



**In:** KSC-BC-2023-12  
**The Specialist Prosecutor v. Hashim Thaçi, Bashkim Smakaj,  
Isni Kilaj, Fadil Fazliu and Hajredin Kuçi**

**Before:** Pre-Trial Judge  
Judge Marjorie Masselot

**Registrar:** Fidelma Donlon

**Date:** 7 February 2025

**Language:** English

**Classification:** Confidential

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**Decision on Review of Detention of Bashkim Smakaj**

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**THE PRE-TRIAL JUDGE**,<sup>1</sup> pursuant to Article 41(6), (10) and (12) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 56(2) and 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby issues the following decision.

## I. PROCEDURAL BACKGROUND

1. On 5 December 2024, Bashkim Smakaj ("Mr Smakaj" or "Accused") was arrested in Kosovo,<sup>2</sup> pursuant to a decision and arrest warrant issued by the Pre-Trial Judge ("Decision on Arrest"),<sup>3</sup> and further to the confirmation of an indictment against him, Hashim Thaçi ("Mr Thaçi"), Fadil Fazliu, Isni Kilaj and Hajredin Kuçi ("Confirmation Decision").<sup>4</sup>

2. On 8 December 2024, at the initial appearance of Mr Smakaj,<sup>5</sup> the Pre-Trial Judge ordered his continued detention ("First Detention Decision")<sup>6</sup> and set the briefing schedule for the Parties' submissions in relation to the review of Mr Smakaj's detention.<sup>7</sup>

3. On 15 January 2025, the Defence for Mr Smakaj ("Smakaj Defence") made submissions on review of detention ("Defence Submissions").<sup>8</sup>

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<sup>1</sup> KSC-BC-2023-12, F00015, President, [Decision Assigning a Pre-Trial Judge](#), 6 June 2024, public.

<sup>2</sup> KSC-BC-2023-12, F00042, Registrar, *Notification of Arrest of Bashkim Smakaj Pursuant to Rule 55(4)*, 5 December 2024, public.

<sup>3</sup> KSC-BC-2023-12, F00037, Pre-Trial Judge, *Decision on Request for Arrest Warrants and Related Matters*, 29 November 2024, confidential, with Annexes 1-8, strictly confidential and *ex parte*. A public redacted version of the main filing was issued on 19 December 2024, [F00037/RED](#).

<sup>4</sup> KSC-BC-2023-12, F00036, Pre-Trial Judge, *Decision on the Confirmation of the Indictment*, 29 November 2024, confidential.

<sup>5</sup> KSC-BC-2023-12, Transcript of Hearing, *Initial Appearance of Bashkim Smakaj* ("Initial Appearance Transcript"), 8 December 2024, public.

<sup>6</sup> See Initial Appearance Transcript, p. 40, line 23, to p. 43, line 25.

<sup>7</sup> See Initial Appearance Transcript, p. 43, lines 10-20.

<sup>8</sup> KSC-BC-2023-12, F00117, Smakaj Defence, *Submission on Detention on Remand*, 15 January 2025, confidential and *ex parte*, with Annex 1, confidential and *ex parte*. The Pre-Trial Judge notes that Annex 1 contains a document partly in Albanian, partly in English. In line with F00076, Pre-Trial Judge, [Decision on Working Language](#), 11 December 2024, public, paras 12-14, the Smakaj Defence was

4. On 27 January 2025, the Specialist Prosecutor's Office ("SPO") responded to the Defence Submissions ("SPO Response").<sup>9</sup>

## II. SUBMISSIONS

### A. DEFENCE SUBMISSIONS

5. The Smakaj Defence submits that Mr Smakaj's detention is not necessary or proportionate,<sup>10</sup> since: (i) the mere suspicion of having committed crimes under the jurisdiction of the Specialist Chambers ("SC") is insufficient to meet the requirements for detention on remand, and the strength of such suspicion cannot, at this stage, be tested by the Smakaj Defence;<sup>11</sup> (ii) the requirements under Article 41(6)(b) of the Law are not (sufficiently) met;<sup>12</sup> and (iii) it has not been shown that there are no alternatives to pre-trial detention.<sup>13</sup>

6. More specifically, with regard to the risks under Article 41(6)(b) of the Law, the Smakaj Defence first avers that the Accused is not a risk of flight,<sup>14</sup> since he: (i) went on with his daily life in Kosovo after the search of his house by the SPO in 2023, and did not attempt to make himself untraceable to the authorities; (ii) is a teaching professor with limited, but crucial income for the daily cost of living of his family; (iii) is rooted in his residential area; (iv) has no financial or actual ability to evade justice authorities for long periods of time; and (v) is unlikely to flee from the

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ordered to submit a translation of Annex 1 by 24 January 2025 (*see* CRSPD22, 17 January 2025). On 24 January 2025, the Smakaj Defence re-submitted Annex 1, without an English translation of the Albanian portions (*see* F00136/A01). On 29 January 2025, pursuant to an additional instruction by the Pre-Trial Judge (*see* CRSPD25, 27 January 2025), the Smakaj Defence sent a partial translation of Annex 1 (*see* CRSPD27, 29 January 2025, with Annex 1).

<sup>9</sup> KSC-BC-2023-12, F00138, Specialist Prosecutor, *Prosecution Response to 'Submission on Detention on Remand'* (F00117), 27 January 2025, confidential and *ex parte*.

<sup>10</sup> Defence Submissions, para. 2 (under heading "Submission").

<sup>11</sup> Defence Submissions, paras 3-4 (under heading "Submission").

<sup>12</sup> Defence Submissions, paras 4-6, 8-20.

<sup>13</sup> Defence Submissions, para. 7.

<sup>14</sup> Defence Submissions, para. 12.

authorities for years, given the punishment that may follow in case of a conviction.<sup>15</sup> Second, the Smakaj Defence submits that there are no grounds to believe that there is a risk of interference with proceedings,<sup>16</sup> since: (i) the accusation against him concerns two specific visits to the SC Detention Facilities; (ii) Mr Smakaj has no criminal record; (iii) since the search of his house by the SPO in 2023, the Accused has not attempted to contact any witness;<sup>17</sup> and (iv) detailed statements have already been made against Mr Smakaj, and all material has been seized in relation thereto.<sup>18</sup> Third, the Smakaj Defence avers that there are no grounds to believe that there is a risk of committing further crimes,<sup>19</sup> as the mere fact that someone is a suspect does not create a risk of recurrence, especially now that the circumstances have changed and Mr Smakaj is aware of the suspicion and the investigation against him.<sup>20</sup>

7. According to the Smakaj Defence: (i) the SPO has not substantiated the grounds for pre-trial detention;<sup>21</sup> and (ii) the disclosed evidence so far only shows transcripts of conversations that are *prima facie* subject to multiple interpretations, and does not include further instances of Mr Smakaj confronting or manipulating witnesses or others.<sup>22</sup>

8. In light of the above, the Smakaj Defence requests the Pre-Trial Judge to order Mr Smakaj's interim release or placement in house arrest,<sup>23</sup> if necessary subject to the following conditions: (i) not changing his place of residence; (ii) surrendering his passport and other travel documents; (iii) reporting daily to the police or other relevant authorities; (iv) being subject to close monitoring by the authorities;

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<sup>15</sup> Defence Submissions, paras 8-11.

<sup>16</sup> Defence Submissions, paras 13, 17.

<sup>17</sup> Defence Submissions, paras 13, 15-16.

<sup>18</sup> Defence Submissions, para. 16.

<sup>19</sup> Defence Submissions, para. 20.

<sup>20</sup> Defence Submissions, para. 19.

<sup>21</sup> Defence Submissions, paras 21, 24.

<sup>22</sup> Defence Submissions, paras 22-23.

<sup>23</sup> Defence Submissions, paras 6-7, 25-26, 31.

(v) appearing in court whenever ordered to do so; (vi) posting bail in the amount of €10.000; and/or (vii) any other conditions as deemed appropriate.<sup>24</sup>

9. Lastly, the Smakaj Defence requests the Pre-Trial Judge to consider Mr Smakaj's relevant and grave personal circumstances as described in Annex 1 of the Defence Submissions, in particular the (financial) impact of detention on his family.<sup>25</sup>

#### B. SPO RESPONSE

10. In response, the SPO argues that Mr Smakaj must remain detained,<sup>26</sup> since the requirements under Article 41(6) of the Law are satisfied.<sup>27</sup> At the outset, the SPO submits that: (i) nothing has occurred since the previous rulings that would affect the finding of a well-grounded suspicion against Mr Smakaj;<sup>28</sup> and (ii) such suspicion exceeds the standard required for detention.<sup>29</sup>

11. Concerning the risk of flight, the SPO responds that there is a "sufficiently real possibility" that Mr Smakaj presents such a risk,<sup>30</sup> given: (i) the factors previously taken into account when ordering his arrest;<sup>31</sup> and (ii) the Accused's increasing access to additional evidence, through the ongoing disclosure process.<sup>32</sup> Concerning the risk of obstruction, the SPO recalls the multiple examples of Mr Smakaj's persistent, obstructive acts previously provided by the SPO and considered in the Decision on Arrest.<sup>33</sup> Concerning the risk of committing further crimes, the SPO responds that, in the absence of information contrary to the findings of the Pre-Trial

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<sup>24</sup> Defence Submissions, paras 26-27.

<sup>25</sup> Defence Submissions, paras 28-30. *See* Annex 1 to the Defence Submissions.

<sup>26</sup> SPO Response, paras 1, 11, 34.

<sup>27</sup> SPO Response, paras 1, 11-22.

<sup>28</sup> SPO Response, paras 12-13.

<sup>29</sup> SPO Response, para. 12.

<sup>30</sup> SPO Response, para. 16.

<sup>31</sup> SPO Response, para. 14, referring to [Decision on Arrest](#), paras 15, 69-71.

<sup>32</sup> SPO Response, para. 15.

<sup>33</sup> SPO Response, paras 17-20, referring to [Decision on Arrest](#), paras 74-76.

Judge in the Decision on Arrest, and in light of continuing disclosure, this risk continues to exist.<sup>34</sup>

12. Regarding the proposed alternative conditions to detention, the SPO avers that:<sup>35</sup> (i) the risks under Article 41(6)(b)(ii)-(iii) of the Law can only be effectively managed through the communications monitoring regime at the SC Detention Facilities;<sup>36</sup> (ii) some of the factors brought up by the Smakaj Defence were already known to the Pre-Trial Judge when she issued the Decision on Arrest;<sup>37</sup> and (iii) the Smakaj Defence does not indicate how the proposed conditions mitigate the risks.<sup>38</sup>

13. Lastly, the SPO submits that, given its arguments on necessity as a whole, the stage of the proceedings, and the progress already made, including the recent SPO completion of its disclosure obligations pursuant to Rule 102(1)(a) of the Rules, Mr Smakaj's detention is both reasonable and proportional.<sup>39</sup>

### III. APPLICABLE LAW

14. Pursuant to Article 41(6) of the Law, the SC shall only order the arrest and detention of a person when: (a) there is a grounded suspicion that he or she has committed a crime within the jurisdiction of the SC; and (b) there are articulable grounds to believe that the person: (i) is a risk of flight; (ii) will destroy, hide, change or forge evidence of a crime, or will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices; or (iii) will repeat the criminal offence, complete an attempted crime, or commit a crime which he or she has threatened to commit.

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<sup>34</sup> SPO Response, paras 21-22, referring to [Decision on Arrest](#), paras 78-79.

<sup>35</sup> SPO Response, paras 1, 23-31.

<sup>36</sup> SPO Response, paras 23, 26-30.

<sup>37</sup> SPO Response, para. 24.

<sup>38</sup> SPO Response, paras 25-26, 31.

<sup>39</sup> SPO Response, paras 1, 32.

15. Pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules, until a judgment is final or until release, upon expiry of the two (2) months from the last ruling on detention on remand, the Pre-Trial Judge or Panel seized with the case shall examine whether reasons for detention on remand still exist, and render a ruling by which detention on remand is extended or terminated.

16. Pursuant to Article 41(12) of the Law, in addition to detention on remand, the following measures may be ordered by the SC to ensure the presence of the accused, including by video-conference, to prevent reoffending or to ensure successful conduct of criminal proceedings: summons, arrest, bail, house detention, promise not to leave residence, prohibition on approaching specific places or persons, attendance at police station or other venue, and diversion. Pursuant to Rule 56(5) of the Rules, the Panel may impose such conditions upon the release as deemed appropriate to ensure the presence of the detained person.

17. Pursuant to Rule 56(2) of the Rules, the Pre-Trial Judge shall ensure that a person is not detained for an unreasonable period prior to the opening of the case, and, in case of an undue delay caused by the Specialist Prosecutor, the Panel, having heard the Parties, may release the person under conditions as deemed appropriate.

#### IV. DISCUSSION

##### A. APPLICABLE STANDARD

18. The Pre-Trial Judge recalls that she has an obligation under Article 41(10) of the Law to examine every two (2) months whether the reasons for detention on remand continue to exist,<sup>40</sup> including the grounds set out in Article 41(6) of the Law, namely

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<sup>40</sup> See, for example KSC-BC-2020-07, IA002/F00005, Court of Appeals Panel, [Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention](#) ("First Haradinaj Detention Appeal Decision"), 9 February 2021, public, para. 55; KSC-BC-2020-06, IA006/F00005/RED, Court of Appeals Panel, [Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Review of Detention](#) ("Second Krasniqi Detention Appeal Decision"), 1 October 2021, public, para. 15; KSC-BC-



whether: (i) there is a grounded suspicion that the person has committed the crime(s), under Article 41(6)(a) of the Law; and (ii) there are articulable grounds to believe that any of the risks set out in Article 41(6)(b) of the Law are present.<sup>41</sup> The duty to determine whether the circumstances underpinning detention still exist imposes on the Pre-Trial Judge the task to assess, *proprio motu*, whether she is still satisfied that, at the time of the review and under the specific circumstances of the case when the review takes place, the detention of the person remains warranted.<sup>42</sup> This two (2)-month automatic review is not strictly limited to whether or not a change of circumstances occurred, but such a change can be determinative and shall be taken into consideration if raised by a Party or *proprio motu*.<sup>43</sup> Furthermore, the Pre-Trial Judge may refer to findings in previous decisions if she is satisfied that the evidence or information underpinning those decisions still supports the findings made at the time of the review.<sup>44</sup> The Pre-Trial Judge is neither required to make findings on the factors already decided upon in the initial ruling on detention, nor to entertain submissions that merely repeat arguments that have already been addressed in earlier decisions.<sup>45</sup>

19. The Pre-Trial Judge likewise underscores that any analysis of Mr Smakaj's detention must duly consider his presumption of innocence.<sup>46</sup> This means, as a

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2020-04, F00224/RED, Pre-Trial Judge, [Public Redacted Version of Decision on Review of Detention of Pjetër Shala](#) ("Sixth Shala Detention Decision"), 22 June 2022, public, para. 19.

<sup>41</sup> [Sixth Shala Detention Decision](#), para. 19; [First Haradinaj Detention Appeal Decision](#), para. 55. See also KSC-BC-2020-04, F00075/RED, Pre-Trial Judge, [Public Redacted Version of Decision on Review of Detention of Pjetër Shala](#) ("Second Shala Detention Decision"), 10 September 2021, public, para. 19; KSC-BC-2020-07, F00143, Pre-Trial Judge, [Decision on Review of Detention of Hysni Gucati](#), 24 February 2021, public, para. 17.

<sup>42</sup> [Second Krasniqi Detention Appeal Decision](#), para. 15; [Sixth Shala Detention Decision](#), para. 19.

<sup>43</sup> See [Second Krasniqi Detention Appeal Decision](#), para. 16; [Sixth Shala Detention Decision](#), para. 19.

<sup>44</sup> KSC-BC-2020-04, IA003/F00005/RED, Court of Appeals Panel, [Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Review of Detention](#) ("Second Shala Detention Appeal Decision"), 11 February 2022, public, para. 18. See also [Sixth Shala Detention Decision](#), para. 19.

<sup>45</sup> [First Haradinaj Detention Appeal Decision](#), para. 55; [Second Krasniqi Detention Appeal Decision](#), para. 17; [Second Shala Detention Appeal Decision](#), para. 18; [Sixth Shala Detention Decision](#), para. 19.

<sup>46</sup> See KSC-BC-2020-06, F00177/RED, Pre-Trial Judge, [Public Redacted Version of Decision on Hashim Thaçi's Application for Interim Release](#) ("First Thaçi Detention Decision"), 22 January 2021, para. 18;



consequence, that pre-trial detention cannot be maintained lightly and that the SPO bears the burden of establishing that Mr Smakaj's detention is necessary.<sup>47</sup> This also means that the SPO must provide specific arguments and concrete evidence to establish that continued detention is necessary at the time of the review.<sup>48</sup>

## B. GROUNDED SUSPICION

20. As regards the threshold for continued detention, Article 41(6)(a) of the Law requires a grounded suspicion<sup>49</sup> that the detained person has committed a crime within the jurisdiction of the SC. This is a condition *sine qua non* for the validity of the detained person's continued detention.<sup>50</sup>

21. The Pre-Trial Judge recalls that, in the Confirmation Decision, it was determined that, pursuant to Article 39(2) of the Law, there is a well-grounded suspicion that Mr Smakaj is criminally responsible for offences within the jurisdiction of the SC, namely attempting to obstruct official persons in performing official duties and contempt of court, within the meaning of Articles 401(2) and (5),

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KSC-CC-PR-2017-01, F00004, Specialist Chamber of the Constitutional Court, [Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19\(5\) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office](#) ("SCCC 26 April 2017 Judgment"), 26 April 2017, public, para. 113. Similarly, ECtHR, [McKay v. the United Kingdom](#), no. 543/03, Judgment, 3 October 2006, para. 43.

<sup>47</sup> See, for example, KSC-BC-2020-04, F00045/RED, Pre-Trial Judge, [Public Redacted Version of Decision on Pjetër Shala's Request for Provisional Release](#) ("First Shala Detention Decision"), 23 June 2021, public, para. 13; [First Thaçi Detention Decision](#), para. 19, with further references. See also ECtHR, [Merabishvili v. Georgia](#), no. 72508/13, Judgment ("Merabishvili v. Georgia"), 28 November 2017, para. 234.

<sup>48</sup> [Sixth Shala Detention Decision](#), para. 19.

<sup>49</sup> See Article 19(1)(1.9) of the 2022 Kosovo Criminal Procedure Code, Code No. 08/L-032 ("KCPC"). See similarly, Article 5(1)(c) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights in, *inter alia*, ECtHR, [Fox, Campbell and Hartley v. United Kingdom](#), nos 12244/86; 12245/86; 12383/86, Judgment, 30 August 1990, para. 32; [Erdagöz v. Turkey](#), no. 21890/93, Judgment, 22 October 1997, para. 51; [Ilgar Mammadov v. Azerbaijan](#), no. 15172/13, Judgment, 22 May 2014, para. 88; [Selahattin Demirtaş \(No. 2\) v. Turkey](#), no. 14305/17, Judgment, 22 December 2020, para. 314.

<sup>50</sup> [First Shala Detention Decision](#), para. 14. See also ECtHR, [Merabishvili v. Georgia](#), para. 222.

and 393 of the 2019 Kosovo Criminal Code, Code No. 06/L-074, respectively, in violation of Article 15(2) of the Law.<sup>51</sup>

22. Contrary to the Smakaj Defence's submissions, these findings were not made on the basis of a "mere" suspicion,<sup>52</sup> but a "well-grounded" suspicion, which goes "beyond mere theory or suspicion" and exceeds the threshold required for the purposes of Article 41(6)(a) of the Law.<sup>53</sup> Accordingly, the Pre-Trial Judge finds the Smakaj Defence's argument without merit.

23. In light of the above, and in the absence of any contrary intervening information or developments, the Pre-Trial Judge finds that there continues to exist a grounded suspicion that Mr Smakaj has committed offences under the jurisdiction of the SC, within the meaning of Article 41(6)(a) of the Law.<sup>54</sup>

#### C. NECESSITY OF DETENTION

24. Once the threshold in Article 41(6)(a) of the Law is met, the grounds that would justify the deprivation of a person's liberty must be *articulable* in the sense that they must be specified in detail.<sup>55</sup> In this regard, Article 41(6)(b) of the Law echoes the principle that the continued detention of a person can only be justified if there are specific indications of a genuine requirement of public interest, which outweigh the person's right to liberty.<sup>56</sup> Therefore, the Pre-Trial Judge must rely on case-specific

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<sup>51</sup> Confirmation Decision, para. 313(c).

<sup>52</sup> See *supra* para. 5.

<sup>53</sup> See Confirmation Decision, para. 43. See also [Decision on Arrest](#), para. 43. See similarly, [Second Shala Detention Decision](#), para. 22; [Sixth Shala Detention Decision](#), para. 24.

<sup>54</sup> See similarly, [Decision on Arrest](#), para. 43; Initial Appearance Transcript, p. 42, lines 20-24.

<sup>55</sup> See Article 19(1.31) of the KCPC, which defines "articulable" as: "the party offering the information or evidence must specify in detail the information or evidence being relied upon". See also, for example, [First Shala Detention Decision](#), para. 16; KSC-BC-2020-06, IA001/F00005, Court of Appeals Panel, [Decision on Kadri Veseli's Appeal Against Decision on Interim Release](#) ("First Veseli Detention Appeal Decision"), 30 April 2021, public, paras 15, 18.

<sup>56</sup> [SCCC 26 April 2017 Judgment](#), para. 113.

reasoning and concrete grounds in deciding whether to order continued detention.<sup>57</sup>

25. The Pre-Trial Judge further recalls that, on the basis of the available evidence, the specific articulable grounds must support the “belief”<sup>58</sup> that any of the risks specified under the three limbs of Article 41(6)(b) of the Law exist, denoting an acceptance of the possibility, not the inevitability, of a future occurrence.<sup>59</sup> In other words, the standard to be applied is less than certainty, but more than a mere possibility of a risk materialising.<sup>60</sup> The Pre-Trial Judge further observes that these grounds are in the alternative, and that the existence of one ground suffices to determine the necessity of detention.<sup>61</sup>

26. As regards the nature of the assessment under Article 41(6)(b) of the Law, the Pre-Trial Judge recalls that, while the evaluation involves an element of discretion,<sup>62</sup> it must be based on the facts of the case and must be undertaken on an individual basis in light of the personal circumstances of the detained person.<sup>63</sup> When assessing the relevant factors, the Pre-Trial Judge may not conduct a piecemeal assessment, but must weigh all relevant factors taken together.<sup>64</sup>

27. Lastly, in relation to the grounds set forth in Article 41(6)(b)(ii)-(iii) of the Law, the Pre-Trial Judge emphasises that it suffices that the risks may materialise as a

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<sup>57</sup> [SCCC 26 April 2017 Judgment](#), para. 115; [First Shala Detention Decision](#), para. 16; KSC-BC-2020-06, IA004/F00005/RED, Court of Appeals Panel, [Public Redacted Version of Decision on Hashim Thaçi’s Appeal Against Decision on Interim Release](#), 30 April 2021, public, para. 22. See also ECtHR, [Khudoyorov v. Russia](#), no. 6847/02, Judgment (“*Khudoyorov v. Russia*”), 8 November 2005, para. 173.

<sup>58</sup> See chapeau of Article 41(6)(b) of the Law.

<sup>59</sup> See [First Shala Detention Decision](#), para. 16; [Second Shala Detention Decision](#), para. 24; [Sixth Shala Detention Decision](#), para. 26; [First Thaçi Detention Decision](#), para. 20, with further references.

<sup>60</sup> See [First Veseli Detention Appeal Decision](#), para. 17; [First Shala Detention Decision](#), para. 16.

<sup>61</sup> See [First Shala Detention Decision](#), para. 20; [First Thaçi Detention Decision](#), para. 25.

<sup>62</sup> See [First Thaçi Detention Decision](#), para. 21, with further references.

<sup>63</sup> See [First Shala Detention Decision](#), para. 17; [First Thaçi Detention Decision](#), para. 21, with further references. See similarly, ECtHR, [Aleksanyan v. Russia](#), no. 46468/06, Judgment, 22 December 2008, para. 179.

<sup>64</sup> See [First Shala Detention Decision](#), para. 17; [First Thaçi Detention Decision](#), para. 21, with further references.

result of the detained person's acts or omissions, but they do not require physical execution on his or her part.<sup>65</sup>

## 1. Risk of Flight

28. As regards the risk of flight under Article 41(6)(b)(i) of the Law, the Pre-Trial Judge finds that the considerations set out in the Decision on Arrest and the First Detention Decision are still relevant, namely: (i) Mr Smakaj's awareness of the gravity of the offences he is charged with, together with the potential sentence that these offences could attract if he is convicted, which provide him with a motive to evade justice;<sup>66</sup> (ii) his demonstrated blatant disregard for the laws and the rules of the SC;<sup>67</sup> (iii) the fact that he possesses an active Albanian passport and would have the opportunity to flee, by travelling freely to jurisdictions beyond the reach of the SC;<sup>68</sup> and (iv) the fact that he has the means to evade justice.<sup>69</sup> On the last point, the Pre-Trial Judge recalls her previous considerations as to the Accused's past (high-level) positions in Kosovo's institutions (National Security Adviser to Mr Thaçi, Director of the Kosovo Intelligence Agency, and member of the Kosovo Police), and his links to former Kosovo Liberation Army ("KLA") commanders, such as Mr Thaçi, government officials and other persons with resources and security, police and intelligence expertise.<sup>70</sup> Therefore, the Pre-Trial Judge remains persuaded that the Accused can rely on a significant network of influential individuals from whom he may seek and secure resources and support for the purpose of fleeing.<sup>71</sup> In this regard, and also considering his willingness to post bail in the amount of €10.000, the Pre-Trial Judge finds the Smakaj Defence's argument

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<sup>65</sup> [First Shala Detention Decision](#), para. 19; [First Thaçi Detention Decision](#), para. 24.

<sup>66</sup> See [Decision on Arrest](#), para. 69, with references; Initial Appearance Transcript, p. 42, lines 3-7.

<sup>67</sup> See [Decision on Arrest](#), para. 69.

<sup>68</sup> See [Decision on Arrest](#), para. 70.

<sup>69</sup> See [Decision on Arrest](#), para. 71.

<sup>70</sup> See [Decision on Arrest](#), para. 71.

<sup>71</sup> See [Decision on Arrest](#), para. 71.

that the Accused lacks the ability to evade justice given his limited income<sup>72</sup> unconvincing. At this juncture, it is worth recalling that it is the risk, not the inevitability of flight, that must be assessed.<sup>73</sup> Accordingly, the Pre-Trial Judge finds that Mr Smakaj has the means to flee, irrespective of this personal financial means.

29. In addition to the above, the Pre-Trial Judge attaches weight to the fact that, since his arrest, Mr Smakaj is aware of the indictment-supporting evidence against him, and has now gained increased insight into the evidence underpinning the charges through the ongoing disclosure process.<sup>74</sup>

30. Lastly, the Pre-Trial Judge takes note of Mr Smakaj's family circumstances,<sup>75</sup> but considers that they do not alter her previous findings that Mr Smakaj's rooted family ties in Kosovo only mitigate and do not diminish the risk that he will flee.<sup>76</sup>

31. In light of the above, and in the absence of any contrary intervening information, the Pre-Trial Judge concludes that the risk of flight in relation to Mr Smakaj continues to exist.

## **2. Risk of Obstructing the Progress of SC Proceedings**

32. As regards the risk of obstruction of proceedings under Article 41(6)(b)(ii) of the Law, the Pre-Trial Judge finds that the circumstances set out in the Decision on Arrest and the First Detention Decision continue to apply, namely: (i) the nature of the charges confirmed against the Accused, who was part of a group, led by Mr Thaçi, aiming at unlawfully influencing witnesses;<sup>77</sup> and (ii) Mr Smakaj's

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<sup>72</sup> See *supra* para. 6.

<sup>73</sup> See *similarly*, KSC-BC-2023-10, KSC-BC-2023-10, F00123/RED, Pre-Trial Judge, [Public Redacted Version of Decision on Sabit Januzi's Request for Interim Release](#) ("First Januzi Detention Decision"), 8 December 2023, public, para. 48.

<sup>74</sup> See Disclosure Packages Nos 6, 8. See also, *similarly*, KSC-BC-2023-12, IA001/F00005, Court of Appeals Panel, [Decision on Isni Kilaj's Appeal Against Decision on Continued Detention](#) ("Kilaj Detention Appeal Decision"), 28 January 2025, public, para. 42.

<sup>75</sup> See *supra* para. 9. See also Annex 1 to the Defence Submissions, pp 2-3.

<sup>76</sup> See [Decision on Arrest](#), para. 72; Initial Appearance Transcript, p. 42, lines 7-9.

<sup>77</sup> [Decision on Arrest](#), para. 74, with further explanations; see *similarly*, [Kilaj Detention Appeal Decision](#), para. 43.

persistence in furthering obstruction efforts in SC proceedings, including by following orders from persons with political influence to whom he is loyal, such as Mr Thaçi.<sup>78</sup>

33. Further to the above, the Pre-Trial Judge considers important the fact that the Accused is gaining increased awareness of the incriminating evidence against him in this case, as a result of the ongoing disclosure, and has, as such, further incentive to interfere with witnesses.<sup>79</sup> In this respect, the Pre-Trial Judge underscores that the risk of obstruction need not materialise by Mr Smakaj personally approaching any witnesses, but may materialise, for instance, through further coordination with people loyal to KLA commanders, such as Mr Thaçi, and/or people from his political circles.<sup>80</sup>

34. In this regard, the Pre-Trial Judge underlines that she assesses the above factors against the backdrop of the pervasive climate of fear and intimidation in Kosovo against witnesses or potential witnesses of the SC.<sup>81</sup> The Pre-Trial Judge considers that, in this context, the risk of Mr Smakaj exerting pressure on witnesses is particularly high,<sup>82</sup> in light of his ties, as referenced above.

35. Lastly, concerning the Smakaj Defence's arguments, the Pre-Trial Judge recalls that the purported isolated nature of the offences and the passage of time are insufficient to disturb the Pre-Trial Judge's assessment.<sup>83</sup>

36. In light of the above, and in the absence of any contrary intervening information, Pre-Trial Judge concludes that the risk that Mr Smakaj will obstruct the progress of SC proceedings continues to exist.

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<sup>78</sup> See [Decision on Arrest](#), para. 74.

<sup>79</sup> See [Decision on Arrest](#), para. 75; see similarly, [Kilaj Detention Appeal Decision](#), para. 44.

<sup>80</sup> See similarly, [First Januzi Detention Decision](#), para. 54. See *supra* para. 28, with references.

<sup>81</sup> See [Decision on Arrest](#), para. 76, with references.

<sup>82</sup> See ECtHR, [Štvrtecký v. Slovakia](#), no. 55844/12, Judgment, 5 June 2018, para. 61; [Podeschi v. San Marino](#), no. 66357/14, Judgment, 13 April 2017, para. 149; [Staykov v. Bulgaria](#), no. 16282/20, Judgment, 8 June 2021, para. 83; [Pantano v. Italy](#), no. 60851/00, Judgment, 6 November 2003, para. 70.

<sup>83</sup> Initial Appearance Transcript, p. 42, lines 10-14.



### 3. Risk of Committing Further Crimes

37. As regards the risk of committing further offences under Article 41(6)(b)(iii) of the Law, the Pre-Trial Judge recalls that, even though the existence of a risk of obstruction does not automatically translate into a risk of committing further offences, the factors underpinning the former are of relevance to the assessment of the latter in the present circumstances.<sup>84</sup> In this regard, the Pre-Trial Judge notes that the relevant factors to be considered are the same as those outlined in paragraphs 32-35 above with respect to the risk of obstruction of proceedings. In particular, the Pre-Trial Judge underlines that, insofar as the Accused has (allegedly) attempted to obstruct proceedings for the benefit of Mr Thaçi, the possibility that he may repeat these actions for his own benefit cannot be ruled out, especially in the pervasive climate of fear and intimidation in Kosovo against witnesses or potential witnesses of the SC.<sup>85</sup>

38. For these reasons, the Pre-Trial Judge considers that there exists a risk that the Accused will repeat the offences he is alleged to have committed.

39. In light of the above, and in the absence of any contrary intervening information, the Pre-Trial Judge concludes that the risk that Mr Smakaj will commit further crimes continues to exist.

### 4. Conclusion

40. In view of the foregoing, the Pre-Trial Judge finds that there are articulable grounds to believe that Mr Smakaj may flee, obstruct the progress of the SC proceedings, and commit further offences, thus necessitating Mr Smakaj's continued detention, in accordance with Article 41(6)(b) of the Law. The Pre-Trial Judge will assess below whether these risks can be adequately mitigated by any conditions for Mr Smakaj's release.

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<sup>84</sup> See [Decision on Arrest](#), para. 78.

<sup>85</sup> See *supra* para. 34.



## D. CONDITIONAL RELEASE

41. The Pre-Trial Judge recalls that, when deciding on whether a person should be released or detained, she must consider all proposed and alternative measures to prevent the risks in Article 41(6)(b) of the Law.<sup>86</sup>

42. The Pre-Trial Judge recalls her previous finding in the First Detention Decision that none of the conditions proposed by the Smakaj Defence, including bail in the amount of €5.000, reporting to EULEX, or any other conditions deemed necessary,<sup>87</sup> could sufficiently mitigate the existing risks.<sup>88</sup>

43. Having considered the conditions proposed by the Smakaj Defence and all elements in English in Annex 1 to the Defence Submissions, the Pre-Trial Judge remains of the view that no conditions, whether those proposed by the Smakaj Defence or other conditions she could impose *proprio motu*,<sup>89</sup> could mitigate, at this stage, the existing risks, in particular the risk that the Accused will obstruct the progress of SC proceedings or commit further offences, in particular in light of the significant network of influential individuals within his KLA network and/or political circles.<sup>90</sup> Notably, the Pre-Trial Judge is of the view that such conditions: (i) do not address the possibility of Mr Smakaj employing communication devices belonging to other persons or requesting others to use their devices for these purposes; and (ii) cannot ensure the effective monitoring of Mr Smakaj's communications.

44. In the view of the Pre-Trial Judge, while the risk of illicit messages and instructions cannot be entirely eliminated, the measures in place at the SC Detention

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<sup>86</sup> As regards the obligation to consider "alternative measures", see [SCCC 26 April 2017 Judgment](#), para. 114. See also ECtHR, [Buzadji v. the Republic of Moldova](#), no. 23755/07, Judgment ("Buzadji v. Moldova"), 5 July 2016, para. 87; [Idalov v. Russia](#), no. 5826/03, Judgment, 22 May 2012, para. 140.

<sup>87</sup> See Initial Appearance Transcript, p. 37, line 24, to p. 38, line 6.

<sup>88</sup> See Initial Appearance Transcript, p. 43, lines 3-5.

<sup>89</sup> See KSC-BC-2020-06, IA017/F00011/RED, Court of Appeals Panel, [Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention](#), 5 April 2022, public, para. 51.

<sup>90</sup> See *supra* para. 28.

Facilities, viewed as a whole, provide robust assurances against unmonitored visits and communications with family members and pre-approved visitors with a view to minimising the risks of obstruction and commission of further offences, as much as possible.<sup>91</sup> In this regard, the Pre-Trial Judge recalls that the Registrar and the Panel, who have unrestricted access to confidential information concerning witnesses and victims, may take action more promptly than other authorities acting under a distinct framework.<sup>92</sup>

45. In light of the above, the Pre-Trial Judge concludes that the conditions for Mr Smakaj's release proposed by the Smakaj Defence and/or any *additional* reasonable conditions imposed by the Pre-Trial Judge remain insufficient to adequately mitigate the risks under Article 41(6)(b)(i)-(iii) of the Law.

#### E. PROPORTIONALITY OF DETENTION

46. At the outset, the Pre-Trial Judge recalls the importance of the proportionality principle in the determination of the reasonableness of pre-trial detention, as reflected in Rule 56(2) of the Rules.<sup>93</sup> The duration of time in detention pending trial is a factor that needs to be considered along with the degree of the risks that are described in Article 41(6)(b) of the Law, in order to determine whether, all factors being considered, the continued detention "stops being reasonable" and the individual needs to be released.<sup>94</sup> However, the Pre-Trial Judge notes that the question of whether a length of time spent in pre-trial detention is reasonable cannot be assessed in the abstract, and must be assessed based on the facts of each

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<sup>91</sup> Similarly, KSC-BC-2020-06, IA010/F00008/RED, Court of Appeals Panel, [Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention](#) ("Second Thaçi Detention Appeal Decision"), 27 October 2021, public, para. 68.

<sup>92</sup> KSC-BC-2023-10, F00165, Pre-Trial Judge, [Public Redacted Version of Decision on Review of Detention of Haxhi Shala](#), 9 February 2024, public, para. 54.

<sup>93</sup> KSC-BC-2020-07, IA001/F00005, Court of Appeals Panel, [Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention](#), 9 December 2020, public, paras 72-73.

<sup>94</sup> [Second Thaçi Detention Appeal Decision](#), para. 49, with further references.

case and according to its specific features.<sup>95</sup> Furthermore, the Pre-Trial Judge recalls that such an assessment can only be based on the circumstances at the time of review, and not on what may or may not occur in the foreseeable future.<sup>96</sup>

47. Considering that Mr Smakaj has been detained since 5 December 2024,<sup>97</sup> the Pre-Trial Judge is of the view that no question of proportionality arises at this early stage of the proceedings. Further, the Pre-Trial Judge takes into consideration that, since the First Detention Decision: (i) a status conference has been held in order to review the status of the case and organise the disclosure of evidence between the Parties;<sup>98</sup> (ii) the Pre-Trial Judge has issued the “Framework Decision on Disclosure of Evidence and Related Matters”, setting the timelines for the disclosure of evidence between the Parties with a view to ensuring the efficiency of the process;<sup>99</sup> and (iii) the SPO has completed disclosure of all Rule 102(1)(a) material.<sup>100</sup> Thus, in the view of the Pre-Trial Judge, the proceedings are moving forward expeditiously.

48. Moreover, pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules, Mr Smakaj’s detention will be regularly reviewed upon the expiry of two (2) months from the last ruling on detention or at any time upon request, or *proprio motu*, where a change in circumstances since the last review has occurred.

49. In view of the foregoing, the Pre-Trial Judge finds that the time Mr Smakaj has spent in pre-trial detention is not unreasonable within the meaning of Rule 56(2) of the Rules.

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<sup>95</sup> ECtHR, *Buzadji v. Moldova*, para. 90.

<sup>96</sup> KSC-BC-2023-10, F00325, Pre-Trial Judge, *Third Decision on Review of Detention of Haxhi Shala*, 5 June 2024, public, para. 47.

<sup>97</sup> See *supra* para. 1.

<sup>98</sup> KSC-BC-2023-12, Transcript of Hearing, *Status Conference*, 17 December 2024, public, pp 126-198.

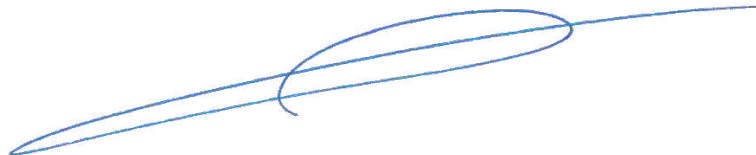
<sup>99</sup> KSC-BC-2023-12, F00100, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 20 December 2024, public.

<sup>100</sup> See Disclosure Packages Nos 6, 8.

## V. DISPOSITION

50. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a) **ORDERS** Mr Smakaj's continued detention;
- b) **ORDERS** the Smakaj Defence and the SPO to file public redacted versions of their respective submissions, or request their reclassification as public, by **Friday, 14 February 2025**;
- c) **ORDERS** Mr Smakaj, if he so wishes, to file submissions on the next review of detention by **Monday, 10 March 2025**, with responses and replies following the timeline set out in Rule 76 of the Rules; and
- d) **ORDERS** the SPO, should Mr Smakaj decide not to file any submissions by the aforementioned time limit, to file submissions on the next review of Mr Smakaj's detention by **Friday, 14 March 2025**, and Mr Smakaj, if he so wishes, to file his response by **Friday, 21 March 2025**.



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**Judge Marjorie Masselot**  
**Pre-Trial Judge**

Dated this Friday, 7 February 2025

At The Hague, the Netherlands.