



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

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

**Before:** **A Panel of the Court of Appeals Chamber**  
Judge Michèle Picard  
Judge Emilio Gatti  
Judge Kai Ambos

**Registrar:** Fidelma Donlon

**Date:** 1 October 2021

**Original language:** English

**Classification:** Public

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**Public Redacted Version of**

**Decision on Jakup Krasniqi's Appeal Against Decision on Review of Detention**

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**THE PANEL OF THE COURT OF APPEALS CHAMBER** of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively)<sup>1</sup> acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”) is seised of an appeal filed on 7 July 2021 by Mr Jakup Krasniqi (“Krasniqi” or “the Accused”),<sup>2</sup> against the “Decision on Review of Detention of Jakup Krasniqi” (“Impugned Decision”).<sup>3</sup> The Specialist Prosecutor’s Office (“SPO”) responded on 19 July 2021 that the Appeal should be rejected.<sup>4</sup> Krasniqi replied on 26 July 2021.<sup>5</sup>

## I. BACKGROUND

1. On 4 November 2020, Krasniqi was arrested pursuant to an arrest warrant issued by the Pre-Trial Judge,<sup>6</sup> further to the confirmation of an indictment against him.<sup>7</sup>

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<sup>1</sup> F00002, Decision Assigning a Court of Appeals Panel, 8 July 2021 (confidential, reclassified as public on 30 September 2021).

<sup>2</sup> F00001, Krasniqi Defence Appeal Against Decision on Review of Detention of Jakup Krasniqi, 7 July 2021 (confidential) (“Appeal”).

<sup>3</sup> F00371/RED, Public Redacted Version of Decision on Review of Detention of Jakup Krasniqi, 30 June 2021 (original version filed on 25 June 2021) (“Impugned Decision”).

<sup>4</sup> F00003/RED, Public Redacted Version of Response to Krasniqi Defence Appeal of June 2021 Detention Decision, 19 July 2021 (original version filed on 19 July 2021) (“Response”), paras 2, 30.

<sup>5</sup> F00004, Krasniqi Defence Reply to SPO Response to Krasniqi Defence Appeal of June 2021 Detention Decision, 26 July 2021 (confidential) (“Reply”).

<sup>6</sup> F00027/RED, Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders, 26 November 2020 (original version filed on 26 October 2020); F00027/A07/COR/RED, Public Redacted Version of Arrest Warrant for Jakup Krasniqi, 11 November 2020 (original version filed on 26 October 2020, corrected version filed on 28 October 2020); F00044, Notification of Arrest of Jakup Krasniqi Pursuant to Rule 55(4), 4 November 2020 (strictly confidential and *ex parte*, reclassified as public on 20 November 2020), para. 4.

<sup>7</sup> F00026/RED, Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 30 November 2020 (original version filed on 26 October 2020). The operative indictment was filed on 4 November 2020; F00045/A03, Further redacted Indictment, 4 November 2020 (strictly confidential and *ex parte*, reclassified as public on 5 November 2020).

2. On 22 January 2021, the Pre-Trial Judge rejected his request for interim release.<sup>8</sup>
3. On 30 April 2021, the Court of Appeals Panel denied Krasniqi's appeal against the First Detention Decision.<sup>9</sup>
4. On 25 June 2021, after having received submissions from Krasniqi and the SPO,<sup>10</sup> the Pre-Trial Judge issued the Impugned Decision and ordered the continuation of Krasniqi's detention, finding that the risks that Krasniqi will abscond, obstruct Specialist Chambers proceedings or commit further crimes against those perceived as being opposed to the Kosovo Liberation Army ("KLA"), including potential witnesses, continue to exist.<sup>11</sup> The Pre-Trial Judge further found that the conditions Krasniqi proposed in relation to the First Detention Decision for his conditional release ("Proposed Conditions") could sufficiently mitigate the risk of flight but that the Proposed Conditions, or any additional measure, would insufficiently mitigate the risks of obstructing the progress of Specialist Chambers proceedings or the risk of committing further crimes.<sup>12</sup> He finally found that Krasniqi's detention remained proportionate.<sup>13</sup>

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<sup>8</sup> F00122/RED, Public Redacted Version of Application for Interim Release, 18 December 2020 (original version filed on 7 December 2020; F00180/RED, Public Redacted Version of the Decision on Jakup Krasniqi's Application for Interim Release, 26 January 2021 (original version filed on 22 January 2021), para. 52 ("First Detention Decision").

<sup>9</sup> F00005/RED, Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release, 30 April 2021 (original version filed on 30 April 2021) ("*Krasniqi Appeal Decision*"), para. 84.

<sup>10</sup> See F00329/RED, Public Redacted Version of Krasniqi Defence Submissions on Detention Review, KSC-BC-2020-06/F00329, dated 31 May 2021, 30 June 2021 (original version filed on 31 May 2021) ("*Submissions on Detention Review*"); F00345/RED, Public redacted version of Prosecution response to Krasniqi Defence Submissions on Detention Review, 14 June 2021 (original version filed on 10 June 2021) ("*Response to Detention Review*"); F00358/RED, Public Redacted Version of Krasniqi Defence Reply to Prosecution Response to Defence Submissions on Detention Review, KSC-BC-2020-06/F00358, dated 18 June 2021, 30 June 2021 (original version filed on 18 June 2021) ("*Reply to Submissions on Detention Review*").

<sup>11</sup> Impugned Decision, paras 30, 40, 44-45, 61.

<sup>12</sup> Impugned Decision, paras 49, 53.

<sup>13</sup> Impugned Decision, para. 59.

5. In the Appeal, Krasniqi develops four grounds of appeal where he argues that the Impugned Decision suffers from a number of legal and factual errors which, individually and cumulatively, led to the erroneous finding that his continued detention was necessary.<sup>14</sup> Krasniqi therefore requests the Court of Appeals Panel to correct these errors, apply the correct legal standards to the evidence, and grant him interim release.<sup>15</sup>

## II. STANDARD OF REVIEW

6. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.<sup>16</sup>

## III. DISCUSSION

### A. PUBLIC FILINGS

7. The Panel notes that Krasniqi has not yet filed public redacted versions of his Appeal and Reply. Considering that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential, and that Parties shall file public redacted versions of all submissions filed before the Panel,<sup>17</sup> the Panel orders Krasniqi to file public redacted versions of his Appeal and Reply, or indicate, through a filing, whether they can be reclassified as public within ten days of receiving notification of the present Decision.

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<sup>14</sup> Appeal, paras 4-5.

<sup>15</sup> Appeal, paras 5, 54.

<sup>16</sup> KSC-BC-2020-07, F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, paras 4-14. See also e.g. KSC-BC-2020-07, F00005, Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention, 9 February 2021 ("*Haradinaj Appeal Decision*"), paras 11-14; *Krasniqi Appeal Decision*, paras 4-7.

<sup>17</sup> See e.g. KSC-BC-2020-07, F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021 ("*Gucati and Haradinaj Appeal Decision on Preliminary Motions*"), para. 13; F00005/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021 ("*Thaçi Appeal Decision*"), para. 10.

8. In addition, the Court of Appeals Panel notes that the obligation for filings to be public as far as possible necessarily implies that filings must be made public (for example, through redaction) as soon as possible. Not only does this uphold the principle of publicity of proceedings, but also has practical advantages, such as aiding the Panel in assessing which pieces of information within, for example, a confidential filing should be redacted from its decision and which could be made public. The Panel therefore reminds the Parties to file public redacted versions of their filings as soon as possible, rather than waiting for an order from the Panel before doing so.

B. ALLEGED ERROR REGARDING THE STANDARD APPLICABLE TO REVIEW OF DETENTION AND REASONED OPINION

**1. Submissions of the Parties**

9. Krasniqi argues that the Impugned Decision overall fails to give adequate reasons, despite the Court of Appeals Panel's past findings.<sup>18</sup>

10. The SPO responds that, in the absence of any justification for re-evaluation, the Pre-Trial Judge was not required to provide further reasoning on factors already upheld by the Court of Appeals Panel, notwithstanding that the Panel had found shortcomings in his reasoning and had carried out its own analysis on various issues.<sup>19</sup> The SPO relies in particular on the Panel having stated that factual findings underpinning detention need not be set out anew in subsequent decisions.<sup>20</sup> The SPO further argues that the Pre-Trial Judge did give full reasoning in addressing Krasniqi's new submissions.<sup>21</sup>

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<sup>18</sup> Appeal, para. 15, citing *Krasniqi* Appeal Decision, para. 32; Reply, para. 2. Krasniqi gives two examples of lack of reasoning (see Appeal, para. 15, citing Impugned Decision, paras 39, 60, fn. 97), and cross-references to other paragraphs of the Appeal for further examples (see Appeal, fn. 27). See also Appeal, para. 54.

<sup>19</sup> Response, paras 8-11.

<sup>20</sup> Response, para. 10, citing *inter alia* *Haradinaj* Appeal Decision, para. 55.

<sup>21</sup> Response, para. 10.

## 2. Assessment of the Court of Appeals Panel

11. The Court of Appeals Panel recalls the provisions of the Law and of the Rules relevant to review of detention.

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

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

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

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

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

The competent panel has an obligation to review the reasons or circumstances underpinning detention and determine whether these reasons continue to exist under Article 41(6) of the Law. The competent panel is not required to make findings on the factors already decided upon in the initial ruling on detention but must examine these reasons or circumstances and determine whether they still exist. What is crucial is that the competent panel is satisfied that, at the time of the review decision, grounds for continued detention still exist.<sup>22</sup>

15. The Panel considers that a further explanation of how the above findings must be interpreted is warranted. In that regard, the Panel underlines that the duty to

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<sup>22</sup> *Haradinaj* Appeal Decision, para. 55.

determine whether the circumstances underpinning detention “still exist”<sup>23</sup> is not a light one. It imposes on the competent panel the task to, *proprio motu*, assess whether, it is still satisfied that, at the time of the review and under the specific circumstances of the case when the review takes place, the detention of the Accused remains warranted.

16. The Panel is mindful that according to the Specialist Chamber of the Constitutional Court, the “change in circumstances” wording in Rule 57(2) of the Rules applies to review of detention at any point in time and separately from the mandated review at two-month intervals. Such a review “ensures that *new* relevant factors that *arise in the intervals* between reviews of detention can be assessed”.<sup>24</sup> The Panel finds that, although the automatic review every two-months under Rule 57(2) of the Rules is not strictly limited to whether or not a change of circumstances occurred in the case, such a change can nonetheless be determinative and shall be taken into consideration if raised before the Panel or *proprio motu*.<sup>25</sup>

17. In light of the above, the Panel is satisfied that the Pre-Trial Judge applied the correct standard.<sup>26</sup> Additionally, the Panel finds that the Pre-Trial Judge should not be expected to entertain submissions that merely repeat arguments that have already been addressed in his previous decisions.<sup>27</sup>

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<sup>23</sup> See Article 41(10) of the Law: “whether reasons for detention on remand still exist”.

<sup>24</sup> KSC-CC-PR-2020-09, F00006, Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020, 26 May 2020, para. 67.

<sup>25</sup> Rule 57(2) of the Rules.

<sup>26</sup> See Impugned Decision, para. 19.

<sup>27</sup> See e.g. ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-1626-Red, Public Redacted Version of Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled “Decision on Applications for Provisional Release”, 12 September 2011, para. 60; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-1019, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled “Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence”, 19 November 2010, para. 53.

18. To the extent that Krasniqi argues that the Pre-Trial Judge repeatedly failed to give full or any reasons on critical findings in the Impugned Decision,<sup>28</sup> the Panel will address these allegations directly in the relevant parts of the discussion below only insofar as the findings challenged are specifically identified.<sup>29</sup> The Panel summarily dismisses Krasniqi's general claim of "over-arching" failure to provide a reasoned opinion as undeveloped and unsupported.<sup>30</sup>

C. ALLEGED ERRORS REGARDING ASSESSMENT OF ARTICLE 41(6)(B) OF THE LAW  
(GROUNDS 1-2)

1. **Article 41(6)(b)(ii) of the Law**

(a) Submissions of the Parties

19. First, Krasniqi argues that the Pre-Trial Judge erred in relying on [REDACTED], [REDACTED].<sup>31</sup> He argues that [REDACTED], because the contemporaneous search inventory was too vague, and [REDACTED] an inventory more than [REDACTED] later. In his view, the procedure under Rule 39(4) of the Rules was breached and there is substantial doubt about its reliability, rendering [REDACTED] inadmissible under Rule 138(2) of the Rules.<sup>32</sup>

20. Alternatively and in any event, Krasniqi maintains that the Pre-Trial Judge unreasonably found that [REDACTED] reinforces [REDACTED]<sup>33</sup> and failed to explain his unreasonable finding that [REDACTED].<sup>34</sup>

21. Second, Krasniqi argues that the Pre-Trial Judge was unreasonable and speculative in finding that he holds a position of influence allowing him to elicit

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<sup>28</sup> Appeal, para. 15.

<sup>29</sup> Ibid.

<sup>30</sup> See e.g. *Haradinaj* Appeal Decision, para. 29 and jurisprudence cited therein.

<sup>31</sup> Appeal, paras 17-25.

<sup>32</sup> Appeal, paras 18, 21; Reply, paras 3-4.

<sup>33</sup> Appeal, para. 24.

<sup>34</sup> Appeal, paras 24-25.



sympathisers' support.<sup>35</sup> He submits that there is no evidence of him trying to elicit such support and the Impugned Decision fails to identify the alleged sympathisers, their capacity or resources.<sup>36</sup>

22. Third, Krasniqi argues that the Pre-Trial Judge failed to explain why the risk of intimidation or interference "is inherently high" or why he was "not convinced" that it can be "efficiently mitigated relying only on protective measures".<sup>37</sup> According to Krasniqi, this reverses the burden of proof and fails to link the risk to Krasniqi himself.<sup>38</sup> He alleges that the risk of interference has been removed or "dramatically reduced" by the quantity and "uniquely far-reaching" nature of protective measures in the case. As such, the Pre-Trial Judge had to consider this factor and failed to explain why it was insufficient to mitigate any risk of obstruction.<sup>39</sup>

23. The SPO responds that Krasniqi identifies no discernible error or justification for re-evaluating factors linked to his position of influence, [REDACTED] and the climate of intimidation.<sup>40</sup> The SPO submits that Rule 39(4) of the Rules was not violated as Krasniqi received a contemporaneous inventory [REDACTED] and a formal inventory on 28 April 2021 [REDACTED].<sup>41</sup> The SPO contends that the "admissibility" of evidence only relates to its assessment at trial and it is premature to determine [REDACTED] admissibility.<sup>42</sup> In any event, it argues that the Pre-Trial Judge explained in detail why [REDACTED].<sup>43</sup>

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<sup>35</sup> Appeal, para. 26, citing Impugned Decision, para. 38.

<sup>36</sup> Appeal, para. 26, citing *Krasniqi* Appeal Decision, para. 55.

<sup>37</sup> Appeal, para. 27, quoting Impugned Decision, para. 39; Reply, paras 7-10. See also Appeal, para. 15.

<sup>38</sup> Appeal, paras 28, 31; Reply, paras 8, 10.

<sup>39</sup> Appeal, paras 29-31; Reply, paras 9-10.

<sup>40</sup> Response, paras 15, 19, 21. See also Response, paras 10-11.

<sup>41</sup> Response, paras 16-17.

<sup>42</sup> Response, para. 17. The SPO states that a Chamber need not assess the admissibility of evidence for the purposes of a decision on release or detention. Response, fn. 25 and International Criminal Court jurisprudence cited therein.

<sup>43</sup> Response, para. 18.

24. Finally, as to protective measures, the SPO submits that the Pre-Trial Judge did not err and did not have to re-reason his finding that the risk faced by SPO witnesses in this case was “inherently high”.<sup>44</sup> According to the SPO, Krasniqi’s reference to the quantity of protective measures, many of which predate the First Detention Decision, demonstrates no discernible error on the Pre-Trial Judge’s part.<sup>45</sup>

25. Krasniqi replies that the SPO should not be allowed to rely on inadmissible documents obtained in breach of the Rules.<sup>46</sup> He challenges the SPO’s reliance on jurisprudence from the International Criminal Court which, according to him, does not show that admissibility is never relevant for interim release.<sup>47</sup>

(b) Assessment of the Court of Appeals Panel

26. The Pre-Trial Judge found that the risk that Krasniqi will obstruct the progress of the Specialist Chambers proceedings under Article 41(6)(b)(ii) of the Law continues to exist based on the following factors: (i) [REDACTED]; (ii) his position of influence allowing him to elicit the support of sympathisers; and (iii) the persisting climate of intimidation of witnesses and interference with criminal proceedings against former KLA members.<sup>48</sup>

27. The Panel first turns to address Krasniqi’s influence. The Panel notes that, in the Impugned Decision, the Pre-Trial Judge found that the recent election developments in Kosovo did not affect his previous finding that, as a former political leader and former KLA deputy commander, Krasniqi still holds a position of influence in Kosovo.<sup>49</sup> The Pre-Trial Judge stated that this position of influence allows him to call upon the support of persons sympathetic to him and/or the KLA to obstruct the

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<sup>44</sup> Response, para. 20.

<sup>45</sup> Ibid.

<sup>46</sup> Reply, para. 5.

<sup>47</sup> Reply, para. 6.

<sup>48</sup> Impugned Decision, paras 35-38, 40.

<sup>49</sup> Impugned Decision, para. 36. See also Impugned Decision, para. 38.

Specialist Chambers' proceedings.<sup>50</sup> The Panel recalls that in its *Krasniqi* Appeal Decision, it found that the Pre-Trial-Judge did not err in finding that Krasniqi continued to enjoy an influential position in Kosovo due to his former functions.<sup>51</sup> This has not changed. However, the Court of Appeals Panel also found that the evidence was insufficient to demonstrate that Krasniqi's opinions may mobilise support networks, including present and former subordinates, that there was no concrete evidence of influence exerted by Krasniqi on individuals within the support network of the KLA War Veterans Association, and that there was also no evidence adduced with regard to the existence of a support network, such as its composition, its capacity or its resources.<sup>52</sup>

28. As noted by the Defence, the Panel observes that the Pre-Trial Judge no longer refers to the support of a "network" of supporters but to the support of "persons sympathetic to him and/or the KLA" or "sympathisers".<sup>53</sup> While the Panel finds that it is reasonable for the Pre-Trial Judge to find that Krasniqi continues to enjoy a position of influence in Kosovo, the Panel however finds some merit in Krasniqi's assertion that the evidence relied upon by the Pre-Trial Judge is insufficient to reasonably conclude that he exerts influence over sympathisers of the KLA in the absence of any new concrete evidence adduced since the previous assessment that would support such a finding. In that regard, the Panel is not convinced that the material adduced by the SPO could be sufficient to show how Krasniqi would actually be in a position to exert influence over KLA sympathisers insofar as there appears to be no evidence therein linking him to the events referred to.<sup>54</sup> This finding must therefore be set aside. The Panel will address the repercussions, if any, of this finding subsequently.

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<sup>50</sup> Ibid.

<sup>51</sup> *Krasniqi* Appeal Decision, para. 52.

<sup>52</sup> *Krasniqi* Appeal Decision, paras 54-56.

<sup>53</sup> See Impugned Decision, paras 36, 38. See Appeal, para. 26.

<sup>54</sup> See Response to Detention Review, paras 7-8, referred to at Impugned Decision, para. 33(ii).

29. The Panel turns next to [REDACTED]. In the Impugned Decision, the Pre-Trial Judge recalled his previous determination on the existence of a risk of obstruction based *inter alia* on [REDACTED].<sup>55</sup> In that respect, the Panel found in the *Krasniqi* Appeal Decision that this indicated, at least, that Krasniqi was predisposed to witness intimidation.<sup>56</sup> With regard to [REDACTED], the Pre-Trial Judge found that [REDACTED].<sup>57</sup> The Pre-Trial Judge further found that [REDACTED].<sup>58</sup> The Pre-Trial Judge also dismissed Krasniqi's objection as to the admissibility of [REDACTED].<sup>59</sup>

30. The Panel notes that Krasniqi is not challenging the Pre-Trial Judge's reliance on [REDACTED] in his Appeal. The Court of Appeals Panel has previously found with respect to [REDACTED] that: (i) [REDACTED]; (ii) [REDACTED]; (iii) [REDACTED]; (iv) [REDACTED]; and (v) [REDACTED] Krasniqi is predisposed to witness intimidation.<sup>60</sup> In the absence of any change of circumstances identified that would affect the Pre-Trial Judge's previous determination, the Panel considers that this finding still stands. It is satisfied that this factor alone confirms [REDACTED] and supports the Pre-Trial Judge's conclusion that there is a risk that, if released, Krasniqi will obstruct the progress of the criminal proceedings.

31. As a result, the Panel does not need to address Krasniqi's arguments relating to the Pre-Trial Judge's alleged erroneous reliance on [REDACTED].<sup>61</sup> Accordingly, the Panel considers that it is not necessary, at this stage and for the purposes of the present Decision, to engage in a determination of whether the rules governing admissibility of evidence at trial are necessarily applicable in the context of detention-related matters and to engage in an assessment of the admissibility of [REDACTED].

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<sup>55</sup> Impugned Decision, para. 35.

<sup>56</sup> *Krasniqi* Appeal Decision, para. 62. See also Impugned Decision, para. 35.

<sup>57</sup> Impugned Decision, para. 37.

<sup>58</sup> *Ibid.*

<sup>59</sup> Impugned Decision, para. 16.

<sup>60</sup> *Krasniqi* Appeal Decision, paras 61-62, 65.

[REDACTED] was not relied upon by the Pre-Trial Judge with a view to establishing the responsibility of an accused at trial. It was only considered for the purposes of assessing the risk of obstruction under Article 41(6)(b)(ii) of the Law.

32. Likewise, and given, as found above, that [REDACTED] alone supports the existence of a risk of obstruction,<sup>62</sup> the Panel finds that the Pre-Trial Judge's erroneous reliance on the influence Krasniqi allegedly exerted over persons sympathetic to the KLA<sup>63</sup> does not invalidate his overall conclusion that there continues to be a risk that, if released, Krasniqi will obstruct the progress of the criminal proceedings. The Panel therefore finds that Krasniqi has failed to demonstrate that the Pre-Trial Judge erred in finding so.

33. The Panel finally turns to the Pre-Trial Judge's alleged error in failing to find that the extensive nature of the protective measures in the case either removed or drastically reduced any remaining risk of witness interference. While Krasniqi argues that the Pre-Trial Judge was "required" to consider the impact of the protective measures on the relevant risks, the Panel finds that he fails to demonstrate that this is a systematic requirement.<sup>64</sup> The Panel recalls that while in some instances chambers of some international criminal tribunals took into account the existence of protective measures when deciding on provisional release as a mitigating factor,<sup>65</sup> at other times the existence of protective measures was equally viewed as heightening the chamber's concerns about granting provisional release.<sup>66</sup>

34. In any event, and although the reasoning in the Impugned Decision could have been more detailed, the Panel is satisfied that the Pre-Trial Judge considered the extent of the protective measures in the present case and assessed whether they could

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<sup>62</sup> See above, para. 30.

<sup>63</sup> See above, para. 28[finding on influence].

<sup>64</sup> Contra Appeal, para. 27; Reply, para. 9.

<sup>65</sup> See also F00005, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, 30 April 2021 ("*Veseli Appeal Decision*"), para. 51 and jurisprudence cited therein.

<sup>66</sup> *Ibid.*

sufficiently mitigate the identified risks.<sup>67</sup> The Panel agrees that a significant number of witnesses in the case were granted protective measures, and notes that, for some of them, the Pre-Trial Judge ordered [REDACTED];<sup>68</sup> (ii) [REDACTED];<sup>69</sup> or (iii) [REDACTED].<sup>70</sup> At the time of the Impugned Decision,<sup>71</sup> the Pre-Trial Judge, recalling that [REDACTED], found that, [REDACTED].<sup>72</sup> The Panel agrees with this assessment and finds that it remains valid [REDACTED].<sup>73</sup> The Panel does not find that the fact that [REDACTED] affects the Pre-Trial Judge's determination.

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<sup>67</sup> Impugned Decision, para. 39.

<sup>68</sup> See F00133/COR/CONF/RED, Confidential Redacted Version of Corrected Version of First Decision on Specialist Prosecutor's Request for Protective Measures, 14 December 2020 (confidential) (original version filed on 10 December 2020) ("First Decision on Protective Measures"), para. 132(d); F00190/CONF/RED, Confidential Redacted Version of Decision on Specialist Prosecutor's Second Request for Protective Measures and Renewed Request for Protective Measures and Procedural Matters, 5 February 2021 (confidential) (original version filed on 5 February 2021) ("Second Decision on Protective Measures"), para. 144(d). See also the following decisions issued after the Impugned Decision: F00373/CONF/RED, Confidential Redacted Version of Sixth Decision on Specialist Prosecutor's Request for Protective Measures, 25 June 2021 (confidential) (original version filed on 25 June 2021) ("Sixth Decision on Protective Measures"), para. 107(b); F00407/CONF/RED, Confidential Redacted Version of Seventh Decision on Specialist Prosecutor's Request for Protective Measures, 21 July 2021 (confidential) (original version filed on 21 July 2021) ("Seventh Decision on Protective Measures"), para. 148(b); F00438/CONF/RED, Confidential Redacted Version of Eighth Decision on Specialist Prosecutor's Request for Protective Measures, 24 August 2021 (confidential) (original version filed on 24 August 2021) ("Eighth Decision on Protective Measures"), para. 93(f).

<sup>69</sup> See First Decision on Protective Measures, para. 132(h); Second Decision on Protective Measures, para. 144(e); F00338/CONF/RED, Confidential Redacted Version of Fifth Decision on Specialist Prosecutor's Request for Protective Measures, 7 June 2021 (confidential) (original version filed on 4 June 2021) ("Fifth Decision on Protective Measures"), para. 76(c); Sixth Decision on Protective Measures, para. 107(c); Seventh Decision on Protective Measures, para. 148(c); Eighth Decision on Protective Measures, para. 93(g).

<sup>70</sup> See First Decision on Protective Measures, para. 132(k); Second Decision on Protective Measures, para. 144(g); Fifth Decision on Protective Measures, para. 76(b); Sixth Decision on Protective Measures, para. 107(d); Seventh Decision on Protective Measures, para. 148(d); Eighth Decision on Protective Measures, para. 93(h).

<sup>71</sup> The Sixth Decision on Protective Measures was issued on the same day as the Impugned Decision.

<sup>72</sup> Sixth Decision on Protective Measures, para. 90. The Pre-Trial Judge also found that [REDACTED]. See Second Decision on Protective Measures, para. 91. In the Sixth Decision on Protective Measures, the Pre-Trial Judge [REDACTED]. See Sixth Decision on Protective Measures, para. 107(c) and (d).

<sup>73</sup> See Seventh Decision on Protective Measures, para. 148(d) ([REDACTED]); Eighth Decision on Protective Measures, para. 93(h) ([REDACTED]). See also Eighth Decision on Protective Measures, paras 64, 66.

35. [REDACTED].<sup>74</sup> The Panel notes that Krasniqi omits to mention that [REDACTED].<sup>75</sup> [REDACTED].<sup>76</sup> In light of the findings, upheld on appeal, on Krasniqi's personal predisposition to witness intimidation and [REDACTED],<sup>77</sup> the Panel finds no error in the Pre-Trial Judge's conclusion that the protective measures in place were not sufficient to mitigate the "inherently high" risk of witness intimidation or interference.<sup>78</sup> The Panel therefore considers that Krasniqi has failed to identify any discernible error or abuse of discretion in the Pre-Trial Judge's consideration of the protective measures.

36. In view of the foregoing, the Court of Appeals Panel dismisses Krasniqi's arguments related to the alleged erroneous assessment of Article 41(6)(b)(ii) of the Law.

## 2. Article 41(6)(b)(iii) of the Law

37. Given that the Panel has found no error in the Pre-Trial Judge's conclusion that a risk of obstruction existed under Article 41(6)(b)(ii) of the Law, making continued detention necessary, Krasniqi's allegations with regard to factors that were relied upon by the Pre-Trial Judge in his determination of the risk under Article 41(6)(b)(iii) of the Law need not be addressed.<sup>79</sup> The Court of Appeals Panel recalls that the conditions set forth in Article 41(6)(b) of the Law are alternative to one another.<sup>80</sup> If one

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<sup>74</sup> See First Decision on Protective Measures, paras 38, 43, 56, 63, 84, 95, 104; Second Decision on Protective Measures, paras 48, 58, 70; Fifth Decision on Protective Measures, paras 22, 34, 41, 48, 56; Sixth Decision on Protective Measures, paras 25, 36, 47, 57, 66, 76, 88; Seventh Decision on Protective Measures, paras 49, 72, 89, 99, 109, 118; Eight Decision on Protective Measures, paras 39-40, 51, 61.

<sup>75</sup> See First Decision on Protective Measures, paras 124-125, 132(q); Second Decision on Protective Measures, paras 135-136, 144(k); Fifth Decision on Protective Measures, paras 74-75, 76(g); Seventh Decision on Protective Measures, paras 143, 145, 148(i); Eighth Decision on Protective Measures, paras 88-89, 93(m).

<sup>76</sup> Contra Appeal, paras 29-30.

<sup>77</sup> See above, para. 30. See also Impugned Decision, paras 35, 38.

<sup>78</sup> See Impugned Decision, para. 39.

<sup>79</sup> See Appeal, paras 33-39.

<sup>80</sup> See e.g. KSC-BC-2020-04, F00005/RED, Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Provisional Release, 20 August 2021 (original version filed on 20 August 2021) ("*Shala* Appeal Decision"), para. 43; *Krasniqi* Appeal Decision, para. 66; *Thaçi* Appeal Decision, para. 78.

of those conditions is fulfilled, the other conditions do not have to be addressed in order for detention to be maintained. Accordingly, the errors Krasniqi alleges with regard to Article 41(6)(b)(iii) of the Law need not be addressed.<sup>81</sup> Any findings by the Panel on Krasniqi's arguments would therefore not have an impact on the outcome of the Impugned Decision. The Panel needs nonetheless to address whether the Pre-Trial Judge erred in finding that the risk of obstructing the proceedings could not be mitigated by the proposed conditions. The Panel also needs to address the Parties' arguments on the proportionality of the detention.

D. ALLEGED ERRORS REGARDING ASSESSMENT OF THE PROPORTIONALITY OF DETENTION  
(GROUND 4)

**1. Submissions of the Parties**

38. Krasniqi argues that the Pre-Trial Judge made discernible errors in concluding that his ongoing detention is proportionate.<sup>82</sup> He submits that the Pre-Trial Judge erred by finding that the trial start date remained speculative and failed to consider proportionality in relation to the earliest possible start date of mid-January 2022.<sup>83</sup> According to Krasniqi, the Pre-Trial Judge also erred by considering the denial of family visits separately from the proportionality assessment and by finding that this denial was proportionate to the legitimate aim of protecting his and others' health in a public health emergency.<sup>84</sup> Krasniqi finally submits that his detention in the Netherlands will continue to restrict his ability to have in-person meetings, even after such meetings resume in mid-July 2021.<sup>85</sup>

39. The SPO responds that the Pre-Trial Judge did not err in concluding that estimating the length of pre-trial detention was premature and speculative in light of

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<sup>81</sup> See Appeal, paras 33-39.

<sup>82</sup> Appeal, paras 47-53, referring to Impugned Decision, paras 58-60.

<sup>83</sup> Appeal, paras 47-49.

<sup>84</sup> Appeal, paras 48, 50-51; Reply, para. 14.

<sup>85</sup> Appeal, para. 52; Reply, para. 14, fn. 27.



differing estimates from the Parties, and as the Court of Appeals Panel found that such an estimate was not required.<sup>86</sup> It also submits that the Pre-Trial Judge did take the issue of family visits into account, and Krasniqi merely disagrees with the weight he gave to this factor.<sup>87</sup>

40. Krasniqi replies that the Response overlooks the different handling of family visits in Dutch prisons, and that the restriction of some rights in Kosovo prisons does not equate to an eight-month ban on family visits.<sup>88</sup>

## 2. Assessment of the Court of Appeals Panel

41. The Panel notes that the Pre-Trial Judge correctly recalled the importance of the proportionality principle in the determination of the reasonableness of pre-trial detention.<sup>89</sup> The length of time spent in detention pending trial is a factor that needs to be considered along with the risks that are described in Article 41(6)(b) of the Law, in order to determine whether, all factors being considered, the continued detention “stops being reasonable” and the individual needs to be released.<sup>90</sup> The Panel further recalls its determination in the *Krasniqi* Appeal Decision that the Pre-Trial Judge had not erred in adopting a different approach than some judges at the International Criminal Tribunal for the former Yugoslavia who took the probable length of pre-trial detention into account in the exercise of their discretion to release an accused, especially in light of the periodic review of the necessity of continued detention.<sup>91</sup>

42. The Panel furthermore notes that the Pre-Trial Judge considered the following factors to reach his conclusion that Krasniqi’s pre-trial detention is proportionate so far and that a discussion on its anticipated length remained purely speculative at that

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<sup>86</sup> Response, paras 27-28.

<sup>87</sup> Response, para. 28.

<sup>88</sup> Reply, para. 15.

<sup>89</sup> Impugned Decision, para. 58. See also *Krasniqi* Appeal Decision, para. 69.

<sup>90</sup> Impugned Decision, para. 58.

<sup>91</sup> *Krasniqi* Appeal Decision, para. 71 and jurisprudence cited therein. See also Rule 57(2) of the Rules; Article 41(10) of the Law.

moment: (i) Krasniqi is charged with ten counts of war crimes and crime against humanity for events in multiple locations over an extended period of time; (ii) if convicted, his sentence could be lengthy; (iii) the complexity of the case; (iv) the risks under Article 41(6)(b)(ii) and (iii) of the Law cannot be mitigated by any additional condition; (v) all pre-trial procedural steps will be completed to transmit the case for trial in the foreseeable future; and (vi) time limits have either been met or extended for good cause, including at Krasniqi's request.<sup>92</sup> The Pre-Trial Judge also highlighted the existence of a periodic review of pre-trial detention.<sup>93</sup>

43. Although the Pre-Trial Judge did not explicitly list the Parties' estimates as to the probable start date of the trial as one of the factors he took into account with regard to proportionality, he did take note of the Defence's argument that the Parties differed widely in their opinion as to the likely start date of trial.<sup>94</sup> Given the current stage of the pre-trial proceedings, and the Parties' persisting different positions as to the likely start date for the trial, and therefore as to the likely length of the pre-trial period, the Panel finds that it was again not unreasonable and within his discretion for the Pre-Trial Judge to find, like in his previous assessment, that any determination *at the present stage* as to the expected total length of Krasniqi's pre-trial detention is purely speculative.<sup>95</sup>

44. Turning next to Krasniqi's arguments regarding the issue of family visits, the Panel is of the view that the Pre-Trial Judge did take this issue specifically into account in his determination of whether continued detention remained reasonable. This is not only clear from the Pre-Trial Judge considering this issue within the section entitled "Proportionality of Detention",<sup>96</sup> but also from the Pre-Trial Judge focusing on the *upcoming* availability of family visits as part of his assessment of whether the

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<sup>92</sup> Impugned Decision, para. 59.

<sup>93</sup> Impugned Decision, para. 59.

<sup>94</sup> Impugned Decision, para. 55, citing Submissions on Detention Review, paras 35-39.

<sup>95</sup> Contra Appeal, para. 49.

<sup>96</sup> Impugned Decision, paras 55, 57, 59-60.

*continuation* of Krasniqi's pre-trial detention was proportionate. Although the Pre-Trial Judge's discussion of the limitations on Krasniqi's right to family life is indeed succinct and fails to engage in detail with the jurisprudence or factual arguments set out in Krasniqi's submissions,<sup>97</sup> the Panel is not convinced that the Pre-Trial Judge's forward looking approach was unreasonable in light of the information provided by the Specialist Chambers' Registrar, namely that family visits were due to resume on 15 July 2021, less than three weeks after the Impugned Decision was issued.<sup>98</sup>

45. Moreover, as to the alleged error in failing to consider Krasniqi's difficulty in having personal meetings with his family even after restrictions are lifted, due to being detained in the Netherlands, the Panel notes that this argument was not raised before the Pre-Trial Judge and is therefore being raised for the first time on appeal.<sup>99</sup> The Registrar informed the Pre-Trial Judge and the Parties of the upcoming resumption of family visits through a filing on 16 June 2021, two days before Krasniqi filed his reply submissions before the Pre-Trial Judge.<sup>100</sup> As Krasniqi could reasonably have raised this argument before the Pre-Trial Judge, the Panel summarily dismisses it.<sup>101</sup>

46. Accordingly, Krasniqi's ground of appeal related to the assessment of the proportionality of his detention is dismissed.

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<sup>97</sup> Impugned Decision, para. 60; Submissions on Detention Review, paras 40-44; Reply to Submissions on Detention Review, paras 12-13.

<sup>98</sup> Impugned Decision, para. 60, citing F00353/RED, Public Redacted Version of 'Update to Submissions of the Registrar Pursuant to Rule 23(2) of COVID-19 Risk Mitigation Measures, filing F00353 dated 16 June 2021, 17 June 2021 (original version filed on 16 June 2021) ("Registrar Update on COVID-19 Measures"), paras 15, 17. See also F00402, Registrar's Submissions for the Sixth Status Conference, 16 July 2021, para. 8.

<sup>99</sup> Appeal, para. 52.

<sup>100</sup> See Registrar Update on COVID-19 Measures, filed on 16 June 2021; Reply to Submissions on Detention Review, filed on 18 June 2021.

<sup>101</sup> *Haradinaj* Appeal Decision, paras 29, 38; *Veseli* Appeal Decision, para. 51. See also *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 15; *Shala* Appeal Decision, para. 8.

## E. ALLEGED ERRORS REGARDING ASSESSMENT OF CONDITIONS OF RELEASE (GROUND 3)

### 1. Submissions of the Parties

47. Krasniqi submits that the Pre-Trial Judge made discernible errors in concluding that conditional interim release would insufficiently mitigate any risks which were correctly identified.<sup>102</sup> He argues that the Pre-Trial Judge failed to properly consider potential conditions of release, and ignored or failed to give reasons for rejecting Defence submissions thereon.<sup>103</sup> Specifically, Krasniqi argues that the Pre-Trial Judge failed to look at the totality of the evidence showing that the Kosovo Police would be able to monitor his private communications.<sup>104</sup> In addition, he submits that the Pre-Trial Judge was unreasonable to dismiss a Kosovo Police statement as a general assertion without making *proprio motu* inquiries, given that it referred explicitly to the Defence's request, which specifically asked about its ability to monitor communications.<sup>105</sup>

48. Moreover, Krasniqi takes issue with the Pre-Trial Judge's focus on his ability to use someone else's electronic device or pass information through someone else, which departed from earlier findings focussing on the Kosovo Police's ability to monitor and enforce conditions.<sup>106</sup> According to Krasniqi, the Pre-Trial Judge failed to consider how the risks could be mitigated by additional conditions and failed to explain why they are not sufficient to reduce the risk to an acceptable level.<sup>107</sup>

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<sup>102</sup> Appeal, paras 4(3), 40-46, referring to Impugned Decision, paras 50-52.

<sup>103</sup> Appeal, paras 41-42; Reply, para. 11, citing *inter alia* Impugned Decision, paras 50-52; Submissions on Detention Review, paras 48-51; F00358/A01, Annex 1 to Krasniqi Defence Reply to Prosecution Response to Defence Submissions on Detention Review, 18 June 2021 (confidential) ("Annex to Krasniqi Reply on Detention Review").

<sup>104</sup> Appeal, para. 42.

<sup>105</sup> Appeal, para. 43.

<sup>106</sup> Appeal, para. 44; Reply, para. 13, citing Impugned Decision, para. 52; First Detention Decision, para. 49.

<sup>107</sup> Appeal, para. 45.

49. The SPO responds that Krasniqi merely disagrees with, and identifies no error in the Pre-Trial Judge's explanation of why no conditions could mitigate the risks.<sup>108</sup> According to the SPO, if no condition can mitigate the risks identified, the chamber "is not obligated to assess a State's willingness and ability to enforce conditions".<sup>109</sup> In any event, the SPO contends that the Pre-Trial Judge properly weighed the Kosovo Police's assurances.<sup>110</sup> The SPO further refers to a previous decision in which the Court of Appeals Panel upheld the Pre-Trial Judge's finding that vague assurances from the General Director of the Kosovo Police were insufficient.<sup>111</sup>

50. Krasniqi replies that the Court of Appeals Panel's previous finding on the insufficiency of a guarantee is irrelevant – the new guarantees responded to specific Defence questions and were consistent with other material, which the Impugned Decision failed to assess.<sup>112</sup> Finally, Krasniqi argues that the Impugned Decision applied an excessively high threshold, contrary to the principle of pre-trial detention being the exception before the Specialist Chambers, by focusing on the possibility of passing information through others, despite evidence of the enforceability of restrictions on his contacts, communications monitoring and the existence of protective measures.<sup>113</sup>

## **2. Assessment of the Court of Appeals Panel**

51. The Pre-Trial Judge recalled his previous finding that it is only through the communications monitoring framework at the Specialist Chambers Detention Facilities that Krasniqi's communications can be effectively restricted and monitored, thereby mitigating the risk of obstructing proceedings or contributing to crimes.<sup>114</sup> Moreover, he found that neither the conditions proposed by Krasniqi nor any further

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<sup>108</sup> Response, para. 25.

<sup>109</sup> Response, para. 26.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> Reply, para. 12.

<sup>113</sup> Reply, para. 13, citing Impugned Decision, para. 52; First Detention Decision, para. 49.

<sup>114</sup> Impugned Decision, para. 50.

limitations would sufficiently mitigate the risk of obstructing proceedings or the risk of committing further crimes.<sup>115</sup> He also found that the additional guarantees proposed by Krasniqi insufficiently address the risks, in particular finding that, despite the detailed set of questions posed by the Defence to the Kosovo Police, a statement by the latter was a general assertion that did not explain whether the conditions proposed by Krasniqi or any other measure imposed by the Pre-Trial Judge, in particular to prevent prohibited communications, could be effectively enforced and, if so, which measures would be adopted.<sup>116</sup> The Pre-Trial Judge found that even additional measures, such as a restriction of internet and (mobile) telephone use, the installation of a keylogger or similar monitoring devices would not prevent Krasniqi from employing other electronic devices belonging to other persons, such as his family or acquaintances, or from passing on instructions to other persons with a view to intimidating and/or interfering with witnesses, noting in particular his influential position and [REDACTED].<sup>117</sup>

52. The Court of Appeals Panel will first address Krasniqi's argument that the Pre-Trial Judge erred by raising concerns about the possibility of information being passed via others. First, the Panel is not persuaded that it was unreasonable for the Pre-Trial Judge to consider this form of indirect communication for the first time in this decision, having not mentioned it in previous decisions regarding Krasniqi's detention.

53. Second, the Panel is also not persuaded that this consideration sets an excessively high threshold for interim release in Krasniqi's case. Conditions of release "must be proportionately tailored to mitigate the risks identified".<sup>118</sup> Consequently,

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<sup>115</sup> Impugned Decision, para. 53.

<sup>116</sup> Impugned Decision, para. 51.

<sup>117</sup> Impugned Decision, para. 52.

<sup>118</sup> ICC, *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-1251-Red2, Second Public Redacted Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute, 21 February 2019, para. 54.

Krasniqi has failed to show that taking into account avenues for indirect communication was unreasonable in light of the serious risks identified by the Pre-Trial Judge in the event that Krasniqi was able to communicate in an unauthorised manner and the serious consequences that may flow from such communications. The Panel therefore dismisses Krasniqi's arguments regarding the Pre-Trial Judge's consideration of indirect means of communication as part of his reasoning.

54. The Panel notes that Krasniqi did indeed propose a detailed list of conditions which may, in the abstract, restrict and monitor his communications. That being said, the Panel stresses that it still needs to be assessed whether such measures can be effectively enforced. In that regard, the Panel finds that the Kosovo Police's willingness and ability to enforce proposed conditions could assist in mitigating the risks identified by the Pre-Trial Judge. The competent panel therefore has to review whether, when applicable, the guarantees that have been provided can appropriately mitigate the risks. Such a review should be done on a case-by-case basis. The Panel considers that in light of the extensive list of conditions put forward by Krasniqi, it was not open to the Pre-Trial Judge to conclude that none of these conditions could sufficiently mitigate the identified risks without enquiring further into the enforceability of these measures.

55. Turning therefore to the guarantees provided by the Kosovo Police, the Panel agrees with the Pre-Trial Judge that the response from the [REDACTED] ("Police Director"), given its general and generic character, cannot be considered as constituting a positive response to the detailed questions posed by the Defence, contrary to Krasniqi's contention.<sup>119</sup> Likewise, the Panel agrees with the Pre-Trial Judge that, given the level of detail of the questions asked by Counsel for Krasniqi,<sup>120</sup> a more specific response from the Police Director supported by relevant

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<sup>119</sup> Annex to Krasniqi Reply on Detention Review, p. 2; Impugned Decision, para. 51. See contra Appeal, para. 43.

<sup>120</sup> Annex to Krasniqi Reply on Detention Review, pp. 3-4.

documentation as well as concrete measures that could be adopted was expected but was not provided.<sup>121</sup> In such circumstances, the Panel finds that while the guarantees from the Kosovo Police seem to demonstrate its willingness/readiness to enforce proposed conditions, in light of the little information available, it is not possible to assess to what extent the Kosovo Police has the actual capacity and resources to implement these measures.

56. However, the Panel finds that if the Pre-Trial Judge considered, and as he did in fact, that the response from the Kosovo Police was not sufficiently satisfactory, he should then have enquired with the Police Director to obtain the detailed response he found was lacking, especially as he was expressly invited to do so by Krasniqi<sup>122</sup> and the response of the Police Director implies the Kosovo Police's ability to enforce conditions.<sup>123</sup> The Panel recalls that conducting such an enquiry would fall within the discretionary powers the Pre-Trial Judge is vested with pursuant to Article 39(13) of the Law with regard to detention related matters, depending on the circumstances of the case.<sup>124</sup> The Panel also notes that the Pre-Trial Judge did not provide reasons for not ordering the Police Director to provide a detailed response despite acknowledging the need for it.

57. Therefore, in light of the specific circumstances of the case, the Panel finds merit in Krasniqi's contention that the Pre-Trial Judge abused his discretion when concluding that none of the conditions proposed by Krasniqi nor any other additional condition could mitigate the identified risks without first seeking additional

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<sup>121</sup> Impugned Decision, para. 51.

<sup>122</sup> Submissions on Detention Review, para. 51. The Panel notes that Krasniqi's invitation to the Pre-Trial Judge to seek information from the Kosovo Police was made prior to Krasniqi filing the assurances provided by the Kosovo Police in response to his own enquiries, and no additional invitation to the Pre-Trial Judge was made after these assurances were filed. However, the Panel considers that the initial invitation to the Pre-Trial Judge, in these circumstances, should still have prompted him to turn his mind to whether such further enquiries would have been warranted after reviewing the Kosovo Police assurances filed by Krasniqi and finding them wanting in terms of detail.

<sup>123</sup> Annex to Krasniqi Reply on Detention Review, p. 2: "[REDACTED]" (emphasis added).

<sup>124</sup> *Shala* Appeal Decision, para. 60.



submissions from the Police Director. The Panel finds that the Pre-Trial Judge erred in not doing so, as this information would have put him in a position to assess whether the Kosovo Police can effectively enforce these measures. More precise information of this kind would give the Pre-Trial Judge a more complete and solid factual basis to assess the feasibility of such conditions, without of course anticipating the outcome of the final determination on these matters.

58. In light of the above, the Court of Appeals Panel grants Krasniqi's ground of appeal 3 and remands the matter to the Pre-Trial Judge in order to assess whether the Kosovo Police can effectively enforce the conditions proposed by Krasniqi or any further condition the Pre-Trial Judge identifies as necessary to mitigate the identified risks.

59. In light of this finding, the Panel need not address Krasniqi's remaining argument about the Pre-Trial Judge's failure to consider the Kosovo Police assurances in light of the applicable legal framework regarding communications monitoring, and open source material about the Kosovo Police using these powers in practice.<sup>125</sup>

#### IV. DISPOSITION

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

**GRANTS** Krasniqi's ground of appeal 3;

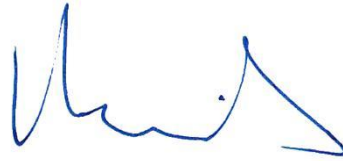
**REMANDS** the matter to the Pre-Trial Judge for further consideration consistent with paragraphs 56-58 of this Decision;

**DISMISSES** all other aspects of the Appeal (Krasniqi's grounds of appeal 1, 2 and 4); and

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<sup>125</sup> Appeal, para. 42; Reply, para. 12.

**ORDERS** Krasniqi to file public redacted versions of his Appeal and Reply or indicate, through a filing, whether these filings can be reclassified as public within ten days of receiving notification of the present Decision.



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**Judge Michèle Picard,  
Presiding Judge**

Dated this Friday, 1 October 2021

At The Hague, the Netherlands