

In: KSC-BC-2020-06
**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi
and Jakup Krasniqi**

Before: **The President of the Specialist Chambers**
Judge Ekaterina Trendafilova

Registrar: Dr Fidelma Donlon

Filing Participant: Defence Counsel for Jakup Krasniqi

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Public Redacted Version of

Krasniqi Defence Appeal Against Decision on Review of Detention of Jakup

Krasniqi, KSC-BC-2020-06/IA006/F00001, dated 7 July 2021

with public Annex 1

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I. INTRODUCTION

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

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

3. The Impugned Decision determined that: a moderate risk of flight continues to exist in relation to Mr. Krasniqi,³ there continues to be a risk that he will obstruct the progress of Kosovo Specialist Chambers ("KSC") proceedings,⁴ and a risk that he will commit further crimes.⁵ It further concluded that the imposition of conditions would mitigate the risk of flight⁶ but would insufficiently mitigate the other identified risks.⁷ The Impugned Decision also held that detention was proportionate.⁸ Interim release was denied.

4. The Defence appeal on the following grounds:-

¹ KSC-BC-2020-06, F00371, Pre-Trial Judge, *Decision on Review of Detention of Jakup Krasniqi*, 25 June 2021, confidential.

² KSC-BC-2020-07, IA001/F00005, Court of Appeals Chamber, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention* ("Gucati Appeal Decision"), 9 December 2020, public, paras 15, 18.

³ Impugned Decision, paras 29-30.

⁴ *Ibid.*, paras 37-40.

⁵ *Ibid.*, paras 42-44.

⁶ *Ibid.*, para. 49.

⁷ *Ibid.*, paras 51-53.

⁸ *Ibid.*, paras 59-60.

- 1) The Impugned Decision erred in law and fact in determining that, despite extensive protective measures, there continues to be specific reasoning based on evidence supporting a sufficiently real possibility of Mr. Krasniqi obstructing KSC proceedings;⁹
- 2) The Impugned Decision erred in law and fact in finding that the risk that Mr. Krasniqi will commit crimes similar to the underlying acts charged continues to exist;¹⁰
- 3) The Impugned Decision made discernible errors in concluding that conditions insufficiently mitigate any risks which were correctly identified;¹¹
- 4) The Impugned Decision made discernible errors in concluding that ongoing detention is proportionate.¹²

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

6. The Impugned Decision also erred in finding that Mr. Krasniqi posed a moderate risk of flight.¹³ However, it found that the moderate risk of flight was mitigated by the proposed conditions.¹⁴ Accordingly, the erroneous finding that Mr. Krasniqi posed a

⁹ Impugned Decision, paras 37-40.

¹⁰ *Ibid.*, paras 43-44.

¹¹ *Ibid.*, paras 51-53.

¹² *Ibid.*, paras 59-60.

¹³ *Ibid.*, paras 29-30.

¹⁴ *Ibid.*, para. 49.

flight risk did not affect the outcome of the Impugned Decision and the Defence do not address it further.

II. PROCEDURAL HISTORY

7. On 26 October 2020, the Pre-Trial Judge confirmed the revised indictment¹⁵ and issued an arrest warrant for Mr. Krasniqi.¹⁶

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

9. On 22 January 2021, the Pre-Trial Judge issued a decision rejecting Jakup Krasniqi's application for Interim Release.¹⁷

10. On 30 April 2021, the Appeals Chamber rejected Mr. Krasniqi's appeal against that decision.¹⁸

11. On 31 May 2021, the Defence filed their submissions on detention review.¹⁹ On 10 June 2021, the SPO responded.²⁰ On 18 June 2021, the Defence filed their reply.²¹

¹⁵ KSC-BC-2020-06, F00026/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 19 November 2020, confidential.

¹⁶ KSC-BC-2020-06, F00027/A07/COR/RED, Pre-Trial Judge, *Public Redacted Version of Corrected Version of Arrest Warrant for Jakup Krasniqi*, 5 November 2020, public.

¹⁷ KSC-BC-2020-06, F00180, Pre-Trial Judge, *Decision on Jakup Krasniqi's Application for Interim Release ("First Interim Release Decision")*, 22 January 2021, confidential.

¹⁸ KSC-BC-2020-06, IA002/F00005, Court of Appeals Chamber, *Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release ("First Appeal Decision")*, 30 April 2021, confidential.

¹⁹ KSC-BC-2020-06, F00329, Krasniqi Defence, *Krasniqi Defence Submissions on Detention Review ("Submissions")*, 31 May 2021, confidential.

²⁰ KSC-BC-2020-06, F00345, Specialist Prosecutor, *Prosecution Response to Krasniqi Defence Submissions on Detention Review ("Response")*, 10 June 2021, confidential, with Annex 1, confidential.

²¹ KSC-BC-2020-06, F00358, Krasniqi Defence, *Krasniqi Defence Reply to Prosecution Response to Defence Submissions on Detention Review ("Reply")*, 18 June 2021, confidential.

12. On 25 June 2021 (distributed to the Defence on 28 June 2021), the Pre-Trial Judge rendered the Impugned Decision.

III. APPLICABLE LAW

13. Appeals may challenge errors of law and errors of fact.²² In the Gucati Appeal Decision, the Appeals Chamber elaborated the standards of review applicable in an interlocutory appeal. In relation to errors of law, a party “must identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision”.²³ Regarding errors of fact, the Court will “only find the existence of an error of fact when no reasonable trier of fact could have made the impugned finding” and the factual error must have “caused a miscarriage of justice” by affecting the outcome of the decision.²⁴

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

a party must demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion. The Court of Appeals Panel will also consider whether the lower level panel has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.²⁵

15. The over-arching error pervading the Impugned Decision is failure to give adequate reasons. The Appeals Chamber previously “strongly urge[d] the Pre-Trial

²² Article 46(1) of the Law, which applies *mutatis mutandis* to interlocutory appeals (Guhati Appeal Decision, para. 10).

²³ Guhati Appeal Decision, para. 12. In the same paragraph, the Appeals Chamber continued “[...] *even if the party's arguments are insufficient to support the contention of an error, the Panel may find for other reasons that there is an error of law*”.

²⁴ Guhati Appeal Decision, para. 13.

²⁵ *Ibid.*, para. 14.

Judge to provide fuller reasoning in future decisions on [...] review of detention”.²⁶ Despite this, the Impugned Decision fails to give full or any reasons on critical findings.²⁷ For instance, the finding that “the Pre-Trial Judge is not convinced that the risk of obstruction can be efficiently mitigated relying only on protective measures”²⁸ is unencumbered by any reasoning explaining why the extensive protective measures cannot effectively mitigate the supposed risk. Similarly, the key finding regarding the denial of family visits to Mr. Krasniqi that this restriction was “proportionate to the legitimate aim pursued”²⁹ is not supported by analysis or authority but only by a cursory footnote to “Article 8 of the European Convention on Human Rights”.³⁰ As explained below, this repeated failure to give reasons invalidates the Impugned Decision.

IV. GROUND 1

The Impugned Decision erred in law and fact in determining that, despite extensive protective measures, there continues to be specific reasoning based on evidence supporting a sufficiently real possibility of Mr. Krasniqi obstructing KSC proceedings

16. The starting point for any detention review is the presumption of innocence. Pre-trial detention cannot be maintained lightly and the SPO bears the burden of demonstrating that it is necessary.³¹ Pre-trial detention is the exception not the rule.³² Further, regarding Article 41(6)(b), the question is whether the SPO presented specific reasoning based on evidence supporting the belief of a sufficiently real possibility that

²⁶ First Appeal Decision, para. 32.

²⁷ See paras 20, 24-27, 29, 31, 41-42, 45, 50, 52, 54 below.

²⁸ Impugned Decision, para. 39.

²⁹ *Ibid.*, para. 60.

³⁰ *Ibid.*, fn. 97.

³¹ First Appeal Decision, para. 23.

³² KSC-BC-2020-06, IA004/F00005, Judge Kai Ambos, *Separate Concurring Opinion of Judge Kai Ambos* (“Judge Ambos SCO”), 30 April 2021, confidential, para. 4.

the relevant risk exists.³³ The commentary on the Kosovo Criminal Procedure Code also emphasises that concrete evidence is required to justify the existence of a risk under the equivalent provision.³⁴

17. [REDACTED]: [REDACTED];³⁵ [REDACTED];³⁶ [REDACTED];³⁷ [REDACTED].³⁸ [REDACTED].

18. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]³⁹ [REDACTED].⁴⁰ [REDACTED], [REDACTED].⁴¹ [REDACTED].⁴² [REDACTED], [REDACTED]. [REDACTED]: [REDACTED]; [REDACTED]; [REDACTED]. [REDACTED], [REDACTED].

19. [REDACTED]: [REDACTED].⁴³

20. [REDACTED]. [REDACTED], [REDACTED], [REDACTED], [REDACTED]. [REDACTED]. [REDACTED], [REDACTED].

³³ First Appeal Decision, para. 28.

³⁴ Sahiti, E., Murati, R., and Elshani, X., Commentary of Kosovo Criminal Procedure Code, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, December 2014, available at http://jus.igjk.rks-gov.net/486/1/Komentari_Kodi%20i%20Procedures%20Penal.pdf (accessed 5 July 2021), p. 491: "The existence of special circumstances which indicate the risk of impact must be concrete circumstances. For example, a proven attempt to establish contact with a witness, injured party, or accomplice, either directly or indirectly through other persons, both before and after the designated person has been questioned; their intimidation; trying to buy the witness; alibi preparation; engagement of false witnesses etc".

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED]. See further [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED]. [REDACTED].

⁴³ [REDACTED].

21. [REDACTED]; [REDACTED]. [REDACTED].⁴⁴ [REDACTED]. [REDACTED].
[REDACTED], [REDACTED].

22. [REDACTED], [REDACTED]. [REDACTED], [REDACTED]. [REDACTED].
[REDACTED], [REDACTED].⁴⁵

23. [REDACTED], [REDACTED]⁴⁶ [REDACTED]. [REDACTED], [REDACTED].
[REDACTED]. [REDACTED], [REDACTED]. [REDACTED], [REDACTED].

24. [REDACTED], [REDACTED], [REDACTED].⁴⁷ [REDACTED], [REDACTED]:

a) [REDACTED], [REDACTED];⁴⁸

b) [REDACTED];⁴⁹ and

c) [REDACTED], [REDACTED].⁵⁰

25. [REDACTED], [REDACTED]⁵¹ [REDACTED]. [REDACTED]? [REDACTED],
[REDACTED].

26. The conclusion that Mr. Krasniqi “holds a position of influence that allows him to elicit the support of sympathisers” is based on a patently incorrect conclusion of fact and is unreasonable.⁵² Mindful of the Appeals Chamber’s criticism of previous

⁴⁴ [REDACTED].

⁴⁵ [REDACTED], *see also* [REDACTED]; [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² *Ibid.*, para. 38.

references to an ill-defined support network,⁵³ the Impugned Decision instead refers to eliciting the support of sympathisers. This change of form does not correct the substance. There remains no evidence that Mr. Krasniqi has tried to elicit the support of sympathisers. The Impugned Decision cannot identify the alleged “sympathisers” or their “capacity” or “resources”.⁵⁴ These findings are based on speculation not specific reasoning founded on evidence.

27. The Impugned Decision also failed to give reasons for concluding that “the risk of intimidation or interference for witnesses and/or their family members is inherently high, and the Pre-Trial Judge is not convinced that the risk of obstruction can be efficiently mitigated relying only on protective measures”.⁵⁵ This conclusion was reached without analysing the protective measures and their impact on relevant risks, without explaining why they are insufficient to mitigate risk and without assessing the position of Mr. Krasniqi as distinct from a general risk.⁵⁶ It contains serious errors.⁵⁷

28. First, the Impugned Decision reverses the burden of proof. It is not for Mr. Krasniqi to establish that the risk of obstruction is effectively mitigated by protective measures, but for the SPO to establish that it remains necessary to detain Mr. Krasniqi despite the protective measures.⁵⁸

29. Second, the Impugned Decision fails to explain why the risk of obstruction is not effectively mitigated by the protective measures. The number of witnesses subject to protective measures in this case and the extent of those measures is uniquely far-

⁵³ First Appeal Decision, para. 55.

⁵⁴ *Ibid.*

⁵⁵ Impugned Decision, para. 39.

⁵⁶ ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, Trial Chamber II, *Decision on Ramush Haradinaj's Motion for Provisional Release* (“Haradinaj Decision”), 6 June 2005, paras 46-48.

⁵⁷ The Appeals Chamber has not addressed this issue substantively in this case: KSC-BC-2020-06, IA001/F00005, Court of Appeals Chamber, *Decision on Kadri Veseli's Appeal Against Decision on Interim Release* (“Veseli Appeal Decision”), 30 April 2021, public, para. 51.

⁵⁸ See First Appeal Decision, para. 23.

reaching. [REDACTED], [REDACTED].⁵⁹ [REDACTED], [REDACTED].⁶⁰ [REDACTED]. [REDACTED]. [REDACTED], [REDACTED], [REDACTED].⁶¹ [REDACTED] – [REDACTED] – [REDACTED].⁶² It is difficult to imagine that a more comprehensive set of protective measures has ever been granted.

30. These far-reaching measures [REDACTED]. There is no evidence that Mr. Krasniqi has the ability to circumvent them.⁶³ Further, [REDACTED].

31. The Impugned Decision failed to engage with these issues. It fails to explain why there remains a sufficient risk of interference with witnesses from Mr. Krasniqi⁶⁴ to justify detention despite the number of witnesses subject to protective measures and the extent of that protection. On any view, the protective measures substantially mitigate the risk of interference (otherwise this extensive intrusion into fair trial rights would be unjustified).

32. The Defence therefore invite the Appeals Chamber to overturn the Impugned Decision and to find that there is no specific reasoning based on evidence to justify a continued risk of witness interference from Mr. Krasniqi.

V. GROUND 2

The Impugned Decision erred in law and fact in finding that the risk that Mr. Krasniqi will commit crimes similar to the underlying acts charged continues to exist

⁵⁹ Submissions, para. 26.

⁶⁰ [REDACTED]; [REDACTED].

⁶¹ See e.g. [REDACTED].

⁶² [REDACTED].

⁶³ Submissions, para. 26.

⁶⁴ An inherently high risk is insufficient; the risk must come from Mr. Krasniqi: Haradinaj Decision, paras 46-48; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-PT, Trial Chamber, *Order on Provisional Release of Jadranko Prlić* (“Prlić Order”), 30 July 2004, para. 28.

33. The Impugned Decision concluded that there is a continuing risk that “Mr Krasniqi will, under any form of responsibility, commit crimes similar to the underlying acts charged against those perceived as being opposed to the KLA, including witnesses”.⁶⁵ That finding erred in law and fact.

34. Article 41(6)(b)(iii) is not satisfied by a potential future crime which is merely “similar to the underlying acts charged”. Article 41(6)(b)(iii) is unambiguous. It defines three situations in which interim release may be refused: where there is a risk that the Accused “will repeat the criminal offence”, will “complete an attempted crime” or will “commit a crime which he or she has threatened to commit”. Reading “will repeat the criminal offence” as “will, under any form of responsibility, commit crimes similar to the underlying acts charged”⁶⁶ subverts this clear language and is unsustainable:-

- 1) The drafters selected the words “repeat the criminal offence”, instead of broader alternatives such as “repeat a criminal offence” or “commit a similar offence”. Choice of the definite article limits “the criminal offence” to the offence(s) charged in the Indictment; it does require that the future crime is identical to that charged;
- 2) The requirement for specificity in relation to the type of future offence in Article 41(6)(b)(iii) is not unique or unusual. Article 58(1)(b)(iii) of the Rome Statute provides that one ground justifying arrest / detention is to “prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances” (underlining added). The reference in

⁶⁵ Impugned Decision, para. 44.

⁶⁶ Impugned Decision, para. 44.

Article 58(1)(b)(iii) to “that crime” is clearly limited to the crime charged – identical to the reference in the Law to “repeat the criminal offence”. Knowing that the Rome Statute expressly allows detention in order to prevent the future commission of “a related crime”, the drafters of the Law nonetheless chose to omit the words “or a related crime” and hence deliberately adopted a narrower definition of future crimes which excludes reliance on “similar crimes”;

3) Further, Article 41(6)(b)(iii) should be narrowly construed.⁶⁷

35. The Appeals Chamber should find that Article 41(6)(b)(iii) only applies where there are articulable grounds to believe that there is a risk that Mr. Krasniqi will repeat the criminal offence, complete an attempted crime or commit a crime which he has threatened to commit. The Impugned Decision finding that “Mr Krasniqi will, under any form of responsibility, commit crimes similar to the underlying acts charged” errs because it does not meet that threshold.

36. Applying the correct test to the facts, Article 41(6)(b)(iii) is only satisfied if there is a risk of Mr. Krasniqi repeating the Indictment crimes against humanity of persecution, imprisonment, torture, other inhumane acts, murder or enforced disappearance or the war crimes of arbitrary arrest, cruel treatment, torture or murder. Self-evidently there is not. There is no ongoing armed conflict or widespread / systematic attack on a civilian population. This interpretation would not neuter Article 41(6)(b)(iii), since the KSC’s jurisdiction is not limited to international crimes

⁶⁷ KSC-CC-PR-2017-01, F00004, Specialist Chamber of the Constitutional Court, *Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office*, 26 April 2017, public, para. 111.

but also covers the offences identified in Article 15(2) of the Law in relation to which repetition of the offence is possible.

37. In any event, if “repeat the criminal offence” means “repeat the underlying criminal acts”, that would still require a finding that there is a risk that Mr. Krasniqi will commit serious violent offences such as murder, torture, cruel treatment or imprisonment. The Impugned Decision did not make that finding. Nor should the Appeals Chamber countenance it: the severity of those offences stands in stark contrast to the absence of evidence that Mr. Krasniqi committed any crime in the last 20 years, or that he has the means to commit any such crime.

38. Furthermore, the conclusion that there is sufficient risk that Mr. Krasniqi will commit similar crimes is unreasonable. The Impugned Decision relied on Mr. Krasniqi’s position of influence, the general climate of witness intimidation, [REDACTED] and increased knowledge of the case.⁶⁸ These factors are manifestly insufficient:-

- a) A position of influence does not mean that Mr. Krasniqi will use any influence unlawfully;⁶⁹
- b) A general climate of interference does not establish a risk of interference from Mr. Krasniqi;⁷⁰

⁶⁸ Impugned Decision, para. 43.

⁶⁹ First Appeal Decision, para. 57, fn. 105; Prlić Order, paras 27-28; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-PT, Trial Chamber I, *Order on Provisional Release of Valentin Ćorić*, 30 July 2004, para. 28; *Prosecutor v. Bošković and Tarčulovski*, IT-04-82-PT, Trial Chamber II, *Decision on Defence Motion of Ljube Bošković for Provisional Release*, 18 July 2005, para. 43.

⁷⁰ Haradinaj Decision, paras 46-48.

c) [REDACTED]. As set out above,⁷¹ [REDACTED], [REDACTED], [REDACTED], [REDACTED];

d) Finally, the Impugned Decision fails to analyse the practical effect of Mr. Krasniqi's increased knowledge of this case. The protective measures [REDACTED] . [REDACTED], [REDACTED].

39. Applying the correct test to these facts, respecting the presumption of innocence regarding the current charges, and considering Mr. Krasniqi's age and retirement, it was wholly unreasonable to find that there is any risk of him committing similar crimes or that any alleged risk is sufficiently high to justify continued detention.

VI. GROUND 3

The Impugned Decision made discernible errors in concluding that conditions insufficiently mitigate any risks which were correctly identified

40. The Pre-Trial Judge was obliged to "consider more lenient measures" and to "inquire and evaluate all reasonable conditions that could be imposed".⁷²

41. The Impugned Decision fails to provide adequate reasons regarding conditions.⁷³ It recalls previous findings,⁷⁴ [REDACTED]⁷⁵ and finds that conditions "would not prevent Mr Krasniqi from employing other electronic devices belonging

⁷¹ See para. 24 above.

⁷² Judge Ambos SCO, para. 3; KSC-CC-PR-2020-09, F00006, Specialist Chamber of the Constitutional Court, *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, public, para. 70; KSC-BC-2020-06, IA003/F00005, Court of Appeals Chamber, *Decision on Rexhep Selimi's Appeal Against Decision on Interim Release*, 30 April 2021, confidential, paras 85-86; IA004/F00005, Court of Appeals Chamber, *Decision on Hashim Thaçi's Appeal Against Decision on Interim Release*, 30 April 2021, confidential, para. 83.

⁷³ See First Appeal Decision, para. 78.

⁷⁴ Impugned Decision, para. 50.

⁷⁵ *Ibid.*, para. 51.

to other persons, including for example his family or his acquaintances, or from passing on instructions to other persons with a view to intimidating and/or interfering with witnesses".⁷⁶

42. The Impugned Decision strikingly fails to address inconvenient Defence submissions or to explain why they were rejected. The Appeals Chamber should not have to dig deep into the evidence to understand the Impugned Decision.⁷⁷ The Defence submitted [REDACTED] (1) [REDACTED]; (2) the legislative underpinning for surveillance in Kosovo; and (3) open source evidence proving that the KP use these powers in practice.⁷⁸ The combination of this evidence shows irrefutably that the KP are able to monitor Mr. Krasniqi's private communications. [REDACTED].⁷⁹ [REDACTED], [REDACTED].

43. [REDACTED], [REDACTED]. [REDACTED],⁸⁰ [REDACTED].⁸¹ [REDACTED].⁸² [REDACTED], [REDACTED].⁸³

44. Further, the reason now given for rejecting conditions is that Mr. Krasniqi could pass information using an electronic device belonging to someone else or by passing information through someone else. This departs from previous reasoning, which focused only on the capacity of the KP to monitor and enforce conditions.⁸⁴ The decisive question is whether these risks are unacceptably high in the circumstances of the case. Any risk of interference is necessarily limited by the protective measures and

⁷⁶ Impugned Decision, para. 52.

⁷⁷ Judge Ambos SCO, para. 2.

⁷⁸ Submissions, paras 46-51; [REDACTED].

⁷⁹ Impugned Decision, para. 51.

⁸⁰ [REDACTED].

⁸¹ [REDACTED].

⁸² [REDACTED].

⁸³ See [REDACTED].

⁸⁴ First Interim Release Decision, para. 49.

the likelihood of re-arrest if any Accused abused the conditions of interim relief.⁸⁵ The risk is further reduced by the conditions which could be imposed.

45. All of the risks identified by the Pre-Trial Judge can be very considerably limited by conditions including: prohibiting Mr. Krasniqi from using other people's electronic devices; monitoring all communications from Mr. Krasniqi's family or from his home address; preventing him from leaving his home address; restricting the people allowed to visit his home address and monitoring any meetings at his home. Mr. Krasniqi has undertaken to abide by any conditions imposed.⁸⁶ The Impugned Decision erred in failing to consider and assess the ways in which the identified risks could be mitigated by conditions and failing to explain why they were not sufficient to reduce any risk to an acceptable level.

46. The Appeals Chamber should correct these errors and determine that any identified risks are already limited by protective measures and are capable of being sufficiently mitigated by the imposition of appropriate conditions so that continued detention is unnecessary.

VII. GROUND 4

The Impugned Decision made discernible errors in concluding that ongoing detention is proportionate

47. The Appeals Chamber has emphasised the importance of proportionality⁸⁷ and found the previous decision "defective" for failing to address relevant submissions.⁸⁸ The Appeals Chamber, however, concluded that at that stage of proceedings, given

⁸⁵ Judge Ambos SCO, para. 5(i).

⁸⁶ Submissions, para. 52.

⁸⁷ First Appeal Decision, para. 69.

⁸⁸ *Ibid.*, para. 70.

the Parties differed widely in their estimates of when trial could start, the Pre-Trial Judge was entitled not to take the anticipated length of pre-trial detention into account.⁸⁹

48. The Impugned Decision pays lip service to those findings,⁹⁰ before concluding that discussion about the trial start date remains “purely speculative”⁹¹ and that the interference with Mr. Krasniqi’s right to family life in denying family visits “pursued the legitimate aim of protecting his and others’ health, and, having particular regard to the unprecedented global public health emergency, was proportionate to the legitimate aim pursued”.⁹² Both conclusions were in error.

49. While the start date of trial is unknown, it is clear that the unrealistic earliest possible trial start date is mid-January 2022.⁹³ The SPO did not demur from that assessment. The consequence of denying interim release is not purely speculative. It is that Mr. Krasniqi will be imprisoned for at least 14 months and probably longer before the start of trial. That is a substantial period of time to imprison a person presumed innocent. The Impugned Decision erred in failing to grapple with that reality.

50. Further, the Impugned Decision’s treatment of the interference with Article 8 rights due to the absence of family visits is wholly inadequate. First, the Impugned Decision erred in failing to treat the absence of family visits as a relevant factor in relation to the proportionality of ongoing detention. The material and moral effects of

⁸⁹ *Ibid.*, para. 71.

⁹⁰ Impugned Decision, para. 58.

⁹¹ *Ibid.*, para. 59.

⁹² *Ibid.*, para. 60.

⁹³ Submissions, paras 35-39. *See also* the SPO’s recent request for extension of its Rule 102(3) notice deadline: KSC-BC-2020-06, F00356, Specialist Prosecutor, *Prosecution Request for Extension of Time Limit to Provide its Rule 102(3) Notice*, 18 June 2021, public, paras 1, 6.

detention on Mr. Krasniqi were a relevant consideration.⁹⁴ The particular intensity of detention without family visits over the period of 8 months was a factor which the Pre-Trial Judge should have considered in assessing proportionality in paragraph 59 of the Impugned Decision rather than noting it as a separate concern in paragraph 60.

51. Second, the Impugned Decision's analysis of whether the interference with a qualified right was necessary and proportionate is gravely inadequate. On that critical issue, it made only the bare finding that "having particular regard to the unprecedented global public health emergency" the denial of family visits "was proportionate to the legitimate aim pursued".⁹⁵ It thus failed to analyse: the authorities cited by the Defence;⁹⁶ any authority on the meaning of proportionality; the Defence submission that the ban on family visits at the KSC was more extensive than that imposed in either Dutch prisons or prisons in Kosovo (a restriction cannot be necessary or proportionate when lesser restrictions are applied in every other Dutch prison);⁹⁷ and the possibility of lesser restrictions (e.g. masks or distancing).

52. Third, the findings that "other means to communicate with his family have been made available" and in-person visits will resume in mid-July⁹⁸ fail to acknowledge or respond to directly relevant submissions [REDACTED].⁹⁹

53. The Appeals Chamber should correct these errors, find that the denial of family visits was a disproportionate interference with Article 8 rights and, considering this interference together with the likely duration of detention prior to trial, find that ongoing detention is disproportionate.

⁹⁴ See Submissions, para. 40; ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Chamber, *Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić*, 25 September 1996, para. 26.

⁹⁵ Impugned Decision, para. 60.

⁹⁶ Submissions, para. 41.

⁹⁷ Submissions, para. 43.

⁹⁸ Impugned Decision, para. 60.

⁹⁹ Submissions, para. 44.

VIII. CONCLUSION

54. The KSC was established to protect fundamental rights and secure fair criminal proceedings, including in the regulation of pre-trial detention.¹⁰⁰ Mr. Krasniqi's ongoing detention must be justified on its individual merits. The sparse reasoning in the Impugned Decision is insufficient to justify the continued detention of a 70-year-old retired man who is presumed innocent and who has already been imprisoned for 8 months without seeing his family in person. If the speculative possibility that Mr. Krasniqi could somehow pass information to another despite imposing strict conditions on him is sufficient to deny interim release, then pre-trial detention has ceased to be the exception and become the rule. Mr. Krasniqi should be released.

Word count: 4,414 words



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¹⁰⁰ Law, Article 1(2).