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In:	**KSC-BC-2020-06** **Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**
Before:	**President of the Kosovo Specialist Chambers,** Judge Ekaterina Trendafilova
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Rexhep Selimi
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Public Redacted Version of Appeal against Decision on Review of Detention of Rexhep Selimi

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I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law[1] and Rules 58(1) and 170 of the Rules,[2] The Defence for Mr. Rexhep Selimi hereby files this Appeal against the Decision on Review of Detention of Rexhep Selimi, issued by the Pre-Trial Judge on 25 June 2021 ("Second Detention Decision") and notified on 28 June 2021,[3] which ordered Mr. Selimi's continued detention.

2. The Second Detention Decision again displays a paucity of legal and factual reasoning. The limited reasoning which is employed demonstrates that the Pre-Trial Judge has entirely fettered his discretion by making it clear he will not grant interim release to Mr. Selimi, whatever the circumstances, irrespective of the merits of such an Application by the Accused.

3. The Defence therefore raises the following issues on appeal:

   i. The lack of substantiation and reasoning in the Impugned Decision;
   ii. The legal and factual errors in relation to the identification of Article 41(6)(b) risks;
   iii. The failure to grade levels of risk and appropriately assess the concomitant proposed conditions that would mitigate such risks;
   iv. The unreasonable, incomplete and speculative assessment of the proposed conditions and their enforcement by the Kosovo Police; and,
   v. The refusal to consider the potential duration of proceedings in relation to interim release.

4. Given these errors and the Pre-Trial Judge's apparent refusal to apply the directions previously given by the Appeals Panel, it is not appropriate for the Appeals Panel to refer the issue of whether Mr. Selimi should continue to be detained back to the Pre-Trial Judge for further adjudication. Instead, the Appeals Panel should directly apply

[1] 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.
[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] Decision on Review of Detention of Rexhep Selimi, 25 June 2021, KSC-BC-2020-06/F00372.

the correct legal principles, substitute its reasoning for that of the Pre-Trial Judge and directly order Mr. Selimi's immediate release with, or without conditions.

II. SUBMISSIONS

A. The Impugned Decision lacked substantiation and reasoning

5. Although ultimately upholding the First Detention Decision, the Appeals Panel was crystal clear in criticising the Pre-Trial Judge's conspicuous lack of reasoning throughout the First Detention Decision. For example, the Appeals Chamber held that the Pre-Trial Judge's reasoning relating to Mr. Selimi's [REDACTED]."[4] Similarly, it also held that First Detention Decision "lacks reasoning with regard to Selimi's [REDACTED]"[5] and moreover, that "when assessing the Proposed Conditions against the risk of obstructing the proceedings, the Impugned Decision does not refer to any evidence."[6]

6. These are not superficial or technical flaws in the First Detention Decision which can be ignored or glossed over by the Pre-Trial Judge, for they are substantive failings which prevent the Defence from meaningfully being able to analyse and understand the Impugned Decision. The Pre-Trial Judge must render a reasoned opinion and indicate all relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision.[7] Sufficiently detailed and unambiguous reasoning is vital to ensure the Defence can effectively exercise its automatic right to appeal the decision. The absence of reasoning on crucial issues decided by the Pre-Trial Judge in the Impugned Decision therefore fundamentally compromises the Defence's ability to do so.

[4] 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.
[5] Ibid, para. 89.
[6] Id, para. 90.
[7] Prosecutor v. Milutinovic et al, No. IT-99-37-AR65, Decision on Provisional Release (30 October 2002), para. 6.

7. The Defence specifically raised the issue of the lack of judicial reasoning in its Submissions[8] due to the all too real concerns that it would be provided again with a decision that does little more than make sweeping findings without identifying the evidence relied upon[9] or otherwise adopts wholesale the content of decisions issued in relation to other accused. Yet the Defence's stated genuine concerns again appear to have been ignored.

8. While adequate and detailed reasoning is necessary for all decisions before the KSC, its importance is accentuated in relation to reviewing detention due to the consequences of the decision, the potentially repetitive nature of decisions on release and the discretionary nature of the judicial assessment which forms the basis of this decision.

9. First, interim release is not simply a minor procedural issue relating to the scheduling of a filing, disclosure of a document or any of the other relatively routine decisions issued over the course of long and complex international criminal proceedings. By their very nature, decisions on interim release directly affect the liberty of the accused, a fundamental right protected by all human rights instruments. It merits a detailed and thorough decision above and beyond almost any other.

10. Second, although the legal framework of reviewing detention pursuant to Articles 41(6) and 41(10) and Rule 57(2) requires that the Pre-Trial Judge decide anew upon whether to maintain the detention of an accused, the Pre-Trial Judge held that although he must examine these reasons or circumstances and determine whether they still exist, he was "not required to make findings on the factors already decided upon in the initial ruling on detention."[10] The interpretation that factors that had previously been decided upon did not require new findings inevitably means therefore that there will be a reduction in reasoning on these factors in subsequent decisions to the detriment of the accused. This temptation must be avoided.

[8] Selimi Defence Submissions on Review of Detention, 31 May 2021, KSC-BC-2020-06/F00330, para. 24 ("Defence Submissions").
[9] See Prosecutor v. Gucati and Haradinaj, Decision on the Defence Appeals Against Decision on Preliminary Motions, KSC-BC-2020-07/IA004, 23 June 2021, paras 16-17 for the importance of properly referenced filings.
[10] Impugned Decision, para. 16.

11. Third, the Appeals Panel has previously held that decisions on interim release are discretionary[11] and that when appealing such a decision "the appellant must demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion."[12] In such circumstances, the specific factors identified and relied upon by the Pre-Trial Judge when exercising his discretion take on an even greater importance in order to properly assess whether this discretion is being exercised appropriately.

12. The Pre-Trial Judge's failure to provide the necessary reasoning in the Impugned Decision fatally compromises it. Neither the Defence, nor the Appeals Panel, should be required to search for the rationale and justification for any findings that are relied upon by the Pre-Trial Judge to deny the release of Mr. Selimi. If such reasoning and justification are not clearly set out in the Impugned Decision, the finding they are directed towards must therefore be set aside.

B. Legal and Factual errors concerning the identification of Article 41(6)(b) risks

13. The Pre-Trial Judge's assessment that he was satisfied of the existence of each of the Article 41(6)(b) risks[13] was a patently incorrect conclusion of fact and so unfair or unreasonable as to constitute an abuse of the Pre-Trial Judge's discretion. Given the overlap between the different factors purportedly relied upon by the Pre-Trial Judge, they are all addressed together.

14. The Pre-Trial Judge took the following factors into consideration when assessing the Article 41(6)(b) factors:

[11] F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, para. 44 ("*Gucati* Appeal Decision").
[12] Interim Release Appeal Decision, para. 7 citing *Gucati* Appeal Decision, para. 14
[13] Impugned Decision, para. 26 (risk of flight); para. 44 (obstruct proceedings); para. 53 (committing future crimes).

i. Mr. Selimi's awareness of the charges against him and the possibility of a serious sentence in the event of a conviction;[14]

ii. Mr. Selimi's increased insight into the evidence underpinning these charges on the basis of the ongoing disclosure process;[15]

iii. Mr. Selimi's significant role in Kosovo on the basis of the previous positions he occupied and the influence he continues to enjoy which may assist him in evading SC proceedings;[16]

iv. [REDACTED];[17]

v. [REDACTED];[18]

vi. The persisting climate of intimidation of witnesses and interference with criminal proceedings against former KLA members;[19]

15. Although these factors are separated out in relation to the three different risks set out in Article 41(6)(b), the Pre-Trial Judge refers to each interchangeably and repeatedly. Therefore, although the Appeals Panel previously dismissed Defence arguments in relation to some of these factors[20] as the Pre-Trial Judge had found that the risk of flight could be mitigated by conditions proposed,[21] the reliance by the Pre-Trial Judge on these same factors in relation to the other Article 41(6)(b) risks means that they must be addressed now by the Appeals Panel.

16. First, Mr. Selimi's alleged awareness of the crimes and the possibility of a serious sentence, simply reflects the jurisdiction of the KSC which by definition is limited to serious crimes. Lesser crimes do not fall under the KSC's jurisdiction.

17. Moreover, Mr. Selimi was interviewed at length by the SPO both in November 2019 and February 2020 covering extensive and wide-ranging topics by experienced SPO Prosecutors.[22] The Pre-Trial Judge's finding that it is only after Mr. Selimi was arrested, to which he voluntarily surrendered, that he actually became aware of the alleged

[14] Impugned Decision, paras. 25, 50.
[15] Impugned Decision, paras. 25, 50.
[16] Impugned Decision, paras. 25, 40, 50.
[17] Impugned Decision, paras. 33, 37, 38, 50.
[18] Impugned Decision, paras. 39, 50.
[19] Impugned Decision, para. 41.
[20] Interim Release Appeal Decision, para. 50.
[21] Interim Release Appeal Decision, para. 49.
[22] Defence Application for Interim Release, 7 December 2020, KSC-BC-2020-06/F00124, para. 90.

crimes and the possibility of a serious sentence is therefore patently incorrect and not based on reality.

18. Second, any accused brought before the Tribunal, at least theoretically has an increased insight into the evidence underpinning these charges on the basis of the ongoing disclosure process. This is the very process established by the Law and the Rules. The mere notification of such evidence, without further demonstration that the accused has actually used it in some unlawful way, for example to interfere with, threaten or harm the disclosed witnesses, should not have been relied upon by the Pre-Trial Judge as a factor in assessing the Article 41(6) risks.[23] Indeed, the logical consequence of the Pre-Trial Judge's fallacious reasoning is that an accused is only able to be granted interim release before he has received any disclosure, and that as soon as some evidence is provided to him, he will be detained on that basis. This cannot be the logical or fair way of reading the legal framework established by the Rules.

19. However, even if one was to consider that an accused exercising one lawful right to know the nature and cause of the case against him fundamentally compromises the ability to exercise his right to liberty, the vague and unsupported assessment by the Pre-Trial Judge is wholly without merit in this case.

20. As the Defence explained in submissions before the Pre-Trial Judge, even on the Prosecution's case, Mr. Selimi is distinctly remote from the vast majority of crimes alleged against him in the Indictment which is based on JCE and superior responsibility and based on Mr. Selimi's alleged role within the KLA General Staff.[24] The allegations of direct physical participation in any alleged crimes are almost non-existent. The evidence that is relied upon by the SPO appears to come from a limited number of witnesses [REDACTED],[25] or other documentary evidence which is already public. The crime base evidence, which the SPO has already suggested is "often unknown and largely not at issue,"[26] will likely not be a central focus of the case. The supposed

[23] *See*, in this regard, ICTY, *Proscutor v. Stanisic and Simatovic,* Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, *Prosecutor v Stanišić and Simatović* (IT-03-69-AR56.4), 26 June 2008, para.55
[24] Indictment, paras 8, 15, 19, 36, 42 & 53.
[25] [REDACTED].
[26] 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.

increased insight accorded to Mr. Selimi is therefore nothing of the sort as the evidence against him appears to be no more than that which is already referred to repeatedly in the *Haradinaj* Judgment.[27] The Pre-Trial Judge simply ignored this argument, yet it goes to the heart of whether there is a risk he will flee or obstruct the investigation. If most of the disclosed evidence is wholly irrelevant to his own conduct, his awareness of it or otherwise does not increase with its disclosure.

21. The Pre-Trial Judge similarly ignores the substantial and significant restrictions on [REDACTED].[28] [REDACTED]. The Indictment itself is also still extensively redacted from the Defence. Far from gaining a detailed insight into the Prosecution case therefore, Mr. Selimi is still seeking to be made aware of even some of the most basic facets of that case.

22. Third, the Pre-Trial Judge's reliance upon Mr. Selimi's alleged influence as a former and current political leader and Head of the KLA Operational Directorate as a relevant factor fails (again) to identify who is in Mr. Selimi's supposed support network; what level of control he supposedly maintains over this network; and also how this supposed network would therefore be willing and able to provide funds to Mr. Selimi and assist him. Indeed, as held by the Appeals Panel, the findings by the Pre-Trial Judge in the First Detention Decision on Mr. Selimi's purported network of supporters were "very general"[29] and "the fact that 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."[30]

23. The Pre-Trial Judge has made no effort to take this finding by the Appeals Panel into account when addressing this factor. The Pre-Trial Judge's findings therefore constitute nothing more than a speculative assertion that is unsupported by any concrete and identifiable evidence and therefore is a patently incorrect conclusion of fact based on the evidence before him.

24. [REDACTED].[31]

[27] *Prosecutor v. Haradinaj*, Re-Trial Judgment, 29 November 2012, paras. 18-22.
[28] [REDACTED].
[29] Interim Release Appeal Decision, para. 66.
[30] Interim Release Appeal Decision, para. 68.
[31] Impugned Decision, para. 36.

25. [REDACTED].

26. [REDACTED].

27. [REDACTED].[32]

28. Sixth and finally, the Pre-Trial Judge's generic reference to the climate of intimidation of witnesses in Kosovo is vague, and wholly unsubstantiated in relation to Mr. Selimi. While the Defence previously made a passing concession as to the existence of some potential incidents of witness intimidation in the past, this admission did not relate in any way to Mr. Selimi, and does not absolve the Pre-Trial Judge of the obligation to assess whether such incidents have been proven, and whether they are sufficiently proximate in time and space to be relevant in this case. They are not.

29. None of the six factors relied upon interchangeably by the Pre-Trial Judge to support the existence of one of the Article 41(6)(b) risks justify, either individually or collectively, the weight placed in them by the Pre-Trial Judge. They are either unsupported, irrelevant, or simply incorrect.

30. Moreover, when assessed in light of other factors which are favourable to Mr. Selimi, it becomes clearly unarguable that the Pre-Trial Judge has abused his discretion in ordering Mr. Selimi's detention.

31. The Pre-Trial Judge held that Mr. Selimi's "strong family and professional ties to Kosovo, the statements describing his good character, his co-operation with the SPO's investigations and other judicial proceedings, and his voluntary surrender for arrest must be attributed limited weight in view of the seriousness of the considerations set out above."[33] Yet, these factors must be assessed objectively by the Pre-Trial Judge. Their weight must not be reduced by reference to other factors over which Mr. Selimi has no connection whatsoever, such as the climate of witness intimidation in Kosovo. Nor does the Pre-Trial Judge clarify why this would apply to all of the factors so listed. It demonstrates again that the Pre-Trial Judge takes a broad-brush blanket approach,

[32] Interim Release Appeal Decision, para. 70.
[33] Impugned Decision, para. 43.

without any separation or analysis of each individual factor, which would be the required and expected standard of judicial assessment.

32. By way of example, his cooperation with the SPO's investigations and [REDACTED], which has been sustained, extensive and genuine, is not in any way reduced due to the Pre-Trial Judge's findings regarding the Petition and Other Documents. Both must be assessed independently, objectively and thoroughly to make a comprehensive assessment of the Article 41(6)(b) risks. It is clear that this assessment is cursory at best with regards to factors in favour of Mr. Selimi.

33. This is no more evident than in relation to the assessment by the Pre-Trial Judge that "in arguing that he has not (been alleged to have) obstructed the proceedings, Mr. Selimi misstates the applicable test, which pertains to a sufficiently real possibility, and not the inevitability, of such obstruction occurring."[34] In fact, as the Defence set out, "other obvious but important factors include the fact that Mr. Selimi has not obstructed, nor is he alleged to have obstructed, the proceedings."[35] No reasonable trier of fact could consider that the Defence was suggesting that as Mr. Selimi was not alleged to have obstructed these proceedings there is no risk that he would do so. However, that appears to be what the Pre-Trial Judge understood, confusingly suggesting that the Defence had misstated the test for excluding the existence of a risk, thereby demonstrating both the Pre-Trial Judge's misunderstanding of how to apply the test himself and willingness to exclude relevant factors which militate against continued detention.

C. The Impugned Decision failed to delineate between different levels of risk

34. The Appeals Chamber held 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 "it does not follow, however, that any possibility of a risk materialising is sufficient to justify detention"[36] and therefore the Prosecution must demonstrate "more than a mere possibility of a risk materialising."[37] The Appeals Chamber agreed with the Defence

[34] Impugned Decision, para. 43.
[35] Defence Submissions, para. 19.
[36] Interim Release Appeal Decision, para. 40.
[37] Ibid.

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"[38] 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."[39] However, this holding from the Appeals Panel established the minimum threshold for determining that one of the Article 41(6) factors had been met. It did not absolve the Pre-Trial Judge of the responsibility to clearly set out how likely each risk was of materialising.

35. In the Impugned Decision, the Pre-Trial Judge assessed each of the three Article 41(6)(b) factors in turn and held that he was satisfied of the existence of each risk.[40] However, the Pre-Trial Judge failed to specify how likely it was that each risk would actually materialise beyond stating their mere existence and (presumably) that they had met the applicable standard of 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.

36. The likelihood of a risk materialising is fundamentally important as the basis for the assessment by the Pre-Trial Judge as to whether any conditions could mitigate against that risk. It requires that any proposed conditions for interim release be assessed by the Pre-Trial Judge against both the type of risk that is trying to be mitigated (flight, obstruction or future crimes) as well as the likelihood of the risk materialising (marginal, probable or almost certain). Given the low threshold for the Pre-Trial Judge to be satisfied of the existence of an Article 41(6)(b) risk, it thus covers a wide spectrum of situations.

37. For example, in relation to the risk of flight, the Pre-Trial Judge has held that he is satisfied that a risk of flight exists in relation to Mr. Selimi because of his purported knowledge and insight into the allegations against him and role and influence he enjoys over Kosovo society which "may assist him in evading SC proceedings by, for instance, calling upon the support of persons sympathetic to him and/or the KLA, securing access

[38] Id, para. 44.
[39] Ibid.
[40] Impugned Decision, para. 26 (risk of flight); para. 44 (obstruct proceedings); para. 53 (committing future crimes).

to relevant information, and obtaining funds and means to travel."[41] Yet, there is no concrete evidence that Mr. Selimi has ever expressed the desire to evade criminal proceedings, or engage anyone else to assist him to do so. Further, it is important to note that Mr. Selimi willingly surrendered himself to the Kosovo Police on the day of his arrest. As such, even accepting that the evidence demonstrates a risk of flight under Article 41(6)(b)(i) (which the Defence contests as set out above), this evidence barely reaches the applicable threshold.

38. By contrast, it is possible to envisage a situation where an accused has repeatedly escaped from prison, absconded from prior criminal proceedings, and openly declared his willingness to do the same before the KSC and has direct authority over specific individuals who have claimed they will assist him to do so.

39. The difference between this latter hypothetical situation and that of Mr. Selimi could not be more stark. In Mr. Selimi's situation, the required conditions to mitigate this risk would be minimal whereas they would have to be far more onerous to mitigate the risk in the hypothetical example.

40. Thus for each of the Article 41(6)(b) risks, not only does the Pre-Trial Judge have to assess whether it actually exists but must also quantify that risk so as to properly assess whether it can be mitigated. The Pre-Trial Judge failed to do so for any of the Article 41(6)(b) risks, thereby rendering his decision almost impossible to challenge. The Appeals Panel must therefore set aside the Pre-Trial Judge's decision and substitute its own assessment of the risk to carry out this task.

D. The Impugned Decision failed to objectively and effectively assess the Proposed Conditions

41. The Defence notes the previous holding of the Appeals Panel 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."[42] The Defence

[41] Impugned Decision, para 25.
[42] Interim Release Appeal Decision, para 86.

also proposed some of the most extensive and draconian conditions on provisional release that have ever been proposed by the Defence in any international criminal proceedings.[43]

42. However, despite both this extensive obligation upon the Pre-Trial Judge and the extensive list of proposed conditions, the Pre-Trial Judge still considered that the conditions proposed by the Defence, "or any additional conditions cannot sufficiently mitigate the risks under Article 41(6)(b)(ii) and (iii) of the Law."[44]

43. This is a staggering conclusion. It essentially reasons that no conditions exist that could adequately mitigate the Article 41(6)(b) risks regardless of what those measures could theoretically be. It is made without an assessment of the resources or capacity of the Kosovo Police to enforce any such conditions and simply concludes that no conditions could ever mitigate against the risks that he has purportedly identified.

44. To make such a statement, the Pre-Trial Judge envisages the hypothetical situation where messages could be passed on by Mr. Selimi in a number of other ways, namely that "Mr. Selimi could ask someone to pass on a message orally or to use a device belonging to a third person to do so"[45] and "monitoring visits by the Kosovo Police, would insufficiently mitigate this risk due to the possibility of using code or obscure language which cannot be easily recognised or prevented by persons not familiar with SC proceedings."[46] These are nothing more than fanciful and speculative assertions without any serious basis. They are certainly not specified in detail and do not rely on specific reasoning or concrete grounds as would be required for identifying risks under Article 41(6)(b).

45. Moreover, by suggesting that "only through the communication monitoring framework applicable at the SC detention facilities that Mr. Selimi's communications can be restricted and monitored in a way to sufficiently mitigate the risks of him obstructing SC proceedings or committing further crimes,"[47] the Pre-Trial Judge misunderstands

[43] Selimi Defence Reply to SPO Response to Defence Submissions on Review of Detention, KSC-BC-2020-06/F00361, 18 June 2021 ("Reply on Detention Review"), Annex 1.
[44] Impugned Decision, para. 59.
[45] Ibid, para. 62.
[46] Id.
[47] Id, para. 63.

the nature of the detention regime. The accused are not being directly observed at all times while in detention. They are allowed private visits under the rules and may make phone calls which will not necessarily be recorded. Should any accused wish to communicate via codes or obscure language, nothing short of solitary confinement, completely cut off from the outside world, would actually achieve such mitigation of risk to the level of certainty seemingly required by the Pre-Trial Judge.

46. By misunderstanding the detention regime the Pre-Trial Judge sets an artificially high bar on whether conditions for interim release can mitigate the identified risks outside of detention. This has the automatic effect of necessitating the rejection of any proposed conditions, thereby fettering the Pre-Trial Judge's discretion.

47. As explained earlier, in order to assess whether conditions can adequately mitigate an Article 41(6)(b) risk, the Pre-Trial Judge is first obliged to quantify the likelihood of each individual risk with sufficient specificity and not just declare that it exists. If he had fulfilled that obligation, then it would have been possible to properly determine whether and how any conditions could mitigate that risk. As he failed to individually assess the likelihood of each Article 41(6)(b) risk, the Pre-Trial Judge was then able to simply dismiss all potential conditions with one vague assertion without allowing that reasoning to be subject to any scrutiny.

48. The Pre-Trial Judge also abused his discretion in holding that, the response by the General Director of the Kosovo Police to the specific and detailed conditions proposed by the defence was merely "a general assertion, which does not specifically address whether the Proposed Additional Conditions can be efficiently enforced and, if so, which measures would be adopted."[48] The General Director of the KP had confirmed that the KP would "be ready to fulfil all the conditions should they be asked to do so by the Court"[49] having had ample opportunity to carefully consider the proposed conditions. The only reasonable conclusion based on the exchange of correspondence was that the Director of Police was clearly communicating an informed and considered decision on the matter. If the Pre-Trial Judge had wished to take a contrary decision, he should have accepted the specific Defence invitation to engage directly with the

[48] Impugned Decision, para. 61.
[49] Reply on Detention Review, Annex 2. Response from the General Director of the Kosovo Police to Counsel for Mr. Selimi, 14 June 2021.

Director of Police, if any clarification or further information was required. This is especially the case where the issue appears to be how exactly the KP would enforce specific conditions. Indeed, it would be somewhat ironic to require the Defence to explain how exactly it would be subject to monitoring, when part of the effectiveness of this monitoring is dependent on the accused being unaware of such specifics.

E. The Impugned Decision failed to assess the expected total length of detention in a timely manner.

49. The Impugned Decision held that for various reasons, including that Mr. Selimi and the SPO continue to differ as to the likely start date of the trial "the time Mr. Selimi has spent in pre-trial detention is not unreasonable and that, at the present stage, any discussion as to the expected total length of Mr. Selimi's pre-trial detention for the purposes of Rule 56(2) of the Rules remains premature and speculative."[50]

50. However, simply because there are differences of opinion between the parties, this does not mean that the Pre-Trial Judge is prohibited from making a reasoned decision on the basis of these submissions. It is the central responsibility of the Pre-Trial Judge throughout proceedings to weigh the position of the parties and assess which position, or indeed neither, is correct. This is not a binding decision on the start date for trial, but rather the identification of a relevant factor for assessing the reasonableness and proportionality of detention. It is thus incomprehensible why this factor is considered by the Pre-Trial Judge to be "speculative and premature," whereas all other factors identified by the Pre-Trial Judge as being relevant to Mr. Selimi's detention are entirely appropriate.

51. Furthermore, the relevant information willingly provided by the SPO, both before the decision and since it was issued, fully reinforces the Defence's position that the trial will not start in this case until well into 2022. Given the size and complexity of this case, the SPO's competing trial obligations in other cases, which will start before it, and the backdrop of the continuing global covid pandemic, it would be wholly unreasonable to conclude that it could take place in any fair manner before that time.

[50] Impugned Decision, para. 68.

52. The refusal by the Pre-Trial Judge to take this factor into account, despite being provided with the relevant information to do so, constitutes an abuse of discretion.

III. CONCLUSION AND RELIEF SOUGHT

53. The Second Detention Decision is vague and speculative to the detriment of Mr. Selimi. The Pre-Trial Judge has selectively applied the findings of the Appeals Panel; ignored or misrepresented the arguments of the Defence and made a number of wholly unreasonable and unwarranted factual findings in order to justify the continued detention of Mr. Selimi. This approach rides roughshod over the presumption of innocence, the principle of liberty and the resulting burden on the Prosecution to justify detention and singularly fails to individualise the decision in relation to Mr. Selimi. These legal and factual errors alone invalidate the decision.

54. 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: 5127

Respectfully submitted on 25 August 2021,

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