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KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In:	**KSC-BC-2020-06**
Before:	**A Panel of the Court of Appeals Chamber** Judge Michèle Picard Judge Kai Ambos Judge Nina Jørgensen
Registrar:	Fidelma Donlon
Date:	30 April 2021
Original language:	English
Classification:	**Public**

Public Redacted Version of

Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers ("Court of Appeals Panel" or "Panel" and "Specialist Chambers", respectively)[1] 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 the "Public Redacted Version of Krasniqi Defence Appeal Against Decision on Jakup Krasniqi's Application for Interim Release" ("Appeal") filed on 3 February 2021,[2] challenging the "Public Redacted Version of Decision on Jakup Krasniqi's Application for Interim Release" ("Impugned Decision").[3] The Specialist Prosecutor's Office ("SPO") responded on 15 February 2021 that the Appeal should be dismissed in its entirety.[4] Krasniqi filed his reply on 22 February 2021.[5]

I. BACKGROUND

1. On 4 November 2020, Krasniqi was arrested pursuant to an arrest warrant issued by the Pre-Trial Judge,[6] further to the confirmation of an indictment against him.[7]

[1] F00002, Decision Assigning a Court of Appeals Panel, 4 February 2021.
[2] F00001/RED, Public Redacted Version of Krasniqi Defence Appeal Against Decision on Jakup Krasniqi's Application for Interim Release, KSC-BC-2020-06/IA002-F00001, dated 3 February 2021, 3 February 2021 (original version filed on 3 February 2021) ("Appeal").
[3] F00180/RED, Public Redacted Version of the Decision on Jakup Krasniqi's Application for Interim Release, 26 January 2021 (original version filed 22 January 2021) ("Impugned Decision").
[4] F00003/RED, Public redacted version of Response to Krasniqi Defence Appeal of Detention Decision, 19 February 2021 (original version filed on 15 February 2021) ("Response"), para. 52.
[5] F00004, Krasniqi Defence Reply to SPO Response to Krasniqi Defence Appeal of Detention Decision, 22 February 2021 ("Reply").
[6] F00027/RED, Public Redacted Version of Decision on Request for Arrest Warrants and Transfer Orders, 26 November 2020 (original version filed on 26 October 2020) ("Decision on Arrest and Detention"); F00027/A07/COR/RED, Public Redacted Version of Corrected Version of Arrest Warrant for Jakup Krasniqi, 5 November 2020 (original version filed on 26 October 2020) ("Arrest Warrant"); F00044, Notification of Arrest of Jakup Krasniqi Pursuant to Rule 55(4), 4 November 2020 (strictly confidential and *ex parte*, reclassified as public on 20 November 2020).
[7] F00026/RED, Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 30 November 2020 (original version filed on 26 October 2020). The operative indictment was filed on 4 November 2020; see F00045/A03,

2. On 22 January 2021, the Pre-Trial Judge issued the Impugned Decision rejecting Krasniqi's application for interim release on the basis that there was a risk that Krasniqi would abscond, obstruct the progress of Specialist Chambers proceedings or commit further crimes against those who allege that Kosovo Liberation Army ("KLA") members committed crimes, including (potential) witnesses.[8] The Pre-Trial Judge further found that the conditional interim release proposed by Krasniqi ("Proposed Conditions"), as an alternative to unconditional release, could adequately mitigate the risk of flight but would insufficiently mitigate the risk of obstructing the progress of Specialist Chambers proceedings or the risk of committing further crimes.[9]

3. Krasniqi submits that, in the Impugned Decision, the Pre-Trial Judge: (i) violated some of his fundamental human rights;[10] (ii) applied an incorrect threshold for the assessment of the risk under Article 41(6)(b)(ii) of the Law;[11] (iii) made erroneous findings regarding the assessment of Article 41(6)(b)(ii) and (iii) of the Law;[12] (iv) erred regarding the assessment of length of the pre-trial proceedings;[13] and (v) further erred in the assessment of the Proposed Conditions.[14] He invites the Panel to correct the errors of law, apply the correct legal tests in Article 41(6)(b) of the Law to the facts and grant him interim release.[15] Krasniqi does not challenge the findings on the risk of flight because these were not determinative of the outcome of his application for release.[16]

Further redacted Indictment, 4 November 2020 (strictly confidential and *ex parte*, reclassified as public on 5 November 2020) ("Indictment").
[8] Impugned Decision, paras 31, 39, 43-44, 52.
[9] Impugned Decision, paras 48-50, 52.
[10] Appeal, paras 4(2), 21-24, 25, 27, 45.
[11] Appeal, paras 4(1), 14-20, 45.
[12] Appeal, paras 4(3)-(5), 26-40, 45.
[13] Appeal, paras 23, 25, 45.
[14] Appeal, paras 4(6), 41-45.
[15] Appeal, para. 46.
[16] Appeal, para. 6.

II. STANDARD OF REVIEW

4. The Court of Appeals Panel previously decided to apply *mutatis mutandis* to interlocutory appeals the standard of review provided for appeals against judgements under Article 46(1) of the Law.[17] Article 46(1) of the Law specifies, in relevant part, the following grounds of appeal:

> (i) an error on a question of law invalidating the judgement;
>
> (ii) an error of fact which has occasioned a miscarriage of justice; or
>
> (iii) […].

5. The Law states in relation to errors of law that:

> When the Court of Appeals Panel determines that a Trial Panel has made an error of law in a judgement arising from the application of an incorrect legal standard, the Court of Appeals Chamber shall articulate the correct legal standard and apply that standard to the evidence contained in the trial record to determine whether to sustain, enter or overturn a finding of guilty on appeal. Alternatively, if the Trial Panel is available and could more efficiently address the matter, the Court of Appeals Panel may return the case to the Trial Panel to review its findings and the evidence based on the correct legal standard.[18]

6. Regarding errors of fact, the Law provides the following:

> In reviewing the factual findings of the Trial Panel, the Court of Appeals Panel shall only substitute its own findings for that of the Trial Panel where the evidence relied on by the Trial Panel could not have been accepted by any reasonable trier of fact or where the evaluation of the evidence is wholly erroneous.[19]

[17] KSC-BC-2020-07, F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati* Appeal Decision"), paras 4-13; KSC-BC-2020-07, F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021 ("*Haradinaj* Appeal Decision"), paras 11-13.
[18] Article 46(4) of the Law.
[19] Article 46(5) of the Law.

7. If challenging a discretionary decision, the appellant 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.[20] 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.[21]

8. The Court of Appeals Panel recalls that, according to Article 45(2) of the Law, interlocutory appeals lie as of right from decisions or orders relating to detention on remand.[22]

III. DISCUSSION

A. APPLICABLE LAW AND GENERAL CHALLENGES

9. At the outset the Panel recalls the provisions of Article 41(6) of the Law:

> The Specialist Chambers or the Specialist Prosecutor shall only order the arrest and detention of a person when:
>
> a. there is a grounded suspicion that he or she has committed a crime within the jurisdiction of the Specialist Chambers; and
>
> b. there are articulable grounds to believe that:
>
> i. there is a risk of flight;
>
> ii. he or she will destroy, hide, change or forge evidence of a crime or specific circumstances indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices; or

[20] *Gucati* Appeal Decision, para. 14; *Haradinaj* Appeal Decision, para. 14.
[21] Ibid.
[22] Article 45(2) of the Law.

> iii. the seriousness of the crime, or the manner or circumstances in which it was committed and his or her personal characteristics, past conduct, the environment and conditions in which he or she lives or other personal circumstances indicate a risk that he or she will repeat the criminal offence, complete an attempted crime or commit a crime which he or she has threatened to commit.

1. The Wording of Article 41(6)(b)(ii) of the Law (Ground 1)

(a) Submissions of the Parties

10. Krasniqi argues that the Pre-Trial Judge erred in finding that, despite the absence of the word "risk" in the formulation of Article 41(6)(b)(ii) of the Law, compared to the other two prongs of Article 41(6)(b) of the Law, the threshold remains the same for the three prongs and involves a risk analysis. According to him, the drafters of the Law cannot have accidentally omitted the word "risk" from Article 41(6)(b)(ii) of the Law that should therefore be interpreted narrowly.[23] Moreover, the inclusion of "specific circumstances" in Article 41(6)(b)(ii) of the Law underscores the high threshold set by this sub-paragraph.[24]

11. The SPO responds that the Court of Appeals Panel has already concluded that an interim release inquiry involves a risk assessment. The Pre-Trial Judge is not required to determine whether the Accused "will" obstruct the proceedings, but rather whether "there are articulable grounds to believe" this.[25] Recalling that "belief" is a lower standard than certainty, the SPO further argues that any assessment of future conduct *per se* involves a risk assessment.[26]

[23] Appeal, paras 14-20; Reply, paras 1-8.
[24] Appeal, para. 18. See below, para. 28.
[25] Response, paras 14-15.
[26] Response, para. 15.

(b) Assessment of the Court of Appeals Panel

12. The Panel recalls its finding in the *Gucati and Haradinaj* case that: "[t]he Court of Appeals Panel sees no error in the Single Judge's reliance on the allegations presented by the SPO and on Gucati's position as indicating contact and network that could create the risk that Gucati may obstruct the proceedings […]."[27] However, the Panel emphasises that this finding was made in a different case, in a context where the specific question related to the wording of Article 41(6)(b)(ii) of the Law did not arise for consideration. Thus, this issue has not yet been decided on and therefore needs to be addressed here.

13. The Panel finds that a literal interpretation of the word "will" contained in Article 41(6)(b)(ii) of the Law would not be appropriate given that the nature of the assessment to be conducted under Article 41(6)(b) of the Law cannot require certainty. In that regard, Article 41(6)(b) of the Law refers to the "belief" before enumerating the three prongs, denoting a lower standard than certainty.[28]

14. The Panel further finds that a review of the relevant provisions of the Kosovo Criminal Procedure Code ("Kosovo CPC"),[29] as well as relevant provisions of the legal frameworks of other courts on the matter of detention on remand, is instructive to determine the nature of the assessment to be conducted and whether a different threshold should apply to Article 41(6)(b)(ii) of the Law.[30] In that regard, the Panel notes that Article 41(6)(b)(i)-(iii) of the Law appears to be copied from Article 164(1.2.1.)-(1.2.3.) of the Kosovo CPC (Arrest During Investigative Stage), which contains exactly the same wording, but refers to the arrest and detention of a person by the police when a state prosecutor has authorised an arrest during an

[27] *Gucati* Appeal Decision, para. 63.
[28] See also below, para. 26.
[29] Kosovo, Code No. 04/L-123, Criminal Procedure Code, 13 December 2012.
[30] The Panel recalls that Article 3(3) of the Law stipulates that Judges may be assisted by sources of international law, including subsidiary sources such as the jurisprudence from the international *ad hoc* tribunals, the ICC and other criminal courts. See also *Gucati* Appeal Decision, para. 11.

investigative stage. The Panel was unable to find any information as to why the drafters of the Law decided to rely on this provision when drafting Article 41(6)(b)(i)-(iii) of the Law.

15. The Panel considers that, for the purpose of the present assessment, comparison should rather be made with the provision of the Kosovo CPC dealing with detention on remand, as this provision refers to the detention of a person following a court order. According to Article 187 of the Kosovo CPC (Findings Required For Detention on Remand), the court may order detention on remand against a person only after it explicitly finds that there is a grounded suspicion that such person has committed a criminal offence and that one of the following conditions set out in Article 187(1.2.) is met:

> 1.2.1. he or she is in hiding, his or her identity cannot be established or other circumstances indicate that there is a danger of flight;
>
> 1.2.2. there are grounds to believe that he or she will destroy, hide, change or forge evidence of a criminal offence or specific circumstances indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, injured parties or accomplices; or
>
> 1.2.3. the seriousness of the criminal offence, or the manner or circumstances in which it was committed and his or her personal characteristics, past conduct, the environment and conditions in which he or she lives or other personal circumstances indicate a risk that he or she will repeat the criminal offence, complete an attempted criminal offence or commit a criminal offence which he or she has threatened to commit; and
>
> […]

16. First, the Panel notes that Article 187(1.2.2.) of the Kosovo CPC, similarly to Article 41(6)(b)(ii) of the Law, also applies the standard of "grounds to believe that he or she will destroy […]". Second, the Panel notes the different wording between the three prongs of Article 187(1.2.) of the Kosovo CPC, referring in turn to "danger" (Article 187(1.2.1.)), "grounds to believe that he or she will […]"(Article 187(1.2.2.))

and "indicate a risk"(Article 187(1.2.3.)). The Panel considers that the reference to "danger" and "risk" can be interpreted as synonymous in this specific context. In that respect, the Panel observes that the Kosovo courts have in practice applied a risk assessment in addressing the requirements of Article 187(1.2.) of the Kosovo CPC and, while the available jurisprudence on this point is limited, there is no indication of a different threshold being applied for the three prongs despite the different wording.[31]

17. A review of provisions applicable to requests for provisional release before other international courts shows that there is no express reference to "the risk" of a detained person fleeing or obstructing the proceedings. Relevant provisions of the legal frameworks of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") require, *inter alia*, the judge to satisfy himself that, if released, an accused will appear for trial and will not pose a danger to any victim, witness, or other person.[32] Nevertheless, in practice, these courts have conducted a risk analysis.[33]

18. As for the International Criminal Court ("ICC"), according to Article 60(2) of the Rome Statute, if the Pre-Trial Chamber is satisfied that the conditions set forth in Article 58(1) of the Rome Statute are met, the person shall continue to be detained. These conditions include, *inter alia*, that the arrest of the person appears necessary to

[31] See e.g. Kosovo, Constitutional Court, KI10/18, *Fahri Deqani, Constitutional review of Judgment Pml. No. 357/2017 of the Supreme Court of Kosovo of 22 December 2017*, Judgment, 21 October 2019, para. 93 referring to "a risk that the Applicant may repeat the criminal offense". See also Kosovo, Constitutional Court, KI63/17, *Lutfi Dervishi, Constitutional review of Judgment Pml. Kzz. 19/2017, of the Supreme Court of Kosovo, of 11 April 2017*, Resolution on Inadmissibility, 16 November 2017, para. 71 referring to the reasoning of the Supreme Court [Judgment Pml. Kzz 19/2017] making findings on "the risk of flight"; Kosovo, Supreme Court, Pml Kzz 59/2015, *BS*, Judgment, 16 March 2015, para. 10 referring to "the risks pursuant to Article 187 of the CPC".

[32] See ICTY Rules, Rule 65(B); ICTR Rules, Rule 65(B); IRMCT Rules, Rule 68(B).

[33] ICTY, *Prosecutor v. Mladić*, IT-09-92-AR65.1, Public Redacted Version of "Decision on Interlocutory Appeal Against Decision on Urgent Defence Motion for Provisional Release" Issued on 27 June 2017, 30 June 2017, para. 16, referring to the "risk of flight"; ICTR, *Prosecutor v. Muvunyi*, ICTR-00-55A-AR65, Decision on Appeal Concerning Provisional Release, 20 May 2009, para. 4, referring to a "flight risk"; ICTY, *Prosecutor v. Rašević and Todović*, IT-97-25/1-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todović's Application for Provisional Release, 7 October 2005, paras 18, 21, referring to the Trial Chamber's assessment of the risk that an accused will abscond.

ensure that the person does not obstruct or endanger the investigation or the court proceedings. Here again, in practice, the relevant chambers have conducted a risk analysis.[34]

19. In addition, carrying out a risk assessment when deciding on requests for provisional release is also in line with the practice of the European Court of Human Rights ("ECtHR"). The Panel notes in that regard that before the ECtHR, justifications for continued detention that have been deemed "relevant" and "sufficient" (in addition to the existence of reasonable suspicion) "have included such grounds as the danger of absconding, the risk of pressure being brought to bear on witnesses or of evidence being tampered with, the risk of collusion, the risk of reoffending, the risk of causing public disorder and the need to protect the detainee […]."[35]

20. In light of the above, the Court of Appeals Panel finds that the Pre-Trial Judge did not err in finding that, despite the absence of the word "risk" in the formulation of Article 41(6)(b)(ii) of the Law, the threshold remains the same for the three prongs of Article 41(6)(b) of the Law and involves a risk analysis.

2. General Threshold under Article 41(6)(b) of the Law (Ground 1)

(a) Submissions of the Parties

21. Krasniqi argues that the Pre-Trial Judge erred in law in applying an impermissibly low general threshold to justify continued detention under

[34] See e.g. ICC, *Prosecutor v. Gicheru*, ICC-01/09-01/20-90-Red2, Public Redacted Version of 'Decision on Mr Gicheru's Request for Interim Release', 29 January 2021, ICC-01/09-01/20-90-Conf, 29 January 2021, para. 45 referring to the "risks under article 58(1)(b) of the Statute"; ICC, *Prosecutor v. Abd-Al-Rahman*, ICC-02/05-01/20-115, Decision on the Defence Request for Interim Release, 14 August 2020, para. 29 referring to "an unacceptable risk that the suspect may exert pressure on witnesses, either directly or indirectly through his supporters"; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-3249-Red, Public redacted version of Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 23 December 2014 entitled "Decision on 'Defence Urgent Motion for Provisional Release'", 20 May 2015, paras 39-40, 94 referring to a "flight risk" and the "risks under article 58(1)(b) of the Statute.

[35] ECtHR, *Zohlandt v. The Netherlands*, no. 69491/16, Judgment, 9 February 2021, para. 50; ECtHR, *Buzadji v. The Republic of Moldova*, no. 23755/07, Judgment, 5 July 2016, para. 88.

Article 41(6)(b) of the Law, based on a mere possibility.[36] According to Krasniqi, the Pre-Trial Judge merely relied on a risk simpliciter, without assessing whether that risk is sufficiently real to justify detention.[37]

22. The SPO responds that the Pre-Trial Judge correctly found that the threshold for the assessment of the risks under Article 41(6)(b) of the Law is "articulable grounds to believe" denoting an acceptance of the possibility, not the inevitability, of a future occurrence.[38]

(b) Assessment of the Court of Appeals Panel

23. The Panel acknowledges at the outset that any analysis of pre-trial detention must take the presumption of innocence as its starting point.[39] It follows, first, that pre-trial detention cannot be maintained lightly. Second, the burden of demonstrating that pre-trial detention is necessary is on the SPO.[40] In this latter respect, the procedures of the Specialist Chambers differ from those of the ICTY.[41]

24. The Court of Appeals Panel recalls the wording of Article 41(6)(b) of the Law: detention shall only be ordered if "there are articulable grounds to believe" that at least one of the enumerated risks materialises.

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[36] Reply, paras 5-8. See also Appeal, paras 4(1), 14-20.
[37] Reply, paras 7-8.
[38] Response, paras 14, 16-17.
[39] This was recognised by the Pre-Trial Judge, see Impugned Decision, para. 16.
[40] This was also recognised by the Pre-Trial Judge, see Impugned Decision, para. 17.
[41] At the ICTY, where the burden was on the accused to show that release is warranted, the jurisprudence adopted the "balance of probabilities" as the applicable standard of proof, requiring the judges to satisfy themselves that it is more likely than not that the accused will appear for trial and will pose no danger to others. See ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-AR65.1, Decision on Ramush Haradinaj's Modified Provisional Release, 10 March 2006, para. 41; ICTY, *Prosecutor v. Simić*, IT-95-9-A, Decision on Motion of Blagoje Simić Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Services for His Father, 21 October 2004, para. 14. ICTY jurisprudence is also applied at the International Residual Mechanism for Criminal Tribunals ("IRMCT"). See IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Dick Prudence Munyeshuli's Motion for Provisional Release to the United States of America, 8 February 2019, fn. 16; IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Maximilien Turinabo's Motion for Provisional Release, 29 March 2019, para. 14.

25. Given the peculiar set-up of the Specialist Chambers and the text of Article 41(6)(b) of the Law, it is evident that the Specialist Chambers are not bound by the standards used by international tribunals although they can provide some guidance. The Panel notes that the phrase "grounds to believe" is also used, for example, in Article 58(1)(a) of the Rome Statute and in some domestic laws relating to pre-trial detention,[42] often prefaced by the words "reasonable" or "substantial". The term "reasonable grounds" leaves room for interpretation, even though it is a common term in many legal systems. In any event, "reasonable grounds" is understood to embody an objective assessment. In that regard, the standard is lower than "substantial grounds to believe that the person committed the crime charged" used in Article 61(7) of the Rome Statute in determining whether to confirm charges.[43] In addition to showing that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court, Article 58(1) of the Rome Statute requires the Prosecutor to demonstrate that the arrest of the person *appears necessary* to satisfy at least one of the three grounds specified for issuing an arrest warrant.[44] For example, according to Article 58(1)(b)(ii) of the Rome Statute, the Pre-Trial Chamber must satisfy itself that the arrest appears necessary to ensure that the person does not obstruct or endanger the investigation or the court proceedings. If there are reasonable grounds to believe that a suspect would interfere with the investigations of the Prosecutor, the person can be detained according to the wording of Article 58(1)(b)(ii) of the Rome Statute. The text does not refer to specific actions or types of interference. It is not necessary that the suspect has already attempted to

[42] See, for example, in England and Wales, the Bail Act, 1976, Sch. 1, para. 2.
[43] Ryngaert, C., "Article 58: Issuance by a Pre-Trial Chamber a warrant of arrest or a summons to appear" in Ambos, K. (ed), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th ed., Beck/Hart/Nomos 2021 ("Ryngaert, *Article 58*"), marginal number (mn.) 12. See also fn. 44 and references quoted therein.
[44] Rome Statute, Article 58(1)(a) and (b). See also Rome Statute, Article 60(2) according to which: "A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions."

obstruct or endanger the investigation; it is sufficient that the Pre-Trial Chamber has reasonable grounds to believe that such interference could happen. Compelling factors taken into consideration include convincing information indicating that the person detained might intimidate, influence or corrupt witnesses or victims.[45]

26. The Panel recalls its prior finding that, in determining the necessity of detention under Article 41(6)(b) of the Law, the question revolves around the possibility, not the inevitability, of a future occurrence.[46] This finding is supported by ICC jurisprudence.[47] In so finding, the Panel acknowledged that a standard less than certainty was appropriate. That "certainty" cannot be required follows from the nature of the assessment under Article 41(6)(b) of the Law, namely that it entails a prediction about future conduct, and what lies in the future can never be predicted with certainty. It does not follow, however, that *any* possibility of a risk materialising is sufficient to justify detention. In this regard, the Panel notes the finding of the Specialist Chamber of the Constitutional Court that any deprivation of liberty must conform to the substantive and the procedural rules established by law and should be in keeping with the key purpose of protecting the individual from arbitrariness.[48] As part of the protection against arbitrariness, the Panel highlights the importance of specific reasoning and concrete grounds which are required to be relied upon by the

[45] Ryngaert, *Article 58*, mn. 19.
[46] *Gucati* Appeal Decision, para. 67.
[47] According to ICC jurisprudence: "when determining whether detention appears necessary under article 58(1)(b) of the Statute, '[t]he question revolves around the possibility, not the inevitability, of a future occurrence'". See ICC, *Prosecutor v. Abd-Al-Rahman*, ICC-02/05-01/20-177, Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled 'Decision on the Defence Request for Interim Release', 8 October 2020, para. 33. See also ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-278-Red, Public redacted version of Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", 26 October 2012 ("*Gbagbo* Appeal Decision"), para. 56.
[48] KSC-CC-PR-2017-01, F00004, Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 26 April 2017 ("Constitutional Court Judgment dated 26 April 2017"), para. 111.

Pre-Trial Judge in his decisions authorising detention on remand.[49] The Panel therefore finds 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.

27. The Panel notes that, according to Article 19(1.30.) of the Kosovo CPC, "articulable" means that "the party offering the information or evidence must specify in detail the information or evidence being relied upon". Thus, the term "articulable" does not speak directly to the standard or threshold, but to the specificity of the information or evidence required. This also follows from Article 19(1.9) and (1.10.) of the Kosovo CPC, referring to "articulable evidence". In that regard, the Panel dismisses Krasniqi's argument that, the inclusion of "specific circumstances" in Article 41(6)(b)(ii) of the Law underscores the high threshold set by this sub-paragraph.[50] The Panel rather finds that the SPO's duty to specify in detail the information or evidence being relied upon applies equally to the three prongs of Article 41(6)(b) of the Law and not only to Article 41(6)(b)(ii) of the Law.

28. Recalling that the applicable standard must be determined on a scale between a mere possibility and certainty, the Panel finds that Article 41(6)(b) of the Law does not require the Pre-Trial Judge to be satisfied that the risks specified in subparagraphs (i) to (iii) will in fact occur in the event of provisional release being granted, or to be satisfied that they are substantially likely to occur. The Pre-Trial Judge must be satisfied that there are "[articulable] grounds to believe" that there is a risk that they will occur. The question posed by Article 41(6)(b) of the Law 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)

[49] Constitutional Court Judgment dated 26 April 2017, para. 115.
[50] Appeal, para. 18.

of the Law exist.[51] To that extent it is a question of fact depending on the individual circumstances of each case.

3. Duty to Provide a Reasoned Opinion

29. In the conduct of its assessment, a Panel has a duty to provide sufficient reasoning. In this regard, the Court of Appeals Panel recalls relevant ICC jurisprudence emphasising the importance of thoroughly reasoned decisions on interim release.[52] The ECtHR also stressed that in the context of sub-paragraph (c) of Article 5(1)(c) of the European Convention on Human Rights ("ECHR"), the reasoning of the decision ordering a person's detention is a relevant factor in determining whether the detention must be deemed arbitrary.[53] The Panel considers that the extent of the reasoning will depend on the circumstances of the case, but it is nevertheless essential that the lower level panel indicates with sufficient clarity the basis of the decision.[54]

30. The Panel notes that the reasoning in the Impugned Decision in relation to Article 41(6)(b)(ii) of the Law and in relation to the Proposed Conditions is relatively

[51] See e.g. ECtHR, *Jarzyński v. Poland*, no. 15479/02, Judgment, 4 October 2005, para. 46 ([…] factor indicating that there was a real risk of his absconding or obstructing the proceedings); *Merabishvili v. Georgia*, no. 72508/13, Judgment, 28 November 2017, para. 229 (the risk [of absconding] must be "sufficiently real" to justify continued detention).
[52] See ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-2275, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018 ("*Bemba et al.* Decision dated 8 March 2018"), paras 102-108; *Gbagbo* Appeal Decision, paras 46-50; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-323, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release", 16 December 2008, paras 53, 66. See also ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-773, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006 ("*Lubanga* Appeal Decision"), para. 20.
[53] ECtHR, *S. V. and A. v. Denmark*, no. 35553/12, 36678/12 and 36711/12, Judgment, 22 October 2018, para. 92; ECtHR, *Mooren v. Germany*, no. 11364/03, Judgment, 9 July 2009, para. 79.
[54] *Bemba et al.* Decision dated 8 March 2018, para. 105; *Gbagbo* Appeal Decision, para. 46, citing *Lubanga* Appeal Decision, para. 20.

brief. In particular, the Pre-Trial Judge did not set out in much detail how he analysed the evidence presented by the Parties or how he reached his factual conclusions. Rather, in stating his conclusions, the Pre-Trial Judge simply made general references in the footnotes to previous filings. In the conduct of its review, the Panel had to revert to evidence and arguments previously adduced by the Parties in order to clarify and interpret the findings in the Impugned Decision. Nevertheless, and despite those shortcomings of the Impugned Decision, the Panel does not consider that the decision is so lacking in reasoning that it can be said that the Pre-Trial Judge failed to comply with his obligation to provide a reasoned opinion and therefore made an error of law.

31. The Panel considers that, even though the reasoning is brief, it is still comprehensible how the Pre-Trial Judge reached the conclusions he did, enabling the Accused to exercise his right to appeal. In particular, if the reasoning provided in the Impugned Decision is read together with the filings referred to in the footnotes and the submissions of the Parties, the Panel can discern the basis underpinning the conclusions reached by the Pre-Trial Judge.

32. At any rate, the Court of Appeals Panel strongly urges the Pre-Trial Judge to provide fuller reasoning in future decisions on applications for interim release or review of detention.

B. ALLEGED ERRORS REGARDING ASSESSMENT OF ARTICLE 41(6)(B)(II) OF THE LAW (GROUNDS 2 AND 3)

1. Article 41(6)(b)(ii) of the Law

(a) Submissions of the Parties

33. Krasniqi submits that the Pre-Trial Judge failed to respect his fundamental human rights and committed discernible errors in determining that there are

articulable grounds to believe that the requirements of Article 41(6)(b)(ii) of the Law were satisfied.[55]

34. Krasniqi submits that the Pre-Trial Judge failed to respect his right to be presumed innocent by relying on core allegations against him in the Indictment such as his alleged role in the KLA and responsibility for crimes committed against KLA opponents.[56] Krasniqi further argues that the Pre-Trial Judge erred by relying on some of his public statements criticizing the Specialist Chambers and a Facebook post dated 24 April 2020, that do not in any event call for witness interference or obstruction of the Specialist Chambers.[57] According to Krasniqi, this constitutes an interference with the right to free speech, and goes beyond any proportionate restriction which might be necessary in a democratic society.[58]

35. Krasniqi submits that there is no concrete evidential basis to support the erroneous conclusion that he has continued to play a significant role in Kosovo as a prominent and influential KLA figure, Kosovo politician and influential speaker, that his opinions are heard and that he may mobilise a hypothetical and undefined support network.[59] Krasniqi also submits that the [REDACTED].[60] Krasniqi requests the Court of Appeals Panel to weigh the findings on his detention - based on one Facebook post and [REDACTED] against his personal circumstances.[61]

36. In addition, Krasniqi submits that the finding that the risk of obstructing the proceedings will increase as the SPO complies with its disclosure obligations is

[55] Appeal, paras 4(2), 4(3), 21-33.
[56] Appeal, paras 4(2), 21-22, 25, 27.
[57] Appeal, paras 4(2), 21, 24-25, 28-29. See also Reply, paras 17-18.
[58] Appeal, para. 24 referring to ECtHR, *Sürek v. Turkey (No. 4)*, no. 24762/94, Judgment, 8 July 1999 ("*Sürek* Judgment"), paras 57-58 (Krasniqi argues that the ECtHR in this case found that there is little scope for restricting political speech unless the words, read in context, incite violence).
[59] Appeal, paras 29-33; Reply, paras 9-16.
[60] Appeal, para. 30.
[61] Appeal, para. 33.

contrary to ICTY jurisprudence and fails to consider the extensive protective measures granted in this case.[62]

37. Finally, Krasniqi argues that none of the factors identified in the Impugned Decision support the conclusion that he will obstruct Specialist Chambers' proceedings,[63] and that a prior decision issued by the Pre-Trial Judge supports this argument.[64]

38. In response to Krasniqi's argument that his detention is only grounded in one Facebook post and [REDACTED], the SPO responds that the Pre-Trial Judge's findings of risk are based on several factors individual and specific to the Accused which support the necessity of the Accused's detention.[65] According to the SPO, the gravity of the charges against an Accused and potential penalties, his political profile, including his former influential leadership positions in the KLA and government of Kosovo, as well as his access to a support network, are important individual factors to consider when deciding on detention matters.[66]

39. The SPO further argues that a Court of Appeals Panel in a previous decision identified no error in relying upon the allegations presented by the SPO in the course of assessing the risk of obstructing the proceedings.[67] The SPO submits that in any event, the Pre-Trial Judge relied on Krasniqi's condemnations of the Specialist Chambers and on the allegations made in the Indictment alongside other factors.[68] According to the SPO, the Pre-Trial Judge's assessment had no impact on the presumption of innocence because he made no assessment of whether the Accused

[62] Appeal, para. 32.
[63] Appeal, para. 31.
[64] Appeal, para. 31 referring to F00031/COR/RED, Public Redacted Version of Corrected Version of Decision Authorising Search and Seizure, 26 November 2020 (original version filed on 26 October 2020) ("Decision Authorising Search and Seizure"), para. 25.
[65] Response, paras 26, 31. See also Response, paras 24-32.
[66] Response, paras 26-28.
[67] Response, para. 40.
[68] Response, paras 39-40.

was guilty of a crime within the jurisdiction of the Specialist Chambers.[69] The SPO also submits that the Pre-Trial Judge relied on Krasniqi's political opinions not to assess the criminality of these pronouncements as such, but only to determine the risk that Krasniqi will attempt to obstruct justice or interfere with witnesses.[70]

40. The SPO further submits that Krasniqi merely disagrees with the weight given to the materials seized from his home without identifying discernible errors in the Pre-Trial Judge's reliance upon them and fails to appreciate the importance of these materials.[71] According to the SPO, there is no inconsistency between the Impugned Decision and the Pre-Trial Judge's earlier decision authorising the search and seizure of *inter alia* Krasniqi's residences.[72]

41. As for the Pre-Trial Judge's reliance on the progress of disclosure informing the Accused of the evidence against him, the SPO submits that this is a matter that a judge can determine in the exercise of his discretion.[73]

(b) Assessment of the Court of Appeals Panel

42. With regard to Krasniqi's arguments that the Pre-Trial Judge unduly relied on core allegations against him in the Indictment, the Panel notes the SPO's argument that in the *Gucati and Haradinaj* case it identified no error in the Single Judge's reliance on allegations made in the Indictment.[74] The Panel however observes that, in this other case, the appellant had not challenged the Single Judge's finding in this respect. Therefore, the specific question related to whether the Single Judge had respected the appellant's presumption of innocence did not arise for consideration.

[69] Response, para. 40.
[70] Response, paras 38-39.
[71] Response, paras 41-44.
[72] Response, para. 45, citing Decision Authorising Search and Seizure.
[73] Response, paras 36-37.
[74] Response, para. 40 referring to *Gucati* Appeal Decision, paras 60-63.

43. Although the Panel considers that the Pre-Trial Judge was free to rely on allegations made in the Indictment, among other factors, in the exercise of his discretion, the Panel finds some merit in Krasniqi's argument. The Panel notes in particular that the Pre-Trial Judge observed that "Krasniqi, as a KLA spokesperson, was involved in the development and dissemination of KLA policies […], many of which specifically targeted KLA opponents".[75] The Pre-Trial Judge further observed that "Krasniqi's statements at the time sought to justify KLA actions taken against such persons, who […] in many instances were harmed or killed".[76]

44. The Panel finds that the Pre-Trial Judge's findings in this respect were inadequately expressed as they could give the inaccurate impression that the Pre-Trial Judge failed to fully appreciate the Accused's right to be presumed innocent, as enshrined in Article 21 of the Law, in particular paragraph (3) thereof.[77]

45. The Panel considers, however, that the manner in which the Pre-Trial Judge referred to Krasniqi's alleged conduct must be understood in light of the Pre-Trial Judge's reference, elsewhere in the Impugned Decision, to "the crimes allegedly committed by the Accused"[78] and by his unambiguous statement that "any request for provisional release must be considered in the context of the detained person's right to be presumed innocent".[79] The Panel therefore finds that the Pre-Trial Judge did not fail to respect Krasniqi's right to be presumed innocent.

46. Turning to the issue of respect for Krasniqi's right to freedom of speech, the Pre-Trial Judge referred in reaching the Impugned Decision to a Facebook post dated 24 April 2020, in which Krasniqi stated:

[75] Impugned Decision, para. 36.
[76] Ibid.
[77] Article 21(3) of the Law states that: "The accused shall be presumed innocent until proved guilty beyond reasonable doubt according to the provisions of this Law."
[78] Impugned Decision, para. 19.
[79] Impugned Decision, para. 16.

> In conclusion: In 2010, I called Dick MARTY's report – a racist report. Every Albanian that D. MARTY calls a PATRIOT, either in the service of the prime minister or in any other position, is a collaborator and in the service of /Slobodan/ MILOŠEVIĆ's policy of genocide![80]

47. The Pre-Trial Judge found that the language of this Facebook post shows that, even twenty years after the conflict, Krasniqi labels as "collaborators" in the "service of Milošević's policy of genocide" any person who dares to state that KLA members had committed crimes.[81] According to the Pre-Trial Judge, part and parcel of this standpoint are Krasniqi's public statements criticising the Specialist Chambers as the institution that was created further to the report prepared by Special Rapporteur Dick Marty[82] and which is expected to hear witnesses on alleged crimes committed by KLA members.[83]

48. The Panel notes that the Pre-Trial Judge did not make findings on Krasniqi's pronouncements as such, but merely relied on the evidence that these statements had been made and their content in his assessment of Article 41(6)(b)(ii) of the Law. The Pre-Trial Judge did not interfere with Krasniqi's right to freedom of expression set out in Article 10 of the ECHR, nor did he discuss whether Krasniqi overstepped any limits that political figures should observe in terms of public criticism. Indeed, this is not the object of the assessment to be made within the framework of Article 41(6)(b)(ii) of the Law, rather the only question is whether certain statements or declarations by a detained person point in the direction of an obstruction of justice. Accordingly, Krasniqi's statement that the Pre-Trial Judge's findings constitute an interference with the right to free speech and go beyond any proportionate restriction which might be necessary in a democratic society,[84] represents a misplaced reliance on the ECtHR's

[80] F00005/RED/A02, Annex 2 to Public redacted version of 'Request for arrest warrants and related orders', filing KSC-BC-2020-06/F00005 dated 28 May 2020, 17 November 2020 (original version filed on 28 May 2020) ("Annex 2 to Request for Arrest Warrants"), p. 21.
[81] Impugned Decision, para. 36.
[82] Council of Europe Parliamentary Assembly Report on "Inhuman treatment of people and illicit trafficking in human organs in Kosovo", 7 January 2011, Doc.12462.
[83] Impugned Decision, para. 36.
[84] Appeal, para. 24.

jurisprudence. The Panel instead finds that the Pre-Trial Judge properly assessed the material placed before him, including Krasniqi's statements in light of the requirements of Article 41(6)(b)(ii) of the Law. Thus, the Pre-Trial Judge did not err in placing reliance on these statements on the basis that they are relevant to the assessment of the risk that Krasniqi will attempt to obstruct justice or interfere with witnesses.

49. The Panel further notes Krasniqi's argument that, read in today's context, the Facebook post dated 24 April 2020 does not in any event call for witness interference or obstruction of the Specialist Chambers.[85] The Panel rejects this argument because the test under Article 41(6)(b)(ii) of the Law does not require the Pre-Trial Judge to satisfy himself that the Accused will obstruct the proceedings but, rather, the Pre-Trial Judge must satisfy himself that there are grounds to believe there is a risk of such obstruction occurring in the future.[86]

50. In any event, the Panel finds that it was not unreasonable for the Pre-Trial Judge to take into account, among other factors, Krasniqi's public statements criticising the Specialist Chambers and the Facebook post dated 24 April 2020 in assessing whether there is a risk that Krasniqi will obstruct the proceedings if released.

51. The Panel notes that the Pre-Trial Judge found that Krasniqi continued to play a significant role in Kosovo as a prominent KLA figure, a Kosovo politician and an influential speaker whose opinions, including those opposing the Specialist Chambers, are heard and may mobilise his support network.[87] He further found that there is a risk that Krasniqi's statements will instigate, assist or otherwise engage those sharing his views in influencing or intimidating (potential) witnesses.[88]

[85] Appeal, para. 28. See also Reply, paras 17-18.
[86] See above, para. 28.
[87] Impugned Decision, para. 36.
[88] Ibid.

52. With regard to Krasniqi's position of influence, the Panel recalls that the Pre-Trial Judge expressly acknowledged that Krasniqi is now retired and no longer holds public positions.[89] The Panel however notes that Krasniqi is the former Chairman of the Kosovo Assembly and a former Acting President of Kosovo. He is also the former Deputy Commander of the KLA.[90] In that regard, the Panel sees some merit in the SPO's argument that a lifetime of KLA and government contacts are not forgotten simply through retirement.[91] The Pre-Trial Judge was mindful of Krasniqi's past political career and past role as a KLA figure of authority when he reached the finding regarding Krasniqi's position of influence in Kosovo.[92] In light of this, the Panel finds that Krasniqi fails to demonstrate that the Pre-Trial Judge's findings on his position of influence were erroneous.

53. The Panel recalls that the appraisal of evidence lies, in the first place, with the Judge considering the request for interim release. Therefore, in determining whether the Pre-Trial Judge has misappreciated facts in a decision on interim release, the Panel will only intervene in the case of a clear error, namely where it cannot discern how the Pre-Trial Judge's conclusion could have reasonably been reached from the evidence before him.[93]

54. While keeping the above in mind, the Panel considers that the evidence relied upon by the Pre-Trial Judge is insufficient to reasonably deduce, from Krasniqi's interaction with the media, that he is a "seasoned and influential speaker".[94] Indeed, this finding seems to be based on the SPO material provided in support of the Request

[89] Impugned Decision, para. 36.
[90] Decision on Arrest and Detention, paras 40-41.
[91] Response, para. 28.
[92] See Impugned Decision, para. 36. See also Impugned Decision, para. 29 ("Mr Krasniqi's influence as a former political leader and a Kosovo Liberation Army ("KLA") deputy commander cannot be ignored […]").
[93] ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-1626-Red, Public Redacted Version of Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled "Decision on Applications for Provisional Release", 19 August 2011, para. 45.
[94] See Impugned Decision, para. 36.

for Arrest Warrants and its Annexes,[95] consisting of five Facebook posts published over a five-year period and one interview with Koha press.[96] In that regard, the Panel shares the Defence's view that the mere act of posting on social media or conducting one newspaper interview does not show that Krasniqi's opinions are "heard and may mobilise" supporters. As further underlined by the Defence, the SPO failed to produce evidence of the number of people who read the relevant posts or the impact that the posts had.[97]

55. Turning to Krasniqi's ability to mobilise a support network, the Pre-Trial Judge's reference to individuals sharing Krasniqi's firm opposition to the Specialist Chambers,[98] is very general. A review of the available evidence before the Pre-Trial Judge shows that the SPO's submissions on the composition of the Accused's network specifically referred to supporters from the KLA War Veterans Association.[99] However, the Panel notes that the Pre-Trial Judge expressly acknowledged that the SPO adduced no concrete evidence of influence exerted by Krasniqi on individuals within the support network of the KLA War Veterans Association.[100] The Pre-Trial Judge's findings therefore seem to rely solely on Krasniqi's past position as a former KLA leader, mentioned elsewhere in the Impugned Decision.[101] In addition to the issue of the composition of the network, the Panel observes that the Impugned

[95] See F00005/RED, Public Redacted Version of 'Request for arrest warrants and related orders', filing KSC-BC-2020-06/F00005 dated 28 May 2020, 17 November 2020 (original version filed on 28 May 2020) ("Request for Arrest Warrants"); F00005/RED/A01, Annex 1 to Public redacted version of 'Request for arrest warrants and related orders', filing KSC-BC-2020-06/F00005 dated 28 May 2020, 17 November 2020 (original version filed on 28 May 2020); Annex 2 to Request for Arrest Warrants; F00005/RED/A03, Annex 3 to Public redacted version of 'Request for arrest warrants and related orders', filing KSC-BC-2020-06/F00005 dated 28 May 2020, 17 November 2020 (original version filed on 28 May 2020).
[96] Impugned Decision, para. 36 referring to Decision on Arrest and Detention, para. 41 (which does not refer to Krasniqi's statements); Annex 2 to Request for Arrest Warrants, pp. 11-23.
[97] See Appeal, para. 29(4).
[98] Impugned Decision, para. 29.
[99] See F00153/RED, Public redacted version of Prosecution response to Application for Interim Release on behalf of Mr Jakup Krasniqi, 22 December 2020 (original version filed on 17 December 2020) ("Response to Application for Interim Release"), paras 30-32.
[100] Impugned Decision, para. 36.
[101] Impugned Decision, para. 29.

Decision does not contain findings on other areas relevant to the determination of the existence of a support network, such as the network's capacity or its resources.[102]

56. The Panel has also considered other general evidence relied upon by the Pre-Trial Judge, such as the evidence of the context of a general climate of witness intimidation in Kosovo in trials of former KLA members.[103] However, the Panel finds that the evidence relied upon by the Pre-Trial Judge is insufficient to reasonably conclude that Krasniqi's opinions, including those opposing the Specialist Chambers, are heard and may mobilise his support network.[104] This conclusion by the Pre-Trial Judge must therefore be set aside. The Panel will address the repercussions of this finding where relevant in this decision.

57. Although Krasniqi identifies no error in the Pre-Trial Judge's finding on his influential position in Kosovo, the Panel recalls that the fact that an Accused may still hold considerable power to influence victims or witnesses is no indication in itself that the Accused will exercise such influence unlawfully.[105]

58. The Panel acknowledges the Pre-Trial Judge's finding that [REDACTED].[106] The Panel considers that the Impugned Decision is very brief when it comes to the so-called [REDACTED] and provides no reasoning or reference to the evidence relied upon to reach the findings made in relation to [REDACTED].[107] While the Impugned Decision in this respect is somewhat unclear, the Panel can nevertheless discern how the Pre-Trial Judge reached the overall conclusion that there is a risk that, if released,

[102] Impugned Decision, para. 36.
[103] Impugned Decision, para. 38.
[104] Impugned Decision, para. 36.
[105] ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-PT, Order on Provisional Release of Valentin Ćorić, 30 July 2004, para. 28; ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-PT, Decision on Defence Motion of Ljube Boškoski for Provisional Release, 18 July 2005, para. 43.
[106] Impugned Decision, para. 36.
[107] Ibid.

Krasniqi will obstruct the proceedings of the Specialist Chambers, based on the totality of the evidence before him.

59. From the Impugned Decision's summary of the SPO's submissions, the Panel understands that the Pre-Trial Judge refers to [REDACTED].[108] From the information provided by the SPO as well as a review of [REDACTED],[109] [REDACTED]:

[REDACTED].[110]

60. According to the SPO, this [REDACTED].[111]

61. The Court of Appeals Panel finds that Krasniqi was in possession of [REDACTED].

62. However, the Panel cannot discern how the Pre-Trial Judge could have reasonably found that [REDACTED]. The Panel has also considered other general evidence on which the Pre-Trial Judge relied, such as the context of a general climate of witness intimidation in Kosovo in trials of former KLA members.[112]

63. Contrary to Krasniqi's assertion, the Panel finds that the Pre-Trial Judge weighed his findings against Krasniqi's personal circumstances.[113] Notably, the Pre-Trial Judge expressly referred to Krasniqi's statements that no one should flee from justice.[114] Krasniqi's belief that this factor should have been given more weight

[108] Impugned Decision, para. 33.
[109] Response to Application for Interim Release, paras 26-28. See also F00153/A01, Annex 1 to Prosecution Response to Application for Interim Release on behalf of Mr Jakup Krasniqi, 17 December 2020 (confidential) ("Annex 1 to Response to Application for Interim Release"), [REDACTED].
[110] Annex 1 to Response to Application for Interim Release, p. 5.
[111] Response to Application for Interim Release, para. 28.
[112] Impugned Decision, para. 38.
[113] Appeal, para. 33. See also Reply, paras 7-8. Krasniqi argues that had the Impugned Decision asked whether a sufficiently real risk that he will obstruct proceedings had been established, considering his age, family life, absence of allegations of criminality in the last 20 years and the absence of evidence of any past connection to witness intimidation, the only reasonable conclusion would have been that any risk identified is insufficient to justify detention.
[114] Impugned Decision, para. 37. See also Impugned Decision, para. 32 (referring notably to the absence of evidence that Krasniqi has attempted to obstruct the proceedings).

is not sufficient to overturn the factual findings of the trier of fact. The Panel recalls that an appellant's mere disagreement with the Pre-Trial Judge's weighing of various factors and the conclusions reached therefrom is not enough to establish a clear error.[115]

64. The Panel finally dismisses the Defence's argument that a prior decision issued by the Pre-Trial Judge supports the conclusion that there is no risk that Krasniqi will obstruct the proceedings.[116] The Panel notes first that the Pre-Trial Judge's finding referred to by the Defence was made in a different context. Indeed, in the Decision Authorising Search and Seizure, the Pre-Trial Judge found that there was no grounded suspicion that Krasniqi had undertaken efforts to interfere with the administration of justice and/or engaged in any other acts which may constitute an offence under Article 15(2) of the Law.[117] In addition, this finding was based on the submissions of the SPO and the material submitted in support thereof at the time of the Decision Authorising Search and Seizure (original version filed on 26 October 2020). However, [REDACTED] was only submitted to the Pre-Trial Judge on 17 December 2020 together with the Response to Application for Interim Release.

65. Recalling that the test under Article 41(6)(b) of the Law entails a prediction about future conduct and that what lies in the future can never be predicted with certainty,[118] the Panel finds that Krasniqi failed to demonstrate that the Pre-Trial Judge erred in finding that, if released, there is a risk that he will obstruct the proceedings. In light of this finding, the Court of Appeals Panel does not need to address the remainder of Krasniqi's arguments[119] on Article 41(6)(b)(ii) of the Law.

[115] *Gucati* Appeal Decision, para. 64.
[116] Appeal, para. 31.
[117] Decision Authorising Search and Seizure, para. 25.
[118] See above, para. 26.
[119] Appeal, para. 32 alleging that the finding that the risk of obstructing the proceedings will increase as the SPO complies with its disclosure obligations is contrary to ICTY jurisprudence and fails to consider the extensive protective measures granted in this case.

2. Article 41(6)(b)(iii) of the Law

66. The Court of Appeals Panel recalls that the conditions set forth in Article 41(6)(b) of the Law are alternative to one another.[120] If one of those conditions is fulfilled, the other conditions do not have to be addressed in order for detention to be maintained. Accordingly, the errors Krasniqi alleges with regard to Article 41(6)(b)(iii) of the Law need not be addressed. Any findings by the Panel on these arguments would not have an impact on the outcome of the Impugned Decision, given that the Panel has found no error in the Pre-Trial Judge's conclusion that a risk of obstruction existed under Article 41(6)(b)(ii) of the Law, making continued detention necessary. The Panel needs nonetheless to address the Parties' arguments on the length of the pre-trial proceedings. The Panel also needs to address whether the Pre-Trial Judge erred in finding that the risk of obstructing the proceedings could not be mitigated by the Proposed Conditions.

C. ALLEGED ERRORS REGARDING ASSESSMENT OF THE LENGTH OF PRE-TRIAL PROCEEDINGS (GROUND 2)

1. Submissions of the Parties

67. Krasniqi argues that the Pre-Trial Judge committed an error of law by not carrying out an analysis of the proportionality of detention in light of the importance of the right to liberty and the presumption of innocence, and considering the likely substantial period of pre-trial detention in this case.[121] Krasniqi requests that, if the Court of Appeals Panel finds that the conditions in Article 41(6)(b) of the Law are met and cannot be mitigated by conditions, then the Panel should carry out the above proportionality assessment itself.[122]

[120] See above para. 9, recalling the provisions of Article 41(6) of the Law. See also Impugned Decision, para. 23.
[121] Appeal, paras 23, 25.
[122] Appeal, para. 25.

68. The SPO responds that there was nothing unlawful or unreasonable in the Pre-Trial Judge's decision not to estimate the expected length of pre-trial detention.[123] It further submits that, at this stage of the proceedings, such an estimate would be premature and speculative.[124]

2. Assessment of the Court of Appeals Panel

69. The Panel recalls, at the outset, the importance of the proportionality principle in determining the reasonableness of pre-trial detention.[125] The length of time spent in detention pending trial is a factor that needs to be considered along with the risks that are described in Article 41(6)(b) of the Law, in order to determine whether, all factors being considered, the continued detention "stops being reasonable" and the individual needs to be released.[126]

70. The Panel acknowledges that the Impugned Decision fails to address Krasniqi's submissions on the expected length of pre-trial detention in this case, despite the fact that they were raised in his application for interim release.[127] The Panel finds that the Impugned Decision is defective in this respect as it disregarded Krasniqi's argument on the expected length of the pre-trial detention. The Panel considers, however, that this defect did not have an impact on the outcome of the Impugned Decision.

71. The Panel notes that judges at the ICTY have taken the probable length of pre-trial detention into account in the exercise of their discretion to release an

[123] Response, para. 34.
[124] Response, para. 35.
[125] *Gucati* Appeal Decision, paras 72-73.
[126] See ICC, *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-992-Red, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled "Decision on Mr Gbagbo's Detention", 19 July 2017, para. 76 referring to ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-969, Judgment on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, 29 May 2015, para. 45.
[127] F00122/RED, Public Redacted Version of Application for Interim ReleaseKSC-BC-2020-06/F00122, dated 7 December 2020, 18 December 2020 (original version filed on 7 December 2020) ("Application for Interim Release"), paras 15-16. See also Response to Application for Interim Release, paras 9-10.

accused.[128] Recalling that the Specialist Chambers are not bound to follow the ICTY jurisprudence, the Panel finds that the Pre-Trial Judge did not err in adopting a different approach at this stage of the current proceedings. In the circumstances of this case, the Panel notes that, as is evident from the submissions underlying the Impugned Decision, the Parties differed widely in their opinions on the likely start date of the trial, and therefore the likely length of the pre-trial period.[129] Moreover, in contrast to the ICTY, before the Specialist Chambers detained persons benefit from a periodic review of the necessity of continued pre-trial detention every two months.[130] The Panel also notes that Rule 56(2) offers Krasniqi additional protection against an unreasonable period of pre-trial detention.

72. In view of the foregoing, the Panel therefore dismisses Krasniqi's arguments related to the alleged erroneous assessment of the proportionality of his pre-trial detention.

[128] ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying His Provisional Release, 9 March 2006, para. 23; ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84bis-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 10 September 2010, paras 40-42; ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, para. 29; ICTY, *Prosecutor v. Mrkšić*, IT-95-13/1-PT, Decision on Mile Mrkšić's Application for Provisional Release, 24 July 2002, para. 48.

[129] Application for Interim Release, paras 15-16; Response to Application for Interim Release, para. 10.

[130] Rule 57(2) of the Rules; ICTY, *Prosecutor v. Ademi*, IT-01-46-PT, Order on Motion for Provisional Release, 20 February 2002, para. 26, where the chamber noted that taking into account the likely total length of pre-trial detention was important because of the absence of a periodic review of detentions before the ICTY.

D. ALLEGED ERRORS REGARDING ASSESSMENT OF THE PROPOSED CONDITIONS (GROUND 6)

1. Submissions of the Parties

73. Krasniqi argues that the Pre-Trial Judge committed discernible errors in failing to accurately assess whether measures less restrictive than detention could have been ordered in this case.[131] According to Krasniqi, the Pre-Trial Judge was wrong to find that he could instigate crimes or obstruct the Specialist Chambers by making public statements on unrelated topics.[132] Moreover, in Krasniqi's view, the Pre-Trial Judge's conclusion that there are no means to monitor his private communications is unfounded, and that, in any event, the mere ability to have private communications is not a reason to deny interim release.[133] Krasniqi further alleges that, before finding that communication can only be effectively managed by detention, the Pre-Trial Judge should have set out the available conditions and explained why they were inadequate.[134] Furthermore, Krasniqi argues that the conclusion that the Kosovo authorities were unable to enforce or monitor conditions was unreasonable.[135]

74. The SPO responds that the Pre-Trial Judge carefully considered the possibility of mitigation in respect of each of the risks identified under Article 41(6)(b) of the Law and he committed no discernible error in his findings.[136] It submits that there is also no error in the Pre-Trial Judge's concerns that public statements on unrelated topics can further the risks identified under Article 41(6)(b) of the Law.[137] In the SPO's view,

[131] Appeal, paras 4(6), 41-43.
[132] Appeal, para. 42; Reply, paras 19-20.
[133] Appeal, paras 43-44; Reply, paras 19, 21-22.
[134] Reply, para. 21.
[135] Reply, paras 19, 22.
[136] Response, paras 46-47, 49.
[137] Response, para. 48.

there is significant evidence that the Kosovo authorities are limited in their ability to monitor an accused of Krasniqi's stature, resources and authority.[138]

2. Assessment of the Court of Appeals Panel

75. In the Impugned Decision, the Pre-Trial Judge found that Krasniqi's ability to make public statements on seemingly unrelated, political or historical topics could not be effectively limited. Through such public statements, the Pre-Trial Judge considered that Krasniqi could instigate, assist or otherwise engage others in intimidating any person who alleges that crimes were committed by KLA members.[139]

76. Although the language of the Impugned Decision could have been clearer, the Panel understands the Pre-Trial Judge's reliance on "public statements on seemingly unrelated, political or historical topics" as referring to Krasniqi's ability to threaten or intimidate witnesses through indirect language or veiled references. The Panel finds that the Impugned Decision should have contained more explanation on this matter and should have also further explained the reason why an Accused's ability to make public statements could not be monitored by the SPO. In particular, the reasoning does not address the fact that it appears unlikely that if released, Krasniqi would take the risk of threatening or intimidating witnesses by public statements, even if on seemingly unrelated topics, and that he would ignore the likelihood that such behaviour would be reported to the Specialist Chambers that could decide to revoke his conditional release.

77. In the Impugned Decision, the Pre-Trial Judge further considered that none of the Proposed Conditions, including any additional limitations imposed by him, could restrict Krasniqi's ability to communicate with his community or support network. The Pre-Trial Judge found that none of the Proposed Conditions could restrict or monitor Krasniqi's private communications, especially from his home, through which

[138] Response, paras 50-51.
[139] Impugned Decision, para. 49.

he could notably intimidate or threaten witnesses, directly or through others. The Pre-Trial Judge found that prohibiting Krasniqi from contacting witnesses or any person in Kosovo could neither be enforced nor monitored, whether such bar refers to in-person contacts or communication through electronic devices.[140] The Panel recalls that, although the Impugned Decision lacks reasoning with regard to Krasniqi's ability to mobilise a support network, Krasniqi remains a person of influence who has the ability to interact with individuals [REDACTED].[141] The Panel will therefore consider the findings of the Pre-trial Judge as referring to Krasniqi's ability to communicate with such individuals.

78. The Panel notes that, when assessing the Proposed Conditions against the risk of obstructing the proceedings, the Impugned Decision does not refer to any specific evidence. In particular, the Pre-Trial Judge does not set out how he analysed the extensive evidence presented by the SPO on monitoring release conditions.[142]

79. The Impugned Decision summarises the SPO's submissions as stating that neither the Specialist Chambers nor EULEX would be able to adequately monitor Krasniqi's interim release, and that at least three past incidents in Kosovo demonstrate the Kosovo Police's lack of capacity to effect arrests or monitor the release conditions of former KLA leaders.[143] If the reasoning provided in the Impugned Decision is read together with the submissions of the SPO and summary thereof, it is clear that the Pre-Trial Judge based his findings on relevant factors. Notably, in its submissions, the SPO provided concrete examples showing that there are grounds to believe that Kosovo's authorities would be limited in their ability to monitor Krasniqi's activities if released.[144]

[140] Impugned Decision, para. 49.
[141] See above, paras 61-62.
[142] Response to Application for Interim Release, paras 38-43.
[143] Impugned Decision, para. 46.
[144] Response to Application for Interim Release, paras 38-43.

80. Finally, contrary to the Pre-Trial Judge's finding on the impossibility of monitoring conditional release, Krasniqi refers to the "use of house arrest by EULEX in similar scenarios". In support of this assertion, Krasniqi refers to a filing made by Veseli, Co-Accused in this case, on 13 January 2021.[145]

81. In that regard, the Panel recalls that a party cannot simply refer on appeal to arguments made in other documents, for example the submissions of his Co-Accused before the Pre-Trial Judge and expect those arguments to be considered as properly substantiated before the Appeals Panel.[146] This is impermissible and further circumvents the applicable word limits for appellate submissions.[147] Consequently, the Appeals Panel summarily dismisses Krasniqi's argument on that matter.

82. Therefore, Krasniqi fails to demonstrate an error in the Pre-Trial Judge's finding that it is only through the communication monitoring framework applicable at the Specialist Chambers Detention Facilities that Krasniqi's communications can be *effectively* restricted and monitored.[148]

83. In view of the foregoing, the Appeals Panel therefore dismisses Krasniqi's arguments related to the alleged erroneous assessment of the Proposed Conditions.

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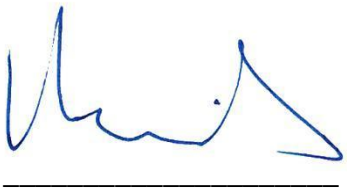
[145] Reply, para. 22 referring to F00174, Defence Reply to the SPO's response to the Provisional Release Application of Kadri Veseli, 13 January 2021, paras 56-58, Annex 1.
[146] ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-A, Decision on Nebojša Pavković's Second Motion to Amend His Notice of Appeal, 22 September 2009 ("*Šainović et al.* Appeal Decision"), para. 18; see also ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR72.5, Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, 9 July 2009, para. 13; ICTY, *Prosecutor v. Hartmann*, IT-02-54-F77.5-A, Decision on Further Motions to Strike, 17 December 2009, para. 12; ICTY, *Prosecutor v. Galić*, IT-98-29-A, Judgement, 30 November 2006, paras 250, 273. The Panel also notes that the Practice Direction states that an interlocutory appeal must contain "[t]he ground(s) on which the appeal is submitted and arguments in support of the ground(s), […] with specific reference to applicable law relied upon"; see KSC-BD-15, Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers, 17 May 2019 ("Practice Direction"), Article 46(1)(c).
[147] *Šainović et al.* Appeal Decision, para. 18; Practice Direction, Article 46(2), which states that the word limit for an interlocutory appeal is 6,000 words.
[148] Impugned Decision, para. 49 (emphasis added).

IV. DISPOSITION

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

DENIES the Appeal in its entirety.



Judge Michèle Picard,

Presiding Judge

Dated this Friday, 30 April 2021

At The Hague, the Netherlands