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Date original: 31/05/2021 16:05:00
Date public redacted version: 30/06/2021 13:18:00

In: **KSC-BC-2020-06**

The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: **Pre-Trial Judge**

Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Defence Counsel for Jakup Krasniqi

Date: 30 June 2021

Language: English

Classification: Public

Public Redacted Version of

Krasniqi Defence Submissions on Detention Review, KSC-BC-2020-06/F00329,

dated 31 May 2021

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I. INTRODUCTION

1. Mr. Krasniqi has been detained for more than seven months, during which he has been allowed no family visits. Since his application for interim release was rejected in January 2021, circumstances have changed: it is clear that trial cannot start in 2021; decisions regarding protective measures have given comprehensive protection to witnesses; and the submissions below demonstrate the ability of the Kosovo police to monitor Mr. Krasniqi's communications. The Defence for Mr. Krasniqi ("Defence") submit that these factors decisively tilt the balance in favour of interim release.

2. This filing is submitted confidentially [REDACTED].

II. PROCEDURAL HISTORY

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

4. On 7 December 2020, the Defence applied for interim release.[1] The Specialist Prosecutor's Office ("SPO") responded on 17 December 2020.[2] On 6 January 2021, the Defence filed their Reply.[3]

5. On 22 January 2021, the Pre-Trial Judge issued the Decision on Jakup Krasniqi's Application for Interim Release and rejected the application.[4] The Pre-Trial Judge determined that a moderate risk of flight exists in relation to Mr. Krasniqi,[5] that there

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[1] KSC-BC-2020-06, F00122, Krasniqi Defence, *Application for Interim Release* ("Application for Interim Release"), 7 December 2020, confidential, with Annexes 1-2, confidential, and Annex 3, public.
[2] KSC-BC-2020-06, F00153, Specialist Prosecutor, *Prosecution Response to Application for Interim Release on behalf of Mr Jakup Krasniqi*, 17 December 2020, confidential, with Annex 1, confidential.
[3] KSC-BC-2020-06, F00163, Krasniqi Defence, *Krasniqi Defence Reply to Prosecution Response to Application for Interim Release*, 6 January 2021, confidential.
[4] KSC-BC-2020-06, F00180, Pre-Trial Judge, *Decision on Jakup Krasniqi's Application for Interim Release* ("Decision on Interim Release"), 22 January 2021, confidential.
[5] Decision on Interim Release, para. 31.

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is a risk that Mr. Krasniqi will obstruct the progress of SC proceedings,[6] and a risk that Mr. Krasniqi will commit further crimes.[7] The Pre-Trial Judge further concluded that the imposition of conditions would mitigate the risk of flight[8] but could not mitigate the risk of Mr. Krasniqi obstructing the progress of SC proceedings or committing further crimes.[9]

6. On 3 February 2021, the Defence filed their Appeal against the Decision on Jakup Krasniqi's Application for Interim Release.[10] The SPO responded to the Appeal on 15 February 2021.[11] On 22 February 2021, the Defence filed their reply.[12]

7. On 24 February 2021, the Pre-Trial Judge extended the time for the Defence to make submissions on the review of Mr. Krasniqi's detention until ten days after notification of the decision of the Court of Appeals Chamber ("Appeals Chamber") on the pending appeal.[13]

8. On 30 April 2021, the Appeals Chamber issued its Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release and denied the Appeal.[14] In so doing, however, the Appeals Chamber identified a number of errors in the Decision on Interim Release and emphasised the importance of proportionality in testing the reasonableness of pre-trial detention against its expected duration.[15]

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[6] *Ibid.*, para. 39.
[7] *Ibid.*, para. 43.
[8] *Ibid.*, para. 48.
[9] *Ibid.*, paras 49-50.
[10] KSC-BC-2020-06, IA002/F00001, Krasniqi Defence, *Krasniqi Defence Appeal Against Decision on Jakup Krasniqi's Application for Interim Release*, 3 February 2021, confidential.
[11] KSC-BC-2020-06, IA002/F00003, Specialist Prosecutor, *Response to Krasniqi Defence Appeal of Detention Decision*, 15 February 2021, confidential, with Annex 1, public.
[12] KSC-BC-2020-06, IA002/F00004, Krasniqi Defence, *Krasniqi Defence Reply to SPO Response to Krasniqi Defence Appeal of Detention Decision*, 22 February 2021, public.
[13] KSC-BC-2020-06, F00206, Pre-Trial Judge, *Decision on Joint Defence Request for Extension of Time Limit*, 24 February 2021, public, para. 6.
[14] KSC-BC-2020-06, IA002/F00005, Court of Appeals Chamber, *Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release* ("Appeal Decision"), 30 April 2021, confidential, para. 84.
[15] Appeal Decision, paras 69-70.

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9. On 19 May 2021, the Pre-Trial Judge extended the time for the Defence to file submissions on the continued detention of Mr. Krasniqi by 31 May 2021.[16]

10. The Defence hereby submit their written observations on the continued detention of Mr. Krasniqi.

III. APPLICABLE LAW

11. The Pre-Trial Judge is conducting a detention review as mandated by the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"). Rule 57(2) provides that

> 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.

12. Article 41(10) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") provides that "upon the expiry of two (2) months from the last ruling on detention on remand, the Pre-Trial Judge […] shall examine whether reasons for detention on remand still exist and render a ruling by which detention on remand is extended or terminated".

13. These provisions require the Pre-Trial Judge to review the decision on detention every two months. Moreover, the requirement of "a change in circumstances" in Rule 57(2) only applies to any additional detention review requested by the Accused, the Specialist Prosecutor or *proprio motu*. As a result, and contrary to the position at the International Criminal Court ("ICC") where Article 60(3) of the Rome Statute specifies that a Chamber can only modify its ruling on detention "if it is satisfied that

[16] KSC-BC-2020-06, Draft Transcript of Hearing, 19 May 2021 ("Draft Transcript of 19 May 2021"), public, p. 451, lines 21-24.

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changed circumstances so require", the Pre-Trial Judge is required to carry out a comprehensive review of the necessity of detention every two months. In any event, the material set out below constitutes changed circumstances which justify interim release.

14. Moreover, the Constitutional Court of Kosovo has held that "reasoning for extension of detention pending trial must contain detailed reasoning and an individualized assessment according to the circumstances and facts of the case, explaining and proving why the detention pending trial is necessary and why other alternative measures are not appropriate […]".[17] Although that case specifically related to an initial decision to remand in custody, the same principles apply to any decision to extend detention pending trial. These provisions of Kosovan law are relevant to the interpretation of the Law.[18]

15. Article 41(6)(b) of the Law provides that the Specialist Chambers or the Specialist Prosecutor shall only order the arrest and detention of a person when:

> 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
>
> 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. In applying Article 41(6)(b), the Appeals Chamber held that the test is "whether the SPO presented specific reasoning based on evidence supporting the belief of a

[17] Kosovo, Constitutional Court, *Constitutional Review of Judgment Pml. No. 357/2017 of the Supreme Court of Kosovo of 22 December 2017*, KI10/18, Judgment, 21 October 2019, para. 118.
[18] Appeal Decision, paras 14-16.

sufficiently real possibility that (one or more of) the risks under Article 41(6)(b)(i)-(iii) of the Law exist".[19]

17. Rule 56(2) of the Rules further provides:

> The Panel shall ensure that a person is not detained for an unreasonable period prior to the opening of the case. In 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.

18. Rule 56(2) imposes a separate obligation on the Pre-Trial Judge to ensure that Mr. Krasniqi is not detained for an unreasonable period pre-trial. The drafting of Rule 56(2) contrasts with the Rome Statute of the ICC, Article 60(4) of which provides "[t]he Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions". The Rome Statute expressly ties the consideration of the reasonableness of pre-trial detention to the issue of inexcusable prosecutorial delay. Rule 56(2), however, requires the Pre-Trial Judge to ensure that a person is not detained for an unreasonable period prior to trial for any reason; and, additionally, provides that the Pre-Trial Judge may release a person in the case of undue prosecutorial delay.

IV. NO SUFFICIENTLY REAL POSSIBILITY THAT MR. KRASNIQI WILL FLEE

19. The Defence maintain the SPO has not demonstrated specific evidence establishing a sufficiently real possibility that Mr. Krasniqi presents a risk of flight. In the light of Mr. Krasniqi's strong connection to Kosovo, age, [REDACTED], and prior history of co-operating with summons from both the SPO and international tribunals, he does not present a risk of flight.[20] Flight is rendered even less likely by the tight

[19] Appeal Decision, para. 28.
[20] Application for Interim Release, paras 33-42.

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international border controls and testing requirements in response to the coronavirus pandemic. Nonetheless, the Pre-Trial Judge found that any risk of flight could be mitigated by appropriate conditions.[21] There is no reason to depart from that conclusion. Accordingly, the Defence do not address the risk of flight further: it was not determinative of the denial of interim release.

V. NO SUFFICIENTLY REAL POSSIBILITY THAT MR. KRASNIQI WILL OBSTRUCT PROCEEDINGS

20. The Defence submit that the SPO has not provided specific evidence establishing a sufficiently real possibility that Mr. Krasniqi will obstruct proceedings. In this detention review, in addition to previous submissions,[22] the Pre-Trial Judge should consider the protective measures decisions, recent developments in Kosovo and relevant findings of the Appeals Chamber.

A. THE PROTECTIVE MEASURES DECISIONS SUBSTANTIALLY REDUCE ANY ALLEGED RISK OF WITNESS INTERFERENCE

21. The extensive protective measures imposed in this case, many since the Decision on Interim Release was rendered, substantially mitigate any alleged risk of obstruction of proceedings / witness interference.

22. Persuasive authority from the *ad hoc* tribunals suggests that protective measures are relevant in assessing provisional release applications because they may be

[21] Decision on Interim Release, para. 48.
[22] Application for Interim Release, paras 43-49.

considered a "contribution to witness security, and an additional safeguard for the protection of potential witnesses concerned with the Accused's provisional release".[23]

23. [REDACTED]:

a. [REDACTED];[24]

b. [REDACTED];[25]

c. [REDACTED];[26]

d. [REDACTED].[27]

24. [REDACTED],[28] [REDACTED].[29] The SPO intends to submit further requests for protective measures.[30]

25. The protective measures decisions constitute a changed circumstance because they are new facts[31] which were not previously argued.[32] The First Decision on Protective Measures was rendered after the Application for Interim Release. [REDACTED]. [REDACTED]. The impact of protective measures on interim release is therefore a new matter to be addressed in this detention review.

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[23] ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, Trial Chamber II, *Decision on Ramush Haradinaj's Motion for Provisional Release*, 6 June 2005, para. 49; SCSL, *Prosecutor v. Sesay*, SCSL-04-15-PT, Trial Chamber, *Decision on Application of Issa Sesay for Provisional Release*, 31 March 2004, para. 54.
[24] [REDACTED].
[25] [REDACTED].
[26] [REDACTED].
[27] [REDACTED].
[28] [REDACTED].
[29] [REDACTED].
[30] Draft Transcript of 19 May 2021, p. 399, lines 19-20.
[31] Cf. ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-718-Red, Trial Chamber I, *Seventh Decision on the Review of Mr Laurent Gbagbo's Detention Pursuant to Article 60(3) of the Statute*, 11 November 2014, para. 31(f).
[32] As the Appeals Chamber expressly found, e.g. KSC-BC-2020-06, IA001/F00005, Court of Appeals Chamber, *Decision on Kadri Veseli's Appeal Against Decision on Interim Release*, 30 April 2021, public, para. 51.

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26. The protective measures reduce any alleged risk of witness interference to the extent that it no longer justifies ongoing detention. [REDACTED]. [REDACTED].[33] As a result, there is no sufficiently real possibility of interference with these witnesses. There is no specific reasoning based on evidence to suggest that Mr. Krasniqi (or anyone connected to him) has the ability or capacity to circumvent the protective measures and identify the protected witnesses. [REDACTED],[34] [REDACTED]. Accordingly, detention cannot be justified for the protection of these witnesses.

27. [REDACTED]. [REDACTED]. [REDACTED][35] [REDACTED].

28. The extensive protective measures ordered in this case offer comprehensive protection to witnesses, [REDACTED]. In the absence of any specific evidence that Mr. Krasniqi is capable of circumventing this protection, and recalling that there is no evidence that he has ever been involved in witness interference, any alleged risk that Mr. Krasniqi will interfere with witnesses is very substantially reduced by the protective measures decisions.

B. DEVELOPMENTS SINCE THE DECISION ON INTERIM RELEASE

29. The Defence invite the Pre-Trial Judge to consider the following developments since the Decision on Interim Release:-

a. Recent elections in Kosovo have confirmed Mr. Krasniqi's declining influence. The Defence previously submitted that Mr. Krasniqi was the Chairman of the National Council of NISMA, which held 6 seats in the Kosovo Parliament.[36] Parliamentary elections were held in February 2021.

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[33] [REDACTED].
[34] [REDACTED].
[35] [REDACTED].
[36] Application for Interim Release, para. 5.

NISMA lost all of its seats. The failure of the party that he is associated with to capture any seats at all in the elections confirms that Mr. Krasniqi does not have any significant influence in Kosovo;

b. In the months since the Decision on Interim Release, the Defence are aware of no allegation that Mr. Krasniqi has behaved inappropriately whilst in detention, or that he or anyone associated with him has done anything to obstruct the SC proceedings.

C. IMPACT OF APPEAL CHAMBER'S FINDINGS

30. Whilst the Appeals Chamber upheld the Decision on Interim Release, it also held that aspects of the reasoning were not supported by the evidence. The Appeals Chamber held that:-

a. The evidence was insufficient to reasonably deduce that Mr. Krasniqi was a 'seasoned and influential speaker';[37]

b. No adequate findings were made about the composition, capacity or resources of any relevant support network;[38]

c. The conclusion that Mr. Krasniqi's opinions are heard and may mobilise his support network must be set aside;[39]

d. It "appears unlikely that if released, Krasniqi would take the risk of threatening or intimidating witnesses by public statements, even if on seemingly unrelated topics".[40]

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[37] Appeal Decision, para. 54.
[38] *Ibid*., para. 55.
[39] *Ibid*., para. 56.
[40] *Ibid*., para. 76.

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31. The Defence respectfully submit that the review of detention should reflect these conclusions. The 'specific reasoning based on evidence' to support the conclusion that there is a sufficiently real risk that Mr. Krasniqi will obstruct proceedings is now limited to: the finding that Mr. Krasniqi had 'influence' as a result of his past positions and offices;[41] Mr. Krasniqi's public statements criticising the KSC and Facebook post dated 24 April 2020; [REDACTED].[42] These factors are no longer sufficient to justify detention in light of the new material above.

D. CONCLUSION

32. There is no longer a sufficiently real risk supported by specific evidence that Mr. Krasniqi may interfere with witnesses or obstruct the proceedings of the KSC. [REDACTED]. Second, evidence of Mr. Krasniqi's influence is undermined by the loss of seats of the political party associated with Mr. Krasniqi in recent elections. The Defence submit that considering all the circumstances of the case there is now insufficient specific evidence to demonstrate a sufficiently real risk of witness interference.

VI. NO SUFFICIENTLY REAL POSSIBILITY THAT MR. KRASNIQI WILL COMMIT FURTHER CRIMES

33. The specific evidence relied upon to demonstrate a sufficiently real risk that Mr. Krasniqi will commit further crimes is the same as the evidence addressed above in relation to the alleged risk of interference with witnesses. Accordingly, the Defence repeat the submission above that there is now insufficient specific evidence to

[41] With the Appeals Chamber noting that in itself this is no indicator that Mr. Krasniqi would use such influence unlawfully: Appeal Decision, para. 57.
[42] [REDACTED].

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demonstrate a sufficiently real risk that Mr. Krasniqi will commit further crimes.[43] The Defence further incorporate by reference its earlier submissions, including that repetition of the criminal offences is impossible given the changed political circumstances in Kosovo[44] (which was not ruled upon by the Appeals Chamber).[45]

VII. THE LIKELY LENGTH OF PRE-TRIAL DETENTION RENDERS ONGOING DETENTION DISPROPORTIONATE AND UNREASONABLE

34. In contrast to the position at the time of the Decision on Interim Release, it is now clear that trial cannot start in 2021 (and it is actually likely to start substantially later). Mr. Krasniqi has been detained for seven months already. If interim release is denied, he will be detained for a very substantial period prior to the start of trial. This period of detention, intensified by the impossibility of any family visits, is disproportionate and unreasonable.

A. THE START OF TRIAL IS MANY MONTHS AWAY

35. The Appeals Chamber confirmed that the length of time spent in detention pending trial is a relevant factor which must be addressed.[46] However, the Appeals Chamber dismissed the appeal because at that stage of proceedings "the Parties differed widely in their opinions on the likely start date of the trial" and the Rules provide for periodic review of detention every two months.[47]

36. At the time of the Decision on Interim Release, there was indeed a wide difference between the parties as to the trial start date. The SPO maintained that "trial

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[43] *See supra* paras 20-32.
[44] Application for Interim Release, paras 50-51.
[45] Appeal Decision, para. 66.
[46] *Ibid*., paras 69-70.
[47] Appeal Decision, para. 71.

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in this matter should commence this summer or no later than September 2021".[48] That has turned out to be wrong. The SPO now submits that it will not be able to file its Pre-Trial Brief until mid-October 2021.[49] The SPO has previously submitted that trial should start three months after the filing of its Pre-Trial Brief.[50] The Defence therefore infer that the SPO's position is now that the earliest that trial could possibly start is mid-January 2022.

37. It remains the Defence position that a mid-January 2022 start date is unrealistic. In particular, the position now adopted by the SPO assumes that there is no further slippage in the disclosure timetable[51] and ignores the likely impact of the decisions on preliminary motions to be rendered on 16 July 2021 and the appeals thereto. In any event, a three month period between the Pre-Trial Brief and the start of trial is too short, taking into account (1) the extent of the current redactions and protective measures which defer significant defence investigative activity until after the submission of the Pre-Trial Brief; (2) the ongoing effect of the coronavirus pandemic on investigations; and (3) the complexity of the case.

38. It is a matter of concern that the SPO felt able to submit to the Pre-Trial Judge that trial could start "this summer" and indeed alleged that the defence submissions to the contrary were "transparently directed towards a primary strategic purpose beyond the legitimate need to prepare for trial".[52] It is now clear that the defence submissions were realistic and that it is the SPO's submissions on trial start date which should be approached with considerable circumspection.

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[48] KSC-BC-2020-06, F00097, Specialist Prosecutor, *Prosecution Submissions Further to the Status Conference of 18 November 2020* ("SPO Submissions Further to SC 18 Nov 2020"), 23 November 2020, public, para. 14.
[49] KSC-BC-2020-06, F00314, Specialist Prosecutor, *Prosecution Submissions for Fifth Status Conference* ("SPO Fifth SC Submissions"), 18 May 2021, public, para. 10.
[50] KSC-BC-2020-06, F00191/COR, Specialist Prosecutor, *Corrected Version of Prosecution Submissions for Third Status Conference*, 10 February 2021, public, para. 14.
[51] The Defence note that a further update and forecast will be provided at the next Status Conference, suggesting the possibility of delay: SPO Fifth SC Submissions, para. 3.
[52] SPO Submissions Further to SC 18 Nov 2020, para. 5.

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39. Nonetheless, the issue on this detention review is whether it is proportionate for Mr. Krasniqi to remain imprisoned pre-trial in circumstances where even the SPO's position is now that trial cannot start until mid-January 2022 - a further eight months from today and a total of more than 14 months from his initial arrest. The Defence emphasise that the likelihood is that further time will be required for defence investigations and the actual trial start date will be significantly later than this (and the period of pre-trial detention therefore longer). The extended period of likely pre-trial detention distinguishes this case from other detention reviews before the KSC.[53]

B. ONGOING DETENTION IS DISPROPORTIONATE CONSIDERING THE LACK OF FAMILY VISITS

40. In assessing proportionality, relevant considerations include the material, moral or other effects of detention on Mr. Krasniqi.[54] The effects of detention on Mr. Krasniqi are disproportionate because the unavailability of family visits is an excessive interference with his right to private and family life.

41. Human rights law is directly applicable before the KSC and has priority over any other law.[55] International human rights law recognises that prisoners have the right to receive family visits pursuant to their right to respect for private and family life.[56] The European Court of Human Rights ("ECtHR") has recognised that "it is an essential part of a prisoner's right to respect for family life that the prison authorities enable

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[53] Cf. KSC-BC-2020-05, F00097, Pre-Trial Judge, *Third Decision on Review of Detention*, 25 March 2021, public, para. 21; *see also* KSC-BC-2020-07, F00188, Pre-Trial Judge, *Decision on Review of Detention of Hysni Gucati*, 23 April 2021, public, para. 28; *see also* KSC-BC-2020-07, F00189/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on Review of Detention of Nasim Haradinaj*, 23 April 2021, public, paras 20, 34.

[54] ICTY, *Prosecutor v. Delalic et al.*, IT-96-21-T, Trial Chamber, *Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalic*, 25 September 1996, para. 26.

[55] Article 3(2) of the Law; Article 22 of the Constitution of the Republic of Kosovo.

[56] Article 8 of the European Convention on Human Rights ("ECHR") and Article 17 of the International Covenant on Civil and Political Rights ("ICCPR").

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him, or, if need be, assist him, to maintain contact with his close family".[57] This entails a positive obligation to provide a reasonably good level of contact, with visits organised as often and in as normal a manner as possible.[58] The European Prison Rules recognise the right to receive visits.[59] Holding prisoners in facilities far away from their families has been held to be a breach of human rights, because of the inevitable restriction on family visits.[60] The Inter-American Court of Human Rights ("IACtHR") has also held that states must ensure prisoners' right to maintain and cultivate family relationships.[61]

42. Mr. Krasniqi has not received any family visits since his arrest on 4 November 2020. [REDACTED]. [REDACTED]. [REDACTED].

43. The Defence fully appreciate that the coronavirus pandemic is unprecedented and that the protection of health is a legitimate purpose for which the right to family life may be restricted.[62] Nonetheless, restrictions imposed for this purpose must be necessary and proportionate. The current restrictions are not. Dutch prisoners, including those at the very prison where the KSC's detention facility is located, are permitted a one hour family visit every week despite the pandemic (subject to social distancing measures).[63] In Kosovo, prisoners remain entitled to receive family visits

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[57] ECtHR, *Khoroshenko v. Russia*, no. 41418/04, *Judgment (Merits and Just Satisfaction)* ("Khoroshenko"), 30 June 2015, para. 123; *Horych v. Poland*, no. 13621/08, *Judgment (Merits and Just Satisfaction)*, 17 July 2012, para. 122; *Trosin v. Ukraine*, no. 39758/05, *Judgment (Merits and Just Satisfaction)*, 23 May 2012, para. 39.
[58] Khoroshenko, para. 134.
[59] Council of Europe, European Prison Rules, para. 24.1.
[60] ECtHR, *Polyakova et al. v. Russia*, nos. 35090/09 and three others, *Judgment (Merits and Just Satisfaction)*, 3 July 2017, paras 116-118.
[61] IACtHR, *X and Y v. Argentina*, Report no. 38/96, Case 10.506, *Merits*, 15 October 1996, para. 98; *Oscar Elías Biscet et al. v. Cuba*, Report no. 67/06, Case 12.476, *Merits*, 21 October 2006, para. 237.
[62] Article 8(2) ECHR.
[63] Ministry of Justice and Security, Custodial Institutions Agency, PI Haaglanden, Are You a Visitor?, available at https://www.dji.nl/locaties/h/pi-haaglanden/bent-u-bezoeker (accessed 27 May 2021). *See further* Ministry of Justice and Security, Custodial Institutions Agency, General Visiting Rules, available at https://www.dji.nl/justitiabelen/bezoek (accessed 27 May 2021).

(subject to social distancing measures).[64] That Mr. Krasniqi is currently in a worse position than prisoners in both the Dutch and Kosovo national systems demonstrates that the current restrictions are not necessary or proportionate.

44. Mr. Krasniqi is 70 years old. [REDACTED]. The complete ban on family visits makes the ongoing detention of Mr. Krasniqi disproportionate because it involves an unjustifiable interference with his right to family life.

C. ONGOING DETENTION IS UNREASONABLE AND DISPROPORTIONATE

45. Rule 56(2) imposes a duty on the Pre-Trial Judge to ensure that Mr. Krasniqi is not detained for an unreasonable period before trial. Given the substantial number of months before trial could possibly commence and the impossibility of family visits due to the coronavirus pandemic, it is disproportionate to keep Mr. Krasniqi imprisoned and he should be released (subject to conditions).

VIII. CONDITIONS CAN MITIGATE ANY REMAINING RISK

46. The Appeals Chamber held that the decisive consideration on the availability of conditions, since there was no evidence of any specific support network, was the ability of Kosovo to monitor Mr. Krasniqi's potential interactions with persons [REDACTED].[65] The additional information below, which was not before the Pre-Trial Judge in the Decision on Interim Release,[66] demonstrates that Kosovo is capable of monitoring Mr. Krasniqi's interactions and hence that conditions can mitigate any remaining risks.

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[64] Kosovo Correctional Service, Visits, available at https://shkk.rks-gov.net/en/institucionet-single/2232/vizitat (accessed 29 May 2021).
[65] Appeal Decision, para. 77.
[66] *Ibid*., paras 80-81.

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47. As a preliminary matter, [REDACTED]. There is no specific evidence that Mr. Krasniqi has any interaction with any such person. [REDACTED].[67]

48. In any event, the Kosovo Police has – and regularly uses - the capability to monitor private communications. Article 13 of the Law on E-communications[68] provides for the creation of an interception sector within the Kosovo police. This law applies to: any message in the form of text, voice, sound or image sent over a public communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient; calls (including voice, voicemail and video conference); supplementary services (including call forwarding and call transfer); and messaging or multi-media services (including short message services, enhanced media services and multimedia services).[69] Articles 18(1) and (2) of the Law on E-communications designate monitoring centres within authorised institutions to receive intercepted communications and data. Monitoring Centres are installed at the Kosovo Police for the interception of electronic communication for purposes of criminal procedures (including EULEX).

49. A plethora of evidence confirms that the Kosovo Police do use their power to intercept communications. Wiretaps have been used on top PDK officials, including former KLA General Staff members (showing that there would be no barrier to applying this technology to a person such as Mr. Krasniqi).[70] Video-surveillance, phone-tapping and email monitoring have been used against suspected terrorists.[71] Further, the Kosovo Police has issued statements confirming that they do not intercept

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[67] [REDACTED].
[68] Law No. 05/L-030 on Interception of Electronic Communications, available at https://gzk.rks-gov.net/ActDetail.aspx?ActID=10968 (accessed 27 May 2021).
[69] Article 3(1)(1.15) and (1.21).
[70] Balkan Insight, EULEX Assessing Kosovo Wiretap Claims, 4 August 2016, available at https://balkaninsight.com/2016/08/04/eulex-checking-kosovo-wiretap-claims-08-04-2016/ (accessed 27 May 2021).
[71] Business Standard, Kosovo Police Arrest Six Terror Suspects, 12 November 2013, available at https://www.business-standard.com/article/pti-stories/kosovo-police-arrest-six-terror-suspects-113111201277_1.html (accessed 27 May 2021).

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communications without judicial authority (with the necessary inference that they do intercept communications with the appropriate authority)[72] and vowed to enforce provisions requiring subjects of surveillance to be notified (once the surveillance is complete).[73]

50. Additionally, the Courts in Kosovo (including the EULEX Courts) have regularly granted interim release subject to house arrest for sustained periods including in war crimes cases connected to the KLA. For instance, in the Klečka case – concerning an Indictment location and defendants including alleged JCE member Fatmir Limaj - the accused were released on house arrest for various periods.[74] In many other cases, the judgment records that house arrest was ordered[75] or orders time spent in house arrest to be credited against the sentence.[76] That these cases were able to proceed in Kosovo with accused subject to house arrest shows that the effective monitoring of these defendants can be achieved within Kosovo.

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[72] Indeks Online, Kosovo Police Reacts: We Do Not Eavesdrop on Anyone Without an Order from the Justice Authorities, 24 June 2018, available at https://indeksonline.net/reagon-policia-e-kosoves-spergjojme-askend-pa-urdher-nga-organet-e-drejtesise/ (accessed 27 May 2021).
[73] Balkan Insight, Kosovo Vows to Inform Subjects of Surveillance, 8 January 2016, available at https://balkaninsight.com/2016/01/08/kosovo-notifies-suspects-that-were-under-surveillance-01-07-2016/ (accessed 27 May 2021).
[74] EULEX, *People v. A.K. et al.*, P 766/12, Basic Court of Prishtine/Pristina, *Judgment*, 17 September 2013, pp. 21-32. *See also* EULEX, House Detention Ordered in Kleçkë/Klečka Case, 22 September 2011, available at https://www.eulex-kosovo.eu/en/pressreleases/0187.php (accessed 27 May 2021); United Nations, Security Council, 'Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo', S/2013/254, 30 April 2013, p. 14; United Nations, Security Council, 'Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo', S/2013/444, 26 July 2013, p. 12.
[75] EULEX, *People v. G.G.*, AP – K 191/2009, Supreme Court of Kosovo, *Judgment*, 8 December 2009, p. 1; Humanitarian Law Center Kosovo, 'War Crimes Trials – Still at the Beginning' ("*People v. Zajić*"), March 2020, p. 404; EULEX, *People v. S.A. et al.*, Pml.Kzz 98/2014, Supreme Court of Kosovo, *Judgment*, 3 September 2014, p. 20, para. 4.28.
[76] Humanitarian Law Center Kosovo, 'An Overview of War Crime Trials in Kosovo 1999-2018', October 2018, p. 382; EULEX, *People v. A.D. et al.*, PAKR Nr 456/15, Court of Appeals, *Judgment*, 14 September 2016, p. 4; EULEX, *People v. O.I. et al.*, P 98/14, Basic Court of Mitrovicë/a, *Judgment*, 30 March 2016, p. 25; EULEX, *People v. J.D. and D.B.*, P.nr. 13/2013, Basic Court of Mitrovicë/a, *Judgment*, 17 April 2013, para. 17; EULEX, *People v. S.G. et al.*, P. nr. 14/2013, Basic Court of Mitrovicë/a, *Judgment*, 12 September 2013, p. 5; EULEX, *People v. J.D. et al.*, PAKR Nr 455/15, Court of Appeals, *Judgment*, 15 September 2016, p. 5.

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51. In light of the above material, it is no longer tenable to hold that it is only through the communications monitoring framework at the KSC detention facility that communications can be effectively restricted and monitored.[77] In fact, the Kosovo Police can monitor Mr. Krasniqi's private communications and regularly and effectively monitors telecommunications and email. The use of house arrest in similar war crimes cases in Kosovo shows that it can be imposed without detriment to court proceedings. If the Pre-Trial Judge remains in any doubt about the capacity of the Kosovo Police to monitor communications, the Defence respectfully invite the Pre-Trial Judge to seek information from the Kosovo Police directly *proprio motu* pursuant to Article 53(1) of the Law and Rule 202(1) of the Rules.

IX. CONCLUSION

52. The Defence maintain that there is no risk that Mr. Krasniqi will flee, interfere with witnesses or commit further crimes. Such risks as were identified in the Decision on Interim Release are now substantially reduced by protective measures and further minimised by the availability of communication monitoring in Kosovo. Ongoing detention before a distant trial without family visits is disproportionate and unreasonable. Mr. Krasniqi remains willing to offer extensive undertakings[78] and to be subject to such conditions, including house arrest, as the Pre-Trial Judge deems appropriate. The Defence respectfully submit he should be released on this basis.

Word count: 5,232

[77] Decision on Interim Release, para. 49.
[78] Application for Interim Release, para. 19.

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Date original: 31/05/2021 16:05:00
Date public redacted version: 30/06/2021 13:18:00

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