PUBLIC
19/09/2022 15:35:00

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
Date:	19 September 2022
Language:	English
Classification:	Public

Thaçi Defence Reply to 'Prosecution Submissions on Detention Review of Mr Thaçi' (F00965)

Specialist Prosecutor's Office

Jack Smith

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi ("Defence") replies[1] to the 'Prosecution Submissions on Detention Review of Mr Thaçi'.[2]

II. SUBMISSIONS

A. ARTICLE 41(6) RISKS

2. The Defence Submissions[3] were limited to the question of proportionality of detention. The Defence replies to the SPO's submissions on the alleged Article 41(6)[4] risks, only to note that the SPO has incorrectly cited the standard for the assessment of risk.[5] The correct standard is that articulated by the Appeals Chamber in April 2021, requiring the Pre-Trial Judge to determine whether there is a "sufficiently real possibility" that one or more of the risks under Article 41(6)(b)(i)-(iii) of the KSC Law exist,[6] rather than whether a risk is merely "possible" as submitted by the SPO. The Defence invites the Pre-Trial Judge to review the SPO submissions with reference to the correct standard.

B. DETENTION IS NO LONGER PROPORTIONATE

3. The Defence submissions centred on the obligation placed on the Pre-Trial Judge by Rule 56(2) of the Rules, which states:

---

[1] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ("Rules"), Rule 76.
[2] KSC-BC-2020-06/F00965, Prosecution Submissions on Detention Review of Mr Thaçi, 12 September 2022, Confidential ("SPO Response").
[3] KSC-BC-2020-06/F00945, Thaçi Defence Submissions on Fourth Detention Review, 1 September 2022, Confidential ("Defence Submissions").
[4] Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law").
[5] SPO Response, para. 7.
[6] KSC-BC-2020-06/IA004/F00005, Appeals Panel, Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021, paras. 21-24.

> The Panel shall ensure that a person is not detained for an unreasonable period prior to the opening of the case.

4. Namely, if the period of pre-trial detention becomes unreasonable, the accused must be released. This rule is unqualified, clear on its face, and was included in the KSC Rules despite having no equivalent before the other international courts, signalling the intention of the drafters that the KSC avoid the kind of protracted pre-trial incarceration now occurring in the present case.

5. The SPO Response essentially seeks to seal off these proceedings from the operation of Rule 56(2), by attempting to justify Mr Thaçi's length of pre-trial incarceration by pointing to the factors that were relied on to justify his incarceration in the first place. In making repeated reference to the risks of witness interference[7] and pointing to the *Gucati and Haradinaj* Trial Panel's finding that "the serious threat of witness intimidation and interference in Kosovo remains current",[8] the SPO misses the point. The Pre-Trial Judge has previously ordered Mr Thaçi's incarceration, and the reasons are well known. The proper question, is whether the length of his incarceration has now become unreasonable. By the SPO's logic, there is no length of time which tips the balance into unreasonableness, because of the reasons relied on for his initial incarceration. This circular reasoning fails to engage in any meaningful way with the Defence submissions. Of course, in every case before the KSC, there will be a point at which the length of pre-trial incarceration becomes unreasonable. Rule 56(2) of the Rules requires the Pre-Trial Judge to avoid it.

6. Alarmingly, in justifying the reasonableness of 22 months of uninterrupted pre-trial detention, the SPO makes reference to "cases involving organised criminal

[7] SPO Response, paras. 17, 25.
[8] SPO Response, para. 25.

activity", and then cites to three ECtHR cases relating to persons alleged to be participating in organised criminal gangs and groups.[9] Any suggestion that this case involves organised crime, or that parallels can be drawn to cases involving criminal gangs, is incorrect and should be disregarded.

7. The SPO also asserts that "less than one month ago" a Panel of the Supreme Court Chamber upheld the Pre-Trial Judge and Appeals Panel's findings that Mr Veseli's period of pre-trial detention remained proportionate,[10] citing to the arrest of Mr Veseli and Mr Thaçi on the same day. The Supreme Court's findings, in fact, assessed proportionality as at the date of the challenged Appeals Panel decision, which was 31 March 2022.[11] Mr Thaçi has been detained for over five months since that decision. This brings his total period of his pre-trial incarceration to 22 months without a trial date even being discussed, with Rule 102(3) disclosure still ongoing, and the SPO still waiting for Rule 107 clearances for further disclosure, a full year after the date at which it informed the Court it would be trial ready.

8. The SPO then attacks the Defence for "distorting" the test for proportionality by "focusing on future events", being the outstanding procedural steps the SPO is required to take before the case can finally move to trial.[12] This criticism is unwarranted for two reasons. First, the Defence submissions outlining the wealth of ways in which the SPO is still not ready for trial, directly addressed the link drawn by the Pre-Trial Judge between trial preparedness and the reasonableness of detention. Namely, the Defence has previously submitted the length of pre-trial

[9] SPO Response, para. 17.
[10] SPO Response, para. 19.
[11] KSC-BC-2020-06/PL001/F00008, Supreme Court Panel, Decision on Kadri Veseli's Request for Protection of Legality, 15 August 2022, public, paras. 67-69, citing IA14/F00008, Appeals Panel, Decision on Kadri Veseli's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, 31 March 2022.
[12] SPO Response, para. 20.

detention could no longer be considered reasonable.[13] 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".[14] The Defence was therefore entitled to explain why such a finding would no longer be reasonable, 22 months in, and with reference to the procedural steps that remain outstanding.

9. Second, the SPO's claim that the Defence "distorted" the test by focusing on future events, is inconsistent with its own submissions listing in detail how the SPO is "on track" to hit key milestones, which "will be met imminently".[15] Thereby setting out its own predictions for future procedural events after having just criticised the Defence for doing the same.

10. A pre-trial detention period of 22 months is an unreasonable period. Rule 56(2) requires the Pre-Trial Judge to act. For these reasons, the Defence maintains its request that the Pre-Trial Judge:

> **ORDER** Mr Thaçi's immediate interim release on the conditions deemed necessary and appropriate.

[Word count: 1,081 words]

[13] KSC-BC-2020-06/F00769, Thaçi Defence Submissions on Third Detention Review, 19 April 2022, paras. 7, 26.
[14] KSC-BC-2020-06/F00818, Pre-Trial Judge, Decision on Periodic Review of Detention of Hashim Thaçi, 26 May 2022, para. 80.
[15] SPO Response, para. 21.

Respectfully submitted,

Gregory W. Kehoe

Counsel for Hashim Thaçi

Monday, 19 September 2022

At Tampa, United States