

In: KSC-BC-2020-06
Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Rexhep Selimi

Date: 13 October 2021

Language: English

Classification: Confidential

**Selimi Defence Submissions on Review of Detention and
Response to Order of the Pre-Trial Judge,
KSC-BC-2020-06/F00514**

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I. INTRODUCTION

1. Following the Appeals Panel's Decision¹ in relation to Mr. Selimi's Interim Release Appeal,² and in accordance with the Pre-Trial Judge's Decision³ and subsequent Order,⁴ the Defence for Mr. Rexhep Selimi hereby requests the Pre-Trial Judge to grant him interim release pursuant to Article 41(6) of the Law⁵ and Rule 57(2) of the Rules⁶ subject to the Conditions proposed previously before the Pre-Trial Judge and Appeals Panel.⁷
2. The Conditions which were proposed by the Defence, and which were remanded back to the Pre-Trial Judge for further consideration by the Appeals Panel, more than sufficiently mitigate the Article 41(6)(b) risks. Furthermore, as repeatedly highlighted by the Defence, the procedural history of this case, where Mr. Selimi has already been detained for almost a whole year, with no date in sight for commencing the trial must not be ignored when assessing this request. Any differences between the parties as to the precise expected date of trial should no longer be used as an excuse to justify ignoring the reality that the duration of pre-trial proceedings will ultimately be disproportionate to the duration of detention.

II. SUBMISSIONS

A. Response to the Order of the Pre-Trial Judge and scope of present submissions

¹ KSC-BC-2020-06/IA007/F00005, Court of Appeals Panel, Decision on Rexhep Selimi's Appeal Against Decision on Review of Detention, 1 October 2021 ("AP Decision").

² KSC-BC-2020-06/IA007-F00001, Appeal against Decision on Review of Detention of Rexhep Selimi, 8 July 2021 ("Appeal").

³ KSC-BC-2020-06/F00419, Pre-Trial Judge, Decision on Selimi Request for Extension of Time Limit, 26 July 2021.

⁴ KSC-BC-2020-06/F00514, Order Seeking Observations from the Defence on the Timeline for the Next Review of Detention, 8 October 2021 ("Order to Defence").

⁵ 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.

⁶ 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.

⁷ See KSC-BC-2020-06/F00124, Defence Application for Interim Release, 7 December 2020 which set out the "Proposed Conditions"; and KSC-BC-2020-06/F00361, Selimi Defence Reply to SPO Response to Defence Submissions on Review of Detention, 18 June 2021, Annex 1 which set out the "Proposed Conditions". Collectively these are referred to herein as the "Conditions".

3. In response to the Order to Defence,⁸ the Defence prefers to:
 - “b. have the detention of the Accused reviewed together with the Pre-Trial Judge’s reconsideration of the Detention Decisions in light of the directions of the Court of Appeals Panel, in one consolidated decision. In this case, the schedule recalled in paragraph 3 will remain in place. In addition, should the Parties wish to make observations on the Kosovo Police’s submissions, the Specialist Prosecutor is expected to do so within five days of notification of the English translation of said submissions and the Defence within three days of notification of the Specialist Prosecutor’s observations.”
4. Given the interrelationship between the directions of the Appeals Panel to the Pre-Trial Judge in assessing the enforceability of the Conditions and the scope of periodic review of detention, consolidating both submissions is the most efficient and effective method of proceeding, without prejudice to the right of any accused to prefer a different process. As the deadline for submissions on review of detention coincides with the deadline for responding to the Order to Defence, this submission therefore includes both the response to the Order to Defence and substantive submissions on detention.
5. Further, while the Defence does not concede that any of the Rule 41(6)(i)-(iii) risks are materialised in this case in relation to Mr. Selimi, given the recent findings on these issues in the AP Decision,⁹ and in order to resolve the issue of Mr. Selimi’s detention in an expeditious manner, no further submissions on the existence of these risks is contained herein.
6. These submissions are therefore limited to:
 - a. whether the Conditions, and any other condition deemed necessary and suitable by the Pre-Trial Judge, are sufficient to mitigate the Article 41(6)(b) risks; and,
 - b. whether the proceedings have been delayed, and if so, how this delay in proceedings affects the question of interim release.

B. Scope of the findings by the Appeals Panel and assessment by the Pre-Trial Judge

7. The Appeals Panel found as follows in relation to the Proposed Conditions:

⁸ Order, para. 6.

⁹ AP Decision, paras 29-41.

“the Kosovo Police’s willingness and ability to enforce proposed conditions could assist in mitigating the risks identified by the Pre-Trial Judge. The competent panel therefore has to review whether, when applicable, the guarantees that have been provided can appropriately mitigate the risks.”¹⁰

“it was 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.”¹¹

“the guarantees from the Kosovo Police seem to demonstrate its general willingness/readiness to enforce proposed conditions in light of the little information available, it is not possible to assess to what extent the Kosovo Police has the actual capacity and resources to implement these measures.”¹²

“the Court of Appeals Panel grants Selimi’s ground of appeal D and remands the matter to the Pre-Trial Judge in order to assess whether the Kosovo Police can effectively enforce the Proposed Conditions, the Additional Proposed Conditions or any further condition he identifies as necessary to mitigate the identified risks.”¹³

8. In light of these findings, the question currently before the Pre-Trial Judge is therefore not whether these conditions would theoretically be able to sufficiently mitigate the risks identified by the Pre-Trial Judge, for the Appeals Panel has already made it clear that this was not a conclusion open to the Pre-Trial Judge. It must be presumed that these Conditions are hypothetically capable of being sufficient to mitigate these risks given their extensive and intrusive nature. Instead, the Pre-Trial Judge must be satisfied that they may be sufficiently enforceable in practice, so the focus now turns to the Kosovo Police’s ability to demonstrate it has the capacity and resources to implement measures to enforce the relevant Conditions.
9. In this regard, the Defence notes the extremely detailed requests posed to the Kosovo Police by the Pre-Trial Judge, amounting to 46 separate questions.¹⁴ While it is often the case that requests for submissions from states are confidential, the level of specific

¹⁰ AP Decision, para. 54.

¹¹ AP Decision, para. 54.

¹² AP Decision, para. 55.

¹³ AP Decision, para. 58.

¹⁴ KSC-BC-2020-06/F00513, Order to the Kosovo Police to Provide Information with confidential Annex, 8 October 2021 (“Order to Kosovo Police”).

detail requested therein differs dramatically from any similar requests for observations by States in the context of applications for interim release before the ICC¹⁵ or other international tribunals¹⁶ where the relevant judge or Chamber has simply requested general observations by the States concerned without requiring anywhere near the level of detail set out by the Pre-Trial Judge. Indeed, the Defence is unable to identify any equivalent request for such specific information about the ability of a state to carry out its basic functions.

10. Consequently, when assessing the response by the Kosovo Police to these questions in due course, in accordance with the schedule ordered by the Pre-Trial Judge, it cannot be required that every single question posed must receive a specific and detailed answer before it could be countenanced that interim release for Mr Selimi would be authorised. This process is not an examination requiring the Kosovo Police to pass with the minimum grade being 100%. Such an approach would amount to setting an impossible standard which could never be reached.
11. Instead, in properly exercising his discretion, the Pre-Trial Judge must be reasonably satisfied of both the willingness of the Kosovo Police to enforce the Conditions, as well as their ability in practice so to do, when considering the response of the Kosovo Police in its totality.
12. Finally, the Defence notes and recalls that the Pre-Trial Judge has previously considered that Proposed Conditions put forward by the Defence relating to restrictions on movement, such as “remaining at his home residence, surrendering his passport and other travel documents, regular reporting to the relevant authorities, returning to the SC at a judicially determined date and complying with any variation or termination of the

¹⁵ ICC, *Prosecutor v. Bemba et al*, Decision requesting observations from States for the purposes of the review of the detention of the suspects pursuant to regulation 51 of the Regulations of the Court, ICC-01/05-01/13, 26 September 2021 where the States concerned were ordered to “submit their observations on (i) the possible conditional release of the suspects to their territory, and (ii) their ability to enforce the conditions restricting liberty listed in letters (a) to (h) of rule 119(1) of the Rules; ICC, *Prosecutor v. Gicheru*, Order Inviting Observations Pursuant to Rule 119(3) of the Rules of Procedure and Evidence and Regulation 51 of the Regulations of the Court, ICC-01/09-01/20, 12 November 2020. See also ICC, *Prosecutor v. Ongwen*, Order requesting observations from relevant States on interim release, ICC-02/04-01/15-469, 15 June 2016.

¹⁶ ICTY, *Prosecutor v. Milutinovic et al*, Request to the Governments of Serbia and Montenegro and the Republic of Serbia to provide written submissions relating to the guarantees provided in support of Sreten Lukic’s request for provisional release, IT-05-87-PT, 7 September 2005; ICTY, *Prosecutor v. Vojislav Seselj*, Order inviting Host Country and receiving State to present their comments with regard to guarantees for a possible provisional release of the accused *proprio motu*, IT-03-67-T, 24 June 2014, para. 10.

interim release” sufficiently mitigated the risk of flight for Mr. Selimi.¹⁷ Indeed, the Appeals Panel summarily dismissed Defence submissions regarding this issue on the basis that Mr. Selimi’s detention had not been ordered on this ground.¹⁸

13. However, despite this finding and its consequences, and despite their being no changed circumstances regarding this question, it appears that the first nine questions proposed by the Pre-Trial Judge¹⁹ all relate exclusively to the ability and willingness of the Kosovo Police to enforce conditions affecting the risk of flight that the Pre-Trial Judge has already accepted. While the response of the Kosovo Police may provide some useful additional information in this regard, it therefore falls outside the scope of this issue currently before the Pre-Trial Judge as remanded by the Appeals Panel and may not be used to reverse the Pre-Trial Judge’s previous findings on this question.

III. Willingness and ability of the Kosovo Police to enforce the Conditions

14. The Defence notes and fully endorses the submissions by the Defence of Mr. Veseli regarding the further information provided by the Director of the Kosovo Police²⁰ on the enforceability of the Conditions which apply equally to Mr. Selimi. In line with the Defence’s preference in relation to the Order to the Defence, submissions in relation to both the response of the Kosovo Police and the observations of the SPO on this response, will be made at the appropriate time, namely within three days of notification of the SPO’s observations.
15. However, on the issue of unmonitored access to Mr. Selimi, it is noted that in the view of the Appeals Panel the Conditions were “very extensive” and could “in the abstract, restrict and monitor [Mr. Selimi’s] communications.” While the Appeals Panel further accepted the Defence’s submission that “in theory, the use of code and obscure

¹⁷ KSC-BC-2020-06/F00179, Decision on Rexhep Selimi’s Application for Interim Release, 22 January 2021, para. 54.

¹⁸ KSC-BC-2020-06/IA003-F00005, Decision on Rexhep Selimi’s Appeal Against Decision on Interim Release, 30 April 2021.

¹⁹ Order to Kosovo Police, Annex 1, paras 4-7.

²⁰ KSC-BC-2020-06/F00518, Veseli Defence Submissions on Second Detention Review, 11 October 2021, paras 28-37 (“Veseli Submissions”).

language remains possible even in detention, unless the Accused is indeed denied any external communication or visit”²¹ it also noted that:

“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).”²²

16. The result of these findings is that even an accused in the KSC detention facility therefore enjoys unmonitored communications with close members of their family in addition to those with their Defence teams, through the application of legal privilege. If the Kosovo Police were therefore able to strictly limit unmonitored visits to immediate family and members of the Defence team, while allowing monitored visits to all other individuals, there would simply be no concrete difference between the limitations employed at the KSC detention facility and those employed on interim release and no justification for maintaining Mr. Selimi in detention in such circumstances.

IV. Undue delay

17. The Defence has consistently raised the issue of delay in the proceedings and its impact on interim release²³ highlighting that Rule 56(2) provides both that the Pre-Trial Judge shall ensure that a person “is not detained for an unreasonable period prior to the opening of the case” and also that “in case of an undue delay caused by the Specialist Prosecutor, the Panel, having heard the Parties, may release the person under conditions as deemed appropriate.”
18. The Defence also notes the position of the Appeals Panel that considering the “current stage of the pre-trial proceedings, and the Parties’ persisting different positions as to the likely start date for the trial, and therefore as to the likely length of the pre-trial

²¹ AP Decision, para. 53 citing to Appeal, para. 45.

²² AP Decision, para. 53, Fn. 125.

²³ KSC-BC-2020-06/IA003-F00001, Appeal Against Decision on Rexhep Selimi’s Application for Interim Release, 3 February 2021, paras 36-37; Appeal, paras 49-52.

period, [...] any determination at the present stage as to the expected total length of Selimi's pre-trial detention is premature and speculative."²⁴

19. However, this does not definitively resolve the issue, for it merely declines to find error in the Pre-Trial Judge's determination of the situation at the time the Decision on Mr. Selimi's Application had been issued on 25 June 2021. As has been extensively set out elsewhere, a further four months have passed since that Decision and the beginning of trial appears to be even further in the distance with further concomitant issues relating to disclosure pursuant to Rules 102(1)(b), Rule 102(3) and Rule 103.²⁵
20. To avoid any ambiguity, the Defence is not seeking for the Pre-Trial Judge to set a specific date for trial now. Such a request would indeed be premature, speculative, and indeed impossible, especially given the extensive restrictions on disclosure in this case, when the identities of almost half of the expected Prosecution witnesses are unknown to the Defence and no pre-trial brief has been produced.
21. However, even the SPO would be hard-pressed to suggest in good faith that the trial will start before the summer of next year. It would not be speculative and premature to use that realistic timescale as a starting point for assessing proportionality as suggested by the Appeals Panel but rather an appropriate exercise of judicial discretion.
22. Requiring the Accused to demonstrate with more specificity when the trial would commence before the issue of proportionality can even be appropriately raised and considered by the Pre-Trial Judge improperly shifts the burden onto him. It also effectively requires the accused to wait until trial has started or is about to start before delay can be taken into account in ordering interim release. Yet, it is precisely at that stage that interim release is typically terminated thereby making it impossible for an accused to enforce his rights. This cannot be the meaning or intention behind Rule 56(2).

²⁴ AP Decision, para. 47.

²⁵ Veseli Submissions, paras 45-55.

V. CONCLUSION AND RELIEF SOUGHT

23. In light of the foregoing, the Defence therefore requests the Pre-Trial Judge to:
- a. Order the interim release of Mr. Selimi.

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Respectfully submitted on 13 October 2021,



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