



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA KOSOVA

**In:** KSC-BC-2023-10/IA002

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

**Registrar:** Fidelma Donlon

**Date:** 12 April 2024

**Original language:** English

**Classification:** Public

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**Public Redacted Version of Decision on Haxhi Shala's Appeal Against  
Decision on Review of Detention**

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**THE PANEL OF THE COURT OF APPEALS CHAMBER** of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively),<sup>1</sup> acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”), is seised of an appeal filed on 19 February 2024 by Mr Haxhi Shala (“Appeal” and “Shala” or “Accused” or “Defence”, respectively),<sup>2</sup> against the “Decision on Review of Detention of Haxhi Shala” (“Impugned Decision”).<sup>3</sup> The Specialist Prosecutor’s Office (“SPO”) responded on 29 February 2024 that the Appeal should be rejected.<sup>4</sup> Shala replied on 6 March 2024.<sup>5</sup>

## I. BACKGROUND

1. On 11 December 2023, Shala was arrested in Kosovo, pursuant to an arrest warrant issued by the Pre-Trial Judge,<sup>6</sup> further to the confirmation of an indictment

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<sup>1</sup> IA002/F00002, Decision Assigning a Court of Appeals Panel, 21 February 2024 (confidential reclassified as public on 12 April 2024).

<sup>2</sup> IA002/F00001, Interlocutory Appeal against the Decision on Review of Detention of Haxhi Shala, 19 February 2024 (confidential) (“Appeal”).

<sup>3</sup> F00165/RED, Public Redacted Version of Decision on Review of Detention of Haxhi Shala, 9 February 2024 (confidential version filed on 9 February 2024) (“Impugned Decision”).

<sup>4</sup> IA002/F00003, Prosecution response to Defence ‘Interlocutory Appeal against the Decision on Review of Detention of Haxhi Shala’, 29 February 2024 (confidential) (“Response”).

<sup>5</sup> IA002/F00004, Reply to Prosecution Response to Interlocutory Appeal against Decision on Review of Detention, 6 March 2024 (confidential) (“Reply”).

<sup>6</sup> KSC-BC-2023-11, F00006/RED/A01/RED, Public Redacted Version of Arrest Warrant for Haxhi Shala, 28 February 2024 (strictly confidential version filed on 4 December 2023, reclassified as confidential on 29 February 2024) (“Arrest Warrant”). See also KSC-BC-2023-11, F00006/RED, Public Redacted Version of Decision on Request for Warrant of Arrest and Transfer Order, 22 December 2023 (strictly confidential and *ex parte* version filed on 4 December 2023, reclassified as confidential on 22 December 2023) (“Decision on Arrest and Transfer”); KSC-BC-2023-11, F00008, Notification of Arrest of Haxhi Shala Pursuant to Rule 55(4), 11 December 2023 (strictly confidential and *ex parte* reclassified as public on 15 December 2023) (“Notification of Arrest”).

against him.<sup>7</sup> He was transferred to the Detention Facilities of the Specialist Chambers (“Detention Facilities”) in The Hague, the Netherlands, on 12 December 2023.<sup>8</sup>

2. On 13 December 2023, Shala’s initial appearance before the Pre-Trial Judge took place.<sup>9</sup>

3. On 8 February 2024, the Pre-Trial Judge granted a request filed by the SPO to join the case against Mr Sabit Januzi (“Januzi”) and Mr Ismet Bahtijari (“Bahtijari”) (“Case 10”) with the case against Shala (“Case 11”).<sup>10</sup>

4. On 9 February 2024, after having received submissions from Shala and the SPO,<sup>11</sup> the Pre-Trial Judge issued the Impugned Decision and ordered the continuation of Shala’s detention.<sup>12</sup> More specifically, the Pre-Trial Judge denied the request for release filed by Shala on the basis of the unlawfulness of his continued detention, as

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<sup>7</sup> KSC-BC-2023-11, F00005/RED, Public Redacted Version of the Decision on the Confirmation of the Indictment, 30 January 2024 (strictly confidential and *ex parte* version filed on 4 December 2023, reclassified as confidential on 12 December 2023) (“Decision on Confirmation of Indictment”); KSC-BC-2023-11, F00013/A01, Annex 1 to Submission of Public Redacted Version of Confirmed Indictment, 12 December 2023 (“Indictment”). A confidential version of the Indictment was filed on 6 December 2023. See KSC-BC-2023-11, F00007/A01, Annex 1 to Submission of Confirmed Indictment, 6 December 2023 (strictly confidential and *ex parte* reclassified as confidential on 11 December 2023).

<sup>8</sup> KSC-BC-2023-11, F00011, Notification of Reception of Haxhi Shala in the Detention Facilities of the Specialist Chambers, 12 December 2023 (strictly confidential and *ex parte* reclassified as public on 15 December 2023); KSC-BC-2023-11, F00011/A01, Annex 1 to Notification of Reception of Haxhi Shala in the Detention Facilities of the Specialist Chambers, 12 December 2023 (strictly confidential and *ex parte*) (“Annex 1 to Notification of Reception”). See also KSC-BC-2023-11, F00006/RED/A02/RED, Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers, 28 February 2024 (strictly confidential version filed on 4 December 2023 and reclassified as public on 28 February 2024) (“Transfer Order”).

<sup>9</sup> KSC-BC-2023-11, Transcript, 13 December 2023.

<sup>10</sup> F00161/RED, Public Redacted Version of Decision on Request for Joinder and Amendment of the Indictment, 8 February 2024 (confidential version filed on 8 February 2024) (“Decision on Joinder”). The Pre-Trial Judge decided that “the joint case will proceed at this stage on the basis of the Case 10 Confirmed Indictment and Case 11 Confirmed Indictment”. See Decision on Joinder, para. 55.

<sup>11</sup> KSC-BC-2023-11, F00037/RED, Public Redacted Version of ‘Prosecution Submission Pertaining to Periodic Detention Review of Haxhi Shala’, 5 February 2024 (confidential version filed on 31 January 2024); KSC-BC-2023-11, F00039, Public Redacted Version of Response to Prosecution Submission Pertaining to Periodic Detention of Haxhi Shala, 7 February 2024 (confidential version filed on 4 February 2024) (“Defence Submissions”).

<sup>12</sup> Impugned Decision, para. 61.

well as his request that the Pre-Trial Judge refer to the Specialist Chamber of the Constitutional Court (“Constitutional Court”) the question of the compatibility of the Specialist Chambers’ legal framework governing the initial review of the detention of a person with the Constitution of the Republic of Kosovo (“Constitution”) and the European Convention on Human Rights (“ECHR”).<sup>13</sup> The Pre-Trial Judge further found that there continued to be a grounded suspicion that Shala has committed offences within the subject-matter jurisdiction of the Specialist Chambers<sup>14</sup> and that there were articulable grounds to believe that Shala would abscond (although this risk was found to be moderate), obstruct the progress of Specialist Chambers’ proceedings or commit further offences.<sup>15</sup> Moreover, the Pre-Trial Judge found that the conditions Shala proposed for his conditional release (“Proposed Conditions”) could mitigate the risk of flight but that they are insufficient to mitigate the risk of obstructing the proceedings or committing further offences.<sup>16</sup>

5. In the Appeal, Shala develops two grounds of appeal, submitting that the Pre-Trial Judge erred (i) in law in dismissing his challenge concerning the lawfulness of his continued detention<sup>17</sup> and (ii) in fact in the assessment of the risks under Article 41(6)(b) of the Law.<sup>18</sup> Shala requests that the Court of Appeals Panel order his immediate release or, in the alternative, refer to the Constitutional Court the question of the constitutionality of the Specialist Chambers’ legal framework governing the decisions on detention at the first appearance.<sup>19</sup> The SPO responds that the Appeal fails to demonstrate any error in the Impugned Decision and should be dismissed.<sup>20</sup>

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<sup>13</sup> Impugned Decision, paras 13-15.

<sup>14</sup> Impugned Decision, para. 23.

<sup>15</sup> Impugned Decision, paras 35, 42, 46-47.

<sup>16</sup> Impugned Decision, paras 52, 55-56.

<sup>17</sup> Appeal, paras 2, 12-25, 30; Reply, paras 7-13.

<sup>18</sup> Appeal, paras 2, 12, 26-30; Reply, paras 14-19.

<sup>19</sup> Appeal, paras 2, 30. See also Reply, paras 12, 20.

<sup>20</sup> Response, paras 1, 20.

## II. STANDARD OF REVIEW

6. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.<sup>21</sup>

## III. PUBLIC FILINGS

7. The Panel recalls that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential, and that Parties shall file public redacted versions of all submissions filed before the Panel.<sup>22</sup>

8. The Panel notes that the Parties have not yet filed a public redacted version of their respective submissions.<sup>23</sup> Reminding the Parties to follow the guidance provided by the redactions made in the public redacted version of the Impugned Decision, the Panel orders the Defence and the SPO to file public redacted versions of their Appeal, Response and Reply, respectively, or indicate, through a filing, whether they can be reclassified as public within ten days of receiving notification of the present Decision.

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<sup>21</sup> KSC-BC-2020-07, IA001/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati* Appeal Decision on Detention"), paras 4-14. See also e.g. KSC-BC-2020-06, IA004/F00005/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021 (confidential version filed on 30 April 2021), paras 4-7.

<sup>22</sup> IA001/F00007, Public Redacted Version of Decision on Sabit Januzi's Appeal Against Decision on Interim Release, 5 February 2024 (confidential version filed on 5 February 2024) ("*Januzi* Appeal Decision on Detention"), para. 10. See also KSC-BC-2020-06, IA008/F00004/RED, Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention, 1 October 2021 (confidential version filed on 1 October 2021) ("*Veseli* Second Appeal Decision on Detention"), para. 8.

<sup>23</sup> The Panel notes that the SPO has indicated that a public redacted version of its Response will be filed. Response, para. 19.

#### IV. DISCUSSION

A. WHETHER THE PRE-TRIAL JUDGE ERRED IN LAW IN DISMISSING THE ACCUSED'S CHALLENGE TO THE LAWFULNESS OF HIS INITIAL DETENTION PURSUANT TO ARTICLE 5(3) AND 5(4) OF THE ECHR (GROUND 1)

##### 1. Submissions of the Parties

9. Shala submits that the Pre-Trial Judge erred in dismissing his challenge to the lawfulness of his initial detention and his related request for immediate release based on Article 5(3) and (4) of the ECHR.<sup>24</sup> Shala recalls his submissions before the Pre-Trial Judge that (i) the Arrest Warrant and Transfer Order cannot constitute adequate legal bases for continued detention;<sup>25</sup> (ii) it is not for the Accused to apply for provisional release but for the Pre-Trial Judge to consider the legality of the arrest, transfer and detention at the initial appearance hearing;<sup>26</sup> and (iii) since the Pre-Trial Judge did not consider the legality or merits of the arrest, transfer and detention during Shala's initial appearance on 13 December 2023, the Accused's continued detention is unlawful so that he should be released.<sup>27</sup>

10. Shala submits that the reasons upon which the Pre-Trial Judge dismissed the Defence's challenge are "legally unsound".<sup>28</sup> First, Shala takes issue with the Pre-Trial Judge stating that the Defence was "afforded the early opportunity to challenge the Decision on Arrest and Transfer under Article 41(2) of the Law but had chosen not to do so".<sup>29</sup> Relying on jurisprudence of the European Court of Human Rights ("ECtHR"), Shala submits that the judicial control of detention under Article 5(3) of the ECHR should be "automatic" and "not dependent on any application by the

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<sup>24</sup> Appeal, paras 13, 15-21, 25; Reply, paras 7-10, 12.

<sup>25</sup> Appeal, para. 13; Reply, paras 7-8.

<sup>26</sup> Appeal, para. 13; Reply, para. 7.

<sup>27</sup> Appeal, para. 13; Reply, para. 9.

<sup>28</sup> Appeal, para. 25.

<sup>29</sup> Appeal, para. 16, quoting Impugned Decision, para. 13.

Defence”.<sup>30</sup> Shala argues that it is not sufficient to allow the Accused to file a written request after his initial appearance instead of addressing the issue at this hearing.<sup>31</sup>

11. Second, Shala argues that the Pre-Trial Judge cannot infer from the ECtHR case law that judicial control upon arrest is only warranted where the arrest is not authorised beforehand by a judge, and not warranted, like in the present case, where the Accused’s arrest was undertaken pursuant to the Pre-Trial Judge’s judicial order.<sup>32</sup> In his view, the ECtHR, in the *Harkmann* Judgment, made clear that Article 5(3) requirements cannot be discharged by “prior judicial involvement” after a suspect is detained.<sup>33</sup>

12. Third, Shala submits that the initial Decision on Arrest and Transfer does not provide sufficient safeguards to the Accused as the Pre-Trial Judge has only heard evidence from one side and not the Accused’s personal circumstances.<sup>34</sup> This, he argues, is contrary to the presumption of release as developed by the jurisprudence of the ECtHR.<sup>35</sup>

13. Shala finally submits that the Pre-Trial Judge erred in not referring the question of the compatibility of the legal framework with the Constitution to the Constitutional Court.<sup>36</sup> In particular, he argues that when assessing the compatibility of the Rules with the Constitution, the Constitutional Court recognised that it was not in a position to determine finally and to what extent the Rules are consistent with the Constitution.<sup>37</sup>

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<sup>30</sup> Appeal, para. 16; Reply, para. 7.

<sup>31</sup> Appeal, para. 17.

<sup>32</sup> Appeal, para. 18.

<sup>33</sup> Appeal, para. 18, referring to ECtHR, *Harkmann v. Estonia*, no. 2192/03, Judgment, 11 July 2006 (“*Harkmann* Judgment”), paras 36-38. See also Reply, para. 10.

<sup>34</sup> Appeal, paras 19-21.

<sup>35</sup> Appeal, para. 21.

<sup>36</sup> Appeal, paras 14, 22-24.

<sup>37</sup> Appeal, paras 22-24; Reply, para. 13.

14. The SPO responds that the Impugned Decision “complies with all applicable law”, and that Shala’s requested relief of immediate and unconditional release is not only unwarranted but has no legal basis and should be considered moot in light of the Impugned Decision on review of detention.<sup>38</sup>

15. First, the SPO submits that, contrary to Shala’s claim, judicial control of detention at the Specialist Chambers is automatic and does not require an application from the detained person.<sup>39</sup> In the SPO’s view, the cases cited by Shala are different from the present case as they involve situations of either police or administrative detention, without judicial oversight of detention.<sup>40</sup> According to the SPO, the two core requirements of the ECtHR which Shala alleges are not reflected in the Specialist Chambers’ legal framework are present: (i) judicial control of detention starts prior to arrest pursuant to Article 41(6) of the Law and (ii) detention can be challenged immediately after arrest pursuant to Article 41(2) of the Law and Rule 57 of the Rules.<sup>41</sup>

16. Second, the SPO submits that the requirement set out by the ECtHR in the *Harkmann* Judgment – that the person must have the opportunity to request review of detention regardless of any prior judicial authorisation for detention – is not relevant in the present case as, pursuant to Rule 57 of the Rules, “the reviewing judge has the power to discontinue detention ‘at any time’, upon request of the SPO or the Accused, or *proprio motu*” and review of detention is mandatory at least every two months.<sup>42</sup>

17. The SPO further responds that the Constitutional Court has already determined, in “an on-point ruling”, the compatibility of the relevant provisions,

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<sup>38</sup> Response, para. 9.

<sup>39</sup> Response, para. 12.

<sup>40</sup> Response, para. 12.

<sup>41</sup> Response, para. 11.

<sup>42</sup> Response, para. 13 (footnotes omitted).



including Rules 56 and 57 of the Rules, with the Constitution, and that Shala fails to articulate any error in the application of these provisions.<sup>43</sup>

18. Finally, the SPO concludes that, even if an automatic detention review at the initial appearance hearing was required, Shala fails to explain how the alleged error would invalidate the Pre-Trial Judge's conclusion in the Impugned Decision that detention was warranted at that time.<sup>44</sup>

19. Shala replies that regardless of whether the judge has the power to discontinue detention under Rule 57 of the Rules, the Pre-Trial Judge failed to exercise any review of the legality of detention after Shala's arrest.<sup>45</sup> Shala also replies that the ECtHR's finding, in the *Harkmann* Judgment, that Article 5(3) of the ECHR "does not provide for any possible exceptions from [the requirement that a person shall be brought promptly before a judge or other judicial officer after having been arrested or detained], not even on grounds of prior judicial involvement",<sup>46</sup> undermines the SPO's argument that the cases cited by the Defence can be distinguished from the present case.<sup>47</sup> Shala further submits that his immediate and unconditional release is warranted, based on Article 5(4) of the ECHR, given that his detention has been unlawful since his "first appearance until the Impugned Decision".<sup>48</sup>

## 2. Assessment of the Court of Appeals Panel

### (a) Preliminary Matter

20. The Panel notes that the present appeal is directed against the Impugned Decision on review of detention, which in essence deals with Shala's *continuing*

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<sup>43</sup> Response, paras 14-15.

<sup>44</sup> Response, para. 16.

<sup>45</sup> Reply, para. 9.

<sup>46</sup> Reply, para. 10.

<sup>47</sup> Reply, para. 11.

<sup>48</sup> Reply, para. 12.

detention.<sup>49</sup> The Panel notes however that Shala challenges the lawfulness of his *initial* detention, alleging violations of his right to prompt access to a judicial authority and to have the merits of the detention reviewed by a judicial authority.<sup>50</sup>

21. In this regard, the Panel notes that Shala had opportunities to raise this issue at a more appropriate time.<sup>51</sup> In fact, Shala had the following avenues under the Specialist Chambers' legal framework to challenge his initial detention but did not use them. Shala was afforded an opportunity to challenge the lawfulness of his initial detention under Article 41(2) of the Law and Rule 57 of the Rules.<sup>52</sup> Recalling that a challenge to the legality of detention falls into the broader category of challenges to detention on remand for which an appeal lies as of right,<sup>53</sup> the Panel notes that Shala was entitled to file an appeal against the Decision on Arrest and Transfer within ten days starting from the first working day after its notification to the Defence.<sup>54</sup>

22. However, Shala raised the challenge regarding the lawfulness of his initial detention for the first time before the Pre-Trial Judge in his submissions regarding review of detention on 4 February 2024.<sup>55</sup> As the Pre-Trial Judge addressed Shala's arguments in relation to the lawfulness of his initial detention in the Impugned

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<sup>49</sup> Appeal, paras 1-2, 13-21, 25; Reply, paras 7-12.

<sup>50</sup> Appeal, paras 13, 16-21; Reply, paras 7-12.

<sup>51</sup> See Arrest Warrant, para. 10, where the Pre-Trial Judge recalled that "Mr Shala has the right to challenge, pursuant to Article 41(2) and (5) of the Law, the lawfulness of his arrest, the transfer order and the conditions of detention before the Pre-Trial Judge, and he has the right to appeal before the [Specialist Chambers] Court of Appeal".

<sup>52</sup> See also Impugned Decision, para. 13.

<sup>53</sup> See Article 45(2) of the Law; Rule 58 of the Rules. See similarly *Gucati* Appeal Decision on Detention, para. 17; KSC-BC-2020-07, IA002/F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021, para. 27.

<sup>54</sup> The Panel notes that while the Arrest Warrant was provided to Shala upon arrest, the Defence was given access to the Decision on Arrest and Transfer through Legal Workflow on 22 December 2023 when it was reclassified as confidential. See KSC-BC-2023-11, F00015, Report on the Arrest and Transfer of Haxhi Shala to the Detention Facilities, 13 December 2023 (strictly confidential and *ex parte* reclassified as confidential on 15 December 2023) ("Report on Arrest and Transfer"), para. 11. In the Panel's view, it is important that accused before the Specialist Chambers have access to the decision granting the SPO's requests for arrest warrant and transfer order as early as possible, and preferably in advance of the initial appearance.

<sup>55</sup> Defence Submissions, paras 29-49.

Decision and dismissed them, the Panel considers that Ground 1 is properly brought before it and will address Shala's challenges under this Ground.

(b) Whether the Pre-Trial Judge Erred in Law

23. The Panel recalls that the Pre-Trial Judge dismissed Shala's challenge to the lawfulness of his initial detention on the basis that (i) the ECtHR decision cited by Shala in his submissions, the *Aquilina* Judgment, was issued in the context of an arrest which had not been authorised beforehand by a judge;<sup>56</sup> (ii) Shala's arrest was authorised by the Pre-Trial Judge who reviewed all substantial requirements for detention under Article 41(6) of the Law;<sup>57</sup> and (iii) Shala was afforded the opportunity to challenge that initial decision.<sup>58</sup> The Panel also recalls that Shala's arguments on appeal are twofold: (i) that the Arrest Warrant cannot constitute a sufficient basis for his continued detention; and (ii) that the Pre-Trial Judge erred by not entering into an automatic judicial control of detention at the initial appearance hearing.<sup>59</sup> In essence, he argues that the procedure set out in the Law and the Rules is not compatible with Article 5(3) of the ECHR.

24. At the outset, the Court of Appeals Panel recalls that the right to liberty and security of person, as guaranteed under Article 29 of the Constitution and Article 5 of the ECHR,<sup>60</sup> is of the highest importance in a democratic society.<sup>61</sup> Any deprivation of liberty must conform to the substantive and procedural rules established by law and

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<sup>56</sup> Impugned Decision, para. 13, referring to ECtHR, *Aquilina v. Malta*, no. 25642/94, Judgment, 29 April 1999 ("*Aquilina* Judgment"), paras 8-9, 43.

<sup>57</sup> Impugned Decision, para. 13.

<sup>58</sup> Impugned Decision, para. 13. Based notably on the above reasons, the Pre-Trial Judge dismissed Shala's request for immediate release and his alternative request for referral to the Constitutional Court. See Impugned Decision, paras 14-15.

<sup>59</sup> Appeal, paras 13, 16-21.

<sup>60</sup> See also Article 9 of the International Covenant on Civil and Political Rights.

<sup>61</sup> 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 on Referral of Rules dated 26 April 2017*"), para. 110.

should be in keeping with the key purpose of protecting the individual from arbitrariness.<sup>62</sup> Such rights have to be interpreted consistently with the ECtHR jurisprudence as per Article 53 of the Constitution.<sup>63</sup>

25. Under Article 5(3) of the ECHR, a person who has been arrested or detained (on reasonable suspicion of having committed an offence or in order to prevent his or her committing an offence or fleeing having done so) “shall be brought promptly before a judge or other officer authorised by law to exercise judicial power”.<sup>64</sup> The Panel is mindful that the first limb of Article 5(3) of the ECHR is primarily aimed at ensuring prompt and automatic judicial control of police or administrative detention ordered in accordance with the provisions of Article 5(1)(c) of the ECHR.<sup>65</sup> In other words, the purpose of Article 5(3) of the ECHR is to protect the individual from arbitrary detention by ensuring that the act of deprivation of liberty is subject to independent judicial scrutiny.<sup>66</sup> The ECtHR explained that judicial control “serves to provide effective safeguards against the risk of ill-treatment, which is at its greatest in

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<sup>62</sup> Constitutional Court Judgment on Referral of Rules dated 26 April 2017, para. 111; KSC-BC-2020-06, IA002/F00005, Public Redacted Version of Decision on Jakup Krasniqi’s Appeal Against Decision on Interim Release, 30 April 2021 (confidential version filed on 30 April 2021), para. 26. See also ECtHR, *McKay v. United Kingdom*, no. 543/03, Judgment, 3 October 2006 (“*McKay Judgment*”), para. 30. See also *Gucati Appeal Decision on Detention*, para. 39, in which the Court of Appeals Chamber recalled that the very purpose of Article 5 of the ECHR is to protect the individual from arbitrariness.

<sup>63</sup> See also Constitutional Court Judgment on Referral of Rules dated 26 April 2017, para. 16.

<sup>64</sup> Article 5(3) of the ECHR provides in full that “[e]veryone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.” Pursuant to Article 5(1) of the ECHR, “[e]veryone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [...] (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”.

<sup>65</sup> ECtHR, *Kornev and Karpenko v. Ukraine*, no. 17444/04, Judgment, 21 October 2010 (“*Kornev and Karpenko Judgment*”), para. 43; *Harkmann Judgment*, para. 36; *Aquilina Judgment*, paras 48-49; ECtHR, *De Jong, Baljet and van den Brink v. Netherlands*, nos 8805/79, 8806/79, 9242/81, Judgment, 22 May 1984 (“*De Jong, Baljet and van den Brink Judgment*”), para. 51.

<sup>66</sup> ECtHR, *Lutsenko v. Ukraine*, no. 6492/11, Judgment, 3 July 2012, para. 85; ECtHR, *Niedbala v. Poland*, no. 27915/95, Judgment, 4 July 2000 (“*Niedbala Judgment*”), para. 50; *Aquilina Judgment*, para. 49; ECtHR, *Kurt v. Turkey*, no. 15/1997/799/1002, Judgment, 25 May 1998, para. 123.

this early stage of detention, and against the abuse of powers bestowed on law enforcement officers or other authorities for what should be narrowly restricted purposes and exercisable strictly in accordance with prescribed procedures".<sup>67</sup>

26. The Panel considers that the Specialist Chambers' legal framework provides for strong safeguards against arbitrariness and undue prolongation of pre-trial detention through the principle of judicial control of detention, which is enshrined in Article 29(2) of the Constitution and mirrored in Article 41(3) of the Law.<sup>68</sup> The Panel further notes that the text of Article 41(5) of the Law substantially mirrors Article 5(3) of the ECHR.<sup>69</sup> The Panel also considers that the Constitution, the Law and the Rules provide that any act of deprivation of liberty must be scrutinised and supervised by an independent judicial authority, either *prior* to or promptly *after* the arrest of the suspect or accused depending on whether the arrest is based, respectively, on an arrest warrant issued by the Specialist Chambers (judicial control *prior* to the arrest) or an arrest order issued by the Specialist Prosecutor (judicial control *after* the arrest).<sup>70</sup>

27. The Panel notes that in this case the Pre-Trial Judge exercised judicial control *prior* to the Accused's arrest in accordance with the Specialist Chambers' legal framework.<sup>71</sup> Shala's arrest was carried out pursuant to a judicial order issued by the

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<sup>67</sup> ECtHR, *Vakhitov and Others v. Russia*, nos. 18232/11, 42945/11 and 31596/14, 31 January 2017 ("*Vakhitov and Others Judgment*"), para. 46; *Ladent v. Poland*, no. 11036/03, Judgment, 18 March 2008 ("*Ladent Judgment*"), para. 72. According to the ECtHR, "[j]udicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5(3)". See ECtHR, *Brogan and Others v. the United Kingdom*, nos 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988 ("*Brogan and Others Judgment*"), para. 58; ECtHR, *Pantea v. Romania*, no. 33343/96, Judgment, 3 June 2003 ("*Pantea Judgment*"), para. 236; ECtHR, *Assenov and Others v. Bulgaria*, no. 90/1997/874/1086, Judgment, 28 October 1998 ("*Assenov and Others Judgment*"), para. 146.

<sup>68</sup> See also Article 29(1)(2) of the Constitution.

<sup>69</sup> Article 41(5) of the Law requires that "[a] person deprived of liberty by or on behalf of the Specialist Chambers shall be [...] brought before a Specialist Chambers Judge without delay and shall be entitled to a trial within a reasonable time or to release pending trial". Compare with Article 5(3) of the ECHR.

<sup>70</sup> See, in particular, Article 29(1) and (2) of the Constitution; Articles 39(3), 41(3) and (6) of the Law; Rules 52 and 53 of the Rules.

<sup>71</sup> Article 39(3) of the Law; Rule 53 of the Rules.

Pre-Trial Judge, annexed to the Decision on Arrest and Transfer.<sup>72</sup> This judicial order constituted the legal basis for Shala remaining in detention until the issuance of the next decision on detention, i.e. the Impugned Decision.<sup>73</sup>

28. The Panel further notes that the Pre-Trial Judge reviewed himself, one week before Shala's arrest, all substantial requirements for arrest and detention under Article 41(6) of the Law.<sup>74</sup> These requirements are not only the same for both arrest and detention, but also mirror the requirements under Article 5(1)(c) of the ECHR. In particular, the Pre-Trial Judge found that there is a well-grounded suspicion that Shala committed offences within the Specialist Chambers' jurisdiction, and that there are articulable grounds to believe that there is a risk that the Accused may flee, obstruct the progress of the criminal proceedings, or commit further offences, "therefore necessitating his arrest and detention".<sup>75</sup>

29. Moreover, the Panel recalls that, in the event of the issuance of an arrest warrant by a Judge, as in this case the Pre-Trial Judge, the Specialist Chambers' legal

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<sup>72</sup> Arrest Warrant; Decision on Arrest and Transfer.

<sup>73</sup> Transcript, 13 December 2023, p. 15; Impugned Decision, para. 16. The Panel notes that the Pre-Trial Judge and the Single Judge adopted the same approach in other cases where an arrest warrant was issued by a judge of the Specialist Chambers. See KSC-BC-2020-05, F00052, Decision on Review of Detention, 23 November 2020; KSC-BC-2020-06, F00177/RED, Public Redacted Version of Decision on Hashim Thaçi's Application for Interim Release, 26 January 2021 (confidential version filed on 22 January 2021); KSC-BC-2020-06, F00178, Decision on Kadri Veseli's Application for Interim Release, 22 January 2021; KSC-BC-2020-06, F00179/RED, Public Redacted Version of Decision on Rexhep Selimi's Application for Interim Release, 26 January 2021 (confidential version filed on 22 January 2021); KSC-BC-2020-06, F00180/RED, Public Redacted Version of the Decision on Jakup Krasniqi's Application for Interim Release, 26 January 2021 (confidential version filed on 22 January 2021); KSC-BC-2020-04, F00045/RED, Public Redacted Version of Decision on Pjetër Shala's Request for Provisional Release, 23 June 2021 (confidential version filed on 15 June 2021); KSC-BC-2020-07, F00057, Decision on Defence Challenges, 27 October 2020; KSC-BC-2020-07, F00058, Decision on Request for Immediate Release of Nasim Haradinaj, 27 October 2020. See also in the present case, F00116/RED, Public Redacted Version of Decision on Ismet Bahtijari's Request for Interim Release, 12 December 2023 (confidential version filed on 29 November 2023); F00123/RED, Public Redacted Version of Decision on Sabit Januzi's Request for Interim Release, 5 January 2024 (confidential version filed on 8 December 2023).

<sup>74</sup> Decision on Arrest and Transfer, paras 17-23. Article 41(6) of the Law provides that "[t]he Specialist Chambers or the Specialist Prosecutor shall only *order the arrest and detention* of a person [when certain conditions are met]" (emphasis added). See also Impugned Decision, para. 13.

<sup>75</sup> Decision on Arrest and Transfer, paras 17, 23.

framework does not specifically prescribe the issuance of a separate decision on detention (for example at the initial appearance hearing). In this regard, it is significant that Article 41(10) of the Law and Rule 57(2) of the Rules do not refer to the Pre-Trial Judge's duty to decide on detention, but instead to his duty to *review* whether the initial conditions for the detention continue to be met on a bi-monthly basis or "at any time upon request by the Accused or the Specialist Prosecutor, or *proprio motu*".<sup>76</sup>

30. The Panel considers that the Pre-Trial Judge applied the legal framework set out above by issuing (i) the Arrest Warrant, annexed to the Decision on Arrest and Transfer, which formed the basis for Shala's arrest and detention before and after his initial appearance; and (ii) the Impugned Decision on review of Shala's detention "within two months from the last ruling on arrest", ordering his continued detention until the next review.<sup>77</sup>

31. In light of Shala's claim that the procedure set out in the Law and the Rules – as followed by the Pre-Trial Judge – is not compatible with Article 5(3) of the ECHR, the Panel will now consider whether the control exercised by the Pre-Trial Judge over Shala's detention constitutes sufficient judicial control in line with Article 5(3) of the ECHR and the relevant jurisprudence of the ECtHR to justify Shala's continued detention upon arrest.

32. The Panel first agrees with the Pre-Trial Judge that the ECtHR case *Aquilina v. Malta* referred to by the Defence involves a different factual situation. In that case, the applicant's arrest, conducted by the police, was not authorised by a judge<sup>78</sup> while, by contrast, Shala's arrest by the SPO was authorised by the Pre-Trial Judge who

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<sup>76</sup> See similarly, concerning Rule 57(1) of the Rules, *Gucati* Appeal Decision on Detention, para. 38.

<sup>77</sup> Impugned Decision, paras 16, 61.

<sup>78</sup> *Aquilina* Judgment, paras 8-9, 43. In that case, the applicant was kept in custody by the police for two days prior to being brought before a magistrate of the Court of Magistrates.

exercised judicial control.<sup>79</sup> The Panel recalls that the Court of Appeals Chamber has previously found that the fact that the act of deprivation of liberty is scrutinised and supervised by an independent judicial authority, prior to the arrest of an accused, constitutes an important safeguard against arbitrariness – which is the very purpose of Article 5 of the ECHR.<sup>80</sup>

33. The Panel is mindful that the ECtHR also found, in cases involving arrests authorised by a court, including the *Harkmann* case cited by the Defence, that Article 5(3) of the ECHR “does not provide for any possible exceptions” from the requirement that a person be brought promptly before a judge (or other judicial officer) after their arrest or detention, “not even on grounds of prior judicial involvement”.<sup>81</sup> The Panel agrees with Shala that, according to the jurisprudence of the ECtHR, the right to be brought promptly before a judge under Article 5(3) of the ECHR includes a procedural requirement for the judge to hear from the individual concerned and a substantive requirement “of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons”.<sup>82</sup>

34. However, and contrary to what Shala argues, the ECtHR did not find that a judicial detention order issued prior to arrest in the absence of the accused could not

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<sup>79</sup> Arrest Warrant; Decision on Arrest and Transfer, paras 17-23, 29. See also Impugned Decision, para. 13.

<sup>80</sup> *Gucati* Appeal Decision on Detention, para. 39.

<sup>81</sup> *Vakhitov and Others* Judgment, para. 51; ECtHR, *Poghosyan v. Armenia*, no. 44068/07, Judgment, 20 December 2011 (“*Poghosyan* Judgment”), para. 69; *Kornev and Karpenko* Judgment, para. 46; ECtHR, *Bergmann v. Estonia*, no. 38241/04, Judgment, 29 May 2008 (“*Bergmann* Judgment”), para. 45; *Ladent* Judgment, para. 75; *Harkmann* Judgment, para. 38.

<sup>82</sup> *Vakhitov and Others* Judgment, para. 49; *Bergmann* Judgment, para. 41; *McKay* Judgment, para. 35; *Harkmann* Judgment, para. 36; *Pantea* Judgment, para. 231; *Aquilina* Judgment, para. 47; *Assenov and Others* Judgment, para. 146; *De Jong, Baljet and van den Brink* Judgment, para. 51; ECtHR, *Schiesser v. Switzerland*, no. 7710/76, Judgment, 4 December 1979 (“*Schiesser* Judgment”), para. 31. See also Appeal, para. 18.



constitute the legal basis for continued detention after arrest.<sup>83</sup> Rather, in the cases involving arrests authorised by a court, the ECtHR found a violation of Article 5(3) of the ECHR because the accused was not *promptly* brought before a judicial officer.<sup>84</sup> In fact, what the ECtHR considers crucial is that the person be brought *promptly* and *automatically* before a judge,<sup>85</sup> that he or she be heard *personally* about the possible reasons militating against the detention,<sup>86</sup> and that the judge has the *power to release* if the detention does not fall within the permitted exception set out in Article 5(1)(c) of the ECHR, or is unlawful.<sup>87</sup>

35. In the present case, the Panel observes that the Accused was brought before the Pre-Trial Judge, and thus had access to a judicial authority, two days and six hours after his arrest, which may be regarded as “prompt” for the purposes of Article 5(3) of the ECHR, also taking into consideration that Shala had to be transferred from

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<sup>83</sup> See *Vakhitov and Others* Judgment, para. 51; *Kornev and Karpenko* Judgment, para. 46; *Harkmann* Judgment, para. 38; *Poghosyan* Judgment, paras 69-70.

<sup>84</sup> See *Harkmann* Judgment, paras 39-40, where the applicant was kept in custody for 15 days before being brought before a judicial officer. See also *Vakhitov and Others* Judgment, paras 52, 54 (41, 39 and 55 days, respectively); *Poghosyan* Judgment, paras 70-71 (the applicant was never brought before a judge); *Kornev and Karpenko* Judgment, paras 47-48 (eight days); *Bergmann* Judgment, paras 46-47 (26 days). In the *Ladent* case, the review of the lawfulness of the applicant's detention was initiated by the application made by his counsel seven days after his arrest and the ECtHR found that the applicant was not brought promptly before a judge. See *Ladent* Judgment, paras 75-76. Among the cases involving judicially-authorized arrests, the Panel came across one exception where the ECtHR found a violation of Article 5(3) of the ECHR because the judicial officer before which the accused was brought after arrest – which was a different judge than the one who issued the arrest warrant (*mandat d'amener*) – did not examine the lawfulness of detention. In that case, the first judge ordering the arrest did not examine the lawfulness of detention either. See ECtHR, *Salih Salman Kılıç c. Turquie*, no. 22077/10, Arrêt, 5 March 2013, paras 5-6, 25-29. See also below, para. 35.

<sup>85</sup> *McKay* Judgment, paras 33-34; *Harkmann* Judgment, para. 36; *Aquilina* Judgment, paras 48-49; *De Jong, Baljet and van den Brink* Judgment, para. 51. According to the ECtHR, the judicial control on the first appearance of an arrested individual “must above all be prompt, to allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty.” See *McKay* Judgment, para. 33.

<sup>86</sup> *Aquilina* Judgment, para. 50; *McKay* Judgment, para. 35; *Schiesser* Judgment, para. 31; *De Jong, Baljet and van den Brink* Judgment, para. 51.

<sup>87</sup> *McKay* Judgment, paras 35, 40; *Niedbala* Judgment, para. 49; ECtHR, *Nikolova v. Bulgaria*, no. 311195/96, Judgment, 25 March 1999, para. 49; *Assenov and Others* Judgment, para. 146.

Kosovo to the Netherlands.<sup>88</sup> The Panel observes that, during the initial appearance, the Pre-Trial Judge heard Shala in person and directly enquired with him whether he “ha[d] any issue [he] would like to raise in relation to [his] arrest, the transfer to The Hague, or [his] detention”,<sup>89</sup> to which Shala responded that “everything [was] fine”.<sup>90</sup> The Panel further notes that Shala’s Counsel was also asked whether he had “any other issues [he] would like to raise”.<sup>91</sup> In this context, the Panel considers that Shala had the opportunity to speak to a judge, to report any ill-treatment, and to raise any issues about his arrest, transfer and detention, including in relation to the lawfulness and the justification of his detention. The Panel also notes that the Pre-Trial Judge was able to assess Shala’s appearance and demeanour for any indications of ill-treatment.<sup>92</sup> In addition, prior to Shala’s initial appearance, the Pre-Trial Judge received from the Registrar a detailed report on Shala’s arrest by the SPO and his transfer to the Detention Facilities by the Registry.<sup>93</sup> The Panel further underlines that the Pre-Trial Judge had the power to review, even of his own motion (i.e. *automatic* in the meaning

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<sup>88</sup> According to the ECtHR, promptness has to be assessed in each case according to its special features. See *Aquilina* Judgment, para. 48; *De Jong, Baljet and van den Brink* Judgment, para. 52. In the present case, the Panel observes that Shala was arrested on 11 December 2023 at 07:47 in Kosovo, transferred on 12 December 2023 at 16:06 to the Detention Facilities in The Hague, and appeared before the Pre-Trial Judge on 13 December 2023 at 14:00. See Notification of Arrest, para. 4; Annex 1 to Notification of Reception; Transcript, 13 December 2023, p. 1. Compare with *Brogan and Others* Judgment, para. 62, where periods of more than four days in detention without appearance before a judge were held to be in violation of Article 5(3) of the ECHR, even in the special context of terrorist investigations.

<sup>89</sup> Transcript, 13 December 2023, pp. 14-15. At the initial appearance, the Pre-Trial Judge also informed Shala that he may challenge his detention on remand, in writing, in accordance with Rule 57 of the Rules. See Transcript, 13 December 2023, p. 15.

<sup>90</sup> Transcript, 13 December 2023, p. 15.

<sup>91</sup> See Transcript, 13 December 2023, p. 14. The Pre-Trial Judge also invited the Parties to file written submissions should they “wish to discuss any other matter not expressly foreseen in the context of the Initial Appearance”. See Transcript, 13 December 2023, p. 5.

<sup>92</sup> See above, fn. 85.

<sup>93</sup> Report on Arrest and Transfer and its three strictly confidential and *ex parte* annexes. The Report on Arrest and Transfer was filed pursuant to the Pre-Trial Judge’s direction. See Decision on Arrest and Transfer, paras 28-29. The Report on Arrest and Transfer specifies that Shala had been promptly informed of the reasons for his arrest and of his rights, and received certified copies of the Arrest Warrant, Transfer Order and Indictment. See Report on Arrest and Transfer, paras 11-12, 30.

of Article 5(3) of the ECHR),<sup>94</sup> the Decision on Arrest and Transfer and to discontinue Shala's detention.<sup>95</sup>

36. The Panel considers that it would have been preferable for the Pre-Trial Judge to have referred explicitly to the legal basis for detention as reasoned in the Arrest Warrant and the Decision on Arrest and Transfer and, given that those proceedings were *ex parte*, invited the Defence to make any specific submissions on the issue of detention at the initial appearance hearing.<sup>96</sup> However, the Panel finds that it was not necessary in terms of the ECHR requirements given that (i) Shala was promptly brought before the Pre-Trial Judge and had the opportunity to raise any matter with respect to his arrest, transfer and detention; (ii) the Pre-Trial Judge received all relevant information and exercised control over the arrest, transfer and detention; (iii) the Pre-Trial Judge reviewed all the substantial requirements for detention under Article 41(6) of the Law one week before Shala's arrest; (iv) the Pre-Trial Judge had the power to release, of his own motion, the Accused if the detention did not fall within the permitted exception set out in Article 5(1)(c) of the ECHR or if the detention was unlawful; and (v) Shala's detention was automatically reviewed, two months after the arrest, by the Pre-Trial Judge based on extensive submissions on continued detention including from Shala.<sup>97</sup> Therefore, the Panel finds that the Pre-Trial Judge

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<sup>94</sup> See Human Rights Chamber of Bosnia and Herzegovina, Case No. CH/01/7488, *Vlatko Buzuk*, Decision on Admissibility and Merits, 5 July 2002, paras 98-101. In this case, the Human Rights Chamber did not take issue with the fact that the applicant was held in pre-trial detention on the basis of a decision issued prior to his arrest; it found that the investigative judge, whom the applicant was brought before upon his arrest, was not a judge for the purposes of Article 5(3) of the ECHR, "as he had no discretion to release the applicant, once he had established that there was a warranted suspicion that the applicant had committed the offence with which he was charged". *Contra Appeal*, para. 21.

<sup>95</sup> Rule 57(2) of the Rules. See also Response, para. 13.

<sup>96</sup> The Panel considers that in cases where the judicial order on arrest and detention has been issued a long time before the actual arrest, the issuance of a new decision on detention might become necessary as the circumstances militating for or against the person's detention might have changed over that period. See *Bergmann Judgment*, para. 44.

<sup>97</sup> See Impugned Decision; Defence Submissions.

exercised sufficient judicial control, both prior to and after Shala's arrest, and complied with the requirements of Article 5(3) of the ECHR.

37. Moreover, the Panel recalls that Shala was afforded additional assurances such as (i) the opportunity to challenge the Decision on Arrest and Transfer under Article 41(2) of the Law as noted by the Pre-Trial Judge;<sup>98</sup> (ii) the possibility to appeal as of right the same decision pursuant to Article 45(2) of the Law and Rule 58 of the Rules; and (iii) the right, pursuant to Rule 57(2) of the Rules, to request review of his detention even earlier than upon the expiry of two months. Cognisant of the ECtHR's jurisprudence that judicial control of detention "cannot be made to depend on a previous application by the detained person",<sup>99</sup> the Panel underlines that these constitute important additional safeguards against arbitrariness.

38. For the foregoing reasons, the Appeals Panel finds that Shala has failed to demonstrate that the Pre-Trial Judge erred in rejecting his challenge to the lawfulness of his initial detention. Accordingly, the Appeals Panel rejects Shala's request for immediate release pursuant to Article 5(4) of the ECHR.

39. Turning to Shala's alternative request to refer the "constitutionality of the legal framework" to the Constitutional Court,<sup>100</sup> the Panel recalls that, in accordance with Article 113(8) of the Constitution and Article 49(4) of the Law, a panel may refer questions of constitutional compatibility of a law to the Constitutional Court if, *inter alia*, it is uncertain as to the compatibility of the contested law with the Constitution.

40. As duly noted by the Pre-Trial Judge,<sup>101</sup> the Constitutional Court has reviewed the relevant Rules in Chapter IV of the Rules entitled "Summonses, Arrest and

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<sup>98</sup> See Impugned Decision, para. 13.

<sup>99</sup> *Niedbala* Judgment, para. 50; *Aquilina* Judgment, para. 49; *McKay* Judgment, para. 34. See also Appeal, para. 16.

<sup>100</sup> Appeal, para. 30(ii).

<sup>101</sup> Impugned Decision, para. 14.

Detention” and determined their compatibility with the fundamental rights and freedoms guaranteed by Chapter II of the Constitution.<sup>102</sup> The Constitutional Court recalled that, in interpreting the fundamental rights and freedoms, it was guided by the ECtHR case law.<sup>103</sup> In particular, in assessing whether Chapter IV of the Rules complied with Article 29 of the Constitution, the Constitutional Court had due regard to the jurisprudence of the ECtHR on Article 5 of the ECHR.<sup>104</sup>

41. While the Appeals Panel finds some merit in the Defence’s argument that the review of the Rules by the Constitutional Court “did not purport to identify all possible applications of the Rules that would be in violation of the Constitution”,<sup>105</sup> it has assessed in the context of the present Appeal how the Pre-Trial Judge applied the Specialist Chambers’ legal framework to Shala’s detention and found no legal error or violation of Article 5(3) of the ECHR. Therefore, in the Panel’s view, no uncertainty with respect to the compatibility of the contested law with the Constitution exists. The Panel recalls, out of fairness to the Accused, that he retains the possibility to make a referral to the Constitutional Court pursuant to Article 49(3) of the Law after exhaustion of all remedies.

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<sup>102</sup> See Constitutional Court Judgment on Referral of Rules dated 26 April 2017; KSC-CC-PR-2017-03, F00006/COR, Judgment on the Referral of Revised Rules of the Rules of Procedure and Evidence Adopted by Plenary on 29 May 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, 25 July 2017 (uncorrected version filed on 28 June 2017) (“Constitutional Court Judgment on Revised Rules of 25 July 2017”); KSC-CC-PR-2020-09, F00006, Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020, 22 May 2020 (“Constitutional Court Judgment on Amended Rules dated 22 May 2020”).

<sup>103</sup> Constitutional Court Judgment on Amended Rules dated 22 May 2020, para. 16; Constitutional Court Judgment on Referral of Rules dated 26 April 2017, para. 16. See also Articles 22(2) and 53 of the Constitution; KSC-CC-2019-05, F00012, Decision on the Referral of Mahir Hasani Concerning Prosecution Order of 20 December 2018, 20 February 2019, para. 25.

<sup>104</sup> Constitutional Court Judgment on Referral of Rules dated 26 April 2017, paras 108-123; Constitutional Court Judgment on Revised Rules of 25 July 2017, paras 94-96; Constitutional Court Judgment on Amended Rules dated 22 May 2020, paras 58-75.

<sup>105</sup> Appeal, para. 22; Reply, para. 13. See also Constitutional Court Judgment on Referral of Rules dated 26 April 2017, paras 10-11.

42. Accordingly, the Panel dismisses Shala's request to refer this question to the Constitutional Court.

43. In light of the above, the Court of Appeals Panel dismisses Ground 1 of the Appeal.

B. WHETHER THE PRE-TRIAL JUDGE ERRED IN FACT IN HIS ASSESSMENT OF THE RISKS UNDER ARTICLE 41(6)(B) OF THE LAW (GROUND 2)

### 1. Submissions of the Parties

44. Shala submits that the Pre-Trial Judge erred by concluding that there were articulable grounds to believe that the Accused will abscond as it is based on a "wholly erroneous" finding that the Accused has strong ties with influential individuals from within the former senior leadership of the Kosovo Liberation Army ("KLA"), [REDACTED].<sup>106</sup> Shala argues that the evidence that supports this finding "could not have been accepted by any reasonable trier of fact as a basis for the finding which relates to the present time" because it pertains to events or alleged connections from many years ago or vague remarks made by Witness 1.<sup>107</sup> Shala finally submits that the Pre-Trial Judge's finding on his flight risk is "decisive" in leading to the conclusions on Shala's risk of obstructing proceedings and committing further crimes.<sup>108</sup>

45. The SPO responds that Shala merely disagrees with the Pre-Trial Judge's conclusion on his flight risk, which does not meet the standard of review for alleged errors of fact.<sup>109</sup> In particular, the SPO submits that while challenging a list of specific facts "reasonably and logically" relied upon by the Pre-Trial Judge, Shala ignores the

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<sup>106</sup> Appeal, paras 27-29; Reply, paras 14-15, 17, 19. See also Appeal, para. 26.

<sup>107</sup> Appeal, para. 28; Reply, paras 16, 19. The Panel recalls that Shala is alleged to have acted in close coordination with Januzi and Bahtijari to persuade Witness 1 to withdraw his testimony [REDACTED] and to dissuade him from participating in Specialist Chambers' proceedings as a witness. See Indictment, paras 5-22; Impugned Decision, para. 38.

<sup>108</sup> Appeal, para. 29; Reply, para. 19.

<sup>109</sup> Response, para. 18.

fact that the Pre-Trial Judge gave only “some weight” to ties with influential individuals from within the former KLA senior leadership, while also relying on many other factors to reach a finding on the flight risk.<sup>110</sup>

46. Shala replies that the Pre-Trial Judge based his finding that the Accused would obstruct justice and commit further offences on Shala’s “unity of interests” with influential individuals within the former KLA leadership and his likely access to their associated networks and resources and that without these factors, the threshold for articulable grounds would not be met.<sup>111</sup>

## 2. Assessment of the Court of Appeals Panel

47. At the outset, the Panel notes that on appeal, Shala only explicitly challenges the Pre-Trial Judge’s finding that “the Accused has strong ties with influential individuals from within the former senior KLA leadership, [REDACTED]” – one of the findings in support of the Pre-Trial Judge’s ultimate conclusion that “the risk of flight in relation to Mr Shala continues to exist, even though it is moderate” under Article 41(6)(b)(i) of the Law.<sup>112</sup> The Panel further notes that Shala generally alleges without substantiation that this challenge would also affect the Pre-Trial Judge’s findings with respect to the risks under Article 41(6)(b)(ii) and (iii) of the Law, namely the risks of obstructing the progress of the Specialist Chambers’ proceedings and committing further crimes.<sup>113</sup> As the Panel cannot be expected to consider a party’s submissions if they are unsubstantiated, it will not address Shala’s submissions vis-à-

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<sup>110</sup> Response, para. 17.

<sup>111</sup> Reply, paras 18-19. See also Reply, para. 15.

<sup>112</sup> Appeal, para. 28. See Impugned Decision, paras 32, 35.

<sup>113</sup> Appeal, paras 27 (“The Pre-Trial Judge adopted the same set of factual findings in reaching the conclusion that there were articulable grounds to believe that the Accused would obstruct proceedings and commit further offences.”), 29 (“[W]ith the removal of the erroneous findings, no reasonable trier of fact could have reached this conclusion [that there are articulable grounds to believe that the Accused will abscond, obstruct proceedings, or commit further offences].”).

vis the Pre-Trial Judge's assessment of the risks under Article 41(6)(b)(ii) and (iii) of the Law.<sup>114</sup>

48. Moreover, the Panel notes that the Pre-Trial Judge found that some of the Proposed Conditions could mitigate Shala's risk of flight under Article 41(6)(b)(i) of the Law.<sup>115</sup> The Panel further notes that as the Pre-Trial Judge's conclusion that Shala's detention shall be continued is not based on his findings regarding the risk of flight, the Panel does not need to consider Shala's arguments related to factors relied upon by the Pre-Trial Judge in the flight risk assessment.<sup>116</sup> Nonetheless, the Appeals Panel will consider Shala's challenge against the Pre-Trial Judge's finding that "the Accused has strong ties with influential individuals from within the former senior KLA leadership, [REDACTED]".<sup>117</sup>

49. In this regard, the Panel observes that the Pre-Trial Judge refers to his findings in the Decision on Arrest and Transfer to support his conclusion in the Impugned Decision.<sup>118</sup> In the Decision on Arrest and Transfer, the Pre-Trial Judge "attache[d] some weight to the SPO submission that Mr Shala is a former commander of Brigade 121 of the [KLA] [REDACTED]".<sup>119</sup> The Pre-Trial Judge also took into account the fact that Shala (i) [REDACTED]; and (ii) [REDACTED].<sup>120</sup>

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<sup>114</sup> Appeal, paras 27, 29; Reply, paras 18-19. See also KSC-CA-2023-02, F00038/RED, Public Redacted Version of Appeal Judgment, 14 December 2023 (confidential version filed on 14 December 2023), para. 29.

<sup>115</sup> Impugned Decision, para. 52.

<sup>116</sup> See KSC-BC-2020-06, IA004/F00005/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021 (confidential version filed on 30 April 2021), para. 32; *Veseli* Second Appeal Decision on Detention, para. 29. See also Appeal, para. 28.

<sup>117</sup> Appeal, para. 28; Impugned Decision, para. 32.

<sup>118</sup> Impugned Decision, para. 32, fn. 70, referring to Decision on Arrest and Transfer, para. 20 and further references therein.

<sup>119</sup> Decision on Arrest and Transfer, para. 20.

<sup>120</sup> Decision on Arrest and Transfer, para. 20.



50. Recalling that decisions concerning detention on remand are discretionary and that the Pre-Trial Judge is best placed to assess the relevant factors,<sup>121</sup> the Panel is not convinced by Shala's undeveloped argument that the evidence "could not have been accepted by any reasonable trier of fact as a basis for the finding which relates to the present time".<sup>122</sup> The Panel also considers that even if some of the evidence relied on by the Pre-Trial Judge in his assessment dates back several years, it is still relevant,<sup>123</sup> especially given that Shala's ties with [REDACTED] continued over many years.<sup>124</sup>

51. The Panel further notes that Witness 1's concerns, which Shala challenges as "vague remarks",<sup>125</sup> constitute evidence underpinning the confirmed charges,<sup>126</sup> and that an appeal against a decision on review of detention is not a proper forum to challenge such evidence, nor can the Panel be expected to examine the evidence submitted by the SPO in preparation for trial.<sup>127</sup>

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<sup>121</sup> *Gucati* Appeal Decision on Detention, paras 49, 51, 64; KSC-BC-2018-01, IA004/F00006/RED, Public Redacted Version of Decision on Isni Kilaj's Appeal Against Decision on Continued Detention, 11 January 2024 (confidential version filed on 11 January 2024), para. 27. See also *Januzi* Appeal Decision on Detention, para. 18.

<sup>122</sup> See Appeal, para. 28.

<sup>123</sup> See Decision on Arrest and Transfer, para. 20, fns 22-23 and references cited therein. The Pre-Trial Judge established, based on available evidence, that Shala's ties with [REDACTED] date back at least to the conflict between the KLA and the Serbian forces, during which Shala served as a commander in Brigade 121 [REDACTED].

<sup>124</sup> The Pre-Trial Judge took into consideration, for example, that [REDACTED]. See Impugned Decision, para. 32, fn. 74, referring to Decision on Arrest and Transfer, para. 20. The Pre-Trial Judge also considered [REDACTED]. See Impugned Decision, para. 32, fn. 73, referring to Decision on Arrest and Transfer, para. 20, referring in footnote 23 to [REDACTED].

<sup>125</sup> Appeal, para. 28; Reply, para. 16.

<sup>126</sup> See e.g. Decision on Confirmation of Indictment, para. [REDACTED]; KSC-BC-2023-11, F00002/A02, Annex 2 to Submission of Indictment for confirmation and related requests, 20 November 2023 (strictly confidential and *ex parte*, reclassified as confidential on 19 December 2023), p. 8, fn. 47; F00146/A02, Annex 2 to Submission of joint Indictment, 12 January 2024 (confidential), p. 8, fn. 47.

<sup>127</sup> *Veseli* Second Appeal Decision on Detention, para. 23.

52. In light of the above, the Panel finds that Shala has failed to show an error in the Pre-Trial Judge's finding that he has strong ties with influential individuals from within the former senior KLA leadership, [REDACTED].<sup>128</sup>

53. In addition, the Panel notes that the Pre-Trial Judge recalled a previous finding he made in a decision in [REDACTED] that [REDACTED].<sup>129</sup> The Court of Appeals Chamber partially set aside this finding [REDACTED].<sup>130</sup> Nevertheless, the Panel considers that the Pre-Trial Judge's erroneous reliance on a previous finding in [REDACTED] to find that Shala likely had access to [REDACTED] associated networks and resources does not invalidate his overall conclusion that, if released, a risk still exists that Shala will obstruct the progress of Specialist Chambers' proceedings and commit further crimes under Article 41(6)(b)(ii) and (iii) of the Law.<sup>131</sup>

54. In light of the above, the Court of Appeals Panel dismisses Ground 2 of the Appeal.

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<sup>128</sup> Impugned Decision, para. 32. In light of the Panel's finding that the Pre-Trial Judge did not err with respect to this finding within his assessment of the risk under Article 41(6)(b)(i) of the Law, there is also no resulting consequence in terms of the Pre-Trial Judge's conclusions regarding the risks under Article 41(6)(b)(ii) and (iii) of the Law. See Appeal, paras 27-29; Reply, paras 18-19. See also above, para. 47.

<sup>129</sup> Impugned Decision, para. 32, fn. 72, recalling [REDACTED]. See also Impugned Decision, paras 39, 45.

<sup>130</sup> The Appeals Panel clarifies that in the Impugned Decision, the Pre-Trial Judge referred to the relevant Court of Appeals Chamber's decision, however, he did not cite to the paragraphs where the Court of Appeals Chamber set aside the relevant finding. See [REDACTED]. *Compare with* Impugned Decision, para. 32, referring to [REDACTED]. The Panel recalls that the Court of Appeals Chamber found that [REDACTED]. See [REDACTED].

<sup>131</sup> The Panel recalls that, besides "Shala's unity of interests with influential individuals from within the former KLA leadership, [REDACTED], and his likely access to their associated networks and resources", the Pre-Trial Judge also considered other factors to reach his conclusion on these risks, including the alleged close coordination between Shala and his co-Accused in relation to their approaches to Witness 1, Shala's increasing access to sensitive witness-related information as a result of the ongoing disclosure process, and the pervasive climate of fear and intimidation in Kosovo against witnesses or potential witnesses of the Specialist Chambers. See Impugned Decision, paras 38-41, 45. The Panel also recalls that the Pre-Trial Judge's conclusion that Shala's detention shall be continued is not based on his findings regarding the risk of flight under Article 41(6)(b)(i) of the Law. See Impugned Decision, para. 52. See also above, para. 48.

V. DISPOSITION

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

**DENIES** the Appeal;

**ORDERS** the Parties to file public redacted versions of the Appeal (IA002/F00001), the Response (IA002/F00003), and the Reply (IA002/F00004) or indicate, through a filing, whether these filings can be reclassified as public within ten days of receiving notification of the present Decision; and

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



**Judge Michèle Picard,  
Presiding Judge**

Dated this Friday, 12 April 2024

At The Hague, the Netherlands