



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

File number: KSC-BC-2023-10/PL001

Before: **A Panel of the Supreme Court Chamber**

Judge Ekaterina Trendafilova, Presiding
Judge Christine van den Wyngaert
Judge Daniel Fransen

Registrar: Fidelma Donlon

Date: 9 September 2024

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Classification: **Public**

Decision on Haxhi Shala's Request for Protection of Legality

Specialist Prosecutor:

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THE PANEL OF THE SUPREME COURT CHAMBER of the Kosovo Specialist Chambers (“Supreme Court Panel” or “Panel”) noting Articles 3, 41, and 48(6)-(7) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 59, 82(4), and 193 of the Rules of Procedure and Evidence (“Rules”)¹ is seised of the “Request for Protection of Legality against Haxhi Shala’s Appeal Against Decision on Review of Detention” (“Request”).²

I. PROCEDURAL BACKGROUND

1. On 11 December 2023, Mr Shala was arrested in Kosovo pursuant to an arrest warrant issued by the Pre-Trial Judge,³ further to the confirmation of an indictment against him.⁴ On 12 December 2023, Mr Shala was transferred to The Netherlands.⁵
2. Mr Shala’s initial appearance took place before the Pre-Trial Judge on 13 December 2023.⁶

¹ Rules of Procedure and Evidence before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, (adopted on 17 March 2017, revised on 29 May 2017, amended on 29 and 30 April 2020).

² PL001/F00001, Request for Protection of Legality against Haxhi Shala’s Appeal Against Decision on Review of Detention, 12 July 2024.

³ KSC-BC-2023-11/F00006/RED/A01/RED, Public Redacted Version of Arrest Warrant for Haxhi Shala, 28 February 2024 (strictly confidential version filed on 4 December 2023, reclassified as confidential on 29 February 2024) (“Arrest Warrant”). See also KSC-BC-2023-11/F00006/RED, Public Redacted Version of Decision on Request for Warrant of Arrest and Transfer Order, 22 December 2023 (strictly confidential and *ex parte* version filed on 4 December 2023, reclassified as confidential on 22 December 2023) (“Decision on Arrest and Transfer”); KSC-BC-2023-11/F00008, Notification of Arrest of Haxhi Shala Pursuant to Rule 55(4), 11 December 2023 (strictly confidential and *ex parte* reclassified as public on 15 December 2023).

⁴ KSC-BC-2023-11/F00005/RED, Public Redacted Version of the Decision on the Confirmation of the Indictment, 30 January 2024 (strictly confidential and *ex parte* version filed on 4 December 2023, reclassified as confidential on 12 December 2023) (“Confirmed Indictment”); KSC-BC-2023-11/F00013/A01, Annex 1 to Submission of Public Redacted Version of Confirmed Indictment, 12 December 2023. A confidential version of the Indictment was filed on 6 December 2023. See KSC-BC-2023-11/F00007/A01, Annex 1 to Submission of Confirmed Indictment, 6 December 2023 (strictly confidential and *ex parte* reclassified as confidential on 11 December 2023).

⁵ KSC-BC-2023-11/F00015/RED, Public Redacted Versions of the Report on the Arrest and Transfer of Haxhi Shala to the Detention Facilities with Strictly Confidential and *Ex Parte* Annexes 1-3, 3 July 2024 (“Report”) (strictly confidential and *ex parte* filed on 13 December 2023 reclassified as confidential on 15 December 2023).

⁶ KSC-BC-2023-11, Transcript, 13 December 2023.

3. On 8 February 2024, the Pre-Trial Judge granted the request by the Specialist Prosecutor's Office ("SPO") to join the case against Mr Shala with the case against Mr Sabit Januzi and Mr Ismet Bahtijari.⁷
4. On 9 February 2024, the Pre-Trial Judge issued the "Decision on Review of Detention of Haxhi Shala" ("Pre-Trial Judge's Decision"), ordering Mr Shala's continued detention.⁸
5. On 12 April 2024, the Appeals Panel issued the "Decision on Haxhi Shala's Appeal Against Decision on Review of Detention" ("Impugned Decision"), wherein it denied Mr Shala's appeal against the Pre-Trial Judge's Decision.⁹
6. On 12 July 2024, Mr Shala filed the Request.
7. On 16 July 2024, the President assigned a Supreme Court Panel to adjudicate the Request.¹⁰
8. On 17 July 2024, the Panel issued an order setting forth the time lines for the response of the Specialist Prosecutor's Office ("SPO"), if any, and any reply by Mr Shala thereto.¹¹
9. On 5 August 2024, the SPO filed the "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" ("Response").¹²
10. On 19 August 2024, Mr Shala filed the "Defence's Reply to the Prosecution

⁷ F00161, Decision on Request for Joinder and Amendment of the Indictment, 8 February 2024 (confidential). A public redacted version was filed on the same day.

⁸ F00165, Decision on Review of Detention of Haxhi Shala, 9 February 2024 (confidential). A public redacted version of the decision was issued on the same day.

⁹ IA002/F0005, Decision on Haxhi Shala's Appeal Against Decision on Review of Detention, 12 April 2024. A public redacted version was filed on the same day).

¹⁰ PL0001/F00002, Decision Assigning a Supreme Court Panel, 16 July 2024.

¹¹ PL001/F00003, Order on the Time-Limits for Submissions, 17 July 2024.

¹² PL001/F00004, 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, 5 August 2024.

Response to Shala Defence's Request for Protection of Legality" ("Reply").¹³

II. ADMISSIBILITY

11. The Panel notes that the Impugned Decision related to Mr Shala's detention is final within the meaning of Article 48(6) of the Law and that Mr Shala filed the Request within the three-month time limit prescribed by this article. The Request is accordingly admissible in this respect.

III. STANDARD OF REVIEW

12. The Panel recalls that protection of legality cannot be characterized as a third instance appeal, as set forth in Article 47 of the Law, nor does it raise matters under Article 48(1) to (5) of the Law. It is an extraordinary legal remedy provided for in Article 48(6) and (7) of the Law and Rules 193 and 194 of the Rules. It is not meant to create another general avenue of appeal.¹⁴ Rather, and similar to the Kosovo Criminal Procedure Code,¹⁵ protection of legality is limited to the specific instances defined in the Law and the Rules. As the Kosovo Supreme Court stated:

[t]he request for protection of legality, as one of the extraordinary legal remedies, is the exceptional legal remedy aiming to correct possibly wrong application of the material and procedural law. Strict requirements of the admissibility are designed to ensure that this legal remedy would not be used as a general third instance against all decisions in the criminal proceedings.¹⁶

13. Strict admissibility requirements accordingly apply to the grounds underlying a request for protection of legality. In the assessment of each ground the Panel shall determine whether a violation of the criminal law contained within the Law or a substantial violation of the procedures set out in the Law and in the Rules has been

¹³ PL0001/F00005, Defence's Reply to the Prosecution Response to Shala Defence's Request for Protection of Legality, 19 August 2024.

¹⁴ KSC-BC-2023-01/F00021, Decision on Requests for Protection of Legality, 18 September 2023 ("Gucati and Haradinaj Decision"), para. 9; KSC-BC-2020-06/PL001/F00008, Decision on Kadri Veseli's Request for Protection of Legality, 15 August 2022 ("Veseli Decision"), para. 21.

¹⁵ Kosovo Criminal Procedure Code No 08/L-032, Official Gazette No. 24/17, 17 August 2022.

¹⁶ Kosovo, Supreme Court, S.S., PmL-Kzz 42/2017, Judgment, 10 May 2017, para. 23.

identified. Arguments that reasonably could have been advanced before the first and second instance panels, cannot be raised *de novo* before the Supreme Court Panel.¹⁷

14. Furthermore, grounds underlying a request for protection of legality alleging erroneous or incomplete determinations of the facts are beyond the competence of this Panel and are thus inadmissible.¹⁸ Mere disagreement with the factual assessment of the first and second instance courts or verbatim repetitions of submissions of the previous appeal without engaging substantively with the impugned decision identifying the specific alleged error or violation are equally insufficient to meet the admissibility threshold for such grounds.¹⁹

15. The Supreme Court Chamber recalls that it has previously set forth the standard of review applicable to requests for protection of legality based on substantial violations of the procedures regarding final judgments.²⁰ The Panel recalls the high threshold established by Article 48(7)(b) of the Law in relation to substantial procedural violations.²¹ More specifically, the Panel decided that a substantial violation of the procedures occurs when it materially affects the judicial finding.²² An alleged substantial violation of the procedures set out in the Law and the Rules will be assessed on a case-by-case basis in view of the circumstances underlying each particular request.²³

16. The Supreme Court Panel further recalls that it may find a substantial violation of the procedures if the Court of Appeals Panel, for example: (i) omitted to apply a provision of the Law or the Rules; (ii) incorrectly applied the Law and/or the Rules; or

¹⁷ See Gucati and Haradinaj Decision, para. 10.

¹⁸ Rule 193(3) of the Rules. See also Gucati and Haradinaj Decision, para. 10; Veseli Decision, para. 25.

¹⁹ Gucati and Haradinaj Decision, para. 10; Veseli Decision, para. 25.

²⁰ Gucati and Haradinaj Decision, para. 13.

²¹ Gucati and Haradinaj Decision, para. 14; Veseli Decision, para. 23.

²² Gucati and Haradinaj Decision, para. 14; Veseli Decision, para. 23.

²³ See also Kosovo Supreme Court, *NV*, Pml.Kzz 91/2015, Judgment, 14 May 2015, paras 4, 10-12; *AM*, Pml.Kzz 84/2015, Judgment, 12 May 2015, pp 2-4; *M.I.*, Pml.Kzz 26/2015, Judgment, 18 March 2015, pp 3-7.

(iii) violated the rights of the Defence in a manner which has influenced the rendering of a lawful and fair decision.²⁴

17. The Panel notes that a request for protection of legality could also be premised on Article 48(8) of the Law, which stipulates that an extraordinary legal remedy may also be filed on the basis of rights available under the Law, which are also protected under the European Convention on Human Rights and Fundamental Freedoms (“ECHR”). The Panel considers that any alleged violation of the rights available under the Law, which are also protected under the ECHR, must meet the same standard of review as set out above.²⁵

18. The Panel has further held that a party requesting protection of legality must clearly identify the alleged legal violation, substantiate it, and, in case of a procedural violation, demonstrate how it materially affected the impugned judgment.²⁶

19. Lastly, the Panel recalls Rule 194(1) of the Rules, which stipulates that where the Supreme Court Panel grants a request for protection of legality, depending on the nature of the violation, it may either:

- (a) modify the impugned decision or judgment;
- (b) annul in whole or in part the impugned decision or judgment and return the case for a new decision or retrial to the competent Panel; or
- (c) confine itself only to establishing the existence of a violation of law.

20. Having recalled the standard of review, the Supreme Court Panel shall proceed to address the Request.

IV. DISCUSSION

1. Submissions

21. Mr Shala contends that Article 5(3) of the ECHR requires that the legality and

²⁴ Gucati and Haradinaj Decision, para. 14; Veseli Decision, para. 24.

²⁵ See Gucati and Haradinaj Decision, para. 18; Veseli Decision, para. 33.

²⁶ Gucati and Haradinaj Decision, para. 19; Veseli Decision, para. 23.

merits of his detention be considered automatically *after* a suspect has been detained.²⁷ According to Mr Shala, this automatic review of detention is meant to act as a safeguard to ensure that a defendant is not arbitrarily detained.²⁸ Mr Shala submits that it is undisputed that: (i) an arrest warrant might authorise the initial arrest of an accused; (ii) Mr Shala was brought before a court in a timely manner; (iii) Mr Shala's Counsel, who was appointed by the court, could have challenged his detention; (iv) Mr Shala's detention is automatically reviewed every two months; and (v) the Pre-Trial Judge has the authority to release Mr Shala.²⁹

22. Mr Shala asserts that the European Court for Human Rights ("ECtHR") established that: (i) this review must take place after a person is arrested; (ii) this will include a review of the legality and merits of detention; (iii) this review is automatic; (iv) it is conducted by a judicial officer; (v) it is carried out promptly; (vi) the decision-maker should have the power to release; (vii) such power to release should be exercised if a person does not fall within the permitted exceptions found in Article 5 of the ECHR.³⁰ Mr Shala submits that the Appeals Panel incorrectly found that: (i) judicial control may take place *before* a person's detention; (ii) the Pre-Trial Judge's power to release of his own motion provided a sufficient safeguard.³¹

23. Specifically, Mr Shala contends that the ECtHR has consistently held that a review must occur automatically after someone is detained.³² Mr Shala asserts that the ECtHR jurisprudence cited by the Appeals Panel does not support its finding "that an arrest warrant can 'constitute a legal basis for continued detention after arrest' without further review".³³ Mr Shala submits that the *Vakhitov* case referred to by the Appeals Panel is inapposite, because: (i) Mr Shala was not a fugitive from justice; and (ii) the

²⁷ Request, para. 18.

²⁸ Request, para. 18.

²⁹ Request, para. 17.

³⁰ Request, para. 18.

³¹ Request, para. 19. See also Request, paras 20-21.

³² Request, para. 22, and citation therein. See also Request, para. 23.

³³ Request, para. 24.

issuance of an arrest warrant *in absentia* does not relieve the state from reviewing the legality upon detention.³⁴

24. Mr Shala asserts that the authority vested in the Pre-Trial Judge to review and release him does not discharge the obligation to conduct a review of the legality after detention, whether or not such a review would lead to Mr Shala's release.³⁵ Mr Shala contends that the Appeals Panel's finding that "it would have been preferable for the Pre-Trial Judge to have referred *explicitly* to the legal basis for detention" suggests that Mr Shala has been detained on an implicit legal basis.³⁶ Mr Shala submits that the other safeguards enumerated by the Appeals Panel cannot substitute the requirement that an automatic review of the legality of his detention take place.³⁷

25. Mr Shala asserts that the distinction that is practically being made between those subject to a pre-existing order "and those not in Article 41(3) of the Law is inconsistent with Article 5(3) [of the ECHR]".³⁸ Mr Shala asserts that the "'quality of law' violates Article 5(1) [of the ECHR] 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".³⁹ According to Mr Shala, contrary to the Appeals Panel's finding, the Specialist Chamber of the Constitutional Court ("SCCC") "did not definitively determine the compatibility of the Rules with the fundamental rights and freedoms guaranteed in the Constitution".⁴⁰ Mr Shala contends that if the SCCC had done so, "it would have no further role in deciding whether there had been a violation of those fundamental rights and freedoms in individual cases".⁴¹ Mr Shala submits

³⁴ Request, para. 25, citing ECtHR, *Vakhitov and Others v. Russia*, Nos 18232/11, 42945/11 and 31596/14, Judgment, 31 January 2017 ("*Vakhitov case*"). See also Request, para. 26, citing ECtHR, *Harkmann v. Estonia*, No. 2192/03, Judgment, 11 July 2006 ("*Harkmann case*").

³⁵ Request, para. 28.

³⁶ Request, para. 29, citing Impugned Decision, para. 36.

³⁷ Request, para. 30.

³⁸ Request, para. 31.

³⁹ Request, para. 31. See also Request, paras 32-33.

⁴⁰ Request, para. 34, citing Impugned Decision, para. 40.

⁴¹ Request, para. 34.

that he has effectively been unlawfully detained since 13 December 2023 and argues that he should therefore be released and/or compensated pursuant to Article 5(4) of the ECHR.⁴²

26. The SPO responds that Mr Shala fails to demonstrate how a review of the grounds for his detention at his initial appearance would have changed the outcome of the Pre-Trial Judge's decision on Mr Shala's continued detention.⁴³ The SPO contends that Mr Shala's detention has been reviewed by the Pre-Trial Judge on three occasions since his initial appearance and his detention continued each time.⁴⁴ According to the SPO, the Request should be denied on this basis alone.⁴⁵

27. The SPO submits that the legal framework of the Specialist Chambers complies with the ECHR and "provides strong safeguards against arbitrary and/or excessive pre-trial detention through the judicial control of detention".⁴⁶ According to the SPO, judicial control requires: "1) scrutiny and supervision by an independent judicial authority, either prior to or promptly after arrest; 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".⁴⁷

28. The SPO asserts that these requirements were met in the present case.⁴⁸ Specifically, the SPO contends that the Pre-Trial Judge exercised scrutiny and supervision by virtue of his decision on Mr Shala's arrest and detention, which "provided an ongoing legal basis for [Mr] Shala's detention".⁴⁹ The SPO submits that Mr Shala, accompanied by Counsel, was brought promptly before the Pre-Trial Judge

⁴² Request, para. 35. See also Request, paras 36-39.

⁴³ Response, para. 12.

⁴⁴ Response, para. 12.

⁴⁵ Response, para. 12.

⁴⁶ Response, para. 14. See also Response, para. 13.

⁴⁷ Response, para. 14.

⁴⁸ Response, para. 15. See also Response, para. 18.

⁴⁹ Response, para. 15. See also Response, paras 16-17, 20.

after his arrest, who had the power to order Mr Shala's release, and Mr Shala was invited to make submissions on his arrest, transfer or detention.⁵⁰ The SPO contends that the legality of Mr Shala's detention thereafter was automatically reviewed and extended in compliance with the applicable legal framework.⁵¹

29. The SPO submits that the legal framework of the Specialist Chambers does not require the Pre-Trial Judge to conduct "a more comprehensive legality assessment and expressly issuing a further decision immediately at the initial appearance".⁵² The SPO further argues that where, such as here, there has been a prior assessment made in the form of the issuance of a decision on an arrest warrant, "the failure of the 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".⁵³

30. Finally, the SPO submits that Mr Shala did not raise arguments regarding the compatibility of Article 41(3) of the Law with Article 5(3) of the ECHR before the Appeals Panel and he is therefore precluded from raising it now before this Panel.⁵⁴ The SPO contends that, in any event, the Appeals Panel correctly found that the relevant Rules "had been reviewed and approved by the [Specialist Chamber of the] Constitutional Court" and that they were not found to have been incompatible with the Kosovo Constitution.⁵⁵ The SPO therefore asserts that the Request should be denied in its entirety.⁵⁶

31. Mr Shala reiterates that the Pre-Trial Judge's failure to automatically review his detention following his arrest and issue a decision thereon constitutes a violation of Article 5(3) of the ECHR.⁵⁷ Mr Shala submits that the fact that the procedural violation

⁵⁰ Response, para. 15 (internal citations omitted).

⁵¹ Response, para. 15. See also Response, para. 21.

⁵² Response, para. 16.

⁵³ Response, para. 16. See also Response, para. 19.

⁵⁴ Response, para. 22. See also Response, para. 23.

⁵⁵ Response, para. 22.

⁵⁶ Response, para. 24.

⁵⁷ Reply, paras 5-7, 13, 23. See also Reply, para. 21.

may not have impacted the outcome of the Pre-Trial Judge's decision on his detention should be rejected, as it is still a human rights violation.⁵⁸ Mr Shala contends that the violation cannot be said to be immaterial, as the violation still "renders the period of detention under review as unlawful"⁵⁹ and it is the fundamental safeguard against arbitrary detention that is at stake.⁶⁰ Mr Shala further asserts that the SPO does not engage with the ECtHR's jurisprudence on the automatic review of detention or relies on ECtHR jurisprudence that is irrelevant.⁶¹

2. The Panel's assessment

32. The Panel recalls Article 48(8) of the Law, which states that "[a] request for an extra-ordinary legal remedy under this Article may be filed on the basis of *rights available under this Law* which are protected under the Constitution or the European Convention on Human Rights and Fundamental Freedoms".⁶² Accordingly, a party requesting protection of legality must allege a violation of the criminal law contained within this Law or a substantial violation of the procedures set out in this Law and the Rules in accordance with Article 48(7)(a) and (b) of the Law. In other words, a party cannot, in the context of a request for protection of legality, refer only to a violation of the ECHR, unless such rights afforded therein are directly contained within the Law and/or the Rules.

33. To that end, the Panel reminds the parties that they are expected to be precise in their submissions before the Specialist Chambers. The Panel notes that Mr Shala does not set forth whether the Request is based on a substantial violation of the procedures or a violation of the criminal law. The Panel further observes that Mr Shala does not claim a substantial violation of Article 41(6) of the Law. Instead, Mr Shala relies on Article 48(6) and (8) of the Law to substantiate his claim that there has been

⁵⁸ Reply, para. 8.

⁵⁹ Reply, para. 9. See also Reply, para. 11.

⁶⁰ Reply, para. 10. See also Reply, para. 12.

⁶¹ Reply, paras 14-15, 19, 20.

⁶² Emphasis added.

a violation of Article 5(3) of the ECHR.⁶³ The Panel could, therefore, dismiss the Request as inadmissible.⁶⁴

34. The Panel notes that Article 5(3) of the ECHR is largely reflected in Article 41(5) and (6) of the Law and the Request therefore addresses a right available under the Law as specified in Article 48(8) of the Law. The Panel understands Mr Shala's arguments to be premised on a substantial violation of the procedures. The Panel will, on an exceptional basis, consider the merits of this Ground in view of the importance the Panel attaches to the right to liberty, its protection and the integrity of the proceedings. Accordingly, and as provided for in Article 3(2)(d) of the Law, the Panel shall adjudicate this Ground in accordance with the ECHR and will be guided in its analysis by ECtHR jurisprudence as it relates to Article 5(3) of the ECHR.⁶⁵

35. The Panel notes that Article 41(5) of the Law provides that "[a] person deprived of liberty by or on behalf of the Specialist Chambers shall be [...] brought before a Specialist Chambers Judge without delay and shall be entitled to a trial within a reasonable time or to release pending trial". As the Appeals Panel stated, Article 41(5) of the Law "substantially mirrors Article 5(3) of the ECHR".⁶⁶ Specifically, Article 5(3) of the ECHR requires that any person who has been arrested or detained on reasonable suspicion of having committed an offence or in order to prevent the commission by that person of an offence or fleeing or having done so, "shall be brought promptly before a judge or other officer authorised by laws to exercise judicial power".⁶⁷

36. As the Appeals Panel noted, the first limb of Article 5(3) of the ECHR is primarily aimed at "ensuring prompt and automatic judicial control of police or administrative detention ordered in accordance with the provisions of Article 5(1)(c)

⁶³ See Request, paras 1-2.

⁶⁴ Cf. Veseli Decision, para. 33.

⁶⁵ Cf. Article 3(2)(e) of the Law.

⁶⁶ Impugned Decision, para. 26.

⁶⁷ Article 5(3) of the ECHR.

of the ECHR”.⁶⁸ More generally, Article 5(3) of the ECHR provides a guarantee against any arbitrary or unjustified deprivation of liberty⁶⁹ and judicial control against the risk of ill-treatment, which is at its greatest in this early stage of detention.⁷⁰

37. Article 5(3) of the ECHR has been interpreted by the ECtHR to include both a procedural and a substantive requirement. According to the ECtHR, “the procedural requirement places the ‘officer’ under the obligation of himself hearing the individual brought before him; the substantive requirement imposes on him the obligations 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”.⁷¹

38. The Panel notes that the ECtHR in the *Kornev and Karpenko* case reiterated that the judicial officer “must himself or herself actually hear the detained person before taking the appropriate decision”, meaning that the person has a “chance to present the court with possible personal or other reasons militating against his [or her] detention” after the actual arrest.⁷² The ECtHR further held in the *McKay* case that “[t]he initial automatic review of arrest and detention [...] must be capable of examining lawfulness issues and whether or not there is a reasonable suspicion that the arrested person has committed an offence, in other words, that detention falls within the permitted exception set out in Article 5 § 1 (c). When the detention does

⁶⁸ Impugned Decision, para. 25, and citations therein.

⁶⁹ ECtHR, *Case of Stephens v. Malta (no. 2)*, Application No. 33740/06, Judgment, 21 April 2009, para. 52; *Case of Aquilina v. Malta*, Application No. 25642/94, Judgment, 29 April 1999 (“*Aquilina* case”), para. 47; *Case of Assenov and Others v. Bulgaria*, Application No. 90/1997/874/1086, Judgment, 28 October 1998, para. 146.

⁷⁰ ECtHR, *Case of Ladent v. Poland*, Application No. 11036/03, Judgment, 18 March 2008, para. 72.

⁷¹ ECtHR, *Case of Kornev and Karpenko v. Ukraine*, Application No. 17444/04, Judgment, 21 October 2010 (“*Kornev and Karpenko* case”), para. 44 and citations therein.

⁷² See, e.g., *Kornev and Karpenko* case, para. 46; *Case of T.W. v. Malta*, Application No. 25644/94, Judgment, 29 April 1999, para. 41. See also *Harkmann* case, paras 36, 38; *Aquilina* case, para. 50.

not, or is unlawful, the judicial officer must then have the power to release”.⁷³ The ECtHR in this context clarified that “[t]here is nothing therefore to suggest that, when referring to ‘the circumstances mitigating for or against detention’, the [ECtHR] was doing more than indicating that the judicial officer had to have the power to review the lawfulness of the arrest and detention [...] and its compliance with the requirements of Article 5 § 1 (c)”.⁷⁴

39. Turning to the Request, the Panel recalls that there is no question surrounding the promptness with which Mr Shala was brought before the Pre-Trial Judge after his arrest or the Pre-Trial Judge’s power to release.⁷⁵ The question before this Panel is whether the Pre-Trial Judge complied with Article 41(5) of the Law and Article 5(3) of the ECHR insofar as it relates to the automatic review of Mr Shala’s detention after his arrest.

40. The Panel observes that, unlike the ECtHR cases cited by Mr Shala,⁷⁶ the arrest and detention of Mr Shala were ordered by the Pre-Trial Judge himself who examined all the requirements for detention provided for in Article 41(6) of the Law and Article 5(1)(c) of the ECHR. Specifically, the Pre-Trial Judge examined whether there was grounded suspicion that Mr Shala committed an offence necessitating his arrest.⁷⁷ The Pre-Trial Judge further found that “there are articulable grounds to believe that there is a risk that the Accused may flee (although the risk is moderate), obstruct the progress of the criminal proceedings, or commit further offences, therefore necessitating his arrest and detention, in accordance with Article 41(6)(b) of the

⁷³ ECtHR, *McKay v. the United Kingdom*, Application No. 543/03, Judgment, 3 October 2006 (“*McKay* case”), para. 40 and citations therein. See also *Pantea v. Romania*, Application No. 33343/96, Judgment, 3 June 2003, para. 231.

⁷⁴ *McKay* case, para. 36.

⁷⁵ See Request, para. 17.

⁷⁶ See, e.g., Request, para. 26, citing *Vakhitov* case (involving an arrest warrant issued as a result of the applicant fleeing from justice and where the question turned on the time it took before they were brought before a Judge); *Harkmann* case (involving an arrest warrant following the failure of the applicant to appear on several occasions before the court. The question here also turned on the promptness of the applicant’s appearance before the court).

⁷⁷ See Decision on Arrest and Transfer, para. 17.

Law”.⁷⁸ The Pre-Trial Judge thoroughly analysed all the requirements enshrined in Article 41(6) of the Law and Article 5(1) of the ECHR in order to decide whether there existed lawful reasons to order the arrest and detention of Mr Shala.

41. Moreover, upon his arrest on 11 December 2024, Mr Shala was provided with certified copies (in Albanian and English) of the Arrest Warrant and the Transfer Order and was informed of the reason for his arrest and of his rights in this respect.⁷⁹ The next day, Mr Shala was provided with a certified copy of the Confirmed Indictment (both in Albanian and in English).⁸⁰ It follows that Mr Shala was well aware of the reasons for being deprived of his liberty when on 13 December 2023 he appeared before the same Pre-Trial Judge who has decided on his arrest and detention.

42. Importantly, the Panel notes that during the initial appearance and in the presence of Mr Shala’s Counsel, the Pre-Trial Judge invited Mr Shala to raise any issue in relation to his arrest, transfer to The Hague or to his detention.⁸¹ Mr Shala responded that he had nothing to add and that “everything was fine”, after which the Pre-Trial Judge decided that Mr Shala thus remains in detention.⁸² In other words, the Pre-Trial Judge gave Mr Shala the opportunity to raise any concerns regarding his detention within the meaning of Article 5(3) of the ECHR and thereafter, having heard the response of Mr Shala, confirmed his continued detention, consistent with the relevant ECtHR jurisprudence.⁸³

43. Based on the above, the Panel considers that the Pre-Trial Judge undertook the steps required pursuant to Article 41(5) of the Law and Article 5(3) of the ECHR. Specifically, the Pre-Trial Judge, found that Mr Shala’s arrest and detention was necessary, decided to order Mr Shala’s arrest, ensured during the initial appearance

⁷⁸ Decision on Arrest and Transfer, para. 23. See also Decision on Arrest and Transfer, paras 19-22.

⁷⁹ Report, paras 11-12.

⁸⁰ Report, para. 30.

⁸¹ KSC-BC-2023-11, Transcript, 13 December 2023, pp 14-15.

⁸² KSC-BC-2023-11, Transcript, 13 December 2023, p. 15.

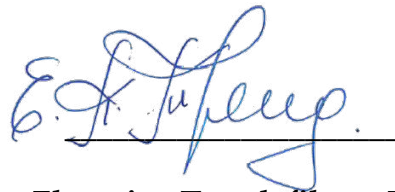
⁸³ KSC-BC-2023-11, Transcript, 13 December 2023, p. 15.

that Mr Shala was heard on the issue of detention and decided on the basis thereof that Mr Shala should remain in detention. The Panel therefore does not find a substantial violation of the procedures on the part of the Pre-Trial Judge or the Appeals Panel.

44. The Panel notes that Mr Shala raises arguments in relation to the constitutional compatibility of Article 41(3) of the Law with Article 5(3) of the Constitution.⁸⁴ The Panel recalls that it has found no substantial violation of the procedures and Mr Shala's arguments in this respect are therefore dismissed as moot.

V. DISPOSITION

45. For these reasons, the Supreme Court Panel hereby **REJECTS** the Request.



Judge Ekaterina Trendafilova, Presiding

Dated this Monday, 9 September 2024

At The Hague, the Netherlands

⁸⁴ See Request, paras 31-34.