

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

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

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Haxhi Shala

**Date:** 13 May 2024

**Language:** English

**Classification:** Confidential

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**Haxhi Shala Submissions for Review of Detention**

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## I. INTRODUCTION

1. Pursuant to the Second Decision on Review of Detention of Haxhi Shala (“Second Decision”),<sup>1</sup> the Defence for Mr. Haxhi Shala (“Defence”) hereby makes its submissions for the next periodic review of detention.

## II. PROCEDURAL BACKGROUND

2. On 11 December 2023, Mr. Haxhi Shala (“Accused”) was arrested in Prishtinë, Republic of Kosovo. The next day he was transferred to the Kosovo Specialist Chambers Detention Management Unit in The Hague, the Netherlands.<sup>2</sup>
3. On 13 December 2023, an initial appearance before the Pre-Trial Judge took place.<sup>3</sup> The Pre-Trial Judge stated that the Accused had the right to request review of decisions on detention,<sup>4</sup> but then failed to issue any decision on the arrest, transfer and continued detention of the Accused.

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<sup>1</sup> KSC-BC-2023-10/F00246, 8 April 2024, confidential.

<sup>2</sup> KSC-BC-2023-11/F00014, Decision Setting the Date for the Initial Appearance of Haxhi Shala and Related Matters, 12 December 2023, paras. 4-5.

<sup>3</sup> KSC-BC-2023-11, First Appearance, Transcript, 13 December 2023, pp. 1-15.

<sup>4</sup> *Ibid*, p. 9, lines 19-22.

4. On 9 February 2024, the Pre-Trial Judge issued the Decision on Review of Detention of Haxhi Shala<sup>5</sup> (“First Decision”), in which he ordered the Accused’s continued detention.<sup>6</sup>
5. On 19 February 2024, the Accused filed an Interlocutory Appeal against the First Decision.<sup>7</sup>
6. On 8 April 2024 in the Second Decision the Pre-Trial Judge ordered the Accused’s continued detention<sup>8</sup> and ordered the Defence, if it wished to do so, to file submissions on the next review of detention by Monday, 13 May 2024.<sup>9</sup>
7. On 12 April 2024 in the Decision on Haxhi Shala’s Appeal Against Decision on Review of Detention,<sup>10</sup> the Court of Appeals Panel denied the Interlocutory Appeal.<sup>11</sup>

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<sup>5</sup> KSC-BC-2023-11/F00165, Decision on Review of Detention of Haxhi Shala, 9 February 2024, confidential.

<sup>6</sup> First Decision, para. 61(a).

<sup>7</sup> KSC-BC-2023-10/IA002/F00001, confidential.

<sup>8</sup> Second Decision, para. 51(a).

<sup>9</sup> *Ibid.*, para. 51(b).

<sup>10</sup> KSC-BC-2023-10/IA002/F00005, confidential.

<sup>11</sup> *Ibid.*, para. 55.

### III. APPLICABLE LAW

8. Article 5(3) of the European Convention for the Protection of Fundamental Rights and Freedoms<sup>12</sup> (“ECHR”) provides, in relevant part, as follows:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c) ... shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

9. Pursuant to Article 41(6) of the Law on Specialist Chambers and Specialist Prosecutor’s Office,<sup>13</sup> (“Law”), the Specialist Chambers (“SC”) shall only order the arrest and detention of a person when (a) there is a grounded suspicion that he or she has committed a crime within the jurisdiction of the SC; and (b) there are articulable grounds to believe that (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

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<sup>12</sup> Ratified 04 November 1950, in force 03 September 1953, 213 UNTS 221.

<sup>13</sup> Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 3 August 2015.

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. (“three limbs of Article 41(6)(b)”).

#### IV. SUBMISSIONS

10. Pursuant to Article 41(10) of the Law, the Pre-Trial Judge shall examine on or before 8 June 2024 whether reasons for detention on remand still exist and render a ruling by which detention on remand is extended or terminated.
11. The Defence submits that a ruling at that stage that the detention of the Accused should be extended would be in violation of Article 5(3) of the ECHR and Article 41(6)(b) of the Law.
12. The European Court of Human Rights (“ECtHR”) has held that under Article 5(3) of the ECHR “domestic courts are under an obligation to review the continued detention of persons pending trial with a view to ensuring release when circumstances no longer justify continued deprivation of liberty.”<sup>14</sup>

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<sup>14</sup> *McKay v. UK*, Judgment, 3 October 2006, ECtHR, Application no. 543/03, para. 45.

13. The ECtHR case of *Clooth v. Belgium*<sup>15</sup> addresses the question whether the length of the Applicant's detention on remand exceeded the reasonable time referred to in Article 5(3). The Court found that by his conduct the Applicant considerably impeded and indeed delayed the inquiry and that the authorities' belief that he should consequently be kept in detention in order to prevent him from disrupting the inquiry even more was easy to understand, at least at the outset.<sup>16</sup> The Court also held:

“In the long term, however, the requirements of the investigation do not suffice to justify the detention of a suspect: in the normal course of events the risks alleged diminish with the passing of time as the inquiries are effected, statements taken and verifications carried out.”<sup>17</sup>

14. The Court noted in *Clooth v. Belgium* that the orders or decisions, which specified the cause or the purpose of the inquiries underway precluding the release of the Applicant had been rare and that the majority of them had merely mentioned, without more ado, the requirements of the investigation, when they were not simply confined to referring, by means of a stereotyped

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<sup>15</sup> Judgment, 27 November 1991, ECtHR, Application no. 49/1990/240/311.

<sup>16</sup> *Clooth v. Belgium*, para. 43.

<sup>17</sup> *Clooth v. Belgium*, para. 43.

formula, to an earlier decision, adopted more than eleven months previously in one case.<sup>18</sup>

15. The Court concluded that the length of the Applicant's detention on remand exceeded the reasonable time referred to in Article 5(3).<sup>19</sup>

16. The investigation in the instant case is now advanced and the evidence to be presented at trial has mostly been disclosed to the Defence. On 27 March 2024, the Pre-Trial Judge ordered the SPO to complete its pre-trial disclosure obligations with the exception of any material requiring judicial authorisation and to submit a notice in the record of the case providing a detailed overview of the entire disclosure process by Friday 19 April 2024.<sup>20</sup> On 19 April 2024, the SPO gave a detailed notice of the disclosure process and noted that it had two pending requests for disclosure pursuant to Rule 102(1)(b) of the Rules.<sup>21</sup> The SPO affirmed that in accordance with the calendar established by the Pre-Trial Judge, it had released a total of 34 disclosure packages to the Defence,

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<sup>18</sup> *Clooth v. Belgium*, para. 44.

<sup>19</sup> *Clooth v. Belgium*, para. 49.

<sup>20</sup> KSC-BC-2023-10/F00233, Decision Setting out the Calendar for the Remaining Procedural Steps of the Pre-Trial Phase, 27 March 2024.

<sup>21</sup> KSC-BC-2023-10/F00260, Prosecution detailed notice of disclosure process, fn. 7.

and communicated the same to the Pre-Trial Judge, through Legal Workflow.<sup>22</sup>

17. The First and Second Decisions of the Pre-Trial Judge indicate a concern with the possibility of interference by the Accused with witnesses.<sup>23</sup> However, the two witnesses that the SPO is seeking to call<sup>24</sup> have already made statements which have been disclosed to the Defence,<sup>25</sup> thereby reducing any perceived risks of interference.
  
18. Applying the principle in *Clooth v. Belgium*, the risks of interference with the investigation and the related grounds for detention are now much reduced in view of the stage reached. More specifically, if the Accused were inclined to interfere with the course of justice, he would have less incentive to do so because the case against him is on the record and the scope for reducing its strength is thereby substantially diminished. The standard of there being articulable grounds to believe that there would be interference as set forth in the second limb of Article 41(6)(b) is therefore not now met.

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<sup>22</sup> KSC-BC-2023-10/F00260, para. 4.

<sup>23</sup> First Decision, paras. 38-41; Second Decision, para. 32.

<sup>24</sup> KSC-BC-2023-10/F00177, Submission of Prosecution Pre-Trial Brief, witness and exhibit lists, and Rule 109(c) chart, 16 February 2024, Confidential Annex 2.

<sup>25</sup> Disclosures 2, 5 and 7 in Case 11 and Disclosure 20 in Case 10.



19. In the Second Decision the Pre-Trial Judge recalled that, even though the existence of a risk of obstruction did not automatically translate into a risk of committing further offences, the factors underpinning the former were of relevance to the assessment of the latter in the circumstances of the present case.<sup>26</sup> In particular, he found that the Accused had the means and incentive to repeat the offences alleged to have been committed by him.<sup>27</sup> He concluded that the risk that Mr Shala would commit further crimes continued to exist.<sup>28</sup>
20. In short, the Pre-Trial Judge's finding of a risk under the third limb of Article 46(6)(b) rested on his finding on the second limb. Since owing the advanced stage in the proceedings there are now no articulable grounds to believe that the second limb is instantiated, the threshold in relation to the third has not been met either.
21. As to the first limb of Article 41(6)(b), the Pre-Trial Judge found in the Second Decision on 8 April 2024 that the risk of flight in relation to the Accused continued to exist, even though it was moderate.<sup>29</sup>

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<sup>26</sup> Second Decision, paras. 35.

<sup>27</sup> Second Decision, paras. 35.

<sup>28</sup> Second Decision, paras. 35.

<sup>29</sup> Second Decision, paras. 27-30.

22. The ECtHR has held that the danger of flight necessarily decreases as the time spent in detention passes by for the probability that the length of detention on remand will be deducted from the period of imprisonment which the person concerned may expect if convicted, is likely to make the prospect seem less awesome to him and reduce his temptation to flee.<sup>30</sup>
23. By the time that the next review of detention takes place, the Accused will have been in pre-trial detention for nearly six months. If he is convicted and a sentence of imprisonment is imposed, the term that he will actually serve will be reduced accordingly thereby diminishing any incentive for flight that he might be supposed to have.
24. The Pre-Trial Judge found on both 9 February 2024 and 8 April 2024 that the risk of flight was moderate.<sup>31</sup> In the Defence submission, the effects of the accumulation of time spent in detention on remand just described tip the scales in favour of a finding that there are no articulable grounds to believe that there is a risk of flight as set forth in Article 41(6)(b).
25. Since none of the three limbs of Article 41(6)(b) have been established, a ruling by which detention on remand is terminated should be given at the next

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<sup>30</sup> *Neumeister v. Austria*, Judgment, 27 June 1968, ECtHR, Appl. no. 1936/63, para. 10.

<sup>31</sup> First Decision, para. 35; Second Decision, para. 30.

review. The passing of time reduces the risk in all three of the limbs of Article 41(6)(b). A failure to take account of this and an order to continue the detention of the Accused would be in violation of the ECHR.

## V. QUALIFICATION

26. This filing is submitted confidentially pursuant to Rule 82(4) of the Rules.

## VI. CONCLUSION

27. For the foregoing reasons the Defence requests that at the next review of detention:

- (i) The detention on remand of the Accused be unconditionally terminated; or, in the alternative
- (ii) His release be ordered subject to one or more of the conditions to which he would consent.<sup>32</sup>

**Word Count: [1,896 words]**

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<sup>32</sup> Response to Prosecution Submission Pertaining to Periodic Detention of Haxhi Shala, KSC-BC-2023-11/F00039, 4 February 2024, confidential, para. 70.



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**Monday, 13 May 2024**

**At Doha, the State of Qatar**