



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

**In:** KSC-BC-2020-06/PL001

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

**Before:** Supreme Court Panel  
Judge Ekaterina Trendafilova, Presiding  
Judge Christine van den Wyngaert  
Judge Michael Bohlander

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Acting Specialist Prosecutor

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**Public Redacted Version of 'Prosecution Response to Veseli Defence Request for Protection of Legality with public annex 1', KSC-BC-2020-06/PL001/F00006, 18 July 2022**

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## I. INTRODUCTION

1. Pursuant to Article 48(6)-(8) of the Law,<sup>1</sup> Rules 59 and 193,<sup>2</sup> the Specialist Prosecutor's Office ('SPO') hereby responds to the Request<sup>3</sup> for protection of legality against the Decision<sup>4</sup> of the Court of Appeals Panel ('Appeals Panel').

2. As explained below, each of the Grounds<sup>5</sup> in the Request fail to substantiate any error of law, substantial violation of a procedural rule, or violation of a right protected under the Constitution or the European Convention on Human Rights ('ECHR'). Instead, the Defence invites the Panel of the Supreme Court Chamber ('Supreme Court Panel') to investigate questions of fact *de novo* by masking mere disagreements with the findings of the Pre-Trial Judge and Appeals Panel as admissible errors.

## II. PROCEDURAL HISTORY

3. On 5 November 2020, Veseli was arrested pursuant to a decision and an arrest warrant issued by the Pre-Trial Judge.<sup>6</sup>

4. On 22 January 2021, the Pre-Trial Judge rejected Veseli's application for interim release ('Initial Detention Decision').<sup>7</sup>

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<sup>1</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law.

<sup>2</sup> 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' refer to these rules unless otherwise noted.

<sup>3</sup> Veseli Defence Request for Protection of Legality Against Decision on Appeal Concerning Remanded Detention Review and Periodic Review of Detention (IA014/F00008), KSC-BC-2020-06/PL001/F00001, 29 June 2022, confidential ('Request').

<sup>4</sup> Decision on Kadri Veseli's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, KSC-BC-2020-06/IA014/F00008, 31 March 2022, confidential ('Decision').

<sup>5</sup> Identified as Grounds 1-6 in the Request, and referenced as such in this filing for clarity.

<sup>6</sup> Notification of Arrest of Kadri Veseli Pursuant to Rule 55(4), 5 November 2020, KSC-BC-2020-06/F00050, public; Pre-Trial Judge, Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders, KSC-BC-2020-06/F00027/RED, 26 October 2020, public; Pre-Trial Judge, Public Redacted Version of Arrest Warrant for Kadri Veseli, KSC-BC-2020-06/F00027/A03/RED, 26 October 2020, public.

<sup>7</sup> Pre-Trial Judge, Decision on Kadri Veseli's Application for Interim Release, KSC-BC-2020-06/F00178, 22 January 2021, public.

5. On 30 April 2021, the Appeals Panel upheld the Initial Detention Decision ('April 2021 Appeals Decision').<sup>8</sup>
6. On 2 July 2021, the Pre-Trial Judge ordered Veseli's continued detention ('July 2021 Detention Decision').<sup>9</sup>
7. On 1 October 2021, the Appeals Panel granted in part Veseli's appeal against the July 2021 Detention Decision ('October 2021 Appeals Decision').<sup>10</sup>
8. On 23 November 2021, the Pre-Trial Judge ordered Veseli's continued detention ('November 2021 Detention Decision').<sup>11</sup>
9. On 3 December 2021, the Defence filed an appeal against the November 2021 Detention Decision ('Appeal').<sup>12</sup>
10. On 15 December 2021, the Pre-Trial Judge varied the time limit for Defence submissions on detention review until ten days after notification of the Appeal Panel's decision on the Appeal, while noting that Veseli waived his right to have his detention reviewed before the expiry of the two-month time limit under Article 41(1) and Rule 57(2).<sup>13</sup>
11. On 31 March 2022, in the Decision, the Appeals Panel upheld the November 2021 Detention Decision.<sup>14</sup>
12. On 26 May 2022, the Pre-Trial Judge ordered Veseli's continued detention.<sup>15</sup>

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<sup>8</sup> Decision on Kadri Veseli's Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA001/F00005, 30 April 2021, public.

<sup>9</sup> Pre-Trial Judge, Decision on Review of Detention of Kadri Veseli, KSC-BC-2020-06/F00380/RED, 2 July 2021, public.

<sup>10</sup> Decision on Kadri Veseli's Appeal Against Decision on Review of Detention, KSC-BC-2020-06/IA008/F00004/RED, 1 October 2021, public.

<sup>11</sup> Pre-Trial Judge, Decision on Remanded Detention Review Decision and Periodic Review of Detention of Kadri Veseli, KSC-BC-2020-06/F00576/RED, 23 November 2021, public.

<sup>12</sup> Defence for Mr Veseli, Veseli Defence Appeal Against Decision on Remanded Detention Review Decision and Periodic Review of Detention of Kadri Veseli, KSC-BC-2020-06/IA014/F00004/RED, 3 December 2021, Public.

<sup>13</sup> Transcript of Hearing, KSC-BC-2020-06, 15 December 2021, public, p.763.

<sup>14</sup> Court of Appeals, Decision on Kadri Veseli's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, KSC-BC-2020-06/IA014/F00008/RED, 31 March 2022 public.

<sup>15</sup> Decision on Periodic Review of Detention of Kadri Veseli, KSC-BC-2020-06/F00819, 26 May 2022.

13. On 29 June 2022, the Defence filed the Request.
14. On 6 July 2022, the Supreme Court Panel extended the time for the SPO to file its response to the Request.<sup>16</sup>

### III. SUBMISSIONS

#### A. STANDARD OF REVIEW

15. When rendering discretionary decisions, like decisions on the review of detention, the weight given to relevant considerations may depend on numerous factors.<sup>17</sup> Because of the fact-specific nature of detention decisions, the lower level panel is better placed to assess these factors.<sup>18</sup> As concerns the Supreme Court Panel specifically, the Panel can only address alleged violations of law.<sup>19</sup> Pursuant to Rule 193(3), a Supreme Court Panel assessing legality is explicitly prohibited from considering grounds that allege, or amount to alleging, 'erroneous or incomplete determination of the facts of the case.'

16. Alleging an error of law requires identifying the alleged error, presenting arguments in support of the claim, and explaining how the error invalidates the decision.<sup>20</sup> An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.<sup>21</sup>

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<sup>16</sup> Decision on Request for Extension of Time, KSC-BC-2020-06/PL001/F00005.

<sup>17</sup> *Prosecutor v. Gucati and Haradinaj*, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, Public ('*Gucati Appeals Decision*'), paras 44, 49.

<sup>18</sup> *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.49.

<sup>19</sup> Rule 193(3).

<sup>20</sup> *Gucati Appeals Decision*, KSCS-BC-2020-7/IA001/F00005, para.12; ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/08-3249-Red, Public Redacted Version of Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 23 December 2014 entitled "Decision on 'Defence Urgent Motion for Provisional Release'", 20 May 2015, para.20.

<sup>21</sup> *Gucati Appeals Decision*, KSCS-BC-2020-7/IA001/F00005, para.12.

**B. VESELI FAILS TO ESTABLISH A VIOLATION OF ARTICLE 5(4) ECHR BECAUSE OF DELAY (GROUND 1)**

17. The Defence's submission that a delay of three to four weeks is the usual limit for issuing an appellate decision on detention review misrepresents the case law of the European Court of Human Rights ('ECtHR').<sup>22</sup> While the Court in *Illnseher v. Germany* nominated this period for ordinary detention review proceedings on appeal, it has attached significant caveats in this and other cases.<sup>23</sup>

18. First, longer periods are tolerated in appellate proceedings 'where the original detention order was imposed by a court in a procedure offering appropriate guarantees of due process'.<sup>24</sup> In light of the robust procedural framework for detention review,<sup>25</sup> reflecting 'the highest standards of international human rights law',<sup>26</sup> the original detention proceeding's guarantees of due process are beyond question.

19. Second, the possibility of a fresh round of detention review in parallel with the appellate proceeding is a relevant factor for the question of delay.<sup>27</sup> That would have taken place in the ordinary course in this instance had not Veseli voluntarily chosen to waive his right to have his detention reviewed while the Appeals decision was pending.<sup>28</sup>

20. Third, the question of whether the requirement of a speedy judicial decision has been violated is not a numerical exercise and depends on the circumstances of each

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<sup>22</sup> *Contra*: Request, KSC-BC-2020-06/PL001/F00001, paras 15-17.

<sup>23</sup> ECtHR, *Illnseher v. Germany*, 10211/12 and 27505/14, Judgment, Grand Chamber, 4 December 2018 ('*Illnseher v. Germany*').

<sup>24</sup> *Illnseher v. Germany*, paras 255, 273; ECtHR, *Shakurov v. Russia*, 55822/10, Judgment, Court (First Section), 5 June 2012, para.179; ECtHR, *Shcherbina v. Russia*, 41970/11, Judgment, Court (First Section), 26 June 2014, para. 65; ECtHR, *Lebedev v. Russia*, 4493/04, Judgment, Court (First Section), 25 October 2007, para.96; ECtHR, *Mehmet Hasan Altan v. Turkey*, 13237/17, Judgment, Court (Second Section), 20 March 2018 ('*Mehmet Hasan Altan v. Turkey*'), paras 163-165; ECtHR, *Abdulkhakov v. Russia*, 14743/11, Judgment, Court (First Section), 2 October 2012 ('*Abdulkhakov v. Russia*'), para.198.

<sup>25</sup> Article 41; Rules 56-57.

<sup>26</sup> Article 19(2); *see also* Article 21.

<sup>27</sup> *Illnseher v. Germany*, paras 271-273; *Mehmet Hasan Altan v. Turkey*, para.165.

<sup>28</sup> KSC-BC-2020-06, Transcript of Hearing, 15 December 2021, public, p.763.

case.<sup>29</sup> As the Defence acknowledges,<sup>30</sup> the complexity of a proceeding may justify a longer period for issuing a decision.<sup>31</sup> Contrary to the Defence's submission that the appeal was no more complex 'than any other regular appeal against decisions relating to detention review',<sup>32</sup> the Appeals Panel was faced with complex factual issues that justify the period for issuing a decision. For instance, the November 2021 Detention Decision, against which the Appeal was filed, addressed both the Pre-Trial Judge's determination of matters which had previously been remanded by the Court of Appeals in the October 2021 Appeals Decision, and a further round of detention review required pursuant to Rule 57. The Appeals Panel considered numerous grounds challenging the Pre-Trial Judge's findings on proposed conditions of home detention,<sup>33</sup> which in turn required assessment of detailed submissions and voluminous material from *inter alia* the Kosovo Police and the Registry.<sup>34</sup> It also, for example, had to assess voluminous material from past proceedings to determine challenges to the credibility of evidence that members of the SHIK had interfered in KLA related proceedings while Veseli was its head.<sup>35</sup>

21. These issues had to be considered within the context of the overall proceedings,<sup>36</sup> past detention review proceedings, and the ongoing climate of intimidation of witnesses and interference with criminal proceedings against former KLA members in Kosovo. The jurisprudence of the ECtHR, which considers mostly pre-trial

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<sup>29</sup> *Abdulkhakov v. Russia*, para.199.

<sup>30</sup> Request, KSC-BC-2020-06/PL001/F00001, para.18.

<sup>31</sup> *Mehmet Hasan Altan v. Turkey*, para.165; *Ilmseher v. Germany*, para.253.

<sup>32</sup> Request, KSC-BC-2020-06/PL001/F00001, para.18.

<sup>33</sup> Decision, KSC-BC-2020-06/IA014/F00008/RED, paras 28-57.

<sup>34</sup> Annex 1 to Corrected Version of Veseli Defence Submissions on Second Detention Review, KSC-BC-2020-06/F00518/COR/A01, 14 October 2021, confidential; Annex 2 to Corrected Version of Veseli Defence Submissions on Second Detention Review, KSC-BC-2020-06/F00518/COR/A02, 14 October 2021, confidential; Kosovo General Police Directorate, Answer to the Request Number KSCBC-2020-06, Dated 13 October 2021, KSC-BC-2020-06/F00548/eng, 26 October 2021, confidential; Registry Submissions Pursuant to the Order to Provide Information on the Detention Regime (F00522), KSC-BC-2020-06/F00536, 20 October 2021, confidential.

<sup>35</sup> See Decision, KSC-BC-2020-06/IA014/F00008/RED, paras 17-24; November 2021 Detention Decision, KSC-BC-2020-06/F00576/RED, para.52; Appeal, KSC-BC-2020-06/IA014/F00004, paras 8-9.

<sup>36</sup> ECtHR, *Staykov v. Bulgaria*, 16282/20, Court (Fourth Section), 8 June 2021, para.88.

detention for ordinary domestic crimes, must be distinguished and adapted to account for the unique features and complexities attached to a case such as the present one.

22. In any event, even if the period for deciding the Appeal exceeded the ‘speediness’ requirement under Article 5(4) ECHR, no harm to Veseli has resulted. The Appeal was denied in its entirety and the Pre-Trial Judge extended Veseli’s detention at the subsequent periodic detention review.<sup>37</sup>

### C. NO VIOLATION OF ARTICLES 5(3) AND 5(4) ECHR (GROUND 2)

23. Ground 2 concerns the Pre-Trial Judge’s finding that members of Kosovo’s intelligence service (‘SHIK’) were involved in interfering with witnesses [REDACTED] (‘Bllaca Allegations’). The Defence’s submissions on this issue in the Appeal and Request are contradictory, confusing and inconsistent, but two main strands of argument can be distilled, namely: (i) that the Pre-Trial Judge violated Veseli’s right to an adversarial proceeding because the Bllaca Allegations have only ever been raised in an *ex parte* proceeding and the Pre-Trial Judge never made a finding on these allegations in a previous detention decision; and (ii) the Pre-Trial Judge and Appeals Panel failed to address Defence submissions on the allegations.<sup>38</sup> Both of these arguments rest on the Defence’s mistaken belief that the SPO did not file submissions on the Bllaca Allegations during the relevant detention review, which infects all of the Defence’s arguments in this ground.

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<sup>37</sup> See Article 35(3)(b) of the ECHR; Decision on Periodic Review of Detention of Kadri Veseli, KSC-BC-2020-06/F00819, 26 May 2022. It is additionally noted that – while within the statutory period provided for in Article 48(6) – the Defence used virtually the entirety of the permitted three-month period to file the Request, following the issuance of the Decision.

<sup>38</sup> Request, KSC-BC-2020-06/PL001/F00001, paras 22, 24-28; Appeal, KSC-BC-2020-06/IA014/F00004, paras 7-9; 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, KSC-BC-2020-06/IA014/F00007, 21 December 2021 (‘Appeal Reply’), paras 2-3.

## 1. No violation of the right to adversarial proceedings

24. The submission that the Pre-Trial Judge violated Veseli's right to adversarial proceedings by relying on allegations raised *ex parte* and never subject to adversarial proceedings is factually incorrect and inadmissible.<sup>39</sup>

### (a) *The Defence submissions are factually incorrect*

25. The Defence's central claim<sup>40</sup> that the Bllaca Allegations were not before the Pre-Trial Judge is factually incorrect because the SPO raised these allegations in its submissions during the November 2021 detention review.<sup>41</sup> In particular, the SPO submitted that: 'SHIK members answerable to [Veseli] were involved in surveilling, threatening and bribing witnesses testifying against former KLA members at the ICTY', citing the same evidence subsequently referenced by the Pre-Trial Judge.<sup>42</sup> The Defence could have challenged this allegation in their reply to the SPO submissions, but chose not to make any submissions on the risk of obstruction under Article 41(6)(b)(ii).<sup>43</sup>

26. Considering the Defence's sensible concession that additional factors may be introduced subsequent to the Initial Detention Decision,<sup>44</sup> their 'central argument' that the Pre-Trial Judge has not previously made a finding on the Bllaca Allegations is moot. This is even more so where the challenged finding is only one of a number of

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<sup>39</sup> Contra, Request, KSC-BC-2020-06/PL001/F00001, para.24.

<sup>40</sup> Appeal, KSC-BC-2020-06/IA014/F00004, para.8. *See also* Request, KSC-BC-2020-06/PL001/F00001, para.28; Appeal Reply, KSC-BC-2020-06/IA014/F00007, para.3.

<sup>41</sup> Prosecution consolidated response to October 2021 Defence Submissions on Detention Review, KSC-BC-2020-06/F00540, 22 October 2021, confidential, para.15; *contra* Request, KSC-BC-2020-06/PL001/F00001, paras 22-23.

<sup>42</sup> Prosecution consolidated response to October 2021 Defence Submissions on Detention Review, KSC-BC-2020-06/F00540, 22 October 2021, confidential, para.15, fn.25, citing [REDACTED]. *See* November 2021 Detention Decision, KSC-BC-2020-06/F00576, para.52, fn.87.

<sup>43</sup> November 2021 Detention Decision, KSC-BC-2020-06/F00576/RED, para.50.

<sup>44</sup> Request, KSC-BC-2020-06/PL001/F00001, para.27; *see* ECtHR, *Khudobin v. Russia*, 59696/00, Judgment, Court (Third Section), 26 October 2006, para.107.



similar findings establishing a persistent climate of intimidation of witnesses and interference with criminal proceedings against former KLA members.<sup>45</sup>

27. Furthermore, the Defence has had notice of the Bllaca Allegations as of at least the initial detention review,<sup>46</sup> yet raised this issue for the first time during the third detention appeal, despite previously making detailed submissions challenging Nazim Bllaca's credibility, which responded directly to the same SPO submissions that contained the Bllaca Allegations.<sup>47</sup> If the Bllaca Allegations were 'never subject to adversarial procedure', it is because the Defence chose not to challenge them.

(b) *Ground 2 is inadmissible*

28. Moreover, Ground 2 is inadmissible because the Defence never raised the alleged violation of the right to adversarial proceedings before the Appeals Panel. The crux of the Defence's complaint on appeal was that the Pre-Trial Judge abused his discretion and failed to consider Defence submissions and material challenging the Bllaca Allegations.<sup>48</sup> The Defence only raised the Pre-Trial Judge's failure to rely on the Bllaca Allegations in previous detention decisions to argue that the Pre-Trial Judge erred in the exercise of his discretion and is biased against the Accused.<sup>49</sup>

29. Having raised the alleged violation of the right to adversarial proceedings for the first time during the current proceeding means that this ground is inadmissible,

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<sup>45</sup> November 2021 Detention Decision, KSC-BC-2020-06/F00576/RED, paras 54-55; Initial Detention Decision, KSC-BC-2020-06/F00178, paras 39-48; July 2021 Detention Decision, KSC-BC-2020-06/F00380/RED, paras 35-36.

<sup>46</sup> Confidential Redacted Version of 'Request for arrest warrants and related orders, filing KSC-BC-2020-06/F00005 dated 28 May 2020, with confidential redacted Annex 1 and confidential annexes 2 and 3', KSC-BC-2020-06/F00005/CONF/RED, 14 November 2020, confidential; Decision on Request for Arrest Warrants and Transfer Orders, KSC-BC-2020-06/F00027, 26 October 2020, confidential (reclassified on 25 November 2020).

<sup>47</sup> Application for Interim Release of Kadri Veseli With Annexes 1 to 7, KSC-BC-2020-06/F00151, 17 December 2020, paras 25-27.

<sup>48</sup> Appeal, KSC-BC-2020-06/IA014/F00004, paras 7-12 (Ground 1); Appeal Reply, KSC-BC-2020-06/IA014/F00007, paras 2-3.

<sup>49</sup> Appeal, KSC-BC-2020-06/IA014/F00004, para. 8; Appeal Reply, KSC-BC-2020-06/IA014/F00007, paras 2-3.

as the November 2021 Detention Decision falls well outside the 90-day time limit for filing requests for protection of legality.<sup>50</sup>

## 2. No failure to address submissions

30. The Defence also alleges that the Pre-Trial Judge and Appeals Panel failed to address Defence submissions that challenged the credibility of the Bllaca Allegations.<sup>51</sup>

31. As detailed above, the Defence chose not to make submissions before the Pre-Trial Judge on the Bllaca Allegations, despite having sufficient notice. The lack of reference to Defence submissions on this issue in the November 2021 Detention Decision is therefore understandable and entirely attributable to the Defence. Furthermore, the Pre-Trial Judge has considered the Defence's submissions and associated material previously.<sup>52</sup>

32. In any event, the issue was sufficiently ventilated before the Appeals Panel, which did consider the Defence submissions and annexed materials in depth.<sup>53</sup> The Defence merely attempts to introduce by stealth challenges<sup>54</sup> to factual findings made by the Pre-Trial Judge and confirmed by the Appeals Panel. A striking illustration of this is the Defence's submission that the Appeals Panel 'exceeded the scope of appellate review' by analysing a judgment which the Defence had annexed to its own appeal submissions, after complaining to the Appeals Panel that the Pre-Trial Judge had erred by failing to consider this material.<sup>55</sup>

33. A request for protection of legality is confined to raising violations of criminal law, substantial violations of procedural rule(s), and violations of the rights protected by the Constitution or the ECHR.<sup>56</sup> Errors of fact may not be alleged.<sup>57</sup> Instead of

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<sup>50</sup> Rule 193.

<sup>51</sup> Request, KSC-BC-2020-06/PL001/F00001, paras 22.

<sup>52</sup> Initial Detention Decision, KSC-BC-2020-06/F00178, para.43.

<sup>53</sup> Decision, KSC-BC-2020-06/IA014/F00008/RED, para.23.

<sup>54</sup> *For example*, Request, KSC-BC-2020-06/PL001/F00001, paras 29-34.

<sup>55</sup> *See* Request, KSC-BC-2020-06/PL001/F00001, para. 31.

<sup>56</sup> Article 48(7) & (8).

<sup>57</sup> Rule 193.

complying with these requirements, the Defence repeat submissions relevant only to factual findings and discretionary decisions. Unsubstantiated claims that the Appeals Panel failed to take Defence submissions into account merely attempt to mask the fact that the Defence cannot substantiate any error of law or rights violation.

34. Ground 2 attempts to manufacture a rights violation from mere disagreements about factual findings and should therefore be dismissed.

#### D. NO FAILURE TO ADDRESS SUBMISSIONS ON THE LAJÇI INCIDENT (GROUND 3)

35. Like Ground 2, Ground 3 merely revisits a factual finding that had previously been confirmed on Appeal.<sup>58</sup> The Defence claims that its submissions on appeal were aimed at the question of weight to be given to the ‘Lajçi Incident’, as it had already conceded that the incident was relevant to the risk of obstruction.<sup>59</sup> Contrary to the Defence’s submission, the question of ‘weight’ was not raised for the first time during the Appeal,<sup>60</sup> but had been raised by the Defence during the appeal of the Initial Detention Decision.<sup>61</sup> On that occasion, the Appeals Panel considered the Defence submissions and gave detailed reasons for rejecting them.<sup>62</sup> It was therefore proper for the Appeals Panel to summarily dismiss the Defence’s repetitive submissions during the later Appeal.<sup>63</sup>

36. In addition, the ECtHR case law cited by the Defence is inapplicable to the situation at hand. In *Merabishvili v. Georgia*, the first instance domestic court had on one occasion given no reasons at all for its decision to extend detention, and on a

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<sup>58</sup> October 2021 Appeals Decision, KSC-BC-2020-06/IA008/F00004/RED, para.34; April 2021 Appeals Decision, KSC-BC-2020-06/IA001/F00005, paras 36-40.

<sup>59</sup> Request, KSC-BC-2020-06/PL001/F00001, paras 36-38.

<sup>60</sup> Appeal, KSC-BC-2020-06/IA014/F00004, paras 10-12, 21-22.

<sup>61</sup> Defence Request to Appeal the “Decision on Kadri Veseli’s Application for Interim Release”, KSC-BC-2020-06/IA001/F00001, 1 February 2021, para.18.

<sup>62</sup> April 2021 Appeals Decision, KSC-BC-2020-06/IA001/F00005, paras 38, 40. The Defence raised similar submissions also during the appeal of the July 2021 Detention Decision, *see* Veseli Defence Appeal of Decision KSC-BC-2020-06/F00380 (First Detention Review), KSC-BC-2020-06/IA008/F00001, para.7; October 2021 Appeals Decision, KSC-BC-2020-06/IA008/F00004/RED, para.34.

<sup>63</sup> Decision, KSC-BC-2020-06/IA014/F00008/RED, paras 25, 39.

second occasion merely referred to its reasons in the initial detention decision, while making it clear that it was for the applicant to show why his detention was no longer justified.<sup>64</sup> Likewise, in the case of *Nechay v. Ukraine*, the courts gave no specific reasons for extending detention after the initial detention order, which suggested that they had not made an appropriate assessment of the facts relevant to the different stages of the proceedings.<sup>65</sup> These cases, which do not concern appellate proceedings, cannot support the submission that, in the absence of any change in circumstances, an appellate body must revisit the same arguments that have been considered and rejected before.<sup>66</sup>

37. Once again, the Defence obfuscate in order to repackage a disagreement about a discretionary factual finding as an alleged rights violation.

**E. THE APPEALS PANEL DID NOT IMPOSE UNREASONABLE OR DISPROPORTIONATE CONDITIONS (GROUND 4)**

38. Ground 4 again advances inadmissible disagreements on factual findings and discretionary conclusions, without substantiating an error of law or violation of rights. The Supreme Court Panel should give due deference to the factual findings and discretionary conclusions of the lower courts and should only overturn them in the limited circumstances envisioned by Article 48(7) and Rule 193.

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<sup>64</sup> The ECtHR found a violation of Article 5(3) ECHR because the first instance court had failed to give sufficient reasons about any changes to the grounds justifying detention. ECtHR, *Merabishvili v. Georgia*, 72508/13, Judgment, Grand Chamber, 28 November 2017, paras 49, 231-235; *see also* ECtHR, *Svipsta v. Latvia*, 66820/01, Judgment, Court (Third Section), 9 March 2006, paras 130-134; ECtHR, *Mikalauskas v. Malta*, 4458/10, Judgment, Court (Fourth Section), 23 July 2013, para.120.

<sup>65</sup> ECtHR, *Nechay v. Ukraine*, 15360/10, Judgment, Court (Fifth Section), 1 July 2021, para. 53; *compare*: ECtHR, *Ilijkov v. Bulgaria*, 33977/96, Judgment, Court, Fourth Section, 26 July 2001, para.94; ECtHR, *G.B. and Others v. Turkey*, 4633/15, Judgment, Court (Second Section), 17 October 2019, para.176; ECtHR, *Shannon v. Latvia*, 32214/03, Judgment, Court (Third Section), 24 November 2009, paras 62-66; ECtHR, *Michalák v. Slovakia*, 30157/03, Judgment, Court (Fourth Section), 8 February 2011, paras 186-187.

<sup>66</sup> ECtHR, *Podeschi v. San Marino*, 66357/14, Judgment, Court (First Section), 13 April 2017, paras 146-153.

## 1. The Appeals Panel did not reverse its position (Ground 4A)

39. The Defence's submission that the Appeals Panel made inconsistent findings on the sufficiency of conditions misunderstands the nature of appellate review.<sup>67</sup> The Appeals Panel's role is not to usurp the Pre-Trial Judge's responsibility to decide questions of fact based on his assessment of the evidence; and to make discretionary decisions after weighing relevant factors. Rather, the Appeals Panel's task is to consider whether the Pre-Trial Judge fell into error or abused his discretion.<sup>68</sup> As the Appeals Panel in *Prosecutor v. Hysni Gucati* stated:

The Court of Appeals Panel will only find the existence of an error of fact when no reasonable trier of fact could have made the impugned finding. It is not any error of fact that will cause the Panel to overturn a decision by a lower level panel, but only one that has caused a miscarriage of justice. In determining whether a finding was reasonable, the Panel will not lightly overturn findings of fact made by a lower level panel.<sup>69</sup>

40. Similarly, the Appeals Panel will not overturn a discretionary decision unless it is:

[...] (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion. The Court of Appeals Panel will also consider whether the lower level panel has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.<sup>70</sup>

41. The Appeals Panel applied this standard of review in its October 2021 Appeals Decision, where it held that the Pre-Trial Judge had erred by making a finding based on incomplete information.<sup>71</sup> As held by the Appeals Panel, the Pre-Trial Judge should have requested further information from the Kosovo Police, primarily in order to remedy an unfairness to the Defence, which had unsuccessfully requested information from the Kosovo Police on two occasions, and whose submissions on

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<sup>67</sup> *Contra*, Request, KSC-BC-2020-06/PL001/F00001, paras 39-43.

<sup>68</sup> Article 46(1)&(5); Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, KSC-BC-2020-07/IA002/F000059, February 2021, paras 11-14.

<sup>69</sup> Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, para.13.

<sup>70</sup> Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, KSC-BC-2020-07/IA002/F00005, 9 February 2021, para.14.

<sup>71</sup> October 2021 Appeals Decision, KSC-BC-2020-06/IA008/F00004/RED, para.48.

enforceability had been hamstrung by the Kosovo Police's general and vague response.<sup>72</sup>

42. The Appeals Panel did not find, as the Defence now claim,<sup>73</sup> that the proposed conditions sufficiently mitigated the relevant risk and that any finding to the contrary would be in error. It merely held that the Pre-Trial Judge should not have made a finding on enforceability without seeking further information, particularly in light of the Defence's inability at the time to make informed submissions on that issue. It therefore remained open to the Pre-Trial Judge to exercise his discretion on the question of whether the proposed conditions (and any additional conditions) could sufficiently mitigate the relevant risk even if they can be enforced. In other words, the October 2021 Appeals Decision preserved the Pre-Trial Judge's discretion, which is consistent with the Appeals Panel's reluctance to overturn discretionary decisions.

43. The Defence merely disagrees with the Pre-Trial Judge's and Appeals Panel's conclusions without establishing a clear error or rights violation. Ground 4A should therefore be dismissed.

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<sup>72</sup> October 2021 Appeals Decision, KSC-BC-2020-06/IA008/F00004/RED, paras 49-51.

<sup>73</sup> Request, KSC-BC-2020-06/PL001/F00001, paras 39-42.

## 2. The Appeals Panel was not required to order additional measures (Ground 4B)

44. In Ground 4B, the Defence complains about decisions that date back more than 90 days, which exceeds the time limit for filing requests for protection of legality under Rule 193. These parts of Ground 4B should therefore be summarily dismissed as inadmissible.

45. The Defence also challenges the Pre-Trial Judge's and Appeals Panel's refusal to order additional conditions which would sufficiently mitigate the risk of interference.<sup>74</sup> This submission merely mirrors arguments made under Ground 5 and should be dismissed for the reasons discussed under that ground.

## 3. The Appeals Panel did not rely on unnecessary or disproportionate conditions (Ground 4C)

46. In Ground 4C, the Defence challenges the Pre-Trial Judge's conclusion, upheld by the Appeals Panel, that the Detention Facilities, in contrast to house arrest, 'offer a controlled environment where a potential breach of confidentiality could be more easily identified and/or prevented'.<sup>75</sup>

### *(a) Communication with close family members*

47. The Defence submits that 'limiting [REDACTED] is utterly disproportional' and goes against the 'very definition and purpose of house arrest [...] to allow the Accused to live with his close family members'.<sup>76</sup> The Defence also argues that the Appeals Panel failed to provide sufficient reasons as to why limitations on the frequency and length of unmonitored family visits would be proportional in a house arrest setting.<sup>77</sup>

48. These submissions are irrelevant because neither the Appeals Panel nor the Pre-Trial Judge imposed such conditions. In fact, it was the Defence who suggested the

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<sup>74</sup> Request, KSC-BC-2020-06/PL001/F00001, para.47.

<sup>75</sup> Decision, KSC-BC-2020-06/IA014/F00008/RED, para.38.

<sup>76</sup> Request, KSC-BC-2020-06/PL001/F00001, paras 50-51.

<sup>77</sup> Request, KSC-BC-2020-06/PL001/F00001, para.51.

possibility of [REDACTED], which the Appeals Panel rejected as unrealistic.<sup>78</sup> The Defence simply ignores the fact that the Pre-Trial Judge has found that the KSC's detention facilities can offer safeguards which are not available under conditions of house arrest.<sup>79</sup> That finding has been upheld on Appeal together with the Pre-Trial Judge's conclusion that the relevant Article 41(6)(b) risks cannot be sufficiently mitigated under conditions of house arrest in Kosovo.<sup>80</sup> The Defence fails to explain why the Pre-Trial Judge's valid findings and conclusions, confirmed by the Appeals Panel, constitute a legal error or rights violation.

*(b) Communication with pre-approved visitors*

49. Next, the Defence argues that the Appeals Panel failed to adequately engage with the Defence's submission that the Pre-Trial Judge did not genuinely reconsider releasing Veseli on conditions, following the October 2021 Appeals Decision.<sup>81</sup>

50. Once again, the Defence fails to acknowledge the central obstacle to provisional release, namely the Pre-Trial Judge's finding that the risks posed by Veseli's release cannot be sufficiently mitigated under conditions of home detention in Kosovo. Crucially, the Pre-Trial Judge arrived at this finding after receiving multiple rounds of submissions from *inter alia* the Kosovo Police and the Registry. The Defence does not even attempt to explain why this finding leads to an error of law or violates Veseli's rights. Instead, the Defence engage in unsubstantiated accusations that the Pre-Trial Judge was prejudiced in the exercise of his discretion.<sup>82</sup>

51. Like much of the Request, Ground 4 advances inadmissible submissions on factual findings and discretionary decisions without explaining how any of the alleged errors lead to a legal error or rights violation. This ground should therefore be dismissed.

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<sup>78</sup> Decision, KSC-BC-2020-06/IA014/F00008/RED, para.36.

<sup>79</sup> November 2021 Detention Decision, KSC-BC-2020-06/F00576/RED, paras 81-86.

<sup>80</sup> Decision, KSC-BC-2020-06/IA014/F00008/RED, paras 35-45.

<sup>81</sup> Request, KSC-BC-2020-06/PL001/F00001, para.52.

<sup>82</sup> See Request, KSC-BC-2020-06/PL001/F00001, para.52.



**F. NO ERROR IN RELATION TO ASSESSMENT OF ADDITIONAL MEASURES (GROUND 5)**

52. The Defence fails to carry its burden to demonstrate that the Appeals Panel erred in its assessment of the Pre-Trial Judge's consideration of additional conditions of release that could have been imposed.

53. As made clear even by the jurisprudence quoted by the Defence in the Request, the scope of the *proprio motu* measures that a Pre-Trial Judge is required to consider is bounded by what is 'reasonable'.<sup>83</sup> As the Defence observes, the Court of Appeals has held that 'in the assessment of the Proposed Conditions, the Pre-Trial Judge is required, *proprio motu*, to inquire and evaluate all reasonable conditions that could be imposed on an accused and not just those raised by the Defence.'<sup>84</sup> Indeed this is the very same standard, and the very same decision, that the Appeals Panel (which had two out of three judges in common with the decision the Defence cites) relied on in the Decision.<sup>85</sup>

54. The Defence avers, however, that the Appeals Panel went on to impermissibly cabin the range of the *proprio motu* conditions that the Pre-Trial Judge needed to consider.<sup>86</sup> What the Defence fails to grasp is that the Appeals Panel's explanations of what *proprio motu* conditions are necessary to consider are entirely consistent with the Appeals Panel's jurisprudence that the Defence cites.

55. The Appeals Panel's statement that 'the reasonableness of the scope of the PTJ's additional measures must be assessed in light of the submissions he received thereon' is a perfectly common-sense statement about what measures will be considered 'reasonable' within the meaning of the standard, *i.e.* that a judge can rightfully consider the submissions before him when considering what additional measures are reasonable to consider *proprio motu*. By way of example, in a hypothetical situation it

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<sup>83</sup> See Request, KSC-BC-2020-06/PL001/F00001, para.55.

<sup>84</sup> Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA003/F00005, 30 April 2021, para.86.

<sup>85</sup> Decision, KSC-BC-2020-06/IA014/F00008/RED, para.56.

<sup>86</sup> Request, KSC-BC-2020-06/PL001/F00001, para.57.

might be reasonable in the abstract to consider *proprio motu* an electronic monitoring system, but if the submissions demonstrate that as a general matter there is not the technical capacity to implement the measure, it is no longer reasonable to consider it. Indeed, it would be entirely unreasonable for a judge to disregard the filings from the relevant participants when considering what measures might be viable.

56. Similarly, the requirement that a judge need only consider *proprio motu* all reasonable measures is thoroughly compatible with the Appeals Panel's statement that 'there is no requirement for the Pre-Trial Judge to raise all possible conditions *proprio motu*, if these were neither widely used in the context of interim release nor raised by the Parties.'<sup>87</sup> It is perfectly acceptable to assess that what measures will be considered reasonable to consider without prompting are those that are widely in use. Indeed, the reasonableness requirement's purpose for *proprio motu* consideration is to prevent courts from having to address all possible conditions no matter how obscure or unusual.

57. The Defence's additional argument, that the Appeals Panel erred in considering the substance of the Kosovo Police's responses as to what *proprio motu* measures are reasonable, fails by its own terms. The Defence states that 'the Kosovo Police is [*sic*] not legally required to provide assurances on the enforceability of an order before the Specialist Chambers', citing to Article 53.<sup>88</sup> Article 53, however, states explicitly that 'all entities and persons in Kosovo shall co-operate with the Specialist Chambers and Specialist Prosecutor's Office and shall comply without undue delay with any request for assistance or an order or decision issued by Specialist Chambers or Specialist Prosecutor's Office.' Thus, when presented with specific questions and a specific order,<sup>89</sup> the very Article that the Defence cites did, in fact, require the Kosovo Police to be cooperative in their response.

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<sup>87</sup> Decision, KSC-BC-2020-06/IA014/F00008/RED, para.42 (emphasis added).

<sup>88</sup> Request, KSC-BC-2020-06/PL001/F00001, para.58.

<sup>89</sup> Order to the Kosovo Police to Provide Information, KSC-BC-2020-06/F00513, 8 October 2021.

58. Moreover, it was entirely appropriate and logical for the Pre-Trial Judge to consider the inadequate ‘general and generic character’<sup>90</sup> of the Kosovo Police responses—both the responses to the Pre-Trial Judge’s order and the Defence’s inquiries<sup>91</sup>—when assessing what measures were reasonable to consider *proprio motu*. The Defence’s uncited claims that ‘[p]ursuant to the KSC Law and other Kosovo legislation, the police is [*sic*] simply “obliged” to enforce judicial orders’<sup>92</sup> does nothing to displace this.

59. Therefore, Ground 5 should be dismissed.

#### G. THE APPEALS PANEL DID NOT ERR IN ITS ASSESSMENT OF PROPORTIONALITY (GROUND 6)

60. The Defence unconvincingly claims that the Appeals Panel failed to properly consider its submissions on the proportionality of detention, namely that the Pre-Trial Judge: (i) ‘placed considerable weight on the gravity of the charges’; (ii) ‘relied on *pro forma* arguments in relation to the complexity of the case’; (iii) ‘failed to grapple with the *ratio decidendi* of the cited ECtHR cases’ regarding the effect of the passage of time; and (iv) incorrectly interpreted Rule 56(2).<sup>93</sup> Once again, the Defence attempts to elevate mere disagreements by attaching them to false claims that the Appeals Panel failed to consider its submissions, without demonstrating any error of law or rights violation.

61. The Appeals Panel noted the Defence submissions on these issues but was not convinced that the ECtHR cases cited in support were relevant to the present case.<sup>94</sup> The Appeals Panel observed that in these cases, the ECtHR ‘clearly criticises instances where the courts in question relied exclusively or too heavily on factors such as

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<sup>90</sup> Decision, KSC-BC-2020-06/IA014/F00008/RED, para.57.

<sup>91</sup> See Decision, KSC-BC-2020-06/IA014/F00008/RED, fn.118 (collecting submissions).

<sup>92</sup> Request, KSC-BC-2020-06/PL001/F00001, para.58.

<sup>93</sup> Request, KSC-BC-2020-06/PL001/F00001, para.60-61.

<sup>94</sup> Decision, KSC-BC-2020-06/IA014/F00008/RED, paras 63-64.

gravity, and/or disregarded relevant factors such as the passage of time'.<sup>95</sup> The Appeals Panel compared this to the November 2021 Detention Decision, where the Pre-Trial Judge:

...provided detailed reasoning on the risks of obstruction and of committing further crimes, sought further information on and carefully examined measures alternative to detention, clearly acknowledged that it was for the SPO to show that continued detention is necessary and for the Pre-Trial Judge to be satisfied of this necessity, and carefully assessed the proportionality of continued detention in light of the circumstances of this case, including the clear consideration of the passage of time.<sup>96</sup>

62. The Appeals Panel also gave more than sufficient consideration to the Defence's cursory appeal submissions on the interpretation of Rule 56(2).<sup>97</sup> The Defence argues that the Appeals Panel misunderstood the Defence's submissions on the question of whether delays to the proceedings are justified, since the Defence had not attempted to establish that it was unreasonable for the Pre-Trial Judge to consider whether any delays were supported by 'good cause'.<sup>98</sup>

63. This mischaracterises the Appeals Panel's reasoning. First, the Appeals Panel stated that the Defence failed to address why 'good cause' is irrelevant to the question of whether the period of detention is unreasonable.<sup>99</sup> Second, the Appeals Panel did consider the Defence's submissions on whether the period of detention was unreasonable, noting that 'good cause was only one of the factors which the Pre-Trial Judge took into account at this juncture' and held that Veseli had failed to 'substantiate his arguments that the fact that a trial date had yet to be set after he had spent one year in detention, is in itself sufficient to find that the detention is unreasonable and disproportionate'.<sup>100</sup>

64. The Defence's submission that 'good cause does not affect and cannot be used to justify long periods of pre-trial detention' equally misrepresents the Pre-Trial Judge's

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<sup>95</sup> Decision, KSC-BC-2020-06/IA014/F00008/RED, para.64.

<sup>96</sup> Decision, KSC-BC-2020-06/IA014/F00008/RED, para.64 (citations omitted).

<sup>97</sup> Appeal, KSC-BC-2020-06/IA014/F00004, paras 49-50; Decision, KSC-BC-2020-06/IA014/F00008/RED, paras 65-66.

<sup>98</sup> Request, KSC-BC-2020-06/PL001/F00001, para.63.

<sup>99</sup> Decision, KSC-BC-2020-06/IA014/F00008/RED, para.66.

<sup>100</sup> Decision, KSC-BC-2020-06/IA014/F00008/RED, para.66.

and Appeals Panel's decisions.<sup>101</sup> The Pre-Trial Judge considered the question of whether 'good cause' has been shown for any undue delay in the conduct of proceedings only in the relation to the second sentence of Rule 56(2), which allows for the release of a person where undue delay has been caused by the Specialist Prosecutor.<sup>102</sup> However, this was separate from the Pre-Trial Judge's detailed consideration of other factors, as the Appeals Panel pointed out.<sup>103</sup>

65. The Defence does not allege an error in the Appeals Panel's overall conclusion that detention remained proportionate, and neither would the applicable legal principles – resting, as they do, on the circumstances of the specific case<sup>104</sup> - permit this conclusion.

66. Bearing in mind that the period under consideration in the Request is just over one year,<sup>105</sup> this period cannot, on its own, be considered disproportionate in the context of the other factors identified by the Pre-Trial Judge.

#### IV. CLASSIFICATION

67. This filing is classified as confidential pursuant to Rule 82(4). A public redacted version will be submitted.

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<sup>101</sup> Request, KSC-BC-2020-06/PL001/F00001, para.63.

<sup>102</sup> November 2021 Detention Decision, KSC-BC-2020-06/F00576/RED, para.111.

<sup>103</sup> November 2021 Detention Decision, KSC-BC-2020-06/F00576/RED, paras 105-110; Decision, KSC-BC-2020-06/IA014/F00008/RED, para.66.


<sup>104</sup> ECtHR, *Wemhoff v Germany*, 2122/64, Judgment, Court, 27 June 1968 ('Wemhoff v Germany'), page 20, para.10; ECtHR, *McKay v. the United Kingdom*, 543/03, Judgment, Grand Chamber, 3 October 2006, para.45. Relevantly, this may include the fact that a case involves organized criminal activity (ECtHR, *Podeschi v. San Marino*, 66357/14, Judgment, Court (First Section), 13 April 2017, para.149; ECtHR, *Štvrtecký v. Slovakia*, 55844/12, Judgment, Court (Third Section, 5 June 2018, paras 57, 63; Celejewski v. Poland, paras 37-38) and numerous accused (Celejewski v. Poland, para.38; *Wemhoff v Germany*, page 23, para.17). Depending on the circumstances, periods of detention of multiple years have been found to not be disproportionate (*for example*, *Štvrtecký v. Slovakia*, paras 57, 63; ECtHR, *W v Switzerland*, 14379/88, Judgment, Court, 26 January 1993; ECtHR, *Chraidi v Germany*, 65655/01, Judgment, Court (Fifth Section), 26 October 2006; *Wemhoff v Germany*. *See also* KCC, Case No. KI 20/13, Resolution on Inadmissibility, 12 March 2013; KCC, Case No. KI 73/20, Constitutional review of Judgment Pml. No. 117/2020 of the Supreme Court of Kosovo of 24 April 2020, 27 November 2020. *Compare:* KCC, Case No. KI 10/18, Constitutional review of Judgment Pml. No. 357/2017 of the Supreme Court of Kosovo of 22 December 2017, 21 October 2019.

<sup>105</sup> From Veseli's arrest on 5 November 2020 to the Pre-Trial Judge's decision on 23 November 2021.

V. RELIEF REQUESTED

68. For the foregoing reasons, the Request should be denied in its entirety.

**Word count: 6390**



**Alex Whiting**

**Acting Specialist Prosecutor**

Tuesday, 11 July 2023

At The Hague, the Netherlands.