, KSC-BC-2020-06/IA001-F00001.
[73] *Contra.* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, para.26.
[74] Decision, KSC-BC-2020-06/F00178, para.47. *See also* SPO Release Response, KSC-BC-2020-06/F00161/RED, para.34, *citing* Public Redacted Version of Prosecution response to Application for Interim Release on behalf of Mr Hashim Thaçi, KSC-BC-2020-06/F00149/RED, 16 December 2020 (with annex; public version notified 21 December 2020) ('THAÇI Release Response'), paras 25-30.
[75] Decision, KSC-BC-2020-06/F00178, para.47.

explanations were carefully considered by the PTJ in reaching that finding,[76] and the Accused simply disagrees with the PTJ's conclusions.[77]

39. The Defence's second challenge under Ground 3 has already been addressed above.[78]

40. In respect of Ground 2, it was also entirely reasonable for the PTJ to conclude that the 40,000 euro payment by the Kosovo Government to Lahi BRAHIMAJ—made directly in connection with his appearance before the SPO—was disproportionate. This was based on objective, undisputed evidence regarding the size of the payment and the size of payments given to other persons appearing before the SPO.[79] Indeed, the evidence presented by Defence witnesses, rather than contradicting such a finding, merely underscored the irregularity of the payment. For example, the Defence witnesses confirmed that (i) it was known well in advance that the interview would be extremely short given Mr BRAHIMAJ's intention to invoke his right to silence;[80] and (ii) the procedure adopted was irregular,[81] constituting a discretionary payment from a contingency fund,[82] with no need to fulfil specific requirements or provide invoices.[83]

[76] Decision, KSC-BC-2020-06/F00178, para.46.
[77] VESELI Appeal, KSC-BC-2020-06/IA001-F00001, paras 25-28.
[78] *See also* para.28 above.
[79] Decision, KSC-BC-2020-06/F00178, para.45.
[80] VESELI Appeal, KSC-BC-2020-06/IA001-F00001, para.21. Annex 7 of the VESELI Release Reply, KSC-BC-2020-06/F00174/A07, para.6.
[81] *See* VESELI Release Reply, KSC-BC-2020-06/F00174, para.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.'); Annex 6 of the VESELI Release Reply, KSC-BC-2020-06/F00174/A06, paras 14-19.
[82] Annex 6 of the VESELI Release Reply, KSC-BC-2020-06/F00174/A06, para.6.
[83] Decision, KSC-BC-2020-06/F00178, para.45. *See also* Annex 6 of the VESELI Release Reply, KSC-BC-2020-06/F00174/A06, para.16.

Consequently, not only was the PTJ's conclusion as to the nature of the payment reasonable, but the Defence witnesses' own statements reinforce, rather than contradict, it.

41. As for the Defence submissions that a 'causative link' between this disproportionate payment and Mr BRAHIMAJ's decision to invoke silence is required, and that it was 'conclusively disproved' by Defence witness evidence,[84] these are also inaccurate. Mr DIXON (i) confirms that in fact Mr BRAHIMAJ had, completely independent of Mr Dixon's legal advice, already decided to invoke silence,[85] (ii) gives no indication that his legal fees in connection with this one-day interview amounted to anywhere near 40,000 euro, and (iii) understandably, was unable to confirm whether or not his client had received any payment or promise of payment from others.[86] Mr TAHIRI (i) as described above, confirmed the irregular and entirely discretionary nature of the payment,[87] and (ii) stated that no one in the Cabinet said or indicated to him that the payment might be for something other than legal expenses.[88] The limits of his knowledge, and of what his evidence actually spoke to are, again, apparent. Consequently, it was entirely open to the PTJ – or any reasonable judge – to have taken this Defence witness evidence at its highest, and still made the findings which were made. The Defence's procedural challenge under Ground 2 must therefore be rejected. The Defence's second challenge under Ground 2 has already been addressed above.[89]

42. Finally, and as discussed previously,[90] it was not required for the PTJ to conclude that the Accused directed Driton LAJÇI to do something improper, noting that the

[84] *Contra.* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, para.22.
[85] *Contra.* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, para.21.
[86] Annex 7 of the VESELI Release Reply, KSC-BC-2020-06/F00174/A07, paras 6, 8-9.
[87] *See* para.40 above.
[88] Annex 6 of the VESELI Release Reply, KSC-BC-2020-06/F00174/A06, para.17.
[89] *See also* para.28 above.
[90] Paragraph 32 above.

assessment at issue is a *risk* of future interference, not proving actual interference.[91] The finding made by the PTJ was that the Accused's interactions with LAJÇI militate in favour of a risk of obstruction because they indicate that he is able to give instructions to an individual interacting with the KSC; and individual who had already been demonstrated to be willing to go beyond his official functions in his interactions with the SPO.[92] There was ample evidence for that conclusion,[93] including [REDACTED].[94] There is no discernible error in reaching this conclusion.

43. Grounds 1-4 are entirely without merit.

2. Detention duration[95]

44. The Defence submits that 'it is mandatory to make a preliminary evaluation of the likely length of detention, in order to assess its proportionality.[96] No direct jurisprudential support is provided for that assertion.[97]

45. Clearly, because deprivation of liberty must always be proportional,[98] the length of detention is a relevant factor and may be grounds for release if an accused is detained for an unreasonable period prior to the opening of the case.[99] However, the Defence submission fails for several reasons.

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[91] *Contra* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, paras 16-18.
[92] Decision, KSC-BC-2020-06/F00178, para.44.
[93] SPO Release Response, KSC-BC-2020-06/F00161/RED, paras 27-33.
[94] [REDACTED].
[95] *In response to* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, Ground 10.
[96] VESELI Appeal, KSC-BC-2020-06/IA001-F00001, para.60.
[97] The citation leads to a paragraph of the VESELI Release Reply which only quotes a sentence from the *Haradinaj* Trial Chamber indicating that an accused must have adequate time and facilities for preparation of a defence case. That elementary principle of human rights law is undisputed, but it does not support the assertion that a chamber is required to project the estimated duration of detention in order to assess proportionality. VESELI does not identify which *Haradinaj* Trial Chamber decision is quoted in this paragraph of the reply, but it is not the interim release decision relied upon in the VESELI Appeal. *See* ICTY, Trial Chamber, *Prosecutor v. Haradinaj et al*., Decision on Ramush Haradinaj's Motion for Provisional Release, IT-04-84-PT, 6 June 2005.
[98] *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.73.
[99] Rule 56(2).

46. First, it is clear that the PTJ did give consideration to the issue of the length of the Accused's detention.[100] What he then concluded was only that discussion of the expected total length of pre-trial detention was 'premature and speculative at the current stage',[101] and therefore declined to give weight to that aspect. There was nothing unlawful or unreasonable in this approach.[102] In particular, and in contrast to the ICTY, detention at the KSC is reviewed every two months.[103] Therefore, a detention decision made now will not dictate for how long an accused is detained. Estimating the future length of detention is not required at this stage and, in light of the applicable framework, would not advance the relevant assessment. It is indeed premature and speculative. Moreover, the timing of the trial is heavily contested between the parties. The PTJ committed no discernible error in declining to resolve this matter, nor in concluding that the Accused's actual length of detention to this point created no proportionality concerns.

3. Protective measures[104]

47. Contrary to Defence submissions, it is apparent that the PTJ carefully considered issues surrounding witness security and protection, including the extent to which various measures could mitigate the risk of witness interference. In particular, the PTJ noted the context of the general, well-established, and ongoing culture of witness intimidation in Kosovo.[105] The adequacy—or inadequacy—of various safeguards formed part of the parties' submissions, and the PTJ cited to these submissions as part of his considerations of the relevance and weight to give to that factor.[106] Indeed, to conclude that the PTJ did

[100] Decision, KSC-BC-2020-06/F00178, para.61 (referring to the date of arrest).
[101] Decision, KSC-BC-2020-06/F00178, para.61.
[102] *Contra* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, para.59.
[103] Rule 57(2).
[104] *In response to* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, Ground 11.
[105] Decision, KSC-BC-2020-06/F00178, para.48.
[106] Decision, KSC-BC-2020-06/F00178, para.48, fn.111, *citing* SPO Release Response, KSC-BC-2020-06/F00161/RED, para.25 ('What the KLAWVA has already done has intimidated or frightened several of the SPO's potential witnesses. Such actions demonstrate – again–that conducting legal proceedings in The

not consider the availability of protective measures defies rational scrutiny, noting further that he had [REDACTED].[107]

4. Pre-Surrender Conduct[108]

48. Contrary to the Defence submissions,[109] the Pre-Trial Judge considered the Accused's pre-surrender conduct concerning the KSC,[110] including his public statement to supporters.

49. The Defence submissions on VESELI's public statement were, for example, expressly referenced and cited multiple times,[111] and discussed and carefully weighed in the PTJ's reasoning.[112] Indeed, the PTJ expressly gave '[p]articular weight' to this factor when evaluating VESELI's flight risk.[113] There was no discernible error in how the relevant factors were weighed, or in the PTJ's conclusion that VESELI's statement did not adequately address the Article 41(6)(b) risks.

D. NO CONDITIONS SUFFICIENTLY MITIGATE THE RISKS IDENTIFIED

50. Finally, Ground 6 of the VESELI Appeal is meritless as it is again premised on a distortion of the PTJ's findings.

51. The PTJ considered that none of the proposed conditions, nor any additional limitations that could be imposed by him, could restrict the Accused's ability to communicate, through any non-public means, with his community or support

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Hague is best seen not as a panacea for mitigating interference risks so much as a concrete reflection of the deadly seriousness of the problem').

[107] [REDACTED].

[108] *In response to* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, Ground 7.

[109] VESELI Appeal, KSC-BC-2020-06/IA001-F00001, paras 48, 50.

[110] *As acknowledged elsewhere in* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, paras 15, 49.

[111] Decision, KSC-BC-2020-06/F00178, paras 29, 36, 38.

[112] Decision, KSC-BC-2020-06/F00178, para.33.

[113] Decision, KSC-BC-2020-06/F00178, para.33.

network.[114] The PTJ found the risks to be such that they can only be effectively managed through the fully controlled environment that only detention can provide.[115] There was no discernible error in these findings.

52. Any attempts to propose conditions which further restrict phone calls and public statements fail to appreciate the reality behind the PTJ's considerations. The primary way the Accused is going to be able to either interfere or commit further crimes is to get messages out to his former subordinates and supporters.[116]

53. As to the Kosovo Police's indicated willingness to enforce conditions, the PTJ did not conclude or assume anything on this point.[117] If no condition can mitigate the risks identified, a chamber is not obligated to assess a State's willingness and ability to enforce conditions.[118] There is significant evidence that the Kosovo authorities are limited in their ability to monitor an accused of VESELI's stature, resources, and authority in a case like this one.[119] However, in view of the PTJ's finding that no conditions could manage the risks identified, Kosovo's willingness or ability to enforce conditions became immaterial. The PTJ committed no discernible error on this point.

V. Conclusion

54. For the foregoing reasons, the Panel should deny the VESELI Appeal in its entirety.

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[114] Decision, KSC-BC-2020-06/F00178, para.59.
[115] Decision, KSC-BC-2020-06/F00178, para.59.
[116] The Defence presents a highly specific example of how the Accused could communicate surreptitiously outside detention (*see* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, para.46), but it is self-evident that there are multiple potential means of doing so. It is noted in this regard the PTJ indicated that no conditions could restrict communication 'through any non-public means'. Decision, KSC-BC-2020-06/F00178, para.59.
[117] *Contra* VESELI Appeal, KSC-BC-2020-06/IA001-F00001, paras 40-47.
[118] ICC, *Prosecutor v. Gbagbo*, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the '*Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo*'", ICC-02/11-01/11-278-Red, 26 October 2012 , para.80.
[119] SPO Release Response, KSC-BC-2020-06/F00161/RED, paras 44-46, *citing* THAÇI Release Response, KSC-BC-2020-06/F00149/RED, paras 45-47.

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Jack Smith
Specialist Prosecutor

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At The Hague, the Netherlands.