



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA KOSOVA

**In:** KSC-BC-2023-10/IA001

**Before:** A Panel of the Court of Appeals Chamber  
Judge Michèle Picard  
Judge Emilio Gatti  
Judge Nina Jørgensen

**Registrar:** Fidelma Donlon

**Date:** 5 February 2024

**Original language:** English

**Classification:** Public

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**Public Redacted Version of Decision on Sabit Januzi's Appeal Against Decision  
on Interim Release**

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**Specialist Prosecutor's Office:**  
Kimberly P. West

**Counsel for Sabit Januzi:**  
Jonathan Elystan Rees

**Counsel for Ismet Bahtijari:**  
Felicity Gerry

**THE PANEL OF THE COURT OF APPEALS CHAMBER** of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively),<sup>1</sup> acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”), is seised of an appeal filed on 21 December 2023 by Mr Sabit Januzi (“Appeal” and “Januzi” or “Accused” or “Defence”, respectively),<sup>2</sup> against the “Decision on Sabit Januzi’s Request for Interim Release” (“Impugned Decision”).<sup>3</sup> The Specialist Prosecutor’s Office (“SPO”) responded on 9 January 2024.<sup>4</sup> Januzi replied on 14 January 2024.<sup>5</sup>

## I. BACKGROUND

1. On 5 October 2023, Januzi was arrested in Kosovo, pursuant to an arrest warrant issued by the Pre-Trial Judge,<sup>6</sup> further to the confirmation of an indictment against him and Mr Ismet Bahtijari (“Bahtijari”).<sup>7</sup>

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<sup>1</sup> IA001/F00003, Decision Assigning a Court of Appeals Panel, 28 December 2023 (confidential, reclassified as public on 31 January 2024).

<sup>2</sup> IA001/F00001, Appeal Against the Decision on Interim Release on Behalf of Sabit Januzi, 21 December 2023 (confidential). The Panel notes that the Appeal was initially filed on 20 December 2023 but was resubmitted and circulated on 21 December 2023 due to a clerical error.

<sup>3</sup> F00123/RED, Public Redacted Version of Decision on Sabit Januzi’s Request for Interim Release, 5 January 2024 (confidential version filed on 8 December 2023).

<sup>4</sup> IA001/F00005, Prosecution response to Defence ‘Appeal Against the Decision on Interim Release on Behalf of Sabit Januzi’, 9 January 2024 (confidential) (“Response”). On 28 December 2023, the Appeals Panel extended the time limit for the SPO to file the Response to the Appeal and ordered that such response should be filed by 9 January 2024. See IA001/F00004, Decision on Specialist Prosecutor’s Office’s Request for Extension of Time, 28 December 2023 (confidential), para. 5. See also IA001/F00002, Prosecution request for extension of time to respond to ‘Appeal Against the Decision on Interim Release on Behalf of Sabit Januzi’, 27 December 2023 (confidential and *ex parte*).

<sup>5</sup> IA001/F00006, Reply in Appeal Against the Decision on Interim Release on Behalf of Sabit Januzi, 14 January 2024, (confidential) (“Reply”).

<sup>6</sup> F00009/RED, Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders, 12 October 2023 (confidential version filed on 2 October 2023). See also F00009/A01, Arrest Warrant for Sabit Januzi, 2 October 2023 (confidential); F00012, Notification of Arrest of Sabit Januzi Pursuant to Rule 55(4), 5 October 2023 (strictly confidential and *ex parte*, reclassified as public on 10 November 2023).

<sup>7</sup> F00008/RED/COR, Corrected Version of Public Redacted Version of the Decision on the Confirmation of the Indictment, 12 October 2023 (confidential redacted version filed on 2 October 2023, strictly confidential and *ex parte* version filed on 2 October 2023) (“Confirmation Decision”). The operative

2. On 8 December 2023, after having received submissions from Januzi and the SPO,<sup>8</sup> the Pre-Trial Judge issued the Impugned Decision, rejecting Januzi's application for interim release on the basis that there was a risk that Januzi would abscond, obstruct the progress of Specialist Chambers proceedings or commit further crimes against those perceived as being opposed to the Kosovo Liberation Army ("KLA"), including SPO witnesses and/or future witnesses.<sup>9</sup> The Pre-Trial Judge further found that neither the conditional interim release proposed by Januzi as an alternative to unconditional release ("Proposed Conditions"), nor any additional reasonable conditions imposed by the Pre-Trial Judge, could sufficiently mitigate the risk of obstructing the progress of Specialist Chambers proceedings or the risk of committing further crimes.<sup>10</sup>

3. Januzi submits that the Pre-Trial Judge erred in law and in fact in refusing to consider that the President of the Specialist Chambers held that orders as to non-contact/communication with witnesses can be both enforced and monitored, and that the "machinery" to enforce and monitor such conditions has been established.<sup>11</sup> He requests that the Court of Appeals Panel grant the Appeal and order his interim conditional release pending trial.<sup>12</sup>

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indictment was filed on 4 October 2023. See F00010/A01, Indictment, 4 October 2023 (strictly confidential and *ex parte*, reclassified as strictly confidential on 4 October 2023). See also F00016/A01, Submission of public redacted version of confirmed Indictment, 6 October 2023.

<sup>8</sup> F00028, Defence Submission on Detention on Remand, 11 October 2023 (confidential, reclassified as public on 19 December 2023); F00100/RED, Public Redacted Version of Corrigendum Submissions on Detention on behalf of Sabit Januzi, 21 December 2023 (confidential version filed on 13 November 2023, uncorrected confidential version (F00099) filed on 10 November 2023) ("Januzi Detention Submissions"); F00107/RED, Public redacted version of 'Prosecution response to Januzi Defence detention submissions', 20 November 2023 (confidential version filed on 17 November 2023); F00114/RED, Public Redacted Version of Reply to Prosecution Response to Januzi Defence Detention Submissions, 21 December 2023 (confidential version filed on 27 November 2023) ("Januzi Reply on Detention").

<sup>9</sup> Impugned Decision, paras 49, 58, 62-63, 77.

<sup>10</sup> Impugned Decision, paras 70-73.

<sup>11</sup> Appeal, para. 8.

<sup>12</sup> Appeal, para. 19; Reply, para. 10.

## II. STANDARD OF REVIEW

4. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.<sup>13</sup>

## III. PRELIMINARY MATTERS

### A. UNAUTHORISED DISCLOSURE OF CONFIDENTIAL AND *EX PARTE* INFORMATION

5. The Panel notes with utmost concern, as pointed out by the SPO,<sup>14</sup> that in the Appeal the Defence refers to the content of a confidential and *ex parte* annex to a decision issued by the President in Case KSC-SC-2023-01 on the commutation, modification or alteration of the sentence of Mr Hysni Gucati (“Gucati”).<sup>15</sup> The Panel further notes that the Commutation Decision expressly ordered that it should remain confidential and *ex parte*.<sup>16</sup>

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<sup>13</sup> KSC-BC-2020-07, IA001/F00005, Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention, 9 December 2020 (“*Gucati Appeal Decision*”), paras 4-14. See also KSC-BC-2020-06, IA003/F00005, Public Redacted Version of Decision on Rexhep Selimi’s Appeal Against Decision on Interim Release, 30 April 2021 (confidential version filed on 30 April 2021) (“*Selimi Appeal Decision*”), para. 4.

<sup>14</sup> See Response, para. 11. Januzi does not respond to the allegations raised by the SPO in his Reply.

<sup>15</sup> See Appeal, fn. 10, referring to KSC-SC-2023-01, CS001/F00002/A01, Annex 1 to Decision on Commutation, Modification or Alteration of Sentence with Confidential and *Ex Parte* Annexes, 12 October 2023 (confidential and *ex parte*) (“*ex parte Annex*”). See also KSC-SC-2023-01, CS001/F00002, Decision on Commutation, Modification or Alteration of Sentence with Confidential and *Ex Parte* Annexes, 12 October 2023 (confidential, reclassified as public on 12 October 2023) (“*Commutation Decision*”). The Panel observes that the President found that commutation of Gucati’s sentence would not be appropriate and decided to modify Gucati’s sentence by releasing him with conditions. Strictly speaking, because this decision did not grant the commutation of Gucati’s sentence but only modified it, the conditions imposed therein cannot be considered as “*commutation*” conditions. However, for ease of reference and to follow the designations adopted by the Pre-Trial Judge and the Parties in their filings, the Appeals Panel will refer to the President’s decision as the “*Commutation Decision*” and the conditions imposed on Gucati as the “*Commutation Conditions*” in the present Decision.

<sup>16</sup> See Commutation Decision, para. 72 (p. 20). Changes to classification require judicial authorisation pursuant to Article 39 of the Practice Direction on Files and Filings before the Kosovo Specialist Chambers (“*Practice Direction on Filings*”). See KSC-BD-15, Registry Practice Direction, Files and Filings before the Kosovo Specialist Chambers, 17 May 2019.

6. Januzi is not entitled to have access to such filing, let alone use it. It is worth noting that neither the Panel nor the SPO have access to the *ex parte* Annex either. The Panel assumes that it is only by virtue of his capacity as Counsel in Case KSC-SC-2023-01 that Counsel for Januzi had access to the *ex parte* Annex. Yet, Counsel for Januzi, in his capacity in the present case, has no right to either share such a filing with the Accused or to rely on it and/or disclose any information contained therein in submissions in the present case, regardless of whether such submissions are filed confidentially. The Panel recalls that disclosure of confidential and *ex parte* filings from other cases are subject to strict conditions and always require judicial authorisation.<sup>17</sup> Januzi did not take any steps to seek such leave.

7. The Panel regards such conduct seriously and considers that this amounts to unauthorised disclosure of confidential and *ex parte* information, in contravention to and breach of the Commutation Decision, Rule 82 of the Rules, Articles 37 and 39 of the Practice Direction on Filings and Counsel's obligations pursuant to Articles 6(1)(b) and 12(2) of the Code of Professional Conduct.<sup>18</sup>

8. Under the Law, the Specialist Chambers may, as necessary, provide for the protection of confidential information,<sup>19</sup> and this authority is an "essential function" of the Specialist Chambers.<sup>20</sup> The Panel underlines the importance of the Parties respecting their obligations under the Specialist Chambers' legal framework concerning the confidentiality of the proceedings and recalls the Specialist Chambers'

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<sup>17</sup> See e.g. IRMCT, *Prosecutor v. Karadžić*, MICT-13-55A, Decision on a Motion for Access to *Ex Parte* Filings, 10 May 2016, pp. 2-3 (finding that a request for access to confidential material from another case can only be granted if the material sought has been identified or described by its general nature and a legitimate forensic purpose for gaining such access is shown, and that with regard to *ex parte* confidential material the requesting party must meet a higher standard in order to establish a legitimate forensic purpose for accessing such material).

<sup>18</sup> Registry Practice Direction, Code of Professional Conduct – for Counsel and Prosecutors Before the Kosovo Specialist Chambers, KSC-BD-07-Rev1, 28 April 2021 ("Code of Professional Conduct").

<sup>19</sup> See Article 40(6)(d) of the Law, which applies *mutatis mutandis* to proceedings before the Court of Appeals Panel pursuant to Rule 173(3) of the Rules.

<sup>20</sup> See e.g. ICC, *Prosecutor v. Kenyatta*, ICC-01/09-02/11, Order concerning the public disclosure of confidential information, 21 October 2014 ("*Kenyatta* Order"), para. 13.

authority to sanction breaches of orders and obligations of confidentiality.<sup>21</sup> In particular, the Panel notes that, pursuant to Rule 82(6) of the Rules, unauthorised disclosure of records or information bearing the classification levels strictly confidential and confidential may lead to proceedings under Article 15(2) of the Law and Article 400(1) of the Kosovo Criminal Code for violating the secrecy of proceedings.

9. For the foregoing reasons, the Panel reminds Counsel for Januzi of his obligations as set forth under Articles 6(1)(b) and 12(2) of the Code of Professional Conduct and urges him to cease such conduct and to abide strictly by these requirements. Because the confidential and *ex parte* information disclosed in the Appeal has not been made public, the Panel does not find necessary at this stage to issue a formal warning and/or undertake the steps set forth in Rules 63(1) and 82(6) of the Rules. However, should Counsel for Januzi not adhere to his professional obligations as Counsel practicing before the Specialist Chambers in the future, the Panel will consider whether it is necessary to do so.<sup>22</sup>

## B. PUBLIC FILINGS

10. The Appeals Panel notes that the Pre-Trial Judge's Impugned Decision was initially filed confidentially. As a result, all submissions on appeal were also filed confidentially. However, the Panel notes that a public redacted version of the Impugned Decision was subsequently filed. The Panel recalls that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential, and that Parties shall file public redacted versions of all submissions filed before the Panel.<sup>23</sup> While the Panel notes that the

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<sup>21</sup> See e.g. *Kenya* Order, para. 13.

<sup>22</sup> See e.g. KSC-SC-2023-01, CS002/F00004/RED, Public Redacted Version of Decision on a Formal Warning, 22 November 2023 (confidential version filed on 22 November 2023), para. 6.

<sup>23</sup> See e.g. KSC-BC-2020-06, IA008/F00004/RED, Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention, 1 October 2021 (confidential version filed on 1 October 2021), paras 8-9. See also KSC-CA-2022-01, F00103, Decision on Gucati Application for

Parties do not object to the reclassification of the appellate filings as public,<sup>24</sup> the Panel recalls that the Appeal discloses the content of confidential and *ex parte* information<sup>25</sup> and therefore instructs Januzi to file a public redacted version of his Appeal within ten days of receiving notification of the present Decision. Reminding the Parties to follow the guidance provided by the redactions made in the public redacted version of the Impugned Decision in assessing whether their submissions can be reclassified as public, the Panel further orders the SPO and Januzi to file public redacted versions of their Response and Reply, respectively,<sup>26</sup> or indicate, through a filing, whether they can be reclassified as public within ten days of receiving notification of the present Decision.

#### IV. DISCUSSION

##### A. SUBMISSIONS OF THE PARTIES

11. Januzi submits that the Pre-Trial Judge erred in refusing to consider, while this was relevant, that the President of the Specialist Chambers held that orders as to non-contact/communication with witnesses can be both enforced and monitored, and that the “machinery” to enforce and monitor such conditions has been established.<sup>27</sup> According to Januzi, while the Pre-Trial Judge decided to do so on the basis that the factual circumstances of the Commutation Decision were different, so were the factual circumstances in other cases the Pre-Trial Judge relied upon.<sup>28</sup>

12. Januzi asserts that as a result, the Pre-Trial Judge erroneously held that (i) a commitment such as an order to refrain from contact with a witness can “neither be enforced nor monitored”; and (ii) the Kosovo Police does not have the capacity to

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Reclassification or Public Redacted Versions of Court of Appeals Panel Decisions, 9 January 2023, para. 2.

<sup>24</sup> See Reply, para. 11; Response, para. 19.

<sup>25</sup> See above, paras 5-9.

<sup>26</sup> Namely, IA001/F00005 and IA001/F00006.

<sup>27</sup> Appeal, para. 8, fn. 10, referring to Commutation Decision. See also Appeal, paras 9, 11; Reply, para. 8.

<sup>28</sup> Appeal, para. 10.

implement corresponding measures that sufficiently mitigate risks of obstruction and commission of further crimes.<sup>29</sup> He submits that the “machinery” to enforce and monitor conditions of non-contact/communication with witnesses in Kosovo would reduce any residual risk of obstruction or committing further crimes to “no more than a mere possibility of a risk materializing” and adds that there is no suggestion, beyond the single occasion charged, of the Accused having made any inappropriate contact with a witness.<sup>30</sup> Januzi submits that the Specialist Chambers have the powers to require the effective enforcement and monitoring of conditions of non-contact/communication with witnesses with respect to both the release of convicted persons and the interim release of accused pending trial.<sup>31</sup> According to him, the Pre-Trial Judge should therefore have granted interim release on such conditions.<sup>32</sup>

13. The SPO responds that because the only support for the Appeal’s core submission is a confidential and *ex parte* filing in another case to which neither the SPO nor the Panel have access, the Appeal should be summarily dismissed.<sup>33</sup> According to the SPO, summary dismissal is further warranted on the basis that the Appeal “misrepresents and oversimplifies” the Impugned Decision as having failed to address a relevant consideration.<sup>34</sup> In any event, the SPO contends that the Pre-Trial Judge properly considered the conditions set forth in the Commutation Decision (“Commutation Conditions”), their applicability to Januzi and the present stage of the proceedings.<sup>35</sup> The SPO further submits that Januzi never made such argument in his

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<sup>29</sup> Appeal, para. 12, referring to Impugned Decision, para. 71; Reply, para. 9. See also Appeal, para. 14.

<sup>30</sup> Appeal, paras 15-16. See also Appeal, para. 11.

<sup>31</sup> Appeal, paras 17-18. Januzi adds that the President stated that the Specialist Chambers should be prepared to use their wide-ranging powers not only to assist the Prosecution but also the Defence. See Appeal, para. 17.

<sup>32</sup> Appeal, para. 14.

<sup>33</sup> Response, paras 10-12.

<sup>34</sup> Response, paras 13, 16.

<sup>35</sup> Response, paras 15-18. See also Response, para. 13.



detention submissions before the Pre-Trial Judge.<sup>36</sup> In the SPO's view, it was entirely within the Pre-Trial Judge's prerogative to give more weight to other different factual circumstances such as those related to "Case 06".<sup>37</sup>

14. Januzi replies that he did not raise that argument for the first time on appeal.<sup>38</sup> He adds that there is nothing in the "machinery" which can be said to be exclusive to the case or the applicant in Case KSC-SC-2023-01.<sup>39</sup>

#### B. ASSESSMENT OF THE COURT OF APPEALS PANEL

15. The Pre-Trial Judge found that the Proposed Conditions would not mitigate the risk of obstructing the progress of Specialist Chambers proceedings or the risk of committing further crimes and it is only through the communication monitoring regime applicable at the Specialist Chambers Detention Facilities that such risks can be effectively managed.<sup>40</sup> In particular, he found that the Proposed Conditions (i) did not address the possibility of Januzi employing communication devices belonging to other persons or requesting others to use their devices for these purposes; and (ii) could not ensure the effective monitoring of Januzi's communications.<sup>41</sup> The Pre-Trial Judge further found that no additional reasonable conditions he could impose were available to adequately mitigate the existing risks.<sup>42</sup> The Pre-Trial Judge also found that the Commutation Conditions proposed by Januzi were either inapplicable or incompatible with the present stage of the proceedings.<sup>43</sup>

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<sup>36</sup> Response, para. 14. The SPO specifies that Januzi only noted that the President had recently imposed a set of conditions, invited the Pre-Trial Judge to "consider the same", and merely listed certain conditions, ascertaining that they were practicable and enforceable. See Response, para. 14.

<sup>37</sup> Response, para. 16.

<sup>38</sup> Reply, para. 7, referring to Januzi Reply on Detention, para. 27, fn. 4.

<sup>39</sup> Reply, para. 6.

<sup>40</sup> Impugned Decision, paras 70-71.

<sup>41</sup> Impugned Decision, para. 70.

<sup>42</sup> Impugned Decision, para. 72.

<sup>43</sup> Impugned Decision, para. 67.

16. At the outset, the Appeals Panel notes that Januzi's submissions in the Appeal rely essentially on the content of a confidential and *ex parte* annex to the Commutation Decision. Neither the Panel nor the SPO have access to this filing which is therefore precluded from their scrutiny.<sup>44</sup> As a result, the SPO's and Appeals Panel's ability, respectively, to respond to and consider such arguments is entirely impeded. The Panel notes that the Pre-Trial Judge likewise did not have access to the *ex parte* Annex. For these reasons as well as those detailed above,<sup>45</sup> and recalling that unsupported arguments and arguments based on material not on the record warrant summary dismissal,<sup>46</sup> the Panel will not consider the information from the *ex parte* Annex mentioned in the Appeal and will not consider Januzi's appellate submissions to the extent that they are solely supported by the *ex parte* Annex.<sup>47</sup>

17. The Court of Appeals Panel will first address Januzi's claim that the Pre-Trial Judge erred in refusing to consider the Commutation Decision. In this regard, the Panel notes that, in his submissions before the Pre-Trial Judge, Januzi referred to the Commutation Conditions and claimed that they were "both practicable and enforceable".<sup>48</sup> The Panel therefore disagrees with the SPO's submissions that Januzi did not make such an argument before the Pre-Trial Judge.<sup>49</sup> That being said, the Panel observes that Januzi merely "invited" the Pre-Trial Judge "to consider the same" after listing the Commutation Conditions.<sup>50</sup> Furthermore, while Januzi claimed that "the

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<sup>44</sup> See e.g. KSC-BC-2020-07, IA002/F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021, para. 43. See also ICC, *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-208, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled "Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute", 8 September 2015, para. 87.

<sup>45</sup> See above, paras 5-9.

<sup>46</sup> See e.g. KSC-CA-2022-01, F00114, Appeal Judgment, 2 February 2023, para. 32(viii)-(ix); KSC-CA-2023-02, F00038/RED, Public Redacted Version of Appeal Judgment, 14 December 2023 (confidential version filed on 14 December 2023), para. 33(viii)-(ix).

<sup>47</sup> See Appeal, paras 8-9, 11, 14-16, fn. 10; Reply, paras 4, 6-7 (to the extent Januzi's arguments therein refer to the establishment and content of the "machinery" to enforce and monitor conditions of non-contact/communication with witnesses).

<sup>48</sup> See Januzi Detention Submissions, para. 44; Januzi Reply on Detention, paras 23, 26.

<sup>49</sup> See Response, para. 14.

<sup>50</sup> Januzi Detention Submissions, para. 44.

machinery is already in place to monitor and enforce such conditions”, the only support for that assertion was a reference to the *ex parte* Annex to which the Pre-Trial Judge did not have access.<sup>51</sup>

18. Contrary to Januzi’s claim, the Appeals Panel observes that the Pre-Trial Judge addressed his arguments related to the Commutation Decision and the fact that he proposed conditions similar to the Commutation Conditions imposed on Gucati by the President upon his early release.<sup>52</sup> The Pre-Trial Judge examined the potential applicability and compatibility of the Commutation Conditions and the stage of the proceedings.<sup>53</sup> In light of Januzi’s undeveloped submissions in that regard as well as the fact that he failed to address how the Commutation Conditions could effectively mitigate the risks listed under Article 41(6)(b) of the Law, and recalling the discretionary nature of provisional release decisions,<sup>54</sup> the Appeals Panel finds that Januzi fails to demonstrate any error in the Pre-Trial Judge’s exercise of his discretion not to “consider [these conditions] any further”.<sup>55</sup>

19. The Panel further agrees with the Pre-Trial Judge that the Commutation Conditions are inapplicable or incompatible with the current stage of the proceedings and that Januzi is not “in the same position” as Gucati was when the Commutation Conditions were contemplated.<sup>56</sup> Indeed, the conditional release of an accused who is in detention on remand during the pre-trial phase and the release upon conditions of a convicted person as part of the modification of his or her sentence of imprisonment are entirely distinct. The legal framework governing the modification, alteration or commutation of sentences before the Specialist Chambers<sup>57</sup> does not require any

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<sup>51</sup> See Januzi Reply on Detention, para. 27 and fn. 4, referring to *ex parte* Annex. The Panel notes that Januzi only labels it as “confidential”. See Januzi Reply on Detention, fn. 4 (p. 8).

<sup>52</sup> Contra Appeal, paras 8-9, 11.

<sup>53</sup> See Impugned Decision, para. 67. See also Impugned Decision, para. 64.

<sup>54</sup> *Gucati* Appeal Decision, para. 51.

<sup>55</sup> Impugned Decision, para. 67.

<sup>56</sup> Impugned Decision, para. 67.

<sup>57</sup> See Article 51(2) of the Law; Rules 196-197 of the Rules; KSC-BD-48, Practice Direction on Commutation of Sentences, 3 July 2023, Article 11(1) (which provides: “[i]f a decision is taken to modify

determination as to whether the conditions that may be imposed would effectively mitigate any risk of obstruction or of committing further offences under Article 41(6)(b) of the Law. The Commutation Conditions imposed in the Commutation Decision are not conditions in the alternative to *detention* but conditions in the alternative to a term of imprisonment to be served by the convicted person.<sup>58</sup> As such, they do not need to meet the same threshold as the one imposed by Article 41(6)(b) of the Law. The Commutation Decision was further based, *inter alia*, on the comportment of Gucati *after* his conviction.<sup>59</sup>

20. Contrary to Januzi's claim, the Panel is of the view that the Commutation Decision, on its face and without any further information, does not provide support for Januzi's assertion that the Commutation Conditions, including the broad and general order to refrain from any contact or communication with (potential) witnesses or victims before the Specialist Chambers and SPO,<sup>60</sup> are enforceable and that the "machinery" to enforce them has been "established".<sup>61</sup> The Panel notes that while the Commutation Decision "orders" the Registrar to take all necessary measures to ensure the Commutation Conditions and the relevant Kosovo authorities to cooperate with the Registry on the enforcement of such conditions,<sup>62</sup> it does not discuss the feasibility of such conditions. The Panel notes that Januzi fails to demonstrate how the Proposed Conditions or the Commutation Conditions could effectively address the risks

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or alter the sentence of a Convicted Person, the President may impose conditions thereon in accordance with Rule 196(4) of the Rules until the expiry of the date of the final sentence or any other earlier specified date").

<sup>58</sup> Cf. KSC-CA-2022-01, F00031, Decision on Specialist Prosecutor's Office Request to Maintain Detention, 28 July 2022, para. 9 (on the distinction between the pre- and the post-conviction stages in relation to detention being consistent with Article 5 of the European Convention on Human Rights).

<sup>59</sup> See Commutation Decision, paras 18 (expression of regret), 27 (clear signs of rehabilitation), 65 (genuine signs of disassociation from offences), 66, 71.

<sup>60</sup> Commutation Decision, para. 68(f).

<sup>61</sup> Contra Appeal, paras 8-9, 11, 14.

<sup>62</sup> See Commutation Decision, para. 72.

identified by the Pre-Trial Judge,<sup>63</sup> beyond proposing generic conditions and a general undertaking to refrain from contacting Witness 1, Bahtijari and Co-Perpetrator 1.<sup>64</sup> In that sense, the Panel considers that the Pre-Trial Judge was justified in stating that while he could in principle order Januzi to refrain from contacting Witness 1, Bahtijari and Co-Perpetrator 1, such a commitment can neither be enforced nor monitored.<sup>65</sup>

21. In the Panel's view, Januzi further ignores the fact that the Pre-Trial Judge's conclusion was also based on other factors, including the Accused's personal circumstances, notably his likely access to the associated networks and resources of Co-Perpetrator 1, [REDACTED] and the KLA War Veterans Association and the fact that since he is [REDACTED] he has an increased opportunity to directly interfere with Witness 1 and his family.<sup>66</sup> The Panel considers that the specific circumstances of the present case, where the Accused is charged with intimidation during criminal proceedings for having allegedly approached Witness 1 on two separate occasions to dissuade him from testifying, in a context of intense communications between Januzi, Bahtijari and Co-Perpetrator 1 before and after the alleged approaches,<sup>67</sup> are relevant to the assessment of the necessity to ensure the effective monitoring of Januzi's communications.

22. Turning next to the Pre-Trial Judge's reliance on earlier rulings in Case KSC-BC-2020-06, the Panel notes that Januzi essentially argues that the Pre-Trial Judge was inconsistent in refusing to consider the Commutation Decision because the facts were different while at the same time considering other cases where the factual circumstances were also different.<sup>68</sup> Although it is true that the factual circumstances

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<sup>63</sup> Namely, Januzi employing communication devices belonging to other persons or requesting others to use their devices for these purposes, or how the effective monitoring of Januzi's communications could be enforced. See above, para. 15.

<sup>64</sup> See Januzi Detention Submissions, paras 36, 43-44.

<sup>65</sup> Impugned Decision, para. 71.

<sup>66</sup> See Impugned Decision, para. 70.

<sup>67</sup> See Impugned Decision, paras 26-27, 53-54. See also Confirmation Decision, paras 88, 116, 137.

<sup>68</sup> See Appeal, para. 10.

in Case KSC-BC-2020-06 are different, the Panel observes that the Pre-Trial Judge only relied on previous rulings in that case concerning the assessment of the capacity of Kosovo Police to enforce “corresponding measures”.<sup>69</sup> In the Panel’s view, the specific factual circumstances of Case KSC-BC-2020-06 were not decisive in that determination, which was rather based on the information contained in the observations made by the Kosovo Police.<sup>70</sup> The Panel finds that it was within the Pre-Trial Judge’s discretion to find that these rulings bear some relevance to the present case, especially given the similar stage of the proceedings. Accordingly, absent any demonstration of a change of circumstances, the Appeals Panel sees no error in the Pre-Trial Judge’s decision to rely on these previous rulings insofar as they found that the Kosovo Police does not have the capacity to implement corresponding measures sought by Januzi.

23. Finally, while Januzi claims that the “machinery” to enforce and monitor conditions of non-contact/communication with witnesses in Kosovo would reduce any residual risk of obstruction or of committing further crimes,<sup>71</sup> the Panel finds that Januzi does not substantiate his argument besides relying on the *ex parte* Annex. In any event, on the basis of the material before it, the Panel is not persuaded by Januzi’s claim that this “machinery” would effectively and sufficiently reduce the identified risks.<sup>72</sup>

24. In light of the above and in the specific context of this case, the Panel finds that Januzi fails to demonstrate how it was unreasonable for the Pre-Trial Judge to find

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<sup>69</sup> See Impugned Decision, para. 71, fn. 154, referring to KSC-BC-2020-06, F00582/RED, Public Redacted Version of Decision on Remanded Detention Review Decision and Periodic Review of Detention of Jakup Krasniqi, 8 December 2021 (confidential version filed on 26 November 2021) (“*Krasniqi Detention Decision*”), para. 77.

<sup>70</sup> See *Krasniqi Detention Decision*, paras 68-77.

<sup>71</sup> See Appeal, paras 11-13, 15-16.

<sup>72</sup> See Appeal, para. 15, where Januzi contends that the conditions “operate to provide for intervention before any action which amounts to obstruction/further crimes occurs”. In the Panel’s view, [REDACTED], would clearly not be sufficient to effectively mitigate the risks of obstruction and of committing further offences. Contra Appeal, para. 15.

that the Proposed Conditions and the Commutation Conditions would still not prevent him from employing communication devices belonging to other persons, or requesting others to use their devices for these purposes. Likewise, Januzi fails to show an error in the Pre-Trial Judge's finding that, at this stage, it is only through the communication monitoring regime applicable at the Specialist Chambers Detention Facilities that the identified risks can be effectively managed and Januzi's communications monitored.<sup>73</sup> Januzi's arguments in that regard are therefore dismissed.

25. That being said, the Panel recalls that, in the assessment of the conditions of release, the Pre-Trial Judge is also required, *proprio motu*, to inquire into and evaluate all *reasonable* conditions that could be imposed on an accused and not just those raised by the Defence.<sup>74</sup> The Panel will therefore examine whether, while the Pre-Trial Judge did not have access to underlying supporting materials relied upon in the Commutation Decision, he should nevertheless have sought more information in that respect.

26. The Panel notes that, in the Impugned Decision, the Pre-Trial Judge considered that no *additional* reasonable conditions he could impose were available to adequately mitigate the existing risks without elaborating further on how he reached that conclusion.<sup>75</sup> The Panel recalls that while it is incumbent upon the Pre-Trial Judge to consider all reasonable alternative conditions, the Panel recalls that this is not limitless, but rather the Pre-Trial Judge's enquiry as to which measures could be reasonable shall be guided by the circumstances of each case.<sup>76</sup>

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<sup>73</sup> Impugned Decision, paras 68, 70-71, 73.

<sup>74</sup> *Selimi* Appeal Decision, para. 86 (emphasis added).

<sup>75</sup> See Impugned Decision, para. 72 (emphasis in the original).

<sup>76</sup> KSC-BC-2020-06, IA017/F00011/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention, 5 April 2022 (confidential version filed on 5 April 2022), para. 55.

27. The Panel finds that the Pre-Trial Judge was not required to have sought further information on the enforceability of the Commutation Conditions in light of Januzi's undeveloped submissions in that regard, that he relies on the *ex parte* Annex, the fact that Januzi fails to address how the Commutation Conditions could effectively mitigate the risks listed under Article 41(6)(b) of the Law and the difference in legal frameworks between commutation of sentence and provisional release.<sup>77</sup>

28. In the Panel's view, the fact that the Pre-Trial Judge referred to measures previously contemplated in other cases shows that he appropriately enquired into other reasonable measures that could be imposed.<sup>78</sup>

29. Accordingly, the Panel finds that the Pre-Trial Judge did not err in concluding that on the basis of the information before him, no additional measures, which could be reasonably considered, could sufficiently mitigate the identified risks of obstruction and commission of further crimes.<sup>79</sup> The Court of Appeals Panel therefore dismisses Januzi's appeal.

## V. DISPOSITION

30. For these reasons, the Court of Appeals Panel:

**DENIES** the Appeal;

**ORDERS** Januzi to submit a public redacted version of his Appeal within ten days of receiving notification of the present Decision;

**ORDERS** the SPO and Januzi to submit public redacted versions of their Response and Reply, respectively, or indicate, through a filing, whether they

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<sup>77</sup> See above, para. 19.

<sup>78</sup> See Impugned Decision, para. 71.

<sup>79</sup> Impugned Decision, para. 72.



can be reclassified as public, within ten days of receiving notification of the present Decision; and

**INSTRUCTS** the Registry to execute the reclassification of the Response and the Reply, respectively, upon indication by the SPO and Januzi, if any, that they can be reclassified.



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**Judge Michèle Picard,  
Presiding Judge**

Dated this Monday, 5 February 2024

At The Hague, the Netherlands