PUBLIC
Date original: 29/06/2022 23:40:00
Date public redacted version: 04/07/2022 13:56:00

In:	**KSC-BC-2020-06**
	Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**President of the Kosovo Specialist Chambers**
	Judge Ekaterina Trendafilova
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Kadri Veseli
Date:	1 July 2022
Language:	English
Classification:	Public

Public Redacted Version of
Veseli Defence Request for Protection of Legality Against Decision on Appeal Concerning Remanded Detention Review and Periodic Review of Detention (IA014/F00008) (PL001-F00001, dated 29 June 2022)

Specialist Prosecutor's Office

Jack Smith

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. The Defence for Mr Kadri Veseli ("Defence") files this request for protection of legality against the Impugned Decision,[1] in accordance with Article 48(6)-(8) of the Law 05/L-053, and Rules 59, 193 of the Rules of Procedure and Evidence ("Rules").[2] It is filed within three months of the Appeals Panel decision of 31 March 2022, as required by Article 48(6) Law.

2. The Kosovo Specialist Chambers ("KSC") has detained 100 percent of all its accused on remand. For an institution that is supposed to adhere to the highest human rights standards, this practice is not just "deplorable"[3]. It is alarming.

3. Pre-trial detention must be the exception, not the rule. Yet, the practice of the KSC shows quite the opposite; if the Impugned Decision is upheld, such practice will reach a step further, with pre-trial detention becoming the absolute rule, subject to no exception.

4. A substantial part of the present litigation concerns the flawed understanding, by the lower courts, of the Kosovo Police's role in the process of determining whether interim release should be granted. Unlike international courts and tribunals, the KSC is a domestic court. The Kosovo Police is not an organ of a Third State, and concepts such as 'undertaking' or 'guarantees' are not applicable to it. Pursuant to the KSC Law and other Kosovo legislation, the Police is simply 'obliged' to enforce judicial orders.[4] There is no such thing as prior guarantee or undertaking to enforce an order.

[1] IA014/F00008, Decision on Kadri Veseli's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, 31 March 2022, ("Impugned Decision").
[2] Article 48(6)-(8) Law; Rules 59, 193.
[3] IA004/F00005, Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, Separate Concurring Opinion of Judge Kai Ambos, 30 April 2021, para. 4.
[4] Article 53 Law; Kosovo, Law No. 04/L-076 on Police, 19 March 2012, Art. 6.

5. The Supreme Court Panel is invited to declare that the detention of Mr Veseli has now become unreasonable, and that in any case, the lower courts erred in holding that no other alternative measure, including the possibility of house arrest subject to extreme conditions, is insufficient to mitigate risk of obstruction.

6. Against this background, the Defence submits the following grounds:

- **Ground 1**: The Appeals Panel violated Article 5(4) ECHR by failing to issue a speedy decision in respect of Mr Veseli's continued detention;
- **Ground 2**: The Appeals Panel failed to uphold Mr Veseli's right to adversarial proceedings in respect of the Bllaca allegations, resulting in violations of Articles 5(3) and 5(4) ECHR;
- **Ground 3**: The Appeals Panel failed to address Defence submissions whether the *Lajçi* incident is still 'sufficient' ground, for the purposes of Article 5(3) ECHR, when assessing the risk that Mr Veseli would obstruct proceedings;
- **Ground 4**: The Pre-Trial Judge and the Appeals Panel violated Article 41(12) Law and Article 5(3) EHCR by imposing unreasonable and disproportionate conditions relevant to the identified risk;
- **Ground 5**: The Appeals Panel erred in law in the assessment of the additional measures *proprio motu*;
- **Ground 6**: The Appeals Panel erred in its evaluation of the Pre-Trial Judge's assessment of the proportionality of detention.

II. APPLICABLE LAW

7. Article 48(6) governs requests for protection of legality and states that "[d]uring criminal proceedings which have not been completed in final form, a request

for protection of legality may only be filed against final decisions ordering or extending detention on remand."[5]

8. Article 48(7) Law stipulates that:

> A protection of legality request must allege:
> a. violation of the criminal law contained within this Law; or
> b. substantial violation of the procedures set out in this Law and in the Rules of Procedure and Evidence.[6]

9. Article 48(8) Law clarifies that a request for protection of legality "may be filed on the basis of rights available under this Law which are protected under the Constitution or the European Convention on Human Rights and Fundamental Freedoms."[7]

10. Article 29(4) of the Constitution provides that "[e]veryone who is deprived of liberty by arrest or detention enjoys the right to use legal remedies to challenge the lawfulness of the arrest or detention. The case shall be speedily decided by a court and release shall be ordered if the arrest or detention is determined to be unlawful."[8]

11. The jurisprudence of the ECtHR further states that the presumption is always in favour of release.[9] Article 5(3) ECHR does not give the judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. It is the provisional detention of the accused which must not be prolonged beyond a reasonable time; even if the duration of the preliminary investigation is not open to criticism, that of the detention must not exceed a reasonable time.[10]

---

[5] *See also* Rule 59.
[6] Article 48(7) Law.
[7] Article 48(8) Law. *See also* Article 3(2)(a), (e) Law.
[8] Kosovo, Constitution of the Republic of Kosovo, June 2008.
[9] ECtHR, *Buzadji v. The Republic of Moldova*, App. no. 23755/07, [GC], Judgment, 5 July 2016, para. 89.
[10] ECtHR, *Buzadji v. The Republic of Moldova*, App. no. 23755/07, [GC], Judgment, 5 July 2016, para. 89.

III. SUBMISSIONS

A. Ground 1: The Appeals Panel Violated Article 5(4) ECHR by Failing to Issue a Speedy Decision in Respect of Mr Veseli's Continued Detention.

12. The Defence submits that, by taking almost four months to render its decision on Mr Veseli's appeal in the absence of any circumstances that would justify such a delay, the Appeals Panel violated Mr Veseli's rights under Article 5(4) ECHR.

13. Article 5(4) ECHR provides that:

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

14. The Defence notes the settled case law of the ECtHR in respect to Article 5(4) proceedings.[11] With particular regard to appellate proceedings, it recalls that the ECtHR:

> [H]as has laid down relatively strict standards in its case-law concerning the question of State compliance with the speediness requirement. An analysis of its case-law reveals that in appeal proceedings before the ordinary courts which follow a detention order imposed by a court at first instance, delays exceeding three to four weeks for which the authorities must be held responsible are liable to raise an issue under the speediness requirement of Article 5 § 4 unless a longer period of review was exceptionally justified in the circumstances of the case.[12]

15. The ECtHR has consistently held that the *dies a quo* for determining whether the speediness requirement has been violated is the moment the application for release was made/proceedings were instituted.[13]

---

[11] For a summary, *see* ECtHR, *Ilnseher v. Germany*, App. no. 10211/12 27505/14, [GC], Judgment, 4 December 2018, paras 251-256; *see* also, ECtHR, *Rutten v. Netherlands*, App. no. 32605/96, Judgment, 24 July 2001, para. 52 (wherein the Court confirmed that the same principles apply to proceedings constituting an automatic periodic review).
[12] ECtHR, *Ilnseher v. Germany*, App. no. 10211/12 27505/14, [GC], Judgment, 4 December 2018, para. 256, (emphasis added).
[13] *See*, ECtHR, *Smatana v. the Czech Republic*, App. no. 18642/04, Judgment, 27 September 2007, para. 117; ECtHR, *Sanchez-Reisse v. Switzerland*, App. no. 9862/82, [GC], Judgment, 21 October 1986, para. 54; ECtHR, *Ilnseher v. Germany*, App. no. 10211/12 27505/14, [GC], Judgment, 4 December 2018, para. 257.

16. The term 'speediness' is not defined in the abstract, but in light of the circumstances of the individual case, with reference to such factors as (i) the complexity of the proceedings; (ii) the conduct of the authorities and the accused; and (iii) the interests at stake.[14]

17. In the instant case, the Defence filed its Appeal on 3 December 2021.[15] The Court of Appeals Panel rendered its Impugned Decision almost four months later, on 31 March 2022. Considering the above-mentioned case law of the ECtHR,[16] it follows that a delay which exceeds normal periods to issue a decision on appeal by four times, plainly and undisputedly violates Article 5(4) ECHR, unless the authorities, who carry the burden of proof, provide cogent reasons which can justify the considerable delay. The Defence maintains that none of the attendant circumstances are capable of justifying the delay.

18. *Complexity of the case*: while war crime cases are in principle considered complex, it should be noted that in the present case, complexity refers to the detention review proceedings,[17] rather than the merits of the case. A typical example concerns requests for expert reports or a change in jurisprudence by higher courts.[18] However, the Defence fails to note any element which would have rendered resolution of the Impugned Decision more complex than any

[14] ECtHR, *Ilnseher v. Germany*, App. no. 10211/12 27505/14, [GC], Judgment, 4 December 2018, paras. 252-253.
[15] IA014/F00004, Veseli Defence Appeal Against Decision on Remanded Detention Review Decision and Periodic Review of Detention of Kadri Veseli, 3 December 2021, ("Appeal").
[16] *See* for instance, ECtHR, *Abdulkhakov v. Russia*, App. no. 14743/11, Judgment, 2 October 2012, paras 200-202; ECtHR, *Lebedev v. Russia*, App. no. 4493/04, Judgment, 25 October 2007, para 97; 102; ECtHR, *Rehbock v. Slovenia*, App. no. 29462/95, Judgment, 28 November 2000, paras 82-88; ECtHR, *Kolev v. Bulgaria*, App. no. 50326/99, Judgment, 28 April 2005, paras 77-81; ECtHR, *Savriddin Dzhurayev v. Russia*, App. No 71386/10, Judgment, 25 April 2013, paras 222-231.
[17] ECtHR, *Ilnseher v. Germany*, App. no. 10211/12 27505/14, [GC], Judgment, 4 December 2018, para 253 ("The Court accepts that the complexity of medical – or other **– issues involved in an examination of an application for release** can be a factor which may be taken into account when assessing compliance with the requirement of "speediness" laid down in Article 5 § 4."), (emphasis added).
[18] ECtHR, *Ilnseher v. Germany*, App. no. 10211/12 27505/14, [GC], Judgment, 4 December 2018, paras 262-263.

other regular appeal against decisions relating to detention review. No reports or other views were requested, nor any changes in law introduced. The matter was determined solely on the basis of written submissions by the Defence and SPO.

19. *Conduct of the authorities and the accused*: The Defence complied with all relevant deadlines, and there is no other evidence to suggest that Mr Veseli is responsible for the delay.

20. *Interest at stake*: It is self-evident that matters concerning detention are of fundamental importance to the Accused, particularly here, where Mr Veseli is being held in the Netherlands, and interim release would allow the Accused to return to his home country of Kosovo and reunify with his wife and young children.

21. Accordingly, the Defence submits that there has been a violation of Article 5(4) ECHR.

B. Ground 2: The Appeals Panel Failed to Uphold Mr Veseli's Right to Adversarial Proceedings in Respect of the Bllaca Allegations, Resulting in Violations of Articles 5(3) and 5(4) ECHR

22. The Defence submits that the Appeals Panel violated Mr Veseli's right to an adversarial procedure by relying on allegations put forth in an *ex parte* proceeding, and by failing to address submissions put forth by the Defence in subsequent litigation that undermined the veracity of those allegations.

23. The Defence recalls the following background to this issue:

- [REDACTED], Mr Nazim Bllaca, alleged, *inter alia*, that he and other persons, acting as SHIK members, were involved in incidents of witness

interference and intimidation [REDACTED].[19] This allegation has never been tested in a judicial proceeding.[20] Furthermore, by his own account, [REDACTED].[21]

- During the trial in 2012, three witnesses (including Mr Veseli) testified under oath that Mr Bllaca had never been a member of or in any way related to SHIK.[22] Mr Bllaca was not able to answer detailed questions on the upper structures or organisation of SHIK. Mr Bllaca also testified that he had never met Mr Veseli.[23]

- In its judgment (P592/11) the District Court of Prishtina considered it highly probable that Mr Bllaca at least understood to be working for SHIK through other persons – while simultaneously cautioning that "he may have had a wrong understanding or even be lying on this issue."[24] As to SHIK's involvement in the murders in the indictment, the District Court concluded that based on the evidence before it, this was probable, but had not been established beyond reasonable doubt.

- Several years later, in 2019, investigative journalists uncovered documents indicating that Mr Bllaca was a paid participant informant and provocateur, working for the Serbian secret service.[25]

- In 2020, after the information about his affiliation with Serbian intelligence came to light, the SPO raised – and the Pre-Trial Judge

[19] *See* 010819-010836.
[20] IA014/F00004/A02, Annex 2 to Veseli Defence Appeal Against Decision on Remanded Detention Review Decision and Periodic Review of Detention of Kadri Veseli, 3 December 2021, (*see* in particular District Court of Prishtina, Case no P 292/11, 17 December 2012, pp. 53-54).
[21] 010819-010836 RED, at 010822.
[22] IA014/F00004/A02, pp. 53-54.
[23] SPOE00003384-SPOE00003410 RED, p. SPOE00003406 ("[REDACTED]").
[24] IA014/F00004/A02, p. 56.
[25] *See*, RTK, Nazim Bllaca agent of Serbia's BIA since 1997, 8 February 2019; Appeal, para. 8, fn. 6; F00151, Application for Interim Release of Kadri Veseli, 17 December 2020, para. 26.

accepted – Bllaca's untested [REDACTED] allegations, during the Arrest Warrant proceedings, which were naturally conducted *ex parte*.[26]

- However, the SPO did **not** rely on the [REDACTED] allegations during the initial detention review though it referred to Bllaca's testimony "that SHIK agents were involved in the murder of alleged collaborators during VESELI's tenure as chief."[27] The Pre-Trial Judge simply noted the District Court of Prishtina's conclusion that although not proven, it was probable that SHIK was involved in the murders alleged by Bllaca.[28] Neither the SPO nor the Pre-Trial Judge addressed the Defence's submission concerning Bllaca's involvement with the Serbian intelligence.

- On 23 November 2021, the Pre-Trial Judge referred to Bllaca's [REDACTED] ICTY Trial allegations for the first time during a detention decision.[29]

i. Reliance on the Bllaca Allegations

24. In Ground 1 of its brief before the Court of Appeals Panel, the Defence argued that the Pre-Trial Judge erred by relying on allegations raised *ex parte* by the SPO during the Warrant of Arrest Application, but never previously considered in relation to interim release proceedings, and thus never subjected to adversarial procedure.[30] The Court of Appeals Panel rejected the Defence

[26] F00005/CONF/RED, Confidential Redacted Version of 'Request for arrest warrants and related orders', filing KSC-BC-2020-06/F00005, dated 28 May 2020, with confidential redacted Annex 1 and confidential annexes 2 and 3, 14 November 2020, para. 8; F00027, Decision on Request for Arrest Warrants and Transfer Orders, 26 October 2020, para. 33, fn. 66.
[27] F00161, Prosecution response to Application for Interim Release on behalf of Mr Kadri Veseli, 4 January 2021, para. 35.
[28] F00178, Decision on Kadri Veseli's Application for Interim Release, 21 January 2021, para. 43.
[29] F00576, Decision on Remanded Detention Review Decision and Periodic Review of Detention of Kadri Veseli, 23 November 2021, para. 52.
[30] *See*, Appeal, paras 7-9; *see* also IA014/F00007, Veseli Defence Reply to Prosecution Response to Veseli Defence Appeal Against Decision on Remanded Detention Review Decision and Periodic Review of Detention of Kadri Veseli, 21 December 2021, paras 2-3.

arguments, finding that (i) there would have been no error even if the Pre-Trial Judge relied on this factor for the first time, as an additional factor reinforcing his initial conclusion that the risk of obstruction exists; and that (ii) the fact that a certain factor was not mentioned by the Pre-Trial Judge in a previous detention decision did not necessarily mean that he considered that factor to be irrelevant or not worthy of any weight.[31]

25. The Defence submits that the reasoning of the Court of Appeals Panel is both inadequate (in failing to engage with core Defence submissions in Ground 1 of its Appeal) as well as inconsistent with the right to adversarial proceedings pursuant to Article 5(4) ECHR (in condoning the Pre-Trial Judge's failure to consider relevant Defence submissions).

26. First, the Court of Appeals Panel failed to engage with the central argument of the Defence, namely that, despite his 'recall',[32] the Pre-Trial Judge never made any previous finding, in the course of an adversarial procedure,[33] that SHIK members interfered with witnesses [REDACTED].[34]

27. Second, contrary to the Court of Appeals Panel's allusions,[35] the Defence did not argue that additional factors should not, as a matter of principle, be introduced subsequent the on Initial Detention Review Decision. Instead, it held, as Ground 1 of the Appeal plainly indicates, that the Pre-Trial Judge erred "by failing to consider relevant Defence submissions".[36]

---

[31] Impugned Decision, para. 21.
[32] F00576, Decision on Remanded Detention Review Decision and Periodic Review of Detention of Kadri Veseli, 23 November 2021, para. 52.
[33] Detention related proceedings must be adversarial, *see*, ECtHR, *Reinprecht, v. Austria*, App. no. 67175/01, Judgment, 15 November 2005, para. 31.
[34] IA014/F00007, para. 3. *See* also, fn. 6, explaining that the only finding, in F00178, para 43 concerned the 'probability' that SHIK members were involved in the commission of other crimes unrelated to the [REDACTED] case.
[35] Impugned Decision, para. 21 ("in any event, there would have been no error even if the Pre-Trial Judge had relied on this factor for the first time in the Impugned Decision, as an additional factor...").
[36] Appeal, III(A); para 7.

28. Third, the argument that the Pre-Trial Judge's silence on an issue does not mean that he found it to be irrelevant or not worthy of any weight[37] is beside the point. It was improper for the Pre-Trial Judge to resurrect an allegation that was not before him, upon which he had not previously ruled in an adversarial setting, *and* without addressing Defence submissions that undermined the SPO's evidence on this point. Without a **reasoned** decision public scrutiny of the administration of justice is impossible.[38]

ii. Assessment of the Evidence

29. The Court of Appeals Panel found no error in the Pre-Trial Judge's assessment of the evidence, considering, in the view of the Panel, the Pre-Trial Judge "relied on the information given by Mr Bllaca during a suspect interview, which factually supports the Pre-Trial Judge's findings about witness interference being carried out by members of SHIK while Veseli was its head."[39] Yet, once again, the Court of Appeals Panel failed to take into account Defence submissions in its Appeal, namely that these allegations: (i) were unproven; (ii) related to events alleged to have occurred nearly 20 years ago, and not even alleged to be attributable to Mr Veseli; (iii) were made by a person who admitted in court to never having met Mr Veseli; and (iv) could not be reconciled with the presumption of innocence or the presumption in favour of liberty.[40]

30. While noting Defence submissions that Mr Bllaca was most likely never a SHIK member and that there were reasons to believe that he was an intelligence agent

[37] Impugned Decision, para. 21.
[38] ECtHR, *Tase v. Romania*, Judgment, App. no. 29761/02, 10 June 2008, para. 41.
[39] Impugned Decision, para. 22.
[40] Appeal, para. 9. Importantly, these allegations were never investigated or adjudicated by any judicial authority.

of the Serbian State,[41] the Appeals Panel made a series of legal and material errors.

31. First, it engaged in an analysis of Judgment P592/11 relating to Mr Bllaca's supposed membership of SHIK that far exceeded the scope of appellate review.[42] The Pre-Trial Judge never considered Judgment P592/11 in light of the question whether Mr Bllaca had ever been a SHIK member. He simply noted:

> [T]hat the District Court of Prishtinë/Priština considered it probable that SHIK was involved in the commission of three counts of aggravated murder, attempted kidnapping, and attempted aggravated murder, respectively, although the court could not make such finding beyond reasonable doubt.[43]

32. The Court of Appeals relies on its own analysis of the judgment to determine that there was no error in the Pre-Trial Judge's assessment of the same –[44] when in fact, the Pre-Trial Judge made no such assessment at all.

33. Second, the Appeals Panel misinterpreted and overlooked key aspects of the district court's reasoning. For instance, the fact that Kosovo law – like every other state – [REDACTED], is irrelevant to the unequivocable testimony of three[45] witnesses confirming that Mr Bllaca was never a SHIK official.[46] As to Bllaca, the court stressed that it was highly probably that at least he 'understood' to be working for SHIK through others, and that "of course he may have had a wrong understanding or even be lying on this issue".[47] In any event, the Court considered it plausible that there may have been activities done 'privately' (as carrying arms) and mistakes (committing murders).[48] Coupled with Bllaca's own admission of never having met Mr Veseli,[49] the

[41] Impugned Decision, paras 22-23.
[42] Impugned Decision, para. 23.
[43] F00178, Decision on Kadri Veseli's Application for Interim Release, 21 January 2021, para. 43.
[44] Impugned Decision, para. 22.
[45] *Contra*, Impugned Decision, para. 23 (referring to two witnesses).
[46] IA014/F00004/A02, pp. 53-54.
[47] IA014/F00004/A02, p. 56.
[48] IA014/F00004/A02, p. 55.
[49] F00151, Application for Interim Release of Kadri Veseli, 17 December 2020, para. 26.

Defence submits that, even if the allegations concerning witness interference during [REDACTED] ICTY Trial are accurate (which is strongly contested), it is wholly erroneous to hold Mr Veseli accountable for them given that, even if they occurred they may well have been carried out in a private capacity. The simple fact that he was Head of SHIK during the time of the alleged events is patently insufficient to find articulable grounds to believe that Mr Veseli would obstruct the proceedings.

34. Third, the Court of Appeals Panel made both a material and legal error in relation to the Defence's claim[50] that Mr Bllaca is suspected to be an asset of the Serbian intelligence service.[51] Contrary to the Appeals Panel's assessment, the Defence did not claim that Mr Bllaca's involvement with the Serbian intelligence service was alleged in the judgment.[52] Indeed, such evidence was unavailable at the time that the District Court of Prishtina found Mr Bllaca to be an 'overall credible' witness.[53] Clearly, however, this new evidence casts Mr Bllaca's testimony in a very different light, and undermines his allegations as to both SHIK-sponsored murders and witness interference [REDACTED].

35. As to the legal error involved, the Appeals Panel erred in finding that it was unable[54] to consider documents in Serbian, for which an English translation was not provided, despite that the Decision on Working Language clearly enabled it to remedy this oversight and request, LSU, through CMU, to translate any text elements that require an official translation into English if such text was

[50] Appeal, paras 8-9.
[51] Impugned Decision, para. 23.
[52] Appeal, para. 8, fn. 6; F00151, Application for Interim Release of Kadri Veseli, 17 December 2020, para. 26 ("Moreover, evidence has subsequently emerged in the public domain which strongly indicates that throughout the relevant period, Mr. Bllaca was a paid participant informant and *provocateur*, working for the Serbian secret service, the RDB"). *Contra*, Impugned Decision, para. 23 (last sentence).
[53] The evidence only came to light in 2019: RTK, Nazim Bllaca agent of Serbia's BIA since 1997, 8 February 2019.
[54] Impugned Decision, fn. 50.

"deem[ed] relevant for the resolution of the request or matter".[55] Even if the Appeals Panel does not regard that Decision as applicable to appellate litigation, the reasonable course of action would have been to order the Defence to resubmit the materials in English – as opposed to remaining silent and later relying on the absence of an English translation to the detriment of the Accused.

C. Ground 3: The Appeals Panel Failed to Address Defence Submissions Whether the *Lajçi* Incident is Still 'Sufficient' Ground, for the Purposes of Article 5(3) ECHR, When Assessing the Risk that Mr Veseli Would Obstruct Proceedings

36. The Appeals Panel failed to provide adequate reasons when addressing the Defence's submissions on the Driton Lajçi incident. Specifically, it dismissed the submissions as repetitive and inconsequential for the Pre-Trial Judge's determination on the risk that Mr Veseli would obstruct proceedings.[56] Such reasoning is inconsistent with settled ECtHR jurisprudence, according to which all arguments relied upon by the prosecution to justify continued detention, even if identical to previous detention reviews, require fresh examination, since, by their very nature, reasons which at first justify the imposition of pre-trial detention can change over time.[57]

37. The Court of Appeals Panel misinterpreted the submissions of the Defence, in which it made clear its intention not to re-litigate the 'relevance' component, *i.e.* the finding that the incident with Mr Lajci - while amounting to an 'innocent communication' - showed "Veseli's direct intervention involving the Specialist Chambers".[58] Instead, the Defence took issue with the 'sufficiency' requirement, namely "its weight vis-à-vis the proposed mitigation and the passage of time/continued delay in the Pre-Trial proceedings which has

[55] F00072, Decision on Working Language, 11 November 2020, para. 22(2).
[56] Impugned Decision, para. 25.
[57] *See*, ECtHR, *Merabishvili v. Georgia*, App. no 72508/13, [GC], Judgment, 28 November 2017, para. 232.
[58] Appeal, para. 10. Reply, para. 4.

reduced the duty to periodically review whether the risk of interference 'still exists' to nothing more than a mere formality".[59]

38. The Court of Appeals Panel was required to determine whether the Lajci incident, despite it being a factor in justifying the initial detention of Mr Veseli, was still 'sufficient' to continue to justify it after one year of pre-trial detention.[60] Given the relatively innocuous nature of the instruction given to Mr Lajci and the passage of time since its occurrence, the Court of Appeals Panel should have considered whether the Pre-Trial Judge erred in finding that the risk identified was so high that no measure other than detention was sufficient to mitigate it. The failure to do so violated Mr Veseli's rights under Article 41(12) Law as well as ECtHR jurisprudence requiring that less harsh measures be considered before imposing pre-trial detention.

D. Ground 4: The Pre-Trial Judge and Court of Appeals Panel Violated Article 41(12) Law and Article 5(3) EHCR by Imposing Unreasonable and Disproportionate Conditions Relevant to the Identified Risk

i. Ground 4A: The Court of Appeal Either Acted in a Contradictory Manner or Erred in Reversing its Position That the Conditions Proposed by the Defence Sufficiently Mitigated the Identified Risks Provided They Could be Enforced

39. The Court of Appeals Panel's reasoning in its Second and Third decisions is contradictory, and its reasoning in the Third decision - leading it to uphold the Pre-Trial Judge's dismissal of conditions which it previously considered sufficient and reasonable by the Court of Appeal Panel - is erroneous.

[59] IA014/F00007, para. 4 (emphasis added).
[60] *See*, ECtHR, *Nechay v. Ukraine*, App. no. 15360/10, Judgment, 1 July 2021, para. 53 ("With the passage of time, the applicant's continued detention required further justification, but the courts did not provide any further reasoning").

40. In its Second Appeal Decision,[61] the Appeals Panel held that the conditions proposed by the Defence could, if capable of being implemented in practice, sufficiently mitigate the identified risks relating to witness interference. The Panel noted that:

> Veseli did indeed propose a detailed list of conditions which may, in the abstract, restrict and monitor his communications. That being said, the Panel stresses that it still needs to be assessed whether such measures can be effectively enforced. […]
> The Panel considers that in light of the extensive list of conditions put forward by Veseli, it was not open to the Pre-Trial Judge to conclude that none of these conditions could sufficiently mitigate the identified risks without enquiring further into the enforceability of these measures.[62]

41. It is clear from the above that the *rationale* for remanding the matter back to the Pre-Trial Judge concerned the 'enforceability' of the proposed measures which, in the Court of Appeals Panel's view, was sufficient to mitigate the identified risks.

42. While it is true that the Panel did not "anticipate the outcome of the final determination"[63] on the proposed conditions, or limit the Pre-Trial Judge's discretion to identify further conditions "as necessary to mitigate the identified risks,"[64] it is plain that:

- firstly, the key issue was enforceability not sufficiency; and
- secondly, any further condition would have needed to be both clearly identified by the Pre-Trial Judge (and not the Kosovo Police which cannot propose conditions)[65] and necessary and proportional[66] to the aim sought.

[61] IA008/F00004/RED, Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention, 1 October 2021.
[62] IA008/F00004/RED, para. 48, (emphasis added).
[63] IA008/F00004/RED, para. 52.
[64] IA008/F00004/RED, para. 53.
[65] Pursuant to the KSC Law Article 53 and Law No.04/L-076 On Police, it may only "enforce" judicial orders.
[66] Necessity and proportionality are deeply rooted in ECtHR jurisprudence when discussing measures that have the effect of limiting fundamental rights.

43. As to the proposed Defence Conditions, [REDACTED] the Kosovo Police provided clear and unequivocal confirmation that such conditions, if ordered by the Pre-Trial Judge, would be effectively implemented by the Kosovo Police.[67] Despite this, the Pre-Trial Judge denied Mr Veseli's request for interim release, finding that *no* measures could sufficiently mitigate the existing risks, rendering the issue of enforceability moot.[68] The Court of Appeals Panel upheld that decision, despite earlier remanding the matter on the question of enforceability.

44. On this basis alone, the Supreme Court Panel should find that the error committed by the lower courts is sufficient to invalidate the Impugned Decision and grant the Request.

ii. Ground 4B: The Pre-Trial Judge and Appeals Panel Committed a Manifest Error of law in Requiring That the Kosovo Police Propose 'Conditions' for Granting House Arrest

45. The Pre-Trial Judge had the authority to order any further conditions that *he* deemed necessary to protect the integrity of the proceedings while granting Mr Veseli a form of house arrest. Instead, he simply ordered the Kosovo Police to provide 'information.'[69] Considering that the Kosovo Police was neither formally requested to provide 'conditions' or 'guarantees', nor was it legally allowed to do so, the approach followed by the Pre-Trial Judge was flawed from the outset.

46. It is not disputed that the Pre-Trial Judge requested information on "which specific measures are the Kosovo Police authorised to put in place and capable

[67] *See*, F00518/02, Annex 2 to Veseli Defence Submissions on Second Detention Review, 11 October 2011; F00548, Answer to the Request number KSC-BC-2020 of 13 October 2021, 27 October 2021, ("Kosovo Police Submissions").
[68] F00576, para. 98.
[69] F00513, Order to the Kosovo Police to Provide Information, with confidential Annex, 8 October 2021.

of putting in place […]".[70] However, such questions of legal and operational nature were either unnecessary (according to the *jura novit curia* principle, the Judge should not need advice on the interpretation of legal provisions) or irrelevant (the Judge should not be concerned with operational practicalities, but whether a judicial order is capable of being enforced).

47. In any event, while the Pre-Trial Judge was within his prerogatives to issue orders to the Kosovo Police, the legal error committed by both courts was to consider the 'informative' answers as fixed, 'proposed conditions,' incapable of amendment by the courts.[71] As a matter of law the Pre-Trial Judge (and the Court of Appeals Panel) had the legal authority to grant house arrest while simultaneously ordering the Kosovo Police to enforce any measure which, in their view, would sufficiently mitigate any risk of interference. They failed to do so.

iii. Ground 4C: The Conditions Relied Upon by Both Courts Were Neither Necessary nor Proportional vis-à-vis the Identified Risk of Interference

Communications With Close Family Members

48. At paragraph 35 of the Impugned Decision, the Court of Appeals Panel held that the Pre-Trial Judge reasonably concluded that the measures described by the Kosovo Police would allow for [REDACTED], despite specifically being asked to provide information in this respect.

49. Leaving aside the question whether the Pre-Trial Judge posed specific questions in relation to limiting unmonitored interactions with close family members,[72] the Defence submits that the Appeals Panel erred in law by

[70] F00513, Order to the Kosovo Police to Provide Information, with confidential Annex, 8 October 2021, paras 4-16, 20.
[71] *See* for instance, Impugned Decision, para. 35 ("The Panel notes that the proposed conditions do not include […]").
[72] The Defence is well aware that the term "person" necessarily includes family members, as well as "any human being". However, considering the formulation of the question as well as the context of

considering 'reasonable' an otherwise unnecessary and unreasonable requirement ([REDACTED]) which it knew to be "unrealistic both in terms of the resources required to [REDACTED] and in terms of the scope of [REDACTED]".[73]

50. The requirement to place measures against [REDACTED] is unnecessary because, as previously recalled, the current detention regime already allows for such unmonitored visits, albeit in more limited timeframes.[74] Furthermore, the very definition and purpose of house arrest is to allow the Accused to live with his close family members. In requesting that house arrest regime be equated to the current detention regime within DMU premises, the Court of Appeal effectively renders the lesser measures provided in Article 41(12) Law impossible and meaningless.

51. As for proportionality, the Defence notes that limiting [REDACTED] is utterly disproportional, relative to the risk identified. In this respect, it is recalled that (i) the only circumstance specific to Mr Veseli relates to an incident amounting to an 'innocent communication';[75] (ii) despite many instances of [REDACTED] no allegation of inappropriate conduct has so far been levelled by the Registry or SPO (which further provides evidence that close family members should be provided, just like the Defence team, a presumption of trust); and (iii) available measures as identified by the Kosovo Police[76] further limit any such risk. It

house arrest, it was reasonable for the Kosovo Police to assume that the Pre-Trial Judge was referring to pre-approved visitors. It was, therefore, the Pre-Trial Judge's responsibility to ask specific questions relating to any protocol applicable to close family members. In any event, as the Defence noted, the Kosovo Police did refer to measures applicable to close family members elsewhere in its submissions, *see*, F00513, Order to the Kosovo Police to Provide Information, with confidential Annex, 8 October 2021, pp. 11, 12, 14, 15, and 18.

[73] Impugned Decision, para. 36.

[74] Appeal, para. 19.

[75] *Contra*, Impugned Decision, para. 39. The Appeals Panel continues to miss the point and consider such submissions on the merit, rather than on continued relevance relative to the risk of interference.

[76] *See*, F00513, Order to the Kosovo Police to Provide Information, with confidential Annex, 8 October 2021, pp. 11, 12, 14, 15, and 18.

follows that the Appeals Panel's finding that "limitations on [REDACTED] are relevant to the Pre-Trial Judge's reasoning"[77] fails to provide sufficient reasons as to why such impossible and irrational measure would be proportional in a house arrest setting.

Communications With Pre-Approved Visitors

52. The Defence recalls that, by considering the Kosovo Police's lack of access to confidential information 'decisive', the Pre-Trial Judge rendered the exercise of review on remand moot from the outset. In so doing, he requested the Kosovo Police to carry out an irrational and pointless exercise, without any intention of genuinely reconsidering the matter in accordance with the Appeal Court direction.[78] In the Impugned Decision, the Court of Appeals Panel failed to adequately engage with this crucial point, by holding that the Defence

> [f]ails to acknowledge that the Kosovo Police themselves stated that they [REDACTED].[79]

53. The Defence submits that the above statement is, respectfully, incorrect and misinterprets the Kosovo Police submissions. The Kosovo Police simply noted that, despite requesting measures to avoid contacts with witnesses, the Pre-Trial had failed to provide the personal details of witnesses. Despite this, the Kosovo Police provided detailed measures applicable to both scenarios. For the avoidance of any further doubt, the relevant section is reproduced here in full:

> The Kosovo Police do not have the personal details of witnesses, victims or persons connected with the case. If the Court provides such information to us, we will see that there are no contacts between the person subject to conditional release and these other persons. In instances when the police do not have the personal details of the persons whom the person subject to conditional release is prohibited from having contact, we can take measures to restrict the movements of that person, restrict the communications of that person with other persons, except with those authorized by the Court. Or prohibit the use of internet-enabled devices. For the purpose of enforcing these measures, and subject also to a Court order, we can provide 24/7security surveillance for an individual

[77] Impugned Decision, para. 38.
[78] Appeal, para. 32.
[79] Impugned Decision, para. 40.

> subject to conditional release, CCTV monitoring, block all electronic communications inside his residential address and allow communications and visits only with and by the persons who are on the Court's pre-approved list of visitors. Here again, the police will need an order from the Court specifying the prohibitions imposed on the person subject to conditional release.[80]

54. As to other 'drawbacks',[81] the Defence recalls the above submissions,[82] namely that the Court of Appeals Panel erred in law by upholding the 'passive' stance of the Pre-Trial Judge, considering that, in view of any declared lack from the Kosovo Police to effectively enforce judicial decisions, it was within the Pre-Trial Judge's prerogatives, and indeed his legal obligation, to order *proprio motu*, any condition that he considered necessary and proportional to mitigate the identified risks.

E. Ground 5: The Court of Appeals Panel Erred in law in the Assessment of the Additional Measures *Proprio Motu*

55. The Defence recalls that, as the Court of Appeals held, "[i]n 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".[83] It is evident that it is the responsibility of the Pre-Trial Judge to suggest additional measures for implementation.

56. In these circumstances, the scope of the Pre-Trial Judge's *proprio motu* additional measures stems from Constitutional and ECtHR obligations relating to the presumption of liberty and the use of detention only in exceptional circumstances and as a last resort. Such obligation should not be determined

[80] F00513, Order to the Kosovo Police to Provide Information, with confidential Annex, 8 October 2021, p. 8.
[81] Impugned Decision, paras 41-44.
[82] See, for example, paras 4, 33.
[83] IA003/F00005, para. 86; *See* also KSC-CC-PR-2017-01/F00004, Judgment on the Referral of the Rules and Procedure and Evidence Adopted by Plenary on March 2017, 26 April 2017, para. 114.

by the Kosovo Police nor should the Kosovo Police be required to provide a sufficient basis for *proprio motu* measures to be ordered.

57. Yet, the Court of Appeals Panel held, without any legal basis, that "the reasonableness of the scope of the PTJ's additional measures must be assessed in light of the submissions he receives thereon."[84] In conditioning the use of *proprio motu* powers to them being "widely used in the context of interim release" or "raised by the Parties",[85] the Court of Appeals Panel impermissibly restricted, without any legal basis, the scope of *proprio motu* powers as provided by Article 41(12) KSC Law, relevant Constitutional,[86] ECtHR jurisprudence,[87] as well as its own precedent.[88]

58. Further, the Panel erred in relying on the purported "general and generic character" of the Kosovo Police's response to justify the decision not to order *proprio motu* measures.[89] Contrary to the Appeals Panel's and Pre-Trial Judge's considerations, the Kosovo Police is not legally required to provide assurances on the enforceability of an order before the Specialist Chambers.[90] The Kosovo Police is not an organ of a Third State, and concepts such as 'undertaking' or 'guarantees' are not applicable to it. Pursuant to the KSC Law and other Kosovo legislation, the Police is simply 'obliged' to enforce judicial orders. There is no such thing as prior guarantee or undertaking to enforce an order.

[84] Impugned Decision, para 57. *See* also, Impugned Decision, para. 42.
[85] Impugned Decision, para. 42.
[86] KSC-CC-PR-2017-01/F00004, Judgment on the Referral of the Rules and Procedure and Evidence Adopted by Plenary on March 2017, 26 April 2017, para. 114; 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, 22 May 2020, para. 70.
[87] ECtHR, *Idalov v. Russia*, App. no. 5826/03, [GC], Judgment, 22 May 2012, para. 140; ECtHR, *Jablonski v. Poland*, App. no. 33491/96, Judgment, 21 December 2000, para. 83.
[88] IA003/F00005, Decision on Rexhep Selimi's Appeal Against Decision on Interim Release, 30 April 2021, para. 86.
[89] Impugned Decision, para. 57.
[90] Article 53 Law.

59. It follows, therefore that the Court of Appeals Panel erred in law by requiring that in order to consider other measures *proprio motu*, the Kosovo Police need provide detailed guarantees (which it actually did).

F. Ground 6: The Appeals Panel Erred in its Evaluation of the Pre-Trial Judge's Assessment of the Proportionality of Detention

60. The Court of Appeals Panel was satisfied that the Pre-Trial Judge considered all the relevant considerations in reaching the conclusion that the time Mr Veseli has spent in pre-trial detention was not, and remains not, unreasonable.[91] In reaching such determination, the Court of Appeals merely listed the factors taken into consideration by the Pre-Trial Judge[92] while neglecting to materially engage with the legal principles relied upon by the Defence.[93] For instance, the Court of Appeals Panel fails to engage with the submissions that the Pre-Trial Judge placed considerable weight on the gravity of the charges;[94] relied on *pro forma* arguments in relation to the complexity of the case;[95] and failed to grapple with the *ratio decidendi* of the cited ECtHR cases, namely that, with the passage of time, <u>further reasons</u> are required to justify detention and that the absence of any further developments indicated that any risk initially identified has become more speculative and less weighty.[96]

61. It follows that the Appeals Panel erred by failing to properly consider Defence submissions as well as the relevant principles enunciated in ECtHR case law, whilst giving little to no weight to the passage of time.

[91] Impugned Decision, para. 64.
[92] Impugned Decision, paras 62, 64.
[93] Appeal, paras 44-48.
[94] Appeal, para. 46.
[95] Appeal, para. 47.
[96] Appeal, para. 48.

62. Moreover, the Appeals Panel failed to adequately consider Defence submissions[97] concerning the Pre-Trial Judge's incorrect interpretation of Rule 56(2) Rules, which, the Defence maintains, amounts to a substantial violation pursuant to Article 48(7)(b) Law as well as relevant ECtHR case-law concerning the obligation of States to make sure that pre-trial detention remains proportionate.[98]

63. According to the Court of Appeals Panel, the Defence failed to address why the Pre-Trial Judge's consideration of good cause was 'unreasonable'.[99] However, this is not what the Defence argued.[100] The Defence made it clear that good cause does not affect and cannot be used to justify long periods of pre-trial detention, which are rendered 'unreasonable' by the passage of time. Unless the delay is attributed to the Accused, the authorities cannot adduce internal rules and bureaucracies to justify unreasonable periods of detention.[101]

64. As previously noted,[102] if the argument put forward by the Pre-Trial Judge is upheld, Mr Veseli's detention would remain 'reasonable' indefinitely, provided that the process inches forward and a showing of good cause is made.[103] The Panel makes no attempt to correct this interpretation.[104]

IV. CONCLUSION

65. For the reasons set out above, the Defence requests that the Supreme Court Panel grant the Request, reverse and modify the Impugned Decision, and order Mr Veseli's interim release, accompanied by any conditions it deems necessary

---

[97] Appeal, para. 49.
[98] *See*, ECtHR, *Buzadji v. The Republic of Moldova*, App. no. 23755/07, [GC], Judgment, 5 July 2016, para. 89.
[99] Impugned Decision, para. 66.
[100] Appeal, para. 49.
[101] *See* above, footnote 15.
[102] Appeal, para. 49.
[103] IA014/F00004, para. 49.
[104] IA014/F00008, para. 65.

and proportionate; or in the alternative order Mr Veseli's interim release and remand the matter solely for the determination of any conditions deemed necessary and proportionate.

Word Count: 7262

Ben Emmerson, CBE QC
Counsel for Kadri Veseli

Andrew Strong
Co-Counsel for Kadri Veseli

Annie O'Reilly
Co-Counsel for Kadri Veseli