In:	**KSC-BC-2020-06**
	The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Court of Appeals Panel**
	Judge Michèle Picard
	Judge Kai Ambos
	Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Defence Counsel for Jakup Krasniqi
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Krasniqi Defence Reply

to SPO Response to Krasniqi Defence Appeal of Detention Decision

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I. INTRODUCTION

1. Pursuant to Rule 170(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("KSC"), the Defence for Jakup Krasniqi ("Defence") hereby reply to the Specialist Prosecutor's Response to Krasniqi Defence Appeal of Detention Decision ("Response").[1]

II. THE EVALUATION OF RISK

2. The Response fails to grapple with the degree of probability of risk required to justify detention, indicated by the use of the word "will" in Article 41(6)(b)(ii) and "risk that he will" in Article 41(6)(b)(iii), as distinct from "risk" in Article 41(6)(b)(i).[2] Instead, the Response suggests that the specific language used in each subsection does not matter because those terms are "surrounded by language making it clear that certainty is not remotely required".[3]

3. This issue is not foreclosed by the Panel's decision in Gucati, in which the appeal related to whether any identified risks could be mitigated by conditions[4] and the specific language of Article 41(6)(b) was not argued.[5]

4. The Panel in Gucati cited with approval the statement that "the question revolves around the possibility, not the inevitability, of a future occurrence".[6] Aside from establishing that inevitability is not required, that does not define the degree of

[1] KSC-BC-2020-06, IA002/F00003, Specialist Prosecutor, *Response to Krasniqi Defence Appeal of Detention Decision*, 15 February 2021, confidential, with Annex 1, public.
[2] *Ibid*., paras 14-16.
[3] *Ibid*., para. 15.
[4] KSC-BC-2020-07, IA001/F00001, Gucati Defence, *Notice of Interlocutory Appeal on Behalf of Hysni Gucati*, 2 November 2020, public, para. 38.
[5] *Ibid*., paras 38-58.
[6] KSC-BC-2020-07, IA001/F00005, Court of Appeals Chamber, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, 9 December 2020, public, para. 67.

probability which is required to deny interim release. Between certainty and suspicion simpliciter lies a broad range of probabilities.

5. The ECtHR has identified that on this spectrum of probability a risk must be "sufficiently real"[7] and "convincingly established"[8] in order to justify detention. Similarly, the Appeals Chamber of the ICTY has required a "substantiated indication" of the stated harm rather than a mere risk.[9]

6. This jurisprudence accords with the presumption of liberty before the KSC; if pre-trial detention is the exception rather than the rule, mere identification of a risk however small cannot be enough to deny release.

7. The Defence submits, consistent with the natural meaning of "will obstruct" and "will destroy, hide, change or forge" in Article 41(6)(b)(ii), and consistent with the above jurisprudence, mere identification of a risk is not enough to justify detention. The Impugned Decision did err in relying on "a risk that Mr. Krasniqi will obstruct" proceedings and "a risk that Mr. Krasniqi will commit further crimes".[10] This reliance on risk simpliciter, without assessing whether that risk is sufficiently real to justify detention, applied too low a threshold.

8. Had the Impugned Decision asked whether a sufficiently real risk that Mr. Krasniqi will obstruct proceedings or will commit further crimes had been established, considering his age, family life, absence of allegations of criminality in the

[7] ECtHR, *Merabishvili v. Georgia*, no. 72508/13, *Judgment (Merits and Just Satisfaction)*, 28 November 2017, para. 229.
[8] ECtHR, *Valeriy Samoylov v. Russia*, no. 57541/09, *Judgment (Merits and Just Satisfaction)*, 24 January 2012, paras 109, 119-120.
[9] ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Appeals Chamber, *Decision on Lahi Brahimaj's Application for Provisional Release* ("Brahimaj Decision"), 25 May 2009, para. 14.
[10] KSC-BC-2020-06, F00180, Pre-Trial Judge, *Decision on Jakup Krasniqi's Application for Interim Release* ("Impugned Decision"), 22 January 2021, confidential, paras 36, 39, 42, 43, 44, 50.

last 20 years and the absence of evidence of any past connection to witness intimidation, the only reasonable conclusion would have been that any risk identified is insufficient to justify detention.

III. THE FAILURE TO EVIDENCE A SUPPORT NETWORK

9. The Pre-Trial Judge relied on Mr. Krasniqi's alleged access to a support network as the decisive factor establishing a risk pursuant to each of the three limbs of Article 41(6)(b)[11] which could not be mitigated by any conditions.[12]

10. There was no evidence to support the decisive finding that Mr. Krasniqi, considered as an individual, has access to a support network capable of committing crimes or obstructing the KSC.[13]

11. Rather than pointing to evidence capable of supporting the Impugned Decision, the Response again[14] resorts to unsubstantiated assertions and conjecture. Thus, the SPO repeats its allegation that Mr. Krasniqi "has access to the same vast support network as the other accused in this case, including those with security, police, and intelligence expertise".[15] No evidence is cited in support. No explanation is offered for linking a man who has been retired for five years to exactly the same support network as current senior political figures. The SPO even submits that there is "ample evidence of such a support network", ironically without referring to a single piece of evidence connected to Mr. Krasniqi.[16]

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[11] Impugned Decision, paras 29, 36 and 42.
[12] *Ibid.*, para. 49.
[13] KSC-BC-2020-06, IA002/F00001, Krasniqi Defence, *Krasniqi Defence Appeal Against Decision on Jakup Krasniqi's Application for Interim Release* ("Appeal"), 3 February 2021, confidential, para. 28.
[14] *See* KSC-BC-2020-06, F00153, Specialist Prosecutor, *Prosecution Response to Application for Interim Release on behalf of Mr Jakup Krasniqi*, 17 December 2020, confidential, para. 12.
[15] Response, para. 28.
[16] *Ibid.*, para. 29.

12. There is no cogent evidence that Mr. Krasniqi had or still has access to any support network or that he – or any individual connected to him – has obstructed the process of justice or committed crimes in the last 20 years. Instead of evidence, the SPO submits "[t]hat KRASNIQI has access to a support network is clear from the climate of witness intimidation in Kosovo in trials of former KLA members".[17] This is a *non sequitur*; it does not follow from a climate of witness intimidation that Mr. Krasniqi himself has access to a support network. Instead, the SPO is trying to compensate for the absence of evidence against Mr. Krasniqi himself, by transforming a general factor (climate of intimidation) which would not be sufficient to justify detention into an individual factor (access to a support network) which it is not logically related to.

13. The Response compounds that error by identifying the KLAWVA as the support network available to Mr. Krasniqi.[18] The Impugned Decision found no concrete evidence linking Mr. Krasniqi to the KLAWVA.[19] That the SPO nevertheless continues to base its submission on the KLAWVA only highlights the dearth of actual evidence on which it could rely.

14. Further, the SPO mischaracterizes the Appeal by criticizing the Defence for "[r]equiring the PTJ to fully define or identify the complete membership of this network".[20] That was never the Defence submission. Rather, in order for a reasonable trier of fact to find that there are specific, concrete grounds[21] that Mr. Krasniqi has access to a support network, that network must be identified or defined in some way. This has not been done. Instead the SPO seeks to manoeuvre Mr. Krasniqi into the

[17] Response, para. 30.
[18] *Ibid*., paras 29, 30, fn. 56.
[19] Impugned Decision, para. 36.
[20] Response, para. 30.
[21] Impugned Decision, para. 18.

impossible position of disproving his access to a network which it cannot identify or define.

15. Finally, the submission that prior government contacts[22] are sufficient to prove current access to a relevant support network, giving rise to risks of committing crimes or obstructing proceedings, is misconceived. If such was the case, then contrary to the presumption of innocence, no person connected with government would ever be able to obtain bail.

16. In the absence of any evidence of access to a support network, no reasonable trier of fact could have relied upon this as the decisive consideration in denying interim release to Mr. Krasniqi.

IV. THE UNREASONABLE INTERPRETATION OF THE FACEBOOK POST

17. The SPO seeks to support the Impugned Decision by submitting that "the Accused's recent conduct should reasonably be interpreted as an attempt to incite or instigate crimes against such persons and/or a threat indicating his intent to commit future crimes".[23] The 'recent conduct' is one Facebook post,[24] which called on a political party "to seriously distance themselves from 'Dick MARTY's patriotism'". Even if one disagrees with Mr. Krasniqi's choice of language and opinions, his words cannot reasonably be construed as an incitement or instigation of crimes or as a threat to commit future crimes. He has not and does not call for any violent or criminal act.

[22] Response, para. 28.
[23] *Ibid*., para. 23.
[24] 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*, 17 November 2020, public, pp. 22-23.

18. The Response can only justify the findings about the Facebook post by alighting upon the single word "collaborator" and connecting it to statements attributed to Mr. Krasniqi during the conflict which, the Impugned Decision held, "sought to justify KLA actions taken against such persons, who were designated as 'collaborators' and in many instances were harmed or killed".[25] But the term 'collaborator' only assumes this significance if the core Indictment allegation of a purpose to mistreat opponents including collaborators[26] is assumed to be true. That supposition is clearly inconsistent with the presumption of innocence. Nor can the use of the same word 22 years later be assumed to have the same meaning. Accordingly, the reliance on this one Facebook post to justify detention was unreasonable.

V. SUPPOSITION ABOUT THE INEFFECTIVENESS OF CONDITIONS

19. The Impugned Decision held that no conditions "could restrict Mr Krasniqi's ability to communicate with his community or support network".[27] That finding was made on the unsustainable basis that, first, conditions could not "effectively limit" Mr. Krasniqi's ability to instigate intimidation by making public statements on "seemingly unrelated" topics and, second, conditions could not "restrict or monitor Mr Krasniqi's private communications".[28] The Response fails to justify these conclusions.

20. First, the SPO supports the speculative conclusion that Mr. Krasniqi could instigate intimidation by making public statements on "seemingly unrelated topics" with the equally unsubstantiated submission that he is "fully capable of giving statements with indirect and latent calls for interference".[29] In any event, the Response fails to counter the submission that any alleged risk arising from public statements on

[25] Impugned Decision, para. 36.
[26] KSC-BC-2020-06, F00045/A03, Specialist Prosecutor, *Further Redacted Indictment*, 4 November 2020, public, para. 32.
[27] Impugned Decision, para. 49.
[28] *Ibid*.
[29] Response, para. 48.

unrelated topics could be countered by imposing a condition not to make any public statements, as was done in previous cases concerning Kosovo.[30]

21. Second, regarding private communications, the Impugned Decision did not give "careful consideration" to the various conditions which could have been imposed to mitigate any risk.[31] Before reaching the conclusion supported by the SPO that the risk of private communication "can only be effectively managed" through detention, it was surely necessary to set out the available conditions (including by making enquiries with the Kosovo authorities if appropriate)[32] and explain why they were inadequate.[33] Any ability to "get messages out",[34] would be mitigated by conditions including house arrest or monitoring electronic or telephone communications.

22. Third, the SPO mischaracterises the Appeal when submitting that the Impugned Decision did not "conclude or assume anything" about the "willingness" of the Kosovo Police to enforce conditions.[35] The Impugned Decision held that conditions restricting communications "can neither be enforced nor monitored".[36] The Appeal challenges this conclusion that the Kosovo authorities are unable – not unwilling – to enforce or monitor such conditions.[37] That conclusion was unreasonable in light of *inter alia* the absence of evidence and the use of house arrest by EULEX in similar scenarios.[38]

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[30] *See*, e.g., Brahimaj Decision, para. 18(e)(iv).
[31] *Contra* Response, para. 47.
[32] Brahimaj Decision, para. 11.
[33] Response, para. 47.
[34] *Ibid*., para. 50.
[35] *Contra* Response, para. 51.
[36] Impugned Decision, para. 49.
[37] Appeal, para. 43.
[38] *Ibid*. *See*, further, KSC-BC-2020-06, F00174, Veseli Defence, *Defence Reply to the SPO's Response to the Provisional Release Application of Kadri Veseli*, 13 January 2021, public, paras 56-58, Annex 1.

VI. CONCLUSION

23. The Defence respectfully invite the Panel to allow the Appeal and order the interim release of Mr. Krasniqi subject to such conditions as the Panel deems necessary.

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