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
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Public Redacted Version of

Krasniqi Defence Appeal Against Decision on Jakup Krasniqi's Application for Interim Release, KSC-BC-2020-06/IA002-F00001, dated 3 February 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 ("the Law") and Rule 170 of the Rules of Procedure and Evidence ("the Rules") before the Kosovo Specialist Chamber ("KSC"), the Defence for Jakup Krasniqi ("Defence") submit his appeal against the Decision on Jakup Krasniqi's Application for Interim Release ("the Impugned Decision").[1]

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

3. The Impugned Decision determined that: a moderate risk of flight exists in relation to Mr. Krasniqi,[3] there is a risk that Mr. Krasniqi will obstruct the progress of KSC proceedings,[4] and a risk that Mr. Krasniqi will commit further crimes.[5] It further concluded that the imposition of appropriate conditions would mitigate the risk of flight[6] but that no conditions would mitigate the risk of Mr. Krasniqi obstructing the progress of KSC proceedings or committing further crimes.[7] Interim release was therefore denied.

4. The Defence submit the following grounds of appeal:-

1) The Impugned Decision erred in law in defining the standard applicable to Article 41(6)(b)(ii) as "acceptance of the possibility, not the inevitability, of

[1] KSC-BC-2020-06, F00180, Pre-Trial Judge, *Decision on Jakup Krasniqi's Application for Interim Release*, 22 January 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* ("the Gucati Appeal Decision"), 9 December 2020, public, paras 15, 18.
[3] Impugned Decision, para. 31.
[4] *Ibid.*, para. 39.
[5] *Ibid.*, para. 43.
[6] *Ibid.*, para. 48.
[7] *Ibid.*, paras 49-50.

a future occurrence. In simple terms, while suspicion simpliciter is not enough, certainty is not required";[8]

2) The Impugned Decision erred in law by failing to respect fundamental human rights, specifically, the presumption of innocence and the right to free speech, which are directly applicable before the KSC;[9]

3) The Impugned Decision made discernible errors in determining that there are articulable grounds to believe that there is a risk that Mr. Krasniqi will obstruct the progress of the KSC's proceedings;[10]

4) The Impugned Decision erred in law in finding that Article 41(6)(b)(iii) is satisfied where "there is a likelihood that the Accused, if released, will, under any form of responsibility, engage in or contribute to crimes similar to the underlying acts charged";[11]

5) The Impugned Decision made discernible errors in determining that there are articulable grounds to believe that there is a risk that Mr. Krasniqi will commit further crimes;[12]

6) The Impugned Decision made discernible errors in concluding that no conditions were capable of mitigating any risks which were correctly identified.[13]

[8] Impugned Decision, para. 18.
[9] *Ibid.*, paras 36, 26-50.
[10] *Ibid.*, paras 32-39.
[11] *Ibid.*, para. 21.
[12] *Ibid.*, paras 40-43.
[13] *Ibid.*, paras 49-50.

5. These errors, individually and cumulatively, led to the erroneous decision that the continued detention of Mr. Krasniqi was necessary. The Defence request the Appeals Court to correct these errors, to apply the correct legal standards to the evidence and to grant interim release to Mr. Krasniqi.

6. The Impugned Decision also erred in finding that Mr. Krasniqi posed a moderate risk of flight.[14] However, it went on to find that the moderate risk of flight was mitigated by the proposed conditions.[15] If the risk of flight had been the only risk, the necessity of detaining Mr. Krasniqi would therefore not have been established and he would have been granted interim release. Accordingly, the erroneous finding that Mr. Krasniqi posed a flight risk did not affect the outcome of the Impugned Decision.

II. PROCEDURAL HISTORY

7. On 26 October 2020, the Pre-Trial Judge confirmed the revised indictment[16] and issued an arrest warrant for Mr. Krasniqi.[17]

8. On 4 November 2020, Mr. Krasniqi was arrested and transferred to the KSC detention center.

9. On 9 November 2020, Mr. Krasniqi made his initial appearance and pleaded not guilty to all of the Counts in the Indictment.[18]

[14] Impugned Decision, para. 31.
[15] *Ibid.*, para. 48.
[16] KSC-BC-2020-06, F00026/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 19 November 2020, confidential.
[17] KSC-BC-2020-06, F00027/A07/COR/RED, Pre-Trial Judge, *Public Redacted Version of Corrected Version of Arrest Warrant for Jakup Krasniqi*, 5 November 2020, public.
[18] KSC-BC-2020-06, Transcript of Hearing (Mr Krasniqi), 9 November 2020, public, p. 18, line 5.

10. On 7 December 2020, the Defence filed their application for interim release.[19] The SPO responded on 17 December 2020.[20] On 6 January 2021, pursuant to an extension ordered by the Pre-Trial Judge,[21] the Defence filed their Reply.[22]

11. On 22 January 2021, the Pre-Trial Judge issued the Impugned Decision.

III. APPLICABLE LAW

12. Appeals may challenge errors of law and errors of fact.[23] In the Gucati Appeal Decision, the Appeals Court elaborated the standards of review applicable in an interlocutory appeal. In relation to errors of law, "[a] party alleging an error of law must identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision".[24] 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 error of fact must have "caused a miscarriage of justice" in that it affected the outcome of the decision.[25]

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

> 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

[19] KSC-BC-2020-06, F00122, Defence for Mr Krasniqi, *Application for Interim Release* ("Application for Interim Release"), 7 December 2020, confidential, with Annexes 1-2, confidential, and Annex 3, public.
[20] KSC-BC-2020-06, F00153, Specialist Prosecutor, *Prosecution Response to Application for Interim Release on behalf of Mr Jakup Krasniqi* ("SPO Response to Interim Release"), 17 December 2020, confidential, with Annex 1, confidential.
[21] KSC-BC-2020-06, F00155, Pre-Trial Judge, *Decision on Defence Requests to Vary Time Limits*, 18 December 2020, public, para. 23.
[22] KSC-BC-2020-06, F00163, Defence for Mr Krasniqi, *Krasniqi Defence Reply to Prosecution Response to Application for Interim Release* ("Krasniqi Defence Reply"), 6 January 2021, confidential.
[23] Article 46(1) of the Law, which applies *mutatis mutandis* to interlocutory appeals (Gucati Appeals Decision, para. 10).
[24] Gucati Appeal Decision, para. 12. In the same paragraph, the Appeals Court 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*".
[25] *Ibid.*, para. 13.

> 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.[26]

IV. GROUND 1

The Impugned Decision erred in law in defining the standard applicable to Article 41(6)(b)(ii) as "acceptance of the possibility, not the inevitability, of a future occurrence. In simple terms, while suspicion simpliciter is not enough, certainty is not required"

14. Detention may only be justified under the Law if one or more of the three conditions set out in Article 41(6)(b) are satisfied. The Impugned Decision held that "specific articulable grounds must support the 'belief' that the risks under any of the three limbs of Article 41(6)(b) of the Law exist, denoting an acceptance of the possibility, not the inevitability, of a future occurrence. In simple terms, while suspicion simpliciter is not enough, certainty is not required".[27] In so finding, the Impugned Decision erred in law by failing to give effect to the different wording of the three limbs of Article 41(6)(b). Unlike Article 41(6)(b)(i) and (iii), Article 41(6)(b)(ii) does not utilise the word "risk" and requires instead the establishment of the higher standard that the Accused "**will** destroy, hide, change or forge evidence" or "**will** obstruct the progress of the criminal proceedings".

15. Article 41(6) provides that:

> The Specialist Chambers or the Specialist Prosecutor shall only order the arrest and detention of a person when:
>
> a. […]; and
> b. there are articulable grounds to believe that:
> i. there is a risk of flight;
> ii. he or she will destroy, hide, change or forge evidence of a crime or specific circumstances indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices; or

[26] Gucati Appeal Decision, para. 14.
[27] Impugned Decision, para. 18.

> iii. the seriousness of the crime, or the manner or circumstances in which it was committed and his or her personal characteristics, past conduct, the environment and conditions in which he or she lives or other personal circumstances indicate a risk that he or she will repeat the criminal offence, complete an attempted crime or commit a crime which he or she has threatened to commit.

16. The interpretation of Article 41(6) must be consistent with international human rights law. The Court must *"adjudicate and function"* in accordance with *"(a) the Constitution of the Republic of Kosovo"* and *"(e) international human rights law […] as given superiority over domestic laws by Article 22 of the Constitution"*.[28] Moreover, Article 19(2) of the Law emphasizes that *"[t]he Rules of Procedure and Evidence shall reflect the highest standards of international human rights law"*.

17. In accordance with international human rights law, and in contrast to the position at the ICTY,[29] the presumption in Article 41(6)(b) is of liberty and remand in detention shall **only** be ordered when one of the specified grounds is made out. As to the construction of those grounds, the KSC Constitutional Court ruled that "[o]nly a narrow interpretation of the stated exceptions is consistent with the aim of Article 29 of the Constitution, and Article 5(1) of the Convention, namely, that no one is deprived arbitrarily of his or her right to liberty".[30] Accordingly, the exceptions in Article 41(6)(b) must be narrowly construed.

18. The Impugned Decision erred in finding that Article 41(6)(b)(ii) is satisfied by a "risk" of obstructing KSC proceedings, which must merely be more than "suspicion simpliciter". That is inconsistent with the wording of the Law. Article 41(6)(b)(i) refers to a "risk of flight" (underlining added). Article 41(6)(b)(iii) refers to a "risk that he or

[28] Article 3(2) of the Law. Article 22 of the Constitution of the Republic of Kosovo provides that human rights *"are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions"*.
[29] *See*, ICTY, Rules of Procedure and Evidence, Rule 65.
[30] KSC-CC-PR-2017-01, F00004, Specialist Chamber of the Constitutional Court, *Judgement 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* ("Constitutional Court Judgment"), 26 April 2017, public, para. 111.

she will repeat the criminal offence…" (underlining added). In contrast, Article 41(6)(b)(ii) does not use the word "risk". It applies where there are articulable grounds to believe that "he or she will destroy, hide, change or forge evidence of a crime or specific circumstances indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices" (underlining added). The Impugned Decision erred in reading the word "risk" into Article 41(6)(b)(ii) and thus adopting an expansive rather than a narrow interpretation of this provision. The drafters of the Law cannot have accidentally omitted the word "risk" from Article 41(6)(b)(ii), given that the word "risk" features in the sub-paragraphs immediately before and after it. Moreover, the inclusion of "specific circumstances" in Article 41(6)(b)(ii) underscores the high threshold set by this sub-paragraph. The correct construction of Article 41(6)(b)(ii) is that it is only satisfied where there are articulable grounds to believe that the Accused will obstruct the progress of proceedings. That sets a higher threshold: it is harder to establish that the Accused will do a specified act than that there is a risk that they will do it.

19. As a result, the finding that there are articulable grounds to believe that there is a risk that the Accused will obstruct proceedings,[31] and the underlying reasoning which is based entirely on findings of "risk" without reference to the actual wording of Article 41(6)(b)(ii),[32] is erroneous and applied too low a threshold which does not suffice to satisfy Article 41(6)(b)(ii).

20. Since that erroneous legal conclusion formed the basis for the conclusion that Article 41(6)(b)(ii) was satisfied,[33] the Appeals Court should correct the error and apply the correct test to the evidence. Measured against this higher standard, and

[31] Impugned Decision, para. 39.
[32] *Ibid.*, paras 35-36 refer repeatedly to "risk" and not to the correct standard.
[33] *Ibid.*, para. 39.

considering the other errors in the Impugned Decision set out below,[34] the Court cannot be satisfied that Mr. Krasniqi will obstruct the KSC's proceedings.[35]

V. GROUND 2

The Impugned Decision erred in law by failing to respect fundamental human rights, specifically, the presumption of innocence and the right to free speech, which are directly applicable before the KSC

21. Article 21(3) of the Law expressly protects the right to "be presumed innocent until proved guilty beyond reasonable doubt". The KSC is also obliged to "adjudicate and function in accordance with (a) the Constitution of the Republic of Kosovo".[36] The Constitution of the Republic of Kosovo makes human rights "directly applicable" and gives them superiority over other laws.[37] Accordingly, fundamental rights including the right to free speech are also directly applicable and prevail over other inconsistent laws.

22. The Impugned Decision noted "that any request for provisional release must be considered in the context of the detained person's right to be presumed innocent".[38] Yet, in assessing whether Mr. Krasniqi will obstruct the progress of proceedings, the Impugned Decision found that "Mr. Krasniqi, as a KLA spokesperson, was involved in the development and dissemination of KLA policies through the drafting and/or issuance of General Staff communiques and political statements, many of which specifically targeted KLA opponents. As previously found, Mr. Krasniqi's statements at the time sought to justify KLA actions taken against such persons, who were

[34] *See* paras 22, 24, 26-33 below.
[35] *See* para. 33 below.
[36] Article 3(2)(a) of the Law.
[37] Constitution of the Republic of Kosovo Article 22.
[38] Impugned Decision, para. 16.

designated as 'collaborators' and in many instances were harmed or killed".[39] Those are the core allegations against Mr. Krasniqi in the Indictment.[40] They have not been proved beyond reasonable doubt.[41] The presumption of innocence therefore applies and the Impugned Decision should not have presumed his guilt. The Impugned Decision erred in relying on and giving weight to these matters against Mr. Krasniqi.

23. Moreover, having identified that certain risks existed, the Impugned Decision failed to balance those risks against the presumption of innocence and Mr. Krasniqi's right to liberty. That was a necessary part of the analysis.[42] The Impugned Decision was required to analyse the proportionality of detention against the importance of the right to liberty and the presumption of innocence, in light of the likely substantial period of pre-trial detention in this case. Those matters were in issue.[43] Instead, the Impugned Decision erred in moving straight from a finding that specified risks existed to rejecting the application, missing out entirely the proportionality analysis.[44]

24. Furthermore, the Impugned Decision violated Mr. Krasniqi's right to free speech. Although it recognised that "every person is entitled to his or her political opinions, including criticising the SC", that same protected free speech was relied upon against Mr. Krasniqi as the critical evidence that his opinions "are heard and may mobilise his support network".[45] Mr. Krasniqi is entitled to express his opinion about the KSC. He is entitled to call on the LVV governing bodies to "distance themselves from 'Dick MARTY's patriotism'".[46] This exercise of his right to free

[39] Impugned Decision, para. 36.
[40] KSC-BC-2020-06, F00045/A03, Specialist Prosecutor, *Further Redacted Indictment*, 4 November 2020, public, para. 51(a), (d) and (e).
[41] Article 21(3) of the Law.
[42] Constitutional Court Judgment, para. 111.
[43] Application for Interim Release, paras 15-16.
[44] Impugned Decision, paras 44, 52.
[45] *Ibid*., para. 36.
[46] KSC-BC-2020-06, F00005/RED/A02, Specialist Prosecutor, *Annex 2 to Public Redacted Version of 'Request for Arrest Warrants and Related Orders', Filing KSC-BC-2020-06/F00005 dated 28 May 2020* ("F00005/A02"), 17 November 2020, public, pp. 22-23.

political speech, in the current context in Kosovo 20 years after the end of the conflict, did not extend to him making threats or calling for acts of violence – and the Facebook posts cited in the Impugned Decision do not overstep the bounds of protected free speech. Despite recognising Mr. Krasniqi's entitlement to express his political opinions, the Impugned Decision nonetheless erroneously relied on that protected free speech as a reason to deny interim release. That is an interference with the right to free speech, and goes beyond any proportionate restriction which might be necessary in a democratic society.[47]

25. The Appeals Court should correct these errors. It should omit consideration of any matters which deny the right to free speech or the presumption of innocence. If the Appeals Court finds that any of the conditions in Article 41(6)(b) are satisfied and cannot be mitigated by conditions, it should carry out the above proportionality assessment itself. The Defence submit that the likely duration of pre-trial detention in this case is inconsistent with the presumption of innocence and disproportionate to any countervailing risks.

VI. GROUND 3

The Impugned Decision made discernible errors in determining that there are articulable grounds to believe that there is a risk that Mr. Krasniqi will obstruct the progress of the KSC's proceedings

26. The Impugned Decision concluded that there was a risk that Mr. Krasniqi will obstruct the progress of SC proceedings.[48] That conclusion was based on (1) his alleged responsibilities as KLA spokesman (2) a Facebook post dated April 2020 (3) a finding that he is an "influential speaker" who could "mobilise his support network" and (4)

[47] *See*, ECtHR, *Surek v. Turkey (No. 4)*, no. 24762/94, *Judgment (Merits and Just Satisfaction)*, 8 July 1999, noting that there is little scope for restricting political speech (para. 57) unless the words, read in context, incite violence (para. 58).
[48] Impugned Decision, para. 39.

[REDACTED].[49] Those findings were patently wrong because there was no specific, concrete evidential basis for them and because they do not logically support the Impugned Decision's conclusion.

27. First, the Impugned Decision should not have relied on Indictment allegations about Mr. Krasniqi's role in the KLA because for the purposes of this application he is presumed innocent of those allegations.[50]

28. Second, the Impugned Decision's reliance on the April 2020 Facebook post disproportionately interfered with Mr. Krasniqi's right to free speech.[51] Further, no reasonable trier of fact could have held that it supported obstruction of the KSC. It expresses a political opinion. Read in today's context, it does not call in any way for witness interference or obstruction of the KSC. As such, it is not capable of supporting the conclusion that he will obstruct the process of the Court.

29. Third, there was no specific concrete evidence to support the conclusion that "Mr. Krasniqi has continued to play a significant role in Kosovo as a prominent KLA figure, a Kosovo politician and a seasoned and influential speaker, whose opinions, including those opposing the SC, whether publicly or privately expressed, are heard and may mobilise his support network".[52] These findings are based on five Facebook posts and one newspaper interview from 3 June 2015 – 24 April 2020[53] and an earlier finding, also unencumbered by evidence, that "Mr. Krasniqi's influence as a former political leader and a Kosovo Liberation Army ("KLA") deputy commander cannot be ignored"[54]. The Impugned Decision was not entitled to enter those findings because there was no concrete evidence supporting them:-

[49] Impugned Decision, para. 36.
[50] *See* Ground Two.
[51] *See* Ground Two.
[52] Impugned Decision, para. 36.
[53] F00005/A02, pp. 11-23.
[54] Impugned Decision, para. 29.

1) The Impugned Decision never defined the "support network" in question. The only network mentioned by the SPO[55] – the KLAWVA – was irrelevant because "there is no concrete evidence of Mr. Krasniqi's specific influence over the KLAWVA support network";[56]

2) Reference to being a "former political leader" and KLA "deputy commander" cannot establish the continued existence of a 'support network' 20 years later, particularly after Mr. Krasniqi has been retired for 5 years. There is no evidence that he had or still has access to any support network, still less any specific, concrete evidence.[57] If the mere fact of holding a position of authority years ago means that an Accused has access to a 'support network' capable of obstructing justice, no political or military leader could ever hope to obtain provisional release;

3) Even the alleged existence of a support network was evidentially insufficient, since there was no evidence that Mr. Krasniqi presented a concrete risk by previously using or attempting to use any support network to obstruct a court's processes or interfere with witnesses;[58]

4) No reasonable trier of fact could have held that five Facebook posts over a period of 5 years, and one newspaper interview, establish that Mr. Krasniqi is "prominent", "a seasoned and influential speaker" or that his opinions

[55] SPO Response to Interim Release, paras 30-32.
[56] Impugned Decision, para. 36.
[57] Impugned Decision, para. 35, *see* for instance ICTY, *Prosecutor v. Mico Stanisic*, IT-04-79-AR65.1, Appeals Chamber, *Decision on Prosecution's Interlocutory Appeal of Mico Stanisic's Provisional Release* ("Stanisic Appeal Decision"), 17 October 2005, para. 27, requiring that the Prosecution produce "specific evidence as to the Accused's alleged contacts".
[58] Impugned Decision, para. 35, *see* for instance Stanisic Appeal Decision, para. 28; ICTY, *Prosecutor v. Prlic et al.*, IT-04-74-PT, Trial Chamber, *Order on Provisional Release of Jadranko Prlic* ("Prlic Order"), 30 July 2004, paras 27-28.

> "are heard and may mobilise" an unspecified support network. Anyone can post on Facebook. The mere act of posting on social media or conducting one newspaper interview does not make a person "influential" or show that his opinions are "heard and may mobilise" supporters. The SPO failed to produce evidence of the number of people who read the relevant posts or the impact that the posts had.

30. Fourth, [REDACTED].[59] [REDACTED].[60] [REDACTED]. [REDACTED].

31. Thus, none of the factors identified in the Impugned Decision actually support the conclusion that Mr. Krasniqi will obstruct KSC proceedings. The manifest unreasonableness of this conclusion is highlighted by the fact that in a different decision having reviewed the same material, the Pre-Trial Judge held that "there is no grounded suspicion that Mr. Krasniqi has undertaken efforts to interfere with the administration of justice and/or engaged in any other acts which may constitute an offence under Article 15(2) of the Law".[61] The Impugned Decision does not explain this obvious inconsistency.

32. Lastly, the finding that the supposed risk will increase as the SPO complies with its disclosure obligations has been considered and refuted as "strange logic" by the ICTY.[62] On an interim release application, the rights of the Accused are the first consideration and the mere possibility of mobilising some unidentified support

[59] *Contra* Impugned Decision, para. 36.
[60] [REDACTED].
[61] KSC-BC-2020-06, F00031/COR, Pre-Trial Judge, *Corrected Version of Decision Authorising Search and Seizure*, 28 October 2020, strictly confidential and *ex parte*, para. 25.
[62] ICTY, *Prosecutor v. Sainovic et al.*, IT-99-37-AR65, Appeals Chamber, *Dissenting Opinion of Judge David Hunt on Provisional Release* ("Dissenting Opinion Judge Hunt"), 30 October 2002, paras 71, 73; *Prosecutor v. Brdanin et al.*, IT-99-36, Trial Chamber II, *Decision on Motion by Prosecution for Protective Measures*, 3 July 2000, para. 20; Stanisic Appeal Decision, para. 28.

network is not sufficient to deny interim release.[63] The Impugned Decision [REDACTED].[64]

33. The Impugned Decision was required to determine whether there are specific concrete grounds[65] or specific circumstances to believe that Mr. Krasniqi will obstruct the progress of proceedings. The Appeals Court should correct the errors identified in Grounds 1-3 and apply this test to the evidence, stripping away unevidenced assertions and respecting the presumption of innocence. The Appeals Court must thus weigh [REDACTED] and one Facebook post against the evidence that Mr. Krasniqi is retired, has never previously been accused of interfering with witnesses or any other crime ([REDACTED]), took no steps to obstruct the KSC process after his suspect interview in July 2019, has said that no-one should flee from justice and agreed not to make public statements about the case (which is a factor relevant at this stage of the analysis not only to the possibility of imposing condition). No reasonable trier of fact balancing those factors could conclude that there are articulable grounds to believe that Mr. Krasniqi will obstruct KSC proceedings.

VII. GROUND 4

The Impugned Decision erred in law in finding that Article 41(6)(b)(iii) is satisfied where "there is a likelihood that the Accused, if released, will, under any form of responsibility, engage in or contribute to crimes similar to the underlying acts charged"

34. The Impugned Decision concluded that "the future crime need not be identical to those included in the charges" and that the Court "must assess whether there is a likelihood that the Accused, if released, will, under any form of responsibility, engage

[63] Dissenting Opinion Judge Hunt, para. 73.
[64] [REDACTED].
[65] Impugned Decision, para. 18.

in or contribute to crimes similar to the underlying act charged".[66] This expansive construction of Article 41(6)(b)(iii) is inconsistent with the drafting of the provision.

35. The wording of Article 41(6)(b)(iii) is unambiguous. It defines three situations in which interim release may be refused: where there is a risk that the Accused "will repeat the criminal offence", will "complete an attempted crime" or will "commit a crime which he or she has threatened to commit". The Impugned Decision subverts the clear language of the Law by reading "will repeat the criminal offence" as "will, under any form of responsibility, engage in or contribute to crimes similar to the underlying acts charged". That is unsustainable:-

1) The drafters selected the words "repeat the criminal offence", instead of broader alternatives such as "repeat a criminal offence" or "commit a similar offence". The use of the definite article "the" limits "the criminal offence" to the offence(s) charged in the Indictment; it does require that the future crime is identical to that charged;[67]

2) The requirement for specificity in relation to the type of future offence in Article 41(6)(b)(iii) is not unique or unusual. Article 58(1)(b)(iii) of the Rome Statute provides that one ground justifying arrest and detention is to "prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances" (underlining added). The reference in Article 58(1)(b)(iii) to "that crime" is clearly limited to the crime charged – in exactly the same way as the reference in the Law to "repeat the criminal offence". Whilst the Rome Statute expressly allows detention in order to prevent the future commission of "a related crime", the drafters of the Law

[66] Impugned Decision, para. 21.
[67] *Contra* Impugned Decision, para. 21.

chose to adopt a narrower definition of future crimes which excludes reliance on "similar crimes";

3) Further, Article 46(1)(b)(iii) should be narrowly construed.[68]

36. The Appeals Court should find that Article 41(6)(b)(iii) only applies where there are articulable grounds to believe that there is a risk that Mr. Krasniqi will repeat the criminal offence, complete an attempted crime or commit a crime which he has threatened to commit. The Impugned Decision finding that "Mr. Krasniqi will, under any form of responsibility, engage in or contribute to crimes, similar to the underlying acts charged, against those who allege that KLA members committed crimes" does not meet that threshold and the Appeals Court should apply the correct test to the facts.

37. Applying the correct test, Article 41(6)(b)(iii) is only satisfied if there is a risk of Mr. Krasniqi repeating the Indictment crimes against humanity of persecution, imprisonment, torture, other inhumane acts, murder or enforced disappearance or the war crimes of arbitrary arrest, cruel treatment, torture or murder. Self-evidently there is not. There is no ongoing armed conflict and no widespread or systematic attack on a civilian population. This interpretation would not neuter Article 41(6)(b)(iii), since the KSC's jurisdiction is not limited to international crimes but also covers the offences identified in Article 15(2) of the Law in relation to which repetition of the offence is possible.

38. In any event, if "repeat the criminal offence" means "repeat the underlying criminal acts", that would still require a finding that there is a risk that Mr. Krasniqi will commit serious violent offences such as murder, torture, cruel treatment or imprisonment. That is not the finding that the Impugned Decision made. Nor should

[68] Constitutional Court Judgment, para. 111.

the Appeals Court countenance it. The severity of those offences stands in stark contrast to the absence of evidence that Mr. Krasniqi committed any crime in the last 20 years, or that he has the means to commit any such crime.

VIII. GROUND 5

The Impugned Decision made discernible errors in determining that there are articulable grounds to believe that there is a risk that Mr. Krasniqi will commit further crimes

39. The Impugned Decision found that there is a risk that Mr. Krasniqi will commit further crimes on the basis that Mr. Krasniqi's prominent position in Kosovo and his enduring standpoint regarding collaborators show a likelihood that he will, under any form of responsibility, engage in or contribute to crimes similar to the underlying acts charged against those allege that the KLA committed crimes.[69] Even if that is the correct test, it is wholly unreasonable to find that those matters demonstrate a sufficient risk that Mr. Krasniqi will commit serious crimes such as murder, imprisonment and torture to necessitate his detention.[70]

40. The Impugned Decision's finding is entirely underpinned by the erroneous previous finding that Mr. Krasniqi will obstruct proceedings.[71] That is inadequate. His Facebook post and [REDACTED] cannot establish a risk that he will commit crimes as serious as murder, imprisonment or torture. One Facebook post, after an interval of 20 years, cannot establish an "enduring standpoint" or a "pattern".[72] Nor was there any evidence for the assumption of "full knowledge of the implications of the term".[73] Moreover, the decisive finding that he "may instigate or assist individuals in his support network to commit such crimes" is vitiated by the absence of any specific,

[69] Impugned Decision, paras 42-43.
[70] *See* Ground Four.
[71] Impugned Decision, para. 42. *See* Ground 3.
[72] *Ibid.*
[73] *Ibid.*

concrete evidence that Mr. Krasniqi has a support network.[74] Applying the correct test to the facts, respecting the presumption of innocence regarding the current charges, and considering his age and retirement, it was wholly unreasonable to find that there is a risk of him committing such crimes, or that consistent with fundamental rights, the risk is sufficiently high to justify the continued detention of a person presumed innocent. The evidence relied upon does not approach that standard.

IX. GROUND 6

The Impugned Decision made discernible errors in concluding that no conditions were capable of mitigating any risks which were correctly identified

41. The Impugned Decision found that no conditions were capable of mitigating the risks in this case because, first, Mr. Krasniqi could instigate crimes or obstruction of the SC by making "public statements on seemingly unrelated, political or historical topics" and, second, proposed conditions limiting private communications could not be enforced or monitored.[75]

42. The first conclusion is patently wrong How, specifically, could Mr. Krasniqi instigate crimes or obstruct the Court by making public statements on unrelated topics? If released, his public statements would be monitored by the SPO. In any event, the KSC could remove this concern by imposing further conditions not to make any public statements or any statements on social media.

43. The second conclusion is unfounded. First, no reasonable trier of fact could have found that there are no means to monitor Mr. Krasniqi's private communications. Many conditions were available, including specified in Article 41(12), which restrict or monitor private communications, including: house arrest; preventing Mr. Krasniqi

[74] *See* Ground Three.
[75] Impugned Decision, para. 49.

leaving his place of residence or approaching specific persons; requiring Mr. Krasniqi to use a particular mobile telephone to facilitate monitoring or restricting his telephone calls. The conditions stipulated in Article 41(12) were included for a reason; they should not lightly be dismissed as ineffective. Second, no reasonable trier of fact could have found that those conditions could not be enforced or monitored. There was no specific concrete evidence that the Kosovo authorities are unable to monitor or enforce those conditions;[76] indeed positive evidence had been led that, consistent with their place in Kosovo's criminal procedures[77] and the regular use of house arrest by EULEX in Kosovo,[78] the authorities could monitor and enforce such conditions.[79] That evidence was equally relevant to Mr. Krasniqi. Accordingly, the Impugned Decision was not entitled to assume that relevant conditions could not be monitored or enforced.

44. Mere ability to have private communications – which would apply to every Accused in every case – is not a reason to deny interim release. There is no evidence before the KSC that Mr. Krasniqi has ever used private communications to interfere with witnesses. Even if he has influence, it does not follow that he would use it unlawfully – especially in the absence of any evidence of any attempt at witness interference since Mr. Krasniqi attended a suspect interview in the Hague in July 2019.[80] The only reasonable conclusion was that conditional release would mitigate any risks, rendering it unnecessary and disproportionate to continue detaining Mr. Krasniqi.

X. CONCLUSION

[76] *Ibid*., paras 18, 50.
[77] Kosovo Criminal Procedure Code, Articles 173, 183.
[78] *See*, e.g. EULEX, *People v. G.G.*, AP – K 191/2009, Supreme Court of Kosovo, *Judgment*, 8 December 2009, p. 1.
[79] KSC-BC-2020-06, F00174, Defence Mr Veseli, *Defence Reply to the SPO's Response to the Provisional Release Application of Kadri Veseli*, 13 January 2021, public, paras 56, 57, Annex 1.
[80] *See* Prlic Order, paras 27-28.

45. Mr. Krasniqi has not been accused of any criminal activity in the last 20 years. He is 70 years old. He retired from politics 5 years ago. There is no evidence that he has ever tried to interfere with witnesses in any case, even after attending the Hague for a suspect interview. There is no evidence he now has access to any support network. To deny him interim release, where he is likely to be detained for a prolonged period before trial starts, is a flagrant violation of his right to liberty and the presumption of innocence.

46. The Defence invite the Appeals Court to correct the errors of law in the Impugned Decision, apply the correct legal tests in Article 41(6)(b) to the facts, and to grant interim release to Mr. Krasniqi.

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