

**In:** KSC-BC-2023-10/PL001

**The 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 Counsel for Haxhi Shala

**Date:** 5 October 2024

**Language:** English

**Classification:** Public

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**Defence's Reply to the Prosecution's Response to Haxhi Shala's Request for Reconsideration of the Supreme Court Chamber's Decision on Haxhi Shala's Request for Protection of Legality**

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## I. INTRODUCTION

1. The Defence submitted a Request for Reconsideration of the Supreme Court Chamber's Decision on Haxhi Shala's Request for Protection of Legality.<sup>1</sup> The Prosecution responded by opposing the Request on 30 September 2024.<sup>2</sup> This document contains a Reply by the Defence to the submission by the Specialist Prosecutor's Office ("SPO").

## II. SUBMISSIONS

2. The SPO make three arguments in its Response:
  - a. That there was a decision on detention at the initial appearance;<sup>3</sup>
  - b. Even if there was no such decision, it was not required<sup>4</sup>; and
  - c. The decision of the Supreme Court is in line with those of the Court of Appeal and the Pre-Trial Judge.<sup>5</sup>

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<sup>1</sup> KSC-BC-2023-10/PL001/F00009, Haxhi Shala's Re-filed Request for Reconsideration of the Supreme Court Chamber's Decision on Haxhi Shala's Request for Protection of Legality ("Request") 18 September 2024.

<sup>2</sup> KSC-BC-2023-10/PL001, Prosecution Response to Haxhi Shala's Request for Reconsideration ("Response") 30 September 2024.

<sup>3</sup> Response, paras 2-4, 6.

<sup>4</sup> Response, para. 5.

<sup>5</sup> Response, para. 7.

3. The Defence points out that its submissions are confined to one point, namely that the judgment has made a material error in determining that a decision was made as to the legality of Mr Shala's detention at his Initial Appearance.
4. In response to the other two points, the Defence maintains that a decision was required, and that the decision of the Supreme Court is not in line with those of the Court of Appeal and the Pre-Trial Judge. Such a submission has not proper basis in law or fact.
5. It is submitted that the decision amounts to a clear error of reasoning, which justifies a reconsideration of its decision given the exceptional circumstances. 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.<sup>6</sup> In the alternative, Mr Shala argues that incorrectly stating the position under which he was detained in the Decision will cause him injustice and, therefore, should be corrected in light of these exceptional circumstances.
6. It is further noted, that the failure to address this most fundamental point that is guaranteed under the Constitution, by incorporating the ECHR, risks not only the continued violation of the rights of Mr. Shala, but of all accused brought before the court in a similar manner.

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<sup>6</sup> Request, para. 18.

**A. RECONSIDERATION DUE TO AN ERROR OF REASONING****(1) The Pre-Trial Judge Made no Decision on Detention**

7. The SPO incorrectly states that the Pre-Trial Judge “confirmed his continued detention”.<sup>7</sup> The Pre-Trial Judge did not issue any Order that Mr Shala shall remain in detention supported by reasons, or otherwise, confirming his continued detention. The phrase used by the Pre-Trial Judge was “as you remain in detention” not “I confirm your continued detention”<sup>8</sup> nor did he invite oral submissions at the hearing from the parties on the question of detention. This latter point is fatal to the question at issue.

8. The Pre-Trial Judge at the Initial Hearing invited Mr Shala to comment on his treatment in relation to his arrest, transfer and detention, not on the legality of his detention as suggested by the SPO.<sup>9</sup> At no stage did he invite the SPO to set out its objections to provisional release or allow the defence to respond as to why Mr. Shala should be released. The invitation to address legality by the Pre-Trial was to be left to the periodic review in accordance with Rule 57 of the Rules of Procedure.<sup>10</sup> It should be noted that the First Decision on Review of Detention did not suggest that any decision about detention was

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<sup>7</sup> Response, para. 3.

<sup>8</sup> KSC-BC-2023-11, Transcript, 13 December 2023, p.14

<sup>9</sup> Response, para. 6.

<sup>10</sup> KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).

made at the Initial Appearance as is evident from the procedural history in its Decision.<sup>11</sup>

**(2) The Legality Framework does not require a Decision on Detention Post-Arrest**

9. The SPO argues that the “central complaint is something which the legal framework does not require”.<sup>12</sup> Whilst the Law may be silent on the issue, it does not override the consideration of the Constitutional and ECHR considerations that are a fundamental aspect of the domestic legal framework. Once again, the KSC does not operate in a vacuum and it is not an international or hybrid tribunal, it is a domestic judicial organ that is required to apply domestic law.
10. The Defence plainly disagrees with the deeply flawed position of the SPO. The Supreme Court Panel also appears to disagree in its decision stating that Mr. Shala was given the opportunity to challenge his detention in accordance with ECHR jurisprudence.<sup>13</sup> The Panel states that “Mr Shala was heard on the issue of detention and decided on the basis thereof that Mr Shala should remain in

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<sup>11</sup> KSC-BC-2023-10, Decision on Review of Detention of Haxhi Shala, 9 February 2024, p.2-3.

<sup>12</sup> Response, para. 5.

<sup>13</sup> 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, paras 42-43.

detention".<sup>14</sup> The Defence's submission is that the Supreme Court has made an error in stating that a decision was made on detention. The error is material because it forms part of the *ratio* or legal reasoning of the judgment.

**(3) The Supreme Court's decision is in line with those of the Court of Appeal and the Pre-Trial Judge**

11. The SPO states that the Supreme Court's decision is in line with that of the Court of Appeal and Pre-Trial Judge.<sup>15</sup> It is not in line with either judicial decision because the Supreme Court found that a decision was made on Mr. Shala's detention at the Initial Appearance.<sup>16</sup> Neither the Court Appeal, nor Pre-Trial Judge suggest that such a decision was made at the Initial Appearance post-arrest. The position of the Court of Appeal and Pre-Trial judge was that the initial arrest warrant provided a basis for his detention and that no further decision was required.<sup>17</sup>

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<sup>14</sup> 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, para., 43.

<sup>15</sup> Response, para. 7.

<sup>16</sup> 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, paras, 42-43.

<sup>17</sup> Request, paras 14-15.

**B. A RECONSIDERATION IS NECESSARY TO AVOID INJUSTICE**

12. In the alternative, a reconsideration is necessary to avoid injustice by correcting a material error in the judgment, which underpins the decision and, therefore, should not be allowed to stand.
13. The SPO argues that there can be no injustice because the initial Request for Protection of Legality could have been declared inadmissible. The Defence notes that the Court ultimately found the Request to be admissible, so this is a moot point and has no bearing at all on the basis for requesting reconsideration.

**III. CONCLUSION**

14. For the foregoing reasons, the Request should be granted.

**Word count: [1,152 words]**



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**5 October 2024**

**At Tirana, Republic of Albania**