

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: Counsel for Rexhep Selimi

Date: 26 July 2021

Language: English

Classification: Public

**Selimi Defence Reply to “Response to Selimi Defence Appeal of June 2021
Detention Decision with public annex 1”**

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I. INTRODUCTION

1. The Defence of Mr. Selimi (“Defence”) hereby replies¹ to the SPO Response² to the Selimi Appeal against Decision on Review of Detention of Rexhep Selimi (“Appeal”),³ in which the Defence respectfully requested the Appeals Chamber to (i) reverse the Decision of the Pre-Trial Judge⁴ to maintain Mr. Selimi in detention and (ii) order the immediate interim release of Mr. Selimi, either with or without conditions assessed to be appropriate in his particular circumstances.
2. While this reply is limited to addressing the issues raised in the Response, the Defence maintains its original submissions in full. Further, the absence of a specific submission in reply to any aspect of the Response is not indicative of a concession as to the validity of the SPO submission.

II. SUBMISSIONS IN REPLY

A. The SPO mischaracterises Defence submissions on the Pre-Trial Judge’s reasoning

3. Ground A of the Appeal argued *inter alia* that the discretionary powers wielded by the Pre-Trial Judge lacked the required transparency to facilitate the Defence’s automatic right to appeal the Decision.⁵ In its Response, the SPO mischaracterises these submissions as relating solely to matters previously addressed by the Appeals Panel and incorrectly argues that “to the extent that the Accused made new submissions [...], the Pre-Trial Judge gave full reasoning on these points in the course of resolving them”.⁶

¹ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (‘Rules’), Rule 170(1). All references to ‘Rule’ or ‘Rules’ herein refer to the Rules, unless otherwise specified.

² KSC-BC-2020-06/IA007/F00003, Response to Selimi Defence Appeal of June 2021 Detention Decision with public annex 1, 21 July 2021 (“Response”).

³ KSC-BC-2020-06/IA007/F00001, Appeal against Decision on Review of Detention of Rexhep Selimi, 8 July 2021.

⁴ KSC-BC-2020-06/F00372, Decision on Review of Detention of Rexhep Selimi, 25 June 2021 (“Impugned Decision”).

⁵ Appeal, paras 2, 5 - 12.

⁶ Response, paras 8 – 11.

4. First, the Response ignores the foundational issue of this ground of appeal; that the continued and repeated deficiency of reasoning undermines the Defence's right to appeal the Impugned Decision. As conceded by the SPO in its Response, the Appeals Panel agreed,⁷ that the January 2021 Detention Decision⁸ suffered from a shortcoming of reasoning.⁹ Criticism from the Appeals Panel was not limited to its general findings on the "Duty to Provide a Reasoned Opinion", as implied in the Response, but in fact referred to several specific failings on the part of the Pre-Trial Judge.¹⁰ The Impugned Decision not only does not cure these defects, but repeats and adds to them, ensuring that the jurisprudence which is developing, and will continue to develop, will leave an opaque understanding of how the Pre-Trial Judge exercises his discretionary powers.
5. Second, that the Appeals Panel managed to decipher the reasoning of the Pre-Trial Judge in a prior decision¹¹ should not mean that the Defence and the Appeals Panel are required to search for the rationale and justification of each decision on interim release.¹² In this light, the SPO's contention in response to Ground A that "the Pre-Trial Judge gave full reasoning on [new submissions]",¹³ a contention which is rejected by the Defence, should be properly regarded as a subtle invitation for the Appeals Panel to repeat this same exercise. This must not be set as precedence.
6. Finally, in addition to the above submissions on reply, the Defence notes that the Appeals Panel saw fit to "strongly [urge] the Pre-Trial Judge to provide fuller reasoning in future decisions on applications for interim release or review of detention".¹⁴ While this is short of a judicial order, the Defence respectfully submits that the Pre-Trial Judge's failure to take on board the urging of the Appeals Panel in the Impugned Decision should result in stronger measures in order to preserve the rights of the Accused and his ability to understand the reasoning of the Pre-Trial Judge.

⁷ Decision on Rexhep Selimi's Appeal Against Decision on Interim Release, 30 April 2021, KSC-BC-2020-06/IA003/F00005, ("Interim Release Appeal Decision"), para. 70.

⁸ Public Redacted Version 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 Response, para. 9. See January 2021 Detention Decision, paras 45 – 48.

¹⁰ Response, para. 6.

¹¹ Response, para. 9.

¹² Appeal, para. 15.

¹³ Response, para. 10. The Defence notes that in the citation provided by the SPO, only one example is provided of this apparent full reasoning.

¹⁴ Interim Release Appeal Decision, para. 48.

B. The SPO misstates the findings of the Appeals Panel regarding awareness of the crimes and seriousness of the sentence

7. The SPO asserts that Defence arguments concerning awareness of the crimes and the seriousness of the sentence have previously been rejected by the Appeals Panel.¹⁵ This is incorrect. Neither the specific paragraph of the Interim Release Appeal Decision cited as support for this assertion in the Response, nor the paragraphs that follow, address this argument.
8. As noted above, the Defence maintains the submissions contained in its Appeal.¹⁶ In light of the SPO's lack of clarity as to why this factor should be re-evaluated, the Defence respectfully offers jurisprudence in support of its position. In deciding on an accused's application for provisional release, a Trial Chamber at the ICTY found that "the expectation of a lengthy sentence cannot be held against the accused *in abstracto* because all accused before this Tribunal, if convicted, are likely to face heavy sentences".¹⁷ This position, in particular the latter part of the quoted text, reflects that of the Defence.¹⁸

C. The SPO seeks to punish the Accused via its disclosure obligations

9. The SPO's position that the necessity of the Accused's detention increases as he is progressively informed of the evidence against him portrays the illegitimate and unfair regard in which it holds the fundamental rights of the Accused. Mr. Selimi has not been convicted of any crime by the KSC, yet the SPO seeks to extend his detention by using the disclosure measures enshrined in the Law and the RPE in order to effectively punish him prior to the issuance of a Trial Judgment.

¹⁵ Response, para. 14.

¹⁶ See above, para. 2.

¹⁷ *Prosecutor v Haradinaj*, No. IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release (6 June 2005), para. 24. See also, *Prosecutor v Stanisic*, Case No. IT-03-69-PT, Decision on Provisional Release, 28 July 2004, para. 22 (citing *Ilijkov v. Bulgaria*, European Court of Human Rights, Judgement of 26 July 2001, para. 81); *Prosecutor v Pavkovic et al*, No. IT-04-70-PT, Decision on Defence Request for Provisional Release (14 April 2005) at page 4; *Prosecutor v Delic*, No. IT-04-83-PT, Decision on Defence Request for Provisional Release (6 May 2005); *Prosecutor v Perisic*, No. IT-04-81-PT, Decision on Momcilo Perisic's Motion for Provisional Release (9 June 2005); *Prosecutor v Popovic et al*, No. IT-05-88-AR65.1, Decision on Interlocutory Appeal of Trial Chamber Decision Denying Drago Nikolic's Motion for Provisional Release (24 January 2006).

¹⁸ Appeal, para. 16.

10. As the SPO makes clear in its Response, it is firm that interim release should never be granted to the Accused regardless of the circumstances or conditions, and with its submissions on progressive disclosure, seeks to ensure that this is the case in pleading that allowing the Accused to prepare his defence by notifying him of the case against him must in turn erode his right to liberty.
11. This position is a distortion of the measures put in place to ensure the fundamental rights of the Accused and must be rejected by the Appeals Panel.

D. The SPO misstates the findings of the Appeals Panel regarding conditions that could mitigate risks

12. The SPO asserts that “the Pre-Trial Judge’s finding that no conditions could mitigate the risks posed by the Accused has been upheld on appeal”.¹⁹ This is also incorrect.
13. First, the paragraphs cited by the SPO in support of this position relate only to the conditions proposed *at the time* of issuing the Interim Release Appeal Decision. Further, the Appeals Panel limited its findings solely to the Accused’s ability to communicate with other individuals.²⁰ In making its findings, the Appeals Panel noted once again the deficient reasoning of the Pre-Trial Judge.²¹
14. Second, as noted above, the Appeals Panel’s finding was made according to the relevant information submitted before the Interim Release Decision, dated 30 April 2021. The proposed additional conditions for release were submitted by the Defence on 18 June 2021, almost three weeks after the issuance of the Interim Release Appeal Decision.²² These proposed additional conditions go directly to the issue of whether the Accused’s communications can be *effectively* restricted and monitored,²³ and as such, the Appeals

¹⁹ Response, para. 22.

²⁰ Interim Release Appeal Decision, para. 89.

²¹ Interim Release Appeal Decision, para. 90.

²² KSC-BC-2020-06, F00361, Defence for Mr Selimi, Selimi Defence Reply to SPO Response to Defence Submissions on Review of Detention, 18 June 2021 (notified on 21 June 2021), confidential, with Annexes 1-2.

²³ Interim Release Appeal Decision, para. 92.

Panel has not issued a decision on the reasonableness of the Pre-Trial Judge's finding in the Impugned Decision.

15. In light of this, SPO's suggestion that the Interim Release Appeal Decision could be utilised to employ a pre-emptive rejection of the proposed additional conditions is incorrect. The Defence respectfully reiterates its position that in rejecting the proposed additional conditions, the Pre-Trial Judge abused his discretion.
16. Finally, the SPO's position regarding the assurances provided by the General Director of the Kosovo Police, and the Appeals Panel's finding on the same, similarly relates to the conditions as proposed at the time of the Interim Release Appeals Decision.²⁴ As stated in the Appeal, the assurance of the General Director was provided as part of the specific invitation to engage directly with the Director of Police, if any clarification or further information was required on the proposed additional measures of the Selimi Defence.²⁵ The Pre-Trial judge, in dismissing these assurances based on his own speculation as to the practicalities of the proposed additional conditions,²⁶ and without showing any willingness to engage with the General Director, decided in a manner so unfair and unreasonable that it constitutes an abuse of discretion.
17. In light of the foregoing, the Defence therefore requests the Appeals Chamber to:
 - a. Reverse the Decision of the Pre-Trial Judge to maintain Mr. Selimi in detention; and
 - b. Order the immediate Interim release of Mr. Selimi, either with, or without, conditions assessed to be appropriate in his particular circumstances.

Word count: 1,740

Respectfully submitted on 26 July 2021,

²⁴ Response, para. 23.

²⁵ Appeal, para. 48.

²⁶ Impugned Decision, paras 61, 62.



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