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In:	**KSC-BC-2020-06**
	The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Court of Appeals Panel**
	Judge Michèle Picard
	Judge Emilio Gatti
	Judge Kai Ambos
Registrar:	Dr Fidelma Donlon
Filing Participant:	Defence Counsel for Jakup Krasniqi
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Krasniqi Defence Reply to SPO Response to Krasniqi Defence Appeal of June 2021 Detention Decision, KSC-BC-2020-06/IA006/F00004, dated 26 July 2021

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I. INTRODUCTION

1. Pursuant to Rule 170(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), the Defence for Jakup Krasniqi ("Defence") hereby reply to the Specialist Prosecutor's Office ("SPO") Response to Krasniqi Defence Appeal of June 2021 Detention Decision.[1]

2. Like the Impugned Decision, the Response fails to engage with the issues raised by the Defence on this detention review. Repeatedly asserting that the Impugned Decision was fully reasoned[2] does not make it so; indeed, the absence of reasoning will be apparent as soon as the Court of Appeals Panel reads the relevant paragraphs of the Impugned Decision. Nor do the Defence merely disagree with relevant findings, as the Response repeatedly suggests,[3] but the appeal highlights discernible errors which invalidate the Impugned Decision.

II. [REDACTED]

3. [REDACTED]. [REDACTED], [REDACTED],[4] [REDACTED].[5] [REDACTED]. [REDACTED][6] [REDACTED].[7]

4. [REDACTED], [REDACTED].[8] [REDACTED], [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

[1] KSC-BC-2020-06, IA006/F00003, Specialist Prosecutor, *Response to Krasniqi Defence Appeal of June 2021 Detention Decision* ("Response"), 19 July 2021, confidential, with Annex 1, public.
[2] *Ibid*., paras 2, 8-11, 25.
[3] *Ibid*., paras 24-25, 28.
[4] *Ibid*., para. 17.
[5] [REDACTED].
[6] [REDACTED].
[7] [REDACTED].
[8] Response, para. 17.

5. [REDACTED], [REDACTED]. [REDACTED], [REDACTED]. [REDACTED]; [REDACTED].

6. [REDACTED].[9] [REDACTED], [REDACTED].[10] [REDACTED][11] [REDACTED]. [REDACTED], [REDACTED], [REDACTED], [REDACTED].[12] [REDACTED], [REDACTED]. [REDACTED], [REDACTED]: [REDACTED]. [REDACTED]. [REDACTED], [REDACTED]. [REDACTED], [REDACTED]; [REDACTED].[13]

III. PROTECTIVE MEASURES DO REMOVE ANY ALLEGED RISK OF INTERFERENCE

7. The Response that the Impugned Decision provided "full reasoning" and "clear considerations underpinning each risk"[14] is certainly not supported by its cursory treatment of protective measures. Despite being a new issue not previously addressed by the Defence,[15] the Impugned Decision addressed the impact of protective measures in just two sentences, without any analysis of the extent of the protective measures or explanation of why the Pre-Trial Judge was not convinced that they mitigate any risks in this case.[16] In no way could this be considered full reasoning.

8. Moreover, in attempting to justify the Impugned Decision, the Response falls into the same errors. In particular, the "inherently high" risk to witnesses and climate of intimidation[17] are only relevant as a contextual factor, and cannot be the decisive

[9] *Contra* Response, para. 17.
[10] [REDACTED].
[11] [REDACTED].
[12] [REDACTED].
[13] [REDACTED].
[14] Response, para. 10.
[15] The SPO appears to accept that full reasoning was required in relation to new issues: Response, para. 10.
[16] Impugned Decision, para. 39.
[17] Response, para. 20.

reason for finding that protective measures do not mitigate any alleged risk of interference from Mr. Krasniqi, precisely because they are general contextual factors which do not relate to Mr. Krasniqi as an individual.[18]

9. Further, like the Impugned Decision, the Response makes no attempt to assess the impact of the extraordinary scale of the protective measures in this case on the alleged risks justifying detention, preferring instead the bare assertion that Defence submissions "demonstrate no discernible error".[19] Self-evidently, the more witnesses who are granted protection, and the greater the extent of the redactions and the number of documents withheld to protect identity, the lower the risk to witnesses. The number of witnesses granted protective measures in this case is plainly a relevant factor which the Impugned Decision was required to consider,[20] because it demonstrates the extent to which the potential risks of interference have been reduced. Instead of taking this into account, the Impugned Decision failed to make any reasoned assessment of the impact of the extensive protective measures on any risk in the case.

10. The core problem is that having sought and obtained the most extensive protective measures in order to protect witnesses from the perceived risk of interference, the SPO now additionally seeks to keep Mr. Krasniqi in detention on the basis of the same alleged risk of interference which has already been removed or minimised by the protective measures. The SPO cannot have it both ways. The consequence of obtaining extensive protective measures is that the risk of interference is dramatically reduced. That dramatic reduction must be properly assessed in

[18] ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-PT, Trial Chamber, *Order on Provisional Release of Jadranko Prlić*, 30 July 2004, para. 28.
[19] Response, para. 20.
[20] *Contra* Response, para. 20.

determining whether a sufficient risk of interference remains so as to justify ongoing detention.

IV. NO REASONED DECISION WAS PROVIDED FOR REJECTING CONDITIONAL RELEASE

11. The assertion that the Impugned Decision gave detailed reasons why conditions were insufficient[21] is belied by paragraphs 50 to 52 of the Impugned Decision, which overlook clearly relevant evidence[22] and fail to provide any reasoned evaluation explaining why detention remains necessary in the light of the reduction in risk that the proposed conditions would entail.

12. [REDACTED], [REDACTED].[23] [REDACTED]. [REDACTED]. [REDACTED], [REDACTED].

13. Finally, the moving of the goalposts from the previous decision which focussed on the capacity to restrict or monitor communications and enforce conditions,[24] to the Impugned Decision which focussed instead on the hypothetical possibility of evading conditions by passing information through others[25] is a clear indication that an erroneously high threshold was applied. If the speculative and far-fetched possibility that Mr. Krasniqi could pass information through another, despite the evidenced availability of enforceable conditions restricting the people he can contact and

[21] Response, para. 25.
[22] *See* KSC-BC-2020-06, IA006-F00001, Krasniqi Defence, *Krasniqi Defence Appeal Against Decision on Review of Detention of Jakup Krasniqi* ("Appeal"), 7 July 2021, confidential, para. 42; F00329, Krasniqi Defence, *Krasniqi Defence Submissions on Detention Review* ("Detention Submissions"), 31 May 2021, confidential, paras 48-51; [REDACTED].
[23] [REDACTED].
[24] KSC-BC-2020-06, F00180, Pre-Trial Judge, *Decision on Jakup Krasniqi's Application for Interim Release*, 22 January 2021, confidential, para. 49.
[25] Impugned Decision, para. 52.

monitoring his communications (and despite the protective measures), is sufficient to deny interim release, then pre-trial detention at the KSC has truly ceased to be the exception and become the norm.

V. THE ASSESSMENT OF PROPORTIONALITY WAS ERRONEOUS

14. The Response that the Impugned Decision did take into account the difficulty in obtaining family visits fails because the Response fails to show: that this issue was addressed as part of the proportionality assessment rather than as a discreet 'concern' after performing that assessment;[26] that any reasoned assessment was made of the interference with Mr. Krasniqi's right to family life; or that the obvious ongoing difficulty of arranging for family members to visit during a global pandemic was assessed.[27]

15. Finally, the Response that Defence submissions about the proportionality of the restrictions on family visits "remain premised on an assumption that these issues would have been different in Kosovo",[28] conveniently and misleadingly overlooks the decisive point that these issues would have been different in Dutch prisons.[29] Nor factually, does the Ombudsman Report cited in the Response that in prisons in Kosovo "some rights" were "restricted and restored"[30] establish that a total ban on family visits would have been imposed for eight months had Mr. Krasniqi been imprisoned in Kosovo.

VI. CONCLUSION

[26] *Ibid*., para. 60.
[27] [REDACTED].
[28] Response, fn. 57.
[29] Appeal, para. 51; Detention Submissions, para. 43.
[30] Response, fn. 57.

16. For all the reasons set out above, the Court of Appeals Panel should allow the appeal and order the release of Mr. Krasniqi subject to any conditions that the Panel deems appropriate.

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