



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
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Public redacted version of
'Prosecution submissions on review of detention'

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I. INTRODUCTION

1. Pursuant to Article 41(6) and (10) of the Law¹ and Rule 57 of the Rules,² and in compliance with the Single Judge's order,³ the Specialist Prosecutor's Office ('SPO') hereby files its submissions on the review of detention of Isni KILAJ ('KILAJ').

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. Furthermore, [REDACTED], the Article 41(6)(b) risks have also increased since the most recent review of detention.

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 and 9 November 2023, the Single Judge issued the Initial Detention Decision.⁴

¹ 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

² 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.

³ Decision on Review of Detention of Isni Kilaj, KSC-BC-2018-01/F00547, 5 January 2024, Confidential ('Second Detention Decision'), para.72.

⁴ Decision on Continued Detention, KSC-BC-2018-01/F00499, 6 November 2023, Public ('Initial Detention Decision') and Reasons for Continued Detention, KSC-BC-2018-01/F00503, 9 November 2023, Confidential ('Initial Detention Reasons'), para.66(a).

4. On 20 November 2023, KILAJ filed an appeal challenging the Initial Detention Decision.⁵
5. On 7 December 2023, KILAJ filed submissions challenging his continued detention.⁶
6. On 5 January 2024, the Single Judge ordered KILAJ's continued detention and set out a timeline for submissions on the next review of detention.⁷
7. On 11 January 2024, the Appeals Panel denied KILAJ's appeal against the Initial Detention Decision.⁸

III. APPLICABLE LEGAL FRAMEWORK

8. 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 Kosovo Specialist Chambers ('KSC');⁹ (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

⁵ Kilaj Appeal Against Decision on Continued Detention, KSC-BC-2018-01/IA004/F00001, 20 November 2023, Confidential. *See also* Prosecution response to Defence appeal against decision on continued detention, KSC-BC-2018-01/IA004, 1 December 2023, Confidential; Kilaj Reply to Prosecution Response to Appeal Against Decision on Continued Detention, KSC-BC-2018-01/IA004/F00004, 8 December 2023, Confidential.

⁶ Kilaj Submissions on Review of Detention, KSC-BC-2018-01/F00524, 6 December 2023, Confidential ('Kilaj Submissions on First Detention Review'). *See also* Prosecution submissions on review of detention with confidential annexes 1 and 2, KSC-BC-2018-01/F00538, 15 December 2023, Confidential ('Prosecution Submissions on First Detention Review'); Prosecution notification regarding F00524, KSC-BC-2018-01, 8 December 2023, Confidential.

⁷ Decision on Review of Detention of Isni Kilaj, KSC-BC-2018-01/F00547, 5 January 2024, Confidential ('Second Detention Decision').

⁸ Decision on Isni Kilaj's Appeal Against Decision on Continued Detention, KSC-BC-2018-01/IA004/F00006, 11 January 2024, Confidential ('Detention Appeal Decision').

⁹ Article 41(6)(a); Detention Appeal Decision, KSC-BC-2018-01/IA004/F00006, paras 17-25.

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.¹⁰

9. 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 41(6)(b) is sufficient to support detention.¹¹ 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.¹² The 'belief' test denotes 'an acceptance of the possibility, not the inevitability, of a future occurrence'.¹³ In other words, the standard to be applied is less than certainty, but more than a mere possibility of a risk materialising.¹⁴ Articulable in this context means specified in detail by reference to the relevant information or evidence.¹⁵

10. In considering whether an individual should be detained or released, the relevant panel must consider whether measures other than detention would

¹⁰ Article 41(6)(b)(i)-(iii).

¹¹ 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').

¹² Veseli Interim Release Appeals Decision, KSC-BC-2020-06/IA001/F00005, para.19.

¹³ 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.

¹⁴ Veseli Interim Release Appeals Decision, KSC-BC-2020-06/IA001/F00005, para.17.

¹⁵ *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.'

sufficiently reduce the risk of the Article 41(6)(b) factors occurring.¹⁶ If the Article 41(6) conditions are met and no lesser measures are available, the person shall continue to be detained.¹⁷

IV. SUBMISSIONS

11. In the Second Detention Decision, the Single Judge found the Article 41(6) criteria continued to be met and KILAJ's detention remained necessary.¹⁸ The Single Judge must now consider anew whether those conditions continue to be satisfied.¹⁹ 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.²⁰

12. For the reasons detailed below, the SPO has fully discharged its burden²¹ by establishing that (a) all Article 41(6) criteria are met, and (b) KILAJ's continued detention is necessary.

A. GROUNDED SUSPICION

¹⁶ 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.

¹⁷ Gucati Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.51.

¹⁸ Second Detention Decision, KSC-BC-2018-01/F00547, paras 37, 57; *see also* Initial Detention Decision, KSC-BC-2018-01/F00499, paras 13-15.

¹⁹ *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.

²⁰ *See, e.g., Krasniqi Decision*, KSC-BC-2020-06/F00180/RED, para.24

²¹ Krasniqi Decision, KSC-BC-2020-06/F00180/RED, para.17.

13. The Initial Detention Decision found a grounded suspicion that KILAJ has committed offences under Article 15(2) of the Law.²² This finding has been upheld on appeal,²³ and has been significantly buttressed by additional evidence.²⁴ Accordingly, the Single Judge has correctly found that the grounded suspicion that KILAJ has committed crimes within the KSC's jurisdiction has only strengthened since the Initial Detention Decision.²⁵ Nothing has occurred since this finding that could diminish the grounded suspicion.

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

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

14. In previously finding that KILAJ presents a moderate flight risk sufficient to necessitate his continued detention, the Single Judge has considered, *inter alia*, his knowledge of potential serious charges and the forthcoming filing of an indictment, the severity of the potential sentence, his awareness that the 6 October 2023 visit was recorded, and that the evidence against him is stronger than he had previously realised.²⁶ In addition, the Single Judge noted that KILAJ has the means and opportunity to evade justice, including by traveling to jurisdictions beyond the reach of the KSC.²⁷ Since then, [REDACTED],²⁸ which further increases the risk that KILAJ may flee the KSC's jurisdiction as his prospect of facing serious charges has become more likely.

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

²³ Detention Appeal Decision, KSC-BC-2018-01/IA004/F00006, paras 27, 34.

²⁴ Prosecution Submissions on First Detention Review, KSC-BC-2018-01/F00538, Annex 1 (containing Transcript of 6 October 2023 Visit, 116083 061023-111500-135746-TR-AT-ET), Annex 2 (containing reconstructed pages of seized materials, SPOE00343600, SPOE00343604).

²⁵ Second Detention Decision, KSC-BC-2018-01/F00547, paras 32-37.

²⁶ Second Detention Decision, KSC-BC-2018-01/F00547, paras 43-44.

²⁷ Second Detention Decision, KSC-BC-2018-01/F00547, para.45.

²⁸ [REDACTED].

15. As such, the risk of flight already found by the Single Judge continues to exist.

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

16. In the Initial Detention Decision, the Single Judge attached weight to, amongst other matters, the fact that the seized materials [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, which, together with the risk of committing further offences, necessitated KILAJ's continued detention.²⁹ This finding has been upheld on appeal.³⁰

17. In the Second Detention Decision, the Single Judge found that the risk that KILAJ may obstruct proceedings increased since the Initial Detention Decision, given that [REDACTED]: (i) [REDACTED]; (ii) [REDACTED]; and (iii) [REDACTED].³¹ This represents a careful evaluation of the established risks, which are heightened further because the investigation relating to KILAJ is ongoing.³²

18. [REDACTED].³³ Consequently, the prospect that he may face criminal charges himself is ever more concrete, which only increases his incentive to continue his efforts to obstruct the progress of criminal proceedings.

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

19. The Single Judge has previously noted that the factors underpinning the risk that KILAJ may obstruct criminal proceedings are also relevant to the assessment of

²⁹ Initial Detention Reasons, KSC-BC-2018-01/F00503, paras 46-47.

³⁰ Detention Appeal Decision, KSC-BC-2018-01/IA004/F00006, paras 33, 43-45.

³¹ [REDACTED].

³² Second Detention Decision, KSC-BC-2018-01/F00547, para.64.

³³ [REDACTED].

the risk that he may commit further offences.³⁴ As outlined above, these factors have increased.

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

20. The Second Detention Decision established that the risk of KILAJ obstructing the proceedings or committing further offences can only be effectively managed through the communications monitoring regime available at the KSC's detention facilities.³⁵

21. The Single Judge has previously rejected as inadequate the conditions proposed by KILAJ, including: (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. The Single Judge further held that no additional measures foreseen in Article 41(12) could sufficiently mitigate the risk that KILAJ may obstruct the proceedings or commit further offences.³⁶

22. In particular, the Single Judge has found that KILAJ, [REDACTED], could use a device belonging to a family member to convey a message, or ask a family member to do so.³⁷ The previously proposed cash bail would only minimally disincentivise KILAJ from obstructing the proceedings, since violations in the manner described above would be difficult to detect.³⁸ Moreover, [REDACTED], it is likely that any cash bail amount could be covered by associates whose interests are closely aligned in this

³⁴ Second Detention Decision, KSC-BC-2018-01/F00547, para.55.

³⁵ Second Detention Decision, KSC-BC-2018-01/F00547, para.64.

³⁶ Second Detention Decision, KSC-BC-2018-01/F00547, para.67.

³⁷ Second Detention Decision, KSC-BC-2018-01/F00547, para.63.

³⁸ See Second Detention Decision, KSC-BC-2018-01/F00547, para.65.

instance – as such, it would provide limited, if any, disincentive from violation of conditions imposed. The Single Judge thus correctly found that the proposed conditions would not overcome the challenges associated with provisional release.³⁹

23. These findings must be assessed in the context of: (i) the ‘persisting climate of intimidation of witnesses and interference with criminal proceedings against former KLA members in Kosovo’;⁴⁰ (ii) the fact 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;⁴¹ and (iii) recently documented corruption affecting the criminal justice sector in Kosovo.⁴² In this regard, the Single Judge took note of prior rulings in Case 06, which established that the Kosovo Police does not have the capacity to implement measures that sufficiently mitigate existing risks.⁴³

24. In contrast, the communication monitoring framework in place at the KSC detention facilities effectively restrict and monitor KILAJ’s communications, thereby mitigating the risks of him obstructing the KSC proceedings or engaging in or contributing to further crimes.⁴⁴

³⁹ Second Detention Decision, KSC-BC-2018-01/F00547, paras 63-65.

⁴⁰ Second Detention Decision, KSC-BC-2018-01/F00547, para.51.

⁴¹ Public Redacted Version of Decision on Review of Detention of Hashim Thaçi, KSC-BC-2020-06/F00624/RED, 14 December 2021, Public, para.84.

⁴² Public Redacted Version of Decision on Review of Detention of Hashim Thaçi, KSC-BC-2020-06/F00624/RED, 14 December 2021, Public, para.84.

⁴³ Second Detention Decision, KSC-BC-2018-01/F00547, para.64, citing Public Redacted Version of Decision on Remanded Detention Review Decision and Periodic Review of Detention of Jakup Krasniqi, KSC-BC-2020-06, F00582/RED, 26 November 2021, public, para.77; Redacted Version of Decision on Jakup Krasniqi’s Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, KSC-BC-2020-06/IA016/F00005/RED, 25 March 2022, public, paras 28-36; *see also* 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’).

⁴⁴ Second Detention Decision, KSC-BC-2018-01/F00547, para.64.

25. Therefore, no conditions, even if they could be effectively monitored and enforced, could adequately mitigate the existing risks associated with provisional release.

D. DETENTION IS PROPORTIONAL

26. 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, detention is both reasonable and proportional at this time.

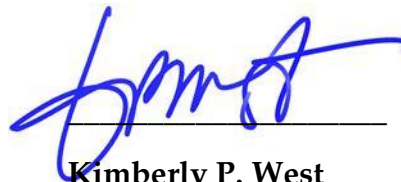
V. CLASSIFICATION

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

VI. CONCLUSION

28. For the foregoing reasons, the SPO respectfully requests that KILAJ remain detained.

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Monday, 12 February 2024,
At The Hague, The Netherlands.