



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

In: KSC-BC-2020-06
Specialist 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 Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

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Prosecution submission pertaining to periodic detention review of Hashim Thaçi

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I. INTRODUCTION

1. Pursuant to Article 41 of the Law¹ and Rule 57 of the Rules,² the Specialist Prosecutor's Office ('SPO') makes the following submissions in support of the need for the continued detention of the Accused Hashim Thaçi ('Thaçi'). The Pre-Trial Judge, the Court of Appeals, and this Panel have repeatedly held that Thaçi's detention is justified on multiple bases, that no conditions short of detention in the Kosovo Specialist Chamber's ('KSC') detention facilities would be sufficient to minimise the risks, and that the detention period—taking all relevant circumstances into account—is reasonable. Since the most recent determination of this Panel on 16 June 2023,³ there has been no change in circumstances that merits deviating from that determination. Indeed, the continued progression of trial and other significant developments that show steady progress and will continue to give Thaçi further access to information regarding sensitive witnesses and the case against him buttress the necessity and reasonableness of detention.

II. PROCEDURAL HISTORY

2. The relevant procedural history regarding Thaçi's detention is referenced in the Panel's most recent detention decision as having been set out extensively in previous decisions.⁴

3. On 3 April 2023, the trial commenced.⁵

¹ Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

² 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.

³ Decision on Periodic Review of Detention of Hashim Thaçi, KSC-BC-2020-06/F01610, 16 June 2023 ('Ninth Detention Decision').

⁴ Ninth Detention Decision, KSC-BC-2020-06/F01610, paras 1-3.

⁵ Transcript (Opening Statements), 3 April 2023.

4. On 20 July 2023, testimony of the fifteenth witness concluded.⁶

III. SUBMISSIONS

5. The Panel has noted that the law applicable to deciding such matters is set out in Article 41 of the Law, and Rules 56 and 57 of the Rules, and has been laid out extensively in earlier decisions.⁷

6. Since the most recent detention decision, there have been no developments that diminish the factors supporting the need and reasonableness of detention. Indeed, the continued progression of trial through the testimony of the fifteenth witness and other developments in the case augment the necessity of detention.

A. GROUNDED SUSPICION

7. Article 41(6)(a) requires a grounded suspicion that the detained person has committed a crime within the jurisdiction of the KSC.⁸ There remains a grounded suspicion that Thaçi has done so.⁹ The Confirmation Decision determined that there is a suspicion that Thaçi is liable for crimes against humanity and war crimes as identified in Articles 13, 14, and 16,¹⁰ to a standard that exceeds that required for detention of 'grounded suspicion'.¹¹ The Pre-Trial Judge later also confirmed amendments to the Indictment that added further, similar charges against Thaçi.¹² Nothing has occurred

⁶ Transcript (Trial Proceedings), 20 July 2023, p.6249.

⁷ Ninth Detention Decision, KSC-BC-2020-06/F01610, para.5.

⁸ Ninth Detention Decision, KSC-BC-2020-06/F01610, para.7.

⁹ See Article 41(6)(a); Ninth Detention Decision, KSC-BC-2020-06/F01610, paras 7-9.

¹⁰ Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026/RED, 26 October 2020, para.521(a).

¹¹ Ninth Detention Decision KSC-BC-2020-06/F01610, para.8.

¹² Public Redacted Version of Decision on the Confirmation of Amendments to the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00777/RED, 22 April 2022, para.185; see also Ninth Detention Decision, KSC-BC-2020-06/F01610, para.8.

since the confirmation decisions that would detract from this determination. Indeed, it has been repeatedly confirmed that there remains a well-grounded suspicion that Thaçi has committed crimes within the KSC's jurisdiction.¹³

B. DETENTION IS JUSTIFIED UNDER ALL ARTICLE 41(6)(B) FACTORS

8. The Court of Appeals has been clear that, once a grounded suspicion under Article 41(6)(a) is identified, an articulable basis of a single ground under Article 41(6)(b) is sufficient to support detention.¹⁴ The three grounds under Article 41(6)(b) justifying detention are: 1) risk of flight; 2) potential obstruction; and 3) risk of additional crimes.¹⁵ The applicable standard is articulable grounds that support a 'belief' that there is a risk of one of the Article 41(6)(b) grounds occurring.¹⁶ The 'belief' test denotes 'an acceptance of the possibility, not the inevitability, of a future occurrence'.¹⁷ In other words, the standard to be applied is less than certainty, but more than a mere possibility of a risk materialising.¹⁸ The Panel has noted that 'articulable' in this context means specified in detail by reference to the relevant information or evidence.¹⁹ In considering whether an accused should be detained or released, the relevant chamber must consider whether

¹³ See, e.g., Ninth Detention Decision, KSC-BC-2020-06/F01610, paras 9-12.

¹⁴ See *Prosecutor v. Gucati and Haradinaj*, Consolidated Decision on Nasim Haradinaj's Appeals Against Decisions on Review of Detention, KSC-BC-2020-07/IA007/F00004, 6 April 2022, para.49.

¹⁵ Ninth Detention Decision, KSC-BC-2020-06/F01610, para.10.

¹⁶ Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA004/F00005, 30 April 2021 ('First Appeals Decision'), para.19.

¹⁷ First Appeals Decision, KSC-BC-2020-06/IA004/F00005, paras 14, 21.

¹⁸ Ninth Detention Decision, KSC-BC-2020-06/F01610, para.10; See First Appeals Decision, KSC-BC-2020-06/IA004/F00005, para.22; See *Prosecutor v. Gucati and Haradinaj*, Public Redacted Version of Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00507/RED, 21 December 2021 ('Haradinaj Decision'), para.28.

¹⁹ Ninth Detention Decision, KSC-BC-2020-06/F01610, para.10 citing Article 19.1.30 of the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123 defining 'articulable' as: 'the party offering the information or evidence must specify in detail the information or evidence being relied upon'.

measures other than detention would sufficiently reduce the risk of the Article 41(6)(b) factors occurring.²⁰

i. Risk of Flight (Article 41(6)(b)(i))

9. Thaçi is aware of the serious confirmed charges against him, the possible lengthy prison sentence that may result therefrom, and through the ongoing disclosure process, he is constantly gaining more knowledge about the evidence to be presented in relation to those crimes.²¹ However, the continuation of trial takes the risk of flight to an even higher level, as Thaçi now sees the evidence against him steadily entering the record. The combination of continuing to gain a fuller knowledge of the case against him, actually seeing inculpatory evidence enter the record, and being put on notice through the *Mustafa* case of the real possibility of a lengthy sentence,²² elevates Thaçi's risk of flight to a 'sufficiently real possibility'.²³

ii. Risk of Obstruction of Proceedings (Article 41(6)(b)(ii))

10. Thaçi continues to present a risk of obstructing proceedings. This Panel has previously concluded that the risk that Thaçi will obstruct the progress of KSC proceedings continues to exist.²⁴

11. The Panel reiterated its previous determination that there is a risk of Thaçi obstructing KSC proceedings based on, *inter alia*, his having: (i) attempted to undermine

²⁰ Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of the Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, KSC-CC-PR-2017-1/F00004, 26 April 2017, para.14.

²¹ Decision on Hashim Thaçi's Application for Interim Release, KSC-BC-2020-06/F00177, 22 January 2021, para.31.

²² *Prosecutor v. Salih Mustafa*, Corrected version of Public redacted version of Trial Judgment, KSC-BC-2020-05/F00494/RED/COR, 24 January 2023, para.831 ('Case 5 Judgment').

²³ See e.g. First Appeals Decision, KSC-BC-2020-06/IA004/F00005, para.24.

²⁴ Ninth Detention Decision, KSC-BC-2020-06/F01610, para.21.

the KSC and offered benefits to persons summoned by the SPO; (ii) a position of influence in Kosovo which could allow him to elicit the support of sympathisers; and (iv) given the commencement of trial, increased knowledge of the evidence underpinning the serious charges against him.²⁵

12. Additionally, there is a persistent climate of intimidation of witnesses and interference with criminal proceedings against former KLA members in Kosovo,²⁶ which the Court of Appeals has agreed is a relevant 'contextual consideration'.²⁷ Similar findings were made in the *Mustafa* Trial Judgment²⁸ and the *Gucati and Haradinaj* Appeal Judgment.²⁹ The Case 7 Trial Panel considered that 'witness protection has continued to be a live and critical issue in Kosovo',³⁰ and credited the testimony of Defence Expert Robert Reid, who remarked that, in over 20 years in the field, he had never seen witness intimidation on the level that exists in Kosovo.³¹

13. Moreover, Thaçi has received information concerning, *inter alia*, the first 40 witnesses the SPO intends to call,³² and the risk of obstruction increases as the remaining delayed disclosure witnesses have their identities lifted in the course of trial.

²⁵ Ninth Detention Decision, KSC-BC-2020-06/F01610, para.18.

²⁶ Ninth Detention Decision, KSC-BC-2020-06/F01610, para.20.

²⁷ Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention, KSC-BC-2020-06/IA017/F00011/RED, 5 April 2022, paras 41-48; Public Redacted Version of 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, para.50; Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, KSC-BC-2020-06/IA015/F00005/RED, 25 March 2022, para.43.

²⁸ Case 5 Judgment, KSC-BC-2020-05/F00494/RED/COR, 24 January 2023, para.57.

²⁹ *Prosecutor v. Guçati and Haradinaj*, Appeal Judgment, KSC-CA-2022-01/F00114, 2 February 2023, para.438 (quoting KSC-BC-2020-07, Transcript, 18 May 2022, pp. 3858-3859).

³⁰ *Prosecutor v. Guçati and Haradinaj*, Public Redacted Version of the Trial Judgment, KSC-BC-2022-01/F00611/RED, 18 May 2022 ('Case 7 Judgment'), para.579.

³¹ Case 7 Judgment, KSC-BC-2020-07/F00611/RED, para.577.

³² Prosecution Submission of Provisional List of First 40 Witnesses to be Called at Trial, KSC-BC-2020-06/F01117, 18 November 2022.

14. In this regard, the Panel has previously noted that the disclosure of such highly sensitive information to the Thaçi Defence necessarily results in it becoming known to a broader range of persons, including the Accused.³³ This continues to amplify the risk of sensitive information pertaining to witnesses becoming known to members of the public before the witnesses in question give evidence,³⁴ which, in the context of the release of an Accused, would not be conducive to the effective protection of witnesses who are yet to testify.³⁵ Therefore, there remains a risk that Thaçi would interfere with the proceedings.

15. In this regard, the SPO notes that, as held by the Trial Panel in Case 7, 'the mere fact that the Accused is entitled to disclosure of relevant material does not mean that the Panel ought to ignore the risks that come with such disclosure, especially in the context of conditional release.'³⁶

iii. Risk of Criminal Offences (Article 41(6)(b)(iii))

16. Thaçi continues to present a risk of committing further crimes. This Panel has previously concluded that the risk that Thaçi will commit further crimes continues to exist.³⁷

17. The Panel recalled its previous finding that the risk of Thaçi committing further crimes continues to exist, opined that the same factors that were taken into account in relation to the risk of obstruction are relevant to the analysis of the risk of committing further crimes, and concluded that no new circumstances have arisen since the last

³³ Ninth Detention Decision, KSC-BC-2020-06/F01610, para.19.

³⁴ See Ninth Detention Decision KSC-BC-2020-06/F01610, para.19.

³⁵ See Ninth Detention Decision, KSC-BC-2020-06/F01610, para.19.

³⁶ Haradinaj Decision, KSC-BC-2020-07/F00507/RED, para.36.

³⁷ Ninth Detention Decision, KSC-BC-2020-06/F01610, para.25.

detention review that would justify a different finding in respect of this matter.³⁸ This includes the general climate of witness intimidation in regards to KLA crimes.

18. Moreover, the crimes against humanity and war crimes that Thaçi is charged with are extremely serious, they are alleged to have been committed in cooperation with others, and the Confirmation Decision describes Thaçi's personal participation in the commission of crimes.

19. The Panel highlighted the fact that the trial in this case has started, that the identities of sensitive witnesses have been disclosed to the Thaçi Defence, and that any risk of the further commission of crimes must be avoided.³⁹

20. This Panel's previous conclusion that the continuing disclosure of sensitive information presented an unacceptable risk for the commission of further crimes⁴⁰ applies even more forcefully as trial continues to progress.

C. NO MODALITIES OF CONDITIONAL RELEASE ARE ABLE TO SUFFICIENTLY MITIGATE THE RISKS

21. The relevant risks, including those regarding flight, can only be effectively managed at the KSC's detention facilities. This Panel has previously concluded that the risks of obstructing the proceedings and committing further offences can only be effectively managed at the KSC's detention facilities.⁴¹

³⁸ Ninth Detention Decision, KSC-BC-2020-06/F01610, para.23.

³⁹ Ninth Detention Decision, KSC-BC-2020-06/F01610, para.24.

⁴⁰ Ninth Detention Decision, KSC-BC-2020-06/F01610, paras 24-25.

⁴¹ Ninth Detention Decision, KSC-BC-2020-06/F01610, paras 30-31.

22. Regarding the risks of obstructing the progress of KSC proceedings and committing further crimes, the Panel found that none of the proposed conditions, nor any additional measures foreseen in Article 41(12) could sufficiently mitigate the existing risks.⁴²

23. Further, the Panel found that the measures in place at the KSC detention facilities, viewed as a whole, provide robust assurances against unmonitored visits and communications with family members and pre-approved visitors with a view to minimising the risks of obstruction and commission of further crimes.⁴³ Moreover, they offer a controlled environment where a potential breach of confidentiality could be more easily identified and/or prevented.⁴⁴

24. The Panel has concluded that it is only through the communication monitoring framework applicable at the KSC detention facilities that Thaçi's communications can be restricted in a manner that would sufficiently mitigate the risks of obstruction and commission of further crimes.⁴⁵

25. Nothing has occurred since the previous determination warranting a different assessment on conditions, either generally or for a discrete period of time, rather, the continuation of trial and attendant further disclosure make the underlying risks higher than ever.

D. DETENTION REMAINS PROPORTIONAL

⁴² Ninth Detention Decision, KSC-BC-2020-06/F01610, para.29.

⁴³ Ninth Detention Decision, KSC-BC-2020-06/F01610, para.29.

⁴⁴ Ninth Detention Decision, KSC-BC-2020-06/F01610, para.29.

⁴⁵ Ninth Detention Decision, KSC-BC-2020-06/F01610, para.30.

26. Detention remains proportional. At the last detention review, this Panel found that Thaçi's detention for a further two months was necessary and reasonable in the specific circumstances of the case.⁴⁶

27. In that regard, the Panel recalled that the reasonableness of an accused's continued detention must be assessed on the facts of each case and according to its special features, which, in this case, include: (i) Thaçi's influence and authority; (ii) his knowledge of the charges and the evidence against him, and a possibly lengthy prison sentence; (iii) the risk that Thaçi would obstruct KSC proceedings; (iv) the risk of committing, instigating, or assisting further crimes; (v) the fact that restrictive measures on release are not sufficient to mitigate risks; (vi) the gravity and the complexity of the charges against Thaçi; and (vii) the fact that the trial is now underway, demonstrating reasonable progression of proceedings.⁴⁷

28. This Panel has previously recalled the Court of Appeals Panel upholding the application of various factors in this context, including: (i) the risks identified under Article 41(6)(b); (ii) the finding that some risks could not be mitigated; and (iii) the potential penalty faced by the accused upon conviction based upon the gravity of the charges.⁴⁸ This Panel has concluded that the usage of these factors in determining the reasonableness of continued detention is consistent with the practice of human rights bodies and international criminal tribunals.⁴⁹

⁴⁶ Ninth Detention Decision, KSC-BC-2020-06/F01610, para.34.

⁴⁷ Ninth Detention Decision, KSC-BC-2020-06/F01610, para.33.

⁴⁸ Decision on Periodic Review of Detention of Hashim Thaçi, KSC-BC-2020-06/F01302, 17 February 2023 ('Seventh Thaçi Detention Decision'), para.47 *citing*, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, IA001/F00005, 30 April 2021 ('First Veseli Appeal Decision'), para.57.

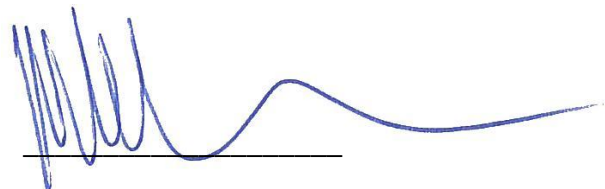
⁴⁹ Seventh Thaçi Detention Decision, KSC-BC-2020-06/F01302, para.47 *citing* First Veseli Appeal Decision, KSC-BC-2020-06/IA001/F00005, para.57.

29. Here, taking these same, and additional, factors into consideration, Thaçi's detention continues to be reasonable, especially in light of the continuing reasonable progression of proceedings.⁵⁰

IV. CONCLUSION

30. For the foregoing reasons, the SPO respectfully submits that Thaçi should remain detained.

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⁵⁰ In this regard, *see* Ninth Detention Decision, KSC-BC-2020-06/F01610, paras 33-34; Decision on Periodic Review of Detention of Jakup Krasniqi, KSC-BC-2020-06/F01679, 17 July 2023, paras 50, 54; Decision on Periodic Review of Detention of Rexhep Selimi, KSC-BC-2020-06/F01680, 17 July 2023, paras 33-34.