

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

**Before:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Defence Counsel for Jakup Krasniqi

**Date:** 20 September 2022

**Language:** English

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**Public Redacted Version of**

**Krasniqi Defence Response to Prosecution Submissions on Detention Review of**

**Mr Krasniqi (F00935), KSC-BC-2020-06/F00953, dated 5 September 2022**

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## I. INTRODUCTION

1. The Defence for Jakup Krasniqi (“Defence”) hereby responds to the Prosecution Submissions on Detention Review of Mr. Krasniqi.<sup>1</sup>

2. The Prosecution Submissions rely primarily on the ‘repeated’ past findings that the risks set out in Article 41(6)(b) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) are satisfied.<sup>2</sup> Over-reliance on past findings renders the requirement to review detention every two months meaningless. Those ‘repeated’ findings have been made on the basis of the same evidence assessed frequently; they do not represent a multiplicity of findings based on recent or fresh evidence. The Defence maintains that this limited material no longer presents a proportionate reason to prolong Mr. Krasniqi’s detention.

3. Indeed, the absence of any new material itself demonstrates a new or changed circumstance. During the extensive period of his detention, there is no evidence that any attempt to interfere with witnesses or otherwise obstruct the Specialist Chambers (“SC”) proceedings has been made by or on behalf of Mr. Krasniqi. Since interim release was first denied in January 2021,<sup>3</sup> the Defence has received a substantial volume of disclosure including the statements or interview transcripts of the 326 witnesses relied on by the Specialist Prosecutor’s Office (“SPO”) and statements or interview transcripts of many other witnesses. Not one of these witnesses alleges any interference by or on behalf of Mr. Krasniqi.

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<sup>1</sup> KSC-BC-2020-06, F00935, Specialist Prosecutor, *Prosecution Submissions on Detention Review of Mr Krasniqi* (“Prosecution Submissions”), 24 August 2022, confidential.

<sup>2</sup> *Ibid.*, paras 1, 8, 10.

<sup>3</sup> KSC-BC-2020-06, F00180, Pre-Trial Judge, *Decision on Jakup Krasniqi’s Application for Interim Release* (“First Detention Decision”), 22 January 2021, confidential.

4. By the time that this detention review is resolved, Mr. Krasniqi will have been detained for more than 22 months. This detention review marks the fifth occasion on which his ongoing detention has been raised before the Pre-Trial Judge. Whilst the Defence takes note of the litigation already undertaken on this issue, the Defence does not concede that the Article 41(6)(b) risks are made out, nor that any established risks cannot be mitigated by appropriate conditions. Moreover, the Defence submits that the duration of pre-trial detention has become disproportionate such that release should be ordered.

5. This filing has been marked confidential, pursuant to Rule 82(4) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).

## II. PROCEDURAL HISTORY

6. On 26 October 2020, the Pre-Trial Judge confirmed the revised indictment<sup>4</sup> and issued an arrest warrant for Mr. Krasniqi.<sup>5</sup>

7. On 4 November 2020, Mr. Krasniqi was arrested and transferred to the Kosovo Specialist Chambers Detention Facilities.

8. On three separate occasions in 2021,<sup>6</sup> and once in 2022,<sup>7</sup> the Pre-Trial Judge has ordered Mr. Krasniqi to remain in detention. These orders were confirmed by the

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<sup>4</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>5</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.

<sup>6</sup> First Detention Decision; KSC-BC-2020-06, F00371, Pre-Trial Judge, *Decision on Review of Detention of Jakup Krasniqi* (“Second Detention Decision”), 25 June 2021, confidential; 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>7</sup> KSC-BC-2020-06, F00801, Pre-Trial Judge, *Decision on Periodic Review of Detention of Jakup Krasniqi* (“Fourth Detention Decision”), 13 May 2022, confidential and *ex parte*.

Panel of the Court of Appeals Chamber (“Appeals Panel”) on 30 April 2021,<sup>8</sup> 25 March 2022,<sup>9</sup> and 2 August 2022<sup>10</sup> respectively.

9. On 24 August 2022, the SPO filed submissions arguing in favour of Mr. Krasniqi’s continued detention.

### III. SUBMISSIONS

10. Whilst the Defence is cognisant of the findings of prior detention reviews, the Defence does not concede that the conditions for detention pursuant to Article 41(6)(b) are met. The Defence reserves the right to make further and fuller submissions in the future.

11. The Defence notes at the outset that the Prosecution Submissions fail to fully set out the threshold articulated by the Appeals Panel in relation to the assessment of risk pursuant to Article 41(6)(b) of the Law.<sup>11</sup> Whilst the Appeals Panel did describe the test as one of possibility and not of certainty, it clarified that “the standard to be applied is, on the one hand, less than certainty, but, on the other, more than a mere possibility of a risk materialising”.<sup>12</sup> Ultimately, the Appeals Panel held that the test which must be applied is “whether the SPO presented specific reasoning based on evidence supporting the belief of a sufficiently real possibility that (one or more of) the risks under Article 41(6)(b)(i)-(iii) of the Law exist”.<sup>13</sup> The Defence maintains that

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<sup>8</sup> KSC-BC-2020-06, IA002/F00005, Court of Appeals, *Decision on Jakup Krasniqi’s Application for Interim Release (“First Appeals Decision”)*, 30 April 2021, confidential.

<sup>9</sup> KSC-BC-2020-06, IA016/F00005, Court of Appeals, *Decision on Jakup Krasniqi’s Appeal against Decision on Remanded Detention Review and Periodic Review of Detention*, 25 March 2022, confidential.

<sup>10</sup> KSC-BC-2020-06, IA020/F00005, Court of Appeals, *Decision on Jakup Krasniqi’s Appeal Against Decision on Periodic Review of Detention*, 2 August 2022, confidential.

<sup>11</sup> Prosecution Submissions, para. 7.

<sup>12</sup> First Appeals Decision, para. 26.

<sup>13</sup> *Ibid.*, para. 28.

continued detention should not be ordered in the current review of Mr. Krasniqi's detention because no sufficiently real risks exist.

12. The Prosecution Submissions do not present specific reasoning grounded in evidence to support the existence of a "persisting climate of intimidation of witnesses and interference in criminal proceedings involving KLA members".<sup>14</sup> Indeed, the SPO cites no evidence at all in support of this proposition. The Defence does not accept that the SPO has provided evidence sufficient to establish that any climate of intimidation continues to exist today – 23 years after the conclusion of the conflict in Kosovo – or to link any such alleged climate to this specific case and to Mr. Krasniqi in particular. The mere fact that the SPO has made similar submissions repeatedly (and often without evidentiary support),<sup>15</sup> should not be sufficient for the alleged persisting climate of intimidation to have become an accepted and unreferenced 'fact' in SPO submissions, nor does it provide sufficient justification to extend Mr. Krasniqi's detention beyond the current period of 22 months.

13. The Defence maintains that there is no sufficiently real possibility of the risks in Article 41(6)(b) occurring.<sup>16</sup> The SPO states that Mr. Krasniqi has been found "repeatedly" to be a flight risk.<sup>17</sup> The Defence respectfully reiterates that this determination overstates Mr. Krasniqi's means and influence in Kosovo in the present

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<sup>14</sup> Prosecution Submissions, para. 8.

<sup>15</sup> See, e.g. KSC-BC-2020-06, IA002/F00003, Specialist Prosecutor, *Response to Krasniqi Defence Appeal of Detention Decision*, 15 February 2021, confidential, paras 30, 39, 49; F00562, Specialist Prosecutor, *Prosecution Response to Kosovo Police Submissions on Detention*, 8 November 2021, confidential, para. 2; IA016/F00003, Specialist Prosecutor, *Response to Krasniqi Defence Appeal of November 2021 Detention Decision*, 22 December 2021, confidential, paras 25, 27; F00772, Specialist Prosecutor, *Prosecution Response to Krasniqi Defence Submissions on Third Detention Review* ("SPO Response to Third Detention Review Submissions"), 19 April 2022, confidential and *ex parte*, paras 11-12; Prosecution Submissions, para. 8.

<sup>16</sup> *Contra* Prosecution Submissions, paras 8-9.

<sup>17</sup> Prosecution Submissions, para. 1.

day,<sup>18</sup> and that those ‘repeated’ findings have been on the basis of the same evidence assessed frequently, rather than a multiplicity of findings based on recent or fresh evidence. In any event, the Pre-Trial Judge has previously found that the alleged risk of flight is capable of being mitigated by conditions.<sup>19</sup>

14. Moreover, the Defence respectfully submits that there is insufficient evidence that there is a sufficiently real possibility that, if released, Mr. Krasniqi [REDACTED] to obstruct SC proceedings or indeed commit crimes similar to those charged. Again, the past findings have repeatedly relied upon the same limited evidence. Repetition of the same findings has been found insufficient to justify ongoing confinement;<sup>20</sup> indeed, if simply rehearsing previous findings was sufficient, there would be no point in reviewing detention every two months. The Defence highlights in particular that the “prior statements by Mr Krasniqi”,<sup>21</sup> previously relied upon, placed emphasis on one Facebook post of 24 April 2020.<sup>22</sup> However, a single social media post from 2.5 years ago is neither a reliable indication of an individual’s true intent and circumstances at the time of posting, nor should it be sufficient to justify continuing Mr. Krasniqi’s detention over a period of more than 22 months. The Defence objects to the persistent use of the same, limited examples to rationalise Mr. Krasniqi’s confinement, as well as the implication that there exists a sufficiently real risk of obstruction to these proceedings on the basis of a single past social media post.

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<sup>18</sup> KSC-BC-2020-06, IA002/F00001, Krasniqi Defence, *Krasniqi Defence Appeal against Decision on Jakup Krasniqi’s Application for Interim Release*, 3 February 2021, confidential, para. 29(1); F00329, Krasniqi Defence, *Krasniqi Defence Submissions on Detention Review*, 31 May 2021, confidential, para. 29(a).

<sup>19</sup> First Detention Decision, para. 48; Second Detention Decision, para. 49; Third Detention Decision, para. 67; Fourth Detention Decision, para. 65.

<sup>20</sup> ECtHR, *Shmorgunov and Others v. Ukraine*, no. 15367/14, *Judgment (Merits and Just Satisfaction)*, 21 April 2021, para. 462; *Dereci v. Turkey*, no. 77845/01, *Judgment (Merits and Just Satisfaction)*, 24 August 2005, paras 35-38.

<sup>21</sup> Prosecution Submissions, para. 8.

<sup>22</sup> KSC-BC-2020-06, F00005/CONF/RED/A02, Specialist Prosecutor, *Annex 2 to Confidential Redacted Version of ‘Request for Arrest Warrants and Related Orders’ Filing KSC-BC-2020-06/F00005 dated 28 May 2020*, 14 November 2020, confidential, pp. 21-22.

15. In any event, the past finding that there is a sufficiently real risk of interference or obstruction should be revisited in light of the complete absence of any evidence of any attempt at interference or obstruction by or on behalf of Mr. Krasniqi in this case. The fact that the SPO has produced no evidence or allegation of any such attempt in the 22 months of this case, is itself evidence which suggests that the alleged risks are no more than a mere possibility. Moreover, in the course of this case, a very substantial volume of material has been disclosed, including statements / transcripts from 326 witnesses on whom the SPO relies and numerous other witness statements / transcripts. The Defence can now say definitively that there is no evidence in the statements reviewed by the Defence which alleges that Mr. Krasniqi, or individuals acting on his behalf, have interfered with witnesses or obstructed the processes of the Court. The Defence is not aware that the Detention Unit have raised any concern about Mr. Krasniqi's communications. The absence of any such evidence should be considered in assessing whether there is or remains a sufficiently real possibility of the alleged risks occurring.

16. The SPO maintains its intractable position that *no* conditions could adequately mitigate the alleged risk posed by Mr. Krasniqi, were he to be released from custody.<sup>23</sup> The Defence has made multiple efforts to propose reasonable conditions that would counterbalance any alleged risk posed by Mr. Krasniqi's release.<sup>24</sup> It remains the position that Mr. Krasniqi unequivocally undertakes to abide by any conditions imposed by the Pre-Trial Judge.<sup>25</sup>

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<sup>23</sup> Prosecution Submissions, paras 1, 10-11.

<sup>24</sup> KSC-BC-2020-06, F00761, Krasniqi Defence, *Krasniqi Defence Submissions on Third Detention Review* ("Third Detention Review Submissions"), 6 April 2022, confidential and *ex parte*, para. 26, fn. 34.

<sup>25</sup> KSC-BC-2020-06, IA020/F00001, Krasniqi Defence, *Krasniqi Defence Appeal Against Decision on Periodic Review of Detention of Jakup Krasniqi*, 25 May 2022, confidential, para. 28; Third Detention Review Submissions, para. 26, fn. 34.



17. Finally, the SPO submits that there has been no change in circumstances for Mr. Krasniqi since the Appeals Panel decision of 2 August 2022.<sup>26</sup> Mr. Krasniqi will have been detained for more than 22 months by the time that this detention review is concluded. Nothing in the Prosecution Submissions truly recognises or grapples with the extensive interference with Mr. Krasniqi's right to liberty or the inherent impact on him personally of such an extended period of pre-trial detention. The passage of time is capable of rendering a period of detention disproportionate and the Defence contends that the 22-month period now before the Pre-Trial Judge has crossed the threshold of disproportionality.

18. In assessing the proportionality of ongoing detention, the Defence requests the Pre-Trial Judge to take into account that: the SPO has yet to discharge its disclosure obligations<sup>27</sup> and that the Pre-Trial Judge has found that the SPO has "not been fully diligent" in the disclosure process;<sup>28</sup> the SPO continues to request amendments to its exhibit and witness lists;<sup>29</sup> and has yet to obtain the necessary clearances for Rule 107 documents.<sup>30</sup> It is a direct result of delays resulting from these requests by the SPO, that the case remains in the pre-trial phase and no date has been set for the commencement of trial. That the SPO argues in favour of Mr. Krasniqi's detention as

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<sup>26</sup> Prosecution Submissions, para. 2.

<sup>27</sup> KSC-BC-2020-06, Transcript of Hearing ("Thirteenth Status Conference"), 13 July 2022, public, p. 1340, lines 14-20.

<sup>28</sup> KSC-BC-2020-06, F00936, Pre-Trial Judge, *Decision on Thaçi and Krasniqi Defence Motions Seeking Remedies for Non-Compliance with Disclosure Obligations*, 26 August 2022, confidential, para. 32.

<sup>29</sup> KSC-BC-2020-06, F00774/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of Prosecution Request to Amend the Exhibit List and for Protective Measures* (KSC-BC-2020-05), 20 April 2022, confidential, with Annex 1, confidential, and Annexes 2-16, strictly confidential and *ex parte*; F00890/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of 'Prosecution Rule 102(2) Submission and Related Requests'*, KSC-BC-2020-06/F00890, dated 20 July 2022, 21 July 2022, confidential, with Annexes 1-7, strictly confidential and *ex parte*, and Annex 8, confidential; F00891/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of 'Prosecution Request to Amend the Exhibit List and for Protective Measures'*, KSC-BC-2020-06/F00891, dated 20 July 2022, 21 July 2022, confidential, with Annexes 1, 5-6, 10, 12, strictly confidential and *ex parte*, and Annexes 2-4, 7-9, 11, and 13, confidential; F00947/CONF/RED, Specialist Prosecutor, *Confidential Redacted Version of Prosecution Request to Add Two Witnesses and Associated Materials*, 5 September 2022, confidential, with Annexes 1-2, strictly confidential and *ex parte*.

<sup>30</sup> Thirteenth Status Conference, p. 1367, line 8 to p. 1368, line 15.



a proportional measure given the scope and complexity of the case,<sup>31</sup> while simultaneously not taking steps within their own control to alleviate those complexities and progress the case to trial, remains a matter of ongoing concern to the Defence. Furthermore, these must be factors that the Pre-Trial Judge considers when assessing the proportionality of Mr. Krasniqi's ongoing detention.

19. Whilst the SPO relies on factors such as the overall complexity of the case, the gravity of the alleged crimes, the severity of the potential sentence and the number of witnesses to justify the length of pre-trial detention,<sup>32</sup> the Defence submits that these factors do not justify an indefinite period of detention. There must logically come a point when detention ceases to be proportionate. Given the age of Mr. Krasniqi, the 22 month period of imprisonment to date, the finding that the SPO has not been diligent, the reliance by the SPO on outdated examples to justify Mr. Krasniqi's confinement, and the fact that no trial date has been set, the Defence submits that the time has come to find that ongoing detention would be disproportionate.

#### IV. CONCLUSION

20. The Defence respectfully requests the Pre-Trial Judge to order the interim release of Mr. Krasniqi on such conditions as the Pre-Trial Judge considers appropriate.

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<sup>31</sup> Prosecution Submissions, para. 13.

<sup>32</sup> SPO Response to Third Detention Review Submissions, para. 21.

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**Venkateswari Alagenda**

Tuesday, 20 September 2022

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Tuesday, 20 September 2022

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