

In: KSC-BC-2020-06

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

Before: Trial Panel II

Judge Charles L. Smith III, Presiding Judge

Judge Christoph Barthe,

Judge Guénaël Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Rexhep Selimi

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**Public Redacted Version of Selimi Defence Submissions on
Review of Detention**

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I. INTRODUCTION

1. The Defence for Mr. Rexhep Selimi, in accordance with the schedule imposed by the Pre-Trial Judge,¹ hereby files submissions on the review of Mr. Selimi's ongoing provisional detention.
2. An independent and current review of the relevant factors relied upon by the Pre-Trial Judge demonstrates that the previously identified Article 41(6)(b)(i)-(iii)² risks do not, or at least, no longer, materialise in relation to Mr. Selimi.
3. In the alternative, for a limited duration of four weeks from 1 - 29 January 2023, extensive, reasonable, realistic and enforceable conditions of interim release can sufficiently mitigate the likelihood that any risks identified pursuant to Article 41(6)(b) by the Trial Panel would materialise in relation to Mr. Selimi.
4. Given the urgent nature of this request, the Defence requests the Trial Panel to order the SPO to respond to this request on an urgent basis.

II. APPLICABLE LAW

5. The Defence notes the following applicable legal framework recently confirmed by the Trial Panel in relation to the periodic review of detention of detainees before the Kosovo Specialist Chambers ("KSC"):

"A panel has an obligation to review the reasons or circumstances underpinning detention and determine whether these reasons continue to exist under Article 41(6) of the Law. The Panel is not required to make findings on the factors already decided upon in the initial ruling on detention but must examine these reasons or circumstances and

¹ KSC-BC-2020-06/F01111, Decision on Periodic Review of Detention of Rexhep Selimi, 18 November 2022 ("Sixth Detention Decision").

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

determine whether they still exist. What is crucial is that the Panel is satisfied that, at the time of the review decision, grounds for continued detention still exist. Moreover, a review of detention under Rule 57(2) of the Rules is not strictly limited to whether or not a change of circumstances occurred in the case. However, such a change can nonetheless be determinative and shall be taken into consideration if raised before the relevant panel or proprio motu.

Article 41(6)(b) of the Law sets out three alternative bases (risks) on which detention may be found to be necessary: (i) risk of flight; (ii) risk of obstruction of the proceedings; or (iii) risk of the further commission of crimes. These grounds must be “articulable” in the sense that they must be specified in detail by reference to the relevant information or evidence. The SPO must accordingly demonstrate the existence of either of these risks against the threshold of articulable grounds to believe. Furthermore, a Panel must provide specific reasoning and rely on concrete grounds when authorising continued detention. That being said, in determining whether any of the grounds under Article 41(6)(b) of the Law allowing for a person’s detention exist, the standard to be applied is less than certainty, but more than a mere possibility of a risk materialising.”³

6. In this regard, when conducting a review of detention, the Panel must independently assess the underlying evidence to determine whether the reasons underpinning detention continue to exist. The Trial Panel may identify different relevant factors for the assessment of Article 41(6)(b) risks than those identified by the Pre-Trial Judge. Otherwise, it may also rely on the same factors but give

³ KSC-BC-2020-06/F01170, Decision on Periodic Review of Detention of Hashim Thaçi, 19 December 2022, paras 20, 24 (“Thaçi Detention Decision”). Footnotes omitted.

them less weight or come to a different conclusion on these same factors than that reached previously.

7. Further, the Trial Panel has held as follows in relation to the question of whether an accused may be granted interim release subject to certain conditions:

“When deciding on whether a person should be released or detained, the Panel must consider alternative measures to prevent the risks in Article 41(6)(b) of the Law. Article 41(12) of the Law sets out a number of options to be considered in order to ensure the accused’s presence at trial, to prevent reoffending or to ensure successful conduct of proceedings. In this respect, the Panel recalls that detention should only be continued if there are no alternative, more lenient measures reasonably available that could sufficiently mitigate the risks set out in Article 41(6)(b) of the Law. The Panel must therefore consider all reasonable alternative measures that could be imposed.”⁴

8. When determining if proposed conditions of interim release, whether raised by the Defence or considered *proprio motu*, are sufficient to mitigate the identified risks, neither the Appeals Panel, nor the Pre-Trial Judge appear to have clearly specified the parameters of their assessment.
9. However, in the above finding by the Trial Panel, namely that it must determine whether conditions of release “could” sufficiently mitigate the Article 41(6)(b) risks, there is no requirement that such conditions would *certainly* or *definitively* eliminate risks. Such an absolute standard would be impossible to reach for an accused and similarly impossible for the Trial Panel to apply.
10. Instead, given the wording of the quoted finding, the Trial Panel should assess whether such conditions are capable of mitigating against the identified risks, in

⁴ Ibid, para. 43. Footnotes omitted.

the ordinary course of events, without reference to unlikely or unrealistic scenarios.

11. Further, in undertaking this assessment of potential conditions, the Panel should examine the Article 41(6)(b) risk that it has specifically identified and articulated to determine the actual likelihood of this risk materialising. The greater the level of risk identified, the more stringent the condition of release may have to be, to mitigate that risk. Conversely, if the risk is articulable, but moderate, it may be more easily mitigated. Measures that may be sufficient to mitigate a specific risk in relation to one accused may not be sufficient to do so for another.
12. Finally, although the Defence may propose the specific conditions of release, the principle of liberty means that the burden remains on the SPO, at all times, to show why any proposed conditions would be insufficient to mitigate the Article 41(6)(b) risks and therefore why detention continues to be necessary.

III. SUBMISSIONS

A. Article 41(6)(b)(i)-(iii) risks do not materialise in relation to Mr. Selimi

13. While the Defence notes that the Trial Panel has held that it is not required to make findings on the factors already decided upon previously by the Pre-Trial Judge,⁵ it is obliged to review for itself these factors to determine whether it considers them to be valid and relevant in relation to Mr. Selimi. Therefore, despite the findings and conclusions of the Pre-Trial Judge regarding the relevant risks,⁶ the Trial Panel may reach a different conclusion, even on the same factors.

⁵ Thaci Detention Decision, para. 20.

⁶ Sixth Detention Decision, paras. 22-37.

14. Indeed, in re-examining the risk of flight in relation to Mr. Selimi's co-accused, the Trial Panel reached a different conclusion than that of the Pre-Trial Judge.⁷ In relation to Mr. Selimi, there is also insufficient evidence produced or identified by the SPO to support a finding of an articulable ground to believe that Mr. Selimi would not attend proceedings if granted release.
15. Thus, a similar re-examination of this evidence in relation to Mr. Selimi would determine that this risk does not apply in his case as the Pre-Trial Judge's previous findings in this regard, namely that Mr. Selimi has been made aware of the charges against him and has been made aware of the possibility of a serious sentence if convicted as well as his purported influence or authority based on his prior role,⁸ are insufficient to justify the existence of this risk.
16. As regards the risk of obstruction of proceedings or committing further crimes, the Pre-Trial Judge relied on various factors which are insufficient to support the existence of any Article 41(6)(b)(ii) or (iii) risk, either individually, or in conjunction with other factors.
17. First, the Pre-Trial Judge relied upon [REDACTED].⁹
18. [REDACTED].
19. [REDACTED].¹⁰
20. Given the transfer of the case to the Trial Panel, a re-evaluation of [REDACTED], is now warranted. With the burden resting on the SPO to justify the existence of the Article 41(6)(b) risks, the SPO's failure to conduct any further investigations

⁷ Thaci Detention Decision, paras. 25-29.

⁸ Sixth Detention Decision, para. 23.

⁹ Ibid, para. 26. Cited references omitted.

¹⁰ [REDACTED].

or adduce any further evidence in this regard, drastically weakens the weight that should be accorded to this factor.

21. Second, the Pre-Trial Judge's finding that Mr. Selimi holds a position of influence in Kosovo as a former high-ranking KLA member and political figure, having held the position of Minister of Internal Affairs and having been elected to the Kosovo Assembly¹¹ should be afforded a significantly reduced weight.
22. Since his arrest and detention beginning in November 2020, any limited residual authority enjoyed by Mr. Selimi has waned significantly since this factor was initially relied upon in the Pre-Trial Judge's first decision on interim release.¹² The authority he enjoyed as a Member of Parliament at that time has evidently disappeared since he no longer occupies that position, while the previous positions of authority he occupied in the KLA or in the Provisional Government of Kosovo occurred almost two decades ago.
23. Third, the "persisting climate of intimidation of witnesses and interference with criminal proceedings against former KLA members"¹³ relied upon by the Pre-Trial Judge is predicated on findings initially issued two years ago. Updated evidence of the current situation in Kosovo in relation to protection of witnesses is lacking.
24. Further, as noted by the Pre-Trial Judge, this factor is not "determinative in relation to the risk of obstructing the progress of the proceedings"¹⁴ and "Mr. Selimi has not been previously accused of involvement in witness interference."¹⁵ While the Pre-Trial Judge held that it need not be demonstrated that an Accused

¹¹ Sixth Detention Decision, para. 27.

¹² KSC-BC-2020-06/F00179, Decision on Rexhep Selimi's Application for Interim Release, 22 January 2021, para. 37.

¹³ Sixth Detention Decision, para. 28.

¹⁴ Ibid.

¹⁵ Id.

was personally tampering with evidence or exerting influence or pressure on witnesses and “suffices that an Accused instigates others or contributes in any way to the materialisation of that risk”,¹⁶ the obligation remains to demonstrate to the required standard of Article 41(6)(b), how this is the case. No specific indication of any instigation or contribution to the obstruction of proceedings has been provided by the Pre-Trial Judge.

25. Fourth, the Pre-Trial Judge relied upon, the “advancement of the pre-trial proceedings in particular, the filing of the SPO’s pre-trial brief and witness list, as well as the disclosure of the identities of witnesses with in-court protective measures has increased the risk of obstruction considering that it will provide Mr Selimi with more details as to the case against him.”¹⁷ In this regard, the Pre-Trial Judge also relied upon the provision of a lesser redacted version of the witness list which included the mode of questioning and presentation times, the amended witness and exhibit lists, and the provisional list of the first 40 witnesses the SPO intends to call at trial.¹⁸
26. While all of these deadlines are normal case management tasks and information, it is difficult to see how information on the mode of testimony will somehow increase the risk of Mr. Selimi obstructing proceedings. Without a specific showing by the Pre-Trial Judge that this information, will specifically increase the risk that Mr. Selimi will obstruct proceedings, it should be disregarded by the Trial Panel.
27. Fifth, the Pre-Trial Judge also relies upon Mr Selimi’s alleged “personal participation in the commission of crimes and his use of others to commit crimes as a joint criminal enterprise member, which adds to the risk that he may commit

¹⁶ Id.

¹⁷ Id, para. 29.

¹⁸ Id, para. 33.

further crimes.”¹⁹ While these allegations are strongly contested by the Defence, this also subverts the proper functioning of Article 41(6). While such findings can properly be relied upon to establish a grounded suspicion in relation to Article 41(6)(a), the same does not apply to Article 41(6)(b). If this was the case, Article 41(6)(b) would serve little purpose, for as soon as a grounded suspicion of having committed any crime was elucidated, then Article 41(6)(b) would be fulfilled.

28. For these reasons, a thorough, independent and current analysis of the factors and underlying evidence in relation to those factors, relied upon by the Pre-Trial Judge to identify the existence of risks pursuant to Article 41(6)(b)(i), (ii) and (iii) by the Trial Panel will demonstrate that they are no longer fulfilled. Mr. Selimi should therefore be granted unconditional interim release.

B. The imposition of conditions to sufficiently eliminate the identified risks

29. Alternatively, If the Trial Panel considers that one or more of the Article 41(6)(b)(i)-(iii) risks are demonstrated to the required standard, the Defence proposes the following conditions of release to sufficiently mitigate those risks, based on the specific likelihood of these risks materialising in relation to Mr. Selimi.
30. The proposed conditions envisaged a regime for interim release where:
- 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;

¹⁹ Id, para. 34.

- b. Mr. Selimi resides and remains at all times under house arrest
[REDACTED];
 - c. [REDACTED];
 - d. [REDACTED];
 - e. [REDACTED];
 - f. [REDACTED];
 - g. A specific room is designated 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 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. Enhanced monitoring is undertaken for family members of Mr. Selimi, in addition [REDACTED]; and,
 - i. A formal request is submitted 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.
31. Furthermore, in addition to these stringent conditions, the Defence also proposes that the period of interim release take place for a four-week period between 1 and 29 January 2023. This means that if granted interim release subject to these conditions, Mr. Selimi will be returned to the KSC Detention Facilities before the Defence will be provided with unredacted statements of protected SPO witnesses and also before the unredacted version of the Indictment will be

provided to the Defence,²⁰ thereby preventing any increase in risk from having access to this information while subject to release.

32. Further, as opposed to an open-ended request for interim release, based on an uncertain duration of pre-trial proceedings, this request is limited, concrete and circumscribed. The limited duration of release will therefore also reduce the cost and organisation for both the Kosovo Police and the KSC as Mr. Selimi's residence will only have to be monitored for this short duration. Moreover, it will substantially reduce the risk, or otherwise mitigate the identified risk of any acts of obstruction or further crimes being committed during this period.

C. Request to reduce or vary the deadline for responses

33. The Defence notes that according to the schedule imposed by the Pre-Trial Judge, the SPO is due to respond to these submissions in accordance with Rue 76, namely within 10 days of notification. Given the request for interim release to commence on 1 January 2023, a shortened deadline is requested to allow the SPO to respond and a decision to be issued in advance of that date.
34. Pursuant to Rule 9(5)(a),²¹ the Panel may reduce any time limit prescribed by the Rules or set by the Panel upon the showing of good cause. The Defence submits that the impact of the Order by the Trial Panel during the status conference on 16 December 2022, highlighting an intention to commence trial on 1 March 2023²² and the resulting provision of unredacted witness statements and the

²⁰ KSC-BC-2020-06, Trial Panel II, In-Court Oral Order, 16 December 2022, p. 1776 line 6 to p. 1777 line 7.

²¹ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

²² KSC-BC-2020-06, Trial Panel II, In-Court Oral Order, 16 December 2022, p. 1773 line 4 to p. 1775 line 5.

unredacted Indictment on 30 January 2023, constitutes good cause to vary the previous schedule established by the Pre-Trial Judge.

D. Confidentiality

35. These submissions are filed confidentially pursuant to Rule 82(3), as based on prior decisions of the Pre-Trial Judge, they contain confidential information. A public redacted version will be filed in due course.

IV. CONCLUSION AND RELIEF REQUESTED

36. Therefore, the Defence hereby requests the Trial Panel:
- (i) Vary the schedule established by the Pre-Trial Judge for responses to these submissions and Order the SPO to respond to this Request by 27 December 2022; and,
 - (ii) Order the unconditional interim release of Mr. Selimi; or,
 - (iii) Order interim release of Mr. Selimi from 1-29 January 2023, subject to any necessary and reasonable conditions, including, but not limited to those set out in the body of these submissions.

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Respectfully submitted on 27 December 2022,



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