



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

**In:** KSC-BC-2020-04  
**Specialist Prosecutor v. Pjetër Shala**

**Before:** **The Panel of the Court of Appeals Chamber**  
Judge Michèle Picard  
Judge Kai Ambos  
Judge Nina Jørgensen

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 1 September 2021

**Language:** English

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**Public Redacted Version of 'Prosecution response to Defence appeal against the  
'Decision on Pjetër Shala's Request for Provisional Release' with one public  
Annex', filing KSC-BC-2020-04/IA001/F00003, dated 9 July 2021**

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Jack Smith

**Counsel for the Accused**  
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## I. INTRODUCTION

1. Pursuant to Articles 41 and 45 of the Law<sup>1</sup> and Rules 57-58 and 170 of the Rules,<sup>2</sup> the Specialist Prosecutor's Office ('SPO') responds to the Appeal<sup>3</sup> of Mr Pjetër SHALA against the Decision,<sup>4</sup> which rejected the Motion for Provisional Release.<sup>5</sup>
2. The Court of Appeals Panel ('Panel) should deny the Appeal in its entirety. As set out in detail below, in the Decision (a) the process was fair and Mr SHALA had all necessary information to make his submissions; (b) the correct legal standards were applied; (c) relevant factors were correctly weighed; and (d) the Pre-Trial Judge correctly determined the necessity and proportionality of detention. Throughout the Appeal, the Defence either mischaracterises, or merely disagrees with, the Pre-Trial Judge's reasoning and conclusions. Such submissions do not demonstrate any error.

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<sup>1</sup> Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

<sup>2</sup> Rules of Procedure and Evidence before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

<sup>3</sup> Defence Appeal against the 'Decision on Pjetër Shala's Request for Provisional Release,' KSC-BC-2020-04/IA001/F00001, 28 June 2021 (notified 29 June 2021), Confidential ('Appeal')

<sup>4</sup> Decision on Pjetër Shala's Request for Provisional Release, KSC-BC-2020-04/F00045, 15 June 2021, Confidential ('Decision').

<sup>5</sup> Motion for Provisional Release of Pjetër SHALA, KSC-BC-2020-04/F00039, 27 May 2021, Confidential ('Motion for Provisional Release').

3. This filing is submitted as confidential pursuant to Rule 82(4). A public redacted version will be filed.

## II. PROCEDURAL BACKGROUND

4. On 14 February 2020, the SPO filed the Application for Arrest Warrant.<sup>6</sup>
5. On 12 June 2021, the Pre-Trial Judge confirmed a four-count indictment against Mr SHALA charging him with war crimes under international law, including murder, torture, cruel treatment, and arbitrary detention.
6. That same day, the Application for Arrest Warrant was granted.<sup>7</sup> Mr SHALA was taken into custody by Belgian authorities on 16 March 2021. Following his transfer to the seat of the KSC in The Hague, he made his initial appearance before the KSC on 19 April 2021.
7. On 27 May 2021, Mr SHALA filed the Motion for Provisional Release, after which the SPO filed its Response on Provisional Release,<sup>8</sup> and Mr SHALA filed his Reply on Provisional Release.<sup>9</sup>

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<sup>6</sup> Submission of Indictment for confirmation and related requests, KSC-BC-2020-04/F00002, 14 February 2020, Strictly Confidential and *Ex Parte* ('Application for Arrest Warrant').

<sup>7</sup> Decision on Request for Arrest Warrant and Transfer Order, KSC-BC-2020-04/F00008, 12 June 2020, Strictly Confidential and *Ex Parte* ('Arrest Warrant Decision').

<sup>8</sup> Prosecution response to Application for Provisional Release on behalf of Mr Pjetër Shala, KSC-BC-2020-04/F00042, 9 June 2021, Confidential ('Response on Provisional Release').

<sup>9</sup> Reply to Prosecution's Response to Motion for Provisional Release, KSC-BC-2020-04/F00044, 14 June 2021, Confidential ('Reply on Provisional Release').

8. On 15 June 2021, the Pre-Trial Judge rendered the Decision.<sup>10</sup> The Pre-Trial Judge concluded that there is a risk that the Accused will abscond, obstruct the progress of KSC proceedings or commit further crimes against those who allege that KLA members committed crimes, including witnesses who provided or could provide evidence in the case and/or are due to appear before the KSC. The PTJ further concluded that no conditions would sufficiently mitigate the risks of the Accused obstructing KSC proceedings or committing further crimes.
9. On 28 June 2021, Mr SHALA filed the Appeal against the Decision.

### III. STANDARD OF REVIEW

10. When rendering discretionary decisions, like provisional release decisions, the weight given to relevant considerations may depend on numerous factors.<sup>11</sup> Because of the fact-specific nature of provisional release decisions, the lower level panel is better placed to assess these factors.<sup>12</sup> Accordingly, the Panel must not intervene unless the appellant demonstrates the existence of a discernible error in

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<sup>10</sup> Decision, KSC-BC-2020-04/F00045, 15 June 2021, Confidential.

<sup>11</sup> *Prosecutor v. Gucati and Haradinaj*, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, Public ('*Gucati Appeals Decision*'), paras.44, 49.

<sup>12</sup> *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.49.

that the Decision was based on an error of law, error of fact, or abuse of discretion.<sup>13</sup>

A mere disagreement with the conclusions that the first instance panel drew from the available facts or the weight it accorded to particular factors is not enough to establish a clear error.<sup>14</sup>

11. Alleging an error of law requires identifying the alleged error, presenting arguments in support of the claim, and explaining how the error invalidates the decision.<sup>15</sup> An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.<sup>16</sup>
12. An error of fact can only be found if no reasonable trier of fact could have made the impugned finding.<sup>17</sup> In determining whether a finding was reasonable, the Panel will not lightly overturn findings of fact made by a lower level panel.<sup>18</sup>
13. Finding an abuse of discretion requires that the Decision was so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.<sup>19</sup>

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<sup>13</sup> *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, paras.14, 49. *Prosecutor v. Gucati and Haradinaj*, Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention, KSC-BC-2020-07/IA002/F00005, 9 February 2021, Public ('*Haradinaj Appeals Decision*'), para.14.

<sup>14</sup> *Gucati Appeals Decision*, KSCS-BC-2020-7/IA001/F00005, para.64.

<sup>15</sup> *Gucati Appeals Decision*, KSCS-BC-2020-7/IA001/F00005, para.12.

<sup>16</sup> *Gucati Appeals Decision*, KSCS-BC-2020-7/IA001/F00005, para.12.

<sup>17</sup> *Gucati Appeals Decision*, KSCS-BC-2020-7/IA001/F00005, para.13.

<sup>18</sup> *Gucati Appeals Decision*, KSCS-BC-2020-7/IA001/F00005, para.13.

<sup>19</sup> *Gucati Appeals Decision*, KSCS-BC-2020-7/IA001/F00005, para.14; *Haradinaj Appeals Decision*, KSC-BC-2020-07/IA002/F00005, para.14.

#### IV. SUBMISSIONS

##### A. The review of detention process was fair

14. As a preliminary matter, the process through which the Pre-Trial Judge reviewed Mr SHALA's detention was fair and complied with the applicable provisions of the Law, Rules, Kosovo Constitution, and European Convention of Human Rights ('ECHR').<sup>20</sup>
15. Before the Defence filed its Motion for Provisional Release on 27 May 2021, Mr SHALA had received versions of the Indictment,<sup>21</sup> the Arrest Warrant Decision;<sup>22</sup> the Application for Arrest Warrant,<sup>23</sup> and the Arrest Warrant<sup>24</sup> with limited redactions. These documents were sufficient to inform Mr SHALA of the basis for the Pre-Trial Judge's decision on detention. While Mr SHALA describes the Arrest Warrant Decision<sup>25</sup> and Arrest Warrant<sup>26</sup> as having been 'heavily redacted,'<sup>27</sup> in
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<sup>20</sup> *Contra* Appeal, KSC-BC-2020-04/IA001/F0001, 28 June 2021, paras 14-21.

<sup>21</sup> Further Lesser Redacted Version of Confirmed Indictment, KSC-BC-2020-04/F00038/A01, 25 May 2021, Confidential ('Further Lesser Redacted Version of the Indictment') (with one remaining redaction).

<sup>22</sup> Redacted Arrest Warrant Decision, KSC-BC-2020-04/F00008/CONF/RED, 15 April 2021, Confidential ('Confidential Redacted Version of Arrest Warrant Decision') (with three redactions).

<sup>23</sup> Application for Arrest Warrant, KSC-BC-2020-04/F00002, 26 April 2021, Confidential (with sixteen redactions, including footnotes).

<sup>24</sup> Redacted Arrest Warrant for Mr Pjetër Shala, KSC-BC-2020-04/F00008/A01/RED, 15 April 2021, Public ('Arrest Warrant') (with four redactions).

<sup>25</sup> Arrest Warrant Decision, KSC-BC-2020-04/F00008/CONF/RED, 15 April 2021.

<sup>26</sup> Arrest Warrant, KSC-BC-2020-04/F00008/A01, 15 April 2021.

<sup>27</sup> Appeal, KSC-BC-2020-04/IA001/F00001, 28 June 2021, para.17.

fact, the versions in Mr SHALA's possession at the time he filed the Motion for Provisional Release contained just three and four redactions, respectively. As a result, the Pre-Trial Judge correctly observed that the Defence was able to 'partly anticipate[] the arguments of the SPO and address[] them in its Request.'<sup>28</sup>

16. Moreover, by the time Mr SHALA filed his Reply on Provisional Release, the Pre-Trial Judge had 'reclassified the relevant documents so as to allow the Defence to effectively address the SPO's submissions in its Reply.'<sup>29</sup> As Mr SHALA acknowledges, he received notice of the reclassification of these documents on Friday, 11 June 2021, three days before he filed his Reply on Monday, 14 June 2021.<sup>30</sup> Mr SHALA argues that one working day was not enough time to fully incorporate these reclassified submissions into his reply brief.<sup>31</sup> However, Mr SHALA did not request an extension of time to file his Reply, nor did he otherwise seek to supplement the record before the Pre-Trial Judge.

17. More to the point, Mr SHALA failed to identify – either to the Pre-Trial Judge or in the Appeal – any facts from the previously redacted portions of the reclassified filings that would have altered the detention analysis. Indeed, while Mr SHALA

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<sup>28</sup> Decision, KSC-BC-2020-04/F00045, 15 June 2021, para.12. In addition, the Pre-Trial Judge noted that the SPO had disclosed the key information under consideration in its Response. *Id.*

<sup>29</sup> Decision, KSC-BC-2020-04/F00045, 15 June 2021 (citing Reply, paras 13-19).

<sup>30</sup> Appeal, KSC-BC-2020-04/IA001/F00001, 18 June 2021, para.18.

<sup>31</sup> Appeal, KSC-BC-2020-04/IA001/F00001, 18 June 2021, para.18.

contends that the redactions led to the ‘non-disclosure of crucial information’<sup>32</sup> that ‘undermined to a substantial extent the ability of the Defence to respond to the SPO’s objections to provisional release,’<sup>33</sup> he does not say what this information is or articulate any additional arguments arising from the lifted redactions. In reality, in advance of his Reply on Provisional Release, Mr SHALA had access to all of the information necessary to ensure ‘equality of arms’ with the prosecution and to permit him to advance his best arguments in opposition to detention.<sup>34</sup>

18. For these reasons, the Pre-Trial Judge correctly concluded that ‘viewed in combination, the Defence has had a sufficient opportunity to set out its view in relation to this matter.’<sup>35</sup> Accordingly, there is no merit to Mr SHALA’s claim of a constitutional violation under Article 29 of the Kosovo Constitution or Article 5 of the ECHR.<sup>36</sup> Mr SHALA had all necessary information to make his submissions, and no error or abuse of discretion has been demonstrated.

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<sup>32</sup> Appeal, KSC-BC-2020-04/IA001/F00001, 18 June 2021, para.20.

<sup>33</sup> Appeal, KSC-BC-2020-04/IA001/F00001, 18 June 2021, para.17.

<sup>34</sup> European Court of Human Rights (‘ECtHR’), *Podeschi v. San Marino*, no. 66357/14, 13 April 2017, paras.171, 179-193 (holding that there had been no violation of Article 5(4) of the ECHR).

<sup>35</sup> Decision, KSC-BC-2020-04/F00045, 15 June 2021, para.12.

<sup>36</sup> Mr SHALA’s citation to *Mooren v. Germany* is inapposite because the prosecution there repeatedly refused to provide the detained accused with access to key documents in his case file, even after multiple appellate proceedings. By contrast, the SPO requested and the Pre-Trial Judge promptly ordered the reclassification of the relevant filings here before the close of briefing in Mr SHALA’s first challenge to detention. ECtHR, *Mooren v. Germany*, no. 11364/03, 9 July 2009.



## B. The Pre-Trial Judge applied the correct legal standards

19. Mr SHALA's challenge to the legal standard applied<sup>37</sup> ignores the clear prior jurisprudence of this Panel,<sup>38</sup> which the Pre-Trial Judge correctly set out and applied in the Decision.<sup>39</sup>
20. This Panel has already concluded that an interim release inquiry involves a risk assessment.<sup>40</sup> In particular, the Panel concluded that it is not necessary for the Pre-Trial Judge to be satisfied that the risks identified 'will' occur,<sup>41</sup> or even that they are substantially likely to occur.<sup>42</sup> Rather, what is required is that 'there are "[articulable] grounds to believe" that there is a risk that they will occur'.<sup>43</sup>
21. In this regard, in addition to tracking the statutory language of Article 41,<sup>44</sup> the Decision correctly specifies that (i) grounds to justify deprivation of liberty must

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<sup>37</sup> Appeal, KSC-BC-2020-04/IA001/F00001, 28 June 2021, paras 23-26.

<sup>38</sup> For example, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA001/F00005, 30 April 2021 ('Veseli Appeals Decision'), paras 14-19; Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA004/F00005/RED, 30 April 2021, ('Thaçi Appeals Decision'), paras 17-26; *Gucati Appeals Decision*, KSCS-BC-2020-7/IA001/F00005, para.67.

<sup>39</sup> Decision, KSC-BC-2020-04/F00045, 15 June 2021, paras 16-20.

<sup>40</sup> See *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, paras.51, 63, 67, 69.

<sup>41</sup> *Contra*. Appeal, KSC-BC-2020-04/IA001/F00001, 28 June 2021, para.26.

<sup>42</sup> Thaçi Appeals Decision, KSC-BC-2020-06/IA004/F00005/RED, 30 April 2021, para.24; Veseli Appeals Decision, KSC-BC-2020-06/IA001/F00005, para.19.

<sup>43</sup> Thaçi Appeals Decision, KSC-BC-2020-06/IA004/F00005/RED, 30 April 2021, para.24; Veseli Appeals Decision, KSC-BC-2020-06/IA001/F00005, para.19.

<sup>44</sup> See, e.g., Decision, KSC-BC-2020-04/F00045, paras.8 (tracking Article 41(6)), 28 ('risk of flight'), 35 ('risk that Mr Shala will obstruct the progress of SC proceedings' (emphasis added)), 40 ('risk that Mr Shala will commit further crimes' (emphasis added)).

be 'articulable' in the sense that they must be specified in detail;<sup>45</sup> (ii) case-specific reasoning and concrete grounds are required in deciding to continue detention;<sup>46</sup> (iii) the specific, articulable grounds must support the 'belief' that one or more of the Article 41(6)(b) risks exist;<sup>47</sup> and (iv) while the standard to be applied is less than certainty, it is more than a mere possibility of a risk materialising.<sup>48</sup>

22. As such, the Pre-Trial Judge clearly applied the correct legal standard, in conformity with, and with express reliance upon, principles which have already been settled by this Panel. There is no discernible error.

**C. Mr SHALA's submissions regarding alleged error in the risk of flight assessment should be summarily dismissed**

23. The Pre-Trial Judge concluded that Mr SHALA's current risk of flight is sufficiently mitigated by his proposed conditions.<sup>49</sup> As such, any alleged errors on

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<sup>45</sup> Decision, KSC-BC-2020-04/F00045, 15 June 2021, para.16 *citing to, inter alia*, Veseli Appeals Decision, KSC-BC-2020-06/IA001/F00005, paras 18-19.

<sup>46</sup> Decision, KSC-BC-2020-04/F00045, 15 June 2021, para.16 *citing to, inter alia*, Thaçi Appeals Decision, KSC-BC-2020-06/IA004/F00005/RED, 30 April 2021, para.22.

<sup>47</sup> Decision, KSC-BC-2020-04/F00045, 15 June 2021, para.16. *See similarly*, Thaçi Appeals Decision, KSC-BC-2020-06/IA004/F00005/RED, 30 April 2021, para.24; Veseli Appeals Decision, KSC-BC-2020-06/IA001/F00005, para.19.

<sup>48</sup> Decision, KSC-BC-2020-04/F00045, 15 June 2021, para.16 *citing to* Veseli Appeals Decision, KSC-BC-2020-06/IA001/F00005, para.17.

<sup>49</sup> Decision, KSC-BC-2020-04/F00045, 15 June 2021, para.45.

this basis<sup>50</sup> have no chance of changing the outcome of a Decision and should be summarily dismissed.<sup>51</sup>

#### **D. Relevant factors were correctly weighed**

24. Throughout Grounds 4 and 5 of the Appeal, the Defence repeats submissions made at first instance and merely disagrees with the conclusions that the Pre-Trial Judge drew from the available facts or the weight he accorded to particular factors.<sup>52</sup> This does not suffice to establish an error.<sup>53</sup>
25. The Pre-Trial Judge's findings of risk that Mr SHALA will obstruct the proceedings or commit further crimes<sup>54</sup> were based on concrete grounds and ample evidence. [REDACTED].<sup>55</sup> The Pre-Trial Judge concluded that [REDACTED].<sup>56</sup>
26. [REDACTED].<sup>57</sup> [REDACTED]<sup>58</sup> [REDACTED].<sup>59</sup>
27. Notwithstanding this evidence, Mr SHALA asserts that the Pre-Trial Judge 'could not have reasonably concluded that there are articulable grounds to believe that
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<sup>50</sup> Appeal, KSC-BC-2020-04/IA001/F00001, 28 June 2021, paras 27-30.

<sup>51</sup> Thaçi Appeals Decision, KSC-BC-2020-06/IA004/F00005/RED, 30 April 2021, para.32.

<sup>52</sup> For example, Appeal, KSC-BC-2020-04/IA001/F00001, paras 32-34, 36, 39-40.

<sup>53</sup> See *Gucati* Appeals Decision, KSCS-BC-2020-7/IA001/F00005, para.64.

<sup>54</sup> Decision, KSC-BC-2020-04/F000045, 15 June 2021, paras 29-35 and 38-40.

<sup>55</sup> Response on Provisional Release, KSC-BC-2020-04/F00042, 9 June 2021, para.12.

<sup>56</sup> Decision, KSC-BC-2020-04/F00045, 15 June 2021, para.32.

<sup>57</sup> Response on Provisional Release, KSC-BC-2020-04/F00042, 9 June 2021, para.14.

<sup>58</sup> Response on Provisional Release, KSC-BC-2020-04/F00042, 9 June 2021, para.14.

<sup>59</sup> Decision, KSC-BC-2020-04/F00045, 15 June 2021, para.33.

Mr Shala will obstruct the proceedings.’<sup>60</sup> This is plainly incorrect. Any of these statements, standing alone, would be sufficient as a matter of fact and law to sustain the Pre-Trial Judge’s finding that Mr SHALA poses a risk of interfering with witnesses. Taken together, they provide overwhelming support for the Pre-Trial Judge’s conclusion.

28. Mr SHALA also argues that ‘[t]he Pre-Trial Judge erroneously gave significant weight to the assertion, which was not supported by any evidence, that Mr Shala’s motivation for interference with potential witnesses has automatically increased once he became an accused.’<sup>61</sup> Again, this is a mere disagreement with the Pre-Trial Judge’s findings.<sup>62</sup> The Pre-Trial Judge was entirely justified in concluding that, now that Mr SHALA has been formally accused of a crime by way of an indictment, he presents a greater risk than when he was a mere suspect.<sup>63</sup>
29. Finally, contrary to Defence submissions,<sup>64</sup> it is apparent that the Pre-Trial Judge did consider the Defence’s submissions relating to protective measures in the

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<sup>60</sup> Appeal, KSC-BC-2020-04/IA001/F00001, para.32.

<sup>61</sup> Appeal, KSC-BC-2020-04/IA001/F00001, para.36.

<sup>62</sup> Similarly, Mr SHALA’s claim that the Pre-Trial Judge gave too little ‘weight’ to Mr SHALA’s lack of engagement with [REDACTED] on Facebook amounts to a mere disagreement that does not support a finding of clear error. *See, e.g.*, Decision, KSC-BC-2020-04/F00045, para.34.

<sup>63</sup> *See generally Prosecutor v. Bemba*, Judgment on the Provisional Release Appeal, ICC-01/05-0108-3249-Red, OA11, 20 May 2015, para.71 (holding that the Trial Chamber did not err in relying on the fact that charges had been confirmed for the purpose of its analysis as to whether detention appeared necessary).

<sup>64</sup> Appeal, KSC-BC-2020-04/IA001/F00001, para.37.

case.<sup>65</sup> As the Panel has previously noted, while protective measures have on occasion been considered as a mitigating factor, in other instances the existence of protective measures has been viewed as heightening concerns around granting provisional release. There is no requirement that they must be considered as a mitigating factor in every case.<sup>66</sup> In this instance, it is notable that the [REDACTED] witnesses [REDACTED]<sup>67</sup> [REDACTED] are not subject to delayed disclosure in this case. As such, there was also no error in the Pre-Trial Judge's assessment on this point.

**E. The Pre-Trial Judge correctly assessed the necessity of detention (Grounds 6, 7 and 9)**

30. The Pre-Trial Judge considered a number of proposed conditions of release, but ultimately concluded that no set of circumstances could sufficiently mitigate the risk that Mr SHALA would obstruct KSC proceedings or commit future crimes.<sup>68</sup> This finding was entirely reasonable in the circumstances.
31. [REDACTED].<sup>69</sup> Against this backdrop, the Pre-Trial Judge correctly concluded that no set of conditions could ensure that Mr SHALA did not engage in
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<sup>65</sup> Decision, KSC-BC-2020-04/F000045, para.29 (noting the Defence submission).

<sup>66</sup> Veseli Appeals Decision, KSC-BC-2020-06/IA001/F00005, para.51.

<sup>67</sup> See paras 25-26 above.

<sup>68</sup> Decision, KSC-BC-2020-04/F000045, 15 June 2021, paras 42-48.

<sup>69</sup> Decision, KSC-BC-2020-04/F000045, 15 June 2021, para.33.

obstruction by contacting victims or families.<sup>70</sup> Before reaching this conclusion, the Pre-Trial Judge specifically and carefully considered both provisional release and house arrest.<sup>71</sup>

32. In particular, after expressly noting that that Mr SHALA had requested house arrest in Belgium as an alternative to provisional release on conditions ('Proposed Conditions'),<sup>72</sup> the Pre-Trial Judge found that 'none of the Proposed Conditions, nor any other additional limitations imposed by the Pre-Trial Judge, could restrict Mr Shala's ability to access information and resources that would facilitate any attempts to communicate with victims, their families or his support network.'<sup>73</sup> The Pre-Trial Judge then specifically noted that he could not prevent Mr SHALA from employing other devices, with specific references to Mr SHALA's family, who live in [REDACTED], and acquaintances.<sup>74</sup> Finally, the Pre-Trial Judge noted the 'significant obstacles' that arise from monitoring communications by Mr SHALA in Belgium.<sup>75</sup> Taken together, this shows that the Pre-Trial Judge considered and rejected Mr SHALA's proposal for house arrest.

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<sup>70</sup> Decision, KSC-BC-2020-04/F000045, 15 June 2021, para.46.

<sup>71</sup> Decision, KSC-BC-2020-04/F000045, 15 June 2021, paras 44-45.

<sup>72</sup> Decision, KSC-BC-2020-04/F00045, 15 June 2021, para.42.

<sup>73</sup> Decision, KSC-BC-2020-04/F00045, 15 June 2021, para.46 (emphasis added).

<sup>74</sup> Decision, KSC-BC-2020-04/F00045, 15 June 2021, para.46.

<sup>75</sup> Decision, KSC-BC-2020-04/F00045, 15 June 2021, para.47.

33. Equally, while Mr SHALA says that the Pre-Trial Judge ‘failed to properly consider’ various options for restricting or monitoring private communications,<sup>76</sup> he again appears to be merely disagreeing with the outcome. The Pre-Trial Judge explicitly considered a range of options, from a keylogger on Mr SHALA’s personal computer to a controlled mobile telephone without an internet connection.<sup>77</sup> However, given the proliferation of communication devices available today, the Pre-Trial Judge concluded these restrictions would not be sufficient to prevent Mr SHALA from using devices belonging to other people or from otherwise passing on instructions with a view to intimidating or interfering with witnesses.<sup>78</sup>

34. The Pre-Trial Judge also appropriately considered some of the practical challenges arising from the fact that Mr SHALA resides in Belgium.<sup>79</sup> While Mr SHALA says that his residence in Belgium should not be held against him, these are the types of pragmatic considerations that courts need to consider in assessing whether proposed conditions can effectively be implemented.<sup>80</sup>

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<sup>76</sup> Appeal, KSC-BC-2020-04/IA001/F0001, para.42.

<sup>77</sup> Decision, KSC-BC-2020-04/F000045, 15 June 2021, para.46.

<sup>78</sup> Decision, KSC-BC-2020-04/F000045, 15 June 2021, para.46.

<sup>79</sup> Decision, KSC-BC-2020-04/F000045, 15 June 2021, para.47.

<sup>80</sup> See generally *Prosecutor v. Bemba*, Judgment on Kilolo Appeal of the Pre-Trial Chambers’ Provisional Release Decision, ICC-01/05-01/13-558, 11 July 2014, para.107 (finding that it was not unreasonable to conclude that ‘if released in Belgium, Mr Kilolo could possibly travel within the Schengen area without his passport and thus this could increase the risk of absconding from the jurisdiction of the Court’);

35. Contrary to Mr SHALA's contention, the Pre-Trial Judge's decision in this case does not amount to a 'blanket ban' on provisional release either for Mr SHALA or for 'all accused.'<sup>81</sup> Rather, the Pre-Trial Judge engaged in an individualised case-specific assessment, including of Mr SHALA's particular circumstances and the degree to which the concrete risks identified could be adequately mitigated. This is demonstrated by the Pre-Trial Judge's finding that conditions could be set to mitigate the moderate risk of flight posed by Mr SHALA.<sup>82</sup>
36. However, in cases like Mr SHALA's [REDACTED], it likely will be difficult to set conditions sufficient to mitigate the risk of obstruction or new criminal conduct.<sup>83</sup>
37. There is no discernible error in the Pre-Trial Judge's finding.
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Observations of the Kingdom of Belgium on the Periodic Review of the detention of Kilolo, ICC-01/05-01/13-605-AnxIII-tENG 07-10-2014 1/9 EK PT, 23 July 2014, p.5 (noting that 'the same factors that would support monitoring of electronic communications records under Belgian law (the continuation of the offences in question or an elevated risk of flight or non-appearance) 'would by themselves justify a decision to continue detention.').

<sup>81</sup> Appeal, KSC-BC-2020-04/F001/00001, 28 June 2021, para.44.

<sup>82</sup> Decision, KSC-BC-2020-04/F000045, 15 June 2021, para.45.

<sup>83</sup> The ECtHR cases cited by Mr SHALA are readily distinguishable. Unlike the individualized assessment conducted by the Pre-Trial Judge, *Hirst v. United Kingdom* involved an actual blanket ban on permitting convicted prisoners to vote in parliamentary and local elections, in that it 'applied automatically irrespective of the length of the sentence or the gravity of the offence.' ECtHR, *Hirst v. United Kingdom (no. 2)*, no. 74025/01, ECHR 2005-IX, 6 October 2005, para.41. Similarly, *Dickson v. United Kingdom* is distinguishable because the default position there reflected 'a deliberate policy that the deprivation of liberty should ordinarily deprive the prisoner of the opportunity to beget children.' ECtHR, *Dickson v. United Kingdom*, no. 44362/04, ECHR 2007-V, 4 December 2007, paras.84-85. By contrast, there is no such presumption at play here, as demonstrated by the Pre-Trial Judge's finding that Mr SHALA's current risk of flight is sufficiently mitigated by his proposed conditions.



## **F. The Pre-Trial Judge appropriately evaluated the proportionality of detention**

38. Mr SHALA contends that the Pre-Trial Judge erred by ‘fail[ing] to make an attempt to strike a fair balance between the various fundamental considerations at stake’ and ‘limiting his assessment of the proportionality of the detention to merely considering the length of detention contrary to established ECHR criteria.’<sup>84</sup> This is incorrect.

39. In fact, the Pre-Trial Judge noted at the outset that any analysis of pre-trial detention must be taken in the context of the detained person’s presumption of innocence.<sup>85</sup> Subsequently, in evaluating the proportionality of detention,<sup>86</sup> the Pre-Trial Judge expressly cited to portions of a decision of this Panel summarising the proportionality requirement of Article 5(1)(c) of the ECHR.<sup>87</sup> Accordingly, it is clear that the Pre-Trial Judge considered these factors as part of his proportionality analysis. At this early stage of the proceedings, the Decision’s particular focus on the length of detention is consistent with the Panel’s jurisprudence on this issue.<sup>88</sup>

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<sup>84</sup> Appeal, KSC-BC-2020-04/F001/00001, 28 June 2021, paras 45-46.

<sup>85</sup> Decision, KSC-BC-2020-04/F00045, 15 June 2021, para.13.

<sup>86</sup> Decision, KSC-BC-2020-04/F00045, 15 June 2021, para.49.

<sup>87</sup> *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, paras 72-73.

<sup>88</sup> *Gucati* Appeals Decision, KSC-BC-2020-07/IA001/F00005, para.73.

V. RELIEF REQUESTED

40. For the foregoing reasons, the Panel should dismiss the Appeal in its entirety.

**Word Count: 3,815**



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**Jack Smith**

**Specialist Prosecutor**

Wednesday, 1 September 2021  
At The Hague, the Netherlands.