

In: KSC-BC-2020-06

Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Pre-Trial Judge

Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Kadri Veseli

Date: 25 June 2021

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**Public Redacted Version of
Veseli Defence Submissions on Detention Review
with Confidential Annexes A to C
(F00341 dated 4 June 2021)**

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I. INTRODUCTION

1. Pursuant to the Pre-Trial Judge's oral *Order regarding the timeline for defence submissions on continued detention* rendered at the conclusion of the 5th Status Conference held on 19 May 2021,¹ the Defence for Mr Kadri Veseli ("Defence") provides the submissions set out below.

2. The Defence submits that detention is no longer justified and that the preventive purpose thereof can equally be achieved by ordering supervised house arrest in Kosovo, subject to the strict and onerous list of conditions set out below (and in the attached Annex C - correspondence with the Director of the Kosovo Police Service). These conditions have been designed specifically to address the only outstanding risk that was found by the Pre-Trial Judge and the Appeals Chamber to justify his continued detention – namely the risk of clandestine communication with his political supporters in an effort to interfere with the course of justice. With specific reference to the list of conditions proposed, the Director of the Kosovo Police Force has confirmed in writing that these conditions can and will be effectively enforced, if ordered by the KSC as conditions of provisional release under house arrest.²

3. There are four factors, in particular, that constitute material changes of circumstance since Mr. Veseli's application for provisional release was initially refused. They relate to (a) the strength of the SPO's case against him; (b) Prosecutorial delay with the result that the period of pre-trial incarceration will inevitably be considerably longer than the SPO's estimate at the time of the original application for provisional release; (c) the exemplary conduct of Mr. Veseli and his family during the recent compassionate release to visit his father in hospital; and (d) the provision of specific guarantees designed to address the precise risk identified by the Pre-Trial

¹ 5th Status Conference, Transcript at p.451 line 19.

² Annex C

Judge and the Appeals Chamber (unsupervised clandestine communication with supporters in an effort to interfere with the administration of justice) and the explicit endorsement of these conditions as feasible by the Kosovo Police Force.

II. SUBMISSION

A. THE STRENGTH OF THE PROSECUTION CASE

3. In confirming the indictment ("Confirmation Decision"), the Pre-Trial Judge found that there was a "well-grounded" suspicion that Mr Veseli had committed criminal offences.³ This *ex parte* decision was without the benefit of informed submissions from the Defence.

4. A detention review (or application for provisional release) is, of course, not the time for a full trial of the SPO's case. However, it is axiomatic that when considering the risks associated with provisional release, the Pre-Trial Judge must take account of the strength of the evidence against an accused, if invited to do so by either the SPO or the Defence. The reason is obvious. The stronger the case is against any particular accused, the more likely it is that he will be convicted and, accordingly, the greater is the incentive to flee or interfere with the course of justice. The converse is also true. The weaker the direct evidence against any individual accused, the less likely they are to flee or seek to interfere with witnesses because there is less incentive to do so. In this respect, it is essential that the Pre-Trial Judge should examine the case against each accused individually and assess the strength of the evidence against them separately.

³ KSC-BC-2020-06/F00026. Put otherwise, and to use the language of Article 19.1.12 of the Kosovo Criminal Code, the Pre-Trial Judge found that the evidence supplied to him "would satisfy an objective observer that a criminal offence has occurred and that the defendant has committed the offence".

5. In carrying out this function, the Pre-Trial Judge will doubtlessly take into account of the fact that this is the first opportunity he has had to hear from the Defence on the issue, following the disclosure of the SPO's case. It will be recalled that the SPO chose when to submit an indictment, and when to seek the arrest of the accused. Since Mr. Veseli was arrested, the SPO has had more than six months to disclose its case against him. It is thus opportune for the Pre-Trial Judge to revisit the evidence with the benefit of informed submissions from the defence, in conformity with the fundamental judicial principle of *audi altarem partem*.

6. The case against Mr. Veseli falls into two parts. The first concerns the direct evidence of his alleged participation in criminal conduct. As will become apparent, there is no such evidence capable of justifying his continued detention. The second part consists of vague allegations of joint criminal enterprise and command responsibility which have no direct evidence to support them and which are, in any event, the subject of a jurisdictional challenge which is, to say the least, strongly arguable.

Evidence of Direct Participation

7. The SPO's allegation that Mr Veseli directly participated in the commission of crimes is based on three alleged events: one in [REDACTED]; one in [REDACTED]; and one in [REDACTED]. These three events are referenced at footnote [REDACTED] of the Confirmation Decision and are synthesised in tabular format below.

8. Now that the Defence has had the opportunity to critically examine the evidence served by the SPO, it is in a position, for the first time, to make informed submissions on the strength of the evidence of Mr. Veseli's supposed direct participation in criminal offences.

9. The Pre-Trial Judge's Confirmation Decision helpfully identifies the supporting evidence relied upon by the SPO. Without the benefit of informed submissions from the Defence, the Pre-Trial Judge was persuaded by the SPO that this evidence supported the conclusion that "on some occasions, the Suspects themselves participated in the arrest and detention of [o]pponents, or were present at locations where [o]pponents were mistreated".⁴

Paragraph of Confirmation Decision	Incident
Paras [REDACTED]	[REDACTED] [REDACTED].
Para [REDACTED]	[REDACTED] An allegation that Mr Veseli transferred a captive to the detention facility at [REDACTED].
Paras [REDACTED]	[REDACTED] Any reference to Mr Veseli, if such exists, is redacted and unavailable to the Defence. The footnotes to this paragraph have been examined and they all refer either to evidence which is yet to be disclosed by the SPO or to evidence which has been disclosed but is totally redacted.

Taking each of these in turn:

⁴ KSC-BC-2020-06/F00026 at para. 447.

i) [REDACTED]

10. The allegation that Mr Veseli was present at [REDACTED] is based solely on testimony provided by [REDACTED]. Protective measures have not been sought for this individual.

11. The materials disclosed by the SPO reveal [REDACTED] occasions on which [REDACTED] provided [REDACTED] concerning a person he named as "Kadri Veseli"; [REDACTED]; [REDACTED]; [REDACTED]. However, it is entirely clear from his evidence as a whole that he was not referring to the accused in the present case, a fact he formally acknowledged [REDACTED].

12. On the face of it, [REDACTED],⁵ asserts that a person with the name "Kadri Veseli" [REDACTED].⁶ No allegation is made that [REDACTED] was tortured or ill-treated by Mr Veseli, or in his presence, either during or immediately prior to this interrogation. There is no evidence capable of establishing that the person he named as "Kadri Veseli" knew or had cause to know that he had been ill-treated or was in distress.

13. [REDACTED] added that the person he named as "Kadri Veseli" originated from [REDACTED].⁷ Kadri Veseli (the accused in the present case) comes from an entirely different part of Kosovo.⁸

⁵ SITF00013852-00013885

⁶ SITF00013852-00013885 at 00013861.

⁷ SITF00013852-00013885 at 00013860.

⁸ Annex B

14. In his [REDACTED] from [REDACTED], [REDACTED] confirmed that the same "Kadri Veseli" interrogated him albeit about other persons, but not about [REDACTED]. [REDACTED].

15. [REDACTED]⁹ [REDACTED]. Given the difference of [REDACTED]. [REDACTED].

16. [REDACTED],¹⁰ [REDACTED]. [REDACTED] it is clear that [REDACTED] [REDACTED] was mistakenly referring to another Veseli and not to the Kadri Veseli subject to the present indictment.¹¹

ii) [REDACTED]

17. The evidence supporting Mr Veseli's alleged transfer of [REDACTED] to the [REDACTED] detention facility is exculpatory in character. It is a point for the Defence not the SPO. In its submissions prior to confirmation, the SPO relied on the record of an interview [REDACTED]. The passage referred to reads as follows:

[REDACTED].¹²

18. The fact that [REDACTED] was [REDACTED] is confirmed by another individual [REDACTED].¹³ [REDACTED]!¹⁴

19. [REDACTED] is [REDACTED]. It follows that nothing in his [REDACTED] suggests that Mr Veseli knew that people were being mistreated at the detention

⁹ **Confidential Annex A** [REDACTED] and **Confidential Annex B** (passport of Kadri Veseli).

¹⁰ SITF00013736-00013800 at

¹¹ SITF00016140-00016220 at 00016148.

¹² 051032-051055 at 051040

¹³ KSC-BC-2020-06-IT-05-87.1 P00516 p. 95/122.

¹⁴ 051032-051055 at 051040.

facility at [REDACTED]. On the contrary, [REDACTED] stresses that Mr Veseli requested that [REDACTED] be treated well. This is entirely credible given that [REDACTED] was [REDACTED].¹⁵ [REDACTED]. There is nothing in this evidence.

iii) [REDACTED]

20. The final incident/s of direct participation imputed to Mr Veseli relate/s, as it would appear, to certain unspecified events at [REDACTED]. All comprehensible evidence pertaining to Mr Veseli's alleged direct participation in crimes at this location is unavailable. As mentioned above, it has either not been disclosed to the Defence or has been disclosed in redacted form. As a consequence, the SPO has engendered the situation whereby the Defence remains entirely in the dark with respect to this allegation.

21. In his decision on Mr. Veseli's application for provisional release, the Pre-Trial Judge rightly ruled that the SPO could not rely, for the purposes of justifying continued pre-trial detention, on evidence that had not been disclosed to the Defence. This is for the obvious reason that the Defence would thereby be prevented from advancing informed submissions on the evidence in question and its relevance to pre-trial detention or release.

22. The Defence invoked the ruling of the Grand Chamber of the European Court of Human Rights in *A and Others v United Kingdom*, Judgment 19 February 2009, Application No, 3455/05, in which the Court held that a decision to order a person's continued detention on the basis of evidence that was not disclosed to the accused was a violation of the right to a fair procedure for a detention review under Article 5(4) of the Convention (the *habeas corpus* provision).

¹⁵ SITF00009578-00009648 at 00009579/

23. Precisely the same conclusion was reached by the United Nations Working Group on Arbitrary Detention which has observed that

"[N]o person should be deprived of liberty or kept in detention on the sole basis of evidence to which the detainee does not have the ability to respond... The Working Group has held that, even if lawyers of the detainee have access to such evidence but are not allowed to share or discuss it with their client, this does not sufficiently protect the detainee's right to liberty".¹⁶

24. Accordingly, the Pre-Trial Judge was entirely correct in refusing, during his provisional release ruling in the present case, that it was impermissible to take into account evidence that had not been disclosed to the accused:

"41. ... Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the accused person or his or her counsel. In the present instance, the Pre-Trial Judge notes that key information regarding one incident that the SPO relies on to demonstrate the existence of a risk of obstruction by Mr. Veseli is redacted, which prevents the Defence from understanding the underlying allegation. In these circumstances, the Pre-Trial Judge does not rely on this allegation in assessing the existence of a risk of obstruction by Mr. Veseli."

25. Given the length of time that has elapsed since he was arrested and the fact that the SPO has still failed to disclose any unredacted meaningful information concerning the allegation relating to [REDACTED], the Pre-Trial Judge should adopt the same approach.

¹⁶ Working Group on Arbitrary Detention, Compilation of Deliberations at para. 72: <https://www.ohchr.org/Documents/Issues/Detention/CompilationWGADDeliberation.pdf> *c.f.*, also, Working Group, opinions Nos. 5/2010 and 26/2007.

Allegations of other modes of commission

26. As noted above, the second aspect of the case against Mr. Veseli consists of vague allegations of joint criminal enterprise and command responsibility which have no direct evidence to support them and which are, in any event, the subject of a jurisdictional challenge which is, to say the least, strongly arguable. To take account of the obvious strength of the jurisdictional challenge does not involve pre-judging its outcome. It is relevant also because it is almost inevitable that this challenge will be considered, in due course, by the Constitutional Chamber of the KSC, on appeal from the Prosecution or the Defence. It is not until that challenge has been resolved that it will be possible for the Defence or the Pre-Trial Judge to ascertain the scope of the case against the accused. Accordingly, the final resolution of that challenge by the Constitutional Chamber of the KSC is a pre-requisite for the effective conduct of defence investigations and the scheduling of a trial, if one is to take place.

B. PROSECUTORIAL DELAY

27. The SPO is not only conducting the disclosure process in an inefficient manner but it has also set unreasonable deadlines which it has proved that it cannot meet. In November 2020, the SPO declared that it would meet all its disclosure obligations in order to permit a trial which "should commence this summer or no later than September 2021".¹⁷ This written declaration was made after having given an undertaking, at the first status conference, to complete Rule 102(1)(b) disclosure by 31 May 2021.¹⁸

¹⁷ KSC-BC-2020-06/F00097 at para 14.

¹⁸ Transcript of 1st Status Conference, 18.11.20 at page 124 line 17.

28. At the second status conference held on 17 December 2020, the Specialist Prosecutor's representative again announced his office's readiness for trial in September 2021:

“Now, I am aware of concerns that have arisen from circumstances where lengthy post-indictment investigations were viewed as resulting in a delay in commencing trial. That is clearly not the case here. Here it is the Prosecution seeking the expeditious arrival of a date upon which the results of further investigation will require judicial authorisation and thereby limit and restrict the scope of prospective investigations. So, in short, while we are unable to put a date, and would not put a date, at the projected end of the investigation, it will not adversely affect the objective of an expeditious and fair trial and, indeed, in our submission, would enhance it.

[...]

With respect, then, to our estimate of when we will be able to file our pre-trial brief and the related Rule 95 submissions, in this circumstance, based on our current projection of the commencement of a trial date in September, which we've explained to the Court, we would be prepared to file the pre-trial brief and the related materials in early July, that is, two to three months before the commencement of trial”.

29. As it now turns out, the SPO will not be ready for trial until well into next year. It will not even have completed its primary disclosure obligations by September 2021. In its written submissions filed in advance of the 5th Status Conference, the SPO stated that it will not be in a position to file a Pre-Trial Brief before mid-October 2021.¹⁹ Almost a year will have passed since the surrender of Mr Veseli to the KSC and, through no fault of the Defence, the case will not even be close to readiness for trial.

¹⁹ KSC-BC-2020-06/F00314 at para. 10.

C. RISK FACTORS

30. The Defence recalls that the Pre-Trial Judge found that the risk of flight emanating from Mr Veseli could be adequately mitigated by strict conditions of release. The only subsisting concern was the risk of unsupervised clandestine communication with his supporters in an effort to interfere with the course of justice. The sole concern was that outside the Detention Unit his non-privileged communications could not be monitored.

D. EVIDENCE OF GOOD CONDUCT

31. The ability to trust an accused person, those in his immediate vicinity and his guarantors is a vital component of assessing the suitability of conditions for interim release. Mr Veseli's trustworthiness is amply demonstrated by the fact that once notified of the warrant for his arrest, he reached an agreement with the SPO for his voluntary surrender. At the same time, Mr Veseli issued a statement in which he demanded that all due respect be accorded the KSC.

32. Further important evidence of Mr Veseli's trustworthiness and, equally, that of his family can be discerned from the exemplary conduct exhibited during the custodial visit to Kosovo as detailed below:

- i) Mr Veseli was permitted to circulate without instruments of restraint and politely obeyed all instructions of the attending custody officers;
- ii) Mr Veseli did not engage in discourse with any members of the general public who chanced to meet him;

- iii) Mr Veseli followed instructions to the letter with respect to the timing of visits arranged in the local detention facility. These visits were arranged at the discretion of the supervising custody officers including a meeting with his wife and children. [REDACTED].
- iv) All of Mr Veseli's family members who visited him in the local detention facility [REDACTED] respected the requirements of the Pre-Trial Judge's order and, most importantly, made no statements to the press, despite being asked repeatedly to do so;
- v) All of Mr Veseli's family members who visited him, complied with arrival times, identification requirements and a prohibition on carrying communication devices;
- vi) The visits to the hospital were facilitated by Mr Veseli's family members who identified and communicated to the supervising custodial authorities the location of the Mr Veseli senior's ward and how to access it as discretely as possible in advance of Mr Veseli's arrival;
- vii) Mr Veseli's family members made sure to clear the hospital room so that the only those previously vetted by the supervising custodial authorities;
- viii) Members of Mr Veseli's family communicated with the custody officials ahead of time as to when they expected that the press would be present (through no fault of their own) so that necessary precautions could be taken;
- ix) Mr Veseli's family members communicated to the supervising custodial officials the location and the physical arrangement of living conditions at the residence of Mr Veseli's mother ahead of the application for the modification of

the order. The family also committed to clearing the premises in order to secure the area for security purposes. The family members, indeed, cleared the premises (two houses) during the window provided for Mr Veseli's visit and made sure that only pre-approved people would be present at the premises.

33. The Defence highlights the commendable compliance of Mr Veseli's family with the Pre-Trial Judge's instruction to maintain the confidentiality of the visit. Members of the media attempted to procure an interview and extract information from members of Mr Veseli's family but were met with a firm refusal the essence of which makes it clear that they believed that anything said could interfere with the judicial process.

34. In so far as Mr Veseli's words and deeds show that he is entitled to the presumption of honest cooperation, the onus must now shift to the SPO to show why Mr Veseli and his family cannot be trusted. The SPO will not be able to rebut any of the aforementioned concrete instances of good conduct in light of its tacit assent to the content of the Registrar's report. The SPO must also show why it is not possible to mitigate the risk factors they claim to be relevant to Mr Veseli in light of proposed conditions of release of an improved nature which the Defence proffers specifically to address the concerns identified by the Appeals Chamber.

E. PROPOSED CONDITIONS & GUARANTEES

35. In its *Decision on Kadri Veseli's Appeal Against Decision on Interim Release*,²⁰ the Appeals Chamber commented that the letter produced by the Defence from the Kosovo Police was "[b]ased on [a] low level of detail", constituted a "blanket guarantee", was "vague and general" in character and focussed "on the risk of flight"

²⁰ KSC-BC-2020-06/IA001-F00005 at para. 74.

while remaining silent "on any measures to prevent prohibited communications". The Defence understood these comments as an invitation to proffer improved conditions of release and, if possible, to elucidate further the capacities of the Kosovo Police Force ("KPF").

36. Accordingly, the Defence proffers the following terms and conditions for interim release which address the concerns of the Appeals Chamber by focussing, in particular, on "measures to prevent prohibited communications":

- i) That Mr Veseli be placed under house arrest at his residential address, and that a member of the KPF supervise those entering or leaving that address at all times (either in person or remotely with the use of a CCTV camera);
- ii) That Mr Veseli be prohibited from leaving his residential address at any time, except in case of medical or other emergency, in which case he will remain in the physical custody of a police officer at all times, until his return;
- iii) That no telephones, telecommunications devices or internet-enabled equipment be permitted inside the residential address at any time;
- iv) That Mr Veseli's residential address be searched in advance of his arrival for any hidden telephones, telecommunications devices or internet-enabled equipment. The property will be searched again upon his entry, and thereafter on a random basis;
- v) That the only persons permitted to enter the residential address, apart from Mr Veseli's immediate family (wife and children) and police officers, will be persons whose names appear on a pre-approved list of family members and other persons entitled to visit him at his place of residence with the advance

approval of the Pre-Trial Judge of the Kosovo Specialist Chambers. Access will be denied to any person who is not verified as being on the pre-approved list of approved visitors;

- vi) That visits of the aforementioned pre-approved persons to Mr Veseli's residential address be coordinated in advance by way of notice to the KPF;
- vii) That any person entering the house be required to surrender telephones, telecommunications devices or internet-enabled equipment prior to entering the property;
- viii) That any person (including family members) entering the property consents to the subsequent monitoring of their telephones, telecommunications devices or internet-enabled equipment for the duration of Mr Veseli's period of interim release;
- ix) That any person entering or leaving the property be searched for the possession of any telephones, telecommunications devices or internet-enabled equipment, written message or other document.
- x) That the KPF perform random checks of Mr Veseli's residential address in order to verify whether Mr Veseli, his family members and/or those visiting him are abiding by the above-mentioned terms and conditions of release and, in particular, do not have any telephones, telecommunications devices or internet-enabled equipment at the said residential address;
- xi) That the KPF notify the Registry of the Kosovo Specialist Chambers **immediately** if Mr Veseli or any of his family members or those

visiting him at his place of residence be found to have violated the aforementioned terms and conditions of release.

37. The attached exchange of correspondence with the Director of the Kosovo Police (Annex C) confirms that these conditions can be enforced if ordered by the KSC. It is submitted that this is quite sufficient to address the one remaining risk identified in Mr. Veseli's case as a justification for his continued pre-trial detention. As before, the Defence respectfully submits that if the Pre-Trial Judge requires elaboration of this information from the Kosovo Police Service, the appropriate course is to address a specific list of questions to the Director. However, on this occasion, unlike the last one, the Director has affirmed the ability of the KPF to implement conditions specifically directed to the risk identified by the Pre-Trial Judge.

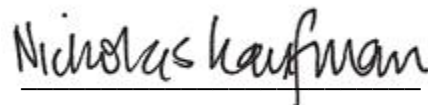
III. CONCLUSION

38. In light of all the aforementioned, the Pre-Trial Judge is respectfully requested to order Mr Veseli's release on the terms and conditions set out in paragraph 35 above.

Word Count: 3967 words



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