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In:	**KSC-BC-2020-06**
	Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**A Court of Appeals Panel** Judge Ekaterina Trendafilova, Presiding Judge Christine van den Wyngaert Judge Judge Michael Bohlander
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Kadri Veseli
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Public Redacted Version of Veseli Defence Reply to SPO Response to its Request for Protection of Legality against Decision on Appeal concerning Detention Review (IA014/F00008) (PL001-F00007, dated 25 July 2022)

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I. INTRODUCTION

1. The Defence for Mr Veseli ("Defence") files this Reply to the SPO's Response[1] to its Request for Protection of Legality.[2]

2. The SPO's submissions largely misinterpret;[3] fail to engage with core Defence arguments;[4] or raise objections inconsistent with KSC legal texts or the jurisprudence of the European Court of Human Rights ("ECtHR").[5] They should be dismissed accordingly.

II. SUBMISSIONS

A. Ground 1: Failure to Issue a Speedy Decision

3. The SPO falsely accuses the Defence of "misrepresent[ing] the case law of the ECHR,[6] and fails to demonstrate any exceptional circumstances that would justify the Court of Appeals' delay in issuing its decision. The SPO has failed to carry its burden of establishing that no violation has occurred and therefore this ground must succeed.

4. The SPO claims that "significant caveats"[7] apply to the ECHR's three-to-four-week limit on detention decisions, however, these 'caveats' are systematically misconstrued by the SPO. Primarily, the SPO argues that the time limit does not apply where there has been a first instance decision offered appropriate due process guarantees – yet ECHR case-law cited by the Defence accounts for

[1] PL001/F00006, Prosecution Response to Veseli Defence Request for Protection of Legality with public annex 1, 18 July 2022.
[2] PL001/F00001, Veseli Defence Request for Protection of Legality Against Decision on Appeal Concerning Remanded Detention Review and Periodic Review of Detention (IA014/F00008), 29 June 2022, ("Request").
[3] *Infra*, paras 3-4; 10; 13-15; 17; 21; 26.
[4] *Infra*, paras 8; 12; 16; 22-23, 25.
[5] *Infra*, paras 6-8; 14; 20; 24; 26.
[6] PL001/F00006, para. 17.
[7] PL001/F00006, paras 17-18.

first instance proceedings in setting out the three-to-four week rule.[8] The Defence also draws attention to *Shcherbina v. Russia* where the initial decision did *not* contain appropriate due process guarantees, and the ECtHR found a violation of Article 5(4) ECHR for a period of just sixteen days.[9]

5. But more to the point, the Defence recalls that the only instances where the ECtHR has allowed for delays equal to or longer than four months, related exclusively to proceedings (i) before Constitutional Courts (which adopt different procedures compared to regular courts), and (ii) involving exceptional circumstances such as medical expert reports; change in jurisprudence;[10] or significant disruptions to the judicial system caused by coup d'état.[11]

6. As to the SPO's contention that the Accused somehow contributed to the delay because it waived its right to participate in a "fresh round of detention review in parallel with the appellate proceedings"[12] the Defence points out that the Pre-Trial Judge declared that *no* conditions could satisfy him sufficiently to issue interim release, rendering a fresh round of proceedings rather moot.[13] But in any case, a fresh round of detention review would have left untouched the question whether the Court of Appeals violated Article 5(4) ECHR.[14]

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[8] ECtHR, *Ilnseher v. Germany*, App. no.10211/12 27505/14, [GC], Judgment, 4 December 2018, para. 256: "An analysis of its case-law reveals that in appeal proceedings before the ordinary courts which follow a detention order imposed by a court at first instance, delays exceeding three to four weeks…are liable to raise an issue under the speediness requirement" (emphasis added).
[9] ECtHR, *Shcherbina v. Russia*, App. no.41970/11, Judgment, 26 June 2014, para. 70.
[10] ECtHR, *Ilnseher v. Germany*, App. no.10211/12 27505/14, [GC], Judgment, 4 December 2018, paras 262-263.
[11] ECtHR, *Mehmet Hasan Altan v. Turkey*, App. no.13237/17, Judgment, 20 March 2018, para. 165.
[12] PL001/F00006, para. 19.
[13] F00576, para. 98.
[14] ECtHR, *Frasik v Poland*, App. no.22933/02, Judgment, 5 January 2010, para. 64: "Even if a detainee has made several applications for release, that provision does not give the authorities either a 'margin of discretion' or a choice as to which of them should be handled more expeditiously and which at a slower pace".

7. The SPO's attempt at presenting the decision-making of the Court of Appeals as unusually complex[15] utterly fails. For comparison, the Pre-Trial Judge's Decision of 23 November 2021 was issued twelve days after the last submission,[16] despite the fact that the Pre-Trial Judge too, was required to assess "detailed submissions and voluminous material from *inter alia* the Kosovo Police and the Registry".[17] While the resulting delay during Pre-Trial proceedings was justified due to the time needed to receive the Kosovo Police and Registry submissions, no such 'factual complexity' occurred before the Court of Appeals, which decided exclusively based on submissions from the Parties.[18]

8. A period of almost four months to render a decision in appellate proceedings is clearly unreasonable unless exceptionally justified in the circumstances of the case. The SPO failed to substantiate any such exceptional circumstances. Considering that no delay can be attributed to Mr Veseli,[19] the Supreme Court Panel should find a violation of Mr Veseli's right to a speedy decision on detention matters.

9. Finally, contrary to SPO submissions, the Defence need not show any harm caused.[20] As the ECtHR has clearly explained, Article 5(4) ECHR is based on "the philosophy of effective judicial control in matters of detention. 'Effectiveness' of such control, in turn, has a time element: delayed judicial

[15] PL001/F00006, para. 20. As already set out (PL001/F00001, para. 18) complexity refers to detention review proceedings, rather than the merits of the case. *Contra*, PL001/F00006, para. 21.
[16] F00576, para. 20.
[17] PL001/F00006, para. 20.
[18] For instance, in *Ilnseher v. Germany* para. 262, the ECtHR took note of the fact that the Court of Appeal had regard to the medical reports ordered **during appellate proceedings**,
[19] Notably, the Court of Appeals denied a very modest request for extension of words, *see* IA014/F00003. As regards the SPO claim at fn. 37, the Defence submits that the Supreme Court Panel should dismiss it summarily considering that (i) it is unrelated to the issue whether the Court of Appeals violated Article 5(4) ECHR, and that (ii) the Defence cannot be blame for making use of the time limit prescribed by the Law.
[20] PL001/F00006, para. 22.

review of detention would not be effective".[21] In any event, the Defence strongly disagrees with the assumption that no harm is caused to an individual held in detention in a foreign country while uncertainty as to the legal basis for that detention persists for month after month.

B. Ground 2: Right to Adversarial Process – Bllaca Allegations

i. Defence Submissions are Factually Correct

10. Preliminarily, it is submitted that the SPO's unsubstantiated argument that the Defence was mistaken in believing "[REDACTED]"[22] misinterprets the Defence submissions.[23]

11. The issue presented before the Supreme Court Panel is whether the Court of Appeals correctly held that the Pre-Trial did not err in relying upon a previous decision issued on an *ex parte*, non-adversarial proceeding. In the view of the Defence, this constitutes a clear violation of the right to adversarial proceedings. The SPO makes no submissions in this respect.

12. To the extent that the SPO claims that adversarial proceedings were upheld during the November 2021 detention review and the Defence failed to challenge the Bllaca allegations in its reply to the SPO submissions,[24] such argument equally fails considering that the Pre-Trial Judge already had submissions before him challenging the credibility of Mr Bllaca,[25] and yet failed to take them into consideration.[26]

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[21] ECtHR, *Shcherbina v. Russia*, App. no.41970/11, Judgment, 26 June 2014, para. 62.
[22] PL001/F00006, paras 23, 25-27.
[23] Nowhere did the Defence argue such point. *See* PL001/F00001, paras 22-35.
[24] PL001/F00006, para. 25.
[25] Considering that the Defence challenged the credibility of Mr Bllaca and his affiliation with SHIK, it is self-evident that such challenges would be valid in respect to all of his claims related to SHIK activity. *Contra*, PL001/F00006, para. 27.
[26] PL001/F00001, para. 27; IA014/F00004, Veseli Defence Appeal Against Decision on Remanded Detention Review Decision and Periodic Review of Detention of Kadri Veseli, 3 December 2021, III(A),

13. As to the claim about the "Defence's sensible concession",[27] the SPO – once again – blatantly misinterprets Defence submissions. Pursuant to settled ECtHR jurisprudence, even if certain factors justified the initial detention of the Accused, they are no longer sufficient and proportionate after one year of pre-trial detention.[28] The Pre-Trial Judge was therefore obliged to rely upon new factors to justify continued detention. However, he erred (i) in relying upon a decision taken *ex parte* and (ii) in failing to take into consideration Defence submissions in relation to the credibility of Mr Bllaca.

ii. Ground 2 is Admissible

14. The claim that Ground 2 is inadmissible[29] because the Defence did not formally mention the violation of the right to adversarial proceedings before the Appeals Panel – although it did so in substance –[30] is without basis and should be dismissed summarily.[31] Furthermore, claims about inadmissibility *ratione temporis* are inapposite since the Request is directed against the Decision of the Court of Appeals, rather than the Pre-Trial Judge's decision, *stricto sensu*.

iii. The Court of Appeals Failed to Engage with Defence Submissions

15. Contrary to SPO claims,[32] the Defence resubmitted Annex 4 of its Initial Application for Interim Release (Annex 2 of its Appeal) to support its

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paras 7-9. Notably, it is the SPO which failed to respond to Defence submissions concerning Mr Bllaca, *see* F00161, Prosecution response to Application for Interim Release on behalf of Mr Kadri Veseli with Confidential Annex 1, 4 January 2021 para. 35.

[27] PL001/F00006, para. 26.

[28] *See*, IA014/F00004, para. 48 and references cited therein.

[29] PL001/F00006, paras 28-29.

[30] *See*, ECtHR, *Gäfgen v. Germany*, [GC], App. No.22978/05, Judgment, 1 June 2020, para. 144.

[31] PL001/F00001, para. 26, fn. 33; IA014/F00007, Veseli Defence Reply to Prosecution Response to Veseli Defence Appeal Against Decision on Remanded Detention Review Decision and Periodic Review of Detention of Kadri Veseli, 21 December 2021, para. 3 (relied upon Bllaca's allegations only once and during an *ex parte* setting); IA014/F00004, para 7: "The Pre-Trial Judge erred by relying on previous incidents of witness interference […] without considering Defence evidence regarding these allegations'; para. 9 "For the Pre-Trial Judge to make such a finding with no reference to, or discussion of, the evidence presented to the contrary is arbitrary and prejudicial".

[32] PL001/F00006, para. 32.

argument that the Pre-Trial Judge had failed to consider Defence submissions.[33] Therefore, the Court of Appeals clearly exceeded the scope of appellate review, because instead of determining whether the Pre-Trial Judge had provided proper reasoning, it proceeded with its own analysis of the judgment.[34]

16. The Defence notes the SPO's failure to respond to its second and third argument developed in paragraphs 33-35 of the Request which address other errors in the Court of Appeals' reasoning, and its decision to ignore pertinent evidence in the absence of an English language translation.

C. Ground 3: Insufficient Grounds – *Lajçi* Incident

17. The claim[35] that the Court of Appeals had already considered submissions in relation to the 'weight' attributed to the *Lajçi* incident is factually incorrect. In its First Appeal Decision, the Appeals Court simply accepted the Pre-Trial Judge's finding that the *Lajçi* incident may be relied upon as "an indication that there is a risk of obstruction occurring in the future".[36] In any event, the Defence recalls that courts are under an obligation to constantly reassess the weight to be attached to risk(s) already found to exist, and balance them against other competing factors such as the passage of time and the presumption of liberty. Due to the constant change of the 'weight' of the risk of obstruction, courts are not, therefore, entitled to dismiss such submissions as "repetitive".

18. As to the alleged inapplicability of the ECtHR jurisprudence to the present case, suffice to note that both the cases cited at paragraph 38 of the Request substantiate the legal principles relied therein by exposing the error committed

[33] *See*, IA014/F00004, para. 8, fn. 7.
[34] *See*, PL001/F00001, paras 31-32.
[35] PL001/F00006, para. 35.
[36] IA001/F00005, para. 38.

by the Court of Appeals, namely failing to consider whether the Pre-Trial Judge erred in finding that the risk identified was so high that no measure other than detention was sufficient to mitigate it.

D. Ground 4: Unreasonable and Disproportionate Conditions

i. Ground 4A: Contradictory Decisions by the Court of Appeals

19. The SPO's forced interpretation[37] of what the Court of Appeals intended to convey is contradicted by the Court of Appeals' reasoning itself, which the Defence quoted in full.[38]

ii. Ground 4B: Power to Propose Conditions

20. The SPO submissions show a flawed understanding of the appeal system considering that the 90 days deadline relates to the Impugned Decision,[39] rather than the Decision of the Pre-Trial Judge. However, the Defence notes that the Impugned Decision cannot be read in isolation, considering that in essence, it confirmed the reasoning of the Pre-Trial Judge. In any event, the Defence clearly identified the legal error committed by both courts, which was "to consider the 'informative' answers [of the Kosovo Police] as fixed, 'proposed conditions,' incapable of amendment by the courts".[40]

iii. Ground 4C: Necessity and Proportionality of Conditions

21. As the Defence recalled in its Request, "the Kosovo Police did refer to [reasonable] measures applicable [REDACTED]".[41] However, the Court of Appeals contradicted itself when it agreed with the Pre-Trial Judge that the

[37] PL001/F00006, para. 42.
[38] PL001/F00001, para. 40.
[39] IA014/F00008, Decision on Kadri Veseli's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, 31 March 2022.
[40] PL001/F00001, para. 47, fn. 71 (referring to Impugned Decision, para. 35).
[41] PL001/F00001, [REDACTED].

measures described by the Kosovo Police "would allow for [REDACTED]"[42] (thus considering this factor as decisive), while at the same time acknowledging that [REDACTED]would be "unrealistic".[43] As to the SPO argument that the Defence fails to explain why the findings of the lower courts constitute a legal error,[44] the Defence refers to paragraphs 50-51 of the Request.

22. With respect to [REDACTED], the SPO fails entirely[45] to respond to the Defence submissions that the Court of Appeals failed to adequately engage with its crucial point, namely that by considering the Kosovo Police's [REDACTED] 'decisive', the Pre-Trial Judge rendered the exercise of review on remand moot from the outset.[46]

E. Ground 5: Assessment of Additional Measures

23. Once again, the SPO fails to engage with the Defence submissions and provide any authority or legal basis to justify the Court of Appeals' "perfectly common-sense statement".[47] Contrary to the Court of Appeals finding, or the SPO's irrelevant hypotheticals, the "reasonableness" requirement should not be dependent on the submissions of the parties (otherwise the obligation "to inquire all reasonable conditions […] and not just those raised by the Defence" would be illegally curtailed) but on the specific risks identified. In the present case, the only risk identified is the possibility that Mr Veseli might ask someone to tweet a public judgment. Such "risk" obliges the Panel to evaluate, *proprio motu*, all the arsenal of alternative measures provided by Article 41(12) KSC Law.

[42] IA014/F00008, para. 35.
[43] IA014/F00008, para. 36; PL001/F00001, para. 49.
[44] PL001/F00006, para. 48.
[45] PL001/F00006, para. 50.
[46] *See* PL001/F00001, paras 52-53.
[47] PL001/F00006, para. 55.

24. Moreover, the Kosovo Police is[48] an organ of the Republic of Kosovo and as such it is "obliged" to enforce judicial orders from any Kosovo court. Therefore, unlike instances of international courts (which were reliant on voluntary 'guarantees' by Third States) KSC Panels need not secure prior detailed (or generic) undertakings before contemplating *proprio motu* measures since the Kosovo Police shall implement **any** lawful judicial order issued by the Pre-Trial Judge, the Court of Appeals or the Supreme Court.[49]

F. Ground 6: Proportionality of Detention

25. Other than accusing the Defence of bringing unconvincing claims,[50] the SPO fails to point at any part of the Impugned Decision which properly considered Defence submissions in its Appeal.[51] As to the ECtHR precedents, the Defence fails to understand how repeating excerpts from the Impugned Decision justifies the failure of the Court of Appeals:

> To grapple with the *ratio decidendi* of the cited ECtHR cases, namely that, with the passage of time, further reasons are required to justify detention and that the absence of any further developments indicated that any risk initially identified has become more speculative and less weighty.[52]

26. Finally, with respect to Rule 56 of the Rules, the SPO misquotes[53] Defence submissions.[54] Rule 56(2) of the Rules states the obligation of the Panel to ensure that a person is not detained for an unreasonable period prior to the opening of the case. This clearly means that pre-trial detention may become unreasonable despite from and irrespective of any existence of good cause.

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[48] The Defence notes the inapposite use, by the SPO, of the [sic] adverb. It recalls that the Kosovo Police is a single entity and as such it should be referred to in the singular.
[49] Law No. 04/L-076, On Police, Article 6(1); KSC Law, Article 53.
[50] PL001/F00006, para. 60.
[51] PL001/F00001, para. 60.
[52] *ibid*.
[53] PL001/F00006, para. 62.
[54] PL001/F00001, para. 63: "The Defence made it clear that good cause does not affect and cannot be used to justify long periods of pre-trial detention, which are rendered 'unreasonable' by the passage of time".

Whenever the pre-trial detention has become unreasonable – as is the case regarding Mr Veseli –[55] good cause is not sufficient to remedy the violation to the presumption of liberty. Despite the SPO's attempt to artificially limit the Supreme Court Panel's assessment to the date of the Pre-Trial Judge's decision,[56] the Defence notes that by the time the Supreme Court Panel will render its decision, Mr Veseli will have remained in detention for almost two years. The Defence further recalls that the general obligation prescribed in Rule 56(2) of the Rules is applicable to *any* Panel of the Specialist Chambers. The Supreme Court Panel should therefore reject the SPO's excessively formalistic approach which runs contrary to the generally accepted principles governing the efficient and effective administration of justice.

III. CONCLUSION

27. For the reasons set out above, the Defence respectfully requests that the Supreme Court Panel grant the Request in accordance with the modalities set out in paragraph 65 therein.

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[55] *Contra*, PL001/F00006, paras 65-66. Moreover, for reasons of efficiency, the Supreme Court Panel should not.
[56] PL001/F00006, para. 66.