PUBLIC
22/02/2021 12:01:00

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:	Counsel for Rexhep Selimi
Date:	22 February 2021
Language:	English
Classification:	Public

Defence Reply to SPO´s Response to Selimi Interim Release Appeal

---

Specialist Prosecutor
Jack Smith

Counsel for Hashim Thaçi
David Hooper

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Rexhep Selimi
David Young

Counsel for Jakup Krasniqi
Venkateswari Alagendra

I. INTRODUCTION

1. Pursuant to Articles 41 and 45 of the Law[1] and Rules 76 and 170(1) of the Rules,[2] the Selimi Defence files this Reply to address two new issues arising from the Specialist Prosecutor's Response to Selimi Defence Appeal of Detention Decision,[3] namely: (1) whether the evidentiary threshold for establishing risks under Article 41(6)(b) has been settled; and (2) how the Kosovo police would be unable to monitor and enforce conditions of release.

2. While the Defence does not address in this Reply the other grounds set out in the Appeal,[4] nothing in the SPO's Response undermines or contradicts the arguments set out by the Defence and the legal and factual errors identified in the Pre-Trial Judge's Decision denying interim release for Mr. Selimi.

II. SUBMISSIONS

a. Evidentiary threshold for Article 41(6)(b) risks

3. Ground B.2 of the Appeal argued that the Decision "failed to articulate and apply an appropriate, concrete and objective evidentiary threshold for assessing the risks under Article 41(6)(b)."[5] In its Response, the SPO merely repeated the terms of Article 41(6)(b) and the finding in *Gucati* that the necessity of detention revolves a "possibility, not the inevitability, of a future occurrence."[6] The SPO proceeds to erroneously assert, by referring to the Decision by the Appeals Panel in *Haradinaj,* that in relation to the evidential standard pursuant to Article 41(6)(b), the "interpretation has already been settled by the Panel" and that "proposing additional or different thresholds of what the

[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.
[3] *Thaci et al.,* Public Redacted Version of Response to Selimi Defence Appeal of Detention Decision, KSC-BC-2020-06/IA003/F00003/RED, 22 February 2021 ("Response").
[4] *Thaci et al.,* Appeal against Decision on Rexhep Selimi's Application for Interim Release, KSC-BC-2020-06/IA003-F00001/RED, 3 February 2021 ("Appeal").
[5] Appeal, para. 13.
[6] Response, para. 15 citing to *Gucati* Appeals Decision, para.67.

PTJ must find does not advance the matter."[7] The finding in *Haradinaj,* issued after the Appeal was filed, does no such thing.

4. As the SPO is well aware, neither the Pre-Trial Judge in the Decision, nor the Appeals Panel in *Haradinaj* actually set out the applicable evidentiary threshold to the assessment of the risks of one of the Article 41(6)(b) criteria being fulfilled. This is undoubtedly why, despite claiming that the interpretation has been settled, the SPO's Response is unable to state or define what that threshold is. The reference by the SPO to the Pre-Trial Judge's findings, which were cited in the Appeal being "in a manner entirely consistent with the applicable standards"[8], is therefore entirely devoid of meaning without the identification of what those supposedly applicable standards actually are.

5. Nor did the SPO explain how the clear threshold of 'substantial likelihood' of a risk materialising, that appears in the Kosovo Code of Criminal Procedure and identified in the Appeal,[9] should not be relied upon by the KSC, which is unambiguously a domestic Kosovo Court created "within the Kosovo justice system."[10] Moreover, the SPO fails to explain how the *Haradinaj* Appeals Panel could have settled this issue without an analysis of how these provisions in the Kosovo Code of Criminal Procedure applied to Article 41(6)(b).

6. Similarly, the SPO's claim that the Defence had somehow quoted the Pre-Trial Judge's findings out of context as the PTJ was in fact in the midst of carefully weighing the risks in question,[11] wholly misses the point. While the Pre-Trial Judge must carefully weigh risks, this does not absolve him from the obligation to render a clear and objectively verifiable finding on these risks up to a concrete standard, which he failed to do.

7. The SPO's Response on this issue is therefore nothing more than a thinly veiled attempt to rely on a finding in *Haradinaj* that was not made to deflect from the inadequacy of

[7] Response para. 18 citing to *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.64 and fn.119.
[8] Response, Fn. 39.
[9] Appeal, paras 17-20.
[10] Article 1(2) of the Law.
[11] Ibid.

the reasoning in the Decision on the evidential standard to be applied to Article 41(6)(b) risks. If an appropriate evidentiary threshold had been set out by the Pre-Trial Judge and applied to the factors deemed relevant to this determination, none of the Article 41(6)(b) criteria would have been fulfilled and the Pre-Trial Judge would therefore have ordered the interim release of Mr. Selimi.

b. Removal of risk through conditions

8. In Ground C.4. of the Appeal, the Defence challenged the finding in the Decision that although the risk of flight can be adequately addressed by the conditions proposed by the Defence,[12] the risk of obstruction of proceedings or the commissions of future crimes could not be adequately removed.[13] This finding is at the heart of the denial of the application for interim release and does not stand up to the barest scrutiny.

9. The Defence proposed certain conditions when seeking the interim release of Mr. Selimi.[14] Contrary to the position advocated by the SPO, however,[15] the inquiry as to whether possible conditions may sufficiently mitigate the Article 41(6)(b) risks is not limited to those conditions proposed by the Defence. Indeed, in addition to conditions proposed by the Defence, the Pre-Trial Judge accepted that he must consider "any additional limitations imposed by the Pre-Trial Judge"[16] to see whether they would sufficiently mitigate the risks he had identified.

10. In these circumstances, and in light of the finding that detention would only be necessary even if the conditions were unable to mitigate the risks that the Pre-Trial Judge had found, a thorough and detailed analysis of all available conditions was required before a finding could be issued that no conditions would be sufficient to mitigate the risks he had identified. While the level of reasoning would vary depending on the condition examined, for those conditions which were specifically identified by the Pre-Trial Judge the reasoning should have been extensive and take into account and

[12] *Thaci et al.,* Public Redacted Version of Decision on Rexhep Selimi's Application for Interim Release, KSC-BC-2020-06/F00179/RED, 22 January 2021 ("Decision"), para. 54.
[13] Decision, para. 56.
[14] Application, paras 47-48.
[15] Response, para. 48.
[16] Decision, para. 55.

identify all relevant evidence relied upon by the Pre-Trial Judge for his findings. This is the only way to ensure that detention was truly necessary and was the least restrictive means of ensuring the objective of pre-trial detention. Contrary to the SPO's Response therefore, the Pre-Trial Judge was indeed obliged to have identified the concrete evidence relied upon for his finding and "the manner in which it would fail to address the identified risks."[17]

11. The Pre-Trial Judge failed to carry out this assessment and explain in the required detail how any conditions would not be sufficient to mitigate the risks he identified, as is evident from an analysis of his sweeping findings on these issues.

12. For example, the Pre-Trial Judge considered that no conditions could adequately restrict Mr Selimi's ability to communicate, through any non-public means, with his community and support network.[18] Notwithstanding the absence of identification of Mr. Selimi's supposed community and support network in the Decision,[19] this sweeping and generalised assertion fails to differentiate between, on the one hand, whether a restriction on non-public communications could ever be enforced or monitored, and, on the other, whether such a restriction could be enforced in theory, but that the Kosovo police are unwilling or unable to do so.

13. If the finding was the former, and the Pre-Trial Judge had considered that restrictions on non-public communications outside of detention are never possible in any circumstances, this is demonstrably false. There are a myriad of ways in which communication by phone, email or electronic messaging such as by SMS or WhatsApp could be sufficiently restricted and such a restriction enforced and verified as addressed in the Appeal.[20] This conclusion would therefore be untenable and far from "correct, reasoned, and reasonable"[21] as the SPO claimed.

14. If, however, the Pre-Trial Judge's finding was that the Kosovo Police were unable to implement such a restriction in the current case with regards to Mr. Selimi, he was obliged to have identified who was responsible for enforcing and monitoring such

[17] Response, para. 48.
[18] Ibid.
[19] Appeal, para. 45.
[20] Appeal, paras 60-61.
[21] Response, para. 48.

restrictions within the Kosovo Police, how they would be unable to implement such restrictions and identify the evidence relied upon for these findings. No attempt was made to do so. As for in-person visits, restrictions on visitors could easily be enforced whether this be by the placement of a guard outside the door of the residence of Mr. Selimi or by electronic monitoring of visitors to Mr. Selimi, in conjunction with limits on his movements to his residence, through the use of remote close circuit television. The Pre-Trial Judge failed to identify how these relatively rudimentary measures would not be possible or would be insufficient to address the risks identified and again failed to cite any evidence in support of his sweeping findings on this point.

15. Finally, in this regard, it is important to note that the Pre-Trial Judge is not required to demonstrate a certainty that conditions imposed on interim release would eliminate one of the Article 41(6)(b) risks. By explaining that the conditions proposed can remove this risk,[22] rather than that they will do so, the Pre-Trial Judge implicitly underlines that certainty of such elimination is not required. Similarly, while it would be impossible for him to determine the risk of an Article 41(6)(b) condition definitely occurring in the first place, a certainty of its removal by imposition of a condition is equally impossible. Conditions could have been imposed on Mr. Selimi's communications which would have adequately been able to remove this risk up to this standard. The Pre-Trial Judge therefore erred in holding the contrary based on nothing more than vague, unsupported and untenable conclusions.

III. CONCLUSION AND RELIEF SOUGHT

16. In light of the foregoing, the Defence therefore reiterates its request to 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.

[22] Decision, para. 54.

Respectfully submitted on 22 February 2021,

DAVID YOUNG
Lead Counsel for Rexhep Selimi

GEOFFREY ROBERTS
Co-counsel for Rexhep Selimi