

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

Before: Pre-Trial Judge
Judge Marjorie Masselot

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Haxhi Shala

Date: 6 June 2024

Language: English

Classification: Public

Request for Reconsideration of Third Decision on Review of Detention of Haxhi Shala

Specialist Prosecutor

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Counsel for Ismet Bahtijari

Dr. Felicity Gerry

Counsel for Haxhi Shala

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I. INTRODUCTION

1. The Defence for Mr. Haxhi Shala (“Defence”) hereby submits a request for reconsideration pursuant to Rule 79 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).¹

II. PROCEDURAL HISTORY

2. On 11 September 2023, the President assigned Judge Nicolas Guillou as Pre-Trial Judge in the present case.²
3. On 27 March 2024, in the Decision Setting out the Calendar for the Remaining Procedural Steps of the Pre-Trial Phase (“Decision on Calendar”),³ the Pre-Trial Judge ordered the Defence teams of Sabit Januzi, Ismet Bahtijari and Haxhi Shala to submit a Pre-Trial Brief, if any, by Friday, 7 June 2024 and decided to set the date for transmitting the case file to the Trial Panel to Friday, 21 June 2024.⁴

¹ KSC-BD-03/Rev3/2020.

² KSC-BC-2023-10/F00001, Decision Assigning a Pre-Trial Judge, 11 September 2023. The decision was reclassified as public on 9 October 2023.

³ KSC-BC-2023-10/F00233.

⁴ Decision on Calendar, paras. 30(i), 30(k).

4. On 13 May 2024, Mr Haxhi Shala (“Accused”) filed Haxhi Shala Submissions for Review of Detention (“Defence Detention Submissions”).⁵
5. On 24 May 2024, the Specialist Prosecutor’s Office (“SPO”) filed Submission Pertaining to Periodic Detention Review of Haxhi Shala (“Prosecution Detention Submissions”).⁶
6. On 31 May 2024, the Accused filed Haxhi Shala Reply to Prosecution Submission Pertaining to Periodic Detention Review (“Reply”).⁷
7. On 5 June 2024, the Pre-Trial Judge issued Decision on Bahtijari Request for Extension of Time (“Decision on Extension”)⁸ and Third Decision on Review of Detention of Haxhi Shala (“Third Detention Decision”).⁹ Legal Workflow shows that the Decision on Extension and the Third Detention Decision were received respectively at 9:06 and 9:32.

⁵ KSC-BC-2023-10/F00286, confidential.

⁶ KSC-BC-2023-10/F00301, confidential.

⁷ KSC-BC-2023-10/F00311, confidential.

⁸ KSC-BC-2023-10/F00324.

⁹ KSC-BC-2023-10/F00325.

8. On 6 June 2024, the President assigned Judge Marjorie Masselot as Pre-Trial Judge to replace Judge Guillou who had resigned from the Roster of International Judges.¹⁰

III. APPLICABLE LAW

9. Rule 56(2) of the Rules provides:

“The Panel shall ensure that a person is not detained for an unreasonable period prior to the opening of the case. In case of an undue delay caused by the Specialist Prosecutor, the Panel, having heard the Parties, may release the person under conditions as deemed appropriate.”

10. Rule 79(1) of the Rules provides, *inter alia*, that “[i]n exceptional circumstances and where a clear error of reasoning has been demonstrated or where reconsideration is necessary to avoid injustice, a Panel may, upon request by a Party or, where applicable, Victims’ Counsel, or *proprio motu* after hearing the Parties, reconsider its own decision.” Pursuant to Rule 2(1) of the Rules, the term “Panel” in this provision includes a Pre-Trial Judge.

¹⁰ KSC-BC-2023-10/F00327, Decision Assigning a Pre-Trial Judge, paras. 3-4.

IV. SUBMISSIONS

11. On 5 June 2024 in the Decision on Extension the former Pre-Trial Judge ordered the Defence Teams to submit a Pre-Trial Brief, if any, by Thursday, 20 June 2024¹¹ and set “the new *tentative* date for transmitting the case file to the Trial Panel to Friday, 5 July 2024”.¹²

12. In the Third Detention Decision which reached the Registry a few minutes later, when considering the proportionality of detention he held:

"In addition, the Pre-Trial Judge recalls that a concrete timeline has been set for the remainder of the pre-trial phase, and that progress continues to be made in preparation for the transfer of the case to the Trial Panel, which has now been set for 21 June 2024. Notably, (i) the SPO has completed its pre-trial obligations, with the exception of any material requiring judicial authorisation; (ii) the SPO and the Defence have submitted their points of agreement on matters of law and fact in a joint

¹¹ Decision on Extension, para. 20(b).

¹² Decision on Extension, para. 20(c) [Italics added.]

filing; (iii) the SPO has submitted its Pre-Trial Brief; and (iv) the Defence shall submit its Pre-Trial Brief, if any, by 7 June 2024."¹³

13. The Pre-Trial Judge then inferred that the time Mr Shala had spent in pretrial detention was not unreasonable within the meaning of Rule 56(2) of the Rules.¹⁴ This conclusion was evidently based on incorrect information as to the length of the pre-trial phase. At the time that the Pre-Trial Judge issued the Third Detention Decision, he had tentatively set the date for transmitting the case file to the Trial Panel as 5 July 2024 and he had postponed the deadline for the Defence Teams to submit their Pre-Trial Briefs to 20 June 2024.¹⁵
14. The postponement of the prescribed period for the filing of Defence Pre-Trial Briefs and the delay in the date set for the transmission to the Trial Panel may appear to be a prolongation of the pre-trial phase by a relatively small amount of time. However, this would be a misunderstanding of the context. The implications of the delay for determining the proportionality of detention are significant.
15. The Pre-Trial Judge dismissed the submissions of the Defence for the disproportionality of detention on a mistaken basis. For the reasons that the

¹³ Third Detention Decision, para. 49 (footnotes omitted).

¹⁴ Third Detention Decision, para. 50.

¹⁵ Decision on Extension, paras. 20(b), 20(c).

Defence gave in the Defence Detention Submissions and the Reply the proportionality of detention is at best finely balanced. In these circumstances had the Pre-Trial Judge not employed incorrect reasoning he should have arrived at the conclusion that detention was disproportionate. His determination that it was proportionate rested upon finding that (i) all required procedural steps relating to the pre-trial phase have been, are being or will be completed with a view to transmitting the case for trial at a point in the *foreseeable future*¹⁶ and (ii) that a *concrete* timeline has been set for the remainder of the pre-trial phase.¹⁷ These findings are contradicted by the open-ended extension of the pre-trial phase in the Decision on Extension, in which the Pre-Trial Judge only *tentatively* set a date for transmission to the Trial Panel.

16. The demonstrably erroneous grounds for the former Pre-Trial Judge's Decision meet the criteria for reconsideration set forth in Rule 79(1) of the Rules. The inconsistency in the determinations that he made in the course of a few minutes constitute exceptional circumstances. There has been a clear error of reasoning and reconsideration is necessary to avoid injustice. There is no reason why under Rule 79(1) of the Rules a Pre-Trial Judge should not

¹⁶ Third Detention Decision, para. 48.

¹⁷ Third Detention Decision, para. 49.

reconsider a decision of his or her predecessor. The Defence therefore submits that the current Pre-Trial Judge should reconsider the Third Detention Decision and find the detention of the Accused to be disproportionate.

V. CONCLUSION

17. For the foregoing reasons the Defence requests that the Pre-Trial Judge reconsider the Third Detention Decision and order the release of the Accused.

Word Count: [1,120 words]



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At Washington DC, United States of America