

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

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Thaçi Defence Submissions on Fourth Detention Review

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I. INTRODUCTION

1. Mr Hashim Thaçi has now been detained, without release, for 21 months.¹ An additional four and half months have passed since the last detention review process commenced.² After nearly two years in prison, Mr Thaçi now brings his fourth request for a periodic review of his detention.

2. In November 2020, the SPO first represented to the Pre-Trial Judge, the parties and the public, that "trial in this matter should commence this summer or no later than September 2021".³ This was either a monumental miscalculation, or a misrepresentation. Now, in September 2022, the case against Mr Thaçi remains in the pre-trial phase. It cannot proceed to trial, because the SPO has been unable to conclude the disclosure process, 21 months after the arrest of the accused. While disclosure remains incomplete, the case cannot be transferred. The Pre-Trial Judge has explicitly recognised that the timeline of the case is in the SPO's hands, and depends on the disclosure of the remaining categories of material.⁴

3. The slow progress of the SPO disclosure is unjustifiable. Importantly, aspects of the SPO's disclosure have now been recognised by the Pre-Trial Judge as untimely.⁵ In the latest decision on SPO disclosure, following requests by two Defence teams seeking remedies for non-compliance with disclosure obligations, the Pre-Trial Judge

¹ KSC-BC-2020-06/F00051, Registrar Notification of Arrest of Hashim Thaçi Pursuant to Rule 55(4), 5 November 2020 (strictly confidential and *ex parte*, reclassified as public on 20 November 2020).

² KSC-BC-2020-06/F00818, Pre-Trial Judge, Decision on Periodic Review of Detention of Hashim Thaçi, 26 May 2022 ("Fourth Decision").

³ KSC-BC-2020-06/F00097, Prosecution submissions further to the status conference of 18 November 2020, 23 November 2020, para. 14. *See also* KSC-BC-2020-06, Transcript of Second Status Conference, 17 December 2020, p. 199 lines 18-21; KSC-BC-2020-06/F00191, Prosecution submissions for third status conference, 8 February 2021, para. 14.

⁴ KSC-BC-2020-06, Transcript of Twelfth Status Conference, 20 May 2022 ("Transcript of Twelfth Status Conference"), p. 1269 lines 9-11.

⁵ KSC-BC-2020-06/F00936, Pre-Trial Judge, Decision on Thaçi and Krasniqi Defence Motions Seeking Remedies for Non-Compliance with Disclosure Obligations, 26 August 2022 ("Disclosure Decision"), para. 36.

felt the need to “strongly urge” the SPO to abide by its obligation to disclose exculpatory material immediately, and to prioritise disclosure of exculpatory material over other competing deadlines.⁶ This reflects that the belaboured process of SPO disclosure has extended the SPO’s own trial date estimates by over a year, while Mr Thaçi is approaching two years in prison without a trial date even being discussed.

4. The KSC’s statutory framework includes a safeguard to avoid this very situation, where accused are detained throughout protracted pre-trial proceedings.⁷ Pre-trial incarceration, the imprisonment of individuals presumed to be innocent, is an exception to the well-recognised presumption in favour of pre-trial release.⁸ The position that prior to trial, detention should not be the default position, “flows from the presumption of innocence”,⁹ a fundamental right which underpins proceedings before this Court.¹⁰ As a Judge of this Court has stated, “the world wide practice of prolonged pre-trial detention, including the practice of international criminal tribunals, is deplorable”.¹¹

5. As such, the KSC Rules contain a trigger in Rule 56(2), which places a positive obligation on the Pre-Trial Judge to act to ensure that a person is not detained for an unreasonable period “prior to the opening of the case”. When the length of time spent in detention continues to increase, it is less likely that the continued detention can still

⁶ *Ibid*, para. 37.

⁷ KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 (“Rules”), Rule 56(2).

⁸ See, e.g., ECtHR, *Bykov v. Russia*, Application no. [4378/02](#), Grand Chamber, Judgment, 10 March 2009, para. 61; ECtHR, *Neumeister v. Austria*, Application no [1936/63](#), Court (Chamber), Judgment, 27 June 1968, Series A no. 8, p. 37, § 4.

⁹ ECtHR, *Buzadji v. the Republic of Moldova*, Application no. [23755/07](#), Grand Chamber, Judgment, 5 July 2016, para. 89; William A. Schabas, *The European Convention on Human Rights* (Oxford University Press, 2015), p. 250.

¹⁰ Rule 56(2) of the Rules.

¹¹ KSC-BC-2020-06/IA004/F00005, Appeals Panel, Separate Concurring Opinion of Judge Kai Ambos, 30 April 2021, para. 4.

be considered reasonable.¹² In the present case, the trigger for Rule 56(2) has now been reached. The pre-trial proceedings have been drawn out beyond any reasonable expectations, with no trial date in sight, and in circumstances in which the accused can no longer continue to be indefinitely detained. This is precisely the situation which Rule 56(2) of the Rules was designed to resolve.

6. While the present Defence submissions are limited to addressing the question of the proportionality of Mr Thaçi's detention, the Defence neither concedes nor accepts that the conditions for ongoing detention under Article 41(6) of the KSC Law have been met, and reserves its right to make further and fuller submissions on all aspects of the detention review regime in subsequent filings.

II. SUBMISSIONS

A. DETENTION IS NO LONGER PROPORTIONATE

7. The time taken by the SPO to meet its disclosure obligations has delayed the proceedings, and extended the length of Mr Thaçi's pre-trial incarceration. At the time of the present filing, disclosure of Rule 102(3) material is ongoing, as is the processing of Defence requests for Rule 102(3) disclosure. The SPO has also not yet filed a updated version of its Rule 102(3) Notice, following which there may be additional disclosure requests made by the Defence, elongating the Rule 102(3) disclosure process even further. In addition, the SPO has not filed a updated version of its Rule 109(C) chart, or its updated SPO List of Witnesses. The SPO has also indicated that it is still waiting for Rule 107 clearances required for further disclosure, a year after its representation that it would be trial ready. The Pre-Trial Judge has now acknowledged that some of the SPO's exculpatory disclosure could have been provided to the Defence earlier,¹³

¹² KSC-BC-2020-06/F00624, Pre-Trial Judge, Decision on Review of Detention of Hashim Thaçi, 14 December 2021 ("Third Decision"), para. 95.

¹³ Disclosure Decision, para. 36.

has felt the need to put in place timelines in order to manage the SPO's disclosure process,¹⁴ and has ordered the SPO to produce a disclosure report on the fulfillment of its Rule 103 disclosure obligations.¹⁵

8. The length of this process is abnormal, and the pre-trial phase has been too long. This is reflected in the fact that 21 months have passed, with deadlines and estimates being repeatedly abandoned. It is also reflected in the Pre-Trial Judge's concrete proposals for streamlining the case, including that the SPO limit the crime sites and total number of SPO witnesses,¹⁶ which could reduce the scope of the SPO's disclosure obligations, and help the parties move forward to trial. In response, the SPO indicated that it did not envisage doing so,¹⁷ (soon after seeking to **add** two new witnesses),¹⁸ preferring instead for the pre-trial phase to continue with no end date in place, while Mr **Thaçi** remains in prison.

9. The Defence has previously submitted the length of pre-trial detention had reached a tipping point, and could not longer be considered reasonable.¹⁹ In rejecting this submission, the Pre-Trial Judge relied on what he called the "substantial procedural steps [that] have been completed with a view to transmitting the case to trial in the future".²⁰ As demonstrated above, it is just as easy to compile a list of the procedural steps that the SPO has yet to take.

¹⁴ For example, a deadline was imposed by the Pre-Trial Judge for completion of Rule 102(3) disclosure: see Transcript of Twelfth Status Conference, Third Oral Order, p. 1323 lines 16-25.

¹⁵ Disclosure Decision, para. 37.

¹⁶ KSC-BC-2020-06/F00863, Pre-Trial Judge, Order Setting the Date for a Thirteenth Status Conference and for Submissions, 1 July 2022, para. 22(3)(c).

¹⁷ KSC-BC-2020-06, Transcript of Thirteen Status Conference, 13 July 2022, p. 1443.

¹⁸ KSC-BC-2020-06/F00890/CONF/RED, Prosecution Rule 102(2) submission and related requests, 21 July 2022

¹⁹ KSC-BC-2020-06/F00769, **Thaçi** Defence Submissions on Third Detention Review, 19 April 2022, paras. 7, 26.

²⁰ Fourth Decision, para. 80.

10. Regardless, it should be presumed that the SPO will continue to take the procedural steps required of it under the KSC Statute and Rules, many of them substantial, in the lead up to trial. The question is not whether progress is being made - which is a given - but the fact that 21 months later, the parties are still not in a position where the trial date is being discussed. In these circumstances, it is insufficient to simply maintain that an accused can remain in prison because procedural steps are being taken.

11. In previously finding that detention remained proportionate, the Pre-Trial Judge also relied on: (i) the gravity of the charges; (ii) the length of the potential sentence; (iii) the purported lengthy period and significant geographic scale of the alleged crimes; (iv) the significant number of SPO witnesses and (v) the extensive protective measures that have been granted to them.²¹ None of these factors, however, distinguish this case from other international criminal cases over the last two decades in which pre-trial provisional release has been granted. The existence of serious charges, potentially long sentences, and long lists of protected SPO witnesses, is reflective of the very nature of international criminal proceedings. The drafters of the KSC Law²² and Rules built a system of provisional release into the Court's procedure, and asked the Pre-Trial Judge to consider every two months whether that detention could be maintained, while knowing that the charges would be serious, the witness lists long, and the potential sentences lengthy. The proportionality of detention must take into account more than the characteristics of international criminal trials.

12. The Pre-Trial Judge has recalled "the importance of the proportionality principle in the determination on the reasonableness of pre-trial detention",²³ while the Appeals Panel had held that the **length** of time spent in detention pending trial

²¹ Fourth Decision, para. 79.

²² Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law").

²³ Third Decision, para. 95.

must be considered, along with the risks described in Article 41(6)(b) of the KSC Law, in order to determine whether “the continued detention stops being reasonable and the individual needs to be released”.²⁴ As such there is no dispute that, in every case, there will be a point at which continued detention stops being reasonable. Importantly, there is no burden on the Defence to establish undue delay on the part of the SPO, Rule 56(2) requires only that the Pre-Trial Judge “ensure that a person is not detained for an unreasonable period prior to the opening of the case.” The Defence submits that, after 21 months, this point has been reached.

13. Prolonged pre-trial incarceration clashes with the right to liberty as a fundamental human right, protected by Article 5 of the ECHR, and Article 29 of the Kosovo Constitution. Depriving accused persons of their liberty, while they continue to benefit from the presumption of innocence, is exceptional. Doing so for prolonged periods cannot be reconciled with the safeguard established by Rule 56(2) of the Rules.

III. RELIEF SOUGHT

14. For these reasons, the Defence respectfully requests the Pre-Trial Judge:

ORDER Mr Thaçi’s immediate interim release on the conditions deemed necessary and appropriate.

[Word count: 1,870 words]

²⁴ KSC-BC-2020-06/IA010/F00008, Appeals Panel, Decision on Hashim Thaçi’s Appeal Against Decision on Review of Detention, 27 October 2021, para. 49.

Respectfully submitted,



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Thursday, 1 September 2022

At Tampa, United States