

**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 Rexhep Selimi

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**Language:** English

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**Public Redacted Version of Selimi Defence Submissions  
on Review of Detention, KSC-BC-2020-06/F00330,  
dated 31 May 2021**

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## I. INTRODUCTION

1. In accordance with the Pre-Trial Judge's schedule,<sup>1</sup> the Defence for Mr. Rexhep Selimi hereby requests the Pre-Trial Judge, to grant him interim release pursuant to Article 41(6) of the Law<sup>2</sup> and Rule 57(2) of the Rules.<sup>3</sup>
2. In light of the recent admission by the SPO as to their readiness for trial and the likely impact on pre-trial detention of the Accused, the entire context and framework within which the Decision was taken needs to be re-assessed. In conducting that re-assessment, it will be demonstrated that:
  - a. [REDACTED]; and,
  - b. applying the standard set out by the Appeals Chamber to this admissible evidence removes the risk of Mr. Selimi obstructing SC proceedings or committing further crimes.
3. Alternatively, if the Pre-Trial Judge considers that the risk of Mr. Selimi obstructing SC proceedings or committing further crimes remains, the risk is reduced thereby the previous Proposed Conditions would now be sufficient to mitigate them.

## II. Scope of application

4. Although the Pre-Trial Judge held that a risk of flight exists in relation to Mr Selimi,<sup>4</sup> he also held that conditions sufficiently mitigate the risk of flight for Mr. Selimi<sup>5</sup> and the Appeals Chamber therefore summarily dismissed Defence submissions regarding this issue.<sup>6</sup> While the Defence contests whether the risk of flight continues to exist, in light of this finding no submissions on this issue are included herein. Consequently, the

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<sup>1</sup> Oral Order, 19 May 2021, pp. 451-452.

<sup>2</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

<sup>3</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

<sup>4</sup> Decision on Rexhep Selimi's Application for Interim Release, KSC-BC-2020-06/F00179, 22 January 2021 ('Interim Release Decision'), para. 33.

<sup>5</sup> Ibid, para. 54.

<sup>6</sup> Decision on Rexhep Selimi's Appeal Against Decision on Interim Release, 30 April 2021 ('Interim Release Appeal Decision').

current application relates solely to the risk of Mr. Selimi obstructing KSC proceedings or committing further crimes pursuant to Article 41(6)(b)(ii) and (iii).

5. Under Rule 57(2) the Pre-Trial Judge shall review a decision on detention on remand upon the expiry of two (2) months from the last ruling on detention, or at any time upon request by the Accused or the Specialist Prosecutor, or *proprio motu*, where a change in circumstances since the last review has occurred.
6. The requirement to demonstrate a change in circumstances therefore relates solely to the requirement for a *proprio motu* decision on remand and not to the periodic review required of the Pre-Trial Judge. There is no threshold to be reached for such Defence submissions. This contrasts with the system at the ICC where Article 60(3) explicitly requires that any modification on detention may only be ordered if the Chamber is “satisfied that changed circumstances so require.” The Pre-Trial Judge has previously reviewed detention pursuant to Rule 57(2) and not explicitly required demonstration of changed circumstances.<sup>7</sup>
7. In any event, if the Pre-Trial Judge does require a change of circumstances to justify a modification of the PTJ Release Decision, the information set out herein reaches that threshold.

### **III. Undue delay**

8. Rule 56(2) provides both that the Pre-Trial Judge shall ensure that a person “is not detained for an unreasonable period prior to the opening of the case” and also that “in case of an undue delay caused by the Specialist Prosecutor, the Panel, having heard the Parties, may release the person under conditions as deemed appropriate.”
9. These are two separate requirements. First, the Pre-Trial Judge must take measures to ensure that an accused is not detained for an unreasonable period. This requires pre-emptive action be taken to ensure that such unreasonable detention does not occur, whether by ordering interim release or indeed taking other measures to prevent this

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<sup>7</sup> *Prosecutor v. Mustafa*, Second Decision on Review of Detention, 25 January 2021, paras 8-10.

occurrence. It relates to the specific period of detention as a whole and may therefore be raised by the Accused even if the unreasonable delay has not yet occurred.

10. In addition, the Pre-Trial Judge is required to examine whether the specific actions, or indeed omissions, of the SPO have caused undue delay to the proceedings. This requirement of undue delay is separate from that of unreasonable delay. While the SPO's actions causing the delay may have already occurred, the Pre-Trial Judge does not need to wait until the end of the delay before this protection takes effect. This requirement may be satisfied even by a relatively short delay where this was unnecessary and demonstrably caused by the SPO. Negligence or deliberate delay on the party of the SPO is not required.
11. In the Interim Release Decision, the Pre-Trial Judge held that considering the charges against Mr. Selimi, his arrest on 5 November 2020 "any discussion as to the expected total length of Mr Selimi's pre-trial detention is premature and speculative at the present stage."<sup>8</sup> Although the Appeals Chamber held that "duration of time in detention pending trial is a factor that needs to be considered along with the risks that are described in Article 41(6)(b) of the Law."<sup>9</sup> It also noted that the Pre-Trial Judge had limited himself to assessing the time that had *already* been spent in detention since Mr. Selimi's arrest<sup>10</sup> in contrast to decisions by ICTY Judges which had taken the probable length of pre-trial detention into account in the exercise of their discretion to release an accused<sup>11</sup> but justified this on the periodic review of detention under Rule 56(2) and the wide difference between the parties on the likely start date of the trial, and therefore the likely length of the pre-trial period.<sup>12</sup>
12. Yet, recent admissions by the Prosecution demonstrate that in reality the projected timeline of the Defence was far more accurate, if not conservative. Despite originally

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<sup>8</sup> Interim Release Decision, para 57.

<sup>9</sup> Interim Release Appeal Decision, para. 79.

<sup>10</sup> Ibid, para. 80.

<sup>11</sup> 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, para. 23; ICTY, Prosecutor v. Haradinaj et al., IT-04-84bis-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 10 September 2010, paras 40-42; ICTY, Prosecutor v. Haradinaj et al., IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, para. 29; Mrkšić Decision, para. 48.

<sup>12</sup> Interim Release Appeal Decision, para. 81.

claiming to be ready for trial in Summer 2021,<sup>13</sup> which the Defence claimed was “frankly oblivious to the reality of international criminal proceedings”<sup>14</sup> the Prosecution now admits that it won’t be in a position to file its Pre-Trial Brief and list of witnesses until mid-October 2021 at the earliest.<sup>15</sup> Given previous experience and the nature of these trials as demonstrated in many other *ad hoc* and hybrid tribunals, it is likely this deadline will slip.

13. While calling into question whether the Prosecution should have ever indicted Mr. Selimi and his co-Accused given their lack of readiness to bring the case to trial within a reasonable time, the Pre-Trial Judge cannot ignore this information. In conjunction with the lack of information the SPO will voluntarily provide before this date, such as a likely list of witnesses, or even its resistance to provide any detailed disclosure categorisation until ordered by the Pre-Trial Judge, the earliest the case against the accused will start will be well into 2022. There is evidently no longer any wild difference between the parties, despite the SPO’s prior assurances.
14. Further, while the periodic review of detention is an important safeguard as the Appeals Chamber acknowledges, this safeguard is only effective if the Pre-Trial Judges fulfils his obligations in assessing and taking into account the likely duration of pre-trial detention in taking his decision.
15. Taking such likely duration into account, it now becomes unarguable that prolonged pre-trial detention of Mr. Selimi will be unreasonable thereby fulfilling the first prong of Rule 56(2). It is also evident that such delay is caused by the inability of the SPO to organise for the preparation of the case within the timeframe originally envisaged thereby fulfilling the second prong of this provision.

#### **IV. Standard for assessing risk of Article 41(6)(b) factors**

16. The Appeals Chamber confirmed that it is not necessary to demonstrate that one of the Article 41(6)(b) factors would occur with certainty to order detention, but equally that

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<sup>13</sup> Prosecution submissions further to the status conference of 18 November 2020, KSC-BC-2020-06/F00097, 23 November 2020, para. 14.

<sup>14</sup> Defence Application for Interim Release, KSC-BC-2020-06/F00124, 7 December 2020, , para. 12.

<sup>15</sup> Prosecution submissions for fifth status conference, KSC-BC-2020-06/F00314, 18 May 2021, para. 10.

“it does not follow, however, that any possibility of a risk materialising is sufficient to justify detention”<sup>16</sup> and therefore the Prosecution must demonstrate “more than a mere possibility of a risk materialising.”<sup>17</sup> The Appeals Chamber agreed with the Defence that in Article 41(6)(b) “the term “articulable” does not speak directly to the standard or threshold, but to the specificity of the information or evidence required”<sup>18</sup> and that the relevant question 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.”<sup>19</sup>

17. This is the standard that the Pre-Trial Judge must strictly apply to the evidence tendered by the Prosecution. In this regard, and to avoid any misunderstanding, nothing is conceded by the Defence with regards either to the general factors relied upon, or specific factors relating to Mr. Selimi. The burden remains on the SPO at all times to bring forward specific reasoning in relation to concrete evidence that a “sufficiently real possibility” that one of the Article 41(6)(b) risks will materialise.

## **V. Obstructing SC proceedings or committing further crimes**

18. The Pre-Trial Judge previously recognised “Mr Selimi’s co-operation with the SPO’s investigations and [REDACTED], his voluntary surrender for arrest in these proceedings, his strong family and professional ties to Kosovo and Prishtinë/Priština in particular, and the statements describing his good character.”<sup>20</sup>
19. While these factors were assessed in the context of whether Mr. Selimi was a flight risk which is not addressed herein, these factors are also directly relevant to the issue of whether it is likely that Mr. Selimi would obstruct SC proceedings or commit further crimes and must be at the forefront of the Pre-Trial Judge’s mind when assessing these issues. Other obvious but important factors include the fact that Mr Selimi has not obstructed, nor is he alleged to have obstructed, the proceedings. Further, Mr Selimi

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<sup>16</sup> Interim Release Appeal Decision, para. 40.

<sup>17</sup> Ibid.

<sup>18</sup> Id, para. 44.

<sup>19</sup> Ibid.

<sup>20</sup> Interim Release Decision, para. 32.

has not committed any ‘further offences’, nor is he alleged to have committed ‘further offences’.

20. For example, Mr. Selimi’s voluntary co-operation with the SPO’s investigations and with other judicial proceedings as well as his voluntary surrender for arrest in these proceedings, is directly relevant to the issue of whether he would obstruct those same proceedings against him. Indeed, where Mr. Selimi has been able to assist the investigation or the smooth conduct of proceedings, he has done so at every opportunity without complaint or opposition. This undermines any presumption that he would be pre-disposed to obstruct the current proceedings and has to be taken into consideration by the Pre-Trial Judge.
21. The Pre-Trial Judge relied on the following factors for assessing whether Mr. Selimi fulfilled the conditions in Article 41(6)(b)(ii) or (iii).
- a. A general, well-established, and ongoing climate of intimidation of witnesses and interference with criminal proceedings against former KLA members;<sup>21</sup>
  - b. Mr. Selimi’s past and present influential positions, including his key functions in the KLA at the time when the alleged JCE unfolded and positions of authority, enable his influence and ability to mobilise support networks;<sup>22</sup>
  - c. [REDACTED];<sup>23</sup>
  - d. the serious allegations made against Mr. Selimi in the Indictment, especially at the current stage of the proceedings, where he is progressively informed of the evidence underpinning the charges against him, including the identity of witnesses who provided or could provide evidence in the case and/or are due to appear before the SC.<sup>24</sup>
22. The Appeals Chamber held in relation to Factors 1 and 2, that the evidence of the context of a general climate of witness intimidation in Kosovo in trials of former KLA

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<sup>21</sup> Id, para. 42.

<sup>22</sup> Interim Release Decision, para. 37.

<sup>23</sup> [REDACTED].

<sup>24</sup> The Defence notes that the Pre-Trial Judge gave limited weight to Mr. Selimi being placed on a “United States sanctions list of persons who threaten international stabilization efforts in the Western Balkans.” Given this limited weight, and the absence of any further detailed information on this issue, this factor is not relevant to this determination. Interim Release Decision, para. 41.

members “is insufficient to reasonably conclude that Selimi’s opinions, including those opposing the Specialist Chambers, are heard and may mobilise support networks, including present and former subordinates”<sup>25</sup> because “an Accused may still hold considerable power to influence victims or witnesses is no indication in itself that the Accused will exercise such influence unlawfully.”<sup>26</sup> The Chamber also held that “the SPO adduced no concrete evidence of influence exerted by Selimi on individuals within the support network of the KLA War Veterans Association”<sup>27</sup> and finally that “the relevance of Selimi’s opposition to the Specialist Chambers to the assessment of the risk to obstruct the proceedings, is not demonstrated.”<sup>28</sup>

23. In light of these findings, the Pre-Trial Judge may not take into account the general climate of witness intimidation or indeed Mr. Selimi’s alleged power to mobilise support networks or influence victims witnesses without specific identification of the evidence relied upon to link Mr. Selimi to these general assertions.
24. The Appeals Chamber examined the Pre-Trial Judge’s reasoning on Factor 3 which it held to be “very brief” and “[REDACTED].”<sup>29</sup> The Appeals Chamber attempted to “discern how the Pre-Trial Judge reached the findings he did, based on the totality of the evidence before him”<sup>30</sup> and considered that [REDACTED]<sup>31</sup> and also that “[REDACTED].”<sup>32</sup>
25. The Appeals Chamber then proceeded to hold that [REDACTED] and “the Panel thus concludes that this indicates, at least, that Selimi is predisposed to witness intimidation”<sup>33</sup> and upheld the Pre-Trial Judge’s finding on this issue accordingly.<sup>34</sup>

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<sup>25</sup> Interim Release Appeal Decision, para. 67.

<sup>26</sup> Ibid, para. 68.

<sup>27</sup> Id, para. 66.

<sup>28</sup> Id, para. 65.

<sup>29</sup> [REDACTED].

<sup>30</sup> Id, para 70.

<sup>31</sup> [REDACTED].

<sup>32</sup> [REDACTED].

<sup>33</sup> Id, para 74.

<sup>34</sup> Id, para 75.



26. The Defence reiterates at the outset, all of its submissions before the Appeals Chamber regarding the irrelevance of [REDACTED].<sup>35</sup> These were not addressed by the Chamber.
27. As for the [REDACTED].
28. [REDACTED].
29. [REDACTED].
30. The Defence sought disclosure of a full inventory of the items seized from Mr. Selimi's residence from the SPO, and then sought [REDACTED]. The SPO disclosed to the Defence [REDACTED].<sup>36</sup> [REDACTED].
31. [REDACTED]. To do so, would clearly violate Article 21(6) as well as the principle of equality of arms.
32. The Defence also notes the gaps [REDACTED].
33. The Defence also notes that [REDACTED]<sup>37</sup> [REDACTED].<sup>38</sup> [REDACTED].<sup>39</sup> [REDACTED].
34. Further, the Prosecution has provided no information or evidence as to how [REDACTED].
35. Indeed, the unproven assumption is that [REDACTED].<sup>40</sup> [REDACTED].
36. Even if the Pre-Trial Judge considers that sufficient evidence has been brought before the Chamber to demonstrate that [REDACTED]. [REDACTED].
37. The Pre-Trial Judge previously also relied on the above factors to determine that there was also a sufficient risk that Mr. Selimi would commit crimes if granted interim release, namely "the climate of witness intimidation in Kosovo, Mr Selimi's past and

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<sup>35</sup> [REDACTED].

<sup>36</sup> The Defence attaches at Annex [REDACTED].

<sup>37</sup> [REDACTED].

<sup>38</sup> [REDACTED].

<sup>39</sup> [REDACTED].

<sup>40</sup> [REDACTED].

present prominent position in Kosovo, the [REDACTED].<sup>41</sup> The Appeals Chamber did not explicitly address these arguments.<sup>42</sup>

38. While the Pre-Trial Judge may rely on factors which are relevant for one Article 41(6)(b) condition as equally relevant for another, that does not mean that it can rely upon a finding under Article 41(6)(a) of “a grounded suspicion that he or she has committed a crime within the jurisdiction of the Specialist Chambers” as proof of a risk that Mr. Selimi would commit another crime for which he has been indicted. If that was the case, then interim release would be automatically rejected as anyone indicted by the KSC would be detained pursuant to Rule 46(1)(b)(iii). The Pre-Trial Judge must identify evidence, based on specific reasoning, that a “sufficiently real possibility” exists that Mr. Selimi would commit future crimes directly relating to those for which he has been indicted. The general factors relied upon are manifestly insufficient for this task.
39. Even the [REDACTED] do not demonstrate a “sufficiently real possibility that” Mr. Selimi will commit further crimes as there is no specific evidence put forward that [REDACTED].
40. Finally, the remaining factor which was partly considered in relation to obstructing of proceedings but relied upon more by the Pre-Trial Judge in relation to the risk of committing future crimes was the “serious allegations made against him in the Indictment, especially at the current stage of the proceedings, where Mr Selimi is progressively informed of the evidence underpinning the charges against him, including the identity of witnesses who provided or could provide evidence in the case and/or are due to appear before the SC.”<sup>43</sup>
41. Yet, even on the Prosecution’s case, Mr. Selimi is remote from the vast majority of crimes alleged against him in the Indictment. Indeed, the case against him is based almost exclusively on his alleged role within the KLA General Staff<sup>44</sup> with the principal modes of liability being Joint Criminal Enterprise and Command Responsibility. In turn

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<sup>41</sup> [REDACTED].

<sup>42</sup> Interim Release Appeal Decision, para. 76.

<sup>43</sup> Interim Release Decision, para. 48.

<sup>44</sup> Indictment, paras 8, 15, 19, 36, 42 & 53.

this is largely based on documents produced by, or relating to, the General Staff or a limited number of witnesses who have testified publicly in other cases, such as [REDACTED].<sup>45</sup>

42. As the SPO has explicitly suggested, the crime base, and indeed “details concerning the subordinates’ acts are often unknown and largely not at issue.”<sup>46</sup> The focus of Defence investigations and the case as a whole will not therefore generally relate to the crime base evidence but on Mr. Selimi’s role and authority within this General Staff. This involves a detailed assessment and investigation of the evidence, but will not typically involve detailed investigation of the alleged victims of KLA crimes in the Indictment. This factor significantly reduces the likelihood of whether there is a risk that Mr. Selimi would commit future crimes.

## **VI. Conditions on interim release**

43. The Appeals Chamber interpreted the finding of the Constitutional Court that “to fully comply with the constitutional standards, a panel must consider more lenient measures when deciding whether a person should be detained”<sup>47</sup> to meet that “the Pre-Trial Judge is required, proprio motu, to inquire and evaluate all reasonable conditions that could be imposed on an accused and not just those raised by the Defence.”<sup>48</sup> The Defence also notes that the Pre-Trial Judge considered that conditions were sufficient to mitigate the risk of flight but not that of obstruction of proceedings or commission of future crimes.
44. Despite the Pre-Trial Judge’s limited reasoning on how the conditions were assessed against the risks in light of the lack of any reference to any evidence or analysis of it,<sup>49</sup> the Appeals Chamber interpreted this to mean that “neither the Specialist Chambers, the SPO, EULEX, nor Kosovo police would be able to adequately monitor Selimi’s

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<sup>45</sup> [REDACTED].

<sup>46</sup> Consolidated Prosecution response to THAÇI, SELIMI, and KRASNIQI preliminary motions on the form of the Indictment, KSC-BC-2020-06/F00258, 23 April 2021, para. 28.

<sup>47</sup> KSC-CC-PR-2020-09, F00006, Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020, 26 May 2020, para. 70.

<sup>48</sup> Interim Release Appeal Decision, para 86.

<sup>49</sup> Interim Release Appeal Decision, paras. 89-90.

interim release [...] [and] there are grounds to believe that Kosovo's authorities would be limited in their ability to monitor Selimi's activities if released."<sup>50</sup>

45. However, it is far from clear whether the Pre-Trial Judge specifically considered a prohibition on the use of internet, a keylogger or other monitoring process including visits by local police as raised by the Defence in the Appeal. Given, the "fundamental right of liberty at stake with regard to a suspect or an accused in pre-trial detention and the presumption of innocence governing this part of the proceedings"<sup>51</sup> the Pre-Trial Judge must methodically assess each and every available condition to see whether they could sufficiently mitigate these risks.
46. In so doing, the Pre-Trial Judge must also take into account both the reduction of risk of obstruction and of commission of future crimes based on the above submissions, as well as the unreasonable time period and undue delay caused to proceedings by the SPO in line with Rule 56.

## VII. CONCLUSION AND RELIEF SOUGHT

47. In light of the foregoing, the Defence therefore requests the Pre-Trial Judge to:
- a. Order the interim release of Mr. Selimi, either with, or without, conditions.

**Word count: 3519**

Respectfully submitted on 30 June 2021,

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<sup>50</sup> Ibid, para 91.

<sup>51</sup> Interim Release Appeal Decision, para 86.



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