



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

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Response to Veseli Defence Appeal of July 2021 Detention Decision

with confidential 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 Veseli Appeal,³ against the Decision⁴ rejecting the Accused's request for interim release.

2. The Court of Appeals Panel ('Panel') should deny the Veseli Appeal in its entirety. As set out in detail below: (a) the evidentiary standard for continued detention was met; (b) progressive disclosure was weighed correctly; and (c) no conditions sufficiently mitigate the risks identified and no further submissions were necessary.

II. Procedural background

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

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 Veseli Defence Appeal of Decision KSC-BC-2020-06/F00380 (First Detention Review), KSC-BC-2020-06/IA008/F00001, 15 July 2021, Confidential (with two annexes) ('Veseli Appeal'). The Veseli Appeal restarts numbering paragraphs at the beginning of Section IV ('Submission'). Unless otherwise specified, all citations in this response are to the paragraph numbers in Section IV of the Veseli Appeal.

⁴ Public Redacted Version of Decision on Review of Detention of Kadri Veseli, KSC-BC-2020-06/F00380/RED, 2 July 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), *confirming* Lesser Redacted Version of Redacted Indictment, KSC-BC-2020-06/F00045-A02, 4 November 2020, KSC-BC-2020-06/F00134, 11 December 2020. An amended version of this indictment was recently ordered, but these amendments do not affect this appeal.

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.

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 ('Veseli Detention Appeals Decision').⁹

7. On 2 July 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.

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').

⁸ Decision on Kadri Veseli's Application for Interim Release Specialist Prosecutor, KSC-BC-2020-06/F00178, 22 January 2021 ('January 2021 Detention Decision').

⁹ Decision on Kadri Veseli's Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA001/F00005, 30 April 2021 ('Veseli Detention Appeal Decision').

¹⁰ Public Redacted Version of Veseli Defence Submissions on Detention Review with Confidential Annexes A to C (F00341 dated 4 June 2021), KSC-BC-2020-06/F00341/RED, 25 June 2021 (with three annexes), *responded to in* Public redacted version of Prosecution response to Veseli Defence Submissions on Detention Review, KSC-BC-2020-06/F00354/RED, 17 June 2021 (with annex) ('June 2021 Detention Response'), *replied to in* Public Redacted Version of Veseli Defence Reply to SPO Response - KSC-BC-2020-06/F00354 (Detention Review) (F00365 dated 22 June 2021), KSC-BC-2020-06/F00365/RED, 24 June 2021 (with annex).

III. Submissions

A. THE EVIDENTIARY STANDARD FOR CONTINUED DETENTION WAS MET

8. Pursuant to Article 41(6)(a), the Pre-Trial Judge was required to conclude that there was a ‘grounded suspicion’ that Veseli committed crimes within the jurisdiction of the KSC. Contrary to the Veseli Defence arguments,¹¹ nothing has changed requiring re-evaluation of the Article 41(6)(a) finding.

9. Factual findings underpinning detention need not be set out anew in subsequent detention reviews,¹² and the Pre-Trial Judge correctly dismissed Veseli’s arguments in the Decision.¹³ The Article 41(6)(a) standard is even lower than the well-grounded suspicion standard necessary to confirm the indictment against the Accused.¹⁴ Moreover, an Article 41(6) inquiry is fundamentally distinct from the consideration of evidence in the course

¹¹ Veseli Appeal, KSC-BC-2020-06/IA008/F00001, paras 1-5.

¹² *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’).

¹³ Decision, KSC-BC-2020-06/F00380/RED, paras 22-29.

¹⁴ *Contra* Veseli Appeal, KSC-BC-2020-06/IA008/F00001, para.5 (making inaccurate reference to the higher standard).

of trial.¹⁵ This is not a ‘procedural excuse’ that the SPO ‘hide[s] behind’,¹⁶ but rather a distinction grounded in the statutory framework¹⁷ and recognised by the Pre-Trial Judge.¹⁸

10. The only justification provided by the Veseli Defence to re-evaluate the Article 41(6)(a) finding is a challenge to certain of the evidence concerning Veseli’s personal participation in crimes. As correctly noted by the Pre-Trial Judge, Veseli is not charged as a direct perpetrator of any crimes.¹⁹ His contributions to the crimes charged are multi-faceted, as are the factors grounding his mental state.²⁰ These other factors are not ‘residual’,²¹ and it misrepresents the Confirmed Indictment to suggest that Veseli’s personal participation in crimes forms a centrepiece of the case charged. It was entirely reasonable for the Pre-Trial Judge to conclude that the Article 41(6)(a) finding would not change even if the very selective evidence identified by Veseli were disregarded.²²

¹⁵ ICC, *Prosecutor v. Ongwen*, Decision on the “Defence Request for the Interim Release of Dominic Ongwen”, ICC-02/04-01/15-349, 27 November 2015 (reclassified 24 March 2016), paras 7-13 (at para.7 - the ICC Statute’s interim release framework ‘cannot be understood to require, for the disposal of an application for interim release, an examination of the merits of the case with a view to determining whether there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court’); ICC, *Prosecutor v. Ntaganda*, Decision on the Defence’s Application for Interim Release, ICC-01/04-02/06-147, 18 November 2013, para.47 ([t]he purpose of an [interim release] assessment under article 60(2) of the [ICC] Statute differs from that required for the purpose of the confirmation of charges or making a finding on the merits upon trial. An assessment pursuant to article 60(2) of the Statute neither aims at confirming one or more charges nor at making a finding of guilt against an accused person, which require meeting a high evidentiary threshold’).

¹⁶ Veseli Appeal, KSC-BC-2020-06/IA008/F00001, para.4.

¹⁷ Compare Article 41(6)(a) with Rule 140(1) (‘A Panel may find an Accused guilty where guilt is proved beyond reasonable doubt’).

¹⁸ See Decision, KSC-BC-2020-06/F00380/RED, para.27.

¹⁹ Decision, KSC-BC-2020-06/F00380/RED, para.23.

²⁰ E.g. Confirmed Indictment, KSC-BC-2020-06/F00134, para.49.

²¹ Contra Veseli Appeal, KSC-BC-2020-06/IA008/F00001, paras 2-3.

²² Decision, KSC-BC-2020-06/F00380/RED, para.27. See similarly ICC, *Prosecutor v. Abd-Al-Rahman*, Public redacted version of ‘Decision on the Review of the Detention of Mr Abd-Al-Rahman pursuant to rule 118 (2) of the Rules of Procedure and Evidence’, ICC-02/05-01/20-230-Red, 11 December 2020, paras 25-27 (rejecting interim release arguments premised on the inadmissibility of evidence relied upon in the warrant of arrest when the Defence arguments, even if accepted in their entirety, would not lead to the annulment of the arrest warrant), confirmed on appeal in ICC, *Prosecutor v. Abd-Al-Rahman*, Judgment on the appeal of

11. The SPO is not required to prove its case against Veseli in the context of responding to an appeal against an extension of his detention.²³ Having determined that Veseli's evidentiary arguments did not alter the basis of the Confirmation Decision's findings, let alone the Rule 41(6)(a) assessment, the Decision correctly did not engage further with them, and no discernible error is identified to suggest the Pre-Trial Judge abused his discretion.

B. PROGRESSIVE DISCLOSURE WAS WEIGHED CORRECTLY

12. 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.²⁴

13. 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.²⁵ 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 consideration further grounding the necessity of detention. That the Accused are not alleged to be physically perpetrating the charged crimes does not change

Mr Abd-Al-Rahman against Pre-Trial Chamber II's 'Decision on the Review of the Detention of Mr Abd-Al-Rahman pursuant to rule 118 (2) of the Rules of Procedure and Evidence', ICC-02/05-01/20-279-Red, 5 February 2021, paras 28-33.

²³ *Contra* Veseli Appeal, KSC-BC-2020-06/IA008/F00001, paras 3-4.

²⁴ *Contra* Veseli Appeal, KSC-BC-2020-06/IA008/F00001, paras 6-8.

²⁵ 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).

this assessment, noting that witnesses and evidence linking the Accused to those crimes are also being progressively disclosed.²⁶

14. There is no discernible error in the Pre-Trial Judge's assessment;²⁷ the Accused merely disagrees with how the Pre-Trial Judge's discretion was applied.

C. NO CONDITIONS SUFFICIENTLY MITIGATE THE RISKS IDENTIFIED AND NO FURTHER SUBMISSIONS WERE REQUIRED

15. The Pre-Trial Judge's finding that no conditions could mitigate the risks posed by the Accused has been upheld on appeal.²⁸ In the Decision, 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.²⁹ The particular risks posed by the Accused's intelligence background, as correctly considered by the Pre-Trial Judge, are not an 'arbitrary addition';³⁰ rather they reflect factors specific to the Accused, which further heighten the risks posed. The Veseli Defence merely disagrees with how the Pre-Trial Judge balanced the proposed conditions against the risks, and no discernible error is identified.³¹

²⁶ In this regard, Veseli Defence's selective framing of the case against the Accused also affects this ground of appeal. *See Veseli Appeal*, KSC-BC-2020-06/IA008/F00001, para.6 (on an alleged failure to disclose any evidence amplifying Veseli's criminal liability, understood again through the lens of personal participation in crimes).

²⁷ 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 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').

²⁸ *See Veseli Detention Appeals Decision*, KSC-BC-2020-06/IA001/F00005, paras 66-77.

²⁹ *Decision*, KSC-BC-2020-06/F00380/RED, paras 47-51.

³⁰ *Contra Veseli Appeal*, KSC-BC-2020-06/F00380, para.9.

³¹ *Contra Veseli Appeal*, KSC-BC-2020-06/F00380, paras 9-10.

16. 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.³² This said, the Pre-Trial Judge also properly weighed the guarantees provided by the General Director of Kosovo Police ('Police Director'). Vague assurances from the Police Director have previously been deemed insufficient by the Pre-Trial Judge to address the risk of obstruction,³³ and the Appeals Panel upheld this finding.³⁴ The new assurance is not meaningfully different.³⁵ Even if the conditions proposed by Veseli's counsel had been explicitly identified and adopted in the new assurance, these conditions remain insufficient to address the risks posed by Veseli if released.

17. For this reason, there was no reason to seek any further submissions from the Police Director about the enforcement of conditions.³⁶ It is within the discretion of the Pre-Trial Judge to seek further clarifications on state guarantees; he is not obliged to do so. That the assurance from the Police Director was found wanting cannot be enough on its own to require receipt of further submissions, as the Appeals Panel has already found no error in exactly these same circumstances.³⁷

18. No discernible error is identified in the Pre-Trial Judge's conclusions as to the new assurances' lack of specificity and the absence of any need to supplement them. As such, this ground of appeal should be dismissed and no additional instructions to the Pre-Trial Judge are warranted.³⁸

³² *Gbagbo* Appeals Judgment, ICC-02/11-01/11-278-Red, 26 October 2012, para.80.

³³ See 22 January Detention Decision, KSC-BC-2020-06/F00178, 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.

³⁴ 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').

³⁵ See June 2021 Detention Response, KSC-BC-2020-06/F00354/RED, paras 19-20.

³⁶ *Contra* Veseli Appeal, KSC-BC-2020-06/F00380, paras 11-13.

³⁷ Veseli Detention Appeals Decision, KSC-BC-2020-06/IA001/F00005, paras 66, 74.

³⁸ *Contra* Veseli Appeal, KSC-BC-2020-06/F00380, para.13 (seeking alternative relief whereby, if the decision is not overturned, it is returned with further instructions).

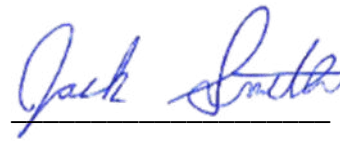
IV. Classification

19. The present submission is submitted confidentially pursuant to Rule 82(4). The SPO has no objection to this filing and its annex being reclassified as public.

V. Conclusion

20. For the foregoing reasons, the Panel should deny the Veseli Appeal in its entirety.

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Monday, 26 July 2021

At The Hague, the Netherlands.