



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

**In:** KSC-SC-2023-10/PL001  
**Specialist Prosecutor v. Sabit Januzi, Ismet Bahtijari and Haxhi Shala**

**Before:** A Panel of the Supreme Court Chamber  
Judge Ekaterina Trendafilova, Presiding  
Judge Christine van den Wyngaert  
Judge Daniel Fransen

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 5 August 2024

**Language:** English

**Classification:** Public

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**Prosecution response to Shala Defence 'Request for Protection of Legality against Haxhi Shala's Appeal Against Decision on Review of Detention' with public Annex 1**

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## I. INTRODUCTION

1. Pursuant to Article 48(6)-(8) of the Law<sup>1</sup> and Rules 59 and 193,<sup>2</sup> the Specialist Prosecutor's Office ('SPO') hereby responds to the Request<sup>3</sup> for protection of legality against the Decision<sup>4</sup> of the Court of Appeals Panel ('Appeals Panel').

2. As explained below, the Request fails to substantiate any error of law, substantial violation of a procedural rule, or violation of a right protected under the Constitution or the European Convention on Human Rights ('ECHR'). Instead, Shala misconstrues underlying laws and relevant jurisprudence to manufacture baseless claims that the Appeals Panel made errors of law under the ECHR.

## II. PROCEDURAL HISTORY

3. On 4 December 2023, the Pre-Trial Judge issued the Arrest and Transfer Decision.<sup>5</sup>

4. Shala was arrested on 11 December 2023, and transferred to detention in the Hague on 12 December 2023.<sup>6</sup>

5. On 13 December 2024, Shala made his initial appearance in court.<sup>7</sup>

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> Request for Protection of Legality against Haxhi Shala's Appeal Against Decision on Review of Detention, KSC-BC-2023-10/PL001/F00001, 12 July 2024 ('Request').

<sup>4</sup> Public Redacted Version of Decision on Haxhi Shala's Appeal Against Decision on Review of Detention, KSC-BC-2023-10/IA002/F00005/RED, 12 April 2024 ('Decision').

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

<sup>6</sup> Decision Setting the Date for the Initial Appearance of Haxhi Shala and Related Matters, KSC-BC-2023-11/F00014, 12 December 2023, paras 4-5.

<sup>7</sup> Transcript (Initial Hearing), 13 December 2023.

6. On 9 February 2024, the Pre-Trial Judge rejected Shala's application for interim release.<sup>8</sup>
7. On 19 February 2024, Shala filed the Appeal challenging the Pre-Trial Judge's decision.<sup>9</sup>
8. On 12 April 2024, the Appeals Panel issued the Decision, denying the Appeal.<sup>10</sup>
9. On 12 July 2024, Shala filed the Request.

### III. STANDARD OF REVIEW

10. Pursuant to Rule 193(3), a Supreme Court Panel assessing legality is explicitly prohibited from considering grounds that allege, or amount to alleging, 'erroneous or incomplete determination of the facts of the case.' When rendering decisions on the review of detention, lower courts assess and weigh the facts before them in order to assess based on certain prescribed factors whether continued detention after initial arrest is justified for an Accused.<sup>11</sup> Because of the fact-specific nature of these detention decisions, lower-level panels are better placed to assess these factors.<sup>12</sup> When such decisions are reviewed by the Supreme Court Panel, it may only consider alleged violations of law in making a determination as to protection of legality.<sup>13</sup>
11. Alleging an error of law requires identifying the alleged error, presenting arguments in support of the claim, and explaining how the error invalidates the

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<sup>8</sup> Public Redacted Version of Decision on Review of Detention of Haxhi Shala, KSC-BC-2023-10/F00165, 9 February 2024 ('Initial Detention Decision').

<sup>9</sup> Interlocutory Appeal against the Decision on Review of Detention of Haxhi Shala, KSC-BC-2023-10/IA002/F00001, 19 February 2024 ('Appeal').

<sup>10</sup> Decision, KSC-BC-2023-10/IA002/F00005, para.55.

<sup>11</sup> *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, Public ('*Gucati Appeals Decision*'), paras 44, 49.

<sup>12</sup> *Gucati Appeals Decision*, KSC-BC-2020-07/IA001/F00005, para.49.

<sup>13</sup> Rule 193(3).

decision.<sup>14</sup> An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.<sup>15</sup>

#### IV. SUBMISSIONS

##### A. SHALA FAILS TO ESTABLISH A CHANCE OF CHANGING THE OUTCOME OF A DECISION

12. As a preliminary matter, an allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.<sup>16</sup> In this instance, Shala has entirely failed to demonstrate that had the Pre-Trial Judge conducted a comprehensive re-review of detention at the initial appearance on 13 December 2023 it would have resulted in any different outcome, such as Shala being released. Indeed, this is something that Shala cannot establish. His detention has been subsequently reviewed, and extended, on three occasions, and continues to the present. The Request could, and should, be denied on this basis alone.

13. However, as outlined below, in his Request, Shala also never meaningfully engages with the core legal and factual findings of the Appeals Panel, which determined in the Decision that the relevant procedures in this case were in accordance with the ECHR. It therefore also fails on the merits.

##### B. SHALA FAILS TO ESTABLISH A VIOLATION OF ARTICLE 5(3) OF THE ECHR (GROUND 1)

14. The framework of the Kosovo Specialist Chambers ('KSC') complies with the ECHR. It provides strong safeguards against arbitrary and/or excessive pre-trial detention through the judicial control of detention;<sup>17</sup> judicial control requires: 1)

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<sup>14</sup> *Gucati Appeals Decision*, KSCS-BC-2020-7/IA001/F00005, para.12; ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/08-3249-Red, Public Redacted Version of Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 23 December 2014 entitled "Decision on 'Defence Urgent Motion for Provisional Release'", 20 May 2015, para.20.

<sup>15</sup> *Gucati Appeals Decision*, KSCS-BC-2020-7/IA001/F00005, para.12.

<sup>16</sup> *Gucati Appeals Decision*, KSCS-BC-2020-7/IA001/F00005, para.12.

<sup>17</sup> Decision, KSC-BC-2023-10/IA002/F00005/RED, para.26.

scrutiny and supervision by an independent judicial authority, either *prior to* or promptly *after* arrest;<sup>18</sup> and 2) post-arrest, a procedural requirement for the independent judicial authority to hear from the detained individual, including a substantive requirement of reviewing the legality of detention.<sup>19</sup>

*i. Sufficient judicial control was exercised both prior to and after Shala's arrest*

15. All relevant requirements were met in this case. In particular, there was judicial control in the form of: 1) the scrutiny and supervision of the Pre-Trial Judge one week prior to Shala's arrest in the form of the Decision on Arrest and Transfer, which provided an ongoing legal basis for Shala's detention; 2) post-arrest, Shala, accompanied by his Counsel, was promptly brought before an independent judicial authority—the Pre-Trial Judge—with the power to order Shala's release, if warranted, was personally examined by the Pre-Trial Judge and expressly invited to make any submissions on his arrest, transfer or detention; and 3) the legality of Shala's detention was thereafter further automatically reviewed and confirmed, in conformity with the applicable framework.<sup>20</sup>

16. What appears to be Shala's central complaint - that the Pre-Trial Judge erred by not conducting a more comprehensive legality assessment and expressly issuing a further decision immediately at the initial appearance - is something which the legal framework does not require. As correctly identified by the Appeals Panel, where - as in the present case - the arrest was ordered by a court, the relevant question is whether the level of judicial involvement was sufficient to meet the requirements of Article 5(3) of the ECHR.<sup>21</sup> The scope of inquiry required of the judicial authority promptly after

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<sup>18</sup> Decision, KSC-BC-2023-10/IA002/F00005/RED, para.26.

<sup>19</sup> Decision, KSC-BC-2023-10/IA002/F00005/RED, para.33

<sup>20</sup> See Decision, KSC-BC-2023-10/IA002/F00005/RED, paras 27, 30, 36-37.

<sup>21</sup> See e.g. Decision, KSC-BC-2023-10/IA002/F00005/RED, para.31; European Court of Human Rights ('ECtHR'), *Bergmann v. Estonia*, no.38241/04, Judgment, 29 May 2008, para.42; ECtHR, *Harkmann v. Estonia*, no.2192/03, Judgment, 11 July 2006, para.37.

arrest is dependent upon the particular circumstances of a given case, and regard may appropriately be had to prior assessments of the necessity and/or legality of the arrest.<sup>22</sup> Where there has been such a prior assessment, the failure of a court to go into further detail at an initial hearing cannot be taken to mean that it has not analysed all the circumstances and satisfied itself of the necessity of detention.<sup>23</sup>

17. Shala argues that (i) it is a ‘legal impossibility’ to review the merits and legality of detention prior to arrest and it would ‘defeat the entire purpose of such a safeguard against arbitrary detention’;<sup>24</sup> and (ii) ‘[t]he 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’.<sup>25</sup> However, he never justifies or explains these unsupported and underdeveloped assertions, which run counter to the ECtHR jurisprudence that expressly allows reliance to be placed on prior assessments of legality.<sup>26</sup> As the Appeals Panel noted in the Decision, the ECtHR never found that a judicial detention order issued prior to arrest in the absence of an Accused could not constitute the legal basis for continued detention after arrest,<sup>27</sup> and Shala’s arguments to the contrary are unavailing.

18. Shala attempts to attack the relevant KSC safeguards related to detention in isolation from each other, ignoring that they operate collectively to provide a comprehensive protective framework. As the Appeals Panel summarised in the Decision, these post-arrest safeguards include that: (i) Shala was promptly brought before the Pre-Trial Judge, was questioned *proprio motu* by the Judge on, and had the

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<sup>22</sup> ECtHR, *Stephens v. Malta*, no.33740/06, Judgment, 21 April 2009, paras 58-61. See also *Bergmann v. Estonia*, no.38241/04, Judgment, 29 May 2008, para.44 (having regard to the fact of a prior judicial decision as to the necessity of detention, albeit, in the particular case, finding that to not be sufficient because the decision had been made more than two years previously).

<sup>23</sup> ECtHR, *Stephens v. Malta*, no.33740/06, Judgment, 21 April 2009, para.61 (upholding a limited inquiry even in circumstances where - unlike the present case - the detainee had expressly challenged and raised issues regarding his detention, which the court did not address at the hearing).

<sup>24</sup> See Request, KSC-BC-2023-10/PL001/F00001, paras 21-23.

<sup>25</sup> See Request, KSC-BC-2023-10/PL001/F00001, para.24.

<sup>26</sup> See preceding paragraph.

<sup>27</sup> See Decision, KSC-BC-2023-10/IA002/F00005/RED, para.34.

opportunity to raise any matters with respect to, his arrest, transfer and detention; (ii) the Pre-Trial Judge received all relevant information and exercised control over Shala's arrest, transfer and detention; (iii) the Pre-Trial Judge himself had reviewed all of the substantial requirements for detention under Article 41(6) just one (1) week before Shala's arrest and detention; (iv) the Pre-Trial Judge had the power to release, on his own motion, Shala if his detention did not fall within the permitted exception set out in Article 5(1)(c) of the ECHR or if the detention was unlawful; and (v) Shala's detention was automatically and regularly periodically reviewed thereafter by the Pre-Trial Judge based on submissions from the parties, including Shala.

19. Shala 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' and that 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.'<sup>28</sup> However, as set out above, the scope of inquiry required is dependent upon the circumstances of the particular case. In this instance, the Appeals Panel noted that it 'would have been preferable' for the Pre-Trial Judge to have expressly referenced the Arrest Warrant and Decision on Arrest and Transfer as the legal basis for detention, but found that this was not a legal requirement.<sup>29</sup> Bearing in mind *inter alia* the assessment which the Pre-Trial Judge had himself conducted just one week prior, and the fact that upon express inquiry by the Pre-Trial Judge to the Accused at the hearing no relevant issues relating to detention were raised, the decision not to go into further detail does not constitute a violation. Nor can it be taken to mean that the Pre-Trial Judge had not analysed all relevant factors.<sup>30</sup> As correctly found by the Appeals Panel, sufficient judicial control was exercised. Given that Shala

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<sup>28</sup> See Request, KSC-BC-2023-10/PL001/F00001, para.24.

<sup>29</sup> Decision, KSC-BC-2023-10/IA002/F00005/RED, para.36.

<sup>30</sup> ECtHR, *Stephens v. Malta*, no.33740/06, Judgment, 21 April 2009, para.61.

was promptly heard on the issue of detention<sup>31</sup> in an appearance before the Pre-Trial Judge, and raised no concerns, and the Pre-Trial Judge had the power *proprio motu* to release him, if warranted,<sup>32</sup> the requirements of the ECHR were satisfied.

20. Shala cites ECtHR jurisprudence holding that the absence of reasons given in a detention order is an indication of the arbitrary nature of the detention<sup>33</sup>—an observation that is irrelevant as applied to Shala given that these reasons were provided in the Arrest and Transfer Decision, which provided the basis for Shala’s detention.

21. Shala also argues that the ‘other “safeguards” that the Court of Appeals Chamber enumerates cannot constitute fulfilment of the *automatic* obligation to consider the legality of detention of its own motion.’<sup>34</sup> Given that the Appeals Panel only noted the ‘additional assurances’ Shala was provided *after* concluding that Shala had been given an opportunity to be heard by the judicial authority that could order his release at the time of his initial hearing and thus the automatic-review requirement had already been satisfied,<sup>35</sup> this argument is both extraneous and meritless.

*ii. Shala’s arguments regarding compatibility of Article 41(3) with Article 5(3) of the ECHR are not properly before this Panel*

22. Shala makes a series of arguments regarding the compatibility of Article 41(3) with Article 5(3) of the ECHR. Shala never made these arguments, as such, to the Appeals Panel, and therefore they do not form part of the impugned decision and are not ripe for consideration by this Panel. As the Appeals Panel noted, Shala had merely requested referral of the constitutionality of the KSC detention ‘legal framework’ to

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<sup>31</sup> See Decision, KSC-BC-2023-10/IA002/F00005/RED, para.35.

<sup>32</sup> Rule 57(2).

<sup>33</sup> See Request, KSC-BC-2023-10/PL001/F00001, para.29.

<sup>34</sup> See Request, KSC-BC-2023-10/PL001/F00001, para.30.

<sup>35</sup> See Decision, KSC-BC-2023-10/IA002/F00005/RED, paras 36-37.



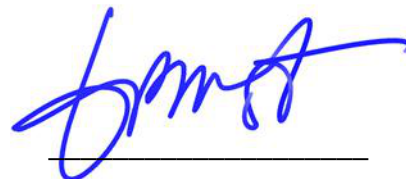
the Constitutional Court.<sup>36</sup> The Appeals Panel further noted that the relevant rules had been reviewed and approved by the Constitutional Court,<sup>37</sup> that no incompatibility with the Constitution exists in this case, and that Shala retained the possibility to make a referral to the Constitutional Court pursuant to Article 49(3) after the exhaustion of all remedies.<sup>38</sup>

23. Given that the KSC legal framework governing pre-existing arrest orders pursuant to Article 41(3) is entirely consistent and compatible with the ECHR, Shala's arguments are, in any case, meritless.

#### V. RELIEF REQUESTED

24. For the foregoing reasons, the Request should be denied in its entirety.

**Word count: 2,325**



**Kimberly P. West**

**Specialist Prosecutor**

Monday, 5 August 2024

At The Hague, the Netherlands.

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<sup>36</sup> See Decision, KSC-BC-2023-10/IA002/F00005/RED, para.39.

<sup>37</sup> See Decision, KSC-BC-2023-10/IA002/F00005/RED, para.40.

<sup>38</sup> See Decision, KSC-BC-2023-10/IA002/F00005/RED, para.40.