KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In:	**KSC-BC-2020-06**
Before:	**A Panel of the Court of Appeals Chamber** Judge Michèle Picard Judge Kai Ambos Judge Nina Jørgensen
Registrar:	Fidelma Donlon
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Decision on Kadri Veseli's Appeal Against Decision on Interim Release

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers ("Court of Appeals Panel" or "Panel" and "Specialist Chambers", respectively)[1] acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 169 of the Rules of Procedure and Evidence ("Rules") is seised of the "Defence Request to Appeal the 'Decision on Kadri Veseli´s Application for Interim Release'" ("Appeal") filed on 1 February 2021,[2] challenging the "Decision on Kadri Veseli's Application for Interim Release" ("Impugned Decision").[3] The Specialist Prosecutor's Office ("SPO") responded on 11 February 2021 that the Appeal should be dismissed in its entirety.[4] Veseli filed his reply on 16 February 2021.[5]

I. BACKGROUND

1. On 5 November 2020, Veseli was arrested pursuant to an arrest warrant issued by the Pre-Trial Judge,[6] further to the confirmation of an indictment against him.[7]

2. On 22 January 2021, the Pre-Trial Judge issued the Impugned Decision rejecting Veseli's application for interim release on the basis that there was a risk that Veseli

[1] F00002, Decision Assigning a Court of Appeals Panel, 4 February 2021.
[2] F00001, Defence Request to Appeal the "Decision on Kadri Veseli´s Application for Interim Release", 1 February 2021 ("Appeal").
[3] F00178, Decision on Kadri Veseli's Application for Interim Release, 22 January 2021 ("Impugned Decision").
[4] F00003/RED, Public redacted version of Response to Veseli Defence Appeal of Detention Decision, 15 February 2021 (original version filed on 11 February 2021) ("Response"), paras 2, 54.
[5] F00004, Defence Reply to SPO's Response to Veseli Provisional Release Request, 16 February 2021 (confidential) ("Reply").
[6] F00027/RED, Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders, 26 November 2020 (original version filed on 26 October 2020); F00027/A03/RED, Public Redacted Version of Arrest Warrant for Kadri Veseli, 5 November 2020 (original version filed on 26 October 2020). See also F00050, Notification of Arrest of Kadri Veseli Pursuant to Rule 55(4), 5 November 2020 (strictly confidential and *ex parte*, reclassified as public on 20 November 2020).
[7] F00026/RED, Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 30 November 2020 (original version filed on 26 October 2020). The operative indictment was filed on 4 November 2020; see F00045/A03, Further Redacted Indictment, 4 November 2020 (strictly confidential and *ex parte*, reclassified as public on 5 November 2020) ("Indictment").

would abscond, obstruct the progress of Specialist Chambers proceedings or commit further crimes against those perceived as being opposed to the Kosovo Liberation Army ("KLA"), including (potential) witnesses.[8] The Pre-Trial Judge further found that the conditional interim release proposed by Veseli ("Proposed Conditions"), as an alternative to unconditional release, could adequately mitigate the risk of flight but would insufficiently mitigate the risk of obstructing the progress of Specialist Chambers proceedings or the risk of committing further crimes.[9] The Pre-Trial Judge further rejected the Defence's request for an oral hearing.[10]

3. Veseli submits that, in the Impugned Decision, the Pre-Trial Judge: (i) applied an incorrect threshold for assessing the risks under Article 41(6)(b) of the Law;[11] (ii) made erroneous findings regarding the assessment of the risk under Article 41(6)(b)(ii) of the Law;[12] (iii) erred in the assessment of the risk under Article 41(6)(b)(iii) of the Law;[13] (iv) failed to properly consider the expected length of pre-trial proceedings;[14] and (v) further erred in the assessment of the Proposed Conditions.[15] Veseli does not challenge the findings on the risk of flight because these were not determinative of the outcome of his application for release.[16]

II. STANDARD OF REVIEW

4. The Court of Appeals Panel previously decided to apply *mutatis mutandis* to interlocutory appeals the standard of review provided for appeals against judgements

[8] Impugned Decision, paras 35, 49, 53-54.
[9] Impugned Decision, paras 58-60.
[10] Impugned Decision, paras 63-64.
[11] Appeal, paras 55-58.
[12] Appeal, paras 16-38, 48-54, 59-60.
[13] Appeal, paras 16-38, 48-54, 59-60.
[14] Appeal, paras 59-60.
[15] Appeal, paras 39-47.
[16] Appeal, para. 12.

under Article 46(1) of the Law.[17] Article 46(1) of the Law specifies, in relevant part, the grounds on which appeals against judgement can be filed:

> (i) an error on a question of law invalidating the judgement;
>
> (ii) an error of fact which has occasioned a miscarriage of justice; or
>
> (iii) […].

5. The Law states in relation to errors of law that:

> When the Court of Appeals Panel determines that a Trial Panel has made an error of law in a judgement arising from the application of an incorrect legal standard, the Court of Appeals Chamber shall articulate the correct legal standard and apply that standard to the evidence contained in the trial record to determine whether to sustain, enter or overturn a finding of guilty on appeal. Alternatively, if the Trial Panel is available and could more efficiently address the matter, the Court of Appeals Panel may return the case to the Trial Panel to review its findings and the evidence based on the correct legal standard.[18]

6. Regarding errors of fact, the Law provides the following:

> In reviewing the factual findings of the Trial Panel, the Court of Appeals Panel shall only substitute its own findings for that of the Trial Panel where the evidence relied on by the Trial Panel could not have been accepted by any reasonable trier of fact or where the evaluation of the evidence is wholly erroneous.[19]

7. If the decision that is being challenged is a discretionary decision, 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.[20] The Court of Appeals Panel will also

[17] F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati* Appeal Decision"), paras 4-13; F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021 ("*Haradinaj* Appeal Decision"), paras 11-13.
[18] Article 46(4) of the Law.
[19] Article 46(5) of the Law.
[20] *Gucati* Appeal Decision, para. 14; *Haradinaj* Appeal Decision, para. 14.

consider whether the lower level panel has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.[21]

8. The Court of Appeals Panel recalls that, according to Article 45(2) of the Law, interlocutory appeals lie as of right from decisions or orders relating to detention on remand.[22]

III. DISCUSSION

A. PRELIMINARY MATTERS

9. The Panel notes that Veseli has not yet filed a public redacted version of the Reply. Considering that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential, and that Parties shall file public redacted versions of all submissions filed before the Panel,[23] the Panel orders Veseli to file a public redacted version of the Reply within ten days of receiving notification of the present Decision.

B. APPLICABLE STANDARDS AND GENERAL CHALLENGES

10. At the outset the Panel recalls the provisions of Article 41(6) of the Law:

> The Specialist Chambers or the Specialist Prosecutor shall only order the arrest and detention of a person when:
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> a. there is a grounded suspicion that he or she has committed a crime within the jurisdiction of the Specialist Chambers; and
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> b. there are articulable grounds to believe that:

[21] Ibid.
[22] Article 45(2) of the Law.
[23] See e.g. ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Decision on Prosecution's Motion for Summary Dismissal or Alternative Remedies, 5 July 2013, para. 9; ICTR, *Ntawukulilyayo v. Prosecutor*, ICTR-05-82-A, Decision on Prosecution's Request for Public Filings, 15 April 2011, p. 1. See also, KSC-BD-15, Registry Practice Direction, Files and Filings before the Kosovo Specialist Chambers, 17 May 2019, Articles 38(1), 39(1).

> i. there is a risk of flight;
>
> ii. he or she will destroy, hide, change or forge evidence of a crime or specific circumstances indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices; or
>
> iii. the seriousness of the crime, or the manner or circumstances in which it was committed and his or her personal characteristics, past conduct, the environment and conditions in which he or she lives or other personal circumstances indicate a risk that he or she will repeat the criminal offence, complete an attempted crime or commit a crime which he or she has threatened to commit.

1. Threshold for the Assessment of the Risks under Article 41(6)(b) of the Law (Ground 9)

(a) Submissions of the Parties

11. Veseli submits that the Pre-Trial Judge applied an impermissibly low general threshold to justify continued detention under Article 41(6)(b) of the Law, based on a mere possibility.[24]

12. Veseli specifically argues that the mere possibility that a future event will occur is not sufficient to justify detention and that the exclusion of all risk is impossible.[25] According to Veseli, the likelihood of the identified risk materialising must be sufficiently significant and must be assessed by reference to evidence specific to the particular accused.[26] In Veseli's view, the threshold applied by the Pre-Trial Judge is that, unless a risk can be entirely eliminated, the accused must remain in custody. This, according to Veseli, is incompatible with Article 5 of the European Convention of Human Rights ("ECHR").[27]

[24] Appeal, paras 55-58.
[25] Appeal, para. 56.
[26] Ibid.
[27] Appeal, paras 55-57.

13. The SPO responds that the Pre-Trial Judge correctly found that the threshold for the assessment of the risks under Article 41(6)(b) of the Law is "articulable grounds to believe" denoting an acceptance of the possibility, not the inevitability, of a future occurrence.[28] According to the SPO, the Pre-Trial Judge's assessment shows that he evaluated the likelihood of the risks materialising.[29]

(b) Assessment of the Court of Appeals Panel

14. The Panel acknowledges at the outset that any analysis of pre-trial detention must take the presumption of innocence as its starting point.[30] It follows, first, that pre-trial detention cannot be maintained lightly. Second, the burden to demonstrate that pre-trial detention is necessary is on the SPO.[31] In this latter respect, the procedures of the Specialist Chambers differ from those of the International Criminal Tribunal for the former Yugoslavia ("ICTY").[32]

15. The Court of Appeals Panel recalls the wording of Article 41(6)(b) of the Law: detention shall only be ordered if "there are articulable grounds to believe" that at least one of the enumerated risks materialises.[33]

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[28] Response, paras 13-18.
[29] Response, paras 16-18.
[30] This was recognised by the Pre-Trial Judge, see Impugned Decision, para. 19.
[31] This was also recognised by the Pre-Trial Judge, see Impugned Decision, para. 20.
[32] At the ICTY, where the burden was on the accused to show that release is warranted, the jurisprudence adopted the "balance of probabilities" as the applicable standard of proof, requiring the judges to satisfy themselves that it is more likely than not that the accused will appear for trial and will pose no danger to others. See ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-AR65.1, Decision on Ramush Haradinaj's Modified Provisional Release, 10 March 2006, para. 41; ICTY, *Prosecutor v. Simić*, IT-95-9-A, Decision on Motion of Blagoje Simić Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Services for His Father, 21 October 2004, para. 14. ICTY jurisprudence is also applied at the International Residual Mechanism for Criminal Tribunals ("IRMCT"). See IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Dick Prudence Munyeshuli's Motion for Provisional Release to the United States of America, 8 February 2019, fn. 16; IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Maximilien Turinabo's Motion for Provisional Release, 29 March 2019, para. 14.
[33] The Panel notes that according to Article 187 of the Kosovo Criminal Procedure Code ("Kosovo CPC"), (Findings Required For Detention on Remand), a court may order detention on remand against a person. Article 187(1.2.2.) of the Kosovo CPC reads as follows: "there are grounds to believe that he or she will destroy, hide, change or forge evidence of a criminal offence or specific circumstances

16. Given the peculiar set-up of the Specialist Chambers and the text of Article 41(6)(b) of the Law, it is evident that the Specialist Chambers are not bound by the standards used by international tribunals, although these can provide some guidance. The Panel notes that the phrase "grounds to believe" is also used, for example, in Article 58(1) of the Rome Statute and in some domestic laws relating to pre-trial detention,[34] often prefaced by the words "reasonable" or "substantial". The term "reasonable grounds" leaves room for interpretation, even though it is a common term in many legal systems. In any event, "reasonable grounds" is understood to embody an objective assessment. In that regard, the standard is lower than "substantial grounds to believe that the person committed the crime charged" used in Article 61(7) of the Rome Statute in determining whether to confirm charges.[35] In addition to showing that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the International Criminal Court ("ICC"), Article 58(1) of the Rome Statute requires the Prosecutor to demonstrate that

indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, injured parties or accomplices". As Article 41(6)(b)(ii) of the Law, Article 187(1.2.2.) of the Kosovo CPC also applies the standard of "grounds to believe that he or she will destroy […]". The Panel further notes the different wording between the three prongs of Article 187(1.2.) of the Kosovo CPC, referring in turn to "danger" (Article 187(1.2.1.)), "grounds to believe that he or she will […]"(Article 187(1.2.2.)) and "indicate a risk"(Article 187(1.2.3.)). The Panel considers that the reference to "danger" and "risk" can be interpreted as synonymous in this specific context. In that respect, the Panel observes that the Kosovo courts have in practice applied a risk assessment in addressing the requirements of Article 187(1.2.) of the Kosovo CPC and, while the available jurisprudence on this point is limited, there is no indication of a different threshold being applied for the three prongs despite the different wording. See e.g. Kosovo, Constitutional Court, KI10/18, *Fahri Deqani, Constitutional review of Judgment Pml. No. 357/2017 of the Supreme Court of Kosovo of 22 December 2017*, Judgment, 21 October 2019, para. 93 referring to "a risk that the Applicant may repeat the criminal offense". See also Kosovo, Constitutional Court, KI63/17, *Lutfi Dervishi, Constitutional review of Judgment Pml. Kzz. 19/2017, of the Supreme Court of Kosovo, of 11 April 2017*, Resolution on Inadmissibility, 16 November 2017, para. 71 referring to the reasoning of the Supreme Court [Judgment Pml. Kzz 19/2017] making findings on "the risk of flight"; Kosovo, Supreme Court, Pml Kzz 59/2015, *BS*, Judgment, 16 March 2015, para. 10 referring to "the risks pursuant to Article 187 of the CPC".

[34] See, for example in England and Wales, the Bail Act, 1976, Sch. 1, para. 2, where the phrase "grounds for believing" is used.

[35] Ryngaert, C., "Article 58: Issuance by a Pre-Trial Chamber a warrant of arrest or a summons to appear" in Ambos, K. (ed), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th ed., Beck/Hart/Nomos 2021 ("Ryngaert, *Article 58*"), marginal number (mn.) 12. See also fn. 44 and references quoted therein.

the arrest of the person *appears necessary* to satisfy at least one of the three grounds specified for issuing an arrest warrant.[36] For example, according to Article 58(1)(b)(ii) of the Rome Statute, the Pre-Trial Chamber must satisfy itself that the arrest appears necessary to ensure that the person does not obstruct or endanger the investigation or the court proceedings. If there are reasonable grounds to believe that a suspect would interfere with the investigations of the Prosecutor, the person can be detained according to the wording of Article 58(1)(b)(ii) of the Rome Statute. The text does not refer to specific actions or types of interference. It is not necessary that the suspect has already attempted to obstruct or endanger the investigation or the court proceedings; it is sufficient that the Pre-Trial Chamber has reasonable grounds to believe that such interference could happen. Compelling factors taken into consideration include convincing information indicating that the person detained might intimidate, influence or corrupt witnesses or victims.[37]

17. The Panel recalls its prior finding that, in determining the necessity of detention under Article 41(6)(b) of the Law, the question revolves around the possibility, not the inevitability, of a future occurrence.[38] This finding is supported by the jurisprudence of the ICC.[39] In so finding, the Panel acknowledged that a standard less than certainty was appropriate. That "certainty" cannot be required follows from the nature of the

[36] Rome Statute, Article 58(1)(a)-(b). See also Rome Statute, Article 60(2) according to which: "A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions."

[37] Ryngaert, *Article 58*, mn. 19.

[38] *Gucati* Appeal Decision, para. 67.

[39] According to ICC jurisprudence: "when determining whether detention appears necessary under article 58(1)(b) of the Statute, '[t]he question revolves around the possibility, not the inevitability, of a future occurrence'". See ICC, *Prosecutor v. Abd-Al-Rahman*, ICC-02/05-01/20-177, Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled 'Decision on the Defence Request for Interim Release', 8 October 2020, para. 33; ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-278-Red, Public redacted version of 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'", 26 October 2012, para. 56.

assessment under Article 41(6)(b) of the Law, namely that it entails a prediction about future conduct, and what lies in the future can never be predicted with certainty. It does not follow, however, that *any* possibility of a risk materialising is sufficient to justify detention. In this regard, the Panel notes the finding of the Specialist Chamber of the Constitutional Court ("Constitutional Court") that any deprivation of liberty must conform to the substantive and the procedural rules established by law and should be in keeping with the key purpose of protecting the individual from arbitrariness.[40] As part of the protection against arbitrariness, the Panel highlights the importance of specific reasoning and concrete grounds which are required to be relied upon by the Pre-Trial Judge in his decisions authorising detention on remand.[41] The Panel therefore finds that the standard to be applied is, on the one hand, less than certainty, but, on the other, more than a mere possibility of a risk materialising.

18. The Panel notes that, according to Article 19(1.30.) of the Kosovo CPC, "articulable" means that "the party offering the information or evidence must specify in detail the information or evidence being relied upon". Thus, the term "articulable" does not speak directly to the standard or threshold, but to the specificity of the information or evidence required. This also follows from Article 19(1.9) and (1.10.) of the Kosovo CPC, referring to "articulable evidence".[42]

19. Recalling that the applicable standard must be determined on a scale between a mere possibility and certainty, the Panel finds that Article 41(6)(b) of the Law does not require the Pre-Trial Judge to be satisfied that the risks specified in subparagraphs (i) to (iii) will in fact occur in the event of provisional release being granted, or to be satisfied that they are substantially likely to occur. The Pre-Trial

[40] KSC-CC-PR-2017-01, F00004, Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 26 April 2017 ("Constitutional Court Judgment dated 26 April 2017"), para. 111.
[41] Constitutional Court Judgment dated 26 April 2017, para. 115.
[42] Kosovo, Code No. 04/L-123, Criminal Procedure Code, 13 December 2012.

Judge must be satisfied that there are "[articulable] grounds to believe" that there is a risk that they will occur. The question posed by Article 41(6)(b) of the Law is whether the SPO presented specific reasoning based on evidence supporting the belief of a sufficiently real possibility that (one or more of) the risks under Article 41(6)(b)(i)-(iii) of the Law exist.[43] To that extent it is a question of fact depending on the individual circumstances of each case.

C. ALLEGED ERRORS REGARDING ASSESSMENT OF ARTICLE 41(6)(B) OF THE LAW (GROUNDS 1-5, 7-8, 10-11[44])

1. Article 41(6)(b)(ii) of the Law

(a) Submissions of the Parties

20. Veseli challenges the finding that the fact that he was able to give instruction to individuals interacting with the Specialist Chambers, such as Mr Driton Lajçi ("Mr Lajçi"), showed an articulable risk of Veseli interfering with the course of justice under Article 41(6)(b)(ii) of the Law. Veseli argues that the Pre-Trial Judge erred and abused his discretion in reaching this finding despite: (i) refusing to hear two witnesses whose written statements adduced by the Defence show that no such instructions had been given; and (ii) finding that there were no issues as to the credibility of the two witnesses' evidence.[45] Alternatively, Veseli argues that the Pre-Trial Judge failed to provide adequate reasons for his finding in this regard.[46]

21. In any event, Veseli recalls that the Pre-Trial Judge found that there was no evidence of Veseli having ever given Mr Lajçi instructions to do anything improper,

[43] See e.g. ECtHR, *Jarzyński v. Poland*, no. 15479/02, Judgment, 4 October 2005, para. 46 ([…] factor indicating that there was a real risk of his absconding or obstructing the proceedings); *Merabishvili v. Georgia*, no. 72508/13, Judgment, 28 November 2017, para. 229 (the risk [of absconding] must be "sufficiently real" to justify continued detention).
[44] The submissions under Grounds 10 and 11 present two distinct arguments (regarding alleged erroneous assessment of the proportionality of detention and failure to take into account the existence of protective measures) with each ground appearing to contain parts of the two arguments.
[45] Appeal, paras 17, 37. See also Appeal, paras 51-54.
[46] Appeal, para. 17.

and submits that Defence evidence shows that Mr Lajçi denied ever being ordered to do anything by Veseli.[47] Therefore, even if the Pre-Trial Judge had rightly reached the finding on Veseli's power to instruct individuals such as Mr Lajçi, Veseli submits that this finding would be insufficient to support the conclusion on the risk of interference with the course of justice.[48]

22. In addition, Veseli challenges the finding that the payment of "disproportionate" legal expenses from the Government of Kosovo to Mr Lahi Brahimaj ("Mr Brahimaj") and the Pre-Trial Judge's implicit acceptance that this was a bribe to induce Mr Brahimaj not to testify for the SPO are illustrative of an articulable risk that Veseli would interfere with the course of justice.[49] Veseli argues that the evidence shows that Mr Brahimaj had made his decision not to testify three weeks before any request for a Government payment.[50] Veseli argues, moreover, that the Pre-Trial Judge erred and abused his discretion in reaching the finding despite: (i) refusing to hear two witnesses whose written statements adduced by the Defence demonstrate that the above finding could not reasonably be reached; and (ii) finding that there were no issues as to the credibility of the two witnesses' evidence.[51] In addition, the Pre-Trial Judge failed to provide reasons for his finding in this regard.[52]

23. Veseli submits that in any event, the Pre-Trial Judge was not entitled to attribute to Veseli the Kosovo Government's payment to Mr Brahimaj, especially after having found that there was no evidence implicating Veseli in the decision to make the payment.[53]

[47] Appeal, para. 18; Reply, para. 18.
[48] Appeal, para. 18.
[49] Appeal, paras 19-24.
[50] Reply, para. 18.
[51] Appeal, paras 20-23, 37. See also Appeal, paras 51-54.
[52] Appeal, para. 23.
[53] Appeal, para. 24.

24. Veseli further refers to the finding that Mr Syleman Selimi ("Mr Selimi") was appointed as adviser to the Kosovo Prime Minister shortly after being summonsed for an SPO interview and shortly after his release from prison for charges related to war crimes.[54] According to Veseli, the Pre-Trial Judge erroneously reversed the burden of proof and expected the Defence to prove that the appointment of Mr Selimi was not a bribe.[55] Veseli submits that in any event, the Pre-Trial Judge erred in taking this factor into consideration even though he accepted that there was no evidence implicating Veseli in the decision to appoint Mr Selimi.[56]

25. Veseli also argues that the Pre-Trial Judge erred in finding that the above-mentioned incidents involving Mr Brahimaj and Mr Selimi evidenced a climate within the Government of Kosovo of attempted interference with Specialist Chambers proceedings and SPO investigations, which he found Veseli supported as a member of the Kosovo Assembly and PDK Parliamentary group, which in turn he found indicated a risk of obstruction by Veseli.[57] In addition, Veseli argues that the Pre-Trial Judge erred in finding that he supported these actions rather than the Kosovo Government in general, by virtue of his positions in the Kosovo Assembly and PDK Parliamentary group.[58]

26. Veseli submits that, as the Pre-Trial Judge accepted that evidence of general context was insufficient and as the above-mentioned[59] factors were the only ones specific to Veseli on which the Pre-Trial Judge relied, the errors identified in relation to these factors show that the Pre-Trial Judge abused his discretion in finding that he posed an articulable risk of obstructing justice.[60]

[54] Appeal, para. 25.
[55] Appeal, para. 26.
[56] Appeal, paras 27-29; Reply, para. 18.
[57] Appeal, paras 29-30.
[58] Appeal, paras 30-35.
[59] See above, paras 20-25.
[60] Appeal, paras 36-38.

27. Veseli moreover argues that the Pre-Trial Judge erred in failing to take into account, or giving due weight to, Veseli's background and personal circumstances, specifically his statement on the day of his arrest, calling on everyone in Kosovo to cooperate with the Specialist Chambers and strongly discouraging interference with SPO investigations.[61]

28. Finally, Veseli argues that the Pre-Trial Judge erred in failing to take into account the fact that he had granted extensive protective measures to a significant number of witnesses, including withholding some of their identities from Veseli until shortly before trial.[62] Veseli submits that according to the jurisprudence of the ICTY, these protective measures must be considered in assessing the risks of interim release.[63]

29. In response, the SPO submits that Veseli misrepresents the meaning of an individualised assessment, as the Pre-Trial Judge clearly set out the distinction between individual and contextual factors.[64] According to the SPO, the Pre-Trial Judge acknowledged that contextual findings may be relevant but are not sufficient to justify detention.[65] In addition to contextual factors,[66] the Pre-Trial Judge clearly relied on individual circumstances such as: (i) the gravity of the charges and potential penalties to be imposed;[67] (ii) Veseli's political profile and prior posts;[68] and (iii) the available support networks.[69] In the SPO's view, these circumstances taken together were sufficient to support the necessity of continued detention.[70]

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[61] Appeal, paras 48-50.
[62] Appeal, paras 59-60.
[63] Appeal, para. 59.
[64] Response, paras 20-21.
[65] Response, para. 21.
[66] Response, para. 26.
[67] Response, para. 22, citing *Gucati* Appeal Decision, para. 72.
[68] Response, paras 23-24.
[69] Response, para. 25.
[70] Response, paras 26-27. The SPO argues that, even if the Appeal were to succeed on the above-mentioned factors, the Pre-Trial Judge's decision would still stand based on other individual factors. See Response, para. 27.

30. The SPO also challenges Veseli's assertion that there needs to be a link between the acts and conduct of the Accused and each of the risk factors relied upon, submitting that contextual factors may be considered.[71] Specifically, the SPO argues that the Pre-Trial Judge did not err in finding that various incidents indicated a contemporaneous climate of attempted interference with SPO investigations and Specialist Chambers proceedings within the Kosovo Government, and in considering Veseli's prominent and influential membership of that Government to be a relevant factor.[72]

31. Moreover, the SPO argues that it was not necessary for the Pre-Trial Judge to conclude that Veseli had directed Mr Lajçi to do something improper, as the test is whether there is a risk of future interference, not proving actual interference.[73] The SPO submits that the Pre-Trial Judge rightly found, based on the available evidence, that these interactions indicated that Veseli was able to give instruction to an individual interacting with the Specialist Chambers and who had already been willing to go beyond his official functions in his interactions with the SPO.[74] According to the SPO, the Pre-Trial Judge correctly held that this finding did not require an assessment of the credibility of the Defence witnesses' evidence because the witnesses provided evidence on an entirely separate incident than the one on which the finding was based.[75] The SPO consequently argues that a reasonable judge could have taken the Defence evidence at its highest and still reached the same findings.[76]

32. The SPO further submits that there is significant evidence that Kosovo's Government offered several persons, including Mr Selimi and Mr Brahimaj, benefits or disproportionate legal assistance contemporaneously with the SPO summonsing

[71] Response, para. 28.
[72] Ibid.
[73] Response, para. 42.
[74] Ibid.
[75] Response, paras 30-32.
[76] Response, para. 34.

them for interviews.[77] The SPO argues that the Pre-Trial Judge reasonably found that Mr Brahimaj's payment was disproportionate, relative to the payments made to other persons appearing before the SPO.[78] In the SPO's view, the Defence witnesses' evidence reinforce, rather than contradict, this conclusion, as they show that the payment was discretionary and that it was known in advance that the interview would be short.[79] The SPO contests Veseli's argument that the Defence witnesses disproved the causative link between the payment and Mr Brahimaj's decision to remain silent, as they were simply unable to comment on this given the limits of their knowledge.[80] Consequently, the Pre-Trial Judge, even taking this evidence at its highest, could have reasonably reached the ultimate findings.[81]

33. Regarding Mr Selimi's appointment, in the SPO's view, Veseli incorrectly argues that it is necessary to show that there was no other reasonable explanation for the appointment. Rather, the relevant assessment is whether it was reasonable to conclude that, together with other similar incidents, this indicates the existence of a contemporaneous climate of attempted interference with SPO investigations and Specialist Chambers proceedings.[82] According to the SPO, the Pre-Trial Judge did consider other possible explanations and made a reasonable finding.[83]

34. In addition, the SPO submits that the Pre-Trial Judge did consider Veseli's pre-surrender conduct concerning the Specialist Chambers, including the public statement to his supporters, by repeatedly referring to it and giving it "particular weight" when evaluating Veseli's risk of flight.[84] The SPO therefore argues that he did not err in

[77] Response, para. 37.
[78] Response, para. 40.
[79] Ibid.
[80] Response, para. 41.
[81] Ibid. See also Response, paras 33-34.
[82] Response, para. 38.
[83] Ibid.
[84] Response, paras 48-49.

affording weight to this factor nor in reaching the conclusion that it did not adequately address the risks in Article 41(6)(b) of the Law.[85]

35. The SPO also submits that, contrary to Veseli's contention that the Impugned Decision failed to address the existence of protective measures for witnesses, the Pre-Trial Judge did consider issues surrounding witness security and protection, including the extent to which various measures could mitigate the risk of witness interference.[86]

(b) Assessment of the Court of Appeals Panel

36. Turning first to Veseli's arguments concerning Mr Lajçi, the Panel notes that the Pre-Trial Judge's disputed finding that "Mr Lajçi would receive instructions from Mr Veseli" was based solely on SPO evidence on an incident involving Mr Lajçi receiving and following instructions from Veseli ("Incident A", i.e. posting on social media about a decision from the Constitutional Court).[87] This incident was entirely separate from the incident around which Veseli's appellate arguments centre ("Incident B", i.e. Mr Lajçi having attended an SPO interview as an interpreter).[88] In his statement of 8 January 2021 annexed to Veseli's reply to the SPO's response to his application for interim release, Mr Lajçi acknowledged receiving and following instructions from *inter alia* Veseli concerning Incident A and merely argued that the instructions did not concern anything improper.[89] Therefore, as the Pre-Trial Judge's finding was limited to Mr Lajçi having received instructions from Veseli based on

[85] Response, para. 49.
[86] Response, para. 47.
[87] Impugned Decision, para. 44, fn. 99, citing F00161/RED, Public Redacted Version of 'Prosecution response to Application for Interim Release on behalf of Mr Kadri Veseli', 15 January 2021 (original version filed on 4 January 2021) ("Response to Application for Interim Release"), para. 31; F00161/RED/A01, Annex 1 to Prosecution response to Application for Interim Release on behalf of Mr Kadri Veseli, Public Redacted Version, 15 January 2021 (original version filed on 4 January 2021), p. 12.
[88] Veseli's arguments centre around instructions allegedly given in connection to an SPO interview.
[89] F00174, Defence Reply to the SPO's response to the Provisional Release Application of Kadri Veseli, 13 January 2021 ("Reply to Application for Interim Release"), para. 32; F00174/A02, Annex 2 to Defence Reply to the SPO's response to the Provisional Release Application of Kadri Veseli, 13 January 2021 ("Annex 2 to Reply to Application for Interim Release").

Incident A, the Panel considers that the finding was entirely in line with Mr Lajçi's own statement.

37. Moreover, the Panel finds that the Pre-Trial Judge did not err in holding that, in the circumstances of this case, an assessment of the credibility of Defence witnesses was not required. Although the Impugned Decision is somewhat brief on this point and the Pre-Trial Judge could have provided fuller reasoning in this respect,[90] the Panel can nevertheless discern how the Pre-Trial Judge reached this conclusion, based on the totality of the evidence before him. As detailed above, the Defence evidence was either in line with the factual finding made regarding Incident A,[91] or was not relevant to the factual finding because it concerned Incident B.[92] In light of the Pre-Trial Judge's finding, favourable to the Defence, on the absence of evidence that Veseli asked Mr Lajçi directly to do something improper, the Defence fails to show how hearing these witnesses would have led the Pre-Trial Judge to a different determination. The Panel therefore dismisses as ill-founded Veseli's argument that the Pre-Trial Judge erred in reaching a finding of fact *contrary* to Defence evidence.[93]

38. Veseli alternatively argues that the Pre-Trial Judge erred in concluding that there was a risk that Veseli would obstruct justice, given his initial finding that there was no evidence of instructions to do anything improper. The Panel recalls that Article 41(6)(b)(ii) of the Law requires an assessment of whether there is a risk of obstruction occurring in the future, which does not require proof that obstruction has actually occurred in the past or, in this case, that actual improper instructions were given in the past. The Panel notes that although Incident A can be viewed as "innocent

[90] Impugned Decision, para. 63.
[91] See above, para. 36.
[92] Impugned Decision, para. 63. See Reply to Application for Interim Release, paras 30-31; Annex 2 to Reply to Application for Interim Release (containing a witness statement from Mr. Lajçi); F00174/A06, Annex 6 to Defence Reply to the SPO's response to the Provisional Release Application of Kadri Veseli, 13 January 2021 ("Annex 6 to Reply to Application for Interim Release") (containing a witness statement from Mr. Tahiri, former Kosovo Minister of Justice).
[93] Appeal, para. 17.

communication" between Veseli and Mr Lajçi insofar as it does not relate to any improper instructions,[94] it nevertheless shows Veseli's direct intervention in matters involving the Specialist Chambers, namely Veseli instructing Mr Lajçi to take specific actions in that regard and Mr Lajçi abiding by such instructions. It was therefore reasonable for the Pre-Trial Judge to rely on Veseli's ability to give instructions on matters directly relating to the Specialist Chambers to Mr Lajçi – an individual interacting with the Specialist Chambers – as an indication that there is a risk of obstruction occurring in the future. The Panel cannot discern any error in this approach.

39. The Panel notes that the Pre-Trial Judge, in making this finding, also considered the relationship between Veseli and Mr Lajçi. Mr Lajçi previously served as Veseli's advisor and is a long-term member of the PDK, a party led by Veseli. Furthermore, the Pre-Trial Judge took into account Mr Lajçi's previous position as Head of the Division for Coordinating Legal Protection and Financial Support for Potential Accused Persons in Trials before the Specialist Chambers and the fact that he went beyond that role in attending an SPO interview as an interpreter.[95]

40. In any event, the Panel notes that the finding on Veseli's relationship with Mr Lajçi was just one among several factors on which the Pre-Trial Judge relied to make his ultimate finding on the existence of a risk of obstruction.[96] The Panel recalls that the Pre-Trial Judge also relied on a combination of individual factors, notably Veseli's influence and authority (as founding member of the KLA General Staff, member of the KLA Political Directorate and Head of the Intelligence Service Department, and Head of the Kosovo Intelligence Service (SHIK), and more recently as Chairman of the Kosovo Assembly), and contextual factors, such as attempts by the Kosovo Government to exercise improper influence over potential SPO witnesses and

[94] Appeal, para. 18.
[95] Impugned Decision, para. 44.
[96] Impugned Decision, paras 39, 43-48.

the general climate of witness intimidation in Kosovo, in order to find that there is a risk of obstruction.[97] The Panel therefore dismisses Veseli's arguments in relation to Mr Lajçi.

41. Turning next to Veseli's arguments concerning Mr Brahimaj, an alleged joint criminal enterprise ("JCE") member alongside Veseli,[98] the Pre-Trial Judge noted that a payment was made to Mr Brahimaj before his SPO interview and found that it was of a disproportionate amount compared to payments made to others summonsed by the SPO.[99] Moreover, he noted that obtaining the payment did not depend on specific requirements or provision of invoices, and found that Mr Brahimaj being considered to be at serious risk of prosecution did not explain the size of the payment.[100]

42. As Veseli acknowledges, the Pre-Trial Judge made no explicit finding that the payment was a bribe in exchange for Mr Brahimaj's eventual silence during his SPO interview. Indeed, the Panel notes that the Pre-Trial Judge did not even mention Mr Brahimaj's decision to remain silent. Consequently, the Panel considers that Veseli's arguments regarding the non-existence of a link between the payment and Mr Brahimaj's silence go beyond the findings actually made by the Pre-Trial Judge. As a consequence, Veseli's arguments on whether the Defence evidence disproved the existence of such a link and on the assessment of the credibility of the Defence evidence are dismissed as inapposite.

43. In any event, the Panel finds that contrary to Veseli's contention, the evidence of the Defence witnesses, Mr Abelard Tahiri ("Mr Tahiri") and Mr Rodney Dixon ("Mr Dixon"), would not establish that the payment was not a bribe. Essentially, both

[97] Impugned Decision, paras 43-48.
[98] See e.g. Response, para. 37; Indictment, para. 35.
[99] Impugned Decision, para. 45.
[100] Impugned Decision, para. 45.

witnesses state that they have no knowledge of the payment being a bribe.[101] Moreover, Mr Dixon simply provided no evidence on why Mr Brahimaj had already decided to remain silent prior to their meeting.[102] In that context, the Pre-Trial Judge did not make a finding *contrary* to their evidence and was not required to assess the credibility of their evidence.

44. The Panel rejects Veseli's additional argument that the Pre-Trial Judge erred in failing to explain how the payment was relevant to the eventual finding of a risk of obstructing justice. The Panel notes that the Pre-Trial Judge reasoned that the payment was relevant due to its large size relative to other payments (a finding that Veseli does not challenge) and its temporal relationship with Mr Brahimaj's interview.[103] Veseli has failed to substantiate why it was erroneous for the Pre-Trial Judge to reach this conclusion based solely on the payment's disproportionate size and its proximity to the SPO interview. The Panel also stresses that the payment to Mr Brahimaj was not the only basis for the Pre-Trial Judge's finding on the risk of obstruction.

45. The Panel next turns to Veseli's arguments concerning the appointment of Mr Selimi, another alleged JCE member alongside Veseli.[104] The Panel recalls that the Pre-Trial Judge noted that Mr Selimi's appointment occurred shortly after he had been summonsed by the SPO, and found that his recent release from prison did not provide an explanation for the appointment occurring around the time of his SPO interview.[105]

46. The Panel first notes that, contrary to Veseli's arguments, the Pre-Trial Judge made no finding that the appointment was a bribe, as he merely noted its temporal coincidence to the SPO summons and interview. The Panel observes though that the

[101] Annex 6 to Reply to Application for Interim Release, para. 17; F00174/A07, Annex 7 to Defence Reply to the SPO's response to the Provisional Release Application of Kadri Veseli, 13 January 2021 ("Annex 7 to Reply to Application for Interim Release"), paras 9-10.
[102] Annex 7 to Reply to Application for Interim Release, para. 8.
[103] Impugned Decision, para. 45.
[104] See e.g. Response, para. 37; Indictment, para. 35.
[105] Impugned Decision, para. 46.

Pre-Trial Judge's finding on the relevance of Mr Selimi's recent release from prison could have been more fully reasoned.[106]

47. Contrary to Veseli's submissions, the Panel finds that Veseli having merely suggested another reasonable explanation for Mr Selimi's appointment is insufficient to show that the Pre-Trial Judge erred in finding that this appointment was more likely to be linked to the SPO summons rather than his release from prison. The Panel recalls that an appellant's mere disagreement with the Pre-Trial Judge's weighing of various factors and the conclusions reached therefrom is not enough to establish a clear error.[107] The Panel therefore dismisses this argument.

48. Furthermore, the Panel observes that Veseli's arguments concerning the Pre-Trial Judge's failure to attribute responsibility for the incidents involving Mr Brahimaj and Mr Selimi to Veseli misunderstand the nature of the Pre-Trial Judge's finding. The Pre-Trial Judge took the incidents involving Mr Brahimaj and Mr Selimi into account to establish the contextual factor of a contemporaneous climate of attempted interference with SPO investigations and Specialist Chambers proceedings within the Kosovo Government. The Pre-Trial Judge reinforced the relevance of this contextual factor to Veseli's case by noting Veseli's general support for the Government in light of his Parliamentary positions.[108] Consequently, the fact that it was not proven that Veseli was himself involved in these incidents is not inconsistent with the Pre-Trial Judge's finding, which pertains instead to Kosovo's Government. In this regard, the Panel recalls the Pre-Trial Judge's finding that contextual factors are relevant to determinations of risk for the purposes of interim release.[109] The Panel also stresses that the finding concerning the climate of attempted interference was one of several findings supporting the Pre-Trial Judge's conclusion

[106] Impugned Decision, para. 46.
[107] *Gucati* Appeal Decision, para. 64.
[108] Impugned Decision, para. 47.
[109] Impugned Decision, para. 22.

on the risk of obstruction. The Panel therefore finds that the Pre-Trial Judge did not err in his approach.

49. Having found that the Pre-Trial Judge did not commit any of the errors alleged by Veseli, the Panel also dismisses Veseli's general argument that the totality of the alleged errors show that the Pre-Trial Judge abused his discretion.[110]

50. Regarding Veseli's argument that the Pre-Trial Judge "failed to make any mention in his reasons" of the speech Veseli made to his supporters on the day of his arrest,[111] the Panel notes that the Pre-Trial Judge did explicitly take this factor into account when setting out his reasoning on the risk of obstructing justice.[112] The Pre-Trial Judge specifically found that the speech did not negate the risk of obstructing justice in light of the other factors he considered.[113] The Panel therefore dismisses Veseli's claim that the Pre-Trial Judge failed to give weight to the speech.[114]

51. Turning next to the alleged error in failing to consider the existence of protective measures, the Panel notes that the relevance of protective measures is an issue that was not raised before the Pre-Trial Judge and is therefore being raised for the first time on appeal.[115] The Panel recalls that such an argument warrants summary dismissal, when it could reasonably have been raised at first instance.[116] In any event, Veseli provides no support for the proposition that protective measures "must" be taken into account as a mitigating factor in every case. The Panel notes that, while the

[110] Contra Appeal, para. 38.
[111] Appeal, para. 50.
[112] Impugned Decision, para. 39.
[113] Ibid.
[114] Appeal, paras 48-50.
[115] The Panel notes that the Pre-Trial Judge's first decision on protective measures was issued *ex parte* to the Defence on 10 December 2020, with a confidential redacted version being available to the Defence on 14 December 2020. Veseli's application for interim release was filed on 17 December 2020; see F00133/COR/CONF/RED, Confidential Redacted Version of Corrected Version of First Decision on Specialist Prosecutor's Request for Protective Measures, 14 December 2020 (original version filed on 10 December 2020); F00151, Application for Interim Release of Kadri Veseli, 17 December 2020 (confidential, reclassified as public on 12 February 2021) ("Application for Interim Release").
[116] *Haradinaj* Appeal Decision, paras 29, 38.

Specialist Chambers are not bound to follow the jurisprudence of other international criminal tribunals, there are indeed some examples of chambers having taken into account the existence of protective measures when deciding on provisional release as a mitigating factor.[117] However, at other times the existence of protective measures was equally viewed as heightening the chamber's concerns about granting provisional release.[118] The Panel finds that Veseli fails to demonstrate that the Pre-Trial Judge abused his discretion in considering issues surrounding witness security and protection of potential witnesses.[119]

52. In view of the foregoing, the Appeals Panel therefore dismisses Veseli's arguments related to the alleged erroneous assessment of Article 41(6)(b)(ii) of the Law.

2. Article 41(6)(b)(iii) of the Law

53. The Court of Appeals Panel recalls that the conditions set forth in Article 41(6)(b) of the Law are alternative to one another.[120] If one of those conditions is fulfilled, the other conditions do not have to be addressed in order for detention to be maintained. Accordingly, the errors Veseli alleges with regard to Article 41(6)(b)(iii) of the Law need not be addressed. Any findings by the Panel on these arguments would not have an impact on the outcome of the Impugned Decision, given that the Panel has found no error in the Pre-Trial Judge's conclusion that a risk of obstruction existed under Article 41(6)(b)(ii) of the Law, making continued

[117] ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005 ("*Haradinaj et al.* Decision of 6 June 2005"), para. 49; SCSL, *Prosecutor v. Sesay*, SCSL-04-15-PT, Decision on Application of Issa Sesay for Provisional Release, 31 March 2004, para. 54.
[118] ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Joint Defence Motion for Provisional Release During Winter Recess, 5 December 2006, para. 13.
[119] Impugned Decision, para. 48.
[120] See para. 10 above recalling the provisions of Article 41(6) of the Law. See also Impugned Decision, para. 26.

detention necessary.[121] The Panel needs nonetheless to address the Parties' arguments on the proportionality of pre-trial detention and on whether the risk of obstructing the proceedings could be mitigated by the Proposed Conditions.

D. ALLEGED ERRORS REGARDING ASSESSMENT OF THE LENGTH OF PRE-TRIAL PROCEEDINGS (GROUND 10-11)

1. Submissions of the Parties

54. Veseli argues that the Pre-Trial Judge erred in declining to consider the relevant mitigating factor of the likely length of the pre-trial phase when assessing the proportionality of Veseli's interim detention, which is mandatory according to ICTY jurisprudence.[122]

55. The SPO responds that the Pre-Trial Judge did not commit any error in declining to estimate the expected total length of pre-trial detention.[123] While the SPO underlines the requirement that deprivation of liberty must be proportionate, it also submits that, at this stage of the proceedings, such an estimate would be premature and speculative.[124]

2. Assessment of the Court of Appeals Panel

56. The Panel recalls that it is fully aware of the severe restriction of the fundamental rights of a person caused by deprivation of liberty and the importance of the proportionality principle in the determination of the reasonableness of pre-trial detention.[125]

[121] In any event, the Panel notes that Veseli's arguments under Article 41(6)(b)(iii) of the Law were the same arguments as those dealt with in relation to Article 41(6)(b)(ii) of the Law; see Appeal, paras 17, 19-35, 7, 48-54, 59-60.
[122] Appeal, paras 59-60.
[123] Response, para. 44.
[124] Response, paras 45-46.
[125] *Gucati* Appeal Decision, paras 72-73.

57. In considering the proportionality principle and whether the length of pre-trial detention is still reasonable, the Panel observes that the Pre-Trial Judge identified the following three factors as relevant in the circumstances of this specific case: (i) the risks identified under Article 41(6)(b) of the Law, which he still found to exist; (ii) his finding that some of these risks could not be mitigated by the Proposed Conditions; and (iii) the potential penalty Veseli faces if convicted of the serious charges in the Indictment.[126] The Panel notes that in determining the reasonableness of detention, a consideration of these factors is in line with the practice of human rights bodies and international criminal tribunals.[127]

58. Concerning the length of the detention itself, the Pre-Trial Judge made reference to the length of time that Veseli had *already* spent in detention to date, since 5 November 2020,[128] and found that estimating the total length of pre-trial detention would at this stage be premature and speculative.[129]

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[126] Impugned Decision, para. 61. See *Gucati* Appeal Decision, para. 72.

[127] See ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-969, Judgment on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, 29 May 2015, paras 43, 45, citing *inter alia* International Covenant on Civil and Political Rights, 16 December 1966, Article 9(3); ECHR, Article 5(3); African Charter on Human and Peoples' Rights, 27 June 1981, Articles 6, 7(1)(d); American Convention on Human Rights, 22 November 1969, Article 7(5); Inter-American Commission on Human Rights, *Lizardo Cabrera v. Dominican Republic*, Case no. 10.832, Report No. 35/96, 19 February 1998, para. 71; ECtHR, *Wemhoff v. Germany*, no. 2122/64, Judgment, 27 June 1968, p. 18, para. 5; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-824, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", 13 February 2007, para. 122; ECtHR, *Chraidi v. Germany*, no. 65655/01, Judgment, 26 October 2006, para. 35; ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić, 25 September 1996, para. 26; ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying His Provisional Release, 9 March 2006 ("*Haradinaj et al.* Appeal Decision"), para. 23. See also ICTY, *Prosecutor v. Mrkšić*, IT-95-13/1-PT, Decision on Mile Mrkšić's Application for Provisional Release, 24 July 2002 ("*Mrkšić* Decision"), para. 48; ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84bis-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 10 September 2010 ("*Haradinaj et al.* Decision of 10 September 2010"), para. 40; *Haradinaj et al.* Decision of 6 June 2005, para. 29; ICTY, *Prosecutor v. Ademi*, IT-01-46-PT, Order on Motion for Provisional Release, 20 February 2002 ("*Ademi* Decision"), para. 26.

[128] Impugned Decision, para. 61. See *Gucati* Appeal Decision, para. 73. See also *Mrkšić* Decision, paras 48, 50.

[129] Impugned Decision, para. 61.

59. The Panel notes that judges at the ICTY have taken the probable length of pre-trial detention into account in the exercise of their discretion to release an accused.[130] Recalling that the Specialist Chambers are not bound to follow the ICTY jurisprudence, the Panel finds that the Pre-Trial Judge did not err in adopting a different approach at this stage of the current proceedings. In the circumstances of this case, the Panel notes that, as is evident from the submissions underlying the Impugned Decision, the Parties differed widely in their opinions on the likely start date of the trial, and therefore the likely length of the pre-trial period.[131] Moreover, in contrast to the ICTY, before the Specialist Chambers detained persons benefit from a periodic review of the necessity of continued pre-trial detention every two months.[132] The Panel also notes that Rule 56(2) offers Veseli additional protection against an unreasonable period of pre-trial detention.

60. In view of the foregoing, the Appeals Panel therefore dismisses Veseli's arguments related to the alleged erroneous assessment of the proportionality of his pre-trial detention.

E. ALLEGED ERRORS REGARDING ASSESSMENT OF THE PROPOSED CONDITIONS (GROUND 6)

1. Submissions of the Parties

61. Veseli argues that the Pre-Trial Judge erred in finding that the sole risk he identified, namely that Veseli would instruct his supporters to interfere with the

[130] *Haradinaj et al.* Appeal Decision, para. 23; *Haradinaj et al.* Decision of 10 September 2010, paras 40-42; *Haradinaj et al.* Decision of 6 June 2005, para. 29; *Mrkšić* Decision, para. 48.
[131] Application for Interim Release, paras 65-68; Response to Application for Interim Release, para. 9; Reply to Application for Interim Release, para. 71.
[132] Rule 57(2) of the Rules; *Ademi* Decision, para. 26, where the Chamber noted that taking into account the likely total length of pre-trial detention was important because of the absence of a periodic review of detention before the ICTY.

course of justice or incite them to commit further offences, could only be adequately mitigated if Veseli remained in custody.[133]

62. Veseli argues that the Pre-Trial Judge erred in reaching this finding while refusing to properly consider a Defence offer for him to hear the Minister of Justice or the Acting Director of the Kosovo Police Service, whose submitted letter confirms that the Kosovo Police has the capacity to monitor and enforce any order of the Specialist Chambers related to conditional release.[134]

63. Additionally, Veseli argues that as the Pre-Trial Judge had accepted that monitoring by the Kosovo Police could mitigate the risk of flight, in line with ICTY jurisprudence stating that State guarantees should be given significant weight, it was not open to him to reach the opposite conclusion without seeking further information from the witnesses on a matter which was ultimately decisive for his finding.[135] By taking the opposite view in relation to the risk of obstructing justice, based solely on the distinction that electronic monitoring of Veseli's communications would be impossible, Veseli submits that the Pre-Trial Judge made the implicit finding that the Kosovo Police would be unable to monitor Veseli's non-public communications, contrary to the unchallenged Defence witness evidence and unqualified State guarantees regarding their ability to enforce and monitor conditions imposed by the Court.[136] Veseli argues that if the witnesses' credibility was not in issue, the Pre-Trial Judge should have sought clarifications on the scope of the witnesses' assertions concerning enforcement and monitoring in an oral hearing.[137]

64. According to Veseli, the only other remaining risk which might not be addressed by the conditions which the Pre-Trial Judge could impose would have been

[133] Appeal, para. 39.
[134] Appeal, paras 40-44. See also Appeal, paras 51-54.
[135] Appeal, para. 47; Reply, paras 2-3, 15-16.
[136] Reply, paras 4-14, 16.
[137] Reply, para. 16.

messages smuggled to and from Veseli by his wife and children. However, Veseli argues that if this was a real concern for the Pre-Trial Judge, he should have addressed it directly and considered whether alternative arrangements could have been made.[138]

65. In response, the SPO submits that the Pre-Trial Judge did not err in finding that no proposed or additional conditions could restrict Veseli's ability to communicate on a non-public basis with his network, making detention the only way to effectively and realistically manage this risk.[139] Moreover, according to the SPO, the Pre-Trial Judge's finding that no conditions could mitigate the risks identified rendered the Kosovo Police's willingness to enforce conditions immaterial, such that the Pre-Trial Judge did not err in not addressing this willingness.[140]

2. Assessment of the Court of Appeals Panel

66. Turning first to the issue of an oral hearing to hear the Defence witnesses, the Panel recalls that there is no general obligation to hold an oral hearing on a detention related issue, as the Pre-Trial Judge may decide in the exercise of his discretion that a hearing is unnecessary when the information before him is sufficient to enable him to reach an informed decision.[141] On the specific issue of government guarantees, the Panel also recalls relevant ICTY jurisprudence according to which "no rule requires the Trial Chamber to hold a hearing before deciding that government or personal guarantees offered by the applicant merit little weight, even if the applicant has requested a hearing and seeks to supplement these guarantees with oral

[138] Appeal, para. 46.
[139] Response, paras 50-52.
[140] Response, para. 53.
[141] ICTY, *Prosecutor v. Rašević and Todović*, IT-97-25/1-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todović's Application for Provisional Release, 7 October 2005 ("*Rašević and Todović* Appeal Decision"), para. 29; ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-558, Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled "Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba'", 11 July 2014, para. 48; *Gucati* Appeal Decision, para. 77; *Haradinaj* Appeal Decision, para. 41.

assurances".[142] Although ICTY jurisprudence has, as previously stated, no binding effect on this Panel, the Panel considers that the Specialist Chambers' legal framework does not require an oral hearing if an applicant seeks to supplement government guarantees with oral assurances. Especially in this case, where the Parties submitted extensive written arguments supported by written government guarantees, the Panel finds that the Pre-Trial Judge did not abuse his discretion by denying the request without holding an oral hearing.

67. Similarly, the Panel sees no error in the Pre-Trial Judge's statement that an assessment of the credibility of the Defence witness evidence was not required.[143] The statement expresses no opinion on the arguments contained in the submissions or the value of the guarantees submitted with them.[144]

68. The Panel turns next to the guarantee provided by the Kosovo Police on the enforcement of conditions of provisional release and to Veseli's argument that once the Pre-Trial Judge accepted that monitoring by the Kosovo Police could mitigate the risk of flight, it was "not reasonably open to him" to reach the opposite conclusion in relation to the risk of obstructing justice.[145] The Panel observes that the Pre-Trial Judge's reasoning when assessing the Proposed Conditions against the risk of obstructing the proceedings is relatively brief, and the Impugned Decision does not refer to any evidence, notably the guarantees provided by the Kosovo Police presented

[142] *Rašević and Todović* Appeal Decision, para. 29.
[143] Impugned Decision, para. 63.
[144] Moreover, the Panel notes that finding that an (additional) assessment of the credibility of a piece of evidence is unnecessary is not synonymous with making a finding that the content of the evidence is reliable. See ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, para. 239; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2359, Judgment, 8 July 2019, para. 53.
[145] Appeal, para. 47.

by Veseli.[146] The same is also true for the Pre-Trial Judge's assessment of the Proposed Conditions against the risk of flight.[147]

69. The Appeals Panel recalls that Veseli had submitted before the Pre-Trial Judge a "declaration […] in the form of [an] opinion"[148] from Kosovo's Minister of Justice stating in relevant part that:

> […] on the capacity of the Kosovo Police to ensure the enforcement of other conditions in case of eventual court order to issue one of the other alternative measures pursuant to article 41 of the law, please be aware that such duty of the Police is a legal duty that is stipulated in the applicable legislation, and moreover, this practice is in place since 2004.[149]

70. In addition, Veseli submitted an email dated 9 January 2021 from the General Director of the Kosovo Police, Mr Mehmeti, addressed to Mr Selimi, stating that:

> I confirm, that Kosovo Police is dedicated to fulfill [sic] all legal obligations as per our mandate and have the capacities to perform any task/duty as requested by Prosecutors Office or Courts (including SPO or KSC). It is part of our ordinary functions to supervise the implementation of conditions imposed on the provisional release of accused persons pending trial, even for the most serious offences, when this is ordered by a Court in Kosovo, and we routinely perform this function.[150]

71. The Panel notes that while State guarantees *may* carry considerable weight in support of an application for provisional release, they are not dispositive and the Pre-Trial Judge is under an obligation to consider all relevant factors which a reasonable Judge or Panel would be expected to take into account before reaching a

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[146] Impugned Decision, para. 59.
[147] The Panel notes that, contrary to Veseli's appellate argument, the Pre-Trial Judge also did not mention the guarantees in the context of his finding on mitigating the risk of flight. However, this had no impact on the outcome of the decision, as the Pre-Trial Judge nevertheless found that the Proposed Conditions would mitigate the risk of flight. See Impugned Decision, para. 58; contra Appeal, para. 47.
[148] F00179/A09, Annex 9 to Defence Reply to the SPO's response to the Provisional Release Application of Kadri Veseli, 13 January 2021 ("Annex 9 to Reply to Application for Interim Release"), p. 1, fn. 1.
[149] Annex 9 to Reply to Application for Interim Release, p. 3.
[150] F00179/A11, Annex 11 to Defence Reply to the SPO's response to the Provisional Release Application of Kadri Veseli, 13 January 2021 ("Annex 11 to Reply to Application for Interim Release"), p. 1.

decision on interim release.[151] The Pre-Trial Judge must still assess the weight to be given to such guarantees in light of the circumstances of this case,[152] and more particularly in light of the generic and purely descriptive nature of the guarantee provided by the Kosovo Police.

72. While it would have been preferable for the Pre-Trial Judge to discuss expressly the relevant aspects of the State guarantees to which Veseli refers, and to explain in more detail why he was satisfied that the Proposed Conditions could mitigate the risk of flight but not the risk of obstruction, the Panel does not consider that the decision is so lacking in reasoning that the Pre-Trial Judge failed to comply with his obligation to provide a reasoned decision.[153] The Panel finds that, reading the reasoning in the Impugned Decision together with its detailed and thorough summary of the Parties' submissions and underlying evidence on that point, including specific reference to the guarantees provided by the Ministry of Justice and the Kosovo Police Service,[154] it can be inferred that the Pre-Trial Judge considered the State guarantees in his determination of *both* the risk of flight and the risk of obstruction, although he did not expressly refer to that evidence when making these findings. The Panel recalls in that regard that, while a panel must provide reasoning in support of its findings on the

[151] ICTY, *Prosecutor v. Mladić*, IT-09-92-AR65.1, Public Redacted Version of "Decision on Interlocutory Appeal Against Decision on Urgent Defence Motion for Provisional Release" Issued on 27 June 2017, 30 June 2017, para. 16; ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-AR65, Decision on Matthieu Ngirumpatse's Appeal Against Trial Chamber's Decision Denying Provisional Release, 7 April 2009, para. 13; IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Dick Prudence Munyeshuli's Motion for Provisional Release to the United States of America, 8 February 2019, p. 4.

[152] ICTY, *Prosecutor v. Čermak and Markač*, IT-03-73-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decision Denying Provisional Release, 2 December 2004, para. 31, citing ICTY, *Prosecutor v. Mrkšić*, IT-95-13/1-AR65, Decision on Appeal Against Refusal to Grant Provisional Release, 8 October 2002 ("*Mrkšić* Appeal Decision"), para. 9.

[153] See e.g. ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-560, Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled "Decision on the 'Requête de mise en liberté' submitted by the Defence for Jean-Jacques Mangenda", 11 July 2014, para. 116.

[154] Impugned Decision, para. 57, fn. 129 referring to Reply to Application for Interim Release, paras 55-61; Annex 9 to Reply to Application for Interim Release; F00179/A10, Annex 10 to Defence Reply to the SPO's response to the Provisional Release Application of Kadri Veseli, 13 January 2021; Annex 11 to Reply to Application for Interim Release.

substantive considerations relevant for a decision, it is not required to articulate every step of its reasoning and to discuss each submission.[155]

73. The Panel does not consider that the Pre-Trial Judge's finding that the conditions necessary to mitigate the risk of obstructing justice "can neither be enforced nor monitored"[156] is in "flat contradiction"[157] with the guarantee from the Kosovo Police. While the Kosovo Police's uncontested blanket statement that it has "the capacities to perform any task/duty as requested by Prosecutors Office or Courts (including SPO or KSC)"[158] seems to indicate that the Kosovo Police would have the capacity to monitor and enforce *any* imposed conditions, the Panel notes that such guarantees are in reality focused on securing the presence of the accused in the criminal proceedings and ensuring that the accused does not abscond.[159] This can additionally be deduced from the fact that, when requesting the guarantee from the Head of the Kosovo Police Service, the Defence referred specifically to the ability to monitor conditions mitigating the risk of flight.[160] Besides, the guarantees are completely silent on any ability of the Kosovo Police to address the risk of obstruction, including via the monitoring of communications.

74. Based on the low level of detail provided in the Kosovo Police's blanket guarantee, its vague and general character, its focus on the risk of flight and its silence on any measures to prevent prohibited communications, it was not unreasonable for the Pre-Trial Judge to consider that the blanket assertion contained in the Kosovo Police's guarantee was not sufficient to address the risk of obstruction. It was also not

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[155] ICTY, *Prosecutor v. Mladić*, IT-09-92-AR73.6, Decision on Interlocutory Appeal Against Decision on Defence Motion for a Fair Trial and the Presumption of Innocence, 27 February 2017, para. 25, citing ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Judgement, 14 December 2015, para. 105.
[156] Impugned Decision, para. 59.
[157] Appeal, para. 40.
[158] Annex 11 to Reply to Application for Interim Release, p. 1.
[159] Annex 9 to Reply to Application for Interim Release.
[160] The Panel notes that Veseli's Counsel stated in the request: "In other words, if the Pre-Trial Judge orders that he should remain at his home address, 24 hours a day, whether the KPS has the resources to ensure that this condition is enforced." See Annex 11 to Reply to Application for Interim Release, p. 2.

unreasonable for the Pre-Trial Judge not to be satisfied that the blanket guarantee covered the onerous and resource intensive measure of monitoring all of Veseli's private communications at all times, in the way in which they can be monitored in the Specialist Chambers Detention Facilities, especially in light of his previous finding regarding Veseli's stature and influence over former subordinates and supporters.[161] The Panel notes that it would have been within the Pre-Trial Judge's discretion to seek such clarifications and hear the relevant evidence before reaching his decision, although, as found above,[162] he was not obliged to do so.

75. Although Veseli argues that he was afforded no prior notice that the effectiveness of the restrictions on communication was a question that had to be addressed,[163] the Panel notes that Veseli was well aware that the Proposed Conditions needed to address all the risks listed under Article 41(6)(b)(i)-(iii) of the Law, including the risk of obstruction.

76. The Appeals Panel therefore finds that Veseli fails to demonstrate that the Pre-Trial Judge abused his discretion in his assessment of the Kosovo Police's guarantee and in finding that it is only through the communication monitoring framework applicable at the Specialist Chambers Detention Facilities that Veseli's communications can be *effectively* restricted and monitored. Consequently, it is unnecessary to address Veseli's additional argument about messages being smuggled

[161] Impugned Decision, paras 39, 59. The ICTY found that "[…] 'the weight to be attributed to guarantees given by a government may depend a great deal upon the personal circumstances of the applicant, notably because of the position he held prior to his arrest.' The rationale behind taking into consideration an accused's prior position is that he or she may possess very valuable information on a government providing a guarantee that could be disclosed to the International Tribunal. This would serve as a disincentive for a government to enforce its guarantee to arrest an accused after provisional release, if needed, to stand trial." See ICTY, *Prosecutor v. Stanišić*, IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005, para. 17, citing *Prosecutor v. Šainović and Ojdanić*, IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, para. 7; *Mrkšić* Appeal Decision, para. 9.
[162] See above, para. 66.
[163] See Appeal, para. 42.

to him by his wife and children, which was predicated on the success of his argument that the Kosovo Police would be able to monitor all other types of communication.[164]

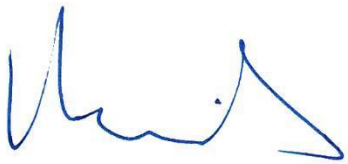
77. In view of the foregoing, the Court of Appeals Panel therefore dismisses Veseli's arguments related to the alleged erroneous assessment of the Proposed Conditions.

IV. DISPOSITION

78. For these reasons, the Court of Appeals Panel:

DENIES the Appeal in its entirety; and

ORDERS Veseli to file a public redacted version of the Reply within ten days of receiving notification of the present Decision.



Judge Michèle Picard,
Presiding Judge

Dated this Friday, 30 April 2021

At The Hague, the Netherlands

[164] Appeal, para. 46.