



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

**In:** KSC-BC-2018-01  
**Before:** Single Judge Panel  
Judge Nicolas Guillou  
**Registrar:** Dr Fidelma Donlon  
**Filing Participant:** Specialist Prosecutor's Office  
**Date:** 15 December 2023  
**Language:** English  
**Classification:** Public

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**Public redacted version of 'Prosecution submissions on review of detention  
with confidential annexes 1 and 2'**

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## I. INTRODUCTION

1. Pursuant to Article 41(6) and (10) of the Law<sup>1</sup> and Rule 57 of the Rules,<sup>2</sup> and in compliance with the Single Judge's order,<sup>3</sup> the Specialist Prosecutor's Office ('SPO') hereby files its response to Kilaj's Detention Submissions.<sup>4</sup>

2. Kilaj's continued detention remains necessary. There has been no change in circumstances detracting from the established reasons for detention. On the contrary, as detailed below, the basis for the Article 41(6)(a) grounded suspicion has only strengthened since the Initial Decision.<sup>5</sup> Furthermore, given that Kilaj will now be aware of additional evidence against him, the Article 41(6)(b) risks have also increased.

## II. PROCEDURAL HISTORY

2. On 2 November 2023, the SPO (a) executed a judicially-authorized search and seizure at Kilaj's residence in Kosovo, (b) conducted a voluntary interview with Kilaj, and (c) arrested Kilaj pursuant to an arrest order issued by the Specialist Prosecutor.

3. On 6 November 2023, the Single Judge issued the Initial Decision ordering Kilaj's continued detention, and indicated that the reasons underlying the decision would be provided subsequently. On 9 November 2023, the Single Judge issued the

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<sup>1</sup> 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 noted

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

<sup>3</sup> Reasons for Continued Detention, KSC-BC-2018-01/F00503, 9 November 2023, para.66(a) ('Detention Reasons').

<sup>4</sup> Kilaj Submissions on Review of Detention, KSC-BC-2018-01/F00524, 6 December 2023, Confidential ('Kilaj Detention Submissions'). *See also* Prosecution notification regarding F00524, KSC-BC-2018-01/F00529.

<sup>5</sup> *See* Decision on Continued Detention, KSC-BC-2018-01/F00499, 6 November 2023, Public ('Initial Decision') and Detention Reasons, KSC-BC-2018-01/F00503 (collectively the 'Detention Decision').

Detention Reasons, which also included a briefing schedule for subsequent review of Kilaj's detention.

4. On 20 November 2023, Kilaj filed an appeal challenging the Single Judge's Detention Decision. The appeal is currently pending. The Kilaj Detention Submissions were submitted and notified on 7 December 2023.<sup>6</sup>

5. On 8 December 2023, the SPO notified the Single Judge that it intended to file one consolidated submission within the timeline set out in Rule 76 to respond to the Kilaj Detention Submissions, and, relatedly, would not challenge the Kilaj Detention Submissions on the grounds of timeliness.<sup>7</sup>

### III. APPLICABLE LEGAL FRAMEWORK

6. Before ordering Kilaj's continued detention, the Single Judge must be satisfied that: (1) there is a grounded suspicion that Kilaj has committed a crime within the jurisdiction of the KSC;<sup>8</sup> (2) there are articulable grounds to believe that: (i) there is a risk of flight; (ii) Kilaj will obstruct the progress of the criminal proceedings, including by influencing witnesses, victims or accomplices; or (iii) the seriousness of the crime or the manner or circumstances in which it was committed and Kilaj's personal characteristics, past conduct, the environment and conditions in which he lives or other personal circumstances indicate a risk that he will repeat the criminal offence, complete an attempted crime or commit a crime which he has threatened to commit.<sup>9</sup>

7. The Court of Appeals has established that, once a grounded suspicion under Article 41(6)(a) is identified, an articulable basis of a single ground under Article

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<sup>6</sup> This was two days after the deadline set for making such submissions by the Single Judge in the Detention Reasons.

<sup>7</sup> See Prosecution notification regarding F00524, KSC-BC-2018-01, 8 December 2023, Confidential.

<sup>8</sup> Article 41(6)(a).

<sup>9</sup> Article 41(6)(b)(i)-(iii).

41(6)(b) is sufficient to support detention.<sup>10</sup> 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.<sup>11</sup> The 'belief' test denotes 'an acceptance of the possibility, not the inevitability, of a future occurrence'.<sup>12</sup> In other words, the standard to be applied is less than certainty, but more than a mere possibility of a risk materialising.<sup>13</sup> Articulable in this context means specified in detail by reference to the relevant information or evidence.<sup>14</sup>

8. In considering whether an accused should be detained or released, the relevant panel must consider whether measures other than detention would sufficiently reduce the risk of the Article 41(6)(b) factors occurring.<sup>15</sup> If the Article 41(6) conditions are met and no lesser measures are available, the person shall continue to be detained.<sup>16</sup>

#### IV. SUBMISSIONS

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<sup>10</sup> See *Specialist 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; See also *Specialist Prosecutor v. Thaçi et al.*, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA001/F00005, 30 April 2021 ('Veseli Interim Release Appeals Decision'), para.15; Articles 19(1.9), 19(1.10) and 19(1.31) of the 2022 Kosovo Criminal Procedure Code, Code No. 08/L-032 ('KCPC').

<sup>11</sup> Veseli Interim Release Appeals Decision, KSC-BC-2020-06/IA001/F00005, para.19.

<sup>12</sup> See Veseli Interim Release Appeals Decision, KSC-BC-2020-06/IA001/F00005, paras 13-19; *Specialist Prosecutor v. Thaçi et al.*, Decision on Kadri Veseli's Application for Interim Release, KSC-BC-2020-06/F00178, 22 January 2021, para.21 citing Gucati Appeals Decision, KSC-BC-2020-07/IA001/F00005, paras 63, 67.

<sup>13</sup> Veseli Interim Release Appeals Decision, KSC-BC-2020-06/IA001/F00005, para.17.

<sup>14</sup> *Specialist Prosecutor v. Thaçi et al.*, Decision on Periodic Review of Detention of Hashim Thaçi, KSC-BC2020-06/F01862, 16 October 2023, para.12 citing Article 19.1.30 of the KCPC 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.'

<sup>15</sup> 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.

<sup>16</sup> Gucati Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.51.

9. In the Detention Decision, the Single Judge found the Article 41(6) criteria met and Kilaj's detention necessary.<sup>17</sup> The Single Judge must now consider anew whether those conditions continue to be satisfied.<sup>18</sup> In doing so, the Single Judge may refer to previous decisions and material and evidence already before him, without this affecting the *de novo* character of his decision.<sup>19</sup>

10. For the reasons detailed below, the SPO has fully discharged its burden<sup>20</sup> by establishing that (a) all Article 41(6) criteria are met, and (b) Kilaj's continued detention is necessary.

#### A. GROUNDED SUSPICION

11. The Detention Decision found grounded suspicion that Kilaj has committed offences under Article 15(2) of the Law.<sup>21</sup> The collection and analysis of additional evidence has only strengthened the grounded suspicion that Kilaj [REDACTED] has committed crimes within the KSC's jurisdiction.

12. [REDACTED].<sup>22</sup>

13. [REDACTED].<sup>23</sup>

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<sup>17</sup> Initial Decision, KSC-BC-2018-01/F00499, paras 13-15.

<sup>18</sup> See, *inter alia*, *Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of the Decision on Jakup Krasniqi's Application for Interim Release, KSC-BC-2020-06/F00180/RED, 22 January 2021 ('Krasniqi Decision'), para.16. Following his first, inter partes detention ruling, the Pre-Trial Judge 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 determine whether they still exist. See, *inter alia*, *Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Review of Detention of Jakup Krasniqi, KSC-BC-2020-06/F00371/RED, 25 June 2021, para.19.

<sup>19</sup> See, e.g., Krasniqi Decision, KSC-BC-2020-06/F00180/RED, para.24

<sup>20</sup> Krasniqi Decision, KSC-BC-2020-06/F00180/RED, para.17.

<sup>21</sup> See Initial Decision, KSC-BC-2018-01/F00499, para.13 and Detention Reasons, KSC-BC-2018-01/F00503, paras 22-32.

<sup>22</sup> [REDACTED].

<sup>23</sup> [REDACTED].

14. [REDACTED].<sup>24</sup> [REDACTED].

15. The facts outlined above strongly re-enforce the already-established grounded suspicion.

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

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

16. In previously finding that Kilaj presents a moderate flight risk sufficient to necessitate his continued detention, the Single Judge considered his knowledge of potential serious charges and the forthcoming filing of an indictment, as well as the severity of the potential sentence. Kilaj will now be aware that [REDACTED], and that the evidence against him is much stronger than he had previously realised.

17. As such, the risk of flight already found by the Single Judge has increased since the time of the Detention Decision.

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

18. In the Detention Decision, the Single Judge attached weight to, amongst other matters, the fact that the seized materials purportedly identified [REDACTED] information that cannot be found in the public domain, [REDACTED]. The fact that Kilaj possessed these materials, while knowing the unlawful status of them, demonstrated a willingness to violate court orders and to intervene in proceedings. The Single Judge found this indicative of the risk that Kilaj will obstruct the progress of criminal proceedings.<sup>25</sup>

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<sup>24</sup> [REDACTED].

<sup>25</sup> [REDACTED].

19. The information now available demonstrates that this risk is significantly greater. Kilaj not only had confidential materials in his possession [REDACTED]<sup>26</sup> [REDACTED].<sup>27</sup>

20. For all of these reasons, there are concrete risks that Kilaj may continue his efforts to obstruct the progress of criminal proceedings. Indeed, given that he is now facing potential criminal charges himself, his incentive to do so has significantly increased.

*iii. Risk of Criminal Offences (Article 41(1)(6)(b)(iii))*

21. In previously finding that Kilaj may commit further crimes, the Single Judge noted that the factors underpinning the risk of obstruction of criminal proceedings, are of relevant to the assessment of the risk of criminal offences. As outlined above, these factors have increased.

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

22. In Kilaj's Detention Submissions, Kilaj proposes a list of conditions which could be applied in the event of his release.<sup>28</sup>

23. The SPO submits that no combination of release conditions, nor any additional measures foreseen in Article 41(12), could sufficiently, and to a degree comparable to that of detention at the KSC detention facilities, mitigate the existing risk with respect to Kilaj. Detention is the only means by which these risks can be adequately managed.

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<sup>26</sup> [REDACTED].

<sup>27</sup> [REDACTED].

<sup>28</sup> Kilaj Submissions on Review of Detention, KSC-BC-2018-01/F00524, 6 December 2023, Confidential.

24. Analysing the conditions necessary to mitigate the severe risks identified must reflect the well-recognised climate of witness intimidation in Kosovo – including the interference to date in this case - and the influence Kilaj [REDACTED] has in Kosovo.

25. In order to mitigate the risk of flight Kilaj proposes (i) house arrest, surveilled by means of electronic monitoring by way of an ankle tag; (ii) daily reporting at the nearest police station; (iii) surrendering his passport and any other document that could be used for travel; and (iv) paying of a security into Court of €30,000.

26. The SPO notes that the starting point for evaluating house arrest in Kosovo under any conditions must be the assessments that the Pre-Trial Judge and the Appeals Panel have made concerning the viability of such an approach generally and in context.<sup>29</sup> This includes the Pre-Trial Judge's and the Appeals Panel's recollections that the conditions in Kosovo were what prompted the need for the change in venue to the Host State for the trial of high ranking former KLA members. It encompasses also the 'persisting climate of intimidation of witnesses and interference with criminal proceedings against former KLA members in Kosovo,' and that 'various international organisations have recently documented that corruption continues to affect the criminal justice sector in Kosovo.'<sup>30</sup>

27. Given this climate, and the speed and ease with which Kilaj could leave the jurisdiction of Kosovo, these conditions cannot be effectively monitored and enforced. Moreover, they do nothing to address the severe risks of obstructing proceedings and criminal offences.

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<sup>29</sup> See Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention, KSC-BC-2020-06/IA017/F00011/RED, Public, para.43 ('The Panel agrees with the Pre-Trial Judge that such context is relevant to assessing whether the proposed conditions were sufficient to mitigate identified risks').

<sup>30</sup> Public Redacted Version of Decision on Review of Detention of Hashim Thaçi, KSC-BC-2020-06/F00624/RED, 14 December 2021, Public, para.84



28. In that regard, the Defence merely proposes that Kilaj 'would abide by conditions.' The Defence, however, makes no attempt to explain how these conditions would be monitored or enforced. The SPO submits that the array of communication mediums available is so varied that monitoring and enforcing any limitation of communications is impossible. Only through the communication monitoring framework in place at the KSC detention facilities the communications of a detainee can be effectively restricted and monitored, thereby mitigating the risks of him obstructing the KSC proceedings or engaging in or contributing to further crimes.

29. Moreover, it is already known that Kilaj is willing to lie to and mislead law enforcement for his own benefit. [REDACTED].

30. No measures short of detention are sufficient to mitigate the very concrete risks posed.

#### D. DETENTION IS PROPORTIONAL

31. Given all of the above, the severity of the risks at issue, the length of time for which Kilaj has been detained, the stage of the proceedings in this case, and the imminently forthcoming filing of the indictment - which will trigger the framework and calendar for pre-trial proceedings - detention is both reasonable and proportional at this time.

#### V. CLASSIFICATION

32. This filing is submitted confidentially pursuant to Rule 82(4). A public redacted version will be filed.

#### VI. CONCLUSION

33. For the foregoing reasons, the SPO respectfully requests that Kilaj remain detained.

**Word count: 2,480**



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Friday, 15 December 2023,

At The Hague, The Netherlands.