

In: KSC-CC-2024-28
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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Haxhi Shala Referral to the Specialist Chamber of the Constitutional Court

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I. INTRODUCTION

1. Pursuant to Rule 20(1)(b) of the Rules of Procedure for the Specialist Chamber of the Constitutional Court¹ (“RPSCCC”), the Defence for Mr. Haxhi Shala (“Defence”) hereby submits a referral to the Specialist Chamber of the Constitutional Court of the Decision of the Supreme Court on Haxhi Shala’s Request for Protection of Legality of 9 September 2024 (“Decision on Request for Protection of Legality”),² in which the Supreme Court Panel did not find in regard to the arrest and detention of Haxhi Shala (“Accused”) that there had been a substantial violation of the procedures on the part of the Pre-Trial Judge or the Appeals Panel.³

II. PROCEDURAL HISTORY

2. On 4 December 2023, the Pre-Trial Judge granted the requests of the Specialist Prosecutor Office (“SPO”) for the issuance of an arrest warrant and a transfer order for the Accused.⁴

¹ KSC-BD-03/Rev3/2020.

² KSC-BC-2023-10/PL001/F00006.

³ Decision on Request for Protection of Legality, para. 43.

⁴ 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).

3. On 11 December 2023, the Accused was arrested in Prishtinë, Republic of Kosovo.
4. On 12 December 2023, the Accused was transferred to the Kosovo Specialist Chambers (“KSC”) Detention Management Unit in The Hague, the Netherlands.⁵
5. On 13 December 2023, an initial appearance before the Pre-Trial Judge took place.⁶ At the hearing, the Pre-Trial Judge stated that the Accused had the right to request review of decisions on detention,⁷ but then failed to issue any decision on the continued detention of the Accused.
6. At the first Status Conference held on 15 December 2023, the Accused entered pleas of not guilty to each charge in the indictment.⁸ No ruling was made on detention.

⁵ 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.

⁶ KSC-BC-2023-11, Initial Appearance, Transcript, 13 December 2023, pp. 1-15.

⁷ *Ibid*, p. 9, lines 19-22.

⁸ KSC-BC-2023-11, Status Conference, Transcript, 15 December 2023, p. 42.

7. On 31 January 2024⁹ and 4 February 2024¹⁰ respectively the SPO and the Defence filed submissions for the first review of detention.
8. On 9 February 2024, the Pre-Trial Judge issued the “Decision on Review of Detention of Haxhi Shala” (“Decision on Review of Detention”), ordering the Accused’s continued detention.¹¹
9. On 12 April 2024, the Appeals Panel issued the “Decision on Haxhi Shala’s Appeal Against Decision on Review of Detention”, in which it denied the Accused’s appeal against the Decision on Review of Detention.¹²
10. On 12 July 2024, the Accused filed a “Request for Protection of Legality against Haxhi Shala’s Appeal Against Decision on Review of Detention” (“Request for Protection of Legality”).¹³

⁹ KSC-BC-2023-11/F00037, Prosecution submission pertaining to periodic detention review of Haxhi Shala, confidential.

¹⁰ KSC-BC-2023-11/F00039, Response to Prosecution submission pertaining to periodic detention review of Haxhi Shala, confidential.

¹¹ KSC-BC-2023-11/F00165, confidential. A public redacted version of the decision was issued on the same day.

¹² IA002/F0005. A public redacted version was filed on the same day.

¹³ PL001/F00001.

11. On 9 September 2024, the Supreme Court Panel issued its 'Decision on Request for Protection of Legality', in which it denied the Request for Protection of Legality in its entirety.¹⁴
12. On 18 September 2024, the Accused submitted its 'Re-filed Request for Reconsideration of the Supreme Court Chamber's Decision on Haxhi Shala's Request for Protection of Legality' ("Request for Reconsideration").¹⁵
13. On 16 October 2024, a Panel of the Supreme Court Chamber issued its 'Decision on Haxhi Shala's Request for Reconsideration of Decision on Protection of Legality' ("Decision on Request for Reconsideration"), in which it denied the Request for Reconsideration.¹⁶

III. APPLICABLE LAW

14. Article 113(7) of the Constitution of the Republic of Kosovo¹⁷ ("Constitution") provides:

¹⁴ PL0001/F00006.

¹⁵ KSC-BC-2023-10/PL001/F00009, 18 September 2024.

¹⁶ KSC-BC-2023-10/PL001/F00013 .

¹⁷ Constitution of the Republic of Kosovo, Official Gazette of the Republic of Kosovo No. K-09042008 of 9 April 2008

“Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.”

15. Pursuant to Article 22(2) of the Constitution, human rights and fundamental freedoms guaranteed by, *inter alia*, the European Convention on Human Rights¹⁸ (“ECHR”) are guaranteed by the Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions.
16. Article 49(3) of the Law on Specialist Chambers and Specialist Prosecutor’s Office¹⁹ (“Law”) specifically grants to individuals, including the accused and victims, the power to make referrals under Article 113(7) to the Specialist Chamber of the Constitutional Court in relation to alleged violations by the Specialist Chambers of individual rights and freedoms.²⁰
17. Article 5(3) of the ECHR provides in relevant part: “Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article²¹

¹⁸ European Convention for the Protection of Fundamental Rights and Freedoms, ratified on 04 November 1950, in force 03 September 1953, 213 UNTS 221.

¹⁹ Law No. 05/L-053, 3 August 2015.

²⁰ See also Rule 20(1) of the RPSCCC.

²¹ Article 5(1)(c) of the ECHR permits “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”.

shall be brought before a judge or other officer authorised by law to exercise judicial power.”

IV. REFERRAL TO THE CONSTITUTIONAL COURT

18. The Defence contends that the failure of the Pre-Trial Judge to decide on the detention of the Accused at the Initial Appearance on 13 December 2023 was a violation of Article 5(3) of the ECHR. It sought a remedy on 4 February 2024²² in submissions for the first review of detention, on 19 February 2024 in an interlocutory appeal²³ and on 18 September 2024 in the Request for Protection of Legality. On each occasion the Specialist Chambers dismissed the request.²⁴ The Defence has therefore exhausted all legal remedies provided by law.

19. The violation of Article 5(3) of the ECHR is a violation of a right guaranteed pursuant to Article 22(2) of the Constitution. The Defence therefore

²² KSC-BC-2023-11/F00039, Response to Prosecution submission pertaining to periodic detention review of Haxhi Shala, confidential.

²³ IA002/F00001, Interlocutory Appeal against the Decision on Review of Detention of Haxhi Shala, confidential.

²⁴ KSC-BC-2023-11/F00165; IA002/F0005; PL001/F00005.

respectfully refers this issue under Article 113(7) of the Constitution to the Constitutional Court.

20. The jurisprudence of the European Court of Human Rights (“ECtHR”) establishes that, to comply with Article 5 of the ECHR,²⁵ there must be a decision on detention when an arrested person is first brought before a judge.²⁶ Specifically:

- a. A review must take place after a person is arrested;
- b. The person arrested whose arrest and detention is to be reviewed must be brought physically before a judge or other judicial officer;
- c. The review must include a review of the legality and merits of detention;
- d. It is automatic;
- e. It is conducted by a judicial officer;
- f. It is carried out promptly;

²⁵ European Convention for the Protection of Fundamental Rights and Freedoms, ratified on 04 November 1950, in force 03 September 1953, 213 UNTS 221.

²⁶ *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.

- g. The decision-maker should have the power of release;
 - h. Such a power of release should be exercised if a person doesn't fall within the permitted exceptions in Article 5; and
 - i. Any judge or judicial officer sanctioning the detention or continued detention should provide reasons for their decision.
21. The steps set out above to be carried out are not optional and must be carried out in their entirety. Their importance is not hierarchical – they are all equally important. They are not aspirational or illusory rights; they constitute the absolute minimum requirements.
22. The European Court of Human Rights (“ECtHR”) has made clear that the judicial control of detention under Article 5(3) is automatic, operating as an independent safeguard for the accused and is not dependent on any application by the Defence. In *Niedbala v Poland*, the Court held, following on from a long line of jurisprudence dating from *De Jong, Baljet and Van den Bink v Netherlands*,²⁷ 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.

²⁷ *De Jong, Baljet and Van den Bink v Netherlands*, Judgment, 22 May 1984, ECtHR, Application No. 8805/79, 8806/79, 9242/81, para. 51. See also *McKay v United Kingdom*, Judgment, 3 October 2006, ECtHR, Application No. 543/03.

Such a requirement would not only change the nature of the safeguard provided for under Article 5 § 3...It might even defeat the purpose of the safeguard under Article 5 § 3 which is to protect the individual from arbitrary detention by ensuring that the act of deprivation of liberty is subject to independent judicial scrutiny.”²⁸

23. The position of the Supreme Court Panel is somewhat ambiguous. For the most part its argument in the Decision on Request for Protection of Legality is that factors other than a decision on detention at the Initial Appearance ensured that the requirements of Article 5(3) were met.²⁹ Such a position is clearly at odds with the obligatory nature of the paragraph 20 above. It is also an illogical position to take that if certain procedural steps are taken then it matters not if some, albeit obligatory steps, are not. Such a position is all the more worrying where such a position is clearly put forward to respond to a failure to apply obligatory procedural steps for the protection of such a fundamental right.

24. Equally, the Panel appeared to state, contrary to the determinations of both the Pre-Trial Judge³⁰ and the Court of Appeal Panel,³¹ that such a decision was

²⁸ *Niedbala v. Poland*, Judgment, 4 July 2000, ECtHR, Application No. 27915/95, para. 50.

²⁹ Decision on Request for Protection of Legality, paras. 38, 40-43.

³⁰ Decision on Review of Detention, para. 13.

³¹ IA002/F0005, para. 30, 35-36.

in fact taken.³² This was the basis for the Request for Reconsideration. It quite clearly was not. The issue was that it was whether it should have been. Whilst denying that Request, the Panel does not endorse its earlier apparent statement that the Pre-Trial Judge confirmed the Accused's detention at the Initial Appearance.³³ Again, the bulk of its reasoning in the Decision on Request for Reconsideration is to the effect that a decision on detention at the Initial Appearance was not necessary for the requirements of Article 5(3) to be met.³⁴ Indeed notwithstanding the lack of precision, this is the predominant import of both Decisions.

25. In the Decision on Request for Protection of Legality, the Supreme Court Panel noted that "Article 5(3) of the ECHR is largely reflected in Article 41(5) and (6) of the Law" and the Defence's request "therefore addresses a right available under the Law as specified in Article 48(8) of the Law."³⁵ The Panel's reasoning is flawed. The critical word is "largely". Articles 41(5) and 41(6) do

³² Decision on Request for Protection of Legality, para. 42. See also Request for Reconsideration, paras. 14-16.

³³ The Supreme Court Panel may be referring to the earlier statement in the following sentence: "Finally, it is inherent that a court of higher instance will assess the facts and legal questions independently and may come to a different conclusion or characterisation of the facts or legal question than the lower courts." Decision on Request for Reconsideration, para. 22.

³⁴ Decision on Request for Reconsideration, paras. 20-23.

³⁵ Decision on Request for Protection of Legality, para. 34.

not include the requirement for a decision on detention at the Initial Appearance before a judge of an arrested person.

26. The Court commented:

“The Panel observes that, unlike the ECtHR cases cited by Mr Shala, 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. 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 Law”. 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.”³⁶

³⁶ Decision on Request for Protection of Legality, para. 40.

27. However, in making the assertion that “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”, the Panel cites (in the accompanying footnote) the “Decision on Arrest and Transfer [of 4 December 2023], para. 17.”³⁷ This decision is a decision on arrest, not a decision on detention. The decisions on the legality of Accused’s arrest, transfer, and detention are different decisions which require different considerations. The rest of the factors cited at paragraph 40 of the Supreme Court’s decision above therefore related solely to the decision-making process on the legality of arrest, not the Accused’s detention. The Supreme Court does not rely on any decision on detention, because no such decision exists.
28. It is important to note that the steps relied upon by the Supreme Court are steps taken prior to arrest and prior to being physically brought before the Pre-Trial Judge. These are significant matters, and whilst “Article 5(3) of the ECHR is largely reflected in Article 41(5) and (6) of the Law” this critical component, the requirement to be brought before a judge or other judicial

³⁷ Decision on Request for Protection of Legality, footnote 77.

officer who hears the accused personally and decides upon detention after hearing from the parties, is not, and such a failure is fatal.

29. To be clear, Article 5(3) is applicable, whether or not a judge has authorised the arrest in advance. The case of *Harkmann v. Estonia* makes clear that the requirements of Article 5(3) cannot be discharged by “prior judicial involvement” after a suspect is detained.³⁸ This includes both a “procedural requirement” to hear from the individual concerned and a “substantive requirement” to review “the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons.”³⁹
30. The way in which the Pre-Trial Judge conducted the proceedings did not comply with the Article 5 ECHR “substantive requirement” to review the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons.
31. The Defence submit that the Supreme Court’s reliance on the Pre-Trial Judge’s prior decision on arrest to justify that a full, reasoned decision in detention

³⁸ *Harkmann v. Estonia*, Judgment, 11 July 2006, ECtHR, Application No. 2192/03, paras. 36-38.

³⁹ *Schiesser v. Switzerland*, Judgment, 4 December 1979, ECtHR, Application No. 7710/76, para. 31.

had been made is wrong, and implies that it is lawful or not necessary for a Pre-Trial Judge to make a full, reasoned decision on detention.

32. The Supreme Court further states, “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. The next day, Mr Shala was provided with a certified copy of the Confirmed Indictment (both in Albanian and in English). 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.”⁴⁰ The Supreme Court then implies that the fact that the Accused had been given a copy of the Arrest Warrant and the Transfer Order which told him of the reason for his arrest and of his rights in this respect before the initial appearance, and the fact that the Pre-Trial Judge invited him during the Accused to raise any issue in relation to his detention during the initial appearance and he did not do so, provide further justification for the failure of the Pre-Trial Judge to make a full, reasoned decision on detention. Once again, the Supreme Court implies that a full, reasoned decision on detention

⁴⁰ Decision on Request for Protection of Legality, para. 41.

was not necessary. The Defence submit that this fails to comply with the requirements in Article 5(3) of the ECHR as set out above.

33. In its Decision on Request for Reconsideration, the Supreme Court does not explicitly affirm that a reasoned decision was taken in court regarding the legality of the Accused's detention, but it nevertheless sought to justify the situation by noting that the Accused "was invited to make submissions on his detention during the initial appearance"⁴¹ and recalling that the ECtHR requires that the person "be heard" and has referred in this context to the person being given the opportunity to "present the court with possible personal or other reasons mitigating against his detention after his actual arrest".⁴² The Supreme Court also argued that "the Pre-Trial Judge carefully considered the substantial requirements for Mr Shala's detention, as well as the relevant legal documents which had been provided to Mr Shala in advance of the initial hearing and on which he did not comment when invited to do so."⁴³

34. Such an approach by the Supreme Court is wrong both in fact and in law. The Accused was given an opportunity to submit observations on detention in

⁴¹ Decision on Request for Reconsideration, para. 20.

⁴² Decision on Request for Reconsideration, para. 20.

⁴³ Decision on Request for Reconsideration, para. 21.

writing after the hearing – not during the hearing as was required by Article 5(3) ECHR.

35. The case law of the ECtHR has made clear that the judicial control of detention under Article 5(3) is automatic, operating as an independent safeguard for the accused and is not dependent on any application by the Defence.⁴⁴ Since the judicial control of detention must be automatic, it was clearly not sufficient to allow the Accused to file a written request (after the hearing) when the issue should have been dealt with by the Pre-Trial Judge at the Initial Hearing.⁴⁵

V. CONCLUSION

36. For the foregoing reasons the Defence requests that the Constitutional Court find that:

- (i) the failure of the Pre-Trial Judge to consider the lawfulness and merits of the detention of the Accused at his initial appearance on 13

⁴⁴ *De Jong, Baljet and Van den Bink v Netherlands*, Judgment, 22 May 1984, ECtHR, Application No. 8805/79, 8806/79, 9242/81, para. 51. See also *McKay v United Kingdom*, Judgment, 3 October 2006, ECtHR, Application No. 543/03.

⁴⁵ Cf. KSC-BC-2023-11/F00039, Response to Prosecution Submission Pertaining to Periodic Detention of Haxhi Shala, 4 February 2024, confidential (“Defence Response”), para. 41.

December 2023 was in violation of Article 5(3) of the ECHR and accordingly Article 22(2) of the Constitution;

- (ii) that the detention of the Accused from 13 December 2023 until the Decision on Review of Detention of 9 February 2024 was therefore unlawful; and
- (iii) the Accused may file a request with the President for compensation or other appropriate redress for the period of time during which he has been unlawfully detained.

Word Count: [3,318 words]



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At the Hague, Netherlands