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KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In:	**KSC-BC-2020-06**
Before:	**A Panel of the Court of Appeals Chamber** Judge Michèle Picard Judge Emilio Gatti Judge Nina Jørgensen
Registrar:	Fidelma Donlon
Date:	1 October 2021
Original language:	English
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Public Redacted Version of

Decision on Kadri Veseli's Appeal Against Decision on Review of Detention

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers ("Court of Appeals Panel", "Appeals Panel" or "Panel" and "Specialist Chambers", respectively)[1] acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 169 of the Rules of Procedure and Evidence ("Rules") is seised of an appeal filed on 15 July 2021 by Mr Kadri Veseli ("Veseli" or "the Accused" and "Appeal", respectively),[2] against the "Decision on Review of Detention of Kadri Veseli" ("Impugned Decision").[3] The Specialist Prosecutor's Office ("SPO") responded on 26 July 2021 that the Appeal should be rejected.[4] Veseli indicated that he would not file a reply.[5]

I. BACKGROUND

1. On 5 November 2020, Veseli was arrested in Kosovo pursuant to an arrest warrant issued by the Pre-Trial Judge,[6] further to the confirmation of an indictment against him.[7]

[1] F00002, Decision Assigning a Court of Appeals Panel, 19 July 2021 (confidential, reclassified to public on 30 September 2021).
[2] F00001, Veseli Defence Appeal of Decision KSC-BC-2020-06/F00380 (First Detention Review), 15 July 2021 (confidential) ("Appeal").
[3] F00380/RED, Public Redacted Version of Decision on Review of Detention of Kadri Veseli, 2 July 2021 (original version filed on 2 July 2021) ("Impugned Decision").
[4] F00003, Response to Veseli Defence Appeal of July 2021 Detention Decision, 26 July 2021 (confidential) ("Response"), paras 2, 20.
[5] Email of 30 July 2021 from Co-Counsel for Veseli to Senior Legal Officer assisting the Court of Appeals Panel.
[6] F00027/RED, Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders, 26 November 2020 (original version filed on 26 October 2020) ("Decision on Arrest and Detention"); F00027/A03/RED, Public Redacted Version of Arrest Warrant for Kadri Veseli, 5 November 2020 (original version filed on 26 October 2020); F00050, Notification of Arrest of Kadri Veseli Pursuant to Rule 55(4), 5 November 2020 (strictly confidential and *ex parte*, reclassified as public on 20 November 2020), para. 4.
[7] F00026/RED, Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 30 November 2020 (original version filed on 26 October 2020) ("Confirmation Decision"). The operative indictment was filed on 4 November 2020; see F00045/A03, Further redacted Indictment, 4 November 2020 (strictly confidential and *ex parte*, reclassified as public on 5 November 2020).

2. On 22 January 2021, the Pre-Trial Judge rejected Veseli's application for interim release.[8]

3. On 30 April 2021, the Court of Appeals Panel denied Veseli's appeal against the First Detention Decision.[9]

4. On 2 July 2021, after having received submissions from Veseli and the SPO,[10] the Pre-Trial Judge issued the Impugned Decision, ordering Veseli's continued detention on the basis there continues to be a grounded suspicion that Veseli has committed crimes within the subject-matter jurisdiction of the Specialist Chambers.[11] The Pre-Trial Judge further found that the risks that Veseli will abscond, obstruct the progress of Specialist Chambers proceedings or commit further crimes against those perceived as being opposed to the Kosovo Liberation Army ("KLA"), including potential witnesses, continue to exist.[12]

5. The Pre-Trial Judge also found that the conditions Veseli proposed for his conditional release ("Proposed Conditions") or any additional conditions imposed by the Pre-Trial Judge could sufficiently mitigate the risk of flight, but could not sufficiently mitigate the risk of obstructing the progress of Specialist Chambers

[8] F00151, Application for Interim Release of Kadri Veseli, 17 December 2020 (confidential, reclassified as public on 22 January 2021); F00178, Decision on Kadri Veseli's Application for Interim Release, 22 January 2021 ("First Detention Decision").
[9] F00005, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, 30 April 2021 ("*Veseli* Appeal Decision").
[10] F00341/RED, Public Redacted Version of Veseli Defence Submissions on Detention Review, 25 June 2021 (original version filed on 7 June 2021) ("Submissions on Detention Review"); F00354/RED, Public redacted version of Prosecution response to Veseli Defence Submissions on Detention Review, 17 June 2021 (original version filed on 17 June 2021) ("Response to Submissions on Detention Review"); F00365/RED, Public Redacted Version of Veseli Defence Reply to SPO Response - KSC-BC-2020-06/F00354 (Detention Review) (F00365 dated 22 June 2021), 24 June 2021 (original version filed on 22 June 2021) ("Reply to Submissions on Detention Review").
[11] Impugned Decision, paras 22-29.
[12] Impugned Decision, paras 32-33, 35-37, 39-42.

proceedings or the risk of committing further crimes.[13] Finally, he found that Veseli's detention remained proportionate.[14]

6. In the Appeal, Veseli develops four grounds of appeal consisting of alleged errors and abuse of discretion committed by the Pre-Trial Judge.[15] Veseli requests that the Court of Appeals Panel grants the Appeal and orders his interim release with some or all of the Proposed Conditions.[16] Alternatively, Veseli requests that the Court of Appeals Panel returns the case to the Pre-Trial Judge, instructing him to reconsider the Impugned Decision after ordering the General Director of the Kosovo Police to address the enforceability of each one of the Proposed Conditions of release.[17]

II. STANDARD OF REVIEW

7. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.[18]

III. PRELIMINARY MATTERS

A. PUBLIC FILINGS

8. The Panel notes that Veseli and the SPO have not yet filed public redacted versions of their respective Appeal and Response. Considering that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential, and that Parties shall file public redacted

[13] Impugned Decision, paras 46-51.
[14] Impugned Decision, paras 55-56.
[15] Appeal, para. 3 (pp. 2-3). There is an error in the paragraph numbering at the beginning of the Appeal, in that paragraph numbers 1-3 are duplicated. To avoid confusion, when referring to one of these paragraphs, the Panel will indicate the page number found in the stamp at the top left of the page on which the relevant paragraph is located.
[16] Appeal, para. 14.
[17] Appeal, paras 13, 15.
[18] KSC-BC-2020-07, F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati* Appeal Decision"), paras 4-14. See also e.g. KSC-BC-2020-07, F00005, Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention, 9 February 2021 ("*Haradinaj* Appeal Decision"), paras 11-14; *Veseli* Appeal Decision, paras 4-7.

versions of all non-public submissions filed before the Panel,[19] the Panel orders the Parties to file public redacted versions of the above-mentioned filings, or to indicate, through a filing, whether these can be reclassified as public within ten days of receiving notification of the present Decision.

9. In addition, the Court of Appeals Panel notes that the obligation for filings to be public as far as possible necessarily implies that filings must be made public (for example, through redaction) as soon as possible. Not only does this uphold the principle of publicity of proceedings, but also has practical advantages, such as aiding the Panel in assessing which pieces of information within, for example, a confidential filing should be redacted from its decision and which could be made public. The Panel therefore reminds the Parties to file public redacted versions of their filings as soon as possible, rather than waiting for an order from the Panel before doing so.

B. THE STANDARD APPLICABLE TO REVIEW OF DETENTION

10. The Court of Appeals Panel recalls the provisions of the Law and of the Rules relevant to review of detention.

11. Article 41(10) of the Law provides that:

> Until a judgement is final or until release, upon the expiry of two (2) months from the last ruling on detention on remand, the Pre-Trial Judge or Panel seized with the case shall examine whether reasons for detention on remand still exist and render a ruling by which detention on remand is extended or terminated. The parties may appeal against such a ruling to a Court of Appeals Panel.

12. Rule 57(2) of the Rules states:

> After the assignment of a Pre-Trial Judge pursuant to Article 33(1)(a) of the Law and until a judgment is final, the Panel seized with a case shall review a decision on detention on remand upon the expiry of

[19] See e.g. KSC-BC-2020-07, F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021, para. 13; F00005/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021 (original version filed on 30 April 2021) ("*Thaçi* Appeal Decision"), para. 10.

> two (2) months from the last ruling on detention, in accordance with Article 41(6), (10), (11) and (12) of the Law 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.

13. In the *Haradinaj* Appeal Decision issued by the Court of Appeals Panel on Haradinaj's appeal against the first decision of the Pre-Trial Judge on review of Haradinaj's detention, the Panel found that:

> The competent panel has an obligation to review the reasons or circumstances underpinning detention and determine whether these reasons continue to exist under Article 41(6) of the Law. The competent panel is not required to make findings on the factors already decided upon in the initial ruling on detention but must examine these reasons or circumstances and determine whether they still exist. What is crucial is that the competent panel is satisfied that, at the time of the review decision, grounds for continued detention still exist.[20]

14. The Panel considers that a further explanation of how the above findings must be interpreted is warranted. In that regard, the Panel underlines that the duty to determine whether the circumstances underpinning detention "still exist"[21] is not a light one. It imposes on the competent panel the task to, *proprio motu*, assess whether it is still satisfied that, at the time of the review and under the specific circumstances of the case when the review takes place, the detention of the Accused remains warranted.

15. The Panel is mindful that according to the Specialist Chamber of the Constitutional Court, the reference to "change in circumstances" in Rule 57(2) of the Rules applies to review of detention at any point in time and separately from the mandated review at two-month intervals. Such a review "ensures that *new* relevant factors that *arise in the intervals* between reviews of detention can be assessed".[22] The Panel finds that, although the automatic review every two-months under Rule 57(2)

[20] *Haradinaj* Appeal Decision, para. 55.
[21] See Article 41(10) of the Law: "whether reasons for detention on remand still exist".
[22] 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. 67.

of the Rules is not strictly limited to whether or not a change of circumstances occurred in the case, such a change can nonetheless be determinative and shall be taken into consideration if raised before the Panel or *proprio motu*.[23]

16. In light of the above, the Panel is satisfied that the Pre-Trial Judge applied the correct standard.[24] Additionally, the Panel finds that the Pre-Trial Judge should not be expected to entertain submissions that merely repeat arguments that have already been addressed in his previous decisions.[25]

IV. DISCUSSION

A. ALLEGED FAILURE REGARDING THE EVIDENTIARY STANDARD FOR ASSESSING GROUNDED SUSPICION UNDER ARTICLE 41(6)(A) OF THE LAW (GROUND I))

1. Submissions of the Parties

17. Veseli submits that the personal conduct of an accused is "the most probative indicator of criminal knowledge".[26] He argues that, in the Impugned Decision, the Pre-Trial Judge disregarded SPO evidence of his personal participation in the commission of the crimes charged and instead relied on residual factors to find that the "well-grounded" nature of the evidence supporting the subjective element of indirect participation could be maintained.[27] According to him, given this disregard, there is nothing in the evidence disclosed by the SPO that could establish that Veseli had either actual or constructive knowledge of an ongoing pattern of violence, orders to attack

[23] Rule 57(2) of the Rules.
[24] See Impugned Decision, para. 16.
[25] See e.g. ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-1626-Red, Public Redacted Version of 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", 12 September 2011, para. 60; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-1019, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence", 19 November 2010, para. 53.
[26] Appeal, paras 1 (p. 3), 5.
[27] Appeal, para. 2 (p. 3), referring to Impugned Decision, para. 26, which, in turn, refers to Confirmation Decision, paras 460-461, 463, 473. See also Appeal, paras 3 (p. 3), 5.

opponents or any other specific criminal activities.[28] In his view, the SPO cannot hide behind the procedural excuse that the sufficiency of evidence should be debated at trial.[29] Veseli concludes that the Pre-Trial Judge abused his discretion in concluding that there still exists a "well-grounded" suspicion against Veseli, despite the lack of evidence that Veseli personally participated in the commission of crimes, which is the only evidence capable of supporting criminal knowledge.[30]

18. The SPO responds that factual findings, such as the ones supporting the existence of a "grounded suspicion", have already been set out in the First Detention Decision and did not need to be set out anew in the Impugned Decision, since "nothing has changed requiring re-evaluation of the Article 41(6)(a) finding".[31]

19. The SPO submits that, since Veseli is not charged as a direct perpetrator of any crimes and therefore his evidentiary challenge regarding his "personal participation" is not relevant,[32] it was entirely reasonable for the Pre-Trial Judge to conclude that the finding under Article 41(6)(a) of the Law would not change even if the evidence identified by Veseli were disregarded.[33]

20. The SPO further emphasises that the standard under Article 41(6)(a) of the Law is lower than the standard of a well-grounded suspicion necessary to confirm an indictment against an accused, and that there is no requirement for the SPO to prove the merits of its case in the context of the present detention review.[34]

2. Assessment of the Court of Appeals Panel

21. The Panel recalls that the Pre-Trial Judge, within the context of detention-related challenges, is only required to determine whether, at the time of the review

[28] Appeal, para. 3 (p. 4). See also Appeal, para. 4.
[29] Appeal, para. 4.
[30] Appeal paras 1-2 (p. 3), 5.
[31] Response, paras 8-9.
[32] Response, para. 10.
[33] Response, para. 10.
[34] Response, paras 9-11. See also Response, fn. 15 and references therein.

decision, "a grounded suspicion that [the Accused] has committed a crime within the jurisdiction of the Specialist Chambers", as required under Article 41(6)(a) of the Law, continues to exist. As the Pre-Trial Judge correctly noted, the standard of "grounded suspicion" required under Article 41(6)(a) of the Law is lower than the standard of "well-grounded suspicion" necessary to confirm an indictment pursuant to Article 39(2) of the Law.[35]

22. In the Impugned Decision, the Pre-Trial Judge found that "there continues to be a grounded suspicion", emphasising that Veseli has not been charged as a direct perpetrator of any of the crimes set forth in the Confirmation Decision and that any absence of evidence regarding his direct participation would not disturb the finding that there is a well-grounded suspicion that he bears individual criminal responsibility, pursuant to various other forms of liability, for a number of crimes against humanity and war crimes.[36]

23. As Veseli himself acknowledged,[37] a decision on review of detention is not the proper forum to challenge either the findings made in a decision confirming an indictment, or the evidence underpinning the confirmed charges. Under the framework of Article 41(6) of the Law and the determination of applications for interim release or reviews of detention, neither the Pre-Trial Judge nor the Court of Appeals Panel can be expected to examine the merits of the case and the overall evidence submitted by the SPO in preparation for the trial.[38]

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[35] Impugned Decision, para. 22. See also Response, para. 9. Article 39(2) of the Law provides that "[i]f satisfied that a well-grounded suspicion has been established by the Specialist Prosecutor, the Pre-Trial Judge shall confirm the indictment." C.f. also ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-147, Decision on the Defence's Application for Interim Release, 18 November 2013, para. 47; ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-548-Red, Public redacted version of Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled "Third decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute", 29 October 2013, para. 38.
[36] Impugned Decision, paras 23, 27, 29.
[37] Submissions on Detention Review, para. 4.
[38] ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-349, Decision on the "Defence Request for the Interim Release of Dominic Ongwen", 27 November 2015 (reclassified 24 March 2016), paras 7-13; ICC,

24. The Panel understands that Veseli challenged the evidentiary basis for the Confirmation Decision at this preliminary stage of the proceedings in light of the material disclosed under Rule 102(1)(b) of the Rules after the First Detention Decision.[39] Contrary to what Veseli argues,[40] the Panel finds that no change of circumstances has been raised and that, in addition, such argument would not warrant a new determination of the Pre-Trial Judge's finding as to the existence of a grounded suspicion pursuant to Article 41(6)(a) of the Law. This is because Veseli is not charged as a direct perpetrator of any of the crimes set forth in the Confirmation Decision,[41] and the evidentiary challenge Veseli raised regarding his "personal participation" in the crimes – suggesting physical perpetration – is not relevant.[42] In that regard, the Panel notes that Veseli appears misleadingly to conflate the concepts of "personal participation" or "personal conduct" with those of "direct perpetration" or "physical perpetration".[43] The Panel further notes that, contrary to what Veseli alleges, no allegation or evidence was "disregarded" by the Pre-Trial Judge in the Impugned Decision.[44]

25. In light of the above, the Panel dismisses Veseli's arguments under the first ground of appeal.

Prosecutor v. Ntaganda, ICC-01/04-02/06-147, Decision on the Defence's Application for Interim Release, 18 November 2013, para. 47.

[39] See Submissions on Detention Review, para. 5; Response to Submissions on Detention Review, para. 6. See also Appeal, paras 1-4.

[40] See Submissions on Detention Review, para. 3 (p. 3). There is an error in the paragraph numbering at paragraph 3, which is duplicated. To avoid confusion, when referring to this paragraph, the Panel will indicate the page number found in the stamp at the top left of the page on which the relevant paragraph starts.

[41] Impugned Decision, para. 23. See also Confirmation Decision, paras 460-463, 473-474, 476-478, 480-482, 492-498.

[42] See e.g. ICTR, *Prosecutor v. Kayishema* and *Ruzindana,* ICTR-95-1-A, Judgment (Reasons), 1 June 2001 ("*Kayishema* and *Ruzindana* Appeal Judgment"), paras 185-186, 189. Contra Appeal, paras 1 (p.3)-5; Submissions on Detention Review, paras 3 (p. 3)-26.

[43] Appeal, paras 1-5. See e.g. *Kayishema* and *Ruzindana* Appeal Judgment, paras 185-186, 189.

[44] Appeal, paras 1, 3, 5.

B. ALLEGED ERRORS REGARDING ASSESSMENT OF ARTICLE 41(6)(B) OF THE LAW (GROUND II))

1. Submissions of the Parties

26. Veseli submits that the Pre-Trial Judge erred in finding that Veseli's increased insight into the evidence, through the ongoing disclosure process, augments the risks under Article 41(6)(b) of the Law, given that none of the evidence disclosed by the SPO since the First Detention Decision incriminates him and given that the allegations of "personal conduct" and "personal participation" were disregarded.[45] In his view, such risks have, on the contrary, diminished.[46]

27. Veseli also contends that the Pre-Trial Judge's findings concerning Veseli's ability to influence or obstruct the judicial process, in particular the finding that he continues to derive influence from "the knowledge, skills and contacts" he acquired in previous intelligence related positions, are speculative and unsubstantiated.[47] Veseli submits that no sensitive and confidential information was found at his premises,[48] and claims that, on the contrary, he has demonstrated his trustworthiness during the custodial visit to Kosovo while his father was seriously ill in hospital.[49] Veseli concludes that the Pre-Trial Judge abused his discretion by not weighing the different factors correctly.[50]

28. The SPO responds that the Pre-Trial Judge properly relied on the fact that the Accused is progressively informed of the evidence underpinning the charges against him, including the identity of witnesses.[51] In its view, it is in the Pre-Trial Judge's discretion to assess how additional disclosure impacts the incentives of the Accused

[45] Appeal, para. 6.
[46] Ibid.
[47] Appeal, para. 7.
[48] Ibid.
[49] Appeal, para. 8.
[50] Ibid.
[51] Response, paras 12-13.

and therefore the risks under Article 41(6)(b) of the Law, and the Pre-Trial Judge correctly weighed the progressive disclosure.[52]

2. Assessment of the Court of Appeals Panel

29. At the outset, the Panel notes that under this ground of appeal, Veseli makes arguments which simultaneously address the different risks under Article 41(6)(b) of the Law.[53] As the Pre-Trial Judge's conclusion that Veseli's detention shall continue is not based on his findings regarding the risk of flight,[54] the Panel will not address factors relevant solely to this risk. Consequently, the Panel recalls that the Pre-Trial Judge, in his assessment of the risk of obstructing the progress of the Specialist Chambers' proceedings under Article 41(6)(b)(ii) of the Law, relied on the following factors: (i) Veseli's willingness and ability to intervene in matters involving the Specialist Chambers; (ii) his increased insight into the evidence underpinning the charges against him, based on the ongoing disclosure process; (iii) Veseli's capacity to garner the means to intervene in Specialist Chambers proceedings due to his continued role of significance in Kosovo, in particular the knowledge, skills and contacts he acquired in his previous intelligence-related positions; and (iv) the persisting climate of intimidation of witnesses and interference with criminal proceedings against former KLA members.[55]

30. Turning first to Veseli's arguments concerning the impact of the Accused's increased insight into the evidence, the Panel notes that the Pre-Trial Judge considered the fact that "Veseli has, at present, gained increased insight into the evidence underpinning the serious charges against him on the basis of the ongoing disclosure

[52] Response, para. 13.
[53] See Appeal, paras 6-8.
[54] Impugned Decision, para. 46.
[55] Impugned Decision, paras 35-36.

process", notably as a factor augmenting the risk of obstructing the progress of the proceedings.[56]

31. The Panel notes that while disclosure of evidence may be a relevant factor, it is but one factor that may be taken into account when determining whether continued detention appears necessary.[57] It is however not sufficient in itself to justify the denial of provisional release. The Panel recalls that in the Impugned Decision the Pre-Trial Judge considered this factor together with other factors to determine the existence of a risk of obstruction.[58]

32. The Panel furthermore notes that, between the issuance of the First Detention Decision of 22 January 2021 and the issuance of the Impugned Decision, 444 pieces of incriminating evidentiary material were disclosed to the Defence.[59]

33. For these reasons, Veseli fails to show that it was unreasonable for the Pre-Trial Judge to conclude that Veseli's increased awareness of the evidence underlying the charges against him, combined with other factors, contributes to the risks identified under Article 41(6)(b)(ii) of the Law.

34. Turning next to Veseli's argument concerning his influence, the Panel observes that the disputed finding that Veseli continues to derive influence from "the knowledge, skills and contacts" that he "acquired in his previous intelligence related positions"[60] had been established in the First Decision on Interim Release on the basis

[56] Impugned Decision, para. 35.
[57] ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-278-Red, Public redacted version of 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* Appeal Judgment on Interim Release"), para. 65.
[58] See above, para. 29. See also Impugned Decision, paras 35-36.
[59] This figure takes into account two disclosure batches of materials under Rule 102(1)(a) of the Rules, and seven disclosure batches of materials under Rule 102(1)(b) of the Rules, containing a total of 444 pieces of incriminating material, comprising a total of over 7850 pages. This includes all materials within these batches, and therefore does not account for duplication of information due to the inclusion of translated, redacted and/or revised versions of certain materials within these disclosure batches.
[60] Impugned Decision, para. 35. See also Impugned Decision, paras 48-49.

of different elements and evidence.[61] Likewise, Veseli's arguments regarding Driton Lajçi, as he acknowledges, had already been addressed – and the Pre-Trial Judge's conclusion upheld – by the Appeals Panel.[62] The Panel finds that Veseli merely disagrees with the Pre-Trial Judge's weighing of various factors[63] and only repeats unsuccessful arguments previously made before the Pre-Trial Judge which do not affect his previous determination. Veseli fails to identify any clear error in the Pre-Trial Judge's rejection of such arguments.[64]Accordingly, the Panel finds no error in the Pre-Trial Judge's reliance on these factors.

35. In the Panel's view, Veseli's argument that his case is "distinguishable" in that there is no evidence of [REDACTED] is irrelevant, given that the Pre-Trial Judge's determination on the risk of obstruction posed by Veseli is based on other factors (both personal and contextual).[65] Veseli fails to show how it was unreasonable for the Pre-Trial Judge to reach the findings he did on the risk of obstruction.[66] The Panel therefore dismisses Veseli's argument.

36. The Panel next turns to Veseli's arguments concerning the trustworthiness he allegedly demonstrated during his recent custodial visit to Kosovo.[67] The Panel finds that Veseli fails to demonstrate how the Pre-Trial Judge erred in assessing the relevance of his behaviour during custodial visits to the risk of obstruction under Article 41(6)(b)(ii) of the Law. The Panel recalls that the Pre-Trial Judge expressly and extensively considered this argument with regard to Veseli's conditional release, but found that, considering the specific nature of custodial visits and the strict conditions imposed during this temporary release, Veseli's and his family's behaviour was not

[61] First Detention Decision, paras 32, 34, 39, 43.
[62] *Veseli* Appeal Decision, paras 36-40. See Appeal, para. 7.
[63] See e.g. *Veseli* Appeal Decision, para. 47; *Gucati* Appeal Decision, para. 64.
[64] See e.g. *Thaçi* Appeal Decision, para. 60.
[65] See Impugned Decision, paras 35-36. Contra Appeal, para. 7.
[66] See Appeal, para. 7.
[67] Appeal, para. 8. See also F00271, Public Redacted Version of Decision on Veseli Defence Request for Temporary Release on Compassionate Grounds, 11 May 2021 (original version filed on 30 April 2021) ("Decision on Veseli Temporary Release").

decisive for the purposes of his decision.[68] The Panel finds no error in the Pre-Trial Judge's conclusion.

37. Given that the Panel has found no error in the Pre-Trial Judge's conclusion that a risk of obstruction existed under Article 41(6)(b)(ii) of the Law, making continued detention necessary, the Panel does not need to address alleged errors with regard to Article 41(6)(b)(iii) of the Law.[69] Therefore, Veseli's second ground of appeal is dismissed.

38. The Panel needs nonetheless to address whether the Pre-Trial Judge erred in finding that the risk of obstructing the proceedings could not be mitigated by the Proposed Conditions.

C. ALLEGED ERRORS REGARDING ASSESSMENT OF CONDITIONS OF RELEASE (GROUNDS III) AND IV))

1. Submissions of the Parties

39. First, Veseli submits that the Pre-Trial Judge erred in law and abused his discretion "in setting an incorrect and inordinately high standard for mitigating risk which is incapable of being satisfied by any reasonable conditions of release".[70] Veseli argues that the Pre-Trial Judge's reliance on Veseli's "intelligence background" to justify his findings as to the risk that Veseli would pass clandestine messages to a third person, is not only without any foundation, but also arbitrary.[71] Veseli further argues that the Pre-Trial Judge should have considered as a mitigating factor Veseli's trustworthiness, especially the fact that he did not exploit his custodial visit to communicate with any unauthorised third party.[72]

[68] Impugned Decision, para. 50. See Decision on Veseli Temporary Release, paras 18-19, 25.
[69] See e.g. *Veseli* Appeal Decision, para. 53.
[70] Appeal, paras 3(iii) (p. 3), 10.
[71] Appeal, para. 9.
[72] Appeal, para. 10.

40. Second, Veseli contends that the Pre-Trial Judge had the duty to enquire whether the Proposed Conditions could be enforced.[73] In particular, Veseli considers that, after having found that the assurances of the General Director of the Kosovo Police ("Police Director") were too "general" and that a "detailed response" from him was required, the Pre-Trial Judge could not ignore the Defence's request to order further information from the Police Director,[74] and should have instructed the latter to provide such information, if necessary at an oral hearing.[75] Veseli consequently requests that the Court of Appeals Panel return the matter to the Pre-Trial Judge for reconsideration, after ordering the Police Director to address the enforceability of the Proposed Conditions.[76]

41. The SPO responds, on the first point, that Veseli merely disagrees with how the Pre-Trial Judge balanced the Proposed Conditions against the risks, and fails to identify any error.[77] In its view, the Impugned Decision contains detailed reasons as to why conditions were insufficient and the Pre-Trial Judge also considered the new conditions proposed by the Defence, in the conduct of his assessment.[78] As to Veseli's intelligence background, the SPO submits that it constitutes a risk-heightening factor specific to Veseli.[79]

42. On the second point, the SPO submits that a Panel "is not obligated to assess a State's willingness and ability to enforce conditions" if no condition can mitigate the risks identified.[80] In any event, the SPO contends that the Pre-Trial Judge properly weighed the assurances provided by the Police Director. The SPO further refers to a previous decision in which the Court of Appeals Panel upheld the Pre-Trial Judge's

[73] Appeal, para. 12.
[74] Appeal, para. 11.
[75] Appeal, para. 12.
[76] Appeal, para. 13.
[77] Response, para. 15.
[78] Ibid.
[79] Ibid.
[80] Response, para. 16, referring to *Gbagbo* Appeal Judgment on Interim Release, para. 80.

finding that vague assurances from the Police Director were insufficient, and argues that the new assurances, even if they were more explicit, would be insufficient to address the risks posed by Veseli if released.[81] The SPO submits that it is "within the Pre-Trial Judge's discretion to seek further clarifications on state guarantees" and the inadequacy of the guarantees did not oblige the Pre-Trial Judge to do so.[82]

2. Assessment of the Court of Appeals Panel

43. The Pre-Trial Judge found that neither the Proposed Conditions nor any additional conditions he could impose could sufficiently mitigate the risk of obstructing the progress of Specialist Chambers proceedings or the risk of committing further crimes posed by Veseli.[83] In particular, the Pre-Trial Judge found that the Proposed Conditions would not prevent unmonitored conversations between Veseli and family members or approved visitors, who, even if they were to surrender their devices and consent to subsequent monitoring of the devices, would still be able to pass messages "in a number of other ways".[84] For instance, the Proposed Conditions would not prevent Veseli from asking his visitors to pass a message orally or by employing a device belonging to a third person.[85] In the Pre-Trial Judge's view, any further conditions, such as visits monitored by the Kosovo Police, would insufficiently mitigate that risk, and it is only through the communication monitoring framework applicable at the Specialist Chambers Detention Facilities that Veseli's communications can be sufficiently restricted and monitored.[86] Furthermore, he found that the Police Director's response did not specifically address whether the Proposed Conditions could be effectively enforced and, if so, which measures would be adopted, stating that the fact that the Proposed Conditions would not prevent unmonitored conversations and would require resource-intensive measures "further

[81] Response, para. 16.
[82] Response, para. 17.
[83] Impugned Decision, paras 47-51.
[84] Impugned Decision, para. 48.
[85] Ibid.
[86] Ibid.

augments the need for a detailed response by the Police Director".[87] Finally, the Pre-Trial Judge found that limited weight should be attributed to Veseli's and his family's behaviour during a custodial visit.[88]

44. In light of its findings on Veseli's second ground of appeal, the Panel declines to address Veseli's arguments that the Pre-Trial Judge should have considered that Veseli's trustworthiness, allegedly established by his good behaviour during the custodial visit, mitigates the risk of "third-party instrumentalisation".[89]

45. The Court of Appeals Panel will address Veseli's submission that, for the Pre-Trial Judge, there can be no condition which could sufficiently mitigate the risks.[90] The Panel observes that the measures contained in Veseli's Proposed Conditions are very extensive.[91] For instance, measures such as the prohibition of any telecommunications or Internet-enabled devices inside Veseli's property, the surrender of any such device by — pre-approved— visitors prior to any visit, and the subsequent monitoring of the visitors' communication devices for the duration of Veseli's provisional release could prevent Veseli from employing electronic devices belonging to his family or acquaintances.

46. The Pre-Trial Judge further relied on Veseli's "position of significance" and his "particular skills due to his intelligence background" to find that "a real possibility exists that Mr Veseli could ask someone to pass on a message orally or to use a device belonging to a third person to do so".[92] While Veseli labels such reliance as "arbitrary",[93] and argues that this finding lacks reasoning, the Panel considers that the

[87] Impugned Decision, para. 49.
[88] Impugned Decision, para. 50.
[89] See above, para. 36. See Appeal, para. 10. See also Appeal, para. 9.
[90] Appeal, para. 3(iii) (p. 3), para. 10.
[91] F00001/A02, Annex 2 to Veseli Defence Appeal of Decision KSC-BC-2020-06/F00380 (First Detention Review), 15 July 2021 (confidential) ("Annex 2 to Appeal"), pp. 3-6. The same document was also submitted before the Pre-Trial Judge. See F00341/A03, Annex 3 to Veseli Defence Submissions on Detention Review, 7 June 2021 (confidential), pp. 2-5.
[92] Ibid.
[93] Appeal, para. 9.

Pre-Trial Judge provided adequate reasoning. In the present case, the Panel recalls that Veseli was a founding member of the KLA, including its General Staff, wherein he held positions of authority, including that of Head of the KLA intelligence services.[94] The Panel considers that it was open to the Pre-Trial Judge to rely on these factors specific to the Accused as part of his assessment.

47. The Panel recalls that communications and visits in detention are subject to some degree of monitoring in the controlled environment of the Specialist Chambers' Detention Facilities, in accordance with the applicable legal framework.[95] However, the question of whether the same level of monitoring of conversations can be implemented outside of detention remains to be determined.

48. The Panel notes that Veseli did indeed propose a detailed list of conditions which may, in the abstract, restrict and monitor his communications. That being said, the Panel stresses that it still needs to be assessed whether such measures can be effectively enforced. In that regard, the Panel finds that the Kosovo Police's willingness and ability to enforce proposed conditions could assist in mitigating the risks identified by the Pre-Trial Judge.[96] The competent panel therefore has to review whether, when applicable, the guarantees that have been provided can appropriately mitigate the risks.[97] Such a review should be done on a case-by-case basis. The Panel considers that in light of the extensive list of conditions put forward by Veseli, it was

[94] See e.g. Decision on Arrest and Detention, para. 33. See also *Veseli* Appeal Decision, para. 40.
[95] See notably Registry Practice Direction on Detainees Visits and Communications, KSC-BD-09/Rev1/2020, 23 September 2020 ("Practice Direction"). In the Detention Centre, visits with a detainee are conducted within the sight and hearing of Detention Officers and they may order the recording, listening to, summarising, and transcribing of visits with certain visitors (Article 15 of the Practice Direction). Unmonitored communications are in fact strictly limited. For instance, the accused are allowed unmonitored "private visits" but only for certain close family members and within limited time periods (Article 24 of the Practice Direction).
[96] See e.g. ICC, *Prosecutor v. Bemba et al*., ICC-01/05-01/13-560, Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled "Decision on the 'Requête de mise en liberté' submitted by the Defence for Jean-Jacques Mangenda", 11 July 2014, para. 128. See also *Gbagbo* Appeal Judgment on Interim Release, paras 77-79.
[97] Contra Response, para. 16.

not open to the Pre-Trial Judge to conclude that none of these conditions could sufficiently mitigate the identified risks without enquiring further into the enforceability of these measures.

49. Turning therefore to the guarantees provided by the Kosovo Police, the Panel agrees with the Pre-Trial Judge that the response from the Police Director, given its general and generic character,[98] cannot be considered as constituting, as such, an acceptance to enforce the Proposed Conditions.[99] Likewise, the Panel agrees with the Pre-Trial Judge that, given the level of detail of the questions asked by Counsel for Veseli,[100] a more specific response from the Police Director supported by relevant documentation as well as concrete measures that could be adopted could have been expected but was not provided.[101] In such circumstances, the Panel finds that, while the guarantees from the Kosovo Police seem to demonstrate its willingness/readiness to do so, in light of the limited information available, it is not possible to assess to what extent the Kosovo Police has the capacity and resources to implement these measures.

50. The Panel observes that the present situation differs from the situation that was examined by the Court of Appeals Panel in the *Veseli* Appeal Decision, in which the Panel found that "it would have been within the Pre-Trial Judge's discretion to seek such clarifications and hear the relevant evidence before reaching his decision, although, […], he was not obliged to do so".[102] Indeed, this is the second time that Counsel for Veseli seeks observations from the Police Director – this time asking him specifically to confirm the Kosovo Police's ability to enforce 11 listed conditions, and informing him that the Specialist Chambers had considered his previous response to have been insufficiently detailed.[103] However, this is the second time that Veseli

[98] See Annex 2 to Appeal, pp. 7-8.
[99] See Impugned Decision, para. 49. Contra Reply to Submissions on Detention Review, para. 10.
[100] Annex 2 to Appeal, pp. 3-6.
[101] Annex 2 to Appeal, pp. 7-8. See also Impugned Decision, para. 49.
[102] *Veseli* Appeal Decision, para. 74 (internal footnotes omitted).
[103] Annex 2 to Appeal, pp. 3-6.

receives the same general and vague response.[104] This shows the Defence's repeated unsuccessful attempts to gather the relevant detailed information. Following that, Veseli made submissions before the Pre-Trial Judge on the Proposed Conditions and the question of their enforceability, and expressly requested the Pre-Trial Judge to issue an order requesting or instructing the Police Director to provide more information, should the Pre-Trial Judge have found the letter insufficient.[105]

51. The Panel finds that, if the Pre-Trial Judge considered that the response from the Kosovo Police was not sufficiently satisfactory, he should then have enquired with the Police Director to obtain the detailed response he found was lacking, especially as he was expressly invited to do so by Veseli[106] and the response of the Police Director implies the Kosovo Police's ability to enforce conditions.[107] The Panel recalls that conducting such an enquiry would fall within the discretionary powers the Pre-Trial Judge is vested with pursuant to Article 39(13) of the Law with regard to detention related matters, depending on the circumstances of the case.[108] The Panel also notes that the Pre-Trial Judge did not provide reasons for not ordering the Police Director to provide a detailed response, despite acknowledging the need for it.[109]

52. Therefore, in light of the specific circumstances of the case, the Panel finds merit in Veseli's contention that the Pre-Trial Judge abused his discretion when concluding that none of the Proposed Conditions nor any other additional condition could mitigate the identified risks without first seeking additional submissions from the Police Director. The Panel finds that the Pre-Trial Judge erred in not doing so, as this

[104] Annex 2 to Appeal, pp. 7-8; F00174/A11, Annex 11 to Defence Reply to the SPO's response to the Provisional Release Application of Kadri Veseli, 13 January 2021, p. 1.
[105] See Submissions on Detention Review, paras 35-37. See also Reply to Submissions on Detention Review, paras 10-11.
[106] Submissions on Detention Review, para. 37; Reply to Submissions on Detention Review, para. 11.
[107] Annex 2 to Appeal, pp. 7-8: "[REDACTED]." (emphasis added).
[108] KSC-BC-2020-04, F00005, Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Provisional Release, 20 August 2021 (original version filed on 20 August 2021), para. 60. See also F00005/RED, Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision in Interim Release, 30 April 2021 (original version filed on 30 April 2021), para. 86.
[109] Impugned Decision, para. 49.

information would have put him in a position to assess whether the Kosovo Police can effectively enforce these measures, including the ones suggested by the Pre-Trial Judge, such as monitoring visits. More precise information of this kind would give the Pre-Trial Judge a more complete and solid factual basis to assess the feasibility of such conditions, without of course anticipating the outcome of the final determination on these matters.

53. In light of the above, the Court of Appeals Panel grants Veseli's fourth ground of appeal and remands the matter to the Pre-Trial Judge in order to assess whether the Kosovo Police can effectively enforce the Proposed Conditions or any further condition he identifies as necessary to mitigate the identified risks.

V. DISPOSITION

54. For these reasons, the Court of Appeals Panel:

GRANTS Veseli's fourth ground of appeal;

REMANDS the matter to the Pre-Trial Judge for further consideration consistent with paragraphs 51-53 of this Decision;

DISMISSES all other aspects of the Appeal (Veseli's first, second and third grounds of appeal); and

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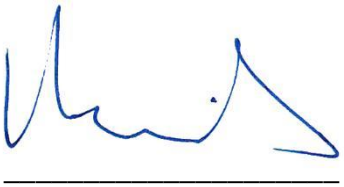
ORDERS the Parties to file public redacted versions of the Appeal and the Response or indicate, through a filing, whether these filings can be reclassified as public within ten days of receiving notification of the present Decision.



Judge Michèle Picard,
Presiding Judge

Dated this Friday, 1 October 2021

At The Hague, the Netherlands