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In:	**KSC-BC-2023-10/IA002** **The Specialist Prosecutor v. Sabit Januzi, Ismet Bahtijari and Haxhi Shala**
Before:	**Court of Appeals Panel**
	Judge Michèle Picard
	Judge Emilio Gatti
	Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Haxhi Shala
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Public Redacted Version of Reply to Prosecution Response to Interlocutory Appeal against Decision on Review of Detention

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I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law on Specialist Chambers and Specialist Prosecutor's Office[1] ("Law") and Rules 58(1), 58(2) and 170(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers[2] ("Rules"), the Defence for Mr. Haxhi Shala ("Accused") hereby submits a reply to the Prosecution Response to Defence 'Interlocutory Appeal against the Decision on Review of Detention of Haxhi Shala'[3] ("Response"). The Defence submits that the Response should be dismissed in its entirety.

II. PROCEDURAL HISTORY

2. On 4 December 2023 the Pre-Trial Judge granted the requests of the Specialist Prosecutor's Office ("SPO") for the issuance of an arrest warrant and a transfer order for the Accused.[4]

3. On 11 December 2023, the Accused was arrested in Prishtinë, Republic of Kosovo.

[1] Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015.

[2] KSC-BD-03/Rev3/2020.

[3] KSC-BC-2023-10/IA002, 29 February 2024.

[4] KSC-BC-2023-11/F00006, Decision on Request for Warrant of Arrest and Transfer Order, 4 December 2023, confidential ("Arrest Decision"), paras. 29(a), (b).

4. On 13 December 2023, the initial appearance of the Accused took place before the Pre-Trial Judge.[5]

5. On 9 February 2024 the Pre-Trial Judge issued the Decision on Review of Detention of Haxhi Shala[6] ("Impugned Decision"), in which he ordered the continued detention of the Accused.[7]

6. On 19 February 2024 the Defence filed an Interlocutory Appeal against the Decision on Review of Detention of Haxhi Shala[8] ("Interlocutory Appeal").

III. SUBMISSIONS

Error of law

7. Article 5(3) of the European Convention on Human Rights ("ECHR") requires consideration of detention when an arrested person is "brought promptly before a judge or other officer authorised by law to exercise judicial power" and this does not depend on a prior request by the defence.[9] More general

[5] KSC-BC-2023-11, First Appearance, Transcript, 13 December 2023, pp. 1-15.

[6] KSC-BC-2023-10/F00165, confidential.

[7] Impugned Decision, para. 61.a.

[8] KSC-BC-2023- 10/IA002/F00001, confidential.

[9] Interlocutory Appeal, paras. 13, 16, 20.

consideration by the SPO of "judicial control of detention"[10] does not address this fundamental obligation. The failure to address detention at the first appearance is not remedied, as the SPO appear to believe, by "the detailed analysis and findings pursuant to Article 41(6)" of the Arrest Decision.[11] That Decision provides legal authority only for the arrest of the Accused and his transfer to The Hague.

8. The SPO's submissions on the opportunity to challenge a judicial detention determination also do not address the central point that once a person has been brought before a court after their initial arrest, that court must examine the legality of their detention.[12] The whole point of the judicial safeguards written into Article 5(3) is to prevent 'arbitrary detention' *after* a person is detained. At stake is a fundamental principle of law. It is insufficient to base the legality of detention on an arrest warrant before a person has been detained. The reasons for this safeguard were outlined in the case of *Aquilina v Malta*: it operates as a safeguard by "ensuring that the act of deprivation of

[10] Response, paras. 11, 12.

[11] Response, para. 10.

[12] Response, para 13.

liberty is subject to independent judicial scrutiny" and it provides a safeguard against ill treatment[13]

9. Regardless of whether the judge has the *power* to discontinue detention under Rule 57, [14] the Pre-Trial Judge did not exercise any review of the legality of detention *when* Mr Shala was brought before the court on 13 December 2023. The substantive requirement under Article 5(3) was therefore not discharged because the Pre-Trial Judge did not review "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…"[15]

10. As the Prosecution accepts, *Harkmann v Estonia* establishes that prior judicial authorization does not discharge the Article 5(3) obligation.[16] In *Harkmann* the ECtHR acknowledged that Article 5(3) imposes on the judicial officer the obligations of reviewing the circumstances militating for or against detention, and of deciding, by reference to legal criteria, whether there are reasons to

[13] *Aquilina v. Malta*, Judgment, 29 April 1999, Appl. no. 25642/94, para. 49; See also African Commission on Human and People's Rights, '*Fair Trial Principles*' (2003) Section M 3(b) for the full list.

[14] Response para. 13.

[15] *Schiesser v Switzerland*, Judgment, 4 December 1979, ECtHR, Appl. No. 7710/76, para. 31.

[16] *Harkmann v. Estonia*, Judgment, 11 July 2006, ECtHR, Appl. No. 2192/03, paras 36-38.

justify detention and of ordering release if there are no such reasons.[17] The Court went on to hold:

> "The Court observes, first, that the text of Article 5 § 3 requires that a person shall be brought promptly before a judge or other judicial officer after having been arrested or detained. The text of the provision does not provide for any possible exceptions from that requirement, not even on grounds of prior judicial involvement. To conclude otherwise would run counter to the plain meaning of the text of the provision."[18]

11. This undermines the SPO's submission that the cases cited by the Defence (*De Jong, Baljet and Van den Bink v Netherlands*[19] and *Niedbała v. Poland*[20]) can be distinguished on the grounds that the initial arrest was not judicially ordered.[21]

12. The SPO claims that the Accused's requested relief of immediate and unconditional release has no stated basis in law.[22] This is not correct. It follows

[17] *Harkmann v. Estonia*, para. 36.

[18] *Harkmann v. Estonia*, para. 38.

[19] *De Jong, Baljet and Van den Bink v Netherlands*, Judgment, 22 May 1984, ECtHR, Application No. 8805/79, 8806/79, 9242/81.

[20] *Niedbała v. Poland*, Judgment, 4 July 2000, ECtHR, Application No. 27915/95.

[21] Response, para. 12.

[22] Response, para. 9.

from Article 5(4) of the ECHR[23], which provides that the release of a detained or arrested person should be ordered if the detention is unlawful.[24] There was no legal basis for the detention of the Accused from the first appearance until the Impugned Decision. At that point his detention was unlawful and, pursuant to Article 5(4) of the ECHR, his release should have been ordered.

13. The SPO wholly erroneously characterises the Constitutional Court Judgment that the Pre-Trial Judge referred to[25] as an "on-point ruling".[26] As explained in the Interlocutory Appeal, the Decision in question was no ordinary ruling in a case but a review of the Rules in order to determine their compliance with the fundamental rights and freedoms set forth in Chapter II of the Constitution.[27] Regarding the Judgment as giving the definitive position of the Constitutional Court on the issue raised here would have quite absurd consequences. If the Constitutional Court, or any court, could make a one-time, exhaustive and authoritative assessment of the compliance of a set of

[23] See also Article 29(4) of the Constitution of the Republic of Kosovo Official Gazette of the Republic of Kosovo No. K-09042008 of 9 April 2008 ("Constitution").

[24] KSC-BC-2023-11/F00039, Response to Prosecution Submission Pertaining to Periodic Detention of Haxhi Shala, 4 February 2024, confidential, para. 40.

[25] 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 Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 26 April 2017.

[26] Response, para. 15.

[27] Interlocutory Appeal, para. 22.

comprehensive criminal procedural provisions with human rights standards, human rights jurisprudence would cease to exist.

Error of fact

14. The Pre-Trial Judge concluded that there were articulable grounds to believe that the conditions set forth in Article 41(6)(b) of the Law were met, necessitating continued detention.[28] The Defence submitted in the Interlocutory Appeal that the Pre-Trial Judge's conclusion depended on a chain of factual findings relating to influential individuals from within the former senior KLA leadership which were wholly erroneous.[29]

15. The SPO submits that the factual findings were "reasonably and logically relied upon" and were given only some weight by the Pre-Trial Judge in determining that there was a risk of flight under Article 41(6)(b)(i).[30] Both submissions are mistaken.

16. As indicated in the Interlocutory Appeal, the findings rest exclusively on vague remarks by Witness 1 and events that took place years previously.[31] It follows that it would not be reasonable or logical to rely on them in drawing

[28] Impugned Decision, paras. 24-47.

[29] Interlocutory Appeal, para. 28.

[30] Response, para. 17.

[31] Interlocutory Appeal, para. 28.

an inference about what might happen now if the Accused were to be released from detention.

17. The chain of factual findings is decisive in that it is the only factual basis for inferring that the Accused would have the means and assets to enable him to escape.[32] The other findings that the Pre-Trial Judge makes in relation to flight risk relate to his motivation and opportunity to evade justice,[33] which on their own are insufficient to establish articulable grounds.

18. The Pre-Trial Judge was "of the view that Mr Shala's unity of interests with influential individuals from within the former KLA leadership, [REDACTED], and [REDACTED], are *important factors* in assessing the risk of obstruction of proceedings."[34] [Emphasis added.] Without these factors the threshold for articulable grounds to believe that the Accused would obstruct justice would not be met. It was on the basis of his finding of a risk of obstruction of justice that the Pre-Trial Judge also concluded that there was a risk of further commission of offences.[35]

[32] Impugned Decision, para. 32.

[33] Impugned Decision, paras. 31, 33.

[34] Interlocutory Appeal, para. 39.

[35] Interlocutory Appeal, para. 45.

19. The assertion in the Interlocutory Appeal that the chain of factual findings is *decisive* in leading to the conclusion that there are articulable grounds to believe that the Accused will abscond, obstruct proceedings, or commit further offences[36] is therefore vindicated. Without the chain, no reasonable trier of fact could have reached this conclusion.[37]

IV. CONCLUSION

20. For the foregoing reasons the Defence requests that the Appeals Chamber Panel dismiss the Response and make the orders requested in paragraph 30 of the Interlocutory Appeal.

Word Count: [1,674 words]

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[36] Interlocutory Appeal, para. 29.

[37] Interlocutory Appeal, para. 29.

5 March 2024

At London, United Kingdom