

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

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Reply to Prosecution Response to F00329

Specialist Prosecutor

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I. INTRODUCTION

1. The Defence for Mr. Haxhi Shala (“Defence”) hereby submits a reply to Prosecution response to F00329.¹

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-BC-2023-10/F00341, 18 June 2024.

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.⁵
5. On 24 May 2024, the Specialist Prosecutor’s Office (“SPO”) filed Submission Pertaining to Periodic Detention Review of Haxhi Shala.⁶
6. On 31 May 2024, the Accused filed Haxhi Shala Reply to Prosecution Submission Pertaining to Periodic Detention Review.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.
8. In the Third Detention Decision, when considering the proportionality of detention, the Pre-Trial Judge 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

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.

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 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."¹⁰

9. However, on the same day in the Decision on Extension the 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* [Italics added] date for transmitting the case file to the Trial Panel to Friday, 5 July 2024”.¹²
10. 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.¹³

¹⁰ Third Detention Decision, para. 49 (footnotes omitted).

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

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

¹³ KSC-BC-2023-10/F00327, Decision Assigning a Pre-Trial Judge, paras. 3-4.

11. On the same day, the Defence submitted a request for reconsideration of the third decision on review of the detention of the Accused (“Request for Reconsideration”).¹⁴
12. On 18 June 2024, the SPO responded to the Defence’s Request for Reconsideration.¹⁵
13. On 20 June 2024, the Pre-Trial Judge granted Januzi’s request for an extension of the deadline for filing the Pre-Trial Brief.¹⁶ The Pre-Trial Judge set the new tentative date for transmitting the case file to the Trial Panel to fourteen (14) days following notification of the Decision on the SPO Amendment Request.¹⁷

III. APPLICABLE LAW

14. Rule 56(2) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”)¹⁸ provides:

¹⁴ KSC-BC-2023- 10/F00329, Request for Reconsideration of Third Decision on Review of Detention of Haxhi Shala, 6 June 2024.

¹⁵ KSC-BC-2023-10/ F00341, Prosecution response to F00329, 18 June 2024, public.

¹⁶ KSC-BC-2023-10/ F00345, Decision on Januzi Request for Extension of Time, 20 June 2024, public.

¹⁷ KSC-BC-2023-10/ F00345, para. 19.

¹⁸ KSC-BD-03/Rev3/2020.

“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.”

15. 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.

IV. SUBMISSIONS

16. The Defence submits that it has demonstrated a clear error of reasoning in the Pre-Trial Judge’s decision and that reconsideration is necessary to avoid injustice.

(i) *Error of reasoning*

17. In its response, the SPO submits that the Accused has failed to demonstrate a clear error of reasoning in the decision. The Defence disagrees. In his Third

Detention Decision, the Pre-Trial Judge found that the Accused's detention was proportionate because (*inter alia*) "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".

18. There are two factual errors in the Pre-Trial Judge's reasoning. Firstly, the transfer of the case to the Trial Panel had not been set for 21 June 2024. Rather, in the Pre-Trial Judge's Decision on Extension, the Pre-Trial Judge set "the new tentative date for transmitting the case file to the Trial Panel to Friday, 5 July 2024." In fact, now as a consequence of the Decision on Januzi Request for Extension of Time and the Decision on Request for Leave to Appeal F00294¹⁹ the date for transmission will be 8 July.²⁰ Secondly, it follows from the use of the word "tentative" that a "concrete" timeline had not been set for the remainder of the pre-trial phase.
19. Therefore, given that the Pre-Trial Judge's reasoning was based on factually incorrect information, there is a clear error of reasoning. This error of reasoning is amenable to reconsideration under Rule 79(1).

¹⁹ KSC-BC-2023-10/ F00347, 24 June 2024, confidential.

²⁰ KSC-BC-2023-10/ F00345, para. 19.

20. In its response the SPO concedes that “Shala is correct that the Pre-Trial Judge mentions the original 21 June 2024 date of transmission in the case progression portion of his proportionality analysis” but suggests that this does not amount to an error of reasoning because it is “only a small subcomponent of his overall - and still correct – reasoning”. Such a position is wholly illogical and does not alter whether there has been error.
21. The Defence submit that it is immaterial whether an error of reasoning is a “small component” of the decision in question or a large component. An error of reasoning exists, and falls for reconsideration under Rule 79(1). Indeed, for reasons that will be given the error of reasoning is by no means a “small component” of the decision.

Use of Reconsideration Procedure

22. The SPO submits that the Accused’s Request fails to demonstrate any error of reasoning or injustice that warrants undertaking the exceptional measure of reconsideration.²¹ The Accused disagrees. Pursuant to Rules 2(1) and 79(1) of the Rules, in exceptional circumstances and where a clear error of reasoning has been demonstrated or where reconsideration is necessary to avoid

²¹ KSC-BC-2023-10/ F00341, para. 1.

injustice, a Pre-Trial Judge may, upon request by a Party, reconsider its own decision.

23. Conversely, Rule 57 of the Rules empowers the Pre-Trial Judge to review a decision on detention on remand at any time where a “change in circumstances” has occurred since the last review. There has been no change in circumstances since the last review in this case. Therefore, a request for reconsideration is the correct avenue for redress in this situation, not a request for a review of detention.
24. The SPO claims that the Shala Defence caused a delay in the tentative date for transmission of the case file to the Trial Panel by not opposing the Bahtijari Defence’s request for an extension of time to file its pre-trial brief and that this should be taken into account when assessing proportionality and/or reasonableness.²²
25. It cites in support the Decision on Periodic Review of Detention of Rexhep Selimi of 15 November 2023 in *Prosecutor v. Thaçi et al.*,²³ in which a Trial Chamber found the conduct of the Defence in overestimating time for cross-examination to be an objective factor which must be taken into account when

²² KSC-BC-2023-10/ F00341, para. 3.

²³ KSC-BC-2020- 06/F01927.

assessing whether proceedings exceed what is reasonable.²⁴ The Trial Chamber cited a paragraph in *Eckle v. Germany* at the European Court of Human Rights (“ECtHR”) in which reasonableness of the length of proceedings under Article 6(1) of the European Convention on Human Rights was considered.²⁵ The ECtHR found that whilst no reproach could be levelled against the Applicants for having made full use of the remedies available under the domestic law, they increasingly resorted to actions, including the systematic recourse to challenge of judges, likely to delay matters, some of which could even be interpreted as illustrating a policy of deliberate obstruction. It held that such conduct constituted an objective fact, not capable of being attributed to the respondent State, which was to be taken into account when determining whether or not the proceedings lasted longer than the reasonable time referred to in Article 6(1). Both the Decision on Periodic Review of Detention of Rexhep Selimi and the Judgment in *Eckle v. Germany* are distinguishable because they concern delays that are plainly attributable to fault on the part of the defendants concerned. The Shala Defence’s position of neutrality on the extension of time sought by Mr. Bahtijari is entirely reasonable and does not reflect any error, negligence or impropriety.

²⁴ KSC-BC-2020- 06/F01927, para.46.

²⁵ *Eckle v. Germany*, ECtHR, 8130/78, Judgment, 15 July 1982, para. 82.

(ii) *Reconsideration is necessary to avoid injustice*

26. The Accused is at currently at risk of being detained for a longer period than is justified because of an error of reasoning in the Pre-Trial Judge's decision. This evidently places him at "risk of injustice". The proportionality of the Accused's detention was at best finely balanced when the date for transmission of the case file was 21 June 2024.²⁶ The delay that the Pre-Trial Judge decided upon in the Decision on Extension is therefore sufficient to render his detention disproportionate. The request for reconsideration is therefore "necessary to avoid injustice" for the purposes of Rule 79(1) of the Rules.

V. CONCLUSION

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

²⁶ Request for Reconsideration, para. 15.

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At London, United Kingdom