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In:	**KSC-BC-2020-06**
	The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**The President of the Specialist Chambers**
	Judge Ekaterina Trendafilova
Registrar:	Dr Fidelma Donlon
Filing Participant:	Defence Counsel for Jakup Krasniqi
Date:	6 April 2022
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Krasniqi Defence Appeal Against Decision on Remanded Detention Review Decision and Periodic Review of Detention of Jakup Krasniqi, KSC-BC-2020-06/IA016/F00001, dated 9 December 2021

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I. INTRODUCTION

1. Pursuant to Article 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 170 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), the Defence for Jakup Krasniqi ("Defence") submits his appeal against the Decision on Remanded Detention Review Decision and Periodic Review of Detention of Jakup Krasniqi ("ID").[1]

2. Since the ID relates to detention on remand, Mr. Krasniqi may appeal as of right pursuant to Article 45(2).[2]

3. Having determined that risks within Article 41(6)(b)(i), (ii) and (iii) continue to exist,[3] the ID was required to assess the possibility of mitigating those risks by imposing conditions. Despite comprehensive information provided by the Kosovo Police ("KP")[4] which confirmed their capacity to monitor conditions amongst the most extensive ever proposed by a comparable court or tribunal, the ID misinterpreted the KP Submissions and erroneously held that the KP had not provided guarantees establishing that they had the capacity to implement measures that would sufficiently minimise the identified risks.[5] The ID further determined that detention remained proportionate and there had been no undue delay by the Specialist Prosecutor's Office ("SPO").[6]

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[1] KSC-BC-2020-06, F00582, Pre-Trial Judge, *Decision on Remanded Detention Review Decision and Periodic Review of Detention of Jakup Krasniqi*, 26 November 2021, confidential.
[2] KSC-BC-2020-07, IA001/F00005, Court of Appeals Chamber, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention* ("*Gucati* Appeal Decision"), 9 December 2020, public, paras 15, 18.
[3] ID, paras 38, 47, 53-54.
[4] KSC-BC-2020-06, F00548/eng, CMU, *Answer to the Request Number KSC-BC-2020-06, dated 13 October 2021* ("KP Submissions"), 3 November 2021, confidential.
[5] ID, para. 77.
[6] *Ibid*., paras 99-100.

4. The Defence appeals on the following grounds:-

1) The Impugned Decision erred in law and fact and made discernible errors in determining that release on the proposed conditions was insufficient to mitigate the identified risks;

2) The Impugned Decision erred in law and fact in failing to consider ordering additional conditions *proprio motu*;

3) The Impugned Decision erred in law and fact in determining that there was no undue delay by the SPO and that ongoing detention was proportionate.

5. These errors, individually and cumulatively, led to the erroneous decision that the continued detention of Mr. Krasniqi was necessary. The Defence requests the Court of Appeals Chamber ("Appeals Chamber") to correct these errors, apply correct legal standards to the evidence and release Mr. Krasniqi subject to appropriate conditions.

6. Whilst the Defence does not concede that Mr. Krasniqi poses any risk in relation to Article 41(6)(b)(i)-(iii) of the Law, this Appeal does not challenge this aspect of the ID. Instead, this Appeal is focussed on the ID's erroneous assessment of the mitigation of those identified risks by conditions capable of being monitored by the KP and, separately, on undue delay and proportionality.

II. PROCEDURAL HISTORY

7. On 4 November 2020, Mr. Krasniqi was arrested and transferred to the Kosovo Specialist Chambers ("KSC") detention center.

8. On 1 October 2021, the Appeals Chamber granted in part Mr. Krasniqi's appeal against the Pre-Trial Judge's Decision on Review of Detention of Jakup Krasniqi[7] and held that the Pre-Trial Judge erred in finding that conditions could not mitigate the identified risks without seeking further information from the KP.[8] The Appeals Chamber remanded the issue of conditional release to the Pre-Trial Judge.

9. On 8 October 2021, the Pre-Trial Judge ordered the KP to provide further information about their ability to monitor conditions of release.[9] On 13 October 2021, the Pre-Trial Judge ordered the Registry to provide information on conditions applicable in the Detention Unit ("DU").[10]

10. On 13 October 2021, the Defence filed its Observations on Detention Review Timeline and Submissions on Second Detention Review.[11]

11. On 20 October 2021, the Registry filed submissions setting out the detention conditions applicable at the KSC.[12]

[7] KSC-BC-2020-06, F00371, Pre-Trial Judge, *Decision on Review of Detention of Jakup Krasniqi*, 25 June 2021, confidential.
[8] KSC-BC-2020-06, IA006/F00005, Court of Appeals Chamber, *Decision on Jakup Krasniqi's Appeal Against Decision on Review of Detention* ("Decision on Krasniqi's Appeal"), 1 October 2021, confidential, paras 56-58, 60.
[9] KSC-BC-2020-06, F00513, Pre-Trial Judge, *Order to the Kosovo Police to Provide Information*, 8 October 2021, public, with Annex, confidential.
[10] KSC-BC-2020-06, F00522, Pre-Trial Judge, *Order to the Registrar to Provide Information on the Detention Regime,* 13 October 2021, public.
[11] KSC-BC-2020-06, F00524, Krasniqi Defence, *Krasniqi Defence Observations on Detention Review Timeline and Submissions on Second Detention Review* ("Submissions"), 13 October 2021, confidential.
[12] KSC-BC-2020-06, F00536, Registrar, *Registry Submissions Pursuant to the Order to Provide Information on the Detention Regime (F00522)* ("Registry Submissions"), 20 October 2021, confidential.

12. On 22 October 2021, the SPO filed the Consolidated Response to the detention review submissions.[13] The Defence replied on 1 November 2021.[14]

13. On 27 October 2021, the KP Submissions were filed. On 8 and 12 November 2021, the SPO and the Defence filed their respective observations on the KP Submissions.[15]

14. On 26 November 2021 (notified on 29 November 2021), the Pre-Trial Judge rendered the ID.

III. APPLICABLE LAW

15. Appeals may challenge errors of law and errors of fact.[16] In relation to errors of law, a party "must identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision".[17] Regarding errors of fact, the Court will "only find the existence of an error of fact when no reasonable trier of fact could have made the impugned finding" and the factual error must have "caused a miscarriage of justice" by affecting the outcome of the decision.[18]

16. Further, in relation to a discretionary decision:-

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[13] KSC-BC-2020-06, F00540, Specialist Prosecutor, *Prosecution Consolidated Response to October 2021 Defence Submissions on Detention Review* ("Consolidated Response"), 22 October 2021, confidential.
[14] KSC-BC-2020-06, F00554, Krasniqi Defence, *Krasniqi Defence Reply to Prosecution Consolidated Response to October 2021 Defence Submissions on Detention Review*, 1 November 2021, confidential.
[15] KSC-BC-2020-06, F00562, Specialist Prosecutor, *Prosecution Response to Kosovo Police Submissions on Detention*, 8 November 2021, confidential, with Annex 1, public; F00568, Krasniqi Defence, *Krasniqi Defence Observations on Kosovo Police Submissions* ("Krasniqi Observations"), 12 November 2021, confidential.
[16] Article 46(1) of the Law, which applies *mutatis mutandis* to interlocutory appeals (*Gucati* Appeal Decision, para. 10).
[17] *Gucati* Appeal Decision, para. 12. In the same paragraph, the Appeals Chamber continued "[…] *even if the party's arguments are insufficient to support the contention of an error, the Panel may find for other reasons that there is an error of law*".
[18] *Gucati* Appeal Decision, para. 13.

> a party must demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion. The Court of Appeals Panel will also consider whether the lower level panel has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.[19]

IV. GROUND 1

The Impugned Decision erred in law and fact and made discernible errors in determining that release on the proposed conditions was insufficient to mitigate the identified risks

17. The ID erred in law in applying the wrong standard to the KP Submissions and Registry Submissions, erred in fact in misunderstanding or misinterpreting the evidence, took into account irrelevant 'contextual' considerations and committed discernible errors in determining that conditions remain insufficient to mitigate the identified risks.

Errors of Law

18. First, the ID erred by reversing the burden of proof applicable to interim release. Tellingly, it held that "the Kosovo Police have not provided guarantees establishing that they have the capacity to implement corresponding measures that sufficiently minimise the existing risks".[20] That clearly placed the burden of proof on the Defence to prove that the KP have the capacity to implement relevant measures.[21] The correct position, however, which flows from the presumption of liberty,[22] is that it is for the SPO to establish that detention is necessary[23] and therefore to prove that the KP lack the requisite capacity.

[19] *Gucati* Appeal Decision, para. 14.
[20] ID, para. 77.
[21] *See* further ID, para. 79 requiring the KP to prove their experience in monitoring provisional release.
[22] Constitution of the Republic of Kosovo, Article 29(1); Law, Article 41(1).
[23] KSC-BC-2020-06, IA002/F00005, Court of Appeals Chamber, *Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release* ("Appeal Decision Interim Release"), 30 April 2021, confidential, para. 23;

19. Second, whilst finding that measures "would not adequately mitigate the risks",[24] the ID failed to articulate the threshold to which risks must be mitigated in order to allow interim release. The likelihood of a risk arising must be "more than a mere possibility".[25] As developed below,[26] had the ID properly assessed the remaining level of risk, it would have found that any remaining risks do not rise above the level of mere possibility.

20. Third, the ID relied heavily on comparing the conditions in the DU against the KP Submissions,[27] [REDACTED].[28] That imposes an erroneously high standard. The test is not whether conditional release would be 'comparable' to detention,[29] but whether detention remains necessary because identified risks are not adequately mitigated by the conditions identified by the Defence and the KP. Conditional release may thus adequately mitigate the identified risks without being co-extensive with the conditions at the DU. Indeed, the only significance of conditions at the DU is that if conditional release is capable of providing an equivalent protection to the DU, it is manifestly unreasonable to find that the conditional release is inadequate.

Errors of Fact or Unreasonable Evaluations

21. In evaluating the KP Submissions and the Registry Submissions, the ID made fundamental errors of fact. The critical factual findings were that:-

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F00180, Pre-Trial Judge, *Decision on Jakup Krasniqi's Application for Interim Release*, 22 January 2021, confidential, para. 17.
[24] ID, para. 81.
[25] Appeal Decision Interim Release, para. 26.
[26] *See* paras 21-35 below.
[27] For instance ID, para. 71 "[b]y contrast, at the SC Detention Facilities"; para. 73 "unlike Mr Krasniqi's private residence, the SC Detention Facilities".
[28] ID, para. 74.
[29] The Appeals Chamber found that the Pre-Trial Judge was required to request further information from the KP not from the Registry, *see* Decision on Krasniqi's Appeal, paras 56-58, 60.

- [REDACTED].[30] [REDACTED];[31]

- At the DU, unmonitored visits are "strictly limited" and other visits are "conducted within the sight and general hearing of SC Detention Officers";[32]

- [REDACTED].[33] [REDACTED].[34] [REDACTED];[35]

- [REDACTED].[36]

22. Each of these findings was patently incorrect, illogical, or disregarded relevant evidence or submissions. [REDACTED]. [REDACTED]. [REDACTED].[37] [REDACTED].[38] [REDACTED]; [REDACTED][39] [REDACTED]. [REDACTED].

23. [REDACTED].[40] [REDACTED];[41] [REDACTED];[42] [REDACTED].[43] [REDACTED]. [REDACTED].

24. Third, the ID unreasonably found that the proposed conditions offered lesser protection than the DU because at the DU unmonitored visits are "strictly limited"

[30] [REDACTED].
[31] [REDACTED].
[32] *Ibid*., para. 71.
[33] [REDACTED].
[34] [REDACTED].
[35] [REDACTED].
[36] ID, para. 75.
[37] [REDACTED].
[38] [REDACTED].
[39] [REDACTED].
[40] [REDACTED].
[41] [REDACTED].
[42] [REDACTED].
[43] [REDACTED].

and other visits are conducted "within the sight and general hearing" of DU Officers.[44] This is patently unreasonable. Unmonitored visits occur in the DU, [REDACTED]. The ID considerably understated the extent of unmonitored communications in the DU; telephone conversations from the DU are only passively monitored so that a mere 10% of calls are listened to.[45] In any event, limiting the duration of unmonitored visits is no safeguard;[46] coded messages can be passed quickly. Further, that monitored visits occur within the "sight and general hearing" of a DU Officer actually confirms that not every word spoken is actively monitored. Coded messages could be passed whilst within the general hearing of a DU Officer, [REDACTED]. [REDACTED].[47] It was unreasonable to find that the risk of passing information would be greater on conditional release than in the DU given the occurrence of unmonitored visits and telephone calls in the DU [REDACTED].

25. Fourth, the ID erred in finding [REDACTED].[48] [REDACTED]. [REDACTED].[49] [REDACTED]. [REDACTED],[50] [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

26. [REDACTED]. The general contours of the case are publicly known: there is a public version of the Indictment and many of the underlying crimes have been tried before, including within Kosovo. [REDACTED].

[44] ID, para. 71.
[45] Registry Submissions, paras 18-19, 26-28.
[46] *Contra* ID, para. 71.
[47] [REDACTED].
[48] ID, para. 74.
[49] Registry Submissions, para. 30.
[50] [REDACTED].

27. [REDACTED].[51] [REDACTED].[52] [REDACTED][53] [REDACTED].[54] [REDACTED]. [REDACTED]. [REDACTED].

28. The result is that the ID's evaluation of the conditions proposed by the KP and at the DU was fatally flawed because it was based on patently incorrect findings of fact and misread or misinterpreted the relevant submissions to the detriment of Mr. Krasniqi.

29. Moreover, the ID failed to consider the extent to which the proposed conditions mitigate the risks specifically identified in relation to Mr. Krasniqi. [REDACTED].[55] [REDACTED]. Any remaining risk is no more than a mere possibility and hence cannot justify ongoing detention.

Error in Consideration of Irrelevant Factors

30. The ID considered wholly irrelevant contextual factors. First, even if *arguendo* it is correct that "the very reason for establishing the SC was that criminal proceedings against (high-ranking) former KLA members could not be conducted in Kosovo" and that the procedural framework was designed to ensure the protection of witnesses,[56] that does not affect the availability of interim release or diminish the capacities of the KP. Indeed, that the Law nevertheless enshrines the presumption of liberty, demonstrates that these factors cannot automatically be relied upon to deny provisional release in this and every case.

[51] [REDACTED].
[52] [REDACTED].
[53] [REDACTED].
[54] [REDACTED].
[55] [REDACTED].
[56] ID, para. 80.

31. Second, the ID erred in finding that it has been insufficiently demonstrated that the KP have experience in enforcing the conditional release of individuals accused of serious crimes. [REDACTED].[57] [REDACTED].[58] [REDACTED][59] [REDACTED].[60]

32. Third, the mantra that there is a "persisting climate" of witness interference in Kosovo[61] should not have been a decisive consideration in this case. The SPO relies on examples of historic cases[62] and has not demonstrated that this climate truly persists today, more than 20 years after the end of the armed conflict. In any event, evidence of a general climate is irrelevant in the absence of any evidence that Mr. Krasniqi is connected to or contributed to that climate, and irrelevant to the instant issue which relates to the enforceability of conditions and assessment of risk.

Conclusion on Ground One

33. The ID's conclusion that the conditions in the KP Submissions fail adequately to mitigate the identified risks was a discernible error, its assessment of the KP Submissions and the Registry Submissions is vitiated by multiple legal and factual errors.

34. Fundamentally, the identified risks related to Mr. Krasniqi [REDACTED]. These risks are mitigated by proposed conditions [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]. Indeed, these conditions are as extensive as anything previously imposed by any international tribunal.

[57] [REDACTED].
[58] [REDACTED].
[59] [REDACTED].
[60] [REDACTED].
[61] ID, paras 45, 80.
[62] Consolidated Response, para. 13.

35. Release does not depend on identified risks being entirely eliminated, but on articulable risks being reduced to an acceptable level. Any risks that would remain after the imposition of the above conditions would be (i) no more than a mere possibility, particularly regarding Mr. Krasniqi who benefits from the presumption of innocence, has never previously been accused of involvement in witness interference and has no background in intelligence services; and (ii) no greater than the risks which exist at the DU, so that ongoing detention is not necessary. The only reasonable conclusion is that the identified risks would be adequately reduced by the proposed conditions and release should be granted.

V. GROUND 2

The Impugned Decision erred in law and fact in failing to consider ordering additional conditions proprio motu

36. The ID held that there was insufficient basis to order additional measures *proprio motu* because the KP Submissions did not accept that any measure ordered would be adequately implemented and no additional measures can guarantee that fundamental concerns about illicit communications can be mitigated.[63]

37. The ID thus disregarded the KP Submissions which stated that any order of the KSC would be enforced by the KP and failed to consider measures which the Pre-Trial Judge could have ordered to mitigate the identified risks.

38. First, the assessment of whether additional conditions can be enforced or mitigate risks necessarily depends on the specific additional conditions which must be assessed on a case-by-case basis.[64] The blanket dismissal of the KP's ability to

[63] ID, para. 82.
[64] Decision on Krasniqi's Appeal, para. 54.

enforce any additional measures *in abstracto* (despite the KP's stated willingness and ability to enforce the KSC's orders), was wrong in principle and defeats the whole purpose of remanding the issue to the Pre-Trial Judge, sending detailed questions to the KP and receiving the KP Submissions. The ID was required to set out potential additional measures and assess them *in concreto*.

39. Second, there can be no doubt that the KP are willing, ready and able to implement any order made by the KSC. [REDACTED]: [REDACTED][65] [REDACTED].[66] This can only reasonably be read as an acceptance of readiness and acknowledgment of available capacity so that any measure ordered by the Pre-Trial Judge would be implemented by the KP.[67] The contrary finding is perverse.

40. Nor was there any or any reasonable evidential basis for doubting that measures would be "adequately implemented".[68] [REDACTED].[69] [REDACTED][70] [REDACTED].

41. The ID's finding that international organisations have recently documented that corruption continues to affect the criminal justice system in Kosovo is inaccurate and unreasonable.[71] All three reports cited relate to corruption in Kosovo generally not within the KP.[72] Indeed amongst the cited reports, in relation to war crimes cases EULEX commended the "considerable progress achieved by the Kosovo Police",[73] whilst the European Commission confirmed that Kosovo had met a benchmark to

[65] [REDACTED].
[66] [REDACTED].
[67] *Contra* ID, para. 82.
[68] *Ibid*.
[69] [REDACTED].
[70] [REDACTED].
[71] ID, para. 80.
[72] *Ibid*., fn. 150.
[73] European Union Rule of Law Mission, *Justice Monitoring Report*, October 2020, p. 23.

strengthen the track record in the fight against organised crime and corruption.[74] Accordingly, the ID erred in declining to consider whether additional measures could be imposed on the basis of vague and unsupported concerns about the adequacy of their implementation.

42. Third, the ID erred in finding that no additional measures could mitigate the identified risk of illicit communication. The Defence notes that the aim is to reduce risk to an acceptable level, not to eliminate risk or "guarantee"[75] that concerns can be mitigated. [REDACTED]. Additional measures could obviously limit this risk. [REDACTED]: [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]. All these and other additional measures warranted consideration because they would reduce the identified risks and increase the chance of detection of any rule breaches. The ID erred in failing to consider and assess these and any other potential additional measures.

43. These errors invalidate the ID. At no point did it set out all the extensive measures offered by the Defence and supported by the KP, together with any additional measures which could have been ordered, and actually conduct a comprehensive assessment of whether a sufficient risk of witness interference or commission of further crimes remained so as to justify ongoing detention. The only reasonable conclusion is that comprehensive measures could have been adopted which would have reduced any risks to the level of mere possibility and rendered ongoing detention unnecessary.

VI. GROUND 3

[74] European Commission, *Kosovo Report 2021*, 19 October 2021, p. 23.
[75] ID, para. 82.

The Impugned Decision erred in law and fact in determining that there was no undue delay by the SPO and that ongoing detention was proportionate

44. The ID held that the time that Mr. Krasniqi has spent in detention is "not unreasonable" and is "proportionate".[76] The separate issue of undue delay raised by the Defence[77] was dismissed for two reasons: good cause has been demonstrated for delays regarding particular time limits and progress continues to be made towards completing the pre-trial proceedings in the foreseeable future.[78] Both reasons are erroneous.

45. The ID made no legal findings on the meaning of the second sentence of Rule 56(2), which provides that "[i]n case of an undue delay caused by the Specialist Prosecutor, the Panel, having heard the Parties, may release the person under conditions as deemed appropriate". It thus defines a separate and distinct basis for release, which is defined by undue delay by the SPO.[79]

46. The drafting of Rule 56(2), however, differs significantly from Article 60(4) of the ICC Statute which is its equivalent. First, the adjective "undue" in Rule 56(2) rather than "inexcusable" in the ICC Statute clearly reflects a lower standard of culpability. 'Undue' means exceeding or violating propriety or fitness.[80] 'Inexcusable' requires that the excess or violation of propriety is beyond excusing. Second, Article 60(4) of the ICC Statute requires a connection between an "unreasonable period" of detention and the "inexcusable delay". By contrast, Rule 56(2) addresses an unreasonable period

[76] ID, para. 99.
[77] Submissions, paras 28, 31-45.
[78] ID, para. 100.
[79] *See*, ICC, *Prosecutor v. Bemba et al*., ICC-01/05-01/13-969, Appeals Chamber, *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. 42.
[80] *Merriam-Webster Online Dictionary*, undue, adj., Merriam-Webster 2021.

of detention and undue delay disjunctively in two separate sentences. The result is that undue delay may, subject to the Court's discretion, be a ground for release at the KSC without necessarily also requiring that the overall period of detention is unreasonable.

47. The ID erred in finding that progress made towards completion of the pre-trial process determined that there was no undue delay.[81] The existence of undue delay depends on the SPO's conduct. Progress towards completion of the pre-trial process is irrelevant in itself; what matters is whether the SPO has unduly delayed any such progress. The ID failed to carry out that assessment.

48. Furthermore, the ID erred in forgiving the SPO's delays on the basis that "good cause has been demonstrated for delays regarding particular time limits".[82] Despite acknowledging that there have been delays,[83] the finding that good cause had been demonstrated wholly fails to appreciate and address the scale of the individual and cumulative delays which will extend the pre-trial detention of Mr. Krasniqi.

49. The ID failed to analyse all of the SPO's undue delays which the Defence had pleaded. These include:

1) The Pre-Trial Brief, which the SPO is due to file on 17 December 2021 with related materials to be filed on 28 January 2022,[84] having previously submitted that it would be ready to file both the Pre-Trial Brief and related materials in early July 2021.[85] This is a delay of **more than six months**. Since

[81] ID, para. 100.
[82] *Ibid*.
[83] *See also ibid*., para. 99.
[84] KSC-BC-2020-06, In Court – Oral Order, Order on SPO's Pre-Trial Brief and Related Material According to Rule 95(4)(a), 29 October 2021, public.
[85] KSC-BC-2020-06, Transcript of Hearing, 17 December 2020, public, p. 199, lines 17-20.

no deadline was initially set by the Court, there has been no finding of good cause for this delay;

2) Rule 102(1)(b) disclosure was due to be completed on 31 May 2021,[86] but is currently extended to 31 January 2022 – a delay of **eight months**;

3) The SPO's Rule 102(3) Notice was supposed to be provided on 30 April 2021, with the Defence to indicate which documents it wished to inspect by 14 June 2021 and disclosure to follow by 5 July 2021.[87] Following a granted extension, the Rule 102(3) Notice provided by the SPO on 31 July 2021 was inadequate[88] and the SPO had to provide a revised version on 22 October 2021. The delay in providing a complete Notice was therefore **six months** and the delay attributable to the SPO in the Rule 102(3) process is **ongoing**. Whilst there was a finding of good cause for the initial extension to 31 July 2021, the delay beyond this point is because the Notice prepared by the SPO was inadequate;

4) The SPO's investigation remains ongoing and the processes of Rule 103 disclosure and Rule 107 disclosure remain ongoing despite the Pre-Trial Judge repeatedly inquiring at Status Conferences when these are going to be completed.

50. As a result, the cursory finding that "good cause has been demonstrated for delays" is wrong. It is factually wrong because no finding of good cause has been

[86] KSC-BC-2020-06, F00099, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 23 November 2020, public, para. 99(e).
[87] *Ibid*., para. 99(f), (g), (h).
[88] KSC-BC-2020-06, F00460, Pre-Trial Judge, *Decision on the Defence Request for an Amended Rule 102(3) Notice*, 8 September 2021, public, paras 19-20.

made in relation to the delay to the Pre-Trial Brief, the ongoing delays to the Rule 102(3) timetable or the other ongoing processes.

51. Further, having failed to set out and assess each individual prosecutorial delay, the ID also failed to evaluate the cumulative effect of the delays. The delay in this case is undue – it exceeds propriety – not only because of the individual delays, but also because overall the SPO has repeatedly failed to comply with any of its own estimates or the deadlines imposed by the Pre-Trial Judge. Insofar as the ID found that the SPO's estimates were not relevant,[89] that approach is erroneous. The fact that the SPO has delayed by six months or more beyond its own estimates is highly relevant to whether the delay is "undue". Indeed, the delay beyond the SPO's own estimates also refutes the inevitable response that this is a large and complex case, since any competent estimate would have taken the size and complexity of the case into account.

52. Mr. Krasniqi has been detained for more than one year. The SPO has yet to file its Pre-Trial Brief and related materials; yet to complete Rule 102(1)(b) disclosure and relevant translations, Rule 102(3) disclosure, Rule 103 disclosure and Rule 107 disclosure; and yet to complete its investigations. No reasonable court could make any other finding than that the SPO's delay is undue.

53. Furthermore, the ID failed to consider these delays in the context of the ECtHR jurisprudence which requires that "special diligence" be shown in order to justify significant periods of pre-trial detention.[90] The above submissions demonstrate that

[89] ID, para. 97.
[90] ECtHR, *Kalashnikov v. Russia*, no. 47095/99, *Judgment (Merits and Just Satisfaction)*, 15 October 2002, para. 114; *Buzadji v. the Republic of Moldova*, no. 23755/07, *Judgment (Merits and Just Satisfaction)*, 5 July 2016, para. 87; *Bykov v. Russia*, no. 4378/02, *Judgment (Merits and Just Satisfaction)*, 10 March 2009, para. 64; *Letellier v. France*, no. 12369/86, *Judgment (Merits and Just Satisfaction)*, 26 June 1991, para. 35; *Labita v. Italy*, no. 26772/95, *Judgment (Merits and Just Satisfaction)*, 6 April 2000, para. 153; *Idalov v. Russia*, no. 5826/03, *Judgment (Merits and Just Satisfaction)* ("*Idalov* Judgment"), 22 May 2012, para. 140; *Kudła v. Poland*, no. 30210/96, *Judgment (Merits and Just Satisfaction)*, 26 October 2000, para. 111.

the SPO has failed to show special diligence in this case and therefore the ongoing detention is not proportionate.

54. Finally, the ECtHR has also held that whilst an identified risk of obstruction and the gravity of the alleged offences may initially justify detention, those risks do not necessarily continue to justify detention after a period of one year has passed.[91] The ID failed to carry out any proper balancing exercise in relation to proportionality, instead simply repeating prior findings[92] without genuinely assessing the impact of the substantial period of pre-trial detention which has already occurred.

55. The Defence submits that there has been undue delay by the SPO and ongoing detention is disproportionate. Given that Mr. Krasniqi has already been detained for one year, and the KP are evidently ready to enforce any conditions ordered by the KSC, he should be released on such conditions as the Appeals Chamber deems appropriate.

VII. CONCLUSION

56. The number of serious errors in the ID, including on matters previously remanded to the Pre-Trial Judge by the Appeals Chamber, mean that, where the right to liberty is at stake, it would not be sufficient to remand the matter to the Pre-Trial Judge again. The Defence urges the Appeals Chamber to overturn the ID and to order Mr. Krasniqi's release subject to appropriate conditions.

Word count: 4,693 words

[91] *Idalov* Judgment, para. 144; ECtHR, *Merabishvili v. Georgia*, no. 72508/13, *Judgment (Merits and Just Satisfaction)*, 28 November 2017, para. 234.
[92] ID, para. 99.

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Wednesday, 6 April 2022

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