

In: KSC-BC-2023-10/PL001

The Specialist Prosecutor v. Sabit Januzi, Ismet Bahtijari and Haxhi Shala

Before: **The President of the Kosovo Specialist Chambers**
Judge Ekaterina Trendafilova

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Haxhi Shala

Date: 18 September 2024

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Haxhi Shala’s Re-filed Request for Reconsideration of the Supreme Court Chamber’s Decision on Haxhi Shala’s Request for Protection of Legality

Specialist Prosecutor

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Counsel for Ismet Bahtijari

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I. INTRODUCTION

1. The Defence for Mr Haxhi Shala (“Defence”) hereby seeks reconsideration of a Decision on Haxhi Shala’s Request for Protection of Legality that a Panel of the Supreme Court rendered on 9 September 2024 (“the Decision”).¹
2. The Defence respectfully requests that the Supreme Court Chamber reconsider the decision pursuant to Rule 79 of the Rules of Procedure due to an error.²
3. Paragraph 42 of the Decision incorrectly states that a ‘decision’ was made on the Accused’s continued detention at his Initial Appearance on 13 December 2024.
4. This is incorrect for two reasons:
 - (i) The Pre-Trial Judge made no such decision as is clear from the Transcript.
 - (ii) Neither the Court of Appeal, nor the Pre-Trial Judge himself, found that a decision on detention had been made.

¹ KSC-BC-2023-10/PL001, Decision on Haxhi Shala’s Request for Protection of Legality, A Panel of the Supreme Court Chamber, 9 September 2024.

² KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”).

5. The Defence submits that there is a “clear error” of a material fact, which underpins the Panel’s decision. This requires a reconsideration of the decision. Such an error, if allowed to stand, will cause the Accused injustice, by incorrectly stating the position contrary to the facts.

II. APPLICABLE LAW

6. Rule 79 of the Rules of Procedure (“Power to Reconsider Decisions”) provides as follows:

- (1) In 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 decisions. Judgements are not subject to reconsideration.

III. SUBMISSIONS

7. The Decision incorrectly states that a decision was made as to the Accused’s detention in paragraph 42, which is reproduced below:

“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. 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. 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.”

8. The relevant parts of the transcript of the Initial Appearance are reproduced below for the sake of clarity:

JUDGE GUILLOU: Thank you, counsel. I would like to ask the accused, before we end this hearing, if, Mr. Shala, you have any issue you would like to raise in relation to your arrest, the transfer to The Hague, or your detention. Mr. Shala.

THE ACCUSED: [Interpretation] No, I have nothing to add.

Everything is fine, Your Honour.

JUDGE GUILLOU: Thank you, Mr. Shala.

Finally, as you remain in detention, Mr. Shala, I would like to

inform you that you may challenge your detention on remand in

accordance with Rule 57. This will be dealt with in written rulings.³

(i) The Pre-Trial Judge made no decision on detention as is clear from the Transcript

9. It is clear from the Transcript, that the Pre-Trial Judge did not make any finding as to his detention. The phrase “as you remain in detention” does not constitute a decision on his detention. This is also evidenced by the absence of any reasoning set out by the Pre-Trial Judge that would follow such a decision.
10. The invitation by the Pre-Trial Judge to address any “issue” in relation to the Accused’s arrest, transfer or detention was not an invitation to hear oral submissions specifically on the legality of his detention. The Pre-Trial Judge was checking that the Accused had been properly treated as he is required to do by law and set go through the procedural steps on his rights. Indeed, in contrast, to the Judge explaining the charges in the indictment, no attempt is made by the Judge to check whether the Accused understood the legal basis for his detention.

³ KSC-BC-2023-11, Transcript, 13 December 2023, p.14-15.

11. Further, as is clear from the transcript, there were no submissions advanced by the prosecution opposing provisional release to which the defence ordinarily would be invited to respond, and no consideration as to the legal basis and the grounds for continuing to remand the Accused in custody.
12. The Pre-Trial Judge stated that his “detention” could be challenged by way of written submissions in accordance with Rule 57 of the Rules, thereby clearly indicating that he could not advance oral submissions.
13. Consequently, the Pre-Trial Judge gave no order or justification for his detention at the Initial Appearance. Certainly, no review of the legality of detention was conducted at this Hearing. His continued detention presumably remained on the basis of the initial arrest warrant issued by the Decision on the Arrest and Transfer made on 4 December 2023.⁴ This is not what Article 5(3) of the ECHR requires as argued throughout the application for the protection of legality.⁵

(ii) Neither the Court of Appeal nor the Pre-Trial Judge himself found that a decision on detention had been made at the Initial Appearance

⁴ KSC-BC-2023-11, F00006/RED, Public Redacted Version of Decision on Request for Warrant of Arrest and Transfer Order, 22 December 2023, filed on 4 December 2023.

⁵ KSC-BC-2023-10/PL001

14. The Supreme Court's finding that a decision was made on his detention at the Initial Appearance is at odds with the findings of both the Court of Appeal and the Pre-Trial Judge himself.
15. The Court of Appeal found that the basis of the Accused's detention was the initial arrest warrant and transfer not any decision at the Initial Appearance.

"30. The Panel considers that the Pre-Trial Judge applied the legal framework set out above by issuing (i) the Arrest Warrant, annexed to the Decision on Arrest and Transfer, which formed the basis for Shala's arrest and detention before and after his initial appearance; and (ii) the Impugned Decision on review of Shala's detention "within two months from the last ruling on arrest", ordering his continued detention until the next review.

"[...]

"35. [...] The Panel further underlines 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 on Arrest and Transfer and to discontinue Shala's detention.

"36. The Panel considers that it would have been preferable for the Pre-Trial Judge to have referred explicitly to the legal basis for detention as reasoned in the Arrest Warrant and the Decision on

Arrest and Transfer and, given that those proceedings were *ex parte*, invited the Defence to make any specific submissions on the issue of detention at the initial appearance hearing. However, the Panel finds that it was not necessary in terms of the ECHR requirements [...].”⁶

16. Similarly, the Decision is at variance with the finding of the Pre-Trial Judge himself. The Pre-Trial Judge in his Decision on Review of Detention does not suggest that that any decision on detention was ordered at the Initial Appearance. Rather, the basis for detention was made at the time the arrest order was granted:

“13. In the present case, the Accused’s arrest was undertaken pursuant to a judicial order issued by the Pre-Trial Judge, annexed to the Decision on Arrest. In this decision, the Pre-Trial Judge reviewed all substantial requirements for the detention of Mr Shala under Article 41(6) of the Law, namely the existence of a grounded suspicion and the necessity of the arrest. These are the same criteria as the ones required for any decision on detention under the SC legal framework.”⁷

⁶ KSC-BC-2023/IA002.

⁷ F00165, Decision on Review of Detention of Haxhi Shala, Pre-Trial Judge Nicolas Guillou, 9 February 2024.

17. It is noted that both the Pre-Trial Judge and the Court of Appeal refer back to the Law, but fail to appreciate the significance of the deviation from what is required as an obligatory requirement of Article 5(3) of the ECHR.
18. The Defence submits that this is not a minor error but a fundamental error of fact that underpins the Decision that the Pre-Trial Judge failed to act in compliance with Article 5(3) of the ECHR.
19. Such an error will cause injustice to the Accused by misrepresenting the position as to when and on what basis he was detained, moreover it consolidates a practice under the Law and the Rules that is not compliance with the ECHR.
20. The Defence, therefore, respectfully invites the Court to reconsider the decision to correct this error.

IV. CONCLUSION

21. For the foregoing reasons, the Supreme Court is invited to correct the error that a decision on detention was made at the Initial Appearance.

Word Count: [1,486 words]



Toby Cadman

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At London, United Kingdom