



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: **KSC-BC-2023-10**
The Specialist Prosecutor v. Sabit Januzi, Ismet Bahtijari and Haxhi Shala

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

Registrar: Dr Fidelma Donlon

Date: 28 March 2024

Language: English

Classification: **Public**

Public Redacted Version of Decision on Review of Detention of Ismet Bahtijari

Specialist Prosecutor

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 41(6), (10) and (12) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 56(2) and 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 5 October 2023, Ismet Bahtijari ("Mr Bahtijari" or "Accused") was arrested pursuant to a decision² and an arrest warrant issued by the Pre-Trial Judge,³ upon request of the Specialist Prosecutor's Office ("SPO"),⁴ and further to the confirmation of an indictment against him and Sabit Januzi ("Mr Januzi" and "Confirmation Decision").⁵

2. On 29 November 2023, the Pre-Trial Judge rejected an application for interim release submitted by the Defence for Mr Bahtijari ("Defence") and ordered Mr Bahtijari's continued detention ("First Detention Decision").⁶

¹ KSC-BC-2023-10, F00001, President, *Decision Assigning a Pre-Trial Judge*, 11 September 2023, public.

² KSC-BC-2023-10, F00009, Pre-Trial Judge, *Decision on Request for Arrest Warrants and Transfer Orders* ("Decision on Arrest"), 2 October 2023, confidential, with Annexes 1-4, confidential. A public redacted version was issued on 12 October 2023, F00009/RED.

³ See KSC-BC-2023-10, F00009/A03, Pre-Trial Judge, *Arrest Warrant for Ismet Bahtijari*, 2 October 2023, confidential; a public redacted version was issued on 28 February 2024, F00009/RED/A03/RED; F00011, Registrar, *Notification of Arrest of Ismet Bahtijari Pursuant to Rule 55(4)*, 5 October 2023, public.

⁴ KSC-BC-2023-10, F00002, Specialist Prosecutor, *Submission of Indictment for Confirmation and Related Requests*, 11 September 2023, strictly confidential and *ex parte*, para. 32(ii), with Annexes 1 and 3, strictly confidential and *ex parte*, and Annex 2, confidential. A confidential redacted version and a public redacted version of the main filing were submitted on 12 October 2023, F00002/CONF/RED and F00002/RED.

⁵ KSC-BC-2023-10, F00008, Pre-Trial Judge, *Decision on the Confirmation of the Indictment*, 2 October 2023, strictly confidential and *ex parte*. A confidential redacted version and a public redacted version of the decision were filed on 12 October 2023, F00008/CONF/RED and F00008/RED. A corrected version of the public redacted version of the decision was filed on 12 October 2023, F00008/RED/COR.

⁶ KSC-BC-2023-10, F00116, Pre-Trial Judge, *Decision on Ismet Bahtijari's Request for Interim Release*, 29 November 2023, confidential. A public redacted version was issued on 12 December 2023, F00116/RED.

3. On 29 January 2024, having received submissions from the SPO concerning the periodic detention review of Mr Bahtijari,⁷ the Pre-Trial Judge ordered Mr Bahtijari's continued detention ("Second Detention Decision").⁸

4. On 8 February 2024, after hearing the Parties and seized with a request by the SPO, the Pre-Trial Judge joined the case against Mr Bahtijari and Mr Januzi, with the case against Haxhi Shala ("Mr Shala" and "Joinder Decision").⁹

5. On 4 March 2024, pursuant to the Pre-Trial Judge's order,¹⁰ the Defence filed its submissions on the periodic review of Mr Bahtijari's detention ("Defence Submissions").¹¹ The SPO responded on 14 March 2024.¹² The Defence did not reply.

II. SUBMISSIONS

6. The Defence submits that, in assessing Mr Bahtijari's continued detention, the Pre-Trial Judge must take into account the circumstances relating to the funding of the Defence teams and Mr Bahtijari's health condition.¹³ The Defence asserts that it is not clear whether: (i) the SPO inquired about Mr Bahtijari's state of health before filing the case and applying for warrants; (ii) Mr Bahtijari's health issues were brought to the attention of the Pre-Trial Judge before arrest warrants were issued; and

⁷ KSC-BC-2023-10, F00147, Specialist Prosecutor, *Prosecution Submission Pertaining to Periodic Detention Review of Ismet Bahtijari*, 15 January 2024, confidential. A public redacted version was issued on 16 January 2024, F00147/RED.

⁸ KSC-BC-2023-10, F00156, Pre-Trial Judge, *Decision on Review of Detention of Ismet Bahtijari*, 29 January 2024, confidential. A public redacted version was issued on 30 January 2024, F00156/RED.

⁹ KSC-BC-2023-10, F00161, Pre-Trial Judge, *Decision on Request for Joinder and Amendment of the Indictment*, 8 February 2024, confidential; a public redacted version was issued on the same day, F00161/RED; KSC-BC-2023-11, F00041, Pre-Trial Judge, *Decision on Request for Joinder and Amendment of the Indictment*, 8 February 2024, confidential; a public redacted version was issued on the same day, F00041/RED.

¹⁰ Second Detention Decision, para. 42(b).

¹¹ KSC-BC-2023-10, F00195, Defence for Ismet Bahtijari, *Bahtijari Review of Detention Submissions*, 4 March 2024, confidential.

¹² KSC-BC-2023-10, F00215, Specialist Prosecutor, *Prosecution Response to 'Bahtijari Review of Detention Submissions' ("SPO Response")*, 14 March 2024, confidential.

¹³ Defence Submissions, paras 3, 15, 37, 39.

(iii) consequently, whether the SPO and the Specialist Chambers (“SC”) have complied with their obligations to assist the Defence in preliminary investigations.¹⁴ The Defence further submits that the Pre-Trial Judge should also consider in his review the weakness in the SPO’s case, based on the disclosed material.¹⁵

7. In particular, the Defence submits that Mr Bahtijari has been diagnosed with or treated for a number of health issues,¹⁶ and that, along with his advanced age, he appears to suffer from a potential dependency problem,¹⁷ or is otherwise unwell.¹⁸ The Defence avers that these concerns require an expert assessment of Mr Bahtijari’s fitness to stand trial, his cognitive function at the time of the alleged offences, and his state of health at the time of his transfer.¹⁹ In this context, the Defence submits that it has not yet been possible to: (i) conduct an expert health assessment, due to the Ministry of Justice’s refusal to provide suitable funding for the Defence;²⁰ and (ii) complete the legal aid forms with Mr Bahtijari, despite efforts.²¹

8. With regard to the grounds for detention, the Defence submits that (i) Mr Bahtijari poses no risk of flight, obstructing proceedings, or committing further crimes;²² and that (ii) his continued detention is neither necessary nor proportionate.²³ The Defence further submits that, given Mr Bahtijari’s health issues and vulnerability, he should be afforded the possibility to be tried in a court in Kosovo.²⁴

¹⁴ Defence Submissions, para. 5.

¹⁵ Defence Submissions, para. 4.

¹⁶ Defence Submissions, para. 7.

¹⁷ Defence Submissions, para. 8.

¹⁸ Defence Submissions, para. 39.

¹⁹ Defence Submissions, para. 8. The Defence affirms that it has raised these issues with the Kosovo Ministry of Justice, the Registry, the SC Detention Facilities and at the last status conference. *See* Defence Submissions, para. 6.

²⁰ Defence Submissions, paras 9, 37.

²¹ Defence Submissions, para. 10.

²² Defence Submissions, paras 16, 23-24, 34.

²³ Defence Submissions, paras 16, 33.

²⁴ Defence Submissions, paras 35-37.

9. For the above reasons, the Defence requests that Mr Bahtijari be released from the SC Detention Facilities, with or without conditions,²⁵ in order to allow him to be with his family and seek medical treatment in Kosovo.²⁶

10. The SPO submits that the Accused's continued detention remains justified, necessary, reasonable and proportional, as there has been no change in circumstances detracting from the reasons established in the Second Detention Decision.²⁷ In particular, the SPO avers that a grounded suspicion that Mr Bahtijari has committed a crime within the SC's jurisdiction continues to exist²⁸ and that the grounds for detention under Article 41(6)(b) of the Law continue to apply.²⁹ The SPO further submits that ongoing disclosures and the steady progression of the case continue to provide Mr Bahtijari with access to sensitive information and reinforce the necessity of his detention.³⁰

11. In addition, the SPO avers that the Defence (i) does not connect Mr Bahtijari's possible health conditions and funding issues to any relevant basis for release from detention; (ii) does not provide any supporting documentation or other substantiation for these claims; and (iii) relies on misstatements or misrepresentations of fact or law, as, for instance, it has not specified how the expert health assessment available to Mr Bahtijari in the SC Detention Facilities falls short of his needs.³¹

12. Lastly, the SPO submits that no modalities of conditional release could sufficiently mitigate the existing risks.³² For that reason, the SPO requests that Mr Bahtijari remain in detention.³³

²⁵ Defence Submissions, paras 25-32, 38, 40.

²⁶ Defence Submissions, paras 13(c), 16, 23, 35, 39-40.

²⁷ SPO Response, paras 1, 7, 10, 25-29.

²⁸ SPO Response, para. 10.

²⁹ SPO Response, paras 11-20.

³⁰ SPO Response, paras 1, 7.

³¹ SPO Response, paras 8-9.

³² SPO Response, paras 21-25.

³³ SPO Response, para. 31.

III. APPLICABLE LAW

13. Pursuant to Article 41(6) of the Law, the SC 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 SC; and (b) there are articulable grounds to believe that the person: (i) is a risk of flight; (ii) will destroy, hide, change or forge evidence of a crime, or will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices; or (iii) will repeat the criminal offence, complete an attempted crime, or commit a crime which he or she has threatened to commit.

14. Pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules, until a judgment is final or until release, upon expiry of the two (2) months from the last ruling on detention on remand, the Pre-Trial Judge or Panel seized with the case shall examine whether reasons for detention on remand still exist, and render a ruling by which detention on remand is extended or terminated.

15. Pursuant to Article 41(12) of the Law, in addition to detention on remand, the following measures may be ordered by the SC to ensure the presence of the Accused, including by video-teleconference, to prevent reoffending or to ensure successful conduct of criminal proceedings: summons, arrest, bail, house detention, promise not to leave residence, prohibition on approaching specific places or persons, attendance at police station or other venue, and diversion.

16. Pursuant to Rule 56(2) of the Rules, the Pre-Trial Judge shall ensure that a person is not detained for an unreasonable period prior to the opening of the case, and, in case of an undue delay caused by the Specialist Prosecutor, the Panel, having heard the Parties, may release the person under conditions as deemed appropriate.

IV. DISCUSSION

A. APPLICABLE STANDARD

17. The Pre-Trial Judge recalls that he has an obligation, under Article 41(10) of the Law, to examine whether the reasons for detention on remand continue to exist,³⁴ including the grounds set out in Article 41(6) of the Law, namely whether (i) there is a grounded suspicion that the person has committed the crime(s), and (ii) there are articulable grounds to believe that any of the risks set out in Article 41(6)(b) of the Law has been fulfilled.³⁵ The Pre-Trial Judge is neither required to make findings on the factors already decided upon in the initial ruling on detention, nor to entertain submissions that merely repeat arguments that have already been addressed in earlier decisions.³⁶ What is crucial is that the Pre-Trial Judge is satisfied that, at the time of the review decision, grounds for continued detention still exist.³⁷

18. The Pre-Trial Judge likewise underscores that any analysis of Mr Bahtijari's detention must duly consider his presumption of innocence.³⁸ This means,

³⁴ See, for example, KSC-BC-2020-07, IA002/F00005, Court of Appeals Panel, *Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention* ("First Haradinaj Detention Appeal Decision"), 9 February 2021, public, para. 55; KSC-BC-2020-06, IA006/F00005/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Review of Detention* ("Second Krasniqi Detention Appeal Decision"), 1 October 2021, public, para. 15. See also KSC-BC-2020-04, F00224/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Review of Detention of Pjetër Shala* ("Sixth Shala Detention Decision"), 22 June 2022, public, para. 19.

³⁵ See for example, *First Haradinaj Detention Appeal Decision*, para. 55; KSC-BC-2020-04, F00075/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Review of Detention of Pjetër Shala*, 10 September 2021, public, para. 19; KSC-BC-2020-07, F00143, Pre-Trial Judge, *Decision on Review of Detention of Hysni Gucati*, 24 February 2021, public, para. 17.

³⁶ *First Haradinaj Detention Appeal Decision*, para. 55; *Second Krasniqi Detention Appeal Decision*, para. 17; *Sixth Shala Detention Decision*, para. 19.

³⁷ *First Haradinaj Detention Appeal Decision*, para. 55.

³⁸ KSC-CC-PR-2017-01, F00004, Specialist Chamber of the Constitutional Court, *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 the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office* ("SCCC 26 April 2017 Judgment"), 26 April 2017, public, para. 113; KSC-BC-2020-06, IA004/F00005/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release* ("Thaçi Interim Release Appeal Decision"), 30 April 2021, public, para. 17, with further references. See, similarly, ECtHR, *McKay v. the United Kingdom*, no. 543/03, Judgment, 3 October 2006, para. 43.

consequently, that pre-trial detention cannot be maintained lightly, and that the SPO bears the burden of establishing that the detention of the Accused is necessary.³⁹

B. GROUNDED SUSPICION

19. As regards the threshold for continued detention, Article 41(6)(a) of the Law requires at the outset a grounded suspicion that the detained person has committed a crime within the jurisdiction of the SC. This is a condition *sine qua non* for the validity of the detained person's continued detention.⁴⁰

20. The SPO submits that the Pre-Trial Judge's finding of grounded suspicion still stands, and that no developments since the Confirmation Decision detract from the Pre-Trial Judge's determination.⁴¹ The Defence generally submits that the grounds for continued detention do not exist.⁴²

21. The Pre-Trial Judge recalls that, in the Confirmation Decision, it was determined that, pursuant to Article 39(2) of the Law, there is a well-grounded suspicion that Mr Bahtijari is criminally liable for offences within the jurisdiction of the SC, namely intimidation during criminal proceedings and obstructing official persons in performing official duties within the meaning of Articles 387 and 401(1), (2) and (5) of the 2019 Kosovo Criminal Code, Code No. 06/L-074, and Articles 15(2) and 16(3) of the Law.⁴³ These findings were made on the basis of a standard exceeding the grounded suspicion threshold required for purposes of Article 41(6)(a) of the Law.⁴⁴ The Pre-

³⁹ See, similarly, Second Detention Decision, para. 10; First Detention Decision, para. 16, with further references.

⁴⁰ KSC-BC-2020-04, F00045/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Pjetër Shala's Request for Provisional Release* ("First Shala Detention Decision"), 23 June 2021, public, para. 14. See also ECtHR, *Merabishvili v. Georgia*, no. 72508/13, Judgment, 28 November 2017, para. 222.

⁴¹ SPO Response, para. 10.

⁴² Defence Submissions, para. 16.

⁴³ Confirmation Decision, paras 95, 111, 123, 126, 131, 135, 139, 144. See also Decision on Arrest, para. 17.

⁴⁴ Confirmation Decision, para. 24; First Detention Decision, para. 18.

Trial Judge notes that there have been no developments in the case negating these findings.⁴⁵

22. Therefore, in the absence of any contrary intervening information or developments, the Pre-Trial Judge finds that there continues to be a grounded suspicion that Mr Bahtijari has committed offences within the subject-matter jurisdiction of the SC for the purposes of Article 41(6)(a) and (10) of the Law.

C. NECESSITY OF DETENTION

23. Once the threshold in Article 41(6)(a) of the Law is met, the grounds that would justify the deprivation of a person's liberty must be articulable in the sense that they must be specified in detail.⁴⁶ In this regard, Article 41(6)(b) of the Law echoes the principle that the continued detention of a person can only be justified if there are specific indications of a genuine requirement of public interest, which outweigh the person's right to liberty.⁴⁷ Therefore, the Pre-Trial Judge must rely on case-specific reasoning and concrete grounds in deciding whether to continue detention.⁴⁸

24. The Pre-Trial Judge further recalls that, on the basis of the available evidence, the specific articulable grounds must support the "belief"⁴⁹ that any of the risks specified under the three limbs of Article 41(6)(b) of the Law exist, denoting an acceptance of the possibility, not the inevitability, of a future occurrence.⁵⁰ In other words, the standard to be applied is less than certainty, but more than a mere

⁴⁵ See, *similarly*, Second Detention Decision, para. 13.

⁴⁶ See Article 19(1.31) of the 2022 Kosovo Criminal Procedure Code, Code No. 08/L-032, which defines "articulable" as: "the party offering the information or evidence must specify in detail the information or evidence being relied upon". See also, for example, First *Shala* Detention Decision, para. 16; KSC-BC-2020-06, IA001/F00005, Court of Appeals Panel, *Decision on Kadri Veseli's Appeal Against Decision on Interim Release*, 30 April 2021, public, para. 15.

⁴⁷ SCCC 26 April 2017 Judgment, para. 113.

⁴⁸ See, *similarly*, Second Detention Decision, para. 15; First Detention Decision, para. 22, with further references.

⁴⁹ See chapeau of Article 41(6)(b) of the Law.

⁵⁰ KSC-BC-2020-05, F00127, Trial Panel I, *Fourth Decision on Review of Detention*, 25 May 2021, public, para. 17, with further references.

possibility of a risk materialising.⁵¹ The Pre-Trial Judge further observes that these grounds are in the alternative, and that the existence of one ground suffices to establish the necessity of detention.⁵²

25. As regards the nature of the assessment under Article 41(6)(b) of the Law, the Pre-Trial Judge recalls that, while the evaluation involves an element of discretion,⁵³ it must be based on the facts of the case and must be undertaken on an individual basis in light of the personal circumstances of the detained person.⁵⁴ When assessing the relevant factors, the Pre-Trial Judge may not conduct a piecemeal assessment, but must weigh all relevant factors taken together.⁵⁵

26. Lastly, in relation to the grounds set forth in Article 41(6)(b)(ii)-(iii) of the Law, the Pre-Trial Judge emphasises that it suffices that the risks may materialise as a result of the detained person's acts or omissions, but they do not require physical execution on his or her part.⁵⁶

1. Risk of Flight

27. The Defence submits that Mr Bahtijari poses no risk of flight,⁵⁷ because he: (i) is rooted in his residential area;⁵⁸ (ii) has an extremely close relationship with his son and strong community ties to his hometown;⁵⁹ (iii) has good character and has been

⁵¹ *Thaçi* Interim Release Appeal Decision, para. 22.

⁵² *See, similarly*, Second Detention Decision, para. 16; First Detention Decision, para. 22. *See also* First *Shala* Detention Decision, para. 20; KSC-BC-2020-06, F00177/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Hashim Thaçi's Application for Interim Release* ("First *Thaçi* Detention Decision"), 22 January 2021, public, para. 25, with further references.

⁵³ First *Thaçi* Detention Decision, para. 21, with further references.

⁵⁴ *See also* First *Shala* Detention Decision, para. 17; First *Thaçi* Detention Decision, para. 21, with further references. *Similarly*, ECtHR, *Aleksanyan v. Russia*, no. 46468/06, Judgment, 22 December 2008, para. 179.

⁵⁵ *See, similarly*, Second Detention Decision, para. 17; First Detention Decision, para. 23. *See also* First *Thaçi* Detention Decision, para. 21, with further references.

⁵⁶ *See, similarly*, Second Detention Decision, para. 18; First Detention Decision, para. 24. *See also* First *Shala* Detention Decision, para. 19; First *Thaçi* Detention Decision, para. 24.

⁵⁷ Defence Submissions, paras 23-24.

⁵⁸ Defence Submissions, paras 17-18.

⁵⁹ Defence Submissions, para. 18.

compliant throughout his arrest and detention;⁶⁰ and (iv) is observably fatigued and vulnerable.⁶¹ Additionally, the Defence submits that (i) no consideration has seemingly been given to Mr Bahtijari's ill health and fitness to stand trial throughout the proceedings;⁶² and that (ii) he requires a health and fitness assessment, for which there is currently no funding.⁶³ In this context, the Defence concludes that Mr Bahtijari must be released from the SC Detention Facilities, in order to be close to his son and seek medical treatment in Kosovo.⁶⁴

28. The SPO argues that Mr Bahtijari still poses a risk of flight, since (i) he is aware of the possibility of a lengthy prison sentence in the event of conviction; (ii) there has been increasing disclosure of incriminating evidence since the Second Detention Decision; and (iii) he would have the means and opportunity to flee if released.⁶⁵ The SPO further submits that the Defence's arguments, in particular its assertion that the Accused would return home to seek medical treatment, do not meaningfully rebut the findings of the Second Detention Decision.⁶⁶

29. As regards the risk of flight under Article 41(6)(b)(i) of the Law, the Pre-Trial Judge finds that the considerations set out in the Second Detention Decision are still relevant, namely (i) Mr Bahtijari's awareness of the seriousness of the charges and potential sentence in the event of a conviction; (ii) his increased insight into the evidence underpinning these charges; and (iii) his means to flee and opportunity to evade justice.⁶⁷ The Pre-Trial Judge further observes that Mr Bahtijari is aware of the forthcoming transmission of the case file to the Trial Panel, which was addressed at the last status conference.⁶⁸ Additionally, the Pre-Trial Judge maintains his previous

⁶⁰ Defence Submissions, para. 19.

⁶¹ Defence Submissions, para. 19.

⁶² Defence Submissions, paras 20, 33.

⁶³ Defence Submissions, paras 20-22, 33, 37.

⁶⁴ Defence Submissions, paras 23, 35, 39.

⁶⁵ SPO Response, para. 11.

⁶⁶ SPO Response, para. 12.

⁶⁷ Second Detention Decision, para. 20.

⁶⁸ KSC-BC-2023-10, Transcript of Hearing ("22 March 2024 Transcript"), 22 March 2024, confidential, p. 252, line 10, to p. 255, line 11.

findings that, notwithstanding the fact that Mr Bahtijari is rooted in his residential community and his cooperation with the SPO following his arrest, these favourable factors only diminish but do not eliminate the risk of flight.⁶⁹ Furthermore, the Pre-Trial Judge notes that the Defence does not clarify how Mr Bahtijari's health condition mitigates or eliminates the risk of flight.

30. Therefore, in light of the above, and in the absence of any contrary intervening information, the Pre-Trial Judge finds that the risk of flight in relation to Mr Bahtijari continues to exist, even though it is moderate.

2. Risk of Obstructing the Progress of the SC Proceedings

31. The Defence submits that (i) Mr Bahtijari is not obstructing the progress of criminal proceedings,⁷⁰ and that (ii) his state of health is of fundamental importance and relevant on this point.⁷¹

32. The SPO submits that Mr Bahtijari continues to present a risk of obstructing SC proceedings,⁷² citing the Pre-Trial Judge's findings in the Second Detention Decision.⁷³

33. As regards the risk of obstructing proceedings under Article 41(6)(b)(ii) of the Law, the Pre-Trial Judge considers that: (i) the circumstances set out in the Second Detention Decision continue to apply,⁷⁴ particularly considering that Mr Bahtijari has received increasing access to sensitive witness-related information; and (ii) no information been brought to the Pre-Trial Judge's attention that would detract from the findings contained in that decision. With respect to the Defence's argument that Mr Bahtijari is not obstructing the progress of criminal proceedings, the Pre-Trial Judge recalls that the second limb of Article 41(6)(b) of the Law is satisfied with the

⁶⁹ Second Detention Decision, para. 21; First Detention Decision, para. 32.

⁷⁰ Defence Submissions, para. 34.

⁷¹ Defence Submissions, paras 20, 37.

⁷² SPO Response, para. 13.

⁷³ SPO Response, paras 13-16, with further references.

⁷⁴ See Second Detention Decision, paras 24-27.

acceptance of the possibility of a future occurrence,⁷⁵ thus not requiring the materialisation of a current act. Furthermore, the Pre-Trial Judge notes that the Defence does not clarify how Mr Bahtijari's health condition mitigates or eliminates the risk of obstructing proceedings.

34. Therefore, in light of the above, and in the absence of any contrary intervening information, the Pre-Trial Judge finds that there continues to exist a risk that Mr Bahtijari will obstruct the progress of SC proceedings.

3. Risk of Committing Further Crimes

35. The Defence submits that (i) Mr Bahtijari would not commit further offences;⁷⁶ and that (ii) his state of health is of fundamental importance and relevant on this point.⁷⁷

36. The SPO submits that (i) especially in light of continuing disclosure of sensitive witness information, the risk that Mr Bahtijari will commit further crimes mandates his continued detention; (ii) none of the Defence arguments meaningfully address this risk; and (iii) there is no reason to depart from the Pre-Trial Judge's previous determination.⁷⁸

37. As regards the further commission of crimes under Article 41(6)(b)(iii) of the Law, the Pre-Trial Judge recalls that, even though the existence of a risk of obstruction does not automatically translate into a risk of committing further offences, the factors underpinning the former are of relevance to the assessment of the latter in the circumstances of the present case.⁷⁹ Furthermore, the Pre-Trial Judge notes that the

⁷⁵ See *supra*, para. 24.

⁷⁶ Defence Submissions, para. 34.

⁷⁷ Defence Submissions, para. 20.

⁷⁸ SPO Response, paras 19-20.

⁷⁹ Second Detention Decision, paras 29-30; First Detention Decision, para. 45; Decision on Arrest, para. 22. See also First *Shala* Detention Decision, para. 39.

Defence does not clarify how Mr Bahtijari's health condition mitigates or eliminates the risk of committing further crimes.

38. Therefore, in light of the above, and in the absence of any contrary intervening information, the Pre-Trial Judge finds that the risk that Mr Bahtijari will commit further crimes continues to exist.

4. Conclusion

39. In view of the foregoing, the Pre-Trial Judge finds that there are articulable grounds to believe that Mr Bahtijari may flee (although this risk is moderate), obstruct the progress of SC proceedings, or commit further offences, therefore necessitating his continued detention in accordance with Article 41(6)(b) of the Law. The Pre-Trial Judge will assess below whether these risks can be adequately mitigated by any conditions for his release.

D. CONDITIONAL RELEASE

40. The Defence submits that Mr Bahtijari's risk of flight can be adequately managed through alternative measures, as there is no material difference between him and Hysni Gucati, with regard to whom the Trial Panel made such a finding in the case of *The Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj* (KSC-BC-2020-07).⁸⁰ The Defence submits that, in order to address this flight risk, which in any case is low due to Mr Bahtijari's ill health,⁸¹ as well as the risks of obstruction and of committing further offences, the Accused would agree to being released with any or all of the following conditions until trial:⁸² (i) surrender of his passport; (ii) a requirement to live and sleep each night at his home address; (iii) daily reporting to EULEX Police HQ; (iv) a condition not to contact directly or indirectly any person with whom the court

⁸⁰ Defence Submissions, paras 26-30.

⁸¹ Defence Submissions, para. 27.

⁸² Defence Submissions, paras 25, 27, 30-32.

considers such restriction appropriate; and (v) a condition not to go to the premises of the Kosovo Liberation Army War Veterans Association.⁸³

41. The SPO submits that no modalities of conditional release can sufficiently mitigate the existing risks, which it argues are heightened by the progression of the case and further disclosures.⁸⁴ Regarding the risk of flight, the SPO submits that the Pre-Trial Judge's previous finding that the conditions proposed by Mr Bahtijari could mitigate this risk should be reconsidered, given the recent relevant development allowing Kosovo citizens to now travel to the EU without a visa.⁸⁵ Regarding the risks of obstruction and of committing further crimes, the SPO argues that: (i) there has been no change in circumstances since the Second Detention Decision warranting a different assessment of conditions;⁸⁶ (ii) the Defence does not meaningfully engage with these findings;⁸⁷ and (iii) the relevant risks can only be effectively managed at the SC Detention Facilities.⁸⁸

42. The Pre-Trial Judge recalls that, when deciding on whether a person should be released or detained, the Pre-Trial Judge must consider alternative measures to prevent the risks in Article 41(6)(b) of the Law.⁸⁹

43. As regards the risk of flight, the Pre-Trial Judge notes that the conditions proposed in paragraph 31 of the Defence Submissions are, to some extent, similar to those found to sufficiently mitigate this risk in relation to the First Detention Decision and the Second Detention Decision.⁹⁰ The Pre-Trial Judge further observes that it was already possible for Kosovo citizens to travel to the EU without a visa at the time of

⁸³ Defence Submissions, para. 31.

⁸⁴ SPO Response, paras 22, 25.

⁸⁵ SPO Response, para. 21.

⁸⁶ SPO Response, para. 22-25.

⁸⁷ SPO Response, para. 25.

⁸⁸ SPO Response, para. 21.

⁸⁹ As regards the obligation to consider "alternative measures", see SCCC 26 April 2017 Judgment, para. 114. See also ECtHR, *Buzadji v. the Republic of Moldova*, no. 23755/07, Judgment ("*Buzadji v. Moldova*"), 5 July 2016, para. 87; ECtHR, *Idalov v. Russia*, no. 5826/03, Judgment, 22 May 2012, para. 140.

⁹⁰ Second Detention Decision, para. 34; First Detention Decision, para. 51.

the Second Detention Decision, and that such factor was not addressed therein.⁹¹ For these reasons, the Pre-Trial Judge finds that the conditions proposed by the Defence, in addition to the condition to appear in court when ordered to do so,⁹² can sufficiently mitigate the risk of flight.

44. However, as found in the First Detention Decision and Second Detention Decision, the Pre-Trial Judge considers that neither these proposed conditions nor any additional conditions imposed by the Pre-Trial Judge could restrict the Accused's ability to obstruct the progress of SC proceedings and to commit further offences.⁹³ In this regard, the Pre-Trial Judge is particularly mindful of the fact that the Accused is [REDACTED] with likely access to the associated networks of Mr Shala [REDACTED]. Accordingly, should he be released, Mr Bahtijari would have the motive, means and opportunity to exert pressure on Witness 1 [REDACTED] to dissuade him from participating in the proceedings, or to otherwise tamper with evidence.⁹⁴ In the view of the Pre-Trial Judge, while the risk of illicit messages and instructions cannot be entirely eliminated, the measures in place at the SC Detention Facilities, viewed as a whole, provide robust assurances against unmonitored visits and communications with family members and pre-approved visitors with a view to minimising the risks of obstruction and commission of further crimes.⁹⁵

45. For the same reasons, the Pre-Trial Judge considers that no *additional* reasonable conditions imposed by him⁹⁶ are available to adequately mitigate the existing risks.

⁹¹ Kosovo citizens can travel to the EU without a visa as of 1 January 2024.

⁹² See, *similarly*, Second Detention Decision, para. 34.

⁹³ See Second Detention Decision, paras 35-36; First Detention Decision, paras 52-53.

⁹⁴ See Second Detention Decision, para. 35; First Detention Decision, para. 52.

⁹⁵ See, *similarly*, KSC-BC-2020-06, IA010/F00008/RED, Court of Appeals, *Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention* ("Thaçi Detention Appeal Decision"), 27 October 2021, public, para. 68.

⁹⁶ KSC-BC-2020-06, IA017/F00011/RED, Court of Appeals, *Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention*, 5 April 2022, public, para. 51.

46. Accordingly, the Pre-Trial Judge concludes that the conditions addressed in the present decision are insufficient to adequately mitigate the risks under Article 41(6)(b)(ii)-(iii) of the Law in relation to Mr Bahtijari.

E. PROPORTIONALITY OF DETENTION

47. The Defence submits that Mr Bahtijari's continued detention is not proportionate, as he needs to be close to his family in Kosovo where he can also seek medical treatment.⁹⁷

48. The SPO submits that Mr Bahtijari's detention remains reasonable and proportional.⁹⁸ In support, the SPO argues that the proceedings continue to move forward expeditiously, considering that, since the last review: (i) the Pre-Trial Judge has issued the Joinder Decision; (ii) the SPO has harmonised disclosure between the three co-accused and submitted, *inter alia*, an amended indictment and its Pre-Trial Brief; and (iii) additional status conferences were held or scheduled to be held, in order to address the transfer of the case file to the Trial Panel.⁹⁹

49. At the outset, the Pre-Trial Judge recalls the importance of the proportionality principle in the determination of the reasonableness of pre-trial detention, as reflected in Rule 56(2) of the Rules.¹⁰⁰ The duration of time in detention pending trial is a factor that needs to be considered along with the degree of the risks that are described in Article 41(6)(b) of the Law, in order to determine whether, all factors being considered, continued detention "stops being reasonable" and the individual needs to be released.¹⁰¹ However, the Pre-Trial Judge notes that the question whether the length of time spent in pre-trial detention is reasonable cannot be assessed in the abstract,

⁹⁷ Defence Submissions, paras 16, 23, 35, 39-40.

⁹⁸ SPO Response, paras 26, 29.

⁹⁹ SPO Response, para. 28.

¹⁰⁰ KSC-BC-2020-07, IA001/F00005, Court of Appeals, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, 9 December 2020, public, paras 72-73.

¹⁰¹ *Thaçi Detention Appeal Decision*, para. 49.

and must be assessed based on the facts of each case and according to its specific features.¹⁰²

50. The Pre-Trial Judge further recalls his previous findings that: (i) that Mr Bahtijari has been detained since his arrest on 5 October 2023; (ii) he is charged with two counts of obstructing official persons in performing official duties and one count of intimidation during criminal proceedings, which carry a possible sentence of up to five years and ten years of imprisonment, respectively; (iii) the risks under Article 41(6)(b)(ii) and (iii) of the Law cannot be mitigated by the proposed conditions for release, house arrest or any additional conditions; and (iv) all required procedural steps relating to the pre-trial phase of the present case have been, are being or will be completed with a view to transmitting the case for trial at a point in the foreseeable future.¹⁰³ Notably, since the Second Detention Decision, the Pre-Trial Judge has issued the Joinder Decision,¹⁰⁴ the SPO has submitted its Pre-Trial Brief,¹⁰⁵ and five status conferences have been held to date. Furthermore, pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules, Mr Bahtijari's detention shall be reviewed every two months or as soon as a change in circumstances arises.

51. In addition, the Pre-Trial Judge recalls that, according to the calendar for the remainder of the pre-trial phase, the date for the transmission of the case to the Trial Panel is set for 21 June 2024.¹⁰⁶ In this regard, the Pre-Trial Judge recalls that, despite his proposal to transmit the case earlier than this date, the Defence indicated that they needed more time.¹⁰⁷

¹⁰² ECtHR, *Buzadji v. Moldova*, para. 90. See, similarly, Second Detention Decision, para. 39.

¹⁰³ Second Detention Decision, para. 40.

¹⁰⁴ See *supra*, para. 4.

¹⁰⁵ KSC-BC-2023-10, F00177, Specialist Prosecutor, *Submission of Prosecution Pre-Trial Brief, Witness and Exhibit Lists, and Rule 109(c) Chart*, 16 February 2024, public, with Annexes 1-4, confidential.

¹⁰⁶ KSC-BC-2023-10, F00233, Pre-Trial Judge, *Decision Setting out the Calendar for the Remaining Procedural Steps of the Pre-Trial Phase*, 27 March 2024, public, para. 30(k).

¹⁰⁷ 22 March 2024 Transcript, p. 253, line 6, to p. 255, line 8.

52. On this basis, the Pre-Trial Judge finds that the time Mr Bahtijari has spent in pre-trial detention is not unreasonable within the meaning of Rule 56(2) of the Rules.

V. DISPOSITION

53. For the above reasons, the Pre-Trial Judge hereby:

- a. **ORDERS** Mr Bahtijari's continued detention;
- b. **ORDERS** Mr Bahtijari, if he wishes to do so, to file submissions on the next review of detention by **Tuesday, 30 April 2024 at 16h00**, with responses and replies following the timeline set out in Rule 76 of the Rules;
- c. **ORDERS** the SPO, should Mr Bahtijari decide not to file any submissions by the aforementioned time limit, to file submissions on the next review of Mr Bahtijari's detention by **Tuesday, 7 May 2024**, and Mr Bahtijari, if he wishes to do so, to file his submissions by no later than **Tuesday, 14 May 2024**; and
- d. **ORDERS** the Defence and the SPO to file public redacted versions of the Defence Submissions and the SPO Response, respectively, or to indicate that these filings may be reclassified as public, by **2 April 2024**.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Thursday, 28 March 2024

At The Hague, the Netherlands.