

In: KSC-BC-2020-06

Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: The President of the Kosovo Specialist Chambers

Judge Ekaterina Trendafilova

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Kadri Veseli

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Public Redacted Version of Veseli Defence Appeal of Decision KSC-BC-2020-06/F00380 (First Detention Review)
(IA008-F00001 dated 15 July 2021)

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I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law"), the Defence for Mr Kadri Veseli ("Defence") hereby appeals the Pre-Trial Judge's *Decision on Review of Detention of Kadri Veseli* of 2 July 2021 ("the Impugned Decision").¹

II. STANDARD OF APPELLATE REVIEW

2. The jurisprudence of the KSC indicates that the Court of Appeals Chamber will intervene in interlocutory matters in three scenarios: i) where the Panel of First Instance makes an error of law; ii) where the Panel of First Instance makes an error of fact, and; iii) where the Panel of First Instance commits a discernible error in the exercise of discretion.² All of the grounds of appeal identified below fall into one or more of the aforementioned categories.

III. GROUNDS OF APPEAL

3. The Defence raises the following grounds of appeal:

- i) The Pre-Trial Judge erred in finding that the evidence disclosed to date meets an evidentiary standard justifying Mr Veseli's continued detention;

¹ KSC-BC-2020-06/F00380.

² KSC-BC-2020-07/F00026.

- ii) The Pre-Trial Judge erred in finding that Mr Veseli's "increased insight into the evidence underpinning the serious charges against him on the basis of the ongoing disclosure process" supports the identified risk factors;
- iii) The Pre-Trial Judge erred in setting an incorrect and inordinately high standard for mitigating risk which is incapable of being satisfied by any reasonable conditions of release, and;
- iv) The Pre-Trial Judge erred by failing to request or order the General Director of the Kosovo Police to address the enforceability of proposed conditions for the mitigation of any outstanding risk of obstruction and/or commission of crimes.

IV. SUBMISSION

i) The disclosed evidence does not warrant Mr Veseli's continued detention

1. The fact that Mr Veseli's alleged "personal participation in the commission of crimes"³ was cited so extensively by the Pre-Trial Judge in support of all alleged modes of liability,⁴ suggests how central it was to the exercise of his discretion when confirming the indictment.⁵ Personal conduct is indisputably the most probative indicator of criminal knowledge. Accordingly, it is self-evident that if the allegations pertaining to Mr Veseli's personal conduct are disregarded, then the nature of the suspicion must be weakened.

2. Nonetheless, and without relying on the evidence concerning Mr Veseli's personal conduct, the Pre-Trial Judge found that the "well-grounded" nature of the evidence

³ Impugned Decision at para 24.

⁴ Confidential Annex 1 (KSC-BC-2020-06/F00365 Conf Anx 1).

⁵ KSC-BC-2020-06/F00026CONFRED.

supporting the subjective element of indirect participation could be maintained based on other factors that he set out in his confirmation decision. These residual factors were identified by the Pre-Trial Judge at paragraph 26 of the Impugned Decision which, in turn, refers to paragraphs 460, 461, 463 and 473 of the Confirmation Decision.

3. The Defence, however, is confident that the SPO, by way of response to this appeal, will not be able to submit one item of currently disclosed material, apart from the disputed and presently disregarded evidence of "personal participation", in support of these residual considerations. Mr Veseli had neither actual nor constructive knowledge of an ongoing pattern of violence or orders to attack opponents.⁶ No such evidence exists, nor will such evidence ever be found.

4. Without the unsubstantiated evidence of "personal participation", all that the SPO can show is that Mr Veseli had the same actual knowledge of contemporaneous events as any other citizen of Kosovo and the same presumed knowledge of events as any other member of the KLA General Staff.⁷ Familiarity and association with other KLA General Staff members *per se* (which is what the SPO case against Mr Veseli boils down to) is wholly insufficient to impute a criminal state of mind.⁸ There is absolutely nothing in the

⁶ Impugned Decision at paragraph 25. [REDACTED].

⁷ c.f. KSC-BC-2020-06/F00136/A01/5 of 604 at para (4) [SPO rule 86(3)(b) outline] regarding the knowledge requirements of an "attack" on the civilian population: "The knowledge of the Suspects and perpetrators is demonstrated by (i) the public statements and regulations, structures, directions, and orders of the KLA/PGoK leadership, (ii) the contemporaneous public reports by international and non- governmental organisations, and (iii) **the participation of the Suspects**, other KLA/PGoK commanders and the perpetrators in threats, intimidation, arrests, disappearances, detentions, interrogations, mistreatment, and killings of civilian Opponents, which occurred at KLA headquarters and bases. (emphasis added). If personal participation is disregarded, there is nothing in the SPO outline which imputes any specific criminal knowledge to Mr Veseli. It is nothing but surmise.

⁸ KSC-BC-2020-06/F00136/A01/42 of 604 at para (4) [SPO rule 86(3)(b)(b) outline] regarding the subjective requirements of JCE: "The intent of the Suspects to effect the common purpose and commit the crimes is evidenced by, inter alia: (i) the public statements of the Suspects, including in the form of official KLA communiques and political declarations (see JCE, elements (2) and (3)); **(ii) the conduct of the Suspects, including their participation in crimes**, and the steps taken by them to disseminate and enforce the common purpose (see JCE, elements (2) and (3)); (iii) the structures and regulations put in place by the Suspects in order to implement the common purpose (see JCE, elements (2) and (3)); and (iv) the awareness of the Suspects of the charged crimes being committed by KLA members (see Superior Responsibility, element (2)), their continued participation in the common purpose (see JCE,

disclosed evidence which the SPO can produce to suggest that Mr Veseli was aware of or made aware of any specific criminal activity or did anything as a result of which he ought to have known that a crime would be committed. If such evidence exists to justify Mr Veseli's detention, the SPO must produce it by way of response - in the interests of fairness and the liberty of the individual. Charged with establishing the truth, the SPO cannot be allowed to hide behind the procedural excuse that the sufficiency of evidence should be debated at trial. The Pre-Trial Judge was persuaded to confirm the indictment on the basis of the SPO's misrepresentation of its own evidence. The Appeals Chamber, with all due respect, should not endorse this.

5. In the circumstances, the Pre-Trial Judge erred by failing to give sufficient weight to his own disregard of the only evidence capable of supporting criminal knowledge. In so doing, the Pre-Trial Judge abused his discretion in a manner which was neither fair nor reasonable. The Defence suggests that a reasonable and fair exercise of discretion would have led the Pre-Trial Judge to the conclusion that the remaining evidence produced by the SPO in support of the subjective element of Mr Veseli's alleged indirect participation is incapable of establishing a "well-grounded" suspicion. Mr Veseli's continued detention, based on an inappropriately confirmed indictment, is not justifiable.

ii) Mr Veseli's increased insight into the disclosed evidence does not augment risk factors

6. Whatever increased insight into the evidence which Mr Veseli may possess because of disclosure, would not augment the identified risks for the simple reason that none of evidence disclosed since the last decision on interim release incriminates him. As

element (3)) and their failure to take appropriate measures to prevent, investigate and/or punish such conduct (see Superior Responsibility, element (3)). If personal participation is disregarded there is absolutely no "statement", no "regulation" promulgated by Mr Veseli which is criminal in nature or incites criminal conduct. There is nothing that the SPO can produce which shows that Mr Veseli was personally put on notice that a specific crimes had been committed.

the Defence mentioned in its submissions at first instance, the SPO has failed to cite one piece of non-redacted and non-protected evidence disclosed since the first detention decision, which amplifies Mr Veseli's alleged criminal liability. Quite the opposite is true. Mr Veseli's case is unique in so far as the Appeals Chamber must now disregard allegations of personal conduct, in keeping with the Pre-Trial Judge's decision to sidestep their relevance in the context of the Impugned Decision.⁹ If the necessity of detention is now to be assessed without reference to the most dangerous, damning and wholly discredited allegations of "personal participation", the basis for concluding a potential threat to witnesses must obviously have deteriorated. Moreover, the risk of further criminal behaviour must have decreased because such a risk, in the context of the Impugned Decision, is not substantiated by any concrete allegation of previous offending or propensity to offend. Mr Veseli's assumed (yet abjectly denied) incentive to flee must also be viewed from the same perspective and be seen to have decreased in relation to the diminished likelihood that he will be convicted of direct criminal conduct and face a more substantial prison sentence.

7. Mr Veseli's case is also distinguishable in so far as the allegations pertaining to his potential ability to influence or to obstruct the judicial process remain within the realm of the hypothetical and not within the realm of the concrete. Although the Appeals Chamber previously found¹⁰ that Mr Veseli was professionally acquainted with Driton Lajçi and, thus, able to instruct him, it accepted that such familiarity was not dispositive with respect to the risk of obstruction but, rather, "just one among several factors on which the Pre-Trial Judge relied to make his ultimate finding on the existence of a risk of

⁹ Impugned Decision at para 27: "The Pre-Trial Judge finds that it is not necessary to address Mr Veseli's specific arguments relating to the selected evidence underpinning the findings that he directly participated in the commission of crimes in the aforementioned instances".

¹⁰ IA001-F00005 at para. 38.

obstruction".¹¹ Despite his alleged omniscient role as the former Head of the Kosovo Intelligence Service (SHIK), no sensitive and confidential information was found at Mr Veseli's premises. Furthermore, no substantiation is provided for the wild conclusion that Mr Veseli continues to derive influence from "the knowledge, skills and contacts" that he acquired in previous intelligence related positions.¹² Potential risks, even if based on reasonable assumptions and not concrete evidence, must have some foothold in reality. The imputation of Mr Veseli's current ability to control and manipulate former intelligence assets for nefarious purposes is speculative in the extreme.

8. The more speculative the nature of any residual influence flowing from Mr Veseli's previous political and military roles, the less likely it is to displace the presumption of trustworthiness. Such trustworthiness was amply exhibited during the custodial visit to Kosovo while Mr Veseli's father was seriously ill in hospital. Accordingly, the Pre-Trial Judge made a discernible error in the exercise of his discretion by finding that the strength of the risk factors was sustained despite disregarding allegations of personal participation for the purpose of detention review. Had the Pre-Trial Judge exercised his discretion fairly and reasonably, he would have concluded that Mr Veseli's inherent trustworthiness – backed up with suitable guarantees including financial securities, could have neutralised all risk factors entirely.

iii) The Pre-Trial Judge fixed an unreasonably high standard for proposed conditions of release

9. The Pre-Trial Judge found that because of "particular skills due to his intelligence background, 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". It is worth noting

¹¹ IA001-F00005 at para. 40.

¹² Impugned Decision at para. 35.

that the Pre-Trial Judge identified the same risk in his decision on the detention of both Jakup Krasniqi and Rexhep Selimi which suggests that the reference to Mr Veseli's "skills" and "intelligence background" was an arbitrary addition. No reasoning is given as to how Mr Veseli's "intelligence background" would make the risk of his passing on clandestine messages any more "real". The Pre-Trial Judge presumes, without foundation, that Mr Veseli possesses the wily determination and cunning artifice of a spy-movie hero.

10. In any event, the Pre-Trial Judge erred in law *and* abused his discretion by setting an unfair and unreasonable standard for interim release. No proposed condition, other than complete isolation, can ever effectively eliminate the risk of third-party instrumentalisation. If such a concern is deemed paramount, no suspect before the Kosovo Specialist Chambers would ever be released. In Mr Veseli's case, his proven trustworthiness should have been viewed as trumping such an improbable risk – especially since he has previously enjoyed a modicum of virtually unsupervised contact with his family during the custodial visit. Although supervised by custody officers at a respectful distance, Mr Veseli did not exploit his custodial visits to Kosovo in order to communicate with enemies of the KSC through arcane "code or obscure language".¹³

iv) The Pre-Trial Judge erred by failing to invite a response from the General Director of the Kosovo Police Force

11. The Pre-Trial Judge specifically noted that the suggested "resource-intensive measures to be adopted further augments the need for a detailed response by the Police Director" to Counsel's letter of 26 May 2021.¹⁴ Despite this criticism of the brief and general nature of the General Director's letter, the Pre-Trial Judge ignored the Defence's

¹³ Impugned Decision at para. 48.

¹⁴ Annex 2 (KSC-BC-2020-06/F00341 – Confidential Annex C).

request to order a further response pursuant to Rule 198 of the Rules of Procedure and Evidence. This was clearly a mistake. The Defence was denied the opportunity to present the proposed conditions with the benefit of the informed views of the person best placed to inform the Court as to whether the risk of third-party instrumentalisation and other identified weaknesses (such as the use of code or obscure language) may be adequately mitigated by the Kosovo Police.

12. The Appeals Chamber is reminded that there is a presumption of pre-trial release. This presumption ought to have imposed on the Pre-Trial Judge a legal duty to satisfy himself as to whether any of the risks identified could have been adequately mitigated by enforceable conditions. The Defence does not have the duty to prove the enforceability of those conditions. Once the Defence raises the option of conditions that can adequately mitigate the risks, the burden is then on the Pre-Trial Judge to conduct the factual enquiry necessary to determine whether those conditions can be enforced. If the statement offered by the General Director of the Kosovo Police contained insufficient detail, then it was the legal duty of the Pre-Trial Judge to request or even to instruct the General Director to provide answers in a form that would address his concerns – even by ordering him to attend an oral hearing and to be questioned in public.

13. Considering the aforementioned, should the Appeals Chamber not overturn the Impugned Decision, it is hereby requested to return the case to the Pre-Trial Judge with the instruction that he 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, if necessary, at an oral hearing.

V. CONCLUSION

14. In light of all the aforementioned, the Appeals Chamber is respectfully requested to allow the Defence appeal and to order Mr Veseli's interim release with some or all of the terms and conditions set out in Counsel's letter to the General Director of the Kosovo Police dated 26 May 2021.

15. In the alternative, the Appeals Chamber is requested to return the case to the Pre-Trial Judge as set out in paragraph 13 above.

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