

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

Before: The President of the Specialist Chambers
Judge Ekaterina Trendafilova

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Haxhi Shala

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Request for Protection of Legality against Haxhi Shala's Appeal Against Decision on Review of Detention

Specialist Prosecutor

Kimberly P. West

Counsel for Sabit Januzi

Jonathan Elystan Rees KC

Huw Bowden

Counsel for Ismet Bahtijari

Dr. Felicity Gerry KC

Counsel for Haxhi Shala

Toby Cadman

John Cubbon

I. INTRODUCTION

1. Pursuant to Articles 48(6) and 48(8) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law")¹ and Rule 59 and 193 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"),² the Defence for Mr. Haxhi Shala ("Accused") hereby submits a Request for the Protection of Legality against the Decision on Haxhi Shala's Appeal Against Decision on Review of Detention which the Court of Appeals Chamber issued on 12 April 2024 ("Impugned Decision").³
2. The Referral is made on the ground that the failure of the Kosovo Specialist Chambers ("KSC") to consider the legality and merits of detention *after* the Accused was brought before it is in breach of Article 5(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").⁴

¹ Law no.05/L-053, 3 August 2015.

² KSC-BD-03/Rev3/2020.

³ KSC-BC-2023/IA002.

⁴ Ratified 04 November 1950, in force 03 September 1953, 213 UNTS 221.

II. PROCEDURAL HISTORY

3. 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 transfer order for the Accused.⁵
4. On 11 December 2023, the Accused was arrested in Prishtinë, Republic of Kosovo.
5. On 12 December 2023, the Accused was transferred to the KSC Detention Management Unit in The Hague, the Netherlands.⁶
6. On 13 December 2023, an initial appearance before the Pre-Trial Judge took place at the Kosovo Specialist Chambers in The Hague.⁷ At the hearing, the Pre-Trial Judge stated that the Accused had the right to request review of decisions on detention,⁸ but then failed to issue any decision on the arrest, transfer and continued detention of the Accused.

⁵ KSC-BC-2023-11/F00006, Decision on Request for Warrant of Arrest and Transfer Order, 4 December 2023, confidential ("Decision on Arrest and Transfer"), paras. 29(a), (b).

⁶ 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.

⁷ KSC-BC-2023-11, First Appearance, Transcript, 13 December 2023, pp. 1-15.

⁸ *Ibid*, p. 9, lines 19-22.

7. At the first Status Conference held on 15 December 2023, the Accused entered pleas of not guilty to each charge in the indictment.⁹ No ruling was made on the arrest, transfer and continued detention of the Accused.
8. Following a Scheduling Order of 25 January 2024,¹⁰ the SPO and the Defence filed submissions on the first review of detention of the Accused on 31 January 2024¹¹ and on 4 February 2024¹² respectively.
9. On 9 February 2024, the Pre-Trial Judge issued his Decision on the Review of Detention of Haxhi Shala, denying the request for his release on the basis of the lawfulness of his detention.¹³
10. On 19 February 2024, the Accused appealed the Pre-Trial Judge's decision on the basis: (i) that the Pre-Trial Judge had made an error of law on the lawfulness of his detention; and (ii) that the Pre-Trial had made an error of fact pursuant to Article 41(6) of the Law.¹⁴

⁹ KSC-BC-2023-11, Status Conference, Transcript, 15 December 2023, p. 42.

¹⁰ KSC-BC-2023-11/F00034, Scheduling Order for Submissions on Review of Detention, 25 January 2024, paras. 3-4.

¹¹ KSC-BC-2023-11/F00037, Prosecution submission pertaining to periodic detention review of Haxhi Shala, 31 January 2024, confidential

¹² KSC-BC-2023-11/F00039, Response to Prosecution Submission Pertaining to Periodic Detention of Haxhi Shala, 4 February 2024, confidential.

¹³ KSC-BC-2023-11/F00165, Decision on Review of Detention of Haxhi Shala, 9 February 2024.

¹⁴ KSC-BC-2023-10/IA002/F00001, Interlocutory Appeal against the Decision on Review of Detention of Haxhi Shala, 19 February 2024.

11. On 29 February 2024, the SPO issued its response to the Defence.¹⁵ On 6 March 2024, the Accused filed his Reply.¹⁶
12. On 8 April 2024 in the Second Decision on Review of Detention of Haxhi Shala¹⁷ the Pre-Trial Judge ordered the Accused's continued detention.¹⁸
13. On 12 April 2024, the Panel of the Court of Appeals Chambers issued the Impugned Decision dismissing both grounds of appeal.
14. On 5 June 2024, the Pre-Trial Judge issued the Third Decision on Review of Detention of Haxhi Shala.¹⁹
15. On 6 June 2024, the Defence submitted a request for reconsideration of the third decision on review of the detention of the Accused.²⁰ This was followed

¹⁵ KSC-BC-2023-11/IA002/F00003, Prosecution response to Defence 'Interlocutory Appeal against the Decision on Review on Detention, 29 February 2024, confidential.

¹⁶ KSC-BC-2023-11/IA/F00004, Reply to Prosecution Response to Interlocutory Appeal against Decision on Review of Detention, 6 March 2024, confidential.

¹⁷ KSC-BC-2023-10/F00246, 8 April 2024, confidential ("Second Decision").

¹⁸ Second Decision, para. 51(a).

¹⁹ KSC-BC-2023-10/F00325.

²⁰ KSC-BC-2023- 10/F00329, Request for Reconsideration of Third Decision on Review of Detention of Haxhi Shala, 6 June 2024.

by a Response from the SPO,²¹ a Reply from the Accused²² and a supplement to the Reply.²³

16. On 10 July 2024, the Defence filed its submissions for the fourth periodic review of detention.²⁴ A decision on the request is pending at the time of filing this request.

III. SUBMISSIONS ON VIOLATIONS OF ARTICLE 5(3)

Ground 1 - 'Impugned Decision' violates Article 5(3) ECHR

17. It is worth setting out first what is not disputed or contested by the Accused to avoid any conflation of issues:
- a. That an arrest warrant might authorise the initial arrest of the Accused²⁵
 - b. That the Accused was brought before a court in a timely manner.²⁶

²¹ KSC-BC-2023-10/ F00341, Prosecution response to F00329, 18 June 2024.

²² KSC-BC-2023-10/F00349, Reply to Prosecution Response to F00329, 24 June 2024.

²³ KSC-BC-2023-10/F00355, Supplement to Reply to Prosecution Response to F00329, 1 July 2024.

²⁴ KSC-BC-2023-10/F00380, Haxhi Shala Submissions for Review of Detention, confidential.

²⁵ Impugned Decision, para. 23.

²⁶ Impugned Decision, para. 35.

- c. The Accused's counsel who was appointed by the court could have challenged his detention.²⁷
 - d. The Accused's detention is automatically reviewed every two months.²⁸
 - e. That the Pre-Trial Judge possessed the power of release.²⁹
18. The Accused's submissions are that Article 5(3) requires that the legality and merits of detention be considered automatically *after* a suspect has been detained. This acts as a safeguard to ensure that a defendant is not being "arbitrarily" or unjustifiably detained. The case law of the European Court of Human Rights establishes the following propositions:³⁰
- a. That this review must take place after a person is arrested.
 - b. That this will include a review of the legality and merits of detention.
 - c. That it is automatic.
 - d. That it is conducted by a judicial officer.

²⁷ Impugned Decision, para. 35.

²⁸ Impugned Decision, para. 36; Rule 57 of the Rules.

²⁹ Impugned Decision, para. 36.

³⁰ *Aquilina v Malta*, ECtHR no. 25642/94, Judgment, 29 April 1999, paras. 47 - 55; *McKay v UK*, ECtHR, no. 543/03, Judgment, 3 October 2006, paras. 32 - 40.

- e. That it is carried out promptly.
- f. That the decision-maker should have the power of release.
- g. That such a power of release should be exercised if a person doesn't fall within the permitted exceptions in Article 5.

Moreover, in accordance with the principle of legality

- h. That any judge sanctioning the detention or continued detention should provide reasons for their decision.
19. The Impugned Decision makes two main arguments, which are both inconsistent with Article 5(3):
- 1. Judicial control of detention may occur *prior* to a person's detention.
 - 2. That the Pre-Trial Judge's power to release of his own motion provided a sufficient safeguard.

(i) Judicial Control *Prior* to a Person's Detention

20. The Impugned Decision states that "in this case the Pre-Trial Judge exercised judicial control *prior* to the Accused's arrest in accordance with the Specialist Chambers' legal framework."³¹

³¹ Impugned Decision, para. 27.

21. The Defence submits that it is a legal impossibility to review the legality and merits of detention *prior* to a person's detention. Article 5(3) requires a review *after* a person has been detained to determine the legality and merits of that detention, notwithstanding any pre-existing arrest warrant.
22. The case law before the European Court of Human Rights is consistent on the point that this review must be automatic and must occur after someone is detained. As stated in *TW v Malta* on the meaning of Article 5(3):

“This provision enjoins the judicial officer **before whom the arrested person appears to review the circumstances militating for or against detention**, to decide by reference to legal criteria whether there are reasons to justify detention, and to order release if there are no such reasons (see the *De Jong, Baljet and Van den Brink v. the Netherlands* judgment of 22 May 1984, Series A no. 77, pp. 21-24, §§ 44, 47 and 51). In other words, Article 5 § 3 **requires the judicial officer to consider the merits of the detention.**”³²

23. To argue that such an obligation could be discharged prior to someone's detention would defeat the whole purpose of such a safeguard against arbitrary detention. As put in *McKay v UK*:

³² *TW v Malta*, ECtHR, no. 25644/94, Judgment, 29 April 1999, para. 41.

“The initial automatic review of arrest and detention accordingly must be capable of examining lawfulness issues and whether or not there is a reasonable suspicion that the arrested person had committed an offence, in other words, that detention falls within the permitted exception set out in Article 5 § 1(c). When the detention does not, or is unlawful, the judicial officer must then have the power to release.”³³

24. The authorities cited by the Court of Appeals Chamber do not support the conclusion that an arrest warrant could “constitute the legal basis for continued detention after arrest” without further review.³⁴ None of the *ratios* (legal reasons) of the cases cited by the Chamber support this conclusion. Rather, their fact pattern concern warrants that were issued against absconding defendants.

25. The statement in *Vakhitov* that “[t]he possibility of a court issuing an arrest warrant *in absentia* in a situation where a person has fled from justice does not *per se* conflict with the provisions of the Convention”, does not endorse the Court of Appeals Chamber’s interpretation for two reasons: (i) because the Accused was not a fugitive from justice; (ii) the judgment refers to a warrant for arrest. The issuance of an *in absentia* arrest warrant does not

³³ *McKay v UK*, ECtHR, no. 543/03, Judgment, 3 October 2006, para. 40.

³⁴ Impugned Decision, para. 34.

discharge the state from reviewing the legality upon detention. Indeed, it was a failure to discharge this duty by bringing the defendant promptly before a court that led to the court finding a violation of Article 5(3).³⁵

26. Indeed, *Vakhitov and Others*, reaffirms the findings in *Harkman* that a defendant must be “brought promptly before a judge” to examine the legality of their detention. There are no exceptions to this “not even on grounds of prior judicial involvement.”³⁶

(ii) Pre-Trial Judge’s power to review and release of his own motion

27. The Impugned Decision also notes that “the Pre-Trial Judge had the power to review, even of his own motion (i.e. *automatic* in the meaning of Article 5(3) of the ECHR), the Decision and Transfer and to discontinue Shala’s detention.”³⁷ It also stated that “the Pre-Trial Judge had the power to release, of his own motion, the Accused if the detention did not fall within the permitted exception set out in Article 5(1)(c) of the ECHR or if the detention was unlawful”.³⁸

³⁵ *Vakhitov and Others v Russia*, ECtHR nos. 18232/11, 42945/11 and 31596/14, 31 January 2017, para. 51.

³⁶ *Vakhitov*, para. 51; *Harkmann v Estonia*, ECtHR no 2192/03, Judgment, 11 July 2006, para. 38.

³⁷ Impugned Decision, para. 35.

³⁸ Impugned Decision, para. 36.

28. The Defence respectfully submits that to have *the power* to review and release does not discharge the obligation to *conduct a review* of legality after detention, whether such a review would lead to the Accused's release or not. The obligation is not discharged, if it is not exercised and there is no evidence that such review was ever conducted on his first appearance.
29. The statement in the Impugned Decision that "it would have been preferable for the Pre-Trial Judge to have referred *explicitly* to the legal basis for detention as reasoned in Arrest Warrant and the Decision on Arrest and Transfer..."³⁹ encapsulates the problem. This suggests that the Accused has been detained on an *implicit* legal basis. Moreover, the Defence argues that this is not something preferable but legally required to ensure the continued legality of detention. To put it another way, the Pre-Trial Judge is required to state explicitly the legal basis under which a person continues to be detained, which falls under one of the recognised exceptions to the right to liberty. The absence of reasons given in the detention order is an indication of the arbitrary nature of the detention.⁴⁰

(iii) Other Safeguards and Assurances

³⁹ Impugned Decision, para. 36.

⁴⁰ *Stasaitis v. Lithuania*, ECtHR, no. 47679/99, Judgment, 21 March 2002, paras. 66-67.

30. The other “safeguards” that the Court of Appeals Chamber enumerates⁴¹ cannot constitute fulfilment of the *automatic* obligation to consider the legality of detention of its own motion.

a) **The fact that the Accused’s assigned counsel could have challenged his arrest, transfer and detention** is irrelevant because the court is under an *automatic* obligation to consider the legality of detention of its own motion, whether or not the Accused’s counsel did this or not. In *Niedbala v Poland*, the court held, following on from a long line of jurisprudence dating from *De Jong, Baljet and Van den Brink v Netherlands*, that: “[T]he judicial control of the detention must be automatic...It cannot be made to depend on a previous application by the detained person.”⁴² This line of authority cannot be distinguished on any basis because Article 5(3) is to be strictly construed and doesn’t permit exceptions. The flaw in this argument should be readily apparent if applied more generally because the requirement of “automaticity” provides an important safeguard against ill treatment for those incapable of lodging an application to review their detention.

⁴¹ Impugned Decision, paras. 35-37.

⁴² *Niedbala v. Poland*, ECtHR no. 27915/95, Judgment, 4 July 2000, para. 50.

- b) **That the Pre-Trial Judge received all relevant information and exercised control over the arrest, transfer and detention** did not discharge the Judge from examining the legality of detention *after* the Accused has been detained and giving reasons for his continued detention pursuant to Article 5(3).
- c) **The automatic review of the Accused's detention two months after arrest** might address the subsequent period, but it does not address the requirements of the early stages following the initial arrest and detention.

Article 41(3) of the Law is not consistent with Article 5(3)

31. The implicit distinction between those subject to a pre-existing order and those not in Article 41(3) of the Law is inconsistent with Article 5(3). It is clear that “quality of law” violates Article 5(1) for a lack of certainty as is evident from the interpretation of the lower courts, which ordered the detention of the Accused under Article 41(6) of the Law.⁴³
32. Article 41(3) of the Law provides:

⁴³ KSC-BC-2023-10, Decision on the Review of Detention of Haxhi Shala, 9 February 2024, para. 8.

“Any person who is deprived of his or her liberty *without an order* from the Specialist Chambers shall be brought within forty-eight (48) hours in person before a Specialist Chambers Judge who shall decide on his or her detention or release not later than forty-eight (48) hours from the moment the detained person was brought before the court.”

33. Paragraph 26 of the Impugned Judgment notes that the Specialist Chambers’ legal framework which includes Article 41(3) “provides for strong safeguards against arbitrariness and undue prolongation of pre-trial detention through the principle of judicial control of detention.” However, these safeguards are undermined by the implicit distinction between those subject to a pre-existing order and those not. For this reason, the Accused contends that the law is not of a “sufficient quality.”⁴⁴
34. The last point is that the Judgment of the Constitutional Court Panel that the Appeals Chamber Panel considered⁴⁵ did not definitively determine the compatibility of the Rules with the fundamental rights and freedoms guaranteed in the Constitution.⁴⁶ Had it done so, it would have no further

⁴⁴ *Gusinskiy v Russia*, ECtHR, no. 70276/01, Judgment, 19 May 2004, para. 62; *Amuur v France*, ECtHR, no. 19776/92, Judgment, 25 June 1996, para. 50.

⁴⁵ 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 (“SCCC 26 April 2017 Judgment”).

⁴⁶ Cf. Impugned Judgment, para. 40.

role in deciding whether there had been a violation of those fundamental rights and freedoms in individual cases. As the Constitutional Court Panel acknowledged, in certain respects, the only way to ascertain, unequivocally, whether a provision in the Rules is in compliance with the Constitution would be to examine the manner in which the specific provision is applied in a given case.⁴⁷ In other words, the Judgment did not purport to identify all possible applications of the Rules that would be in violation of the Constitution.⁴⁸ To this it might be added the Convention rights set out in the European Convention of Human Rights and incorporated by the Constitution are part of a “living instrument” that are not static in time but constantly being interpreted in light of present-day conditions.⁴⁹

IV. REMEDIES

35. The Accused has effectively been unlawfully held from 13 December 2024. The **requirement** to act in accordance with Article 5(3) is so fundamental that a failure to comply should entail release pursuant to Article 5(4) of the ECHR and/or compensation.

⁴⁷ SCCC 26 April 2017 Judgment, para. 11.

⁴⁸ KSC-BC-2023-10/IA002/F00001, para. 22.

⁴⁹ *Tyrer v UK*, ECtHR, no. 5856/72, Judgment, 25 April 1978, para. 31.

36. Article 13 provides that “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority...” This entails the following elements⁵⁰

- (a) The grievance must be an “arguable” one in terms of the Convention.
- (b) There should be a remedy before a national authority.
- (c) It should be an effective remedy.

37. The Impugned Decision, if allowed to stand, will mean that the Accused will have been left without an “effective remedy” for his unlawful detention in breach of Article 13.

38. Rule 51 of the Rules of Procedure provides for compensation following a suspect’s unlawful detention. The Accused should be eligible for compensation for his unlawful detention.

V. RELIEF REQUESTED

39. For this reason, the Defence requests that the Supreme Court Chamber:

⁵⁰ See generally: *Silver and others v UK*, ECtHR nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgment, 24 October 1983; *Guide on Article 13 of the European Convention on Human Rights: Right to an effective remedy*, 31 December 2020, pp. 7-20

- (i) hold that the failure of the Pre-Trial Judge to consider the lawfulness of the detention of the Accused at his initial appearance on 13 December 2023 was in violation of Article 5(3) of the ECHR;
- (ii) hold that the subsequent detention of the Accused without judicial consideration of whether his release should be ordered was also unlawful;
- (iii) hold that the Accused has been left without an effective remedy in breach of Article 13 of the ECHR for his unlawful detention from 13 December 2023.
- (iv) hold that the Accused may file a request with the President for compensation or other appropriate redress for the period of time in which he has been unlawfully detained.
- (v) order the release of the Accused pursuant to Article 5(4) in view of the unlawfulness of his detention.

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Toby Cadman

Specialist Counsel

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At London, United Kingdom