

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: 31 October 2022

Language: English

Classification: Confidential

Krasniqi Defence Response

to Prosecution Submissions on Detention Review of Mr Krasniqi (F01053)

Specialist Prosecutor

Jack Smith

Counsel for Victims

Simon Laws KC

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson KC

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

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

2. Mr. Krasniqi has been detained, without the possibility of release, for nearly two years. The Defence argues that the length of Mr. Krasniqi’s detention continues to be disproportionate.² The Defence further submits that the Specialist Prosecutor’s Office (“SPO”) misinterprets the assessment of the risk pursuant to Article 41(6)(b) of the Law³ posed by Mr. Krasniqi were he to be released subject to conditions. Finally, as noted in prior filings, the Defence maintains that there has been no evidence of any attempt by (or on behalf of) Mr. Krasniqi to interfere with witnesses or otherwise obstruct the procedures of the Kosovo Specialist Chambers (“KSC”).⁴

3. Pursuant to Rule 82(4) of the Rules,⁵ this filing is classified as confidential as it responds to a document with the same classification.

¹ KSC-BC-2020-06, F01053, Specialist Prosecutor, *Prosecution Submissions on Detention Review of Mr Krasniqi* (“SPO submissions”), 24 October 2022, confidential.

² See KSC-BC-2020-06, F00953, Krasniqi Defence, *Krasniqi Defence Response to Prosecution Submissions on Detention Review of Mr Krasniqi (F00935)* (“Response to Fourth Detention Review Submissions”), 5 September 2022, confidential, paras 4, 17, 19.

³ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”).

⁴ KSC-BC-2020-06, IA020/F00004, Krasniqi Defence, *Krasniqi Defence Reply to Prosecution Response to Krasniqi Defence Appeal Against Decision on Periodic Review of Detention of Jakup Krasniqi*, 13 June 2022, confidential, para. 5; Response to Fourth Detention Review Submissions, para. 2.

⁵ Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).

II. PROCEDURAL HISTORY

4. On 26 October 2020, the Pre-Trial Judge confirmed the revised indictment⁶ and issued an arrest warrant for Mr. Krasniqi.⁷
5. On 4 November 2020, Mr. Krasniqi was arrested and transferred to the Kosovo Specialist Chambers Detention Facilities.
6. On three separate occasions in 2021,⁸ and twice in 2022,⁹ the Pre-Trial Judge has ordered Mr. Krasniqi to remain in detention. These orders were confirmed by the Panel of the Court of Appeals Chamber (“Appeals Panel”) on 30 April 2021,¹⁰ 25 March 2022,¹¹ and 2 August 2022¹² respectively.
7. On 24 October 2022, the SPO filed submissions arguing in favour of Mr. Krasniqi’s continued detention in accordance with the timeline set by the Pre-Trial Judge in his Decision on Periodic Review of Detention of Jakup Krasniqi.¹³

⁶ 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.

⁷ 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.

⁸ KSC-BC-2020-06, F00180, Pre-Trial Judge, *Decision on Jakup Krasniqi’s Application for Interim Release*, 22 January 2021, confidential; F00371, Pre-Trial Judge, *Decision on Review of Detention of Jakup Krasniqi*, 25 June 2021, confidential; F00582, Pre-Trial Judge, *Decision on Remanded Detention Review Decision and Periodic Review of Detention of Jakup Krasniqi*, 26 November 2021, confidential.

⁹ KSC-BC-2020-06, F00801, Pre-Trial Judge, *Decision on Periodic Review of Detention of Jakup Krasniqi*, 13 May 2022, confidential and *ex parte*; F00978, Pre-Trial Judge, *Decision on Periodic Review of Detention of Jakup Krasniqi (“Fifth Detention Decision”)*, 19 September 2022, confidential.

¹⁰ KSC-BC-2020-06, IA002/F00005, Court of Appeals Panel, *Decision on Jakup Krasniqi’s Appeal Against Decision on Interim Release (“First Appeals Decision”)*, 30 April 2021, confidential.

¹¹ KSC-BC-2020-06, IA016/F00005, Court of Appeals Panel, *Decision on Jakup Krasniqi’s Appeal against Decision on Remanded Detention Review and Periodic Review of Detention*, 25 March 2022, confidential.

¹² KSC-BC-2020-06, IA020/F00005, Court of Appeals Panel, *Decision on Jakup Krasniqi’s Appeal Against Decision on Periodic Review of Detention*, 2 August 2022, confidential.

¹³ Fifth Detention Decision, para. 65(c).

III. SUBMISSIONS

8. The Defence emphasises that the ongoing imprisonment of individuals who benefit from the presumption of innocence, is an exception to a recognised practice of pre-trial release.¹⁴ The burden to demonstrate that continued detention remains necessary falls upon the SPO. It is not incumbent on Mr. Krasniqi to lay out reasons justifying his release.

9. The SPO incorrectly outlines the standard for assessing risk, as set out in Article 41(6)(b)(i)-(iii) of the Law. The Appeals Panel defined the appropriate standard in its ruling of April 2021, finding that the SPO is required to present evidence supporting the belief of a “sufficiently real possibility” that one or more of the risks under the Law exist.¹⁵ The SPO instead characterises the test as whether a risk is “possible”¹⁶ – requiring it to reach a lower, hypothetical standard to justify Mr. Krasniqi’s ongoing detention, rather than one grounded in a fact-based assessment of a sufficiently real possibility. The Defence continues to maintain that no sufficiently real possibility exists to justify Mr. Krasniqi’s continued incarceration, and respectfully requests that the Pre-Trial Judge apply the correct standard in his review of the SPO’s submissions.

10. Furthermore, in the same Decision, the Appeals Panel emphasises that *convincing* information is required to indicate that the detained person might “intimidate, influence or corrupt witnesses or victims”.¹⁷ Contrary to what the SPO has argued, there is no convincing information to suggest that Mr. Krasniqi has engaged or would

¹⁴ First Appeals Decision, para. 23; *See also* ICC, *Prosecutor v. Abd-Al-Rahman*, ICC-02/05-01/20-542-Red, Appeals Chamber, *Public Redacted Version of Judgment on the Appeal of Ali Muhammad Ali Abd-Al-Rahman against Trial Chamber I’s “Decision on the Review of Detention”*, 17 December 2021, para. 41.

¹⁵ First Appeals Decision, para. 28.

¹⁶ SPO submissions, para. 7.

¹⁷ First Appeals Decision, para. 25.

engage in such activities. As has been argued in previous filings, the mechanical reiteration of the same, limited evidence every two months for two years by the SPO, does not provide a compelling justification for extending Mr. Krasniqi's detention beyond the current period.¹⁸ Since the last detention review, the Defence has received a number of disclosure batches from the SPO. As has been the case throughout the disclosure process, there continues to be no evidence to suggest that Mr. Krasniqi or those acting on his behalf, have interfered with witnesses, obstructed proceedings at the KSC or elsewhere, or that there is a sufficiently real possibility of the risk of these events occurring.

11. Moreover, the passage of almost two years since Mr. Krasniqi's arrest is itself a changed circumstance which should be considered in this detention review. In making assessments related to the risk of flight, the European Court of Human Rights ("ECtHR") has noted that such risks decrease in proportion with the increased time spent in pre-trial custody. As the length of time spent on remand will likely be deducted from the overall sentence in the event of a conviction, the prospect of fleeing becomes less appealing to an accused and thus they are more likely to comply with conditions imposed on release.¹⁹ This should be taken into consideration when assessing Mr. Krasniqi's current circumstances, recognising that his time on remand has already been substantial, and that there remains no tentative start date for trial.

12. Mr. Krasniqi's good conduct and absence of any real risk shown by SPO over two years on remand constitutes sufficient proof that there is no basis for his continued detention. The risk of absconding cannot be assessed solely on the basis of the severity of the charged crimes, nor may it be based on generalisations.²⁰ The use

¹⁸ Response to Fourth Detention Review Submissions, para. 2.

¹⁹ ECtHR, *Neumeister v. Austria*, no. 1936/63, *Judgment (Merits)*, 27 June 1968, para. 10.

²⁰ ECtHR, *Clooth v. Belgium*, no. 12718/87, *Judgment (Merits) ("Clooth v. Belgium")*, 12 December 1991, para. 44.

of the same arguments by the SPO to indicate a risk of flight, not only over the course of years of detention reviews, but also in relation to all four Accused in this case, would suggest that some generalisations have been made in relation to Mr. Krasniqi. The Defence respectfully suggests that no specific reasoning, considering the period of time already spent on remand, justifies a sufficiently real possibility that Mr. Krasniqi poses a risk of flight.

13. Additionally, the passage of two years on remand diminishes any risk of interference with witnesses or other obstruction of the processes of the KSC. It must be noted that now the SPO has largely completed its investigations and disclosure obligations under Rule 102(1)(b) and Rule 102(3). The ECtHR has established that the risks posed to obstruction of proceedings decrease over time, as investigations are put into place and statements taken from witnesses.²¹ The assessment of risk in this detention review is therefore no longer a hypothetical question posed mid-investigation. The SPO now has consolidated its investigative and legal strategies, including taking the steps it deems appropriate to preserve evidence and safeguard witnesses. There is no evidence that in this process the SPO has actually faced any of the risks outlined earlier in detention review submissions. Despite the disclosure process being relied upon by both the Pre-Trial Judge²² and the SPO²³ to show that Mr. Krasniqi's continued confinement to be reasonable, after almost two years of detention any ongoing needs of an investigation are insufficient on their own to justify the continuation of detention, and any delays in an investigative process do not necessarily require or justify the ongoing detention of an accused.²⁴

²¹ *Clooth v. Belgium*, para. 43.

²² Fifth Detention Decision, para. 36.

²³ SPO submissions, para. 8.

²⁴ *Clooth v. Belgium*, paras 45-46.

IV. CONCLUSION

14. A pre-trial detention period of just under two years, is an unreasonably long period of time to which an accused should be subjected. The continuing reiteration of generalised submissions by the SPO should no longer be deemed sufficient to justify the ongoing detention of Mr. Krasniqi. The Defence therefore respectfully reiterates its request that the Pre-Trial Judge order the immediate interim release of Mr. Krasniqi, under conditions deemed necessary and proportionate.

Word count: 1,613



Venkateswari Alagenda

Monday, 31 October 2022

Kuala Lumpur, Malaysia.



Aidan Ellis

Monday, 31 October 2022

London, United Kingdom.



Victor Băieșu

Monday, 31 October 2022

The Hague, the Netherlands.