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KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In:	**KSC-BC-2020-06**
Before:	**A Panel of the Court of Appeals Chamber** Judge Michèle Picard Judge Kai Ambos Judge Nina Jørgensen
Registrar:	Fidelma Donlon
Date:	30 April 2021
Original language:	English
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Public Redacted Version of

Decision on Rexhep Selimi's Appeal Against Decision on Interim Release

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers ("Court of Appeals Panel" or "Panel" and "Specialist Chambers", respectively)[1] acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 169 of the Rules of Procedure and Evidence ("Rules") is seised of the "Appeal against Decision on Rexhep Selimi's Application for Interim Release" filed on 3 February 2021,[2] challenging the "Decision on Rexhep Selimi's Application for Interim Release" ("Impugned Decision").[3] The Specialist Prosecutor's Office ("SPO") responded on 15 February 2021 that the Appeal should be dismissed in its entirety.[4] Selimi filed his reply on 22 February 2021.[5]

I. BACKGROUND

1. On 5 November 2020, Selimi was arrested in Kosovo pursuant to an arrest warrant issued by the Pre-Trial Judge,[6] further to the confirmation of an indictment against him.[7]

[1] F000002, Decision Assigning a Court of Appeals Panel, 4 February 2021.
[2] F000001/RED, Public Redacted Version of Appeal against Decision on Rexhep Selimi's Application for Interim Release KSC-BC-2020-06/IA003-F00001 dated 3 February 2021, 3 February 2021 (original version filed on 3 February 2021) ("Appeal").
[3] F00179/RED, Public Redacted Version of Decision on Rexhep Selimi's Application for Interim Release, 26 January 2021 (original version filed on 22 January 2021) ("Impugned Decision").
[4] F000003/RED, Public redacted version of Response to Selimi Defence Appeal of Detention Decision, 22 February 2021 (original version filed on 15 February) ("Response"), para. 49.
[5] F00004, Defence Reply to SPO's Response to Selimi Interim Release Appeal, 22 February 2021 ("Reply").
[6] F00027/RED, Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders, 26 November 2020 (original version filed on 26 October 2020) ("Decision on Arrest and Detention"); F00027/A05/RED, Public Redacted Version of Arrest Warrant for Rexhep Selimi, 5 November 2020 (original version filed on 26 October 2020) ("Arrest Warrant"); F00049, Notification of Arrest of Rexhep Selimi Pursuant to Rule 55(4), 5 November 2020 (strictly confidential and *ex parte*, reclassified as public on 20 November 2020).
[7] F00026/RED, Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 30 November 2020 (original version filed on 26 October 2020). The operative indictment was filed on 4 November 2020; see F00045/A03, Further redacted Indictment, 4 November 2020 (strictly confidential and *ex parte*, reclassified as public on 5 November 2020).

2. On 22 January 2021, the Pre-Trial Judge issued the Impugned Decision, rejecting Selimi's application for interim release on the basis that there was a risk that Selimi would abscond, obstruct the progress of Specialist Chambers proceedings or commit further crimes against those perceived as being opposed to the Kosovo Liberation Army ("KLA"), including potential witnesses.[8] The Pre-Trial Judge further found that the conditional interim release proposed by Selimi ("Proposed Conditions"), as an alternative to unconditional release, could adequately mitigate the risk of flight but would insufficiently mitigate the risk of obstructing the progress of Specialist Chambers proceedings or the risk of committing further crimes.[9]

3. Selimi submits that, in the Impugned Decision, the Pre-Trial Judge: (i) erroneously placed the burden on the Defence to justify Selimi's release;[10] (ii) applied an incorrect threshold for the assessment of the risks under Article 41(6)(b) of the Law, and furthermore an incorrect test for Article 41(6)(b)(ii) of the Law;[11] (iii) made erroneous findings regarding the assessment of each of the three prongs of Article 41(6)(b) of the Law;[12] (iv) failed to properly consider the expected length of pre-trial proceedings;[13] and (v) further erred regarding the assessment of the Proposed Conditions.[14]

[8] Impugned Decision, paras 50, 58; F00124/RED, Public Redacted Version of Defence Application for Interim Release, KSC-BC-2020-06/F00124, dated 7 December 2020, 12 December 2020 (original version filed on 7 December 2020) ("Application for Interim Release").
[9] Impugned Decision, paras 54, 56, 58.
[10] Appeal, paras 2, 8-12.
[11] Appeal, paras 2, 13-27; Reply, paras 3-7.
[12] Appeal, paras 2, 28-35, 38-55.
[13] Appeal, paras 36-37.
[14] Appeal, paras 36-37, 56-61; Reply, paras 8-15.

II. STANDARD OF REVIEW

4. The Court of Appeals Panel previously decided to apply *mutatis mutandis* to interlocutory appeals the standard of review provided for appeals against judgements under Article 46(1) of the Law.[15] Article 46(1) of the Law specifies, in relevant part, the following grounds of appeal:

> (i) an error on a question of law invalidating the judgement;
>
> (ii) an error of fact which has occasioned a miscarriage of justice; or
>
> (iii) […].

5. The Law states in relation to errors of law that:

> When the Court of Appeals Panel determines that a Trial Panel has made an error of law in a judgement arising from the application of an incorrect legal standard, the Court of Appeals Chamber shall articulate the correct legal standard and apply that standard to the evidence contained in the trial record to determine whether to sustain, enter or overturn a finding of guilty on appeal. Alternatively, if the Trial Panel is available and could more efficiently address the matter, the Court of Appeals Panel may return the case to the Trial Panel to review its findings and the evidence based on the correct legal standard.[16]

6. Regarding errors of fact, the Law provides the following:

> In reviewing the factual findings of the Trial Panel, the Court of Appeals Panel shall only substitute its own findings for that of the Trial Panel where the evidence relied on by the Trial Panel could not have been accepted by any reasonable trier of fact or where the evaluation of the evidence is wholly erroneous.[17]

[15] F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati* Appeal Decision"), paras 4-13; F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021 ("*Haradinaj* Appeal Decision"), paras 11-13.
[16] Article 46(4) of the Law.
[17] Article 46(5) of the Law.

7. If challenging a discretionary decision, the appellant must demonstrate that the lower level panel has committed a discernible error in that the decision 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.[18] 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.[19]

8. The Court of Appeals Panel recalls that, according to Article 45(2) of the Law, interlocutory appeals lie as of right from decisions or orders relating to detention on remand.

III. DISCUSSION

A. PRELIMINARY MATTERS

9. The Panel recalls the requirement of Article 29(5)(d) of the Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers ("Practice Direction"), according to which the submissions of the Parties shall contain, on the last page, as set out in Annex 1, a word count calculated in accordance with Article 35 of the same Practice Direction.[20] The Court of Appeals Panel notes that Selimi failed to comply with this requirement for the filing of his Appeal and his Reply and therefore reminds the Defence to include a word count in future submissions.

[18] *Gucati* Appeal Decision, para. 14; *Haradinaj* Appeal Decision, para. 14.
[19] Ibid.
[20] KSC-BD-15, Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers, 17 May 2019 ("Practice Direction"). See also KSC-BD-15, Annex to Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers, 17 May 2019, p. 3.

B. APPLICABLE LAW AND GENERAL CHALLENGES

10. At the outset the Panel recalls the provisions of Article 41(6) of the Law:

> The Specialist Chambers or the Specialist Prosecutor shall only order the arrest and detention of a person when:
>
> a. there is a grounded suspicion that he or she has committed a crime within the jurisdiction of the Specialist Chambers; and
>
> b. there are articulable grounds to believe that:
>
> i. there is a risk of flight;
>
> ii. he or she will destroy, hide, change or forge evidence of a crime or specific circumstances indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices; or
>
> iii. the seriousness of the crime, or the manner or circumstances in which it was committed and his or her personal characteristics, past conduct, the environment and conditions in which he or she lives or other personal circumstances indicate a risk that he or she will repeat the criminal offence, complete an attempted crime or commit a crime which he or she has threatened to commit.

1. Burden to Demonstrate that Detention is Necessary and Reliance on *ex parte* Arrest Warrant (Ground B1)

(a) Submissions of the Parties

11. Selimi submits that the Pre-Trial Judge placed the burden on the Defence to justify his release, thereby committing an error of law.[21] Selimi argues that the Pre-Trial Judge interpreted Article 41(2) of the Law – providing a detained person with the right to challenge the lawfulness of his detention – as encapsulating requests for interim release pursuant to Article 41(6) of the Law. Selimi further argues that by placing the burden on the Defence to challenge whether the criteria under Article 41(6)

[21] Appeal, paras 2, 8-12..

of the Law are met pursuant to Article 41(2) of the Law, the Pre-Trial Judge placed the Defence in the position of being the moving party, seeking the interim release of the Accused, instead of being able to respond to the SPO.[22]

12. In addition, Selimi argues that despite acknowledging that the Arrest Warrant was issued *ex parte* the Defence, the Pre-Trial Judge impermissibly relied on findings from the Decision on Arrest and Detention.[23] Selimi contends that by doing so, the Pre-Trial Judge required Selimi to disprove findings that were made before he was a party to proceedings.[24] Selimi further challenges the Pre-Trial Judge's reliance on jurisprudence from the International Criminal Court ("ICC") on this matter.[25]

13. The SPO responds that when the Pre-Trial Judge referred to Article 41(2) of the Law, he did not reverse the burden of proof but merely quoted the applicable legal framework.[26] As for Selimi's submissions that the Pre-Trial Judge impermissibly relied on findings from previous *ex parte* rulings, the SPO argues that the Defence was aware that these factors, among others, underpinned the Accused's detention and further conceded the facts in question.[27]

(b) Assessment of the Court of Appeals Panel

14. The Court of Appeals Panel finds that the Pre-Trial Judge's statement that "Article 41(2) of the Law provides the detained person with an early opportunity to challenge the lawfulness of his or her arrest, including the grounds set out in Article 41(6) of the Law",[28] does not amount to a reversal of the burden of proof.

[22] Appeal, paras 8-10.
[23] Appeal, para. 11.
[24] Ibid.
[25] Appeal, para. 12..
[26] Response, para. 14.
[27] Ibid.
[28] Impugned Decision, para. 17.

As underlined by the SPO, Article 41(2) of the Law is the operative provision pursuant to which Selimi's request for provisional release was considered.[29]

15. The Panel finds that the Defence being the moving party does not reverse the burden of proof. Under Article 41(2) of the Law, the Defence is provided with the opportunity to raise a challenge supported by evidence and arguments while under Article 41(6) of the Law the burden remains on the SPO throughout the proceedings to demonstrate the necessity of the detention. In that regard, the Pre-Trial Judge explicitly accepted that the SPO bears the burden for establishing that the detention of the Accused is necessary.[30]

16. The Panel now turns to the argument that the Pre-Trial Judge relied on inapplicable jurisprudence to require Selimi to disprove findings that were made before he was a party to proceedings.[31] In this context, Selimi is referring to his alleged influential position as a former and current political leader and Head of the KLA Operational Directorate and to the asserted general climate of intimidation of witnesses and interference with criminal proceedings against former KLA members.[32]

17. The Panel notes that the Defence, in its Application for Interim Release, acknowledged Selimi's influential position.[33] As for the Pre-Trial Judge's observation on the climate of intimidation of witnesses and interference with criminal proceedings against former KLA members, Selimi acknowledged that "certain incidents may have occurred in the past, in relation to different cases involving other former KLA members."[34]

[29] Response, para. 14. See also Impugned Decision, introductory paragraph.
[30] Impugned Decision, para. 18.
[31] Appeal, paras 11-12.
[32] Ibid., citing, in relevant part, Impugned Decision, paras 31, 42, in turn citing Decision on Arrest and Detention, paras 37, 41.
[33] Application for Interim Release, para. 18.
[34] Application for Interim Release, para. 44.

18. The Panel further notes that Selimi's argument pertaining to the Pre-Trial Judge's reference to inapplicable jurisprudence does not accurately reflect the finding made in the Impugned Decision. Contrary to Selimi's assertion, the ICC jurisprudence quoted by the Pre-Trial Judge pertains to Article 60(2) of the Rome Statute on applications for interim release and not to Article 60(3) of the Rome Statute on periodic review of detention or release. According to the jurisprudence relied upon by the Pre-Trial Judge, factors underpinning the decision on a warrant of arrest may be the same as those for the decision under Article 60(2) of the Rome Statute. Thus, in a decision under Article 60(2) of the Rome Statute, reference to evidence from the decision on the warrant of arrest does not affect the *de novo* character of the decision on provisional release, as long as the panel deciding on the application is persuaded that the evidence, at the time of the decision, justifies the finding in question.[35] The Panel notes that, in the present instance, the Pre-Trial Judge did not only refer to evidence from the Decision on Arrest and Detention but also to the findings he previously made, based on this evidence.[36]

19. In the context of the Impugned Decision, while the Pre-Trial Judge could refer to evidence forming the basis of the Decision on Arrest and Detention, he still had the obligation to decide *de novo* because he was hearing the submissions of the Defence for the first time. Accordingly, it would have been preferable for the Pre-Trial Judge to clearly state that his findings, on Selimi's influential position and on the general climate of intimidation of witnesses and interference with criminal proceedings

[35] Compare Impugned Decision, para. 26 referring to ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-278-Red, Public redacted version of Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", 26 October 2012 ("*Gbagbo* Appeal Decision"), paras 27, 69, with Appeal, para. 12 referring to ICC, *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-208, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled "Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute", 8 September 2015, para. 36.

[36] See Impugned Decision, paras 31, 37 where the Pre-Trial Judge found that Selimi has continued to play a significant political role in Kosovo. See also Impugned Decision, para. 42 where the Pre-Trial Judge refers to the general climate of intimidation of witnesses and interference with criminal proceedings against former KLA members.

against former KLA members, continued to be valid at the date of the Impugned Decision.

20. The Panel however notes that the wording of the Impugned Decision shows that the Pre-Trial Judge was well aware of his duty to inquire anew into the existence of facts justifying detention in light of the arguments advanced by the Parties.[37]

21. In that regard, the Pre-Trial Judge re-examined his conclusion on Selimi's influence in light of the arguments raised by the Defence in its Application for Interim Release.[38] The Pre-Trial Judge's finding that Selimi has continued to play a significant political role in Kosovo was based on Selimi's own submission in the Application for Interim Release.[39] As for the general climate of intimidation of witnesses and interference with criminal proceedings against former KLA members, the Impugned Decision referred to Selimi's argument that this finding could not be transferred to him without proof of a direct link.[40] Selimi's own acknowledgement that "certain incidents may have occurred in the past, in relation to different cases involving other former KLA members" was also part of the evidence before the Pre-Trial Judge.[41] The Panel is therefore satisfied that the Pre-Trial Judge considered the submissions of the Defence and carried out a *de novo* review.

2. The Wording of Article 41(6)(b)(ii) of the Law (Ground B3)

(a) Submissions of the Parties

22. Selimi argues that the Pre-Trial Judge erred in law in finding that, despite the absence of the word "risk" in the formulation of Article 41(6)(b)(ii) of the Law, compared to the other three prongs of Article 41(6)(b) of the Law, the threshold remains the same for the three prongs and involves a risk analysis. According to him,

[37] Impugned Decision, para. 17.
[38] See e.g. Impugned Decision, para. 37 referring to Application for Interim Release, para. 30.
[39] Impugned Decision, para. 37, fn. 75 referring to Application for Interim Release, para. 18.
[40] Impugned Decision, para. 44, fn. 78 referring to Application for Interim Release, para. 44.
[41] Application for Interim Release, para. 44.

the wording of Article 41(6)(b)(ii) of the Law, which refers to articulable grounds to believe that a detained person "will" obstruct the progress of proceedings, sets a higher threshold.[42]

23. The SPO responds that the Pre-Trial Judge is not required to determine whether the Accused "will" obstruct the proceedings, but rather whether "there are articulable grounds to believe" this.[43] Recalling that "belief" is a lower standard than certainty, the SPO further argues that any assessment of future conduct *per se* involves a risk assessment.[44] In addition, according to the SPO, this threshold had already been adopted by the Court of Appeals Panel in a previous decision.[45]

(b) Assessment of the Court of Appeals Panel

24. In the Impugned Decision, the Pre-Trial Judge noted the linguistic difference in the three prongs of Article 41(6)(b) of the Law, but was not persuaded that the intended result of this difference was to impose different evidentiary thresholds to the three alternative conditions of Article 41(6)(b) of the Law.[46] In making this observation, the Pre-Trial Judge relied on a previous finding made by the Court of Appeals Panel.[47] The Panel recalls its finding in the *Gucati and Haradinaj* case that: "[t]he Court of Appeals Panel sees no error in the Single Judge's reliance on the allegations presented by the SPO and on Gucati's position as indicating contact and network that could create the risk that Gucati may obstruct the proceedings […]."[48] However, the Panel emphasises that this finding was made in a different case, in a context where the specific question related to the wording of Article 41(6)(b)(ii) of the

[42] Appeal, paras 2, 24-27.
[43] Response, para. 16.
[44] Ibid.
[45] Response, para. 17.
[46] Impugned Decision, para. 20.
[47] Impugned Decision, para. 20 noting that "the Appeals Chamber has recently confirmed that the condition under Article 41(6)(b)(ii) of the Law involves a 'risk'".
[48] *Gucati* Appeal Decision, para. 63.

Law did not arise for consideration. Thus, this issue has not yet been decided on and therefore needs to be addressed here.

25. The Panel finds that a literal interpretation of the word "will" contained in Article 41(6)(b)(ii) of the Law would not be appropriate given that the nature of the assessment to be conducted under Article 41(6)(b) of the Law cannot require certainty. In that regard, Article 41(6)(b) of the Law refers to the "belief" before enumerating the three prongs, denoting a lower standard than certainty.[49]

26. The Panel further finds that a review of the relevant provisions of the Kosovo Criminal Procedure Code ("Kosovo CPC"),[50] as well as relevant provisions of the legal frameworks of other courts on the matter of detention on remand, is instructive to determine the nature of the assessment to be conducted and whether a different threshold should apply to Article 41(6)(b)(ii) of the Law.[51] In that regard, the Panel notes that Article 41(6)(b)(i)-(iii) of the Law appears to be copied from Article 164(1.2.1.)-(1.2.3.) of the Kosovo CPC (Arrest During Investigative Stage), which contains exactly the same wording, but refers to the arrest and detention of a person by the police when a state prosecutor has authorised an arrest during an investigative stage. The Panel was unable to find any information as to why the drafters of the Law decided to rely on this provision when drafting Article 41(6)(b)(i)-(iii) of the Law.

27. The Panel considers that, for the purpose of the present assessment, comparison should rather be made with the provision of the Kosovo CPC dealing with detention on remand, as this provision refers to the detention of a person following a court order. According to Article 187 of the Kosovo CPC (Findings Required For Detention on

[49] See below, paras 38-40.
[50] Kosovo, Code No. 04/L-123, Criminal Procedure Code, 13 December 2012..
[51] The Panel recalls that Article 3(3) of the Law stipulates that Judges may be assisted by sources of international law, including subsidiary sources such as the jurisprudence from the international *ad hoc* tribunals, the ICC and other criminal courts. See also *Gucati* Appeal Decision, para. 11.

Remand), the court may order detention on remand against a person only after it explicitly finds that there is a grounded suspicion that such person has committed a criminal offence and that one of the following conditions set out in Article 187(1.2.) is met:

> 1.2.1. he or she is in hiding, his or her identity cannot be established or other circumstances indicate that there is a danger of flight;
>
> 1.2.2. there are grounds to believe that he or she will destroy, hide, change or forge evidence of a criminal offence or specific circumstances indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, injured parties or accomplices; or
>
> 1.2.3. the seriousness of the criminal offence, or the manner or circumstances in which it was committed and his or her personal characteristics, past conduct, the environment and conditions in which he or she lives or other personal circumstances indicate a risk that he or she will repeat the criminal offence, complete an attempted criminal offence or commit a criminal offence which he or she has threatened to commit; and
>
> […]

28. First, the Panel notes that Article 187(1.2.2.) of the Kosovo CPC, similarly to Article 41(6)(b)(ii) of the Law, also applies the standard of "grounds to believe that he or she will destroy […]". Second, the Panel notes the different wording between the three prongs of Article 187(1.2.) of the Kosovo CPC, referring in turn to "danger" (Article 187(1.2.1.)), "grounds to believe that he or she will […]"(Article 187(1.2.2.)) and "indicate a risk"(Article 187(1.2.3.)). The Panel considers that the reference to "danger" and "risk" can be interpreted as synonymous in this specific context. In that respect, the Panel observes that the Kosovo courts have in practice applied a risk assessment in addressing the requirements of Article 187(1.2.) of the Kosovo CPC and,

while the available jurisprudence on this point is limited, there is no indication of a different threshold being applied for the three prongs despite the different wording.[52]

29. A review of provisions applicable to requests for provisional release before other international courts shows that there is no express reference to "the risk" of a detained person fleeing or obstructing the proceedings. Relevant provisions of the legal frameworks of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") require, *inter alia*, the judge to satisfy himself that, if released, an accused will appear for trial and will not pose a danger to any victim, witness, or other person.[53] Nevertheless, in practice, these courts have conducted a risk analysis.[54]

30. As for the ICC, according to Article 60(2) of the Rome Statute, if the Pre-Trial Chamber is satisfied that the conditions set forth in Article 58(1) of the Rome Statute are met, the person shall continue to be detained. These conditions include, *inter alia*, that the arrest of the person appears necessary to ensure that the person does not obstruct or endanger the investigation or the court proceedings. Here again, in practice, the relevant chambers have conducted a risk analysis.[55]

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[52] See e.g. Kosovo, Constitutional Court, KI10/18, *Fahri Deqani, Constitutional review of Judgment Pml. No. 357/2017 of the Supreme Court of Kosovo of 22 December 2017*, Judgment, 21 October 2019, para. 93 referring to "a risk that the Applicant may repeat the criminal offense". See also Kosovo, Constitutional Court, KI63/17, *Lutfi Dervishi, Constitutional review of Judgment Pml. Kzz. 19/2017, of the Supreme Court of Kosovo, of 11 April 2017*, Resolution on Inadmissibility, 16 November 2017, para. 71 referring to the reasoning of the Supreme Court [Judgment Pml. Kzz 19/2017] making findings on "the risk of flight"; Kosovo, Supreme Court, Pml Kzz 59/2015, *BS*, Judgment, 16 March 2015, para. 10 referring to "the risks pursuant to Article 187 of the CPC".

[53] See ICTY Rules, Rule 65(B); ICTR Rules, Rule 65(B); IRMCT Rules, Rule 68(B).

[54] ICTY, *Prosecutor v. Mladić*, IT-09-92-AR65.1, Public Redacted Version of "Decision on Interlocutory Appeal Against Decision on Urgent Defence Motion for Provisional Release" Issued on 27 June 2017, 30 June 2017, para. 16, referring to the "risk of flight"; ICTR, *Prosecutor v. Muvunyi*, ICTR-00-55A-AR65, Decision on Appeal Concerning Provisional Release, 20 May 2009, para. 4, referring to a "flight risk"; ICTY, *Prosecutor v. Rašević and Todović*, IT-97-25/1-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todović's Application for Provisional Release, 7 October 2005, paras 18, 21, referring to the Trial Chamber's assessment of the risk that an accused will abscond.

[55] See e.g. ICC, *Prosecutor v. Gicheru*, ICC-01/09-01/20-90-Red2, Public Redacted Version of 'Decision on Mr Gicheru's Request for Interim Release', 29 January 2021, ICC-01/09-01/20-90-Conf, 29 January 2021, para. 45 referring to the "risks under article 58(1)(b) of the Statute"; ICC, *Prosecutor v. Abd-Al-Rahman*,

31. In addition, carrying out a risk assessment when deciding on requests for provisional release is also in line with the practice of the European Court of Human Rights ("ECtHR"). The Panel notes in that regard that before the ECtHR, justifications for continued detention that have been deemed "relevant" and "sufficient" (in addition to the existence of reasonable suspicion) "have included such grounds as the danger of absconding, the risk of pressure being brought to bear on witnesses or of evidence being tampered with, the risk of collusion, the risk of reoffending, the risk of causing public disorder and the need to protect the detainee […]."[56]

32. In light of the above, the Court of Appeals Panel finds that the Pre-Trial Judge did not err in finding that, despite the absence of the word "risk" in the formulation of Article 41(6)(b)(ii) of the Law, the threshold remains the same for the three prongs of Article 41(6)(b) of the Law and involves a risk analysis.

3. General Threshold under Article 41(6)(b) of the Law (Ground B2)

(a) Submissions of the Parties

33. Selimi argues that the Pre-Trial Judge committed an error of law in applying an incorrect threshold for the assessment of the risks under Article 41(6)(b) of the Law.[57] According to Selimi, the Pre-Trial Judge failed to explain what evidentiary threshold the SPO's allegations needed to reach to demonstrate "articulable grounds to believe".[58]

ICC-02/05-01/20-115, Decision on the Defence Request for Interim Release, 14 August 2020, para. 29 referring to "an unacceptable risk that the suspect may exert pressure on witnesses, either directly or indirectly through his supporters"; ICC, *Prosecutor v. Bemba*, 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, paras 39-40, 94 referring to a "flight risk" and the "risks under article 58(1)(b) of the Statute.

[56] ECtHR, *Zohlandt v. The Netherlands*, no. 69491/16, Judgment, 9 February 2021, para. 50; ECtHR, *Buzadji v. The Republic of Moldova*, no. 23755/07, Judgment, 5 July 2016, para. 88.

[57] Appeal, paras 2, 13-23.

[58] Appeal, para. 16; Reply, paras 4-8.

34. Selimi challenges the Pre-Trial Judge's finding that, in determining the necessity of detention, the question revolves around the possibility, not the inevitability, of a future occurrence.[59] While Selimi acknowledges that the inevitability of a future occurrence cannot be foreseen, he argues that a mere possibility is insufficient.[60]

35. Referring to the Kosovo CPC and to provisions from the legal frameworks of international courts, Selimi submits that the requirement of a "substantial likelihood" threshold as opposed to the mere reference to "a risk" would be an appropriate standard when assessing the grounds under Article 41(6)(b) of the Law.[61] In addition, Selimi submits that the reference to "articulable" is not a threshold in itself but rather an explanation of the form of evidence required to meet the appropriate ground.[62] Accordingly, Selimi invites the Court of Appeals Panel to apply the "correct standard" and determine whether there is a substantial likelihood that Selimi posed the risks alleged.[63]

36. The SPO responds that the Pre-Trial Judge correctly found that the threshold for the assessment of the risks under Article 41(6)(b) of the Law is "articulable grounds to believe", denoting an acceptance of the possibility, not the inevitability, of a future occurrence.[64]

(b) Assessment of the Court of Appeals Panel

37. The Panel acknowledges at the outset that any analysis of pre-trial detention must take the presumption of innocence as its starting point.[65] It follows, first, that pre-trial detention cannot be maintained lightly. Second, the burden of demonstrating

[59] Appeal, para. 15.
[60] Ibid.
[61] Appeal, paras 18-20; Reply, paras 4-8.
[62] Appeal, para. 19.
[63] Appeal, paras 21-23.
[64] Response, paras 15, 18.
[65] This was recognised by the Pre-Trial Judge, see Impugned Decision, para. 17.

that pre-trial detention is necessary is on the SPO.[66] In this latter respect, the procedures of the Specialist Chambers differ from those of the ICTY.[67]

38. The Court of Appeals Panel recalls the wording of Article 41(6)(b) of the Law: detention shall only be ordered if "there are articulable grounds to believe" that at least one of the enumerated risks materialises.

39. Given the peculiar set-up of the Specialist Chambers and the text of Article 41(6)(b) of the Law, it is evident that the Specialist Chambers are not bound by the standards used by international tribunals although they can provide some guidance. The Panel notes that the phrase "grounds to believe" is also used, for example, in Article 58(1)(a) of the Rome Statute and in some domestic laws relating to pre-trial detention,[68] often prefaced by the words "reasonable" or "substantial". The term "reasonable grounds" leaves room for interpretation, even though it is a common term in many legal systems. In any event, "reasonable grounds" is understood to embody an objective assessment. In that regard, the standard is lower than "substantial grounds to believe that the person committed the crime charged" used in Article 61(7) of the Rome Statute in determining whether to confirm charges.[69] In addition to showing that there are reasonable grounds to believe that the person

[66] This was also recognised by the Pre-Trial Judge, see Impugned Decision, para. 18.
[67] At the ICTY, where the burden was on the accused to show that release is warranted, the jurisprudence adopted the "balance of probabilities" as the applicable standard of proof, requiring the judges to satisfy themselves that it is more likely than not that the accused will appear for trial and will pose no danger to others. See ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-AR65.1, Decision on Ramush Haradinaj's Modified Provisional Release, 10 March 2006, para. 41; ICTY, *Prosecutor v. Simić*, IT-95-9-A, Decision on Motion of Blagoje Simić Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Services for His Father, 21 October 2004, para. 14. ICTY jurisprudence is also applied at the International Residual Mechanism for Criminal Tribunals IRMCT. See IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Dick Prudence Munyeshuli's Motion for Provisional Release to the United States of America, 8 February 2019, fn. 16; IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Maximilien Turinabo's Motion for Provisional Release, 29 March 2019, para. 14.
[68] See, for example in England and Wales, the Bail Act, 1976, Sch. 1, para. 2.
[69] Ryngaert, C., "Article 58: Issuance by a Pre-Trial Chamber a warrant of arrest or a summons to appear" in Ambos, K. (ed), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th ed., Beck/Hart/Nomos 2021, ("Ryngaert, *Article 58*") marginal number (mn.) 12. See also fn. 44 and references quoted therein.

has committed a crime within the jurisdiction of the Court, Article 58(1) of the Rome Statute requires the Prosecutor to demonstrate that the arrest of the person *appears necessary* to satisfy at least one of the three grounds specified for issuing an arrest warrant.[70] For example, according to Article 58(1)(b)(ii) of the Rome Statute, the Pre-Trial Chamber must satisfy itself that the arrest appears necessary to ensure that the person does not obstruct or endanger the investigation or the court proceedings. If there are reasonable grounds to believe that a suspect would interfere with the investigations of the Prosecutor, the person can be detained according to the wording of Article 58(1)(b)(ii) of the Rome Statute. The text does not refer to specific actions or types of interference. It is not necessary that the suspect has already attempted to obstruct or endanger the investigation; it is sufficient that the Pre-Trial Chamber has reasonable grounds to believe that such interference could happen. Compelling factors taken into consideration include convincing information indicating that the person detained might intimidate, influence or corrupt witnesses or victims.[71]

40. The Panel recalls its prior finding that, in determining the necessity of detention under Article 41(6)(b) of the Law, the question revolves around the possibility, not the inevitability, of a future occurrence.[72] This finding is supported by ICC jurisprudence.[73] In so finding, the Panel acknowledged that a standard less than certainty was appropriate. That "certainty" cannot be required follows from the nature of the assessment under Article 41(6)(b) of the Law, namely that it entails a

[70] Rome Statute, Article 58(1)(a) and (b). See also Rome Statute, Article 60(2) according to which: "A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions."
[71] Ryngaert, *Article 58*, mn. 19.
[72] *Gucati* Appeal Decision, para. 67.
[73] According to ICC jurisprudence: "when determining whether detention appears necessary under article 58(1)(b) of the Statute, '[t]he question revolves around the possibility, not the inevitability, of a future occurrence'". See ICC, *Prosecutor v. Abd-Al-Rahman*, ICC-02/05-01/20-177, Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled 'Decision on the Defence Request for Interim Release', 8 October 2020, para. 33. See also *Gbagbo* Appeal Decision, para. 56.

prediction about future conduct, and what lies in the future can never be predicted with certainty. It does not follow, however, that *any* possibility of a risk materialising is sufficient to justify detention. In this regard, the Panel notes the finding of the Specialist Chamber of the Constitutional Court ("Constitutional Court") that any deprivation of liberty must conform to the substantive and the procedural rules established by law and should be in keeping with the key purpose of protecting the individual from arbitrariness.[74] As part of the protection against arbitrariness, the Panel highlights the importance of specific reasoning and concrete grounds which are required to be relied upon by the Pre-Trial Judge in his decisions authorising detention on remand.[75] The Panel therefore finds that the standard to be applied is, on the one hand, less than certainty, but, on the other, more than a mere possibility of a risk materialising.

41. Selimi points out that Article 19(1.8.)-(1.10.) of the Kosovo CPC all refer to the knowledge of information which would satisfy an objective observer of *a substantial likelihood* that a future criminal offence will occur. According to him, this demonstrates that the requirement of *substantial likelihood* is appropriate for assessing the probability of a future risk being fulfilled.[76]

42. The Panel notes that the reference to *substantial likelihood* applies in Article 19(1.8.)-(1.11.) of the Kosovo CPC to the occurrence of a future criminal offence but not to the probability of a future risk materialising. Thus, Article 19(1.8.)-(1.11.) of the Kosovo CPC could be of assistance in interpreting Article 41(6)(a) of the Law. It is however of limited, if any, value in answering the relevant question here of the standard to be applied under Article 41(6)(b) of the Law.

[74] KSC-CC-PR-2017-01, F00004, 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 Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 26 April 2017 ("Constitutional Court Judgment dated 26 April 2017"), para. 111.
[75] Constitutional Court Judgment dated 26 April 2017, para. 115.
[76] Appeal, paras 18-20, 23 (emphasis added).

43. The Panel also notes that, according to Article 19(1.30.) of the Kosovo CPC, "articulable" means that "the party offering the information or evidence must specify in detail the information or evidence being relied upon". Thus, as correctly asserted by the Selimi Defence,[77] the term "articulable" does not speak directly to the standard or threshold, but to the specificity of the information or evidence required. This also follows from Article 19(1.9) and (1.10.) of the Kosovo CPC, referring to "articulable evidence".

44. Recalling that the applicable standard must be determined on a scale between a mere possibility and certainty, the Panel finds that Article 41(6)(b) of the Law does not require the Pre-Trial Judge to be satisfied that the risks specified in subparagraphs (i) to (iii) will in fact occur in the event of provisional release being granted, or to be satisfied that they are substantially likely to occur. The Pre-Trial Judge must be satisfied that there are "[articulable] grounds to believe" that there is a risk that they will occur. The question posed by Article 41(6)(b) of the Law is whether the SPO presented specific reasoning based on evidence supporting the belief of a sufficiently real possibility that (one or more of) the risks under Article 41(6)(b)(i)-(iii) of the Law exist.[78] To that extent it is a question of fact depending on the individual circumstances of each case.

4. Duty to Provide a Reasoned Opinion

45. In the conduct of its assessment, a Panel has a duty to provide sufficient reasoning. In this regard, the Court of Appeals Panel recalls relevant ICC jurisprudence emphasising the importance of thoroughly reasoned decisions on

[77] Appeal, paras 14-19.
[78] See e.g. ECtHR, *Jarzyński v. Poland*, no. 15479/02, Judgment, 4 October 2005, para. 46 ([…] factor indicating that there was a real risk of his absconding or obstructing the proceedings); ECtHR, *Merabishvili v. Georgia*, no. 72508/13, Judgment, 28 November 2017, para. 229 (the risk [of absconding] must be "sufficiently real" to justify continued detention).

interim release.[79] The ECtHR also stressed that in the context of sub-paragraph (c) of Article 5(1)(c) of the European Convention on Human Rights, the reasoning of the decision ordering a person's detention is a relevant factor in determining whether the detention must be deemed arbitrary.[80] The Panel considers that the extent of the reasoning will depend on the circumstances of the case, but it is nevertheless essential that the lower level panel indicates with sufficient clarity the basis of the decision.[81]

46. The Panel notes that the reasoning in the Impugned Decision in relation to Article 41(6)(b)(ii) of the Law and in relation to the Proposed Conditions is relatively brief. In particular, the Pre-Trial Judge did not set out in much detail how he analysed the evidence presented by the Parties or how he reached his factual conclusions. Rather, in stating his conclusions, the Pre-Trial Judge simply made general references in the footnotes to previous filings. In the conduct of its review, the Panel had to revert to evidence and arguments previously adduced by the Parties in order to clarify and interpret the findings in the Impugned Decision. Nevertheless, and despite those shortcomings of the Impugned Decision, the Panel does not consider that the decision is so lacking in reasoning that it can be said that the Pre-Trial Judge failed to comply with his obligation to provide a reasoned opinion and therefore made an error of law.

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[79] See ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-2275, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018 ("*Bemba et al.* Decision dated 8 March 2018"), paras 102-108; *Gbagbo* Appeal Decision, paras 46-50; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-323, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release", 16 December 2008, paras 53, 66. See also ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-773, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006 ("*Lubanga* Appeal Decision"), para. 20.

[80] ECtHR, *S. V. and A. v. Denmark*, no. 35553/12, 36678/12 and 36711/12, Judgment, 22 October 2018, para. 92; ECtHR, *Mooren v. Germany*, no. 11364/03, Judgment, 9 July 2009, para. 79.

[81] *Bemba et al.* Decision dated 8 March 2018, para. 105; *Gbagbo* Appeal Decision, para. 46, citing *Lubanga* Appeal Decision, para. 20.

47. The Panel considers that, even though the reasoning is brief, it is still comprehensible how the Pre-Trial Judge reached the conclusions he did, enabling the Accused to exercise his right to appeal. In particular, if the reasoning provided in the Impugned Decision is read together with the filings referred to in the footnotes and the submissions of the Parties, the Panel can discern the basis underpinning the conclusions reached by the Pre-Trial Judge.

48. At any rate, the Court of Appeals Panel strongly urges the Pre-Trial Judge to provide fuller reasoning in future decisions on applications for interim release or review of detention.

C. ALLEGED ERRORS REGARDING ASSESSMENT OF ARTICLE 41(6)(B) OF THE LAW (GROUNDS B3, B4, C1, C2)

1. Article 41(6)(b)(i) of the Law

49. As acknowledged by Selimi,[82] in the Impugned Decision, the Pre-Trial Judge found that the conditions proposed by Selimi in support of his alternative request for conditional interim release could mitigate the risk of Selimi absconding.[83]

50. The Court of Appeals Panel stresses that, when a party alleges that an error of law or of fact has been committed, that party must go on to show that the alleged error invalidates the decision or occasions a miscarriage of justice. Indeed, the Panel is not required to consider the arguments of a party if they do not allege an error of law invalidating the decision, or an error of fact occasioning a miscarriage of justice.[84] As the Pre-Trial Judge's conclusion that Selimi's detention shall be continued is not based

[82] Appeal, para. 42.
[83] Impugned Decision, para. 54.
[84] See e.g. ICTR, *Rutaganda v. Prosecutor*, ICTR-96-3-A, Judgement, 26 May 2003, para. 18. See also Standard of Review, paras 4-8 above.

on his findings regarding the risk of flight, the Panel summarily dismisses the grounds of appeal related to the risk of Selimi absconding.[85]

2. Article 41(6)(b)(ii) of the Law

(a) Submissions of the Parties

51. Selimi argues that in holding that it was sufficient to demonstrate that he could instigate or "simply contribute" in any way to the acts enumerated under Article 41(6)(b)(ii) of the Law, the Pre-Trial Judge impermissibly adopted a very low standard and accepted that a "peripheral" action or an action that would not be criminal in nature could be sufficient for assessing the level of risk for obstruction of the proceedings under Article 41(6)(b)(ii) of the Law.[86]

52. In addition, Selimi submits that the Pre-Trial Judge's findings with regard to the risk of obstructing the proceedings were erroneously based on contextual findings instead of the personal circumstances of the Accused.[87] Selimi also argues that the Pre-Trial Judge failed to establish a link between him and the ongoing climate of intimidation of witnesses and interference with criminal proceedings against former KLA members.[88] Selimi further challenges as too general, speculative and overstated the reference to his influential position and his ability to mobilise support networks.[89]

53. Finally, Selimi submits that the Pre-Trial Judge abused his discretion in relying on the fact that [REDACTED], especially in light of the explanation that was provided by the Defence, according to whom [REDACTED].[90] Selimi further submits that the

[85] Appeal, paras 38-39, 41-46. See also Response, paras 26-33, 35, 41.
[86] Appeal, paras 2, 28-29, 50.
[87] Appeal, paras 38, 40-41.
[88] Appeal, paras 40-41.
[89] Appeal, paras 47-49.
[90] Appeal, para. 51. See also Application for Interim Release, para. 41.

Pre-Trial Judge erroneously relied on the vulnerability of the SPO witnesses in support of the findings related to the risk of obstruction of the proceedings.[91]

54. The SPO responds that, in addition to contextual factors, the Pre-Trial Judge clearly relied on individual circumstances such as the high political profile of the Accused and his access to a support network in reaching his findings.[92] With regard to the Accused's political profile, the SPO submits that Selimi himself indicated that, since the war, his patriotic and professional duties have been substantial.[93]

55. Regarding the Accused's support network, the SPO argues that the Pre-Trial Judge was not required to identify members of the network or to make findings on the Accused's level of control over it. What matters, according to the SPO, is that the Accused has the ability to access a support network, and this ability is clearly established in the Impugned Decision.[94]

56. Addressing the [REDACTED]. According to the SPO, this factor alone would have more than amply justified continued detention.[95]

57. With regard to the Pre-Trial Judge's consideration of the vulnerability of SPO witnesses, the SPO argues that the Defence fails to identify any error. To the contrary, the SPO submits that the Pre-Trial Judge's findings on that matter show that he conducted a careful assessment of the weight given to such factors and further noted the partially mitigating impact of protective measures.[96]

(b) Assessment of the Court of Appeals Panel

58. The Panel observes that, in the Impugned Decision, the Pre-Trial Judge stated "that the risk of obstruction need not materialise in Mr Selimi personally tampering

[91] Appeal, paras 51-53.
[92] Response, paras 26-27, 29-30, 32-33.
[93] Response, para. 39.
[94] Response, para. 31.
[95] Response, para. 44.
[96] Response, para. 38.

with evidence or exerting influence or pressure on witnesses. It suffices that Mr Selimi, through his statements may instigate or contribute in any way to the materialisation of the aforementioned risk".[97]

59. Selimi's argument pertains to the objective nature of participation required to constitute the risk of obstructing the proceedings. In the context of pre-trial detention, it needs to be assessed whether there is a risk that the offence of obstructing the proceedings of the Specialist Chambers materialises. Taking into account the forms of participation for the offence of contempt may be relevant in this regard. In this sense, the Panel notes that both the Criminal Code of the Republic of Kosovo and relevant jurisprudence of the ICTY consider that the offence of contempt may be realised by a number of different forms of participation and encompasses any action harmful to a person or any conduct that is intended to disturb the administration of justice.[98] Thus, it was not unreasonable for the Pre-Trial Judge to state that it suffices that Selimi, through his statements, may instigate or contribute in any way to the materialisation of the risk of obstructing the proceedings of the Specialist Chambers.

60. The Court of Appeals Panel further notes that in the Appeal Selimi fails to point to any concrete example of where the Pre-Trial Judge may have relied on a "peripheral" action or an action that would not be criminal in nature. The Panel recalls that when a party is alleging an error of law, it must demonstrate how this error invalidates the Impugned Decision.

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[97] Impugned Decision, para. 37; see also Impugned Decision, para. 24.

[98] See e.g. ICTY, *Prosecutor v. Milošević*, IT-02-54-Misc.5 & IT-02-54-Misc.6, Decision on the initiation of contempt investigations, 18 July 2011, para. 11; ICTY, *Prosecutor v. Margetić*, IT-95-14-R77.6, Judgement on allegations of contempt, 7 February 2007, paras 14, 64-65; ICTY, *Prosecutor v. Beqaj*, IT-03-66-T-R77, Judgement on Contempt Allegations, 27 May 2005, para. 21. See also Kosovo, Code No. 06/L-074, Criminal Code of the Republic of Kosovo, 14 January 2019, Chapter XXXI on Criminal Offenses Against the Administration of Justice and Public Administration. See Articles 386 (Obstruction of evidence or official proceedings), 387 (Intimidation during criminal proceedings), 388 (Retaliation). See also Kosovo, Code No. 04/L-082, Criminal Code of the Republic of Kosovo, 20 April 2012, Chapter XXXII on Criminal Offenses Against the Administration of Justice and Public Administration. See Articles 394 (Obstruction of evidence or official proceedings), 395 (Intimidation during criminal proceedings), 396 (Retaliation).

61. The Panel will now address Selimi's argument that the risk of obstructing the proceedings was erroneously based on contextual findings instead of personal circumstances. In the Impugned Decision, the Pre-Trial Judge acknowledged that his assessment had to be undertaken on an individual basis and that contextual findings may be relevant but are not sufficient to justify detention.[99] In support of his findings, the Pre-Trial Judge notably relied on the following circumstances: past and present influential political positions in the KLA as enabling Selimi's influence and ability to mobilise support networks including present and former subordinates;[100] and Selimi's possession of [REDACTED].[101] Thus, the Panel finds that the Pre-Trial Judge gave appropriate consideration to the personal circumstances of the Accused in reaching his decision and that Selimi fails to demonstrate an error in that regard.

62. Turning to Selimi's influence and ability to mobilise support networks, the Panel finds that Selimi's argument that the Pre-Trial Judge overstated his prominence[102] is contradicted by the Defence's own observations according to which:

> Mr. Selimi is a public figure who is well-known throughout Kosovo as […] the leader of Kosovo's largest political party and former Prime Minister of Kosovo […]. [Selimi's] duties have been substantial, starting with the position as Minister of Public Order in the Provisional Government of Kosovo (1999-2000), that of the Commander of the Defense Academy (2000-2003), and most recently that of MP of the Vetëvendosje political party in the Assembly of Kosovo.[103]

63. The Impugned Decision referred to Selimi's influence as former and current political leader and Head of the KLA Operational Directorate.[104] It concludes that "Selimi has continued to play a significant role in Kosovo, notably holding a multitude

[99] Impugned Decision, para. 21.
[100] Impugned Decision, para. 37.
[101] Impugned Decision, para. 38.
[102] Appeal, para. 49.
[103] Application for Interim Release, para. 18.
[104] Impugned Decision, para. 31 referring to Decision on Arrest and Detention, para. 37. See also Impugned Decision, para. 37.

of positions of authority until recently".[105] While the Impugned Decision does not elaborate further on Selimi's past and present positions, the Decision on Arrest and Detention highlights that Selimi was a founding member of the KLA General Staff, held positions of authority, including as Head of the KLA Operational Directorate and Provisional Government of Kosovo's Minister of Public Order/Minister of Internal Affairs and that Selimi was elected to the Kosovo Assembly in 2010.[106] This information was available to the Pre-Trial Judge and the Impugned Decision referred to it.[107] Thus, the Panel finds that the Pre-Trial-Judge did not err in relying on Selimi's former and current functions to conclude that he continues to play a significant role in Kosovo. Accordingly, Selimi fails to demonstrate that the Pre-Trial Judge overstated his prominence.

64. The Panel recalls that the appraisal of evidence lies, in the first place, with the Judge considering the request for interim release. Therefore, in determining whether the Pre-Trial Judge has misappreciated facts in a decision on interim release, the Panel will only intervene in the case of a clear error, namely where it cannot discern how the Pre-Trial Judge's conclusion could have reasonably been reached from the evidence before him.[108]

65. While keeping the above in mind, the Panel turns to consider the finding that Selimi's opinions, including those opposing the Specialist Chambers, "are heard and may mobilise support networks, including present and former subordinates".[109] First, the Panel observes that the finding that Selimi's opinions, including those opposing the Specialist Chambers, are "heard", is unsubstantiated. The Panel assumes that the Pre-Trial Judge is referring here to the fact that Selimi openly argued in public before

[105] Impugned Decision, para. 37.
[106] Decision on Arrest and Detention, para. 37.
[107] Impugned Decision, para. 31 referring to Decision on Arrest and Detention, para. 37.
[108] ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-1626-Red, Public Redacted Version Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled "Decision on Applications for Provisional Release", 19 August 2011, para. 45.
[109] Impugned Decision, para. 37. See also Impugned Decision, para. 55.

Kosovo's Assembly that the Specialist Chambers should not be established.[110] In the absence of further explanation from the Pre-Trial Judge, the relevance of Selimi's opposition to the Specialist Chambers to the assessment of the risk to obstruct the proceedings, is not demonstrated.

66. Secondly, with regard to the members of the Accused's network, the Pre-Trial Judge's reference to "including present and former subordinates" is very general. A review of the available evidence before the Pre-Trial Judge shows that the SPO's submissions on the composition of the Accused's network specifically referred to supporters from the KLA War Veterans Association.[111] However, the Panel notes that the Pre-Trial Judge expressly acknowledged that the SPO adduced no concrete evidence of influence exerted by Selimi on individuals within the support network of the KLA War Veterans Association.[112] In addition to the issue related to the composition of the network, the Panel observes that the Impugned Decision does not contain findings on other areas relevant to the determination of the existence of a support network such as the network's capacity or its resources.

67. The Panel has also considered other general evidence relied upon by the Pre-Trial Judge, such as the evidence of the context of a general climate of witness intimidation in Kosovo in trials of former KLA members.[113] However, the Panel finds that the evidence relied upon by the Pre-Trial Judge is insufficient to reasonably conclude that Selimi's opinions, including those opposing the Specialist Chambers, "are heard and may mobilise support networks, including present and former subordinates".[114] This finding must be set aside. The Panel will address the repercussions of this finding where relevant in this decision.

[110] See Application for Interim Release, para. 31.
[111] See F00154, Prosecution response to Application for Interim Release on behalf of Mr Rexhep Selimi, 17 December 2020 (confidential) ("Response to Application for Interim Release"), para. 26.
[112] Impugned Decision, para. 37.
[113] Impugned Decision, para. 42.
[114] Impugned Decision, para. 37. See also Impugned Decision, para. 55.

68. Although Selimi identifies no error in the Pre-Trial Judge's finding on his influential position in Kosovo, the Panel recalls that the fact that an Accused may still hold considerable power to influence victims or witnesses is no indication in itself that the Accused will exercise such influence unlawfully.[115]

69. The Panel acknowledges the Pre-Trial Judge's findings on [REDACTED].[116] The Pre-Trial Judge found that Selimi's [REDACTED]. The Pre-Trial Judge further noted Selimi's ability and willingness to [REDACTED].[117]

70. The Panel considers that the Impugned Decision is very brief when it comes to what is being referred to as [REDACTED].[118] While the Impugned Decision in this respect is somewhat unclear, the Panel can nevertheless discern how the Pre-Trial Judge reached the findings he did, based on the totality of the evidence before him.

71. From the information provided by the SPO at an earlier stage of the proceedings as well as a review of the supporting material provided by the SPO in annex to its response to Selimi's application for interim release, the Court of Appeals Panel observes that the [REDACTED].[119] [REDACTED].[120]

72. At the outset, the Panel observes that the [REDACTED].[121]

73. Although there is no indication that the [REDACTED].[122] Importantly as well, [REDACTED].

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[115] ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-PT, Order on Provisional Release of Valentin Ćorić, 30 July 2004, para. 28; ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-PT, Decision on Defence Motion of Ljube Boškoski for Provisional Release, 18 July 2005, para. 43.
[116] Impugned Decision, para. 38.
[117] Ibid.
[118] Impugned Decision, para. 38.
[119] See Response to Application for Interim Release, para. 23. See also F00154/A01, Annex 1 to Prosecution response to Application for Interim Release on behalf of Mr Rexhep Selimi, 17 December 2020 (confidential), ("Annex 1 to Response to Application for Interim Release"), p. 5.
[120] See [REDACTED].
[121] Annex 1 to Response to Application for Interim Release, pp. 4-5.
[122] Annex 1 to Response to Application for Interim Release, pp. 10-11. [REDACTED].

74. The Panel considers that one of the purposes of [REDACTED]. The Panel thus concludes that this indicates, at least, that Selimi is predisposed to witness intimidation.

75. The Court of Appeals Panel further finds that these factors amply support the Pre-Trial Judge's conclusion that there is a risk that, if released, Selimi will obstruct the progress of the criminal proceedings. Recalling that the test under Article 41(6)(b) of the Law entails a prediction about future conduct and that what lies in the future can never be predicted with certainty,[123] the Panel finds that Selimi failed to demonstrate that the Pre-Trial Judge erred in finding that, if released, there is a risk that he will obstruct the proceedings. In light of this finding, the Court of Appeals Panel does not need to address the remainder of Selimi's arguments[124] on Article 41(6)(b)(ii) of the Law.

3. Article 41(6)(b)(iii) of the Law

76. The Court of Appeals Panel recalls that the conditions set forth in Article 41(6)(b) of the Law are alternative to one another.[125] If one of those conditions is fulfilled, the other conditions do not have to be addressed in order for detention to be maintained. Accordingly, the errors Selimi alleges with regard to Article 41(6)(b)(iii) of the Law need not be addressed. Any findings by the Panel on these arguments would not have an impact on the outcome of the Impugned Decision, given that the Panel has found no error in the Pre-Trial Judge's conclusion that a risk of obstruction existed under Article 41(6)(b)(ii) of the Law, making continued detention necessary. The Panel needs nonetheless to address the Parties' arguments on the length of the pre-trial proceedings. The Panel also needs to address whether

[123] See above, paras 38-40.
[124] Appeal, paras 51-53 referring to other [REDACTED] and further alleging errors in the Pre-Trial Judge's findings on the vulnerability of SPO witnesses.
[125] See above, para. 10 recalling the provisions of Article 41(6) of the Law. See also Impugned Decision, para. 25.

the Pre-Trial Judge erred in finding that the risk of obstructing the proceedings could not be mitigated by the Proposed Conditions.

D. ALLEGED ERRORS REGARDING ASSESSMENT OF THE LENGTH OF PRE-TRIAL PROCEEDINGS (GROUND B6)

1. Submissions of the Parties

77. Selimi argues that the Pre-Trial Judge committed an error of law in refusing to consider the expected duration of pre-trial proceedings as a relevant factor for the assessment of Selimi's application for interim release.[126]

78. The SPO responds that the Pre-Trial Judge did not commit any error in declining to estimate the expected total length of pre-trial detention.[127] While the SPO underlines the requirement that deprivation of liberty must be proportionate, it also submits that, at this stage of the proceedings, such an estimate would be premature and speculative.[128] Moreover, the SPO points out that detention is reviewed every two months at the Specialist Chambers, and that the timing of the trial is "heavily contested" between the Parties.[129]

2. Assessment of the Court of Appeals Panel

79. The Panel recalls, at the outset, the importance of the proportionality principle in the determination of the reasonableness of pre-trial detention.[130] The duration of time in detention pending trial is a factor that needs to be considered along with the risks that are described in Article 41(6)(b) of the Law, in order to determine whether,

[126] Appeal, paras 36-37.
[127] Response, para. 36.
[128] Response, para. 37.
[129] Ibid.
[130] *Gucati* Appeal Decision, paras 72-73.

all factors being considered, the continued detention "stops being reasonable" and the individual needs to be released.[131]

80. The Pre-Trial Judge made reference to the length of time that Selimi had *already* spent in detention to date, since 5 November 2020,[132] and found that estimating the total length of pre-trial detention would at this stage be premature and speculative.[133]

81. The Panel notes that judges at the ICTY have taken the probable length of pre-trial detention into account in the exercise of their discretion to release an accused.[134] Recalling that the Specialist Chambers are not bound to follow the ICTY jurisprudence, the Panel finds that the Pre-Trial Judge did not err in adopting a different approach at this stage of the current proceedings. In the circumstances of this case, the Panel notes that, as is evident from the submissions underlying the Impugned Decision, the Parties differed widely in their opinions on the likely start date of the trial, and therefore the likely length of the pre-trial period.[135] Moreover, in contrast to the ICTY, before the Specialist Chambers detained persons benefit from a periodic review of the necessity of continued pre-trial detention every two months.[136] The Panel also notes that Rule 56(2) of the Rules offers Selimi additional protection

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[131] See ICC, *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-992-Red, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled "Decision on Mr Gbagbo's Detention", 19 July 2017, para. 76 referring to ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-969, Judgment on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, 29 May 2015, para. 45.

[132] See *Gucati* Appeal Decision, para. 73. See also ICTY, *Prosecutor v. Mrkšić*, IT-95-13/1-PT, Decision on Mile Mrkšić's Application for Provisional Release, 24 July 2002 ("*Mrkšić* Decision"), paras 48, 50.

[133] Impugned Decision, para. 57.

[134] ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying His Provisional Release, 9 March 2006, para. 23; ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84bis-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 10 September 2010, paras 40-42; ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, para. 29; *Mrkšić* Decision, para. 48.

[135] Application for Interim Release, paras 11-14; Response to Application for Interim Release, para. 9.

[136] Rule 57(2) of the Rules.

against an unreasonable period of pre-trial detention. Accordingly, Selimi's ground of appeal related to the length of the pre-trial proceedings is dismissed.

E. ALLEGED ERRORS REGARDING ASSESSMENT OF THE PROPOSED CONDITIONS (GROUND C4)

1. Submissions of the Parties

82. Selimi submits that the Pre-Trial Judge was required to *proprio motu* raise and evaluate all reasonable conditions that could be imposed on an accused and not just those raised by the Defence.[137] Selimi also argues that the Pre-Trial Judge failed to accurately assess whether measures less restrictive than detention could have been ordered in this case.[138]

83. With regard to the finding that no condition could adequately restrict Selimi's ability to communicate with his community and network, Selimi submits that the Pre-Trial Judge based his reasoning on unsupported and untenable considerations. According to Selimi, there are "a myriad of ways" in which communication can be restricted and if the Pre-Trial Judge thought that the Kosovo Police was unable to implement such a restriction, he should have explained how and why this would be the case and identified the evidence relied upon for these findings.[139]

84. The SPO responds that the Pre-Trial Judge committed no error in concluding that no provisional release conditions could adequately address the risks he identified in the Impugned Decision. The Pre-Trial Judge especially referred to the impossibility of adequately monitoring communications outside of detention. Contrary to Selimi's assertion, the SPO argues that there was no requirement for the Pre-Trial Judge to

[137] Appeal, paras 56-57; Reply, paras 8-11.
[138] Appeal, paras 59-61; Reply, paras 12-15.
[139] Reply, paras 12-15.

proprio motu consider every conceivable potential condition that could be imposed on him.[140]

2. Assessment of the Court of Appeals Panel

85. The Court of Appeals Panel notes the finding of the Constitutional Court that to fully comply with the constitutional standards, a panel must consider more lenient measures when deciding whether a person should be detained.[141]

86. The Panel interprets the Constitutional Court's ruling as meaning 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. The Panel comes to this conclusion in light of the fundamental right of liberty at stake with regard to a suspect or an accused in pre-trial detention and the presumption of innocence governing this part of the proceedings.[142]

87. The Panel notes that with regard to the risk of flight, the Pre-Trial Judge considered the possibility for the Accused to remain at his residence, surrender his passport and other travel documents, report regularly to the relevant authorities, return to the Specialist Chambers at a judicially determined date and comply with any variation or termination of the interim release.[143] With regard to the risk of obstructing the proceedings, the Panel notes Selimi's argument that the Pre-Trial Judge should have considered a prohibition on the use of internet, a keylogger or other monitoring process including visits by local police.[144] Although his findings were general in nature, the Pre-Trial Judge found that prohibiting Selimi from contacting witnesses, persons connected to the case or, for that matter, any person in Kosovo can neither be

[140] Response, para. 48.
[141] KSC-CC-PR-2020-09, F00006, Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020, 26 May 2020, para. 70.
[142] See *Gucati* Appeal Decision, para. 73.
[143] Impugned Decision, para. 54.
[144] Appeal, para. 60.

enforced nor monitored, whether such bar refers to in-person contacts or communication through electronic devices.[145] The Panel finds that the Pre-Trial Judge rightly considered relevant and possible more lenient measures. The Pre-Trial Judge's reference to Selimi's Proposed Conditions as well as *any additional limitations imposed by the Pre-Trial Judge* further shows that he did not strictly limit his assessment to the arguments raised by the Accused.[146]

88. With regard to the finding that no condition could adequately address the risk of obstructing the proceedings, the Pre-Trial Judge found that it would not be possible to restrict Selimi's ability to communicate from his home, through any non-public means, with his community and support network.[147] Furthermore, the Pre-Trial Judge found that prohibiting Selimi from contacting witnesses or any person in Kosovo can neither be enforced nor monitored, whether such bar refers to in-person contacts or communication through electronic devices.[148]

89. At the outset, the Panel recalls its finding that, although the Impugned Decision lacks reasoning with regard to Selimi's ability to mobilise a support network, the Panel nonetheless considers that the findings made previously in the present Decision on the risk of obstructing the proceedings,[149] show that Selimi has the ability to [REDACTED]. The Panel will therefore consider the above arguments as referring to Selimi's ability to communicate with other individuals.

90. The Court of Appeals Panel finds some merit in Selimi's contention that the Pre-Trial Judge should have better explained his findings and the evidence he relied upon.[150] The Panel notes that when assessing the Proposed Conditions against the risk of obstructing the proceedings, the Impugned Decision does not refer to any evidence.

[145] Impugned Decision, para. 55.
[146] Impugned Decision, para. 56 (emphasis added).
[147] Impugned Decision, para. 55.
[148] Ibid.
[149] See above, para. 67.
[150] Reply, paras 12-15.

In particular, the Pre-Trial Judge does not set out how he analysed the extensive evidence presented by the SPO on monitoring release conditions.[151]

91. The Impugned Decision does however summarise the SPO's submissions as stating that neither the Specialist Chambers, the SPO, EULEX, nor Kosovo police would be able to adequately monitor Selimi's interim release.[152] If the reasoning provided in the Impugned Decision is read together with the submissions of the SPO and summary thereof, it is clear that the Pre-Trial Judge based his findings on relevant factors. Notably, in its submissions, the SPO provided concrete examples showing that there are grounds to believe that Kosovo's authorities would be limited in their ability to monitor Selimi's activities if released.[153]

92. Therefore, Selimi fails to demonstrate an error in the Pre-Trial Judge's finding that it is only through the communication monitoring framework applicable at the Specialist Chambers Detention Facilities that Krasniqi's communications can be *effectively* restricted and monitored.[154]

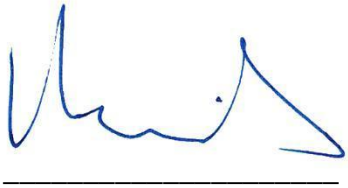
93. In view of the foregoing, the Appeals Panel therefore dismisses Selimi's arguments related to the alleged erroneous assessment of the Proposed Conditions.

[151] Response to Application for Interim Release, paras 35-40.
[152] Impugned Decision, para. 52.
[153] Response to Application for Interim Release, paras 35-40.
[154] Impugned Decision, para. 55 (emphasis added).

IV. DISPOSITION

94. For these reasons, the Court of Appeals Panel:

DENIES the Appeal in its entirety.



Judge Michèle Picard,

Presiding Judge

Dated this Friday, 30 April 2021

At The Hague, the Netherlands.