



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

In: KSC-BC-2020-06

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

Before: Court of Appeals Panel
Judge Michèle Picard
Judge Emilio Gatti
Judge Kai Ambos

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 21 July 2021

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**Public Redacted Version of
Response to Selimi Defence Appeal of June 2021 Detention Decision
with public annex 1**

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I. Introduction

1. With regard to Article 41 of the Law¹ and Rules 57 and 170 of the Rules,² the Specialist Prosecutor's Office ('SPO') responds to the Selimi Appeal,³ against the Decision⁴ rejecting the Accused's request for interim release.

2. The Court of Appeals Panel ('Panel') should deny the Selimi Appeal in its entirety. As set out in detail below: (a) the Decision was properly reasoned; (b) specific risk factors were weighed correctly; (c) no conditions sufficiently mitigate the risks identified; and (d) detention remains proportionate.

II. Procedural background

3. On 26 October 2020, the Pre-Trial Judge confirmed a ten-count indictment against the Accused which charged him with a range of crimes against humanity and war crimes, including murder, enforced disappearance of persons, persecution, and torture.⁵

4. That same day, the SPO's Arrest Warrant Application⁶ was granted by the Pre-Trial Judge.⁷ The Accused went into custody on 5 November 2020 and was transferred to the seat of the KSC in The Hague.

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

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

³ Appeal against Decision on Review of Detention of Rexhep Selimi, KSC-BC-2020-06/IA007/F00001, 8 July 2021, Confidential (notified 9 July 2021) ('Selimi Appeal').

⁴ Public Redacted Version of Decision on Review of Detention of Rexhep Selimi, KSC-BC-2020-06/F00372/RED, 25 June 2021 (public version notified 30 June 2021) ('Decision').

⁵ Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026/RED, 26 October 2020 (public version notified 30 November 2020).

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

⁷ Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders, KSC-BC-2020-06/F00027/RED, 26 October 2020 (public version notified 26 November 2020) ('Arrest Warrant Decision').

5. On 22 January 2021, the Pre-Trial Judge issued the January 2021 Detention Decision rejecting the Accused's request for interim release.⁸ The Pre-Trial Judge concluded that there is a risk that the Accused will abscond, obstruct the progress of KSC proceedings or commit further crimes against those who allege that KLA members committed crimes, including witnesses who provided or could provide evidence in the case and/or are due to appear before the KSC. The Pre-Trial Judge further concluded that no conditions would sufficiently mitigate the risks of the Accused obstructing KSC proceedings or committing further crimes.

6. On 30 April 2021, the Appeals Panel confirmed the January 2021 Detention Decision ('Selimi Detention Appeals Decision').⁹

7. On 25 June 2021, following submissions of the parties,¹⁰ the Pre-Trial Judge reviewed the Accused's detention in the Decision. Detention was extended because the risks previously identified continued to exist and no conditions could mitigate them. The Pre-Trial Judge also found that the Accused's detention remained proportionate.

III. Submissions

A. THE PRE-TRIAL JUDGE WAS NOT REQUIRED TO RE-REASON CONFIRMED FACTORS

⁸ Public Redacted of Decision on Rexhep Selimi's Application for Interim Release, KSC-BC-2020-06/F00179/RED, 22 January 2021 (public version notified 26 January 2021) ('January 2021 Detention Decision').

⁹ Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA003/F00005/RED, 30 April 2021 ('Selimi Detention Appeal Decision').

¹⁰ Public Redacted Version of Selimi Defence Submissions on Review of Detention, KSC-BC-2020-06/F00330, dated 31 May 2021, KSC-BC-2020-06/F00330/RED, 30 June 2021, *responded to in* Public redacted version of Prosecution response to Selimi Defence Submissions on Detention Review, KSC-BC-2020-06/F00346/RED, 14 June 2021, *replied to in* Public Redacted Version of Selimi Defence Reply to SPO Response to Defence Submissions on Review of Detention, KSC-BC-2020-06/F00361, dated 18 June 2021, KSC-BC-2020-06/F00361/RED, 30 June 2021.

8. Many arguments in the Selimi Appeal repeat unsuccessful submissions previously raised on appeal. Nowhere is this more apparent than the Selimi Defence's submissions alleging that the Decision lacked sufficient reasoning.¹¹

9. The Appeals Panel indicated that there were shortcomings in the reasoning of the January 2021 Detention Decision,¹² but the Appeals Panel itself examined the factors and concluded that there was sufficient evidence in the case record for the Pre-Trial Judge to reach the findings made. The January 2021 Detention Decision was not remanded back for the Pre-Trial Judge to provide further reasoning on any point. At the conclusion of the Selimi Appeals Decision, all factors upholding the Accused's detention were sufficiently justified.

10. In this context, and combined with the Appeals Panel's guidance that factual findings underpinning detention need not be set out anew in subsequent detention reviews,¹³ the Pre-Trial Judge was not required to provide further reasoning on the factors already upheld by the Appeals Panel. In the Decision, the Pre-Trial Judge provided clear considerations underpinning each risk found in the Decision, as well as why conditions were insufficient and detention remained proportionate. To the extent that the Accused made new submissions in this review, the Pre-Trial Judge gave full reasoning on these points in the course of resolving them.¹⁴

¹¹ Selimi Appeal, KSC-BC-2020-06/IA007/F00001, paras 2, 5-12, 53.

¹² Selimi Detention Appeal Decision, KSC-BC-2020-06/IA003/F00005/RED, paras 45-48.

¹³ *Prosecutor v. Gucati and Haradinaj*, Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention, KSC-BC-2020-07/IA002/F00005, 9 February 2021, para.55; ICC, *Prosecutor v. Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled "Decision on Applications for Provisional Release", ICC-01/05-01/08-1626-Red, 12 September 2011, para.60 (citations removed: '[t]he Appeals Chamber has previously held that when a Chamber conducts a review of release or detention, it "does not have to enter findings on the circumstances already decided upon in the ruling on detention" or "entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions". [...] The Trial Chamber did not have to re-evaluate this factor in the absence of a suggestion that it had changed or no longer existed').

¹⁴ *E.g.* Decision, KSC-BC-2020-06/F00372/RED, para.61 (explaining the insufficiency of new guarantees provided for conditional release).

11. The Selimi Defence's arguments repeat previous aspects of the Appeals Panel's prior considerations in a manner divorced from its actual findings. In the absence of any justification as to why a factor previously confirmed on appeal should be re-evaluated, the Appeals Panel should summarily dismiss all such arguments.

B. SPECIFIC RISK FACTORS WERE WEIGHED CORRECTLY

12. Specific risk factors challenged by the Accused are addressed below.

13. As a preliminary matter, the Selimi Defence argues that the Pre-Trial Judge erred in not quantifying the degree of risk underpinning his findings.¹⁵ As the Selimi Defence acknowledges, the Appeals Panel set out the applicable threshold in the Selimi Detention Appeals Decision ('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').¹⁶ The Pre-Trial Judge applied this standard in the Decision.¹⁷ There is no requirement to further quantify the risk assessment beyond that set out by the Appeals Panel previously, and in arguing as much the Selimi Defence effectively attempts to raise the required threshold in a manner unsuccessfully argued previously.¹⁸

1. Awareness of crimes and seriousness of sentence

14. The Selimi Defence has already argued that awareness of the crimes and the seriousness of the sentence do not reflect individual risk factors.¹⁹ The Appeals Panel

¹⁵ Selimi Appeal, KSC-BC-2020-06/IA007/F00001, paras 34-40.

¹⁶ Selimi Detention Appeal Decision, KSC-BC-2020-06/IA003/F00005/RED, para.44.

¹⁷ Decision, KSC-BC-2020-06/F00372/RED, paras 43, 45, 51.

¹⁸ Public Redacted Version of Appeal against Decision on Rexhep Selimi's Application for Interim Release, KSC-BC-2020-06/IA003-F00001, dated 3 February 2021, KSC-BC-2020-06/IA003/F00001/RED ('February 2021 Selimi Appeal'), paras 13-23.

¹⁹ February 2021 Selimi Appeal, KSC-BC-2020-06/IA003/F00001/RED, paras 38-41.

rejected this line of argument.²⁰ No reason is given for why this factor should be re-evaluated, nor is any discernible error identified in the Pre-Trial Judge's conclusion that Selimi gained understanding about the gravity of the charges against him after his voluntary surrender.²¹

2. [REDACTED]

15. [REDACTED].²² [REDACTED]. [REDACTED].²³ [REDACTED].

3. Position of influence

16. The Appeals Panel has previously upheld the Pre-Trial Judge's assessment on Selimi's position of influence, and that he has the ability to interact with individuals willing to give him sensitive documents.²⁴ The Pre-Trial Judge's finding in the Decision that Selimi holds a position of influence that allows him to elicit the support of sympathisers²⁵ is nothing more than a restatement of the Appeals Panel's finding. No reason is given for why this factor should be re-evaluated,²⁶ nor is any discernible error identified.

4. Climate of intimidation

17. The Appeals Panel has accepted reliance on a general climate of witness intimidation in Kosovo as a relevant contextual factor in the Article 41(6)(b)(ii)

²⁰ Selimi Detention Appeal Decision, KSC-BC-2020-06/IA003/F00005/RED, paras 52, 61.

²¹ *Contra* Selimi Appeal, KSC-BC-2020-06/IA007/F00001, paras 16-17.

²² [REDACTED].

²³ [REDACTED].

²⁴ Selimi Detention Appeal Decision, KSC-BC-2020-06/IA003/F00005/RED, paras 21, 61, 63, 89.

²⁵ Decision, KSC-BC-2020-06/F00372/RED, para.40.

²⁶ Selimi Appeal, KSC-BC-2020-06/IA007/F00001, paras 22-23.

assessment.²⁷ No justification for re-evaluating this factor is provided, nor is a discernible error identified.²⁸

5. Progressive Disclosure

18. The Pre-Trial Judge properly relied upon the fact that the Accused 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 KSC.²⁹

19. Whether or not the necessity of detention increases because the Accused is progressively informed of the evidence against him is first and foremost a matter for the lower level panel to determine in the exercise of its discretion.³⁰ By virtue of his detailed understanding of the evidence following the confirmation process, the Pre-Trial Judge is best able to assess how additional disclosure impacts the incentives of the Accused and, correspondingly, the Article 41(6)(b) risks. In the present case, the Accused being progressively informed of the witnesses against him was found, in light of all other relevant factors, as a as a consideration grounding the necessity of detention. That the Accused are not alleged to be physically perpetrating the charged crimes does not change this assessment, noting that witnesses and evidence linking the Accused to those crimes are also being progressively disclosed.

20. There is no discernible error in the Pre-Trial Judge's assessment;³¹ the Accused only disagrees with how the Pre-Trial Judge's discretion was applied.

²⁷ See Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA002/F00005/RED, 30 April 2021 ('Krasniqi Detention Appeals Decision'), para.62.

²⁸ *Contra* Selimi Appeal, KSC-BC-2020-06/IA007/F00001, para.28.

²⁹ *Contra* Selimi Appeal, KSC-BC-2020-06/IA007/F00001, paras 18-21.

³⁰ See ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006, para.15 (in the context of the Accused progressively hearing the evidence against him during trial).

³¹ To the contrary, the ICC Appeals Chamber expressly endorsed relying on this factor in the same manner. See ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-278-Red, Judgment on the appeal of Mr Laurent Koudou

6. Factors mitigating risks

21. The Selimi Defence acknowledges that the Pre-Trial Judge took Selimi's strong family and professional ties to Kosovo, the statements describing his good character, his cooperation with SPO investigations and other judicial proceedings, and his voluntary surrender into account in the Decision.³² These same factors were credited in the 22 January 2021 Decision since upheld on appeal.³³ The Selimi Defence merely disagrees with the weight to be attributed to these factors,³⁴ and in the absence of anything justifying a re-evaluation of them no discernible error is identified.

C. NO CONDITIONS SUFFICIENTLY MITIGATE THE RISKS IDENTIFIED

22. The Pre-Trial Judge's finding that no conditions could mitigate the risks posed by the Accused has been upheld on appeal.³⁵ The Pre-Trial Judge gave detailed reasons as to why conditions were insufficient, and did so in light of the new conditions and information provided by the Defence.³⁶ The Selimi Defence merely disagrees with how the Pre-Trial Judge balanced the proposed conditions against the risks, and no discernible error is identified.³⁷

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 ('*Gbagbo Appeals Judgment*'), para.65 (citations removed: '[...] the Appeals Chamber notes that the Pre-Trial Chamber found that the disclosure of evidence "amplified" the risk to the investigation and the court proceedings in case of Mr Gbagbo's release. In the view of the Appeals Chamber, this finding cannot be faulted. Disclosure enhances the detainee's knowledge of the Prosecutor's investigation. Therefore under article 58 (1) (b) (ii) of the Statute [governing risk of interference at the ICC] it may be a relevant factor').

³² Selimi Appeal, KSC-BC-2020-06/IA007/F00001, para.31, *quoting* Decision, KSC-BC-2020-06/F00372/RED, para.43.

³³ January 2021 Detention Decision, KSC-BC-2020-06/F00179, para.32.

³⁴ Selimi Appeal, KSC-BC-2020-06/IA007/F00001, paras 31-33.

³⁵ Selimi Detention Appeals Decision, KSC-BC-2020-06/IA003/F00005/RED, paras 88-93.

³⁶ Decision, KSC-BC-2020-06/F00372/RED, paras 60-62.

³⁷ *Contra* Selimi Appeal, KSC-BC-2020-06/IA007/F00001, paras 41-48. The Selimi Defence's argument that the Pre-Trial Judge overstates the degree of monitoring in the Detention Centre is misconceived. The 'accused are not observed at all times while in detention' (para.45 of the Selimi Appeal), but the Detention Centre allows for a controlled environment where unmonitored communications are strictly limited. The

23. If no condition can mitigate the risks identified, as in the present case, a chamber is not obligated to assess a State's willingness and ability to enforce conditions.³⁸ This said, the Pre-Trial Judge also properly weighed the guarantees provided by the General Director of Kosovo Police.³⁹ Vague assurances from the General Director of the Kosovo Police have previously been deemed insufficient by the Pre-Trial Judge to address the risk of obstruction,⁴⁰ and the Appeals Panel upheld this finding.⁴¹ There is no discernible error in relying on the lack of specificity of these assurances as concerns Selimi.

D. DETENTION REMAINS PROPORTIONATE

24. The Appeals Panel has previously determined that the Pre-Trial Judge's detention assessment did not require estimating the probable length of detention.⁴² The Pre-Trial Judge did not accept any particular party's estimate on the start date of trial, only relying on the fact that the parties differed in their estimates.⁴³ Wide differences in these estimates remain. The Appeals Panel has itself cited this consideration when confirming

Accused are allowed private visits, for instance, but only for certain specified family members once every three months. Article 24 of the Registry Practice Direction on Detainees Visits and Communications, KSC-BD-09/Rev1/2020, 23 September 2020. The conditions proposed by the Selimi Defence would permit unmonitored conversations occurring on a daily basis – this fundamentally changes the risk calculus. In contrast, *see* Article 15(1) of KSC-BD-09/Rev1/2020 ('[v]isits with a Detainee pursuant to this Chapter shall be conducted within the sight and hearing of Detention Officers').

³⁸ *Gbagbo Appeals Judgment*, ICC-02/11-01/11-278-Red, 26 October 2012, para.80.

³⁹ Selimi Appeal, KSC-BC-2020-06/IA007/F00001, para.48.

⁴⁰ *See* Decision on Kadri Veseli's Application for Interim Release, KSC-BC-2020-06/F00178, 22 January 2021, para.59, *in relation to* Annex 11 to Defence Reply to the SPO's response to the Provisional Release Application of Kadri Veseli, KSC-BC-2020-06/F00174/A11, 13 January 2021. *See also* Public Redacted Version of Decision on Review of Detention of Kadri Veseli, KSC-BC-2020-06/F00380/RED, 2 July 2021, para.49.

⁴¹ Veseli Detention Appeals Decision, KSC-BC-2020-06/IA001/F00005, para.74 (noting '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').

⁴² *See* Krasniqi Detention Appeals Decision, KSC-BC-2020-06/IA002/F00005/RED, para.71.

⁴³ Decision, KSC-BC-2020-06/F00372/RED, para.67.

the Pre-Trial Judge's prior finding on the proportionality of the Accused's detention,⁴⁴ and did so without evaluating the relative merits of any particular estimate.

25. All relevant considerations underpinning the finding that detention remained proportionate are set out clearly,⁴⁵ and the Pre-Trial Judge committed no discernible error in concluding that estimating pre-trial detention remained premature and speculative.⁴⁶

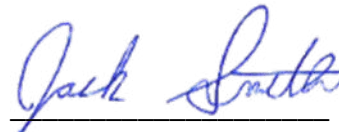
IV. Classification

26. The present submission is submitted confidentially pursuant to Rule 82(4). The SPO will file a public redacted version.

V. Conclusion

27. For the foregoing reasons, the Panel should deny the Selimi Appeal in its entirety.

Word count: 2667



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Wednesday, 21 July 2021

At The Hague, the Netherlands.

⁴⁴ Selimi Detention Appeal Decision, KSC-BC-2020-06/IA003/F00005/RED, para.81.

⁴⁵ Decision, KSC-BC-2020-06/F00372/RED, para.67.

⁴⁶ *Contra* Selimi Appeal, KSC-BC-2020-06/IA007/F00001, paras 49-52.