

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

Date: 9 August 2022

Language: English

Classification: Public

**Public Redacted Version of Selimi Defence Appeal against Decision on
Periodic Review of Detention of Rexhep Selimi**

Specialist Prosecutor
Jack Smith

Counsel for Hashim Thaçi
Gregory Kehoe

Counsel for Victims
Simon Laws

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Rexhep Selimi
David Young

Counsel for Jakup Krasniqi
Venkateswari Alagenda

I. INTRODUCTION

1. Pursuant to Article 45(1) of the Law¹ and Rule 170(2) of the Rules² the Defence for Mr. Selimi (“Defence”) hereby files this Appeal against the Decision on Periodic Review of Detention of Rexhep Selimi, issued by the Pre-Trial Judge on 13 May 2022 (“Impugned Decision”),³ which denied Mr. Selimi’s request for interim release, filed on 7 April 2022 (“Defence Request”).⁴
2. In assessing whether any reasonable conditions could mitigate the Article 41(6)(b) risks he identified, the Pre-Trial Judge relies heavily on the [REDACTED] during his proposed interim release as the central factor preventing release. However, the Pre-Trial Judge’s findings on this factor are predicated on a crucial error of law invalidating the decision⁵ and factual error that has occasioned a miscarriage of justice,⁶ namely how often Mr. Selimi currently benefits from such communications at the KSC Detention Facilities.
3. Further, the Pre-Trial Judge’s assessment that [REDACTED], both individually and in combination with the other conditions of interim release proposed by the Defence were insufficient to mitigate the Article 41(6) risk that Mr. Selimi would either obstruct the progress of SC

¹ Law No.05/L-053 on SC and SPO, 3 August 2015 (‘Law’). All references to ‘Article’ or ‘Articles’ herein refer to articles of the Law, unless otherwise specified.

² RPE before the KSC, KSC-BD-03/Rev3/2020, 2 June 2020 (‘Rules’). All references to ‘Rule’ or ‘Rules’ herein refer to the Rules, unless otherwise specified.

³ F00802, Decision on Periodic Review of Detention of Rexhep Selimi, 13 May 2022 (“Impugned Decision”).

⁴ F00763, Selimi Defence Submissions on Review of Detention, 7 April 2022 (“Defence Request”).

⁵ Article 46(4) of the Law.

⁶ Article 46(5) of the Law.

proceedings or commit further crimes⁷ is so unreasonable as to constitute an abuse of discretion.

4. Similarly, the Pre-Trial Judge's implicit acceptance of the feasibility and sufficiency of remote monitoring of Mr. Selimi's meetings with those [REDACTED] and concomitant misunderstanding of the supplementary role of the Kosovo Police in this proposed monitoring, as well as lack of evidential support or reasoning for his limited findings regarding the potential difficulties they would so encounter, is so unreasonable as to constitute an abuse of discretion.
5. At this stage of proceedings, a thorough and reasonable assessment of the Extra Conditions to which this Appeal relates, in conjunction with all the conditions previously proposed by the Defence, should lead the Appeals Panel to reverse the Impugned Decision and order Mr. Selimi's immediate conditional release until thirty days before trial commences.

II. CONTEXT OF APPEAL

6. This Appeal is grounded on the Pre-Trial Judge's errors in understanding and assessing the content and impact of two additional proposed conditions in the Defence Request, namely the First and Second Extra Conditions set out in the Defence Request. However, these conditions were not proposed in a vacuum, but were to be read in conjunction with Consolidated Conditions, which were previously proposed by the Defence before the Pre-Trial Judge and Appeals Panel.
7. To avoid the Panel or the SPO having to cross-refer to these previous filings and to properly understand the context of the Impugned Decision, these Consolidated Conditions and Extra Conditions are recapitulated here

⁷ Impugned Decision, paras 34, 40.

although they have been condensed and restructured to ensure their easier assessment by the Appeals Panel. No substantive changes to the previous proposed consolidated conditions have been made.

8. The Consolidated Conditions previously proposed by the Defence which were considered by the Pre-Trial Judge to be insufficient to mitigate the Article 41(6) risks, envisaged a regime where:⁸
 - a. Mr. Selimi surrenders his passport and any other valid travel document to authorized officials of the KSC including his Kosovo ID card which allows for travel to Albania;
 - b. Mr. Selimi resides and remains at all times under house arrest [REDACTED];
 - c. [REDACTED];
 - d. [REDACTED];
 - e. [REDACTED];
 - f. [REDACTED].
9. The Defence specifically proposed the following three Extra Conditions in the Defence Request, specifically directed at filling those perceived gaps in the protections offered by the Consolidated Conditions:⁹
 - g. The designation of one room in the house of Mr. Selimi where all non-family visits shall take place in the presence of the Kosovo Police officer guarding the residence, which shall also be subject to video surveillance

⁸ IA015-F00001, Selimi Defence Appeal against "Decision on Remanded Detention Review and Periodic Review of Detention of Rexhep Selimi" with Confidential Annexes 1-2, 8 December 2021, Annex 1 ("Third Defence Appeal").

⁹ Defence Request, para. 2.

which will record or stream all non-family meetings for immediate review by the appointed guard as well as for transmission to the Registry;

- h. The enhanced monitoring for family members of Mr. Selimi, in addition [REDACTED]; and,
- i. A formal request to EULEX or UNMIK to designate specific police officers to guard the residence of Mr. Selimi, or otherwise train and supervise the Kosovo Police in this regard.

III. GROUNDS OF APPEAL

1. [REDACTED]

a. Error of Law and Fact regarding Frequency of Private Visits in Detention

- 10. The Pre-Trial Judge explains that “while it is possible for Mr Selimi to have unmonitored communications at the SC Detention Facilities, these are strictly limited considering that detainees are only allowed unmonitored “private visits” for certain close family members and within limited time periods, [REDACTED].”¹⁰
- 11. The Pre-Trial Judge’s understanding of the Registry Practice Direction on Detainees Visits and Communications is incorrect, with Article 24 providing as follows:¹¹

“A Detainee shall be allowed to spend time [REDACTED] in a private visit **at least** [REDACTED].”

¹⁰ Impugned Decision, para. 55.

¹¹ Registry Practice Direction on Detainees Visits and Communications, KSC-BD09/Rev1/2020, 23 September 2020, Article 24. Emphasis added.

12. [REDACTED] is the bare minimum to which any KSC detainee is entitled and not the maximum amount as the Pre-Trial Judge erroneously concludes. In this manner, the Pre-Trial Judge has erred in law.
13. In practice, KSC detainees enjoy more private visits [REDACTED].¹² Mr. Selimi has personally received private family visits [REDACTED].¹³ Therefore the subsequent finding by the Pre-Trial Judge in the Impugned Decision that “[REDACTED] is not comparable to the limited, yet regular, visits Mr Selimi receives [REDACTED] at the SC Detention Facilities”¹⁴ is therefore based on a demonstrable error of fact which occasions a miscarriage of justice.
14. This clear legal and factual error undermines a key supporting pillar of the Pre-Trial Judge’s finding that the combined conditions of interim release contain an element which would undermine their effectiveness in adequately mitigating against the Article 41(6)(b) risks.

b. Abuse of Discretion in reliance of [REDACTED] to Deny Interim Release

15. Directly connected to the Pre-Trial Judge’s error of law and fact above, is the lack of reasoning underpinning the resulting finding that [REDACTED], in and of itself, renders the proposed conditions insufficient to mitigate the identified Article 41(6)(b) risks.

¹² Third Defence Appeal, para. 26.

¹³ IA015-F00004, Selimi Defence Reply to the SPO Response to the Appeal against “Decision on Remanded Detention Review and Periodic Review of Detention of Rexhep Selimi” with Confidential and Ex Parte Annex 1, 28 December 2021, Annex 1.

¹⁴ Impugned Decision, para. 55 referring to AI015-F00005, Decision on Rexhep Selimi’s Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, 25 March 2022, para. 37, footnote 90 (“Third Appeal Panel Decision”). Emphasis added.

16. The only concretely identified risk from [REDACTED] in the Impugned Decision, is that it would potentially allow Mr. Selimi to “use his family to convey messages to the exterior.”¹⁵
17. In this regard, both the Pre-Trial Judge¹⁶ and Appeals Panel¹⁷ have recognised that Mr. Selimi can and does benefit from some form of [REDACTED] at the KSC Detention Facilities. This is uncontested by the SPO. [REDACTED] through private visits are also expressly limited at the KSC Detention Facilities to visits between Mr. Selimi and [REDACTED], defined as Close Family Members in the Defence Request, [REDACTED].¹⁸
18. Therefore, the only reason underpinning the Pre-Trial Judge’s finding that maintaining Mr. Selimi in detention would be necessary to mitigate the risk in question is that; “[REDACTED] is not comparable to the limited, yet regular, visits Mr Selimi receives [REDACTED] at the SC Detention Facilities.”¹⁹
19. There is no other substantive difference between [REDACTED]. However [REDACTED] has no logical bearing on the risk that a detainee may convey messages to the exterior, as such a risk must logically exist [REDACTED] at the KSC Detention Facilities, [REDACTED].
20. With the above in mind, there has been neither a suggestion that Mr. Selimi has attempted [REDACTED], nor that such an attempt has been [REDACTED]. If, *in arguendo*, Mr. Selimi wished [REDACTED], this would be more than possible during the time available to him [REDACTED] in the

¹⁵ Impugned Decision, para. 54.

¹⁶ Ibid, para. 55 citing to F00580, Decision on Remanded Detention Review and Periodic Review of Detention of Rexhep Selimi, 26 November 2021, para. 61.

¹⁷ Third Appeal Detention Decision, para. 37.

¹⁸ Defence Request, para. 6.

¹⁹ Impugned Decision, para. 55. Emphasis added.

KSC Detention Facilities. In this regard, the Defence notes once more that there has never been any accusation, or even a suggestion, that Mr. Selimi has acted in any manner contrary to the rules imposed upon him while in detention, a fact reflected in the Pre-Trial Judge's own words.²⁰

21. The Pre-Trial Judge does not explain how simply allowing Mr. Selimi [REDACTED] under the proposed conditions necessarily fails to mitigate the Article 41(6)(b) risks when, by definition, the [REDACTED] that he enjoys while detained must mitigate these risks otherwise they would not be permitted. Simply repeating the Appeals Panel's finding that the two situations are "not comparable", without any further explanation, constitutes an abuse of discretion.
22. In this regard, the Defence notes the Pre-Trial Judge's reliance upon the finding that "the Court of Appeals, in a case concerning a co-accused, found that the Pre-Trial Judge's conclusion that the proposed conditions would allow for [REDACTED], and consequently [REDACTED] was a reasonable one."²¹ Yet again, this misses the point. The question is not [REDACTED], which is not contested by the Defence, but [REDACTED] directly translates into an appreciably greater likelihood that the proposed conditions would fail to mitigate the Article 41(6)(b) risks.
23. Finally, [REDACTED] would be insufficient to mitigate the Article 41(6)(b) risks when the current [REDACTED] in the KSC Detention Facilities would be sufficient to mitigate these same risks, the Pre-Trial Judge, when exercising his obligation to assess all reasonable conditions of release

²⁰ Impugned Decision, para. 55.

²¹ Impugned Decision, para. 55, fn. 109 referring to IA016/F00005, Decision on Jakup Krasniqi's Appeal against Decision on Remanded Detention Review and Periodic Review of Detention, 25 March 2022, para. 28.

whether proposed by the Defence or not,²² should have determined how much of a reduction in [REDACTED] upon release would be sufficient to do so. For example, [REDACTED]? If the [REDACTED] was indeed so crucial, the Pre-Trial Judge should have exercised his discretion to reduce it to what would constitute a suitable amount which would still mitigate the Article 41(6)(b) risks.

24. The Pre-Trial Judge's assumption that mere [REDACTED] under the proposed conditions would result in a failure to mitigate the Article 41(6)(b) risks, without articulating the reasons why there is any substantive difference *vis à vis* the allowance under the present detention regime, renders this aspect of the Impugned Decision an abuse of discretion which must be reversed.

c. Abuse of Discretion in Accessing the Likelihood of Mr. Selimi's Close Family Passing Messages

25. The Pre-Trial Judge held that [REDACTED], would not adequately mitigate the identified Article 41(6)(b) risks as it "would still leave ample opportunity for messages being conveyed orally by Mr Selimi's family to third persons."²³
26. This finding must be predicated on specific articulable grounds which must support the "belief" that the Article 41(6)(b) risks continue to exist and have not been sufficiently mitigated. In this regard, it requires that the Pre-Trial Judge has specific articulable grounds to believe not only that Mr. Selimi would [REDACTED] to pass on messages to third persons [REDACTED], but additionally that [REDACTED] would accept to pass on these messages and run the risk of prosecution [REDACTED]. Yet, the Pre-Trial Judge has

²² Third Appeal Panel Decision, para. 50.

²³ Impugned Decision, para. 55.

identified no evidence which would support this conclusion. Instead, he seeks to compensate for this absence of evidence by relying solely on the vague and speculative possibility that they would have “ample opportunity” do so, despite the fact that Mr. Selimi is well aware that “any allegations of obstruction of proceedings or further crimes arose, the finger of suspicion would be pointed squarely at his family”²⁴ as the Defence has previously raised.

27. The logical result of the Pre-Trial Judge’s reasoning is that he suspects that [REDACTED] would effectively commit contempt if given the opportunity. If the Pre-Trial Judge wished to rely on the finding that it was any more than theoretically possible that any one of these three individuals would actually pass on a message from Mr. Selimi to third parties, he was obliged to have identified specific evidence which would underpin this finding. The conspicuous absence of such evidence renders this finding an abuse of discretion.

2. Abuse of Discretion in relation to Remote Monitoring of a Designated Meeting Room

28. In relation to the Second Extra Condition, namely the use of a designated room for meetings between Mr. Selimi and those outside Mr. Selimi’s Close Family under remote Registry supervision, the Pre-Trial Judge did not find it impossible, too expensive or otherwise unreasonable. No findings were made which undermined the extensive arguments put forward in the Defence Request that the Registry would be able to properly view the meetings in the designated room both in real time, and subsequently if any

²⁴ F00780, Selimi Reply to SPO Response to Defence Submissions on Review of Detention, 25 April 2022, para. 17.

review of the meeting were necessary, to ensure that the proposed visits were within sight and hearing of KSC Registry personnel.²⁵

29. Instead, the Pre-Trial Judge appeared to find that this form of monitoring did not sufficiently mitigate the Article 41(6)(b) risks as:

“the Kosovo Police [REDACTED] does not have the ability [REDACTED] in a manner that an official of the SC, such as the Chief Detention Officer, would have. [REDACTED].”

30. This finding is not based on any evidence before the Pre-Trial Judge. The Impugned Decision cites no evidence that the Kosovo Police [REDACTED] and there is no logical reason to suggest that [REDACTED]. [REDACTED]. It is wholly unreasonable to have found otherwise.

31. This finding also ignores the ability of the Kosovo Police official to suspend the meeting as soon as any aspect of concern arises during a meeting with Mr. Selimi, pending an assessment by the Registry of what had actually occurred through a review of the video feed. Contrary to the implicit findings of the Pre-Trial Judge, there would be no obligation for the meeting to continue while the Kosovo Police member is in contact with the Registry and thus there would be no additional opportunities for the passing of information during this time.

32. Furthermore, as the Defence repeatedly explained in the Defence Request, the Impugned Decision appears to misunderstand the purpose of monitoring by the Kosovo Police which would only be supplementary to the monitoring by the Registry.²⁶ Monitoring by the Kosovo Police is merely an extra layer of protection, rather than a substitute for the remote Registry

²⁵ Defence Request, paras 7-13.

²⁶ Defence Request, paras 8-9.

monitoring. The primary responsibility for such monitoring would therefore rest with the Registry who would be aware of the relevant information pertaining to witnesses, victims and other persons at risk and so be able to directly identify if any improper communications had occurred regarding these individuals.

33. Cognisant of the fact that conceptually and practically, the Registry would be able to conduct the necessary remote monitoring as required, and refusing the Defence's invitation to verify with the Registry if it was unsure on this point,²⁷ the Pre-Trial Judge again therefore relies upon the [REDACTED] as a basis for finding that remote monitoring by the Registry would be insufficient to mitigate the identified Article 41(6)(b) risks. But this is a separate issue, the analysis of which is already fundamentally flawed by the Pre-Trial Judge's factual error as set out extensively in Ground One of this Appeal. [REDACTED] does not affect whether the remote monitoring of a designated meeting room would actually mitigate the risk of Mr. Selimi passing messages or improperly communicating with third parties directly.
34. In these circumstances, the finding by the Pre-Trial Judge regarding the remote monitoring of the designated meeting room is so unreasonable as to as to constitute an abuse of his discretion.

IV. CONCLUSION & RELIEF REQUESTED

35. Mr. Selimi has been detained already for over eighteen months at the KSC Detention Facilities. Although no date for trial has yet been set, it is clear that it will not commence before 2023 at the very earliest given the date for the SPO's completion of its Rule 102(3) disclosure by the end of September

²⁷ Ibid, paras 28-29. Impugned Decision, para. 57.

2022 and the filing of the Defence Pre-Trial Brief by 21 October 2022. The Prosecution case alone at trial, based on the expected duration of testimony of their 326 listed witnesses, is expected to take several years, during which it is expected that Mr. Selimi will continue to be detained.

36. The Defence recognises that this Appeal, seeking interim release well into the pre-trial proceedings until thirty days before the commencement of trial when the identities of a significant number of SPO witnesses will be provided to the Defence, is possibly the last reasonable opportunity for Mr. Selimi to be able to [REDACTED], outside the KSC Detention Facilities before returning to detention for trial. For this reason, the Defence has proposed the most extensive, intrusive and detailed conditions of interim release that have ever been ordered by an international tribunal to allow him to do so.
37. The proposed Consolidated and Extra Conditions of interim release submitted before the Pre-Trial Judge, and set out above, comprise reasonable, comprehensive and effective methods of allowing Mr. Selimi to remain on interim release pending trial with [REDACTED], while adequately mitigating the Article 41(6)(b) risks that the Pre-Trial Judge has previously identified. They serve to replicate as close as possible, his current conditions of detention.
38. While it may never be possible to entirely replicate the systems and protections of the KSC Detention Facilities, the question before the Panel is whether the combined effect of all of the conditions proposed by the Defence sufficiently mitigates the specific Article 41(6)(b) risks. For the reasons set out herein, the Pre-Trial Judge abused his discretion in holding that they did not. The Appeals Panel must correct these errors and reverse the Impugned Decision.

39. For the reasons set out herein, the Defence therefore requests the Appeals Panel to:

- a. REVERSE the Impugned Decision; and,
- b. ORDER the immediate release of Mr. Selimi, subject to the Consolidated Conditions set out herein or any other conditions deemed necessary and appropriate to effectively mitigate the Article 41(6)(b) risks identified by the Pre-Trial Judge.

Word count: 3,169

Respectfully submitted on 9 August 2022,



DAVID YOUNG

Lead Counsel for Rexhep Selimi



GEOFFREY ROBERTS

Co-counsel for Rexhep Selimi



ERIC TULLY

Co-counsel for Rexhep Selimi



RUDINA JASINI

Co-counsel for Rexhep Selimi