



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

In: KSC-BC-2023-10/IA002

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

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 29 February 2024

Language: English

Classification: Public

**Public redacted version of 'Prosecution response to Defence 'Interlocutory Appeal
against the Decision on Review of Detention of Haxhi Shala''**

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I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law¹ and Rules 58(1)-(2), 77(2) and 170(2) of the Rules,² the Specialist Prosecutor's Office ('SPO') hereby responds to Haxhi Shala's Appeal³ of the Decision⁴ ordering his continued detention. The Court of Appeals Panel ('Panel') should deny the Appeal in its entirety. As set out below, the Appeal fails to demonstrate any error in the Decision. To the contrary, Shala wilfully misapprehends relevant concepts to manufacture a baseless claim of error of law, and improperly seeks to recast his disagreement with the Pre-Trial Judge's findings as an error of fact.

II. PROCEDURAL HISTORY

2. On 4 December 2023, the Pre-Trial Judge issued the Arrest Decision.⁵
3. On 9 February 2024, the Pre-Trial Judge issued the Decision ordering Shala's continued detention.
4. On 19 February 2024, Shala filed the Appeal challenging the Pre-Trial Judge's Decision.

III. STANDARD OF REVIEW & APPLICABLE LAW

5. Articles 41(1) and (6) of the Law provide:

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law unless otherwise noted.

² KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules unless otherwise noted.

³ Interlocutory Appeal against the Decision on Review of Detention of Haxhi Shala, KSC-BC-2023-10/IA002/F00001, 19 February 2024, Confidential ('Appeal').

⁴ Decision on Review of Detention of Haxhi Shala, KSC-BC-2023-10/F00165, 9 February 2024 ('Decision').

⁵ Decision on Request for Warrant of Arrest and Transfer Order, KSC-BC-2023-11/F00006, 4 December 2023, Confidential ('Arrest Decision').

1. No one shall be deprived of his or her liberty by or on behalf of the Specialist Chambers or Specialist Prosecutor, save in such circumstances and in accordance with such proceedings as are prescribed by this Law and the protections enshrined in Article 29 of the Constitution.

[...]

6. The Specialist Chambers or the Specialist Prosecutor shall only order the arrest and detention of a person when:

a. there is a grounded suspicion that he or she has committed a crime within the jurisdiction of the Specialist Chambers; and

b. there are articulable grounds to believe that:

i. there is a risk of flight;

ii. he or she will destroy, hide, change or forge evidence of a crime or specific circumstances indicate that he or she will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices; or

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

6. The standard of review applied to interlocutory appeals is the same as that for appeals against judgements: errors on a question of law must be shown to invalidate the judgement.⁶ Thus, a party alleging an error of law must identify the alleged error, present arguments in support of the allegation, and explain how the error invalidates the decision. An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.⁷

7. Where a discretionary decision – such as one on pre-trial detention or provisional release⁸ – is appealed, the appellant ‘must demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect

⁶ See *Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Hashim Thaçi’s Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA004/F00005/RED, 30 April 2021, paras 4-7.

⁷ *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020 (‘Gucati Detention Appeal Decision’), para.12.

⁸ Gucati Detention Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.44.

interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.⁹ The Appeals Panel will also consider whether the lower level panel has given weight to extraneous or irrelevant considerations or has failed to give sufficient weight to relevant considerations in reaching its decision.¹⁰

8. Finally, as the Appeals Chamber has previously held, '[a]n appellant's mere disagreement with the conclusions that the first instance Panel drew from the available facts or the weight it accorded to particular factors is not enough to establish a clear error.'¹¹ Indeed, because of the fact-specific nature of provisional release decisions, the lower level panel is better placed to assess these factors.¹² Accordingly, an Appeals Panel must not intervene unless the appellant demonstrates the existence of a discernible error in that the lower level panel's decision was based on an error of law, error of fact, or abuse of discretion.¹³

IV. SUBMISSIONS

9. The Decision complies with all applicable law. Shala has not – and indeed cannot – meet the legal requirements to successfully challenge the Pre-Trial Judge's Decision to continue detention on remand. Further, Shala's requested relief of immediate and unconditional release,¹⁴ in addition to being unwarranted, has no stated basis in law, and should be considered moot in light of the present detention review.

⁹ Gucati Detention Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.14.

¹⁰ Gucati Detention Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.14.

¹¹ Gucati Detention Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.64.

¹² Gucati Detention Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.49.

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

¹⁴ *See* Appeal, KSC-BC-2023-10/IA002/F00001, paras 2,13.

A. THE DECISION IS NOT ERRONEOUS IN LAW

10. Shala contends that he should be unconditionally released from detention because the procedure set out in the Law is not compatible with Articles 5(3) and 5(4) of the European Convention on Human Rights ('ECHR').¹⁵ Shala claims that the Arrest Decision, notwithstanding its detailed analysis and findings pursuant to Article 41(6), cannot constitute an adequate legal basis for continued detention, and that the Pre-Trial Judge erred by not making an automatic (and *proprio motu*) reconsideration of the issue of detention at the initial hearing.¹⁶

11. Shala essentially alleges, incorrectly, that two core requirements of the ECHR are not present in the KSC detention framework: i) 'judicial control of detention', and ii) the opportunity to challenge a judicial detention determination. Contrary to Shala's assertions, and as articulated by the Pre-Trial Judge,¹⁷ pursuant to Article 41(6), 'judicial control of detention' begins prior to arrest, and pursuant to Article 41(2) and Rule 57, detention can (subject to certain conditions) be challenged immediately after arrest.

12. Shala relies on various European Court of Human Rights ('ECtHR') cases in support of the proposition that 'judicial control of the detention must be automatic' in the sense that '[i]t cannot be made to depend on a previous application by the detained person.'¹⁸ This argument misses that point. Judicial control of detention at the KSC is automatic pursuant to the above framework, and does not require an application from the detained person. In contrast to the facts here, the cases cited by Shala involve situations of either police or administrative detention (*De Jong, Baljet and Van den Brink*) or prosecutorial detention (*Niedbala*), where there was no judicial oversight of

¹⁵ Appeal, KSC-BC-2023-10/IA002/F00001, para.13.

¹⁶ Appeal, KSC-BC-2023-10/IA002/F00001, para.13.

¹⁷ Decision, KSC-BC-2023-10/F00165, para.13.

¹⁸ Appeal, KSC-BC-2023-10/IA002/F00001, para.16.

detention until the detained person made the appropriate application.¹⁹ Shala continues to misapprehend this entire concept by wilfully conflating the requirement to file a request to avail oneself of an existing judicial control mechanism with the requirement to file a written request to create or trigger a judicial control mechanism.²⁰

13. Shala also relies on ECtHR jurisprudence to support a series of arguments regarding opportunity to challenge a judicial detention determination. While *Harkmann v. Estonia* does stand for the proposition that prior judicial authorization for detention does not obviate the requirement for the opportunity to request review of such detention,²¹ this is, again, not the situation in the instant case nor in the KSC detention framework. Pursuant to Rule 57, regardless of any prior authorization, the reviewing judge has the power to discontinue detention²² 'at any time',²³ upon request of the SPO or the Accused, or *proprio motu*.²⁴ Further, review of detention is mandatory at least every two months, ensuring regular opportunities to challenge the necessity of detention and continuous judicial monitoring of this process.

14. The Pre-Trial Judge correctly emphasised that the Constitutional Court Chamber of the KSC has determined the compatibility of the relevant provisions of

¹⁹ See ECtHR, *De Jong, Baljet and Van den Brink v Netherlands*, Application Nos 8805/79, 8806/79, 9242/81, Judgment, 22 May 1984, paras 51-58; ECtHR, *Niedbala v. Poland*, Application No. 27915/95, Judgment, 24 July 2000, paras 49-55. As noted by the Pre-Trial Judge, *Aquilina v. Malta*, involves a similar situation of only *ex post facto* judicial control (ECtHR, *Aquilina v. Malta*, Application No. 25642/94, Judgment, 21 April 1999). It is unclear what Shala means when he states, without authority or explanation, that 'such a difference has no relevance to the principle established' in this line of cases.

²⁰ Appeal, KSC-BC-2023-10/IA002/F00001, para.17.

²¹ See ECtHR, *Harkmann v. Estonia*, Application No. 2192/03, Judgment, 11 July 2006, paras 13-16, 36-39.

²² Article 41(12) also allows for alternatives to detention, therefore not implicating *Caballero v United Kingdom* (*contra* Appeal, KSC-BC-2023-10/IA002/F00001, para.21; see ECtHR, *Caballero v United Kingdom*, Application No. 32819/96, Judgment, 22 May 1984, paras 51-58).

²³ That such review could be requested by Accused and/or Counsel at and/or immediately after (or even before) the initial hearing addresses any concerns related to prior *ex parte* submissions and is consistent with the International Covenant on Civil and Political Rights (*contra* Appeal, KSC-BC-2023-10/IA002/F00001, paras 20-21).

²⁴ This is consistent with the holding in *Vlatko Buzuk v. the Federation of Bosnia and Herzegovina* (*contra* Appeal, KSC-BC-2023-10/IA002/F00001, para.21; see Human Rights Chamber of Bosnia and Herzegovina, Case No. CH/01/7488, *Vlatko Buzuk*, decision on admissibility and merits of 3 July 2002, paras 98-101).

the KSC legal framework with the Constitution of Kosovo ('Constitution'), including Chapter 4 containing Rules 56 and 57.²⁵ Shala can only respond with the generality that the possibility of error in the application of these provisions always exists,²⁶ though he completely fails to articulate any such error in the instant case.

15. Relatedly, pursuant to Article 49(4), in accordance with Article 113(8) of the Constitution, referral to the Constitutional Court Chamber is discretionary rather than mandatory, and necessary only in the case of uncertainty as to the compatibility of the contested law with the Constitution. No such uncertainty exists here. There is an on-point ruling of the Constitutional Court Chamber, and Shala has failed to identify any valid legal challenge in this regard.

16. Further, even if providing an automatic detention review at the initial hearing was required, Shala fails to explain how this error invalidates the conclusion in the Decision that his detention was warranted at that time.²⁷

B. THE DECISION IS NOT ERRONEOUS IN FACT

17. Shala challenges the conclusion in the Decision that he is a risk of flight under Article 41(6)(b)(i), contending that it 'depends' on the Pre-Trial Judge's 'wholly erroneous'²⁸ finding that Shala has strong ties with influential individuals from within the former senior KLA leadership, [REDACTED].²⁹ In support, Shala recites a list of specific facts reasonably and logically relied upon by the Pre-Trial Judge in making his finding, and then makes the conclusory assertion that this evidence 'could not have been accepted by any reasonable trier of fact as a basis for the finding which relates to the present time'.³⁰ Shala ignores that in making his flight risk determination, the Pre-

²⁵ See Decision, KSC-BC-2023-10/F00165, para.13.

²⁶ See Appeal, KSC-BC-2023-10/IA002/F00001, paras 22-24.

²⁷ Gucati Detention Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.12.

²⁸ See Appeal, KSC-BC-2023-10/IA002/F00001, para.28.

²⁹ See Appeal, KSC-BC-2023-10/IA002/F00001, paras 27-28.

³⁰ See Appeal, KSC-BC-2023-10/IA002/F00001, para.28.

Trial Judge gave only ‘some weight’ to Shala’s ties to former KLA senior leadership and relied also on numerous additional bases for his finding, including Shala’s: i) awareness of the seriousness of the charges against him and potential sentence in the event of a conviction; ii) increased insight into the evidence underpinning these charges through the ongoing disclosure process; and iii) opportunity to evade justice, including by traveling freely to jurisdictions beyond the reach of the KSC.³¹

18. In sum, Shala’s claim is a (minimally supported) disagreement with the conclusion that the Pre-Trial Judge drew from the available facts and the weight he accorded to particular factors. This does not meet clear error standard.³² This is particularly so given the fact-specific nature of provisional release decisions, which the Pre-Trial Judge is best-placed to assess.³³

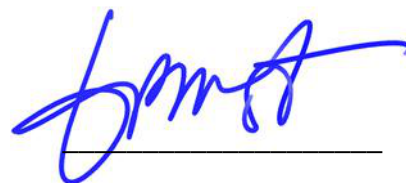
V. CLASSIFICATION

19. This filing is confidential pursuant to Rule 82(4) of the Rules. A public redacted version will be filed.

VI. RELIEF REQUESTED

20. For the foregoing reasons, the SPO respectfully requests that the Appeals Panel dismiss the Appeal in its entirety.

Word count: 2,172



³¹ See Arrest Decision, KSC-BC-2023-11/F00006, paras 30-31, 33.

³² Gucati Detention Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.64.

³³ Gucati Detention Appeal Decision, KSC-BC-2020-07/IA001/F00005, para.49.

Kimberly P. West

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Thursday, 29 February 2024

At The Hague, the Netherlands.