

**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

**Date:** 9 August 2022

**Language:** English

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**Public Redacted Version of**

**Krasniqi Defence Appeal Against Decision on Periodic Review of Detention of Jakup Krasniqi, KSC-BC-2020-06/IA020/F00001, dated 25 May 2022**

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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") submits his appeal against the Decision on Periodic Review of Detention of Jakup Krasniqi ("Impugned Decision").<sup>1</sup>

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

3. On 6 April 2022, the Defence filed submissions on detention review, reiterating that Mr. Krasniqi is willing to abide by any condition imposed by the Pre-Trial Judge, including those specified in previous submissions.<sup>3</sup> In addition, the Defence invited the Pre-Trial Judge to specifically consider the following additional conditions: (i) [REDACTED]; (ii) [REDACTED]; (iii) [REDACTED], [REDACTED]; (iv) [REDACTED]; and (v) [REDACTED] ("Additional Conditions").<sup>4</sup>

4. The Impugned Decision *inter alia* determined that it is only through the communication monitoring framework applicable at the Specialist Chambers ("SC") Detention Facilities that Mr. Krasniqi's communications can be restricted in a manner to sufficiently mitigate the risks of obstructing the progress of SC proceedings and committing further crimes.<sup>5</sup> It accordingly concluded that the Additional Conditions

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<sup>1</sup> KSC-BC-2020-06, F00801, Pre-Trial Judge, *Decision on Periodic Review of Detention of Jakup Krasniqi*, 13 May 2022, confidential and *ex parte*.

<sup>2</sup> 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.

<sup>3</sup> KSC-BC-2020-06, F00761, Krasniqi Defence, *Krasniqi Defence Submissions on Third Detention Review* ("Request"), 6 April 2022, confidential and *ex parte*, para. 26, fn. 34.

<sup>4</sup> [REDACTED].

<sup>5</sup> Impugned Decision, para. 71.

and any other conditions imposed by the Pre-Trial Judge are insufficient to mitigate the risk of Mr. Krasniqi obstructing the progress of SC proceedings or committing further crimes.<sup>6</sup>

5. The Defence appeals on the following ground:

The Pre-Trial Judge erred in the exercise of his discretion in determining that the extensive Additional Conditions and any other conditions imposed by the Pre-Trial Judge are insufficient to mitigate any risk of Mr. Krasniqi obstructing the progress of SC proceedings or committing further crimes.<sup>7</sup>

6. This error led to the erroneous decision that the continued detention of Mr. Krasniqi was necessary. The Defence requests the Court of Appeals Chamber (“Appeals Chamber”) to correct this error and grant interim release to Mr. Krasniqi.

## II. PROCEDURAL HISTORY

7. On 26 October 2020, the Pre-Trial Judge confirmed the revised indictment<sup>8</sup> and issued an arrest warrant for Mr. Krasniqi.<sup>9</sup>

8. On 4 November 2020, Mr. Krasniqi was arrested and transferred to the Kosovo SC Detention Facilities.

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<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, paras 70-71.

<sup>8</sup> 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.

<sup>9</sup> 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.

9. On 22 January 2021, the Pre-Trial Judge issued the Decision on Jakup Krasniqi's Application for Interim Release and remanded Mr. Krasniqi in custody.<sup>10</sup> On 30 April 2021, the Appeals Chamber issued its Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release and denied the appeal.<sup>11</sup>

10. On 31 May 2021, the Defence submitted its written observations on the continued detention of Mr. Krasniqi.<sup>12</sup> On 25 June 2021, the Pre-Trial Judge issued the Decision on Review of Detention of Jakup Krasniqi and ordered Mr. Krasniqi's continued detention.<sup>13</sup>

11. On 7 July 2021, the Defence filed its Appeal against the Decision on Review of Detention of Jakup Krasniqi.<sup>14</sup> On 1 October 2021, the Appeals Chamber granted in part Mr. Krasniqi's appeal against the Decision on Review of Detention and remanded the issue of conditional release to the Pre-Trial Judge for further consideration.<sup>15</sup>

12. On 8 October 2021, the Pre-Trial Judge ordered the KP to provide information about its ability to monitor the execution of the release conditions.<sup>16</sup> On 27 October 2021, the Response from the KP was filed in Albanian.<sup>17</sup> On 8 November 2021, the Specialist Prosecutor's Office ("SPO") submitted its observations on the KP

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<sup>10</sup> KSC-BC-2020-06, F00180, Pre-Trial Judge, *Decision on Jakup Krasniqi's Application for Interim Release*, 22 January 2021, confidential.

<sup>11</sup> KSC-BC-2020-06, IA002/F00005, Court of Appeals Chamber, *Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release* ("First Court of Appeals Decision"), 30 April 2021, confidential.

<sup>12</sup> KSC-BC-2020-06, F00329, Krasniqi Defence, *Krasniqi Defence Submissions on Detention Review*, 31 May 2021, confidential.

<sup>13</sup> KSC-BC-2020-06, F00371, Pre-Trial Judge, *Decision on Review of Detention of Jakup Krasniqi*, 25 June 2021, confidential.

<sup>14</sup> KSC-BC-2020-06, IA006/F00001, Krasniqi Defence, *Krasniqi Defence Appeal Against Decision on Review of Detention of Jakup Krasniqi*, 7 July 2021, confidential, with Annex 1, public.

<sup>15</sup> KSC-BC-2020-06, IA006/F00005, Court of Appeals Chamber, *Decision on Jakup Krasniqi's Appeal Against Decision on Review of Detention*, 1 October 2021, confidential.

<sup>16</sup> KSC-BC-2020-06, F00513, Pre-Trial Judge, *Order to the Kosovo Police to Provide Information*, 8 October 2021, public, with Annex, confidential.

<sup>17</sup> KSC-BC-2020-06, F00548, CMU, *Përgjigje në kërkesë me numër KSC-BC2020-06 datë 13 tetor 2021*, 27 October 2021, confidential. An English translation was notified on 3 November 2021.

Submissions.<sup>18</sup> On 12 November 2021, the Defence filed its observations on the KP Submissions.<sup>19</sup>

13. On 26 November 2021, the Pre-Trial Judge issued the Decision on Remanded Detention Review Decision and Periodic Review of Detention of Jakup Krasniqi which continued the detention of Mr. Krasniqi.<sup>20</sup>

14. On 9 December 2021, the Defence appealed against the Pre-Trial Judge's Decision.<sup>21</sup> On 15 December 2021, the Pre-Trial Judge permitted the Defence to file submissions on the next detention review, 10 days after the Appeals Chamber's determination on the appeal on the Decision on Remanded Detention Review Decision and Periodic Review of Detention of Jakup Krasniqi.<sup>22</sup>

15. On 25 March 2022, the Appeals Chamber dismissed the appeal.<sup>23</sup>

16. On 6 April 2022, the Defence filed submissions on detention review, requesting the Pre-Trial Judge to release Mr. Krasniqi subject to conditions as the Pre-Trial Judge

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<sup>18</sup> KSC-BC-2020-06, F00562, Specialist Prosecutor, *Prosecution Response to Kosovo Police Submissions on Detention*, 8 November 2021, confidential, with Annex 1, public.

<sup>19</sup> KSC-BC-2020-06, F00568, Krasniqi Defence, *Krasniqi Defence Observations on Kosovo Police Submissions*, 12 November 2021, confidential.

<sup>20</sup> KSC-BC-2020-06, F00582, Pre-Trial Judge, *Decision on Remanded Detention Review Decision and Periodic Review of Detention of Jakup Krasniqi* ("Third Detention Decision"), 26 November 2021, confidential.

<sup>21</sup> KSC-BC-2020-06, IA016/F00001, Krasniqi Defence, *Krasniqi Defence Appeal Against Decision on Remanded Detention Review Decision and Periodic Review of Detention of Jakup Krasniqi*, 9 December 2021, confidential, with Annex 1, public.

<sup>22</sup> KSC-BC-2020-06, In Court – Oral Order, *Oral Order on Timeline for the Next Detention Review*, 15 December 2021, public.

<sup>23</sup> KSC-BC-2020-06, IA016/F00005, Court of Appeals Chamber, *Decision on Jakup Krasniqi's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention* ("Third Court of Appeals Decision"), 25 March 2022, confidential.

may deem appropriate.<sup>24</sup> On 19 April 2022, the SPO responded to the Request.<sup>25</sup> On 25 April 2022, the Defence replied to the Response.<sup>26</sup>

17. On 13 May 2022, the Pre-Trial Judge ordered Mr. Krasniqi's continued detention.<sup>27</sup> At the time of this filing, Mr. Krasniqi has been remanded in detention for more than 18 months.

### III. APPLICABLE LAW

18. Appeals may challenge errors of law and errors of fact.<sup>28</sup> In the *Gucati* Appeal Decision, the Appeals Chamber elaborated the standards of review applicable in an interlocutory appeal and held that in relation to discretionary decisions:

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.<sup>29</sup>

### IV. SUBMISSIONS

*The Pre-Trial Judge erred in the exercise of his discretion in determining that the extensive Additional Conditions and any other conditions imposed by the Pre-Trial Judge are insufficient to mitigate any risk of Mr. Krasniqi obstructing the progress of SC proceedings or committing further crimes*

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<sup>24</sup> Request.

<sup>25</sup> KSC-BC-2020-06, F00772, Specialist Prosecutor, *Prosecution Response to Krasniqi Defence Submissions on Third Detention Review* ("Response"), 19 April 2022, confidential and *ex parte*.

<sup>26</sup> KSC-BC-2020-06, F00782, Krasniqi Defence, *Krasniqi Defence Reply to Prosecution Response to Defence Submissions on Third Detention Review* ("Reply"), 25 April 2022, confidential.

<sup>27</sup> Impugned Decision.

<sup>28</sup> Article 46(1) of the Law, which applies *mutatis mutandis* to interlocutory appeals (*Gucati* Appeal Decision, para. 10).

<sup>29</sup> *Gucati* Appeal Decision, para. 14.

19. The Pre-Trial Judge's conclusion that the extensive Additional Conditions do not sufficiently mitigate any risk of Mr. Krasniqi obstructing the SC proceedings or committing further crimes is unfair and unreasonable, constituting an abuse of discretion, and was based on patently incorrect conclusions of fact.<sup>30</sup>

20. In the specific case of Mr. Krasniqi, the identified risks, which must be weighed against the Additional Conditions, are relatively low. The only findings on which the Pre-Trial Judge relied to establish a risk emanating from Mr. Krasniqi himself, are that he had a position of influence, he has made public statements critical of the SC, he made one Facebook post which uses the word "collaborators" in April 2020, [REDACTED].<sup>31</sup> There is no evidence that Mr. Krasniqi [REDACTED]. Indeed, it bears repeating that Mr. Krasniqi is a 71-year-old retired politician who has never been convicted of any offence or accused of obstructing the processes of this – or any – court. He was called as a witness by the Prosecution at the International Criminal Tribunal for the former Yugoslavia ("ICTY") and his evidence was accepted by the Trial Chamber on both occasions.<sup>32</sup> In these circumstances, the risk found by the Pre-Trial Judge to arise from these factors can only be at the lower end of the general spectrum of risk.

21. The Impugned Decision erred and abused the Pre-Trial Judge's discretion in finding that the Additional Conditions do not sufficiently mitigate the identified risks. In particular, the Impugned Decision failed to give reasons for concluding that

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<sup>30</sup> The Defence notes that the alleged risk of flight was not decisive, since the Pre-Trial Judge found that this risk could be appropriately mitigated by the imposition of conditions: Impugned Decision, para. 65. Accordingly, whilst the Defence does not accept that Mr. Krasniqi presents any risk of flight, it is unnecessary to address the risk of flight in this Appeal.

<sup>31</sup> Impugned Decision, paras 48, 54-55.

<sup>32</sup> ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Chamber II, *Judgement*, 30 November 2005, para. 215; *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Trial Chamber I, *Judgement*, 3 April 2008, paras 68-69, 76, 84-85, 87-88, 471.

[REDACTED] would not affect the Pre-Trial Judge's findings that: (i) the communications between Mr Krasniqi and his family members [REDACTED]; (ii) Mr Krasniqi could use coded or obscure language that, [REDACTED], [REDACTED], would not be recognised by the Kosovo Police; and (iii) Mr Krasniqi could ask a family member to pass on a message orally or to use a device belonging to a third person to do so, or that he could transmit covert messages for the purposes of obstructing SC proceedings or committing further crimes.<sup>33</sup>

22. This conclusion was reached without analysing the two Additional Conditions and their impact on relevant risks, without explaining why they are insufficient to mitigate risk, without clarifying why they cannot be adjusted to fulfil their purpose and without assessing the position of Mr. Krasniqi individually as distinct from a general risk.<sup>34</sup> The absence of this analysis vitiates the Pre-Trial Judge's exercise of his discretion.

23. First, the Impugned Decision fails to explain why the identified risks are not sufficiently mitigated by the proposed Additional Conditions, especially considering that Mr. Krasniqi has re-iterated his willingness to abide by any condition imposed by the Pre-Trial Judge, including both, conditions specified in previous Defence submissions,<sup>35</sup> and the Additional Conditions.<sup>36</sup> It is difficult to imagine that a more comprehensive set of conditions of conditional release has ever been offered.

24. Second, the Pre-Trial Judge's conclusion fails to evaluate the spectrum of risk. Self-evidently, [REDACTED] does reduce any identified risk because it reduces any opportunities to pass confidential information and [REDACTED].<sup>37</sup> [REDACTED] would have the same effect; it reduces any opportunities to pass confidential

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<sup>33</sup> Impugned Decision, para. 66, referring to Third Detention Decision, para. 70.

<sup>34</sup> ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, Trial Chamber II, *Decision on Ramush Haradinaj's Motion for Provisional Release*, 6 June 2005, paras 46-48.

<sup>35</sup> See e.g., KSC-BC-2020-06, F00122, Krasniqi Defence, *Application for Interim Release*, 7 December 2020, confidential, para. 19; F00524, Krasniqi Defence, *Krasniqi Defence Observations on Detention Review Timeline and Submissions on Second Detention Review*, 13 October 2021, confidential, para. 24.

<sup>36</sup> Request, para. 26.

<sup>37</sup> [REDACTED].



information and reduces the difficulty of [REDACTED]. The Pre-Trial Judge failed to acknowledge this reduction in risk and hence failed to evaluate whether any risk was sufficiently mitigated in the specific case of Mr. Krasniqi.

25. The Impugned Decision further concluded – with respect to the Additional Conditions of [REDACTED], [REDACTED], and [REDACTED] – that, such measures were inadequate in comparison to the SC Detention Facilities because visits to the SC Detention Facilities are supervised as a rule, and more measures of recording and listening even of all visits are possible if considered necessary and proportionate.<sup>38</sup>

26. The Impugned Decision failed to consider or give reasons as to why the KP cannot be directly ordered [REDACTED] “[REDACTED]”.<sup>39</sup> The Defence recalls the positive obligation on the Pre-Trial Judge to inquire into all reasonable conditions that could be imposed,<sup>40</sup> which would include an oral hearing attended by the KP Director that would have been capable of affecting the Pre-Trial Judge’s conclusions on the Additional Conditions.

27. With respect to the general question of monitoring the interior of Mr. Krasniqi’s residence, the conclusion that “[REDACTED]”<sup>41</sup> is a patently incorrect conclusion of fact and unexplained. Monitoring the interior of Mr. Krasniqi’s residence would, obviously, [REDACTED]. Further, the Impugned Decision fails to explain why [REDACTED], [REDACTED], would not sufficiently mitigate any identified risk of [REDACTED], including [REDACTED], [REDACTED].

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<sup>38</sup> Impugned Decision, para. 68, with reference to the Third Court of Appeals Decision, para. 30; KSC-BC-2020-06, F00536, Registrar, *Registry Submissions pursuant to the Order to Provide Information on the Detention Regime (F00522)*, 20 October 2021, confidential, paras 31-34, 37-39.

<sup>39</sup> Impugned Decision, para. 68.

<sup>40</sup> Third Court of Appeals Decision, para. 42.

<sup>41</sup> [REDACTED]; [REDACTED].

28. Fundamentally, any risks identified by the Pre-Trial Judge can be very considerably limited by conditions including: [REDACTED], including [REDACTED]; [REDACTED] ([REDACTED]); [REDACTED]; and [REDACTED]. Mr. Krasniqi has undertaken to abide by any conditions imposed.<sup>42</sup> 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.

29. The Impugned Decision further considered that, “whereas [REDACTED], [REDACTED]”.<sup>43</sup> The Impugned Decision however fails to explain why this factor was considered to be decisive. Any regime of conditional release, in any international case, would involve [REDACTED]. It is patently incorrect and illogical that [REDACTED], [REDACTED], would automatically render [REDACTED] inadequate to mitigate the identified risks. Nor did the Impugned Decision explain or indicate the basis on which the Pre-Trial Judge relied to conclude that the KP do not “have the ability [REDACTED] in a manner that an official of the SC, such as the Chief Detention Officer, would have”.<sup>44</sup> In reality, all that would be required would be for the KP to [REDACTED].

30. The Impugned Decision strikingly fails to specifically assess and explain its conclusion that the proposed measure of [REDACTED] would not sufficiently mitigate the identified risks. It merely recalled the existing unmonitored communication regime at the SC Detention Facilities, which [REDACTED], and mechanically noted that the Appeals Chamber found that the Pre-Trial Judge’s conclusion, that the proposed conditions would allow for [REDACTED], was a

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<sup>42</sup> Request, para. 26, fn. 34.

<sup>43</sup> Impugned Decision, para. 68.

<sup>44</sup> Impugned Decision, para. 68.

reasonable one.<sup>45</sup> This general conclusion by the Appeals Chamber in relation to conditions previously proposed cannot substitute for the lack of reasoning as to why the specific proposed measure of [REDACTED] would not sufficiently mitigate the identified risks, enhanced and adjusted by such conditions as the SC deems appropriate.

31. Whilst the Pre-Trial Judge's obligation to inquire into and evaluate, *proprio motu*, all reasonable conditions is not limitless,<sup>46</sup> the Pre-Trial Judge failed, even to the minimum reasonable extent, to exercise his discretion by duly assessing the substance of the proposed Additional Conditions, including the capacity of the KP to implement these measures, and by properly analysing their impact. This led the Pre-Trial Judge to erroneously conclude that no additional measures, which could be reasonably considered, could sufficiently mitigate the identified risks.<sup>47</sup> Based on the superficial, incomplete and hypothetical comparison of the conditions in the SC Detention Facilities with the conditions proposed by the Defence, the Pre-Trial Judge erroneously concluded that "it is only through the communication monitoring framework applicable at the SC Detention Facilities that Mr Krasniqi's communications can be restricted in a manner to sufficiently mitigate the aforementioned risks"<sup>48</sup> and that "[a]ccordingly, [...] the Additional Conditions and any other conditions imposed by the Pre-Trial Judge are insufficient to mitigate the risk of Mr Krasniqi obstructing the progress of SC proceedings or committing further crimes".<sup>49</sup>

32. Even leaving aside the flaws and errors and lack of reasoning discussed above, the conclusion that "any other conditions imposed by the Pre-Trial Judge are

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<sup>45</sup> *Ibid.*, para. 69, with reference to the Third Court of Appeals Decision, para. 28.

<sup>46</sup> *Ibid.*, para. 70, with reference to the Third Court of Appeals Decision, para. 42.

<sup>47</sup> Impugned Decision, para. 70.

<sup>48</sup> *Ibid.*, para. 71.

<sup>49</sup> *Ibid.*

insufficient to mitigate the risk of Mr Krasniqi obstructing the progress of SC proceedings or committing further crimes” renders the entire exercise of periodic review of detention futile and meaningless, and pre-judges the outcome of all future Defence applications for interim release.<sup>50</sup> Further, the Pre-Trial Judge did not specifically identify any other conditions that were considered. Moreover, it is plainly disproportionate to the level of risk posed by Mr. Krasniqi himself.

33. The Appeals Chamber should correct these errors. Fundamentally, the Impugned Decision appears to take the view that detention must be maintained, unless any identified risks are reduced to zero. That is not the case.<sup>51</sup> The risks identified by the Pre-Trial Judge in relation to Mr. Krasniqi are, in any sensible view, relatively low. The previous conditions proposed by the Defence and the Additional Conditions are onerous and detailed restrictions, which dramatically mitigate any identified risk to the extent that continued detention is not necessary or proportionate. The Impugned Decision failed to properly evaluate the spectrum of risk or the extent to which the proposed conditions and Additional Conditions reduce the level of any risk upon that spectrum. The Defence invites 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 Mr. Krasniqi obstructing the progress of SC proceedings or committing further crimes in the light of the proposed conditions and Additional Conditions.

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<sup>50</sup> *Ibid.*

<sup>51</sup> First Court of Appeals Decision, para. 26.

Word count: 3,190 words



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**Venkateswari Alagenda**

Tuesday, 9 August 2022

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