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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 Emilio Gatti Judge Nina Jørgensen
Registrar:	Fidelma Donlon
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Public Redacted Version of
Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers ("Court of Appeals Panel", "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 an appeal filed on 16 August 2021 by Mr Hashim Thaçi ("Thaçi" or "the Accused"),[2] against the "Decision on Review of Detention of Hashim Thaçi" ("Impugned Decision").[3] The Specialist Prosecutor's Office ("SPO") responded on 26 August 2021 that the Appeal should be rejected.[4] Thaçi replied on 31 August 2021.[5]

[1] F00005, Decision Assigning a Court of Appeals Panel, 26 August 2021 ("Assignment Decision"). See also F00440, Decision on Application for the Recusal of the President, 24 August 2021 (the President of the Kosovo Specialist Chambers ("the President") dismissed Thaçi's application for the recusal of President Ekaterina Trendafilova from assigning a Court of Appeals Panel to adjudicate Thaçi's appeal on provisional release); F00476, Decision on Applications for Reconsideration and Disqualification of a Judge from a Court of Appeals Panel, 17 September 2021 (the President dismissed Thaçi's request for reconsideration and annulment of the Assignment Decision, the disqualification of Judge Gatti from the Appeals Panel adjudicating the present appeal, and the reinstatement of the President's previous decision in appeal IA004 (F00002, Decision Assigning a Court of Appeals Panel, 4 February 2021) for the assignment of the Appeals Panel in the present case).

[2] F00004/RED, Public Redacted Version of Thaçi Defence Appeal Against Decision on Review of Detention of Hashim Thaçi, 14 September 2021 (original version filed on 16 August 2021) ("Appeal"). On 28 July 2021, Thaçi requested that the deadline to appeal the Impugned Decision be extended to 16 August 2021. See F00001, Thaçi Defence Request for an Extension of the Time Limit to Submit its Appeal against the Pre-Trial Judge's Decision on Review of Detention of Hashim Thaçi, 28 July 2021. See also F00002, Decision Assigning a Court of Appeals Panel to Consider Request Regarding Time Limits, 29 July 2021. On 30 July 2021, the Court of Appeals Panel granted Thaçi's request. See F00003, Decision on Request for Variation of Time Limit, 30 July 2021.

[3] F00417/RED, Public Redacted Version of Decision on Review of Detention of Hashim Thaçi, 23 July 2021 (original version filed on 23 July 2021) ("Impugned Decision").

[4] F00006/RED, Public Redacted Version of Response to Thaçi Defence Appeal of July 2021 Detention Decision, 26 August 2021 (original version filed on 26 August 2021) ("Response"), paras 2, 31.

[5] F00007/RED, Public Redacted Version of Thaçi Defence Reply to Prosecution "Response to Thaçi Defence Appeal of July 2021 Detention Decision", 14 September 2021 (original version filed on 31 August 2021) ("Reply").

I. BACKGROUND

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

2. On 22 January 2021, the Pre-Trial Judge rejected Thaçi's request for interim release.[8]

3. On 30 April 2021, the Court of Appeals Panel denied Thaçi's appeal of this decision.[9]

4. On 23 July 2021, after having received submissions from Thaçi and the SPO,[10] the Pre-Trial Judge issued the Impugned Decision, ordering Thaçi's continued detention on the basis that the risks that Thaçi will 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

[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); F00027/A01/RED, Public Redacted Version of Arrest Warrant for Hashim Thaçi, 5 November 2020 (original version filed on 26 October 2020); F00051, Notification of Arrest of Hashim Thaçi Pursuant to Rule 55(4), 5 November 2020 (strictly confidential and *ex parte*, reclassified as public on 20 November 2020), para. 4.

[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) ("Confirmation Decision"). The operative indictment was filed on 3 September 2021; see F00455/A01, Public Redacted Version of 'Indictment', KSC-BC-2020-06/F00455/A01/RED, dated 3 September 2021, 8 September 2021 (original version filed on 3 September 2021).

[8] F00120/RED, Public Redacted Version of Application for Interim Release on behalf of Mr Hashim Thaçi, 7 December 2020 (original version filed on 4 December 2020); F00177/RED, Public Redacted Version or the Decision on Hashim Thaçi's Application for Interim Release, 26 January 2021 (original version filed on 22 January 2021), para. 61 ("First Detention Decision").

[9] F00005/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021 (original version filed on 30 April 2021) ("*Thaçi* Appeal Decision"), para. 91.

[10] F00377/RED, Public Redacted Version of Thaçi Defence Submissions on Detention Review, 21 July 2021 (original version filed on 30 June 2021) ("Thaçi Submissions on Detention Review"); F00394/RED, Public Redacted Version of Prosecution response to Thaçi Defence Submissions on Detention Review, 12 July 2021 (original version filed on 12 July 2021); F00404/RED, Public Redacted Version of Thaçi Defence Reply to "Prosecution response to Thaçi Defence Submissions on Detention Review", 21 July 2021 (original version filed on 19 July 2021).

witnesses, continue to exist.[11] The Pre-Trial Judge found that the conditions Thaçi proposed for his conditional release ("Proposed Conditions") could sufficiently mitigate the risk of flight but would not sufficiently mitigate the risk of obstructing the proceedings or the risk of committing further crimes.[12] The Pre-Trial Judge further found that Thaçi's detention remains proportionate.[13]

5. In the Appeal, Thaçi develops seven grounds of appeal consisting of alleged errors of law and of fact committed by the Pre-Trial Judge, as well as abuse of discretion.[14] Thaçi requests the Court of Appeals Panel to reverse the Impugned Decision and order his immediate release with conditions assessed to be appropriate.[15]

II. STANDARD OF REVIEW

6. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.[16]

III. DISCUSSION

A. ALLEGED ERROR REGARDING THE BURDEN OF PROOF AND THE STANDARD APPLICABLE TO REVIEW OF DETENTION (GROUND 1)

1. Submissions of the Parties

7. Thaçi argues that the practice of the Pre-Trial Judge to *invite* the Defence to make an application for the review of detention is not authorised by Article 41(10) of the Law.[17] According to Thaçi, in doing so, the Pre-Trial Judge shifted the burden to

[11] Impugned Decision, paras 32, 41, 45-46, 64.
[12] Impugned Decision, paras 50, 55-56.
[13] Impugned Decision, para. 62.
[14] Appeal, paras 3, 6-50.
[15] Appeal, paras 53-54.
[16] KSC-BC-2020-07, F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati* Appeal Decision"), paras 4-14. See also e.g. KSC-BC-2020-07, F00005, Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention, 9 February 2021 ("*Haradinaj* Appeal Decision"), paras 11-14; *Thaçi* Appeal Decision, paras 4-7.
[17] Appeal, para. 7.

the Defence to demonstrate that the conditions for detention no longer exist and unfairly placed the SPO in a "luxury" position to only have to respond.[18] Thaçi specifies that he unsuccessfully challenged such practice during the first status conference.[19]

8. Thaçi further contends that the Pre-Trial Judge erred in finding that he "is not required to make findings on the factors already decided upon in the initial ruling on detention" but must simply "determine whether they still exist".[20] In his view, the Pre-Trial Judge incorrectly assumed that his previous ruling was still valid and imposed on the Defence the burden to demonstrate the contrary, rather than requiring the SPO to present contemporaneous evidence establishing that the conditions for detention still existed.[21]

9. The SPO responds that the argument on the order of the submissions should be summarily dismissed as Thaçi submits this argument for the first time on appeal.[22] Nevertheless, the SPO contends that the briefing schedule for detention review falls within the Pre-Trial Judge's discretion and that the sequencing was more advantageous to the Defence than any alternative as, by virtue of the right to reply, it had the opportunity to file both the first and last submissions, thus gaining an "extra" submission.[23]

10. The SPO further responds that the Pre-Trial Judge correctly identified that the burden of proof in reviewing Thaçi's detention falls on the SPO and that there is no indication that the Pre-Trial Judge shifted it to the Defence.[24]

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[18] Appeal, paras 3(i), 6-8.
[19] Appeal, para. 7, referring to Draft Transcript of 18 November 2020, pp. 157-161. See also Reply, para. 6.
[20] Appeal, para. 7, referring to Impugned Decision, para. 17.
[21] Appeal, paras 7-8.
[22] Response para. 8.
[23] Response, paras 9-10.
[24] Response, para. 8.

11. Thaçi replies that the SPO is wrong in asserting that the issue of the sequencing of filings has never been raised before and that the intervention of the Appeals Panel is warranted since this question involves a central issue of fairness.[25] Thaçi submits that the issue cannot be circumscribed to a mere sequencing of briefs and, regardless, the ability of the Defence to reply, within 3,000 words, to the SPO's submissions does not mitigate the prejudice he suffered from the shifting of the burden of proof.[26]

2. Assessment of the Court of Appeals Panel

12. At the outset, the Panel rejects the SPO's argument that the briefing schedule adopted by the Pre-Trial Judge necessarily places the Defence in a more advantageous position than any alternative by permitting the Defence, via the right to reply, to file two submissions. In that regard, the Panel recalls that the core of the moving party's arguments must be provided in the initial motion. A reply should be limited to arguments contained in the response.[27]

13. Turning to the issue of the sequencing of filings, Thaçi indeed alluded to it during the status conference that took place on 18 November 2020.[28] It is, however, not accurate to state that Thaçi's submission was not successful. The Pre-Trial Judge declined to decide on this issue as well as other issues raised by Thaçi immediately and invited him to file an application for interim release to detail his position.[29] The Panel notes that although Thaçi filed his Interim Release Application on 4 December 2020, he did not raise the issue of the sequencing of filings. Thaçi also did not raise the issue before the Pre-Trial Judge in the context of the detention review. Therefore, the matter was not properly brought to the lower level panel and not settled by the Pre-

[25] Reply, para. 6.
[26] Reply, para. 8.
[27] See e.g., IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Motion for Access to Prosecution Requests for Assistance and Responses Thereto, 18 April 2019, fn. 22.
[28] Transcript of 18 November 2020, pp. 157-161.
[29] Transcript of 18 November 2020, pp. 157-161.

Trial Judge. For this reason, it is not properly brought before the Appeals Panel and warrants summary dismissal.[30]

14. The Panel turns next to Thaçi's challenge of the Pre-Trial Judge's finding that he "is not required to make findings on the factors already decided upon in the initial ruling on detention" but must simply determine whether grounds for continued detention still exist.[31] The Court of Appeals Panel will first recall the provisions of the Law and of the Rules relevant to review of detention.

15. Article 41(10) of the Law provides that:

> Until a judgement is final or until release, upon the expiry of two (2) months from the last ruling on detention on remand, the Pre-Trial Judge or Panel seized with the case shall examine whether reasons for detention on remand still exist and render a ruling by which detention on remand is extended or terminated. The parties may appeal against such a ruling to a Court of Appeals Panel.

16. Rule 57(2) of the Rules states:

> After the assignment of a Pre-Trial Judge pursuant to Article 33(1)(a) of the Law and until a judgment is final, the Panel seized with a case shall review a decision on detention on remand upon the expiry of two (2) months from the last ruling on detention, in accordance with Article 41(6), (10), (11) and (12) of the Law or at any time upon request by the Accused or the Specialist Prosecutor, or *proprio motu*, where a change in circumstances since the last review has occurred.

[30] *Haradinaj* Appeal Decision, paras 29, 38; F00005, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, 30 April 2021 ("*Veseli* Appeal Decision dated 30 April 2021"), para. 51. See also KSC-BC-2020-07, F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021, para. 15; KSC-BC-2020-04, F00005, Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Provisional Release, 20 August 2021 (original version filed on 20 August 2021) ("*Shala* Appeal Decision"), para. 8.

[31] Appeal, para. 7, referring to Impugned Decision, para. 17.

17. In the *Haradinaj* Appeal Decision issued by the Court of Appeals Panel on Haradinaj's appeal against the first decision of the Pre-Trial Judge on review of Haradinaj's detention, the Panel found that:

> The competent panel has an obligation to review the reasons or circumstances underpinning detention and determine whether these reasons continue to exist under Article 41(6) of the Law. The competent panel is not required to make findings on the factors already decided upon in the initial ruling on detention but must examine these reasons or circumstances and determine whether they still exist. What is crucial is that the competent panel is satisfied that, at the time of the review decision, grounds for continued detention still exist.[32]

18. In light of Thaçi's submissions in the present case, the Panel considers that a further explanation of how the above findings must be interpreted is warranted. In that regard, the Panel underlines that the duty to determine whether the circumstances underpinning detention "still exist"[33] is not a light one. It imposes on the competent panel the task to, *proprio motu*, assess whether it is still satisfied that, at the time of the review and under the specific circumstances of the case when the review takes place, the detention of the Accused remains warranted.

19. The Panel is mindful that according to the Specialist Chamber of the Constitutional Court, the reference to "change in circumstances" in Rule 57(2) of the Rules applies to review of detention at any point in time and separately from the mandated review at two-month intervals. Such a review "ensures that *new* relevant factors that *arise in the intervals* between reviews of detention can be assessed".[34] The Panel finds that, although the automatic review every two-months under Rule 57(2) of the Rules is not strictly limited to whether or not a change of circumstances occurred

[32] *Haradinaj* Appeal Decision, para. 55.
[33] See Article 41(10) of the Law: "whether reasons for detention on remand still exist".
[34] 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 ("Constitutional Court Judgment dated 26 May 2020"), para. 67 (emphasis added).

in the case, such a change can nonetheless be determinative and shall be taken into consideration if raised before the Panel or *proprio motu*.[35]

20. In light of the above, the Panel is satisfied that the Pre-Trial Judge applied the correct standard.[36] Additionally, the Panel finds that the Pre-Trial Judge should not be expected to entertain submissions that merely repeat arguments that have already been addressed in his previous decisions.[37]

B. ALLEGED ERRORS REGARDING ASSESSMENT OF ARTICLE 41(6)(B) OF THE LAW (GROUNDS 3-4)

1. Submissions of the Parties

21. With regard to the Pre-Trial Judge's findings on the assessment of the risk of absconding under Article 41(6)(b) of the Law, Thaçi submits that the Pre-Trial Judge failed to consider, and even to mention, that two counts in the Indictment have been dismissed in a decision issued prior to the Impugned Decision resulting in a reduction in the charges against him.[38]

22. Thaçi also presents arguments challenging more generally the Pre-Trial Judge's findings on the three prongs of Article 41(6)(b) of the Law. Notably, Thaçi submits that the Pre-Trial Judge's finding that he continues to play a significant role in Kosovo is ill grounded and that his conclusions concerning Thaçi's influence and authority are so unfair and unreasonable that they constitute an abuse of discretion.[39] Thaçi argues

[35] Rule 57(2) of the Rules.
[36] See Impugned Decision, para. 16.
[37] See e.g. ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-1626-Red, Public Redacted Version of 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", 12 September 2011 ("*Bemba* Appeal Judgement dated 12 September 2011"), para. 60; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-1019, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence", 19 November 2010, para. 53.
[38] Appeal, para. 25.
[39] Appeal, paras 3(iii), 17-23. See also Reply, paras 9-10.

that he provided concrete and verifiable information showing that he is now in the weakest position of his political career, as shown by the fact that his former political party (the PDK) "can no longer even attract enough support to become a viable opposition".[40]

23. Thaçi further submits that the election results of the PDK are the only way of assessing his alleged popularity and support.[41] In that regard, he contends that the Pre-Trial Judge erred in considering that the recent elections and political developments are of little relevance to assess Thaçi's popularity and in finding that "supporters of Mr Thaçi do not necessarily have to be PDK voters".[42] In his view, the Pre-Trial Judge failed to explain how popularity and support should be quantified or assessed.[43]

24. Furthermore, Thaçi submits that the Pre-Trial Judge also erred in inferring Thaçi's support from his former status as a high ranking KLA member which did not automatically, and of itself, provide him with any position of influence or authority after the end of the conflict.[44]

25. Thaçi also submits that the Pre-Trial Judge abused his discretion in finding that through the disclosure process, Thaçi gained increased insight into the evidence underpinning the charges against him and that, as a result, the risks that he will abscond, obstruct the proceedings, and commit further crimes have all increased.[45] In reaching this conclusion, Thaçi submits that the Pre-Trial Judge failed to refer to any evidence indicating the "strength of the SPO case"[46] and further disregarded: (i) Thaçi's submissions that, in his view, the modes of liability alleged against him are

[40] Appeal, para. 18. See also Reply, paras 9-10.
[41] Appeal, paras 17-18, 22.
[42] Appeal, paras 20-21, referring to Impugned Decision, para. 30. See also Reply, paras 9-10.
[43] Appeal, paras 18, 20, 22. See also Reply, paras 9-10.
[44] Appeals, paras 21-23.
[45] Appeal, paras 3(iv), 26-31.
[46] Appeal, para. 30.

tenuous and the evidence disclosed by the SPO is not credible;[47] (ii) Thaçi's behaviour, when he was facing allegations of organ trafficking or, more recently, when he was informed of the present case against him and nonetheless voluntarily attended SPO's interviews, decided not to flee and to surrender to the Specialist Chambers; [48] and (iii) Thaçi's knowledge of the fact that the SPO continues investigating its case against him, showing that the "SPO harbours doubts about its ability to establish the charges against him beyond reasonable doubt".[49]

26. In its Response, the SPO submits that the Appeals Panel previously upheld the Pre-Trial Judge's findings on Thaçi's past and recent influence and authority and that Thaçi merely disagrees with the Pre-Trial Judge without identifying any error in the Impugned Decision.[50] The SPO contends that the Pre-Trial Judge had the discretion to weigh the election results of Thaçi's former political party and to consider Thaçi's prior KLA positions differently than the Defence is suggesting.[51]

27. The SPO further submits that Thaçi's arguments on his increased knowledge of the SPO case must be summarily dismissed as they exclusively address the risk of flight, which was found by the Pre-Trial Judge to be mitigated by conditions that could be imposed.[52] The SPO nonetheless addresses the merits of Thaçi's arguments and contends that the Pre-Trial Judge properly relied upon the fact that Thaçi is progressively informed of the evidence underpinning the charges against him, including the identity of witnesses who provided or could provide evidence in the case and/or are due to appear before the Specialist Chambers.[53] In the SPO's view, this approach is supported by jurisprudence from international courts.[54] In addition, it falls

[47] Appeal, para. 27.
[48] Appeal, paras 28, 30-31.
[49] Appeal, para. 29.
[50] Response, paras 11, 13.
[51] Response, para. 12.
[52] Response, para. 14.
[53] Response, para. 15.
[54] Response, para. 17.

within the discretion of the Pre-Trial Judge to assess how additional disclosure impacts the incentives of the Accused and therefore the risks under Article 41(6)(b) of the Law.[55]

28. In his Reply, Thaçi reiterates some of his arguments and notably contends that the jurisprudence cited by the SPO in support of its arguments on this point is distinguishable from the circumstances of this case where the SPO's investigations are still ongoing.[56]

2. Assessment of the Court of Appeals Panel

(a) Article 41(6)(b)(i) of the Law

29. The Pre-Trial Judge found that Thaçi's Proposed Conditions in support of his request for conditional interim release could sufficiently mitigate the risk of him absconding.[57] As the Pre-Trial Judge's conclusion that Thaçi's detention shall continue is not based on his findings regarding the risk of flight, the Appeals Panel summarily dismisses Thaçi's arguments related to factors relied upon by the Pre-Trial Judge in his assessment of the risk of Thaçi absconding[58] to the extent that these factors do not also form part of the Pre-Trial Judge's determination on the continuation of Thaçi's detention.[59]

30. Specifically, the Panel dismisses Thaçi's arguments concerning the reduction in the charges against him. In that regard, Thaçi is referring to the Pre-Trial Judge's finding that "the nature and extent of the crimes charged" as well as "the severity of

[55] Response, paras 16, 18.
[56] Reply, para. 13.
[57] Impugned Decision, para. 50.
[58] With regard to the assessment of the risk of flight under Article 41(6)(b)(i) of the Law, the Pre-Trial Judge relied on the following factors: (i) Thaçi's position of influence and authority stemming from his past and recent influential positions, which were unaffected by recent electoral results; (ii) his ability to travel to countries beyond the Specialist Chamber's reach; (iii) his knowledge of the charges against him and the possibility of a serious sentence in the event of a conviction; and (iv) his increased insight into the evidence underpinning the charges against him on the basis of the ongoing disclosure process. See Impugned Decision, paras 27-32.
[59] See e.g. *Thaçi* Appeal Decision, para. 32.

a potential sentence" constitute important factors incentivising Thaçi to abscond, should he be released.[60] The Court of Appeals Panel understands the argument on the reduction of charges to be a reference to the Pre-Trial Judge's preliminary motion decision of 22 July 2021 in which he ordered "the SPO to file an amended indictment excluding [joint criminal enterprise] III liability for the special intent crimes".[61] In the meantime, the SPO has filed an appeal as of right against the findings underlying this order, which is currently before a Court of Appeals Panel.[62] Consequently, the matter is still pending before the Court of Appeals Panel.

31. The Panel also summarily dismisses Thaçi's argument that at various earlier junctures he had certain degrees of knowledge about the nature and seriousness of the case against him but did not flee.[63]

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

32. In his assessment of the risk of obstructing the progress of the Specialist Chambers proceedings under Article 41(6)(b)(ii) of the Law, the Pre-Trial Judge relied on the following factors: (i) Thaçi's attempts to undermine the Specialist Chambers and his offer of benefits to persons summoned by the SPO; (ii) [REDACTED]; (iii) the inherently high risk of intimidation or interference for witnesses and/or their family members, which cannot be effectively mitigated relying only on protective measures; (iv) his increased insight into the evidence underpinning the charges against him due to the ongoing disclosure process; (v) the persisting climate of intimidation of witnesses and interference with criminal proceedings against former KLA members;

[60] Appeal, para. 24.
[61] F00412, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021, para. 214.
[62] See F00014, Prosecution Appeal against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers' pursuant to Rule 97(3), 27 August 2021, paras 1, 27; F00015, Decision Assigning a Court of Appeals Panel, 30 August 2021. See also F00018, Veseli Defence Response to SPO Appeal against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers', 30 September 2021.
[63] Appeal, para. 28.

and (vi) his position of influence allowing him to elicit the support of sympathisers in this climate.[64]

33. The Panel will first address Thaçi's influence and ability to elicit the support of sympathisers. The Panel notes that in the Impugned Decision, the Pre-Trial Judge found that, as a former high-ranking KLA member and former political figure, Thaçi continues to play a significant role in Kosovo and has influence and authority over former subordinates and persons affiliated with the KLA War Veterans Association and/or persons sympathetic to the KLA.[65] He held that this influence was premised on Thaçi's past positions and was therefore unaffected by recent political developments.[66] In addition, the Pre-Trial Judge noted that Thaçi's party (the PDK) remains the biggest opposition party in the Assembly of the Republic of Kosovo after the most recent elections and that, in any event, electoral results do not necessarily reflect Thaçi's support or long-term popularity.[67]

34. The Panel recalls that in its *Thaçi* Appeal Decision, it found that the Pre-Trial Judge did not err in finding that Thaçi exercised a degree of influence and control based on his "*past and recent*" influential positions and authority.[68] The Panel further found that it was reasonable for the Pre-Trial Judge to consider that Thaçi undoubtedly continued to exercise a certain degree of influence over his former subordinates despite his recent resignation as President of Kosovo.[69] In the Impugned Decision, the Pre-Trial Judge recalled his finding that Thaçi continues to play a significant role in Kosovo on the basis of the previous positions he occupied.[70] The Panel finds that because the Pre-Trial Judge's findings are unequivocally based on

[64] Impugned Decision, paras 36-40.
[65] Impugned Decision, paras 28, 30, 37, 39-40.
[66] Impugned Decision, paras 30, 37.
[67] Impugned Decision, paras 29-30.
[68] *Thaçi* Appeal Decision, para. 50 (emphasis in original).
[69] *Thaçi* Appeal Decision, para. 50.
[70] Impugned Decision, paras 37, 39.

positions occupied by Thaçi in the past, any recent change of the political landscape in Kosovo is of little relevance.

35. Nonetheless, although the results of the last elections were less favourable to the PDK, the Panel agrees with the Pre-Trial Judge that the PDK's electoral performance is not determinative of Thaçi's position of authority and influence.[71] In particular, the Panel sees no error in the Pre-Trial Judge's finding that Thaçi's supporters are not necessarily PDK voters.[72] Thaçi merely disagrees with these findings but does not substantiate any errors. In addition, the Panel sees no contradiction between the proposition that Thaçi held high-ranking political positions in the past because of the PDK's electoral success, and the Pre-Trial Judge's findings that the PDK's more modest recent electoral performance does not affect the influence and authority Thaçi continues to hold because of having held these positions in the past.[73]

36. Moreover, the Panel dismisses Thaçi's argument that the Pre-Trial Judge is not in a position to make findings about Thaçi's position and level of command within the KLA for the purposes of continuing detention because the matter is still in dispute.[74] The Pre-Trial Judge's reference to Thaçi as a "high ranking KLA member"[75] does not, in the Panel's view, constitute a finding on the level of command he may have had within the KLA for the purposes of proving elements of the crimes with which he is charged – that remains a matter to be litigated at trial. In any event, the Panel notes that the Pre-Trial Judge found that there is a well-grounded suspicion that Thaçi held various positions in the KLA as part of his decision confirming the indictment against the Accused in this case, based on evidence submitted by the SPO.[76] Therefore,

[71] Impugned Decision, paras 29-30.
[72] Impugned Decision, para. 30. Contra Appeal, para. 21.
[73] Impugned Decision, para. 30, 37. Contra Appeal, para. 21.
[74] Appeal, para. 21.
[75] Appeal, para. 21, referring to Impugned Decision, para. 30.
[76] Confirmation Decision, para. 455, and the evidence cited in fns 1960-1964 thereto. See also First Detention Decision, para. 31, referring back to the above-mentioned finding.

although this set of facts remains to be proven by the SPO at trial, and Thaçi will have the opportunity to challenge the SPO's case in this regard, there is no error in the Pre-Trial Judge relying on this finding in the context of his review of pre-trial detention.

37. Turning next to Thaçi's arguments concerning the impact of his increased insight into the evidence, the Panel notes that the Pre-Trial Judge considered the fact that "Thaçi has, at present, gained increased insight into the evidence underpinning the serious charges against him on the basis of the ongoing disclosure process", notably as a factor augmenting the risk of obstructing the progress of the proceedings.[77]

38. The Panel notes that while disclosure of evidence may be a relevant factor, it is but one factor that may be taken into account when determining whether continued detention appears necessary.[78] It is however not sufficient in itself to justify the denial of provisional release. The Panel recalls that in the Impugned Decision the Pre-Trial Judge considered this factor together with other factors to determine the existence of a risk of obstruction.[79]

39. The Panel notes in that respect that, between the issuance of the First Detention Decision of 22 January 2021 and the issuance of the Impugned Decision, 2,314 pieces of incriminating evidentiary material were disclosed to the Defence.[80]

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[77] Impugned Decision, para. 39.
[78] 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 Judgement dated 26 October 2012"), para. 65.
[79] See above, para. 32. See also Impugned Decision, paras 36-40.
[80] This figure takes into account three disclosure batches of materials under Rule 102(1)(a) of the Rules, and 16 disclosure batches of materials under Rule 102(1)(b) of the Rules, containing a total of 2,314 pieces of incriminating material, comprising a total of over 21,100 pages and 35 videos. This includes all materials within these batches, and therefore does not account for duplication of information due to the inclusion of translated, redacted and/or revised versions of certain materials within these disclosure batches.

40. The Panel sees no merit in Thaçi's argument that the Pre-Trial Judge erred by not engaging with his arguments about the quality of the evidence disclosed by the SPO as an indicator of Thaçi's state of mind about this evidence.[81] The quality and strength of the SPO's case are matters to be discussed at trial. Accordingly, an appeal decision on review of detention is not an appropriate forum for these arguments to be addressed. In any event, Thaçi's views on the SPO's evidence would not change the fact that increased access to the evidence provides an increased *ability* to obstruct the proceedings as more detailed information becomes available to the Accused.

41. Moreover, the Panel dismisses as unsubstantiated Thaçi's speculative submissions about the reasons for the SPO's continuing investigations and how this should have alleviated or removed the Pre-Trial Judge's concerns arising from the continuing disclosure process.[82]

42. Thaçi therefore fails to show that it was unreasonable for the Pre-Trial Judge not to make findings about Thaçi's low opinion of the evidence disclosed by the SPO in the case against him and how this affected his incentive to obstruct the proceedings.[83]

43. Accordingly, for the reasons set out above, Thaçi fails to demonstrate that it was unreasonable for the Pre-Trial Judge to conduct a holistic assessment of the information available to him and to conclude that Thaçi's increased awareness of the evidence underlying the charges against him, together with other factors such as notably Thaçi's influential role in Kosovo on the basis of the previous positions he occupied, contributed to the risks identified under Article 41(6)(b)(ii) of the Law.[84]

[81] Appeal, para. 27.
[82] Appeal, para. 29.
[83] Contra Appeal, para. 30.
[84] Impugned Decision, para. 39.

(c) Article 41(6)(b)(iii) of the Law

44. 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, Thaçi's allegations with regard to factors that were relied upon by the Pre-Trial Judge in his determination of the risk under Article 41(6)(b)(iii) of the Law – and not previously reviewed in the present Decision – need not be addressed.[85] The Panel recalls that the conditions set forth in Article 41(6)(b) of the Law are alternative to one another.[86] If one of those conditions is fulfilled, the other conditions do not have to be addressed in order for detention to be maintained. Any findings by the Panel on Thaçi's arguments under Article 41(6)(b)(iii) of the Law would therefore not have an impact on the outcome of the Impugned Decision.

45. The Panel needs nonetheless to address the Parties' arguments on the length of the pre-trial detention. The Panel also needs to address whether the Pre-Trial Judge erred in finding that the risk of obstructing the proceedings could not be mitigated by the Proposed Conditions.

C. ALLEGED ERRORS REGARDING ASSESSMENT OF THE PROPORTIONALITY OF DETENTION (GROUND 2)

1. Submissions of the Parties

46. Thaçi submits that the Pre-Trial Judge exercised his discretion based on an incorrect conclusion of fact in finding that any discussion as to the expected total length of Thaçi's pre-trial detention is "premature and speculative".[87] In his view, the

[85] With regard to the risk of committing further crimes under Article 41(6)(b)(iii) of the Law, the Pre-Trial Judge relied on: (i) the prevalent climate of witness intimidation; (ii) Thaçi's position of influence due to his past positions; (iii) the course of conduct aimed at undermining the Specialist Chambers and SPO and the attempts to interfere with the proceedings; and (iv) his increased account of the case against him through ongoing disclosure of evidence underpinning the serious charges against him. See Impugned Decision, para. 44.
[86] See e.g. *Thaçi* Appeal Decision, para. 78.
[87] Appeal, paras 3(ii), 11, 16.

Pre-Trial Judge should have considered that the Parties no longer "widely disagree" on the expected start date of the trial, given the apparent SPO admission that the trial date would likely be delayed by another year due to its inability to meet disclosure deadlines and its need to continue investigations.[88] Therefore, Thaçi argues that, by the time his trial starts, the length of his pre-trial detention will have extended to the point of being unreasonable.[89]

47. In response, the SPO recalls that the Court of Appeals Panel found in a previous decision that the Pre-Trial Judge's assessment of the proportionality of the detention did not require estimating the probable length of detention, and also emphasises that detention is regularly reviewed.[90] In light of this and the fact that the Parties' differing estimates remain, the SPO argues that the Pre-Trial Judge did not err in concluding that estimating the length of pre-trial detention was premature and speculative.[91]

48. Thaçi replies that the SPO did not explain on what basis the Parties diverge with respect to the estimated start date of trial and reiterates that since they do not, the Pre-Trial Judge should have considered the question of the probable length of pre-trial detention in order to ensure that the Accused is not detained for an unreasonable period prior to the opening of the case.[92]

2. Assessment of the Court of Appeals Panel

49. The Panel notes that the Pre-Trial Judge correctly recalled the importance of the proportionality principle in the determination of the reasonableness of pre-trial detention.[93] The Panel recalls that according to Rule 56(2) of the Rules, the Pre-Trial

[88] Appeal, paras 13-16. See also Reply, paras 3-5.
[89] Appeal, paras 9, 14.
[90] Response, para. 27, referring to F00005/RED, Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release, 30 April 2021 (original version filed on 30 April 2021) ("*Krasniqi* Appeal Decision dated 30 April 2021"), para. 71 and Article 41(10) of the Law and Rule 57(2) of the Rules.
[91] Response, paras 28-29.
[92] Reply, paras 4-5.
[93] Impugned Decision, para. 60. See also *Krasniqi* Appeal Decision dated 30 April 2021, para. 69.

Judge shall ensure that a person "is not detained for an unreasonable period prior to the opening of the case".[94] The reasonableness of an accused person's continued detention must be assessed on the facts of each case and according to its special features.[95] The length of time spent 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, all factors being considered, the continued detention "stops being reasonable" and the individual needs to be released.[96]

50. The Pre-Trial Judge considered the following factors to reach his conclusion that the time spent so far by Thaçi in pre-trial detention is not unreasonable and that a discussion on the expected total length of such pre-trial detention remains premature and speculative at this stage: (i) Thaçi's arrest on 5 November 2020; (ii) he is charged with a number of counts of crimes against humanity and war crimes for events in multiple locations over an extended period of time; (iii) if convicted, Thaçi's sentence could be lengthy; (iv) the risks under Article 41(6)(b)(ii) and (iii) of the Law cannot be mitigated by any additional conditions; (v) all pre-trial procedural steps will be completed to transmit the case for trial in the foreseeable future; (vi) time limits have either been met or extended for good cause, including at Thaçi's request; and (vii) Thaçi and the SPO continue to differ on the likely start date of the trial.[97]

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[94] Rule 56(2) of the Rules. See also Appeal, paras 9-10 where Thaçi recalls the applicable rule and underlines that the procedure before the Specialist Chambers differs from the procedure before the ICC.

[95] ECtHR, *Buzadji v. The Republic of Moldova*, no. 23755/07, Judgment, 5 July 2016, para. 90; ECtHR, *Wemhoff v. Germany*, no. 2122/64, Judgment, 27 June 1968, para. 10 (p. 20).

[96] Impugned Decision, para. 60. See also F00005, Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Interim Release, 30 April 2021 (original version filed on 30 April 2021) ("*Selimi* Appeal Decision dated 30 April 2021"), para. 79; *Krasniqi* Appeal Decision dated 30 April 2021, para. 69. 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 ("*Gbagbo* Appeal Judgement dated 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.

[97] Impugned Decision, paras 61-62.

51. The Panel recalls its determination in previous decisions that the Pre-Trial Judge had not erred in adopting a different approach than some judges at the International Criminal Tribunal for the former Yugoslavia who took the probable length of pre-trial detention into account in the exercise of their discretion to release an accused, especially in light of the periodic review of the necessity of continued detention at the Specialist Chambers and the Parties' differences of opinion.[98] The Panel considers that the Pre-Trial Judge correctly found – at the time of issuing the Impugned Decision – that the Parties continued to differ as to the likely start date of the trial.[99]

52. The Panel further finds that the Pre-Trial Judge correctly assessed the circumstances of the case as a whole, taking into consideration the factors listed above in paragraph 50 of this Decision.[100] As a consequence, Thaçi failed to establish that the Pre-Trial Judge erred in finding that the length of the pre-detention is not unreasonable at this stage or that he erred in finding that at the present stage, any discussion as to the expected total length of Thaçi's pre-trial detention remains premature and speculative.[101] Accordingly, the Panel dismisses this ground of appeal.

[98] *Selimi* Appeal Decision dated 30 April 2021, para. 81 and jurisprudence cited therein; *Krasniqi* Appeal Decision dated 30 April 2021, para. 71; *Veseli* Appeal Decision dated 30 April 2021, para. 59. See also Rule 57(2) of the Rules; Article 41(10) of the Law.
[99] The Panel observes that Thaçi submitted that the SPO anticipated "being in a position to submit its Rule 95(4) material by mid-October 2021", therefore seven months ahead of the mid-2022 trial start date estimated by the Defence. See Thaçi Submissions on Detention Review, para. 12, citing F00314, Prosecution submissions for fifth status conference, 18 May 2021, para. 10 and Transcript of 19 May 2021, pp. 420-421; contra Thaçi Submissions on Detention Review, paras 2, 14. The Panel also notes that the SPO, during the Sixth Status Conference confirmed the mid-October 2021 deadline for the submission of materials under Rule 95(4) of the Rules despite some "variables" and indicated that it is "obviously for a prompt trial start date three months after provision of the Rule 95(4) materials". See Transcript of 21 July 2021, p. 509, lines 6-8, p. 510, lines 5-13.
[100] See *Gbagbo* Appeal Judgement dated 19 July 2017, para. 76.
[101] Impugned Decision, para. 62.

D. ALLEGED ERRORD REGARDING ASSESSMENT OF CONDITIONS OF RELEASE (GROUNDS 5, 6 AND 7)

1. Submissions of the Parties

53. Thaçi contends that the Pre-Trial Judge should have conducted his assessment by considering together the risks and the propositions put forward by the Defence to mitigate them, such as Third State guarantees.[102] Instead, Thaçi submits that the Pre-Trial Judge erred in assessing the risks first – on the sole basis of the SPO's submissions – and, only in a second step, whether the identified risks could be addressed by conditions.[103] According to Thaçi, this approach circumvented the Court of Appeals Panel's requirement that the risk must be "sufficiently real" before detention can be maintained, as well as the practice of judges before international tribunals.[104]

54. Thaçi further submits that the Pre-Trial Judge erred in ignoring the conditions proposed by [REDACTED] and [REDACTED].[105] He contends that the Pre-Trial Judge committed an error of law in reading together Article 41(11) of the Law and Rule 56(4) of the Rules, namely in finding that the use of the term "if released" in Article 41(11) of the Law limits consultations with Third States under Rule 56(4) of the Rules to situations in which a Panel has already formed a view on provisional release.[106]

55. Furthermore, Thaçi contends that the Pre-Trial Judge's references to the "excessive and unnecessary burden" on a Panel in seeking the views of two Third States is not supported by the International Criminal Court ("ICC") jurisprudence he cited. Similarly, he submits that the obligation to "consider more lenient measures"

[102] Appeal, paras 34-37. See also Appeal, para. 44; Reply, para. 15.
[103] Appeal, paras 34-37. See also Appeal, para. 44; Reply, para. 15.
[104] Appeal, paras 34, 36.
[105] Appeal, paras 38, 41.
[106] Appeal, para. 39, referring to Impugned Decision, para. 53. See also Appeal, paras 40-43. The Panel understands that Thaçi mistakenly refers to Article 44(1) of the Law instead of Article 41(11) of the Law. See Appeal, para. 39.

than detention obliges the Panel to engage with the identified Third States, irrespective of the burden for the public authority.[107]

56. In addition, Thaçi argues that the Pre-Trial Judge, when concluding that only the communication monitoring framework applicable at the Specialist Chambers Detention Facilities ("Detention Facilities") could sufficiently mitigate the risks, set an unreasonably high standard for interim release and misunderstood the fact that the detention regime does not prevent the passing of information to the outside world.[108]

57. The SPO responds that Thaçi merely disagrees with how the Pre-Trial Judge balanced the Proposed Conditions against the risks and fails to identify any discernible error.[109] In its view, the Pre-Trial Judge properly considered and weighed all relevant factors, including the new conditions, and sufficiently reasoned his decision.[110]

58. Additionally, the SPO argues that the Pre-Trial Judge did not misconceive the degree of monitoring in the Detention Facilities, which does allow for a controlled environment where unmonitored communications are strictly limited, while the conditions proposed by Thaçi would allow unmonitored communications to occur on a daily basis.[111]

59. The SPO furthermore contends that, if no condition can mitigate the risks identified, the panel is not obligated to assess a State's willingness and ability to enforce such conditions.[112] In any event, the SPO contends that Thaçi's overly broad reading of Rule 56(4) of the Rules contradicts Article 41(11) of the Law, as well as the Appeals Panel's previous finding that the question of whether to seek additional

[107] Appeal, para. 46.
[108] Appeal, paras 47-50.
[109] Response, para. 22.
[110] Response, paras 22, 24.
[111] Response, para. 25.
[112] Response, para. 19.

submissions from national authorities falls within the exercise of the Pre-Trial Judge's discretion.[113]

60. Thaçi replies notably that the SPO's argument that the Proposed Conditions would allow unlimited unmonitored conversations is flawed and that because of the Pre-Trial Judge's failure to hear the Third States, these conditions are still unsettled.[114]

2. Assessment of the Court of Appeals Panel

61. Regarding Thaçi's argument that the Pre-Trial Judge committed an error of law in assessing the Proposed Conditions only after having identified the relevant risks under Article 41(6)(b) of the Law, the Panel observes that the Law does impose on a panel the obligation to assess the possibility of ordering more lenient measures when deciding whether a person should be detained,[115] but does not prescribe a sequence in which this assessment must be performed. However, the Panel finds that it is only logical to verify the existence of risks before assessing whether those risks can be mitigated. Moreover, contrary to what the Defence inferred, the practice of other international judges in that matter is not uniform and does not support the Defence's argument.[116] Ultimately, the Panel cannot see how the adoption of the approach suggested by Thaçi would have impacted the Pre-Trial Judge's assessment of the risks under Article 41(6)(b) of the Law or the outcome of the Impugned Decision.

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[113] Response, para. 20, referring to *Veseli* Appeal Decision dated 30 April 2021, paras 66, 74.
[114] Reply, para. 14.
[115] See Article 41(12) of the Law; KSC-CC-PR-2017-01, 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. 114; Constitutional Court Judgment dated 26 May 2020, para. 70. See also *Thaçi* Appeal Decision, para. 83.
[116] See e.g. ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-718-Red, Seventh decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute, 11 November 2014, paras 69-76 (the Trial Chamber assessed the possibility of conditional release in a separate section, after having determined that the risks justifying detention continued to exist); ICC, *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-800-Red, Third Decision on Mr Yekatom's Detention, 5 January 2021, paras 23-25 (the Trial Chamber considered the question of conditional release after having found that risks continued to exist). Contra Appeal, para. 36, and references therein.

62. The Court of Appeals Panel finds that Thaçi fails to demonstrate how it was unreasonable for the Pre-Trial Judge to determine the existence of the risks under Article 41(6)(b) of the Law before assessing the sufficiency of the conditions of release.[117] As a result, Thaçi's submissions under ground of appeal 5 are dismissed.

63. The Court of Appeals Panel will now address Thaçi's submissions on the Pre-Trial Judge's finding that no condition could sufficiently mitigate the identified risks outside of the Detention Facilities.[118]

64. At the outset, the Panel agrees with the assessment of the Pre-Trial Judge according to which consultations with a Third State to which a detained person seeks to be released, as provided under Article 41(11) of the Law and Rule 56(4) of the Rules, is compulsory only when the panel intends to grant interim release or envisages the possibility thereof.[119] This finding results from the plain meaning of the relevant provisions. Notably, Article 41(11) of the Law stipulates that "*[i]f released*, any person detained in the Specialist Chambers' detention facilities in the Host State […]" and according to Rule 56(4) of the Rules, a "detained person *shall not be released* in the Third State without the consent of that State".[120] It is also supported by the ICC jurisprudence on which the Pre-Trial Judge relied.[121] The Panel further finds that Thaçi's argument related to the "excessive and unnecessary burden on a Panel" misrepresents the Impugned Decision, as the Pre-Trial Judge did not consider that seeking specifically

[117] See Response, para. 24.
[118] Appeal, paras 38-50.
[119] Impugned Decision, para. 53.
[120] See Article 41(11) of the Law and Rule 56(4) of the Rules (emphasis added). See also, by analogy, Constitutional Court Judgment dated 26 April 2017, para. 14 ("To the extent possible, the Court has incorporated the doctrine of 'harmonious interpretation' into its review of the Rules. Subject to its being bound by the plain meaning of the text, it has proceeded upon the assumption that the provisions of individual rules should not be construed in isolation from other parts of the Rules but rather should be construed so as to harmonise therewith.").
[121] Impugned Decision, para. 53, referring to 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 of14 August 2020 entitled 'Decision on the Defence Request for Interim Release', 8 October 2020 ("*Abd-Al-Rahman* Appeal Decision"), para. 55.

the views of [REDACTED] and [REDACTED] would be an excessive and unnecessary burden,[122] but that the whole procedure suggested by the Defence could be.[123]

65. The Panel now turns to Thaçi's arguments related to the Third State guarantees. First, the Panel notes that the present case differs from the situation of some of Thaçi's co-Accused, where the Pre-Trial Judge acknowledged the need for a further detailed response from the Kosovo Police with regard to the monitoring guarantees provided but did not seek any further information, warranting the intervention of the Appeals Panel.[124] In the present case, the Pre-Trial Judge acknowledged that the lack of thoroughness of any preliminary guarantees cannot prevent a panel, if convinced that interim release subject to conditions is possible, from requesting further information from a Third State.[125] However, the Pre-Trial Judge found that Rule 56(4) of the Rules cannot be interpreted as imposing on a panel a general obligation to seek observations from the State on the territory of which interim release is sought, in the absence of any prospect for the application to succeed.[126] In that regard, the Pre-Trial Judge unequivocally found that no additional conditions, including those proposed by [REDACTED] or any other conditions that might be implemented either in [REDACTED] or in [REDACTED], could sufficiently address the risks posed by Thaçi.[127]

66. The Panel recalls that while State guarantees *may* carry considerable weight in support of an application for provisional release, they are not dispositive and the Pre-

[122] See Appeal para. 45.
[123] Impugned Decision, para. 53.
[124] F00005/RED, Public Redacted Version of Decision on Jakup Krasniqi's AppealAgainst Decision on Review of Detention, 1 October 2021 (original version dated 1 October 2021), para. 56; F00005/RED, Public Redacted Version of Decision on Rexhep Selimi's AppealAgainst Decision on Review of Detention, 1 October 2021 (original version dated 1 October 2021) ("*Selimi* Appeal Decision dated 1 October 2021"), para. 56; F00004/RED, Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention, 1 October 2021 (original version dated 1 October 2021), para. 51.
[125] Impugned Decision, para. 53.
[126] Impugned Decision, para. 53.
[127] Impugned Decision, para. 55.

Trial Judge is under an obligation to consider all relevant factors which a reasonable Judge or Panel would be expected to take into account before reaching a decision on interim release.[128] The Pre-Trial Judge must still assess the weight to be given to such guarantees in light of the circumstances of this case,[129] in particular Thaçi's influential position and [REDACTED].[130]

67. The Pre-Trial Judge considered that no additional conditions, including those proposed by [REDACTED] or any other conditions that might be implemented either in [REDACTED] or in [REDACTED], could sufficiently address the risks posed by Thaçi. The Panel is not of the opinion that the Pre-Trial Judge abused his discretion in reaching these findings. The Panel notes that the guarantees provided by the two States are anyhow very general and cannot be considered as constituting, as such, an unequivocal acceptance to enforce specific conditions of release, contrary to Thaçi's contention.[131] While it would have been within the Pre-Trial Judge's discretion to seek further details before reaching his decision, the Panel considers that he was not obliged to do so in this instance[132] given that the Pre-Trial Judge's findings indicate that, at this stage, he was not convinced that he should grant Thaçi's request for conditional release at all.

[128] *Veseli* Appeal Decision dated 30 April 2021, para. 71 and jurisprudence cited therein.
[129] Ibid.
[130] Impugned Decision, para. 55.
[131] Appeal, para. 44. See also Thaçi Submissions on Detention Review, paras 2, 3, 35, 38, 52-53. See also F00377/A01, Annex 1 to Thaçi Defence Submissions on Detention Review, 30 June 2021 (confidential) ("Annex 1 to Thaçi Submissions on Detention Review") and F00377/A02, Annex 2 to Thaçi Defence Submissions on Detention Review, 30 June 2021 (confidential) ("Annex 2 to Thaçi Submissions on Detention Review").The Panel notes that the letter provided by [REDACTED] is extremely brief, [REDACTED]. See Annex 2 to Thaçi Submissions on Detention Review, p. 3. Additionally, [REDACTED] provides a list of measures that could be put in place for the purpose of monitoring Thaçi's release, however this list appears to be largely based on the conditions outlined in the letter sent by Defence Counsel. See Annex 1 to Thaçi Submissions on Detention Review, p. 3, referring to [REDACTED]. Furthermore, the Panel notes the absence of the letters which the Defence sent to [REDACTED] and [REDACTED].
[132] See *Thaçi* Appeal Decision, paras 84, 89.

68. The Panel agrees with Thaçi that illicit messages and instructions could still be passed in the Detention Facilities.[133] However, such communications would still be submitted to some degree of monitoring in the controlled environment of the Detention Facilities in accordance with the applicable legal framework.[134] Whether the same level of monitoring of conversations can be implemented outside of detention remains, at this stage, unknown. Therefore, the Panel is not convinced that the Pre-Trial Judge's decision is based on a flawed understanding of the communication monitoring framework of the Detention Facilities.[135]

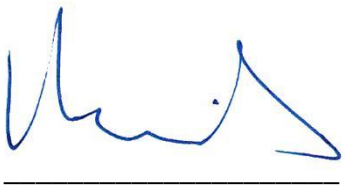
69. The Appeals Panel therefore finds that Thaçi fails to demonstrate that the Pre-Trial Judge committed any error in his assessment of the conditions of release, nor that he abused his discretion. In view of the foregoing, the Court of Appeals Panel therefore dismisses Thaçi's arguments under grounds of appeal 6 and 7.

[133] See Appeal, para. 49.
[134] See notably KSC-BD-09/Rev1/2020, Registry Practice Direction on Detainees Visits and Communications, 23 September 2020 ("Practice Direction"). In the Detention Centre, visits with a detainee are conducted within the sight and hearing of Detention Officers and they may order the recording, listening to, summarising, and transcribing of visits with certain visitors (Article 15 of the Practice Direction). Unmonitored communications are in fact strictly limited. For instance, the accused are allowed unmonitored "private visits" but only for certain close family members and within limited time periods (Article 24 of the Practice Direction). See also more generally, Rules on Detention, 23 September 2020, Detention Management Unit Instructions, 23 September 2020. See also Response, para. 25.
[135] Contra Appeal, paras 47-50.

IV. DISPOSITION

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

DENIES the Appeal.



Judge Michèle Picard,

Presiding Judge

Judge Nina Jørgensen appends a partially dissenting opinion.

Dated this Wednesday, 27 October 2021

At The Hague, the Netherlands

PARTIALLY DISSENTING OPINION OF JUDGE NINA JØRGENSEN

1. The issue presented to the Court of Appeals Panel is whether, in the context of the review of Hashim Thaçi's pre-trial detention, the Pre-Trial Judge committed errors of law, errors of facts or abused his discretion,[1] and consequently whether the Panel should reverse the Impugned Decision.[2] Although I agree with the Panel's assessment in relation to most aspects of the Appeal, I respectfully disagree with the decision of the Majority on Ground 6. In light of the specific circumstances of this case and for the purpose of consistency with prior decisions issued by the Court of Appeals Panel regarding Thaçi's co-Accused, I would have allowed this ground of appeal and remanded the matter to the Pre-Trial Judge in order to assess whether the Third States identified in the Impugned Decision ("The Third States") that had indicated their general willingness to accept the Accused could effectively enforce the Proposed Conditions.

2. As explained in my reasoning below, in my opinion the Pre-Trial Judge did not have sufficient information before him regarding the proposed conditions of release to enable him to make an informed decision as to the mitigation of the identified risks. I wish to emphasise that remanding the matter to the Pre-Trial Judge as the primary finder of fact in this instance does not amount to granting conditional release. In my view, this is a matter of the integrity of the process rather than the reasonableness of specific outcomes at this stage of the proceedings.

3. Based on his interpretation of the scope of Rule 56(4) of the Rules, read with Article 41(11) of the Law, the Pre-Trial Judge found that a Panel shall only seek the views of a Third State "when it intends to grant interim release or envisages the possibility thereof".[3] In these circumstances, the Pre-Trial Judge considered that if a Panel has insufficient information regarding the conditions of release, it shall seek

[1] Appeal, paras 3, 6-50.
[2] Appeal, paras 53-54.
[3] Impugned Decision, para. 53.

additional information from the Third State and that, therefore, "the lack of thoroughness of any preliminary guarantees cannot prevent a Panel, if convinced that interim release subject to conditions is possible, from requesting further information and clarifications from the Third State concerned".[4] Since the Pre-Trial Judge considered that no additional conditions, including those proposed by The Third States, could sufficiently address the risks posed by Thaçi, he concluded that he was not required to seek the views of these States regarding Thaçi's conditional release.[5]

4. The Pre-Trial Judge referred to the jurisprudence of the ICC Appeals Chamber in support of his reasoning.[6] Notably, the ICC Appeals Chamber has found that:

> [a] Chamber's obligations to specify conditions and, if necessary, seek additional information regarding conditions of release are only triggered when: (a) the Chamber is considering conditional release; (b) a State has indicated its general willingness and ability to accept a detained person into its territory; and (c) the chamber does not have sufficient information before it regarding the conditions of release to enable it to make an informed decision.[7]

Where an ICC Chamber's obligations in this respect are triggered, "[d]epending on the circumstances, the Chamber may have to seek further information from the State if it finds that the State's observations are insufficient to enable the Chamber to make an informed decision".[8] The ICC Appeals Chamber has stressed in this context that a Chamber is not obliged to grant conditional release upon receiving such observations, rather, it is only obliged to "seek information that would enable it to make an informed decision on the matter".[9]

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[4] Impugned Decision, para. 53.
[5] Impugned Decision, paras 55-56.
[6] Impugned Decision, para. 53.
[7] *Abd-Al-Rahman* Appeal Decision, para. 60 referring to ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-1937-Red2, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled "Decision on the accused's application for provisional release in light of the Appeals Chamber's judgment of 19 August 2011", 15 December 2011, para. 35.
[8] *Bemba* Appeal Judgement dated 12 September 2011, para. 55.
[9] *Bemba* Appeal Judgement dated 12 September 2011, para. 55.

5. In contrast to the position at the ICC, where in principle a chamber *may* consider conditional release if it is established that identified risks remain,[10] at the Specialist Chambers, in order fully to comply with the constitutional standards, a panel *must* consider more lenient measures when deciding whether a person should be detained.[11] Notwithstanding this distinction, even before the ICC the discretion of the judges is limited when a State has offered to enforce conditions of release. In the *Gbagbo* Appeal Judgement dated 26 October 2012, the ICC Appeals Chamber observed that in circumstances in which a State has offered to accept a detained person and to enforce conditions, "it is incumbent upon the Pre-Trial Chamber to consider conditional release".[12]

6. As the Pre-Trial Judge correctly noted, this should not be interpreted as an obligation to seek the views "of possibly a number of Third States", contrary to the important principles of efficiency and judicial economy.[13] Nevertheless, when the Pre-Trial Judge is provided with the guarantees of Third States affirming their willingness and ability to enforce conditions of release in respect of an accused before the Specialist Chambers, he should duly consider and assess those guarantees. This conclusion follows from the fundamental right to liberty of an accused person in pre-

[10] ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-631-Red, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", 2 December 2009, para. 105: "[i]f the [Chamber] is satisfied that the conditions set forth in article 58 (1) of the Statute are not met, it shall release the person, with or without conditions. *If*, however, the release would lead to any of the risks described in article 58 (1) (b) of the Statute, the Chamber *may*, pursuant to rule 119 of the Rules of Procedure and Evidence, examine appropriate conditions with a view to mitigating or negating the risk." (emphasis added)

[11] *Selimi* Appeal Decision dated 30 April 2021, para. 85, referring to Constitutional Court Judgment dated 26 May 2020, para. 70.

[12] See *Gbagbo* Appeal Judgement dated 26 October 2012, para. 79. See also ICC *Prosecutor v. Bemba et al*., ICC-01/05-01/13-559, Judgment on the appeal of Mr Fidèle Babala Wandu against the decision of Pre-Trial Chamber II of 14 March 2014 entitled "Decision on the 'Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu'", 11 July 2014, para. 116; ICC, *Prosecutor v. Bemba et al*., ICC-01/05-01/13-560, Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled "Decision on the 'Requête de mise en liberté' submitted by the Defence for Jean-Jacques Mangenda", 11 July 2014, para. 128.

[13] Impugned Decision, para. 53.

trial detention and the presumption of innocence governing this part of the proceedings.[14]

7. Conducting an enquiry to establish whether the guarantees offered by specific Third States are sufficient to ensure that conditions could be effectively implemented and enforced would also fall within the discretionary powers the Pre-Trial Judge is vested with pursuant to Article 39(13) of the Law with regard to detention related matters, depending on the circumstances of the case.[15]

8. While the Pre-Trial Judge acknowledged that he shall assess whether conditions, be they the ones proposed by The Third States or any others imposed *proprio motu*, mitigate or otherwise sufficiently address the risks posed by Thaçi,[16] the Impugned Decision does not address the adequacy of the guarantees put forward, or indeed the appropriateness of the proposed locations for conditional release in the circumstances of the case. Moreover, the possible enforceability of the Proposed Conditions or any other conditions that could be imposed in the Third States was not factored into the Pre-Trial Judge's assessment of whether the risks identified under Article 41(6)(b)(ii) of the Law could be sufficiently mitigated.

9. In my opinion, the Pre-Trial Judge abused his discretion in concluding that no additional conditions, including those proposed by one of The Third States or any other conditions that might be implemented in either of The Third States, could sufficiently address the risks he had identified[17] without first inquiring into those Third State guarantees and requesting further information in light of the evident lack of thoroughness of the guarantees provided. It is also relevant to note that the Pre-

[14] See *Selimi* Appeal Decision dated 30 April 2021, para. 86; *Gucati* Appeal Decision, para. 73.
[15] *Shala* Appeal Decision, para. 60. See also *Selimi* Appeal Decision dated 1 October 2021, para. 56.
[16] Impugned Decision, para. 54.
[17] Impugned Decision, para. 55.

Trial Judge decided not to seek the views of TheThird States regarding Thaçi's interim release into their respective territories despite Thaçi's request for him to do so.[18]

10. I consider that the Pre-Trial Judge should have ensured that the information, evidence and submissions available to him were sufficient to make an informed decision on whether any conditions could in practice mitigate the identified risks.[19] Had the Pre-Trial Judge heard The Third States, he would have been in a position to assess whether they could effectively enforce the Proposed Conditions or any additional measures deemed necessary to mitigate the identified risks. Detailed information of this kind would have given the Pre-Trial Judge a more complete and solid factual basis to assess the feasibility of such conditions, without of course anticipating the outcome of the final determination on these matters.

11. In this regard, I appreciate that the Majority distinguished its approach in the present case from the one adopted in the cases of Thaçi's co-Accused by underlining that in the latter cases, the Pre-Trial Judge acknowledged the need for further details with regard to the guarantees provided, but did not seek any additional information and nonetheless dismissed the respective applications.[20] The Majority further underlined that in the present case, the Pre-Trial Judge unequivocally found that no additional conditions, including those proposed by The Third States, could sufficiently address the risks posed by Thaçi.[21] Nothwithstanding these different findings of the Pre-Trial Judge and the different features of the four individual cases that may reasonably result in different outcomes, in my opinion a feature common to these cases is that the Pre-Trial Judge did not have sufficient information before him regarding the proposed conditions of release to enable him to make an informed decision as to the mitigation of the identified risks. Accordingly, I would have

[18] Impugned Decision, para. 56. See also Thaçi Submissions on Detention Review, paras 3, 42.
[19] *Bemba* Appeal Judgement dated 12 September 2011, paras 55-56.
[20] See views of the Majority at para. 65 of the Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention and references quoted therein.
[21] Ibid.

remanded the matter to the Pre-Trial Judge in the present case, following a consistent approach with regard to the four Accused, while noting that seeking information in order to make an informed decision does not oblige a panel upon receiving any observations to grant conditional release.

12. In light of my opinion regarding Thaçi's sixth ground of appeal, I would not have addressed his seventh ground of appeal at this stage.

Judge Nina Jørgensen

Dated this Wednesday, 27 October 2021

At The Hague, the Netherlands