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KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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| **File number:** | **KSC-CC-2024-28** |
| **Before:** | **The Specialist Chamber of the Constitutional Court**<br>Judge Vidar Stensland, Presiding<br>Judge Roumen Nenkov<br>Judge Romina Incutti |
| **Registrar:** | Fidelma Donlon |
| **Date:** | 6 March 2025 |
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| **File name:** | Referral by Haxhi Shala to the Constitutional Court Panel |
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# Judgment on the Referral of Haxhi Shala to the Specialist Chamber of the Constitutional Court

**Applicant**
Haxhi Shala

**Specialist Prosecutor**
Kimberly P. West

**The Specialist Chamber of the Constitutional Court**

Composed of

Vidar Stensland, Presiding Judge

Roumen Nenkov, Judge

Romina Incutti, Judge

Having deliberated remotely delivers the following Judgment

# I. PROCEDURE

## A. REFERRAL

1. On 11 November 2024, Mr Haxhi Shala ("Applicant") made a referral to the Specialist Chamber of the Constitutional Court ("Chamber") under Article 113(7) of the Constitution of the Republic of Kosovo ("Constitution"), and Article 49(3) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law" and "Referral", respectively).[1] The Applicant was represented by Mr Toby Cadman and Mr John Cubbon.

2. In the Referral, the Applicant complained about a violation of his fundamental rights in connection to his arrest and detention, as ordered by the Specialist Chambers ("SC"). In particular, the Applicant argued that the pre-trial judge's failure to consider the lawfulness and merits of his detention, and to decide in that respect at the initial appearance hearing on 13 December 2023, violated his right to liberty and security under Article 5(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention").[2]

3. On 14 November 2024, the President of the SC, pursuant to Article 33(3) of the

[1] KSC-CC-2024-28, F00001, Haxhi Shala referral to the Specialist Chamber of the Constitutional Court, public, 11 November 2024.
[2] Referral, paras 18-35, 36(i).

Law, assigned the above Panel to rule on the Referral.[3]

### B. WRITTEN SUBMISSIONS AND WORKING LANGUAGE

4. The Chamber considered that the Referral was sufficiently comprehensive and that no additional written submissions were necessary under Rule 15(2) of the Rules of Procedure for the Specialist Chamber of the Constitutional Court ("SCCC Rules").[4]

5. Furthermore, pursuant to Article 20 of the Law and Rule 5 of the SCCC Rules, the Chamber decided that the working language of the present proceedings would be English, with official translation provided by the Registry into the two other official languages of the SC, namely Albanian and Serbian.

### C. EXAMINATION OF THE REFERRAL

6. The Chamber turns to the examination of the Referral, based on the Referral and the documents referenced therein. This judgment refers to the facts of the case and the submissions of the Applicant insofar as relevant for the Chamber's assessment of the Referral.

## II. THE FACTS

### A. THE APPLICANT'S ARREST AND INITIAL APPEARANCE

[3] KSC-CC-2024-28, F00002, Decision to assign judges to a Constitutional Court Panel, public, 14 November 2023. As regards the venue of the proceedings, see KSC-CC-2019-06, F00001, Invocation of change of venue for referrals made pursuant to Article 49 of the Law, public, 18 January 2019; F00002, Decision on the location of proceedings before the Specialist Chamber of the Constitutional Court, public, 22 January 2019.

[4] See KSC-CC-2022-19, F00004/RED, Public redacted version of the decision on the referral of Pjetër Shala concerning fundamental rights guaranteed by Articles 31 and 32 of the Kosovo Constitution and Articles 6 and 13 of the European Convention on Human Rights, public, 15 December 2022 ("*Decision on P. Shala referral concerning disqualification request*"), para. 3 *in initio*; KSC-CC-2022-18, F00004/RED, Public redacted version of the decision on the referral of Pjetër Shala to the Constitutional Court Panel concerning fundamental rights guaranteed by Articles 30 and 31 of the Kosovo Constitution and Article 6 of the European Convention on Human Rights, public, 22 August 2022, para. 3 *in fine*. See also KSC-CC-2022-15, F00010, Decision on the referral of Hashim Thaçi concerning the right to an independent and impartial tribunal established by law and to a reasoned opinion, public, 13 June 2022 ("*Decision on H. Thaçi referral concerning jurisdictional challenge*"), paras 44-45.

7. On 4 December 2023, the pre-trial judge confirmed an indictment submitted by the Specialist Prosecutor's Office ("SPO") against the Applicant and charged him with criminal offences under Article 15(2) of the Law, namely one count of offences against the administration of justice and public administration pursuant to Article 387 of the 2019 Kosovo Criminal Code, Code No. 06/L-074 ("KCC"), and two counts of criminal offences against public order within the meaning of Article 401(1) and (5) and 401(2) and (5) of the KCC.[5] The pre-trial judge also issued an arrest warrant for the Applicant, and an order for his transfer to the SC Detention Facilities in The Hague.[6] In particular, alongside the finding of a well-grounded suspicion that the Applicant committed or attempted to commit, alone or in co-perpetration, agreed to commit, or assisted in the commission of the aforementioned offences,[7] the pre-trial judge also found articulable grounds to believe that there was a risk (albeit moderate) that the Applicant may flee, obstruct the progress of the criminal proceedings, and commit further offences,[8] thus "necessitating his arrest and detention" pursuant to Article 41(6) of the Law.[9]

8. On 11 December 2023, at 07h47 in the morning, the Applicant was arrested by the SPO in Kosovo[10] and, on 12 December 2023, he was transferred to the SC Detention

[5] KSC-BC-2023-11, F00005/RED, Public redacted version of the decision on the confirmation of the indictment, public, 30 January 2024 (the original filed on 4 December 2023) ("Confirmation decision"), para. 155(a); F00013/A01, Public redacted indictment, public, 12 December 2023, para. 30. The case against the Applicant (KSC-BC-2023-11) was joined with the case against Messrs Sabit Januzi and Ismet Bahtijari (KSC-BC-2023-10), and the joint case proceeded under the latter case record number (see KSC-BC-2023-11, F00041/RED, Public redacted version of decision on request for joinder and amendment of the indictment, public, 8 February 2024 (the original filed on the same day), para. 58(a), (f); KSC-BC-2023-10, F00161/RED, Public redacted version of decision on request for joinder and amendment of the indictment, public, 8 February 2024 (the original filed on the same day), para. 58(a), (f)).

[6] KSC-BC-2023-11, F00006/RED, Public redacted version of decision on request for warrant of arrest and transfer order, public, 22 December 2023 (the original filed on 4 December 2023), with Annexes 1-2, public ("Decision on arrest and transfer").

[7] Decision on arrest and transfer, para. 17. See also Confirmation decision, paras 101, 117, 129, 132, 136, 140, 144, 149.

[8] Decision on arrest and transfer, paras 18-22.

[9] Decision on arrest and transfer, para. 23.

[10] KSC-BC-2023-11, F00008, Notification of arrest of Haxhi Shala pursuant to Rule 55(4), public, 11 December 202, para. 4.

Facilities in The Hague.[11] Upon his arrest, the Applicant was provided certified copies (in English and Albanian) of the arrest warrant and transfer order, and was informed of the reasons for his arrest and of his rights in this connection.[12] The arrest warrant served on the Applicant contained, *inter alia,* a summary of: (i) the findings of the pre-trial judge concerning the existence of a well-grounded suspicion that the Applicant committed a criminal offence within the SC's jurisdiction, as outlined in the confirmed indictment,[13] and (ii) the reasoning provided by the pre-trial judge in the decision on the arrest and transfer of the Applicant as to the necessity of his arrest.[14] The arrest warrant further specified that, following his arrest and transfer to the custody of the SC, the Applicant would be brought without delay before the pre-trial judge pursuant to Article 41(5) of the Law[15] and that, pursuant to Article 41(2) and (5) of the Law, he would also have the right to challenge the lawfulness of his arrest, the transfer order and the conditions of detention before the pre-trial judge, as well as the right to appeal before the Court of Appeals Chamber.[16]

9. On 12 December 2023, pursuant to Article 39(4) of the Law and Rules 87(6) and 91(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), the pre-trial judge convened the hearing on the initial appearance of the Applicant, to be held in public on 13 December 2023 at 14h00.[17]

10. On 13 December 2023, the Applicant, assisted by a duty counsel, was brought

[11] KSC-BC-2023-11, F00011, Notification of reception of Haxhi Shala in the detention facilities of the Specialist Chambers, public, 12 December 2023.
[12] KSC-BC-2023-11, F00015/RED, Public redacted version of "Report on the arrest and transfer of Haxhi Shala to the detention facilities with strictly confidential and *ex parte* annexes 1-3" (F00015), public, 3 July 2024 (the original filed on 13 December 2023), paras 11-13.
[13] KSC-BC-2023-11, F00006/RED/A01/RED, Public redacted version of arrest warrant for Haxhi Shala, public, 28 February 2024 (the original filed on 4 December 2023) ("Arrest warrant"), paras 1-3. See also Confirmation decision, paras 71-101, 103-117, 119-129, 132, 136, 140, 144, 149.
[14] Arrest warrant, para. 4. See also Decision on arrest and transfer, paras 18-23.
[15] Arrest warrant, para. 9.
[16] Arrest warrant, para. 10.
[17] KSC-BC-2023-11, F00014, Decision setting the date for the initial appearance of Haxhi Shala and related matters, public, 12 December 2023, paras 6-8, 14, 22(a).

before the pre-trial judge.[18] At the hearing, the pre-trial judge proceeded, to (i) have the confirmed indictment read to the Applicant;[19] (ii) confirm that he understood the indictment;[20] (iii) inform the Applicant of his rights before the SC and satisfy himself that his rights, and in particular his right to counsel, were respected;[21] (iv) instruct the Applicant to enter a plea;[22] and (v) set other dates, as appropriate, in the exercise of his function as a pre-trial judge.[23]

11. Before concluding the hearing, the pre-trial judge asked the Applicant whether there were any issues he wished to raise "in relation to [his] arrest, the transfer to The Hague, or [his] detention".[24] The Applicant responded that he had "nothing to add", and that "[e]verything [was] fine".[25] Lastly, after declaring that the Applicant would "remain in detention", the pre-trial judge informed him that he "may challenge [his] detention on remand in accordance with Rule 57 [of the Rules]", and that the matter would "be dealt with in written rulings".[26]

B. REVIEW OF DETENTION

12. On 25 January 2024, taking note that, pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules, the first review of the detention of the Applicant was due on 9 February 2024, the pre-trial judge ordered the SPO to file submissions on the matter by 31 January 2024, and the Applicant, if he so wished, to file a response to the SPO's submissions by 5 February 2024.[27]

13. On 4 February 2024, the Applicant filed a response to the SPO's submissions on

[18] KSC-BC-2023-11, Transcript of initial appearance hearing, public, 13 December 2023 ("Transcript of initial appearance hearing"), p. 2, lines 21-25.
[19] Transcript of initial appearance hearing, p. 5, line 25 to p. 7, line 9.
[20] Transcript of initial appearance hearing, p. 7, lines 15-18.
[21] Transcript of initial appearance hearing, p. 7, line 19 to p. 10, line 25.
[22] Transcript of initial appearance hearing, p. 11, line 1 to p. 12, line 7.
[23] Transcript of initial appearance hearing, p. 12, line 23 to p. 14, line 13.
[24] Transcript of initial appearance hearing, p. 14, line 23 to p. 15, line 1.
[25] Transcript of initial appearance hearing, p. 15, lines 2-3.
[26] Transcript of initial appearance hearing, p. 15, lines 5-7.
[27] KSC-BC-2023-11, F00034, Scheduling order for submissions on review of detention, public, 25 January 2024, paras 3-4.

the review of detention.[28] The Applicant claimed, *inter alia*, that he should be released on the basis of the unlawfulness of his continued detention.[29] Specifically, he alleged that: (i) although the arrest warrant and transfer order provided the legal basis for his initial arrest and transfer to the SC Detention Facilities in The Hague, it could not serve as a sufficient legal basis for his continued detention;[30] (ii) it is not for the detained person to apply for release, but for the judge before whom said person is brought to consider the lawfulness of the arrest, transfer and detention;[31] and (iii) contrary to the requirements of Article 5(3) of the Convention, at the initial appearance hearing, the pre-trial judge failed to consider the merits of the Applicant's detention and to issue a detention order beyond the arrest warrant and transfer order, which had been issued following an *ex parte* application by the SPO.[32] In addition, the Applicant argued that the procedure set out in the Law and the Rules is incompatible with Article 5(3) of the Convention.[33] He maintained that, as a result, his continued detention was unlawful, and that he should be released.[34] Alternatively, the Applicant requested the pre-trial judge to refer the question of the compatibility of the SC's legal framework governing the initial review of a person's detention with the Constitution and the Convention to the Chamber.[35]

14. On 9 February 2024, the pre-trial judge issued the first decision on the review of the Applicant's detention and addressed, preliminarily, the Applicant's challenge to the lawfulness of his initial detention.[36] Noting that (i) the judgment of the European

[28] KSC-BC-2023-11, F00039/RED, Public redacted version of response to prosecution submission pertaining to periodic detention of Haxhi Shala, public, 7 February 2024 (the original filed on 4 February 2024) ("Detention review submissions").
[29] Detention review submissions, paras 1, 28-48, 73(ii), (v).
[30] Detention review submissions, paras 30, 31.
[31] Detention review submissions, paras 32, 34-35.
[32] Detention review submissions, paras 36, 37, 39.
[33] Detention review submissions, paras 33, 41-47.
[34] Detention review submissions, paras 31, 37-40, 48.
[35] Detention review submissions, paras 49, 73(iii).
[36] KSC-BC-2023-10, F00165/RED, Public redacted version of decision on review of detention of Haxhi Shala, public, 12 February 2024 (the original filed on 9 February 2024) ("Decision on detention review"), paras 12-15.

Court of Human Rights ("ECtHR") cited by the Applicant in support thereof, namely *Aquilina v. Malta*, was issued in the context of an arrest which had not been authorised by a judge beforehand; (ii) the Applicant's arrest, conversely, was authorised by the pre-trial judge who, in the decision on arrest and transfer, reviewed all the substantial requirements for the Applicant's detention pursuant to Article 41(6) of the Law; and (iii) the Applicant had the opportunity to challenge said decision, but failed to do so, the pre-trial judge dismissed the Applicant's challenge.[37] The pre-trial judge likewise rejected the Applicant's request to refer the question of constitutional compatibility to the Chamber, noting that it has already determined the compatibility of the relevant SC provisions with the Constitution.[38] Further finding that (i) the requirements under Article 41(6) of the Law continued to be met;[39] (ii) the conditions for release proposed by the Applicant were insufficient to mitigate the risk of obstructing the progress of the criminal proceedings or committing further crimes;[40] and (iii) the detention of the Applicant had not, at that time, become unreasonable under Rule 56(2) of the Rules,[41] the pre-trial judge ordered the Applicant's continued detention.[42]

### C. INTERLOCUTORY APPEAL

15. On 19 February 2024, the Applicant filed an interlocutory appeal against the pre-trial judge's decision on the review of detention.[43] The Applicant argued, *inter alia*, that the pre-trial judge erred in dismissing his challenge regarding the lawfulness of his initial detention and related request for release.[44] Recalling his submissions before the

[37] Decision on detention review, paras 13, 15.
[38] Decision on detention review, paras 14-15.
[39] Decision on detention review, paras 21-23, 30-35, 38-42, 45-47.
[40] Decision on detention review, paras 51-56.
[41] Decision on detention review, paras 58-60.
[42] Decision on detention review, para. 61(a).
[43] KSC-BC-2023-10, IA002/F00001/RED, Public redacted version of interlocutory appeal against the decision on review of detention of Haxhi Shala with Annex, public, 22 April 2024 (the original filed on 19 February 2024) ("Interlocutory appeal against decision on detention review").
[44] Interlocutory appeal against decision on detention review, paras 19-21, 25, 30. See also KSC-BC-2023-10, IA002/F00004/RED, Public redacted version of reply to prosecution response to interlocutory appeal

pre-trial judge,[45] the Applicant further claimed that, since judicial control of detention under Article 5(3) of the Convention should be automatic rather than dependent on a request by the detained person, it had not been sufficient to allow him to file a written request after his initial appearance when the issue should have been addressed at that hearing.[46] In support, he invoked the jurisprudence of the ECtHR as set forth in, *inter alia*, *De Jong, Baljet and Van den Brink v. the Netherlands* and *Niedbała v. Poland*.[47] Further relying on the ECtHR's judgment in *Harkmann v. Estonia*, the Applicant maintained that, contrary to the findings of the pre-trial judge, the requirements of Article 5(3) of the Convention cannot be discharged by prior judicial involvement in the arrest of a detained person; rather, the judicial officer must hear the concerned person, review the circumstances militating for or against detention, and decide, by reference to legal criteria, whether there are reasons to justify detention, and order release if no such reasons exist.[48] In this regard, he also argued that the initial decision on his arrest and transfer did not provide sufficient safeguards under Article 5(3) of the Convention, since it was issued pursuant to an *ex parte* application by the SPO, without hearing the Applicant.[49] Lastly, recalling that the Chamber, when it considered the compatibility of the Rules with the Constitution, recognised that it was not in a position to determine finally and to what extent the Rules are consistent with the Constitution, the Applicant claimed that the pre-trial judge erred in not referring to the Chamber the question of

against decision on review of detention, public, 22 April 2024 (the original filed on 5 March 2024) ("Reply to prosecution response to interlocutory appeal"), paras 7-12.

[45] Interlocutory appeal against decision on detention review, para. 13. See also Reply to prosecution response to interlocutory appeal, paras 7-9; above, para. 13.

[46] Interlocutory appeal against decision on detention review, paras 16-17. See also Reply to prosecution response to interlocutory appeal, para. 7.

[47] Interlocutory appeal against decision on detention review, para. 16, referring to ECtHR, *De Jong, Baljet and Van den Brink v. the Netherlands,* nos 8805/79, 8806/79, 9242/81, 22 May 1984, para. 51; *Niedbała v. Poland*, no. 2791/95, para. 50.

[48] Interlocutory appeal against decision on detention review, para. 18, referring to ECtHR, *Harkmann v. Estonia*, no. 2192/03, 11 July 2006, paras 36-38. See also Reply to prosecution response to interlocutory appeal, para. 10.

[49] Interlocutory appeal against decision on detention review, paras 19-21.

the compatibility of the SC's legal framework with the Constitution.[50]

16. On 12 April 2024, the appeals panel issued a decision on the Applicant's appeal.[51] As a preliminary matter, it noted that, while the Applicant challenged the lawfulness of his initial detention, his appeal was directed against the decision on the review of detention, which essentially dealt with the Applicant's continuing detention.[52] In this regard, the appeals panel further noted that the Applicant had had the opportunity to raise this issue at a more appropriate time by challenging the lawfulness of his initial detention pursuant to Article 41(2) of the Law and Rule 57 of the Rules, or by filing an appeal against the decision on arrest and transfer within ten (10) days starting from the first working day after its notification to the Applicant, pursuant to Article 45(2) of the Law and Rule 58 of the Rules.[53] Although the Applicant had challenged the lawfulness of his initial detention for the first time before the pre-trial judge in his 4 February 2024 submissions on the review of detention, the appeals panel found that, since the pre-trial judge had addressed the Applicant's arguments on the matter, the challenge was properly brought before it as well.[54]

17. At the outset, the appeals panel noted that the key purpose of Article 5(3) of the Convention is to protect the individual from arbitrariness "by ensuring that the act of deprivation of liberty is subject to independent judicial scrutiny".[55] It further observed that (i) the SC's legal framework provides for strong safeguards against arbitrariness

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[50] Interlocutory appeal against decision on detention review, paras 14, 22-24. See also Reply to prosecution response to interlocutory appeal, para. 13.
[51] KSC-BC-2023-10, IA002/F00005/RED, Public redacted version of decision on Haxhi Shala's appeal against decision on review of detention, public, 12 April 2024 (the original filed on the same day) ("Decision on interlocutory appeal").
[52] Decision on interlocutory appeal, para. 20.
53 Decision on interlocutory appeal, para. 21. Recalling that the arrest warrant and transfer order had been provided to the Applicant upon arrest, but that the decision on arrest and transfer was only made available to the Applicant on 22 December 2023, when it was reclassified as confidential, the appeals panel also emphasised that, in its view, an accused before the SC should have access to the decision granting an SPO request for an arrest warrant and transfer order as early as possible, preferably in advance of the initial appearance hearing (see Decision on interlocutory appeal, footnote 54).
[54] Decision on interlocutory appeal, para. 22.
[55] Decision on interlocutory appeal, paras 24-25.

and undue prolongation of pre-trial detention through the principle of judicial control of detention, which is enshrined in Article 29(2) of the Constitution and Article 41(3) of the Law, and (ii) Article 41(5) of the Law mirrors Article 5(3) of the Convention.[56] In this connection, the appeals panel held "that the Constitution, the Law, and the Rules provide that any act of deprivation of liberty must be scrutinised by an independent judicial authority", either before or promptly after the arrest of the suspect or accused, depending on whether the arrest is based on an arrest warrant issued by the SC or an arrest order issued by the Specialist Prosecutor, respectively.[57]

18. Noting that (i) the Applicant was arrested pursuant to a judicial order issued by the pre-trial judged, annexed to the decision on arrest and transfer, and (ii) this judicial order constituted the legal basis for the Applicant's detention until the issuance of the first decision on the review of the Applicant's detention, the appeals panel held that, in the Applicant's case, the pre-trial judge exercised judicial control prior to his arrest, in accordance with the SC's legal framework.[58] It further observed that, one week prior to the Applicant's arrest, the pre-trial judge reviewed all the substantial requirements for arrest under Article 41(6) of the Law, which are the same as those for detention, and mirror the requirements of Article 5(1)(c) of the Convention.[59] In addition, the appeals panel noted that the SC's legal framework does not specifically prescribe the issuance of a separate detention decision in the event of issuance of an arrest warrant by a judge, finding it significant that Article 41(10) of the Law and Rule 57(2) of the Rules refer to the pre-trial judge's duty to review a decision on detention on remand on a bi-monthly basis, rather than to decide on detention.[60] Accordingly, the appeals panel considered that the pre-trial judge duly applied the SC's legal framework.[61]

[56] Decision on interlocutory appeal, para. 26.
[57] Decision on interlocutory appeal, para. 26.
[58] Decision on interlocutory appeal, para. 27.
[59] Decision on interlocutory appeal, para. 28.
[60] Decision on interlocutory appeal, para. 29.
[61] Decision on interlocutory appeal, para. 30

19. In light of the Applicant's claim that the SC's legal framework is not compatible with Article 5(3) of the Convention, the appeals panel further considered whether the control exercised by the pre-trial judge over the Applicant's detention was sufficient under said provision to justify his continued detention upon arrest.[62] While it agreed with the pre-trial judge that the ECtHR case of *Aquilina v. Malta* concerned a different factual situation, namely an arrest carried out by the police, the appeals panel was also mindful that, in cases involving arrests authorised by a court, including *Harkmann v. Estonia*, the ECtHR held that Article 5(3) of the Convention does not provide for any exceptions from the obligation that a person be brought promptly before a judge after their arrest and detention, not even on grounds of prior judicial involvement.[63] The appeals panel noted, however, that the ECtHR did not find that a judicial order issued prior to arrest in the absence of the detained person could not constitute the legal basis for continued detention, but found a violation of Article 5(3) of the ECtHR on the basis that the detained person was not brought promptly before a judge.[64] It recalled in this regard that, "what the ECtHR considers crucial, is that the person be brought *promptly* and *automatically* before a judge, that he or she be heard personally about the possible reasons militating against the detention, and that the judge has the *power to release* if the detention does not fall within the permitted exception set out in Article 5(1)(c) of the [Convention], or is unlawful".[65]

20. The appeals panel further noted that: (i) the Applicant was brought promptly before the pre-trial judge, specifically within two (2) days and six (6) hours from his arrest; (ii) during the initial appearance hearing, he had the opportunity to speak to a judge, to report any ill-treatment, and raise any issues concerning his arrest, transfer, and detention, including in connection to the lawfulness and merits of his detention; and (iii) the pre-trial judge had the power to release the Applicant, of his own motion,

[62] Decision on interlocutory appeal, para. 31.
[63] Decision on interlocutory appeal, paras 32-33.
[64] Decision on interlocutory appeal, para. 34.
[65] Decision on interlocutory appeal, para. 34.

if the detention was unlawful.[66] The appeals panel therefore found that the pre-trial judge had exercised sufficient control over the Applicant's detention both prior and after the Applicant's arrest, thus complying with the requirements of Article 5(3) of the Convention.[67] In this respect, the appeals panel also remarked that, while it would have been preferable for the pre-trial judge to have explicitly referred to the legal basis for detention as reasoned in the arrest warrant and the decision on arrest and transfer and, as those proceedings were *ex parte*, invited the Applicant to make submissions on the issue of detention at the initial appearance hearing, this was not necessary in terms of the requirements of the Convention.[68] For these reasons, the appeals panel found that the Applicant failed to demonstrate that the pre-trial judge erred in rejecting his challenge to the lawfulness of his initial detention, and rejected his request for immediate release.[69]

21. Lastly, in light of its findings, the appeals panel held that no uncertainty existed as regards the compatibility of the SC's legal framework governing the initial review of a person's detention with the Constitution.[70]

D. REQUEST FOR PROTECTION OF LEGALITY

22. On 12 July 2024, the Applicant filed a request for protection of legality before a Supreme Court panel.[71] The Applicant argued that the appeals panel incorrectly found that (i) judicial control of detention may occur before a person's detention, and (ii) the pre-trial judge's power to release of his own motion provided a sufficient safeguard.[72] Chiefly, the Applicant contended that Article 5(3) of the Convention, as interpreted in

[66] Decision on interlocutory appeal, para. 35.
[67] Decision on interlocutory appeal, para. 36. The appeals panel also identified additional safeguards against arbitrariness set out in the Law and the Rules (see Decision on interlocutory appeal, para. 37).
[68] Decision on interlocutory appeal, para. 36
[69] Decision on interlocutory appeal, para. 38.
[70] Decision on interlocutory appeal, para. 41.
[71] KSC-BC-2023-10, PL001/F00001, Request for protection of legality against Haxhi Shala's appeal against decision on review of detention, public, 12 July 2024 ("Request for protection of legality").
[72] Request for protection of legality, paras 18-29.

the case law of the ECtHR, requires that the legality and merits of a person's detention be considered automatically, after he or she has been detained.[73] To maintain that such an obligation could be discharged prior to a person's detention, the Applicant argued, would defeat the purpose of Article 5(3) of the Convention.[74] In his view, a judge's *proprio motu* power to release does not discharge him or her from the obligation to conduct a review of legality after detention.[75] Likewise, the Applicant contended that Article 41(3) of the Law is not consistent with Article 5(3) of the Convention, since it distinguishes between those subject to a pre-existing detention order by the SC, and those who are not.[76] In this regard, the Applicant reiterated that the Chamber did not definitively establish the compatibility of the SC's legal framework governing the initial review of a person's detention with the Constitution.[77] Lastly, the Applicant claimed that he had been unlawfully detained since 13 December 2023, arguing that he should be released and compensated pursuant to Article 5(4) of the Convention and Rule 51 of the Rules, respectively.[78]

23. On 9 September 2024, the Supreme Court panel issued its decision on the request for protection of legality.[79] At the outset, the Supreme Court panel recalled, *inter alia*, the aim of Article 5(3) of the Convention, as well as the ECtHR's interpretation thereof as including both a procedural and a substantive requirement.[80] The Supreme Court panel further clarified that the question before it did not concern the promptness with

[73] Request for protection of legality, paras 18, 20-26. See also KSC-BC-2023-10, PL001/F00005, Defence's reply to the prosecution response to Shala defence's request for protection of legality, public, 19 August 2024 ("Reply to prosecution response to protection of legality"), paras 10, 13, 20.
[74] Request for protection of legality, para. 23. See also Reply to prosecution response to protection of legality, para. 10.
[75] Request for protection of legality, paras 28-29. See also Reply to prosecution response to protection of legality, paras 17-18.
[76] Request for protection of legality, paras 31-33. See also Reply to prosecution response to protection of legality, para. 21.
[77] Request for protection of legality, para. 34.
[78] Request for protection of legality, paras 35-39. See also Reply to prosecution response to protection of legality, paras 9, 11.
[79] KSC-BC-2023-10, PL001/F00006, Decision on Haxhi Shala's request for protection of legality, public, 9 September 2024 ("Decision on request for protection of legality").
[80] Decision on request for protection of legality, paras 35-38.

which the Applicant was brought before the pre-trial judge following his arrest, or the latter's power to release, but whether the pre-trial judge complied with Article 41(5) of the Law and Article 5(3) of the Convention in connection with the automatic review of the Applicant's detention.[81] The Supreme Court panel observed that: (i) the arrest and detention of the Applicant were ordered by the pre-trial judge, who personally and thoroughly examined all the requirements for detention set forth in Article 41(6) of the Law and Article 5(1)(c) of the Convention; (ii) upon his arrest, the Applicant was provided with certified copies (in English and Albanian) of the arrest warrant and transfer order, and was informed of the reasons for his arrest as well of his rights in this regard; and (iii) at the initial appearance hearing, the pre-trial judge gave the Applicant the opportunity to raise any concerns regarding his arrest, transfer, and detention, and having heard his response, decided that the Applicant should remain in detention.[82] The Supreme Court panel therefore considered that the pre-trial judge undertook the steps required pursuant to Article 41(6) of the Law and Article 5(1)(c) of the Convention.[83] As such, it did not find a substantial violation of the procedures on the part of the pre-trial judge or appeals panel and, on this basis, it also dismissed as moot the Applicant's arguments concerning the compatibility of Article 41(3) of the Law with Article 5(3) of the Convention.[84]

### E. REQUEST FOR RECONSIDERATION

24. On 18 September 2024, the Applicant filed a request for reconsideration of the Supreme Court panel's decision on the Applicant's request for protection of legality.[85] In particular, the Applicant alleged that, since (i) the pre-trial judge did not decide on the Applicant's continued detention at the initial appearance hearing, and (ii) neither

[81] Decision on request for protection of legality, para. 39.
[82] Decision on request for protection of legality, paras 40-42.
[83] Decision on request for protection of legality, para. 43.
[84] Decision on request for protection of legality, paras 43-44.
[85] 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, public, 18 September 2024 ("Request for reconsideration").

the pre-trial judge nor the appeals panel held that a decision had been made during the initial appearance hearing, the decision of the Supreme Court panel was based on a clear error of material fact.[86] He claimed that reconsideration was necessary to avoid injustice by correcting a fundamental error of fact underpinning the Supreme Court panel's decision on the request for protection of legality.[87]

25. On 16 October 2024, the Supreme Court panel issued its decision on the request for reconsideration.[88] Observing that requests for reconsideration are an exceptional remedy, the Supreme Court panel found that the Applicant failed to demonstrate an error in the reasoning of the decision on the request for protection of legality, or that reconsideration thereof was necessary to avoid injustice, thus rejecting the request.[89] Rather, the Supreme Court panel was of the view that the Applicant merely disagreed with the judicial reasoning and outcome of the impugned decision.[90] In particular, it noted that "it is inherent that a court of higher instance will examine 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".[91] According to the Supreme Court panel, the statements of the pre-trial judge as to the legal basis for the Applicant's detention, and the subsequent findings of the appeals panel in that regard, could not constitute a ground for reconsideration.[92] Recalling its findings in the decision on the request for protection of legality, and further observing that the Applicant's rights had been sufficiently safeguarded by the criminal chambers, in accordance with the Law

[86] Request for reconsideration, paras 3-5, 7-18. See also KSC-BC-2023-10, PL001/F00012, 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, public, 5 October 2024 ("Reply to prosecution response to request for reconsideration"), paras 3-5, 7-8, 10-11.
[87] Request for reconsideration, paras 5, 18-19. See also Reply to prosecution response to request for reconsideration, paras 5, 12-13.
[88] KSC-BC-2023-10, PL001/F00013, Decision on Haxhi Shala's request for reconsideration of decision on protection of legality, public, 16 October 2024 ("Decision on request for reconsideration").
[89] Decision on request for reconsideration, paras 18-19, 24-25.
[90] Decision on request for reconsideration, para. 19.
[91] Decision on request for reconsideration, para. 22.
[92] Decision on request for reconsideration, paras 21-22.

and Article 5(3) of the Convention, the Supreme Court panel likewise found that the Applicant failed to demonstrate that this decision would cause injustice.[93]

## III. ALLEGED VIOLATION

26. In the Referral, the Applicant complained before the Chamber that, during the hearing on his initial appearance, the pre-trial judge failed to decide on the Applicant's continued detention following his arrest in Kosovo and transfer to the SC Detention Facilities in The Hague.[94] As a result, the Applicant alleged to be a victim of a breach of Article 5(3) of the Convention.[95]

## IV. JURISDICTION

27. The Chamber observes that the Applicant made the Referral under Article 113(7) of the Constitution and raised complaints in relation to his arrest and detention, which was ordered by the SC. The Referral thereby relates to the SC and the SPO, as required by Article 162(3) of the Constitution and Articles 3(1) and 49(2) of the Law. It follows that the Chamber has jurisdiction to rule on the Referral.

## V. SCOPE OF REVIEW

28. The Chamber recalls, at the outset, its supervisory function as regards the work of the SC and the SPO insofar as fundamental rights and freedoms guaranteed by the Constitution are concerned.[96] Pursuant to Article 49(1) of the Law, the Chamber shall be the final authority on the interpretation of the Constitution as it relates to the subject matter jurisdiction and work of the SC and the SPO.

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[93] Decision on request for reconsideration, para. 23.
[94] Referral, para. 18.
[95] Referral, paras 19, 36(i).
[96] KSC-CC-2023-22, F00011, Judgment on the referral by Nasim Haradinaj to the Specialist Chamber of the Constitutional Court, public, 31 May 2024 ("*Judgment on N. Haradinaj referral*"), para. 65. See also KSC-CC-2019-05, F00012, Decision on the referral of Mahir Hasani concerning prosecution order of 20 December 2018, public, 20 February 2019 ("*Decision on M. Hasani referral concerning SPO order*"), para. 24.

29. As regards the fundamental rights and freedoms guaranteed by Chapter II of the Constitution, the Chamber notes that, by virtue of Article 22(2) of the Constitution, the guarantees set forth in the Convention apply at the constitutional level.[97] Indeed, the Kosovo Constitutional Court has reiterated that the rights and freedoms guaranteed by the international instruments enumerated in Article 22 of the Constitution "have the status of norms of constitutional rank and are an integral part of the Constitution, in the same way as all other provisions contained in the Constitution".[98] Therefore, the Chamber finds that, since the Applicant's complaint relates to Article 5(3) of the Convention, it falls to be considered under said provision.[99]

30. Concerning the assessment of the Referral, the Chamber notes that, pursuant to Article 53 of the Constitution, human rights and fundamental freedoms guaranteed by the Constitution "shall be interpreted consistent with the court decisions of the [ECtHR]". Further, the Kosovo Constitutional Court has consistently recognised the application of Article 53 of the Constitution in its review of constitutional referrals.[100] It has also stated that "the Constitutional Court *is bound* to interpret human rights and fundamental freedoms consistent with the court decisions of the [ECtHR]".[101] In that

[97] See, for example, KSC-CC-2022-13, F00010; KSC-CC-2022-14, F00009, Decision on the referral of Jakup Krasniqi concerning the legality of charging joint criminal enterprise and the referral of Kadri Veseli concerning decision of the appeals panel on challenges to the jurisdiction of the Specialist Chambers, public, 13 June 2022 (*"Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges"*), para. 34, with further references to case law.

[98] Kosovo, Constitutional Court, *Constitutional review of judgments [A.A.U.ZH. no. 20/2019 of 30 October 2019; and A.A.U.ZH. no. 21/2019, of 5 November 2019] of the Supreme Court of the Republic of Kosovo*, KI 207/19, Judgment, 10 December 2020 (5 January 2021), para. 111.

[99] See, similarly, *Judgment on N. Haradinaj referral*, para. 66; *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, paras 34-35.

[100] See, for example, Kosovo, Constitutional Court, *Request for constitutional review of judgment Pml no. 225/2017 of the Supreme Court of 18 December 2017,* KI 37/18, Resolution on inadmissibility, 30 May 2018 (11 June 2018), para. 37; *Constitutional review of decision Pn II no. 1/17 of the Supreme Court of Kosovo of 30 January 2017 related to the decision Pml no. 300/16 of the Supreme Court of 12 December 2016,* KI 62/17, Judgment, 29 May 2018 (11 June 2018), para. 43; *Request for constitutional review of judgment Pml no. 225/2017 of the Supreme Court of 18 December 2017,* KI 34/18, Resolution on inadmissibility, 23 May 2018 (11 June 2018), para. 41.

[101] Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 181/15 of the Supreme Court of the Republic of Kosovo of 6 November 2015*, KI 43/16, Resolution on inadmissibility, 14 April 2016 (16 May 2016), para. 50 (emphasis added).

light, and given Articles 22(2) and 53 of the Constitution, this Chamber has particular regard to the case law of the ECtHR in its review of the Applicant's Referral.[102]

## VI. ADMISSIBILITY

31. At the outset, the Chamber must ascertain whether the Applicant's complaint is admissible.[103] This follows from Article 113(1) of the Constitution, pursuant to which the Chamber decides only on matters "referred to [it] in a legal manner by authorised parties".[104] Moreover, Rule 15(1) of the SCCC Rules provides that the Chamber shall decide on "the admissibility and/or the merits of a referral made under Article 49 of the Law". The foregoing provisions provide for the Chamber's responsibility to first determine, *ex officio*, whether the Referral is admissible or not.[105]

32. Turning to the question of admissibility, the Chamber agrees with the appeals panel that the Applicant should have availed himself of the opportunity to challenge the lawfulness of his initial detention pursuant to Article 41(2) of the Law and Rule 57 of the Rules, or by filing an appeal against the decision on arrest and transfer within ten (10) days starting from the first working day after its notification to the Applicant,

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[102] See, similarly, *Judgment on N. Haradinaj referral*, para. 67; *Decision on M. Hasani referral concerning SPO order*, para. 26.

[103] See, for example, *Judgment on N. Haradinaj referral*, para. 70; KSC-CC-2023-21, F00006, Decision on the referral of Pjetër Shala to the Constitutional Court panel concerning the violation of Mr Shala's fundamental rights guaranteed by Articles 31, 32, and 54 of the Kosovo Constitution and Articles 6 and 13 of the European Convention on Human Rights, public, 29 August 2023 ("*Decision on P. Shala referral concerning admissibility of prior statements")*, para. 19; *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, para. 36.

[104] *Judgment on N. Haradinaj referral*, para. 70; *Decision on P. Shala referral concerning admissibility of prior statements*, para. 19; *Decision on P. Shala referral concerning disqualification request*, para. 14. See also Kosovo, Constitutional Court, *Constitutional review of decision Ae no. 287/18 of the Court of Appeals of 27 May 2019 and decision I.EK. no. 330/2019 of the Basic Court in Prishtina, Department for Commercial Matters, of 1 August 2019*, KI 195/19, Judgment, 5 May 2021 (31 May 2021), paras 68-69; *Constitutional review of decision Pml no. 313/2018 of the Supreme Court of 10 December 2018*, KI 12/19, Resolution on inadmissibility, 10 April 2019 (3 May 2019), paras 30-31.

[105] *Judgment on N. Haradinaj referral*, para. 70; *Decision on P. Shala referral concerning admissibility of prior statements*, para. 19; *Decision on P. Shala referral concerning disqualification request*, para. 14; *Decision on H. Thaçi referral concerning jurisdictional challenge*, para. 43.

pursuant to Article 45(2) of the Law and Rule 58 of the Rules.[106] At the same time, the Chamber notes that the competent authorities, namely the pre-trial judge, the appeals panel, and the Supreme Court panel nevertheless examined the Applicant's claim on the merits.[107] Accordingly, the Chamber is of the view that the Applicant cannot be said to have failed to exhaust the remedies provided for by law against the alleged violation pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules.[108]

33. The Chamber further notes that the complaint is not inadmissible on any of the other grounds set forth in Rule 14 of the SCCC Rules. Therefore, it must be declared admissible and examined on the merits.

## VII. MERITS

### A. THE APPLICANT'S SUBMISSIONS

34. The Applicant complained, in particular, that the failure of the pre-trial judge to consider the lawfulness and merits of his detention, and to decide in that respect at the initial appearance hearing on 13 December 2023, violated his right to liberty and security under Article 5(3) of the Convention.[109] With reference to the case law of the ECtHR, the Applicant argued that judicial control of detention within the meaning of Article 5(3) of the Convention is automatic, operates as an independent safeguard for the detained person, and is not dependent on any application by said person.[110] He also contended that Article 5(3) of the Convention is applicable regardless of whether a person's arrest was authorised in advance by a judge or not, and maintained that, in light of the ECtHR's findings in the case of *Harkmann v. Estonia*, "the requirements of

[106] Decision on interlocutory appeal, para. 21. See also above, para. 16.
[107] See above, paras 14, 16-21, 23.
[108] See, similarly, ECtHR, *Savickis and Others v. Latvia* [GC], no. 49270/11, 9 June 2022, para. 140. See also *Judgment on N. Haradinaj referral*, para. 85, with further references to case law.
[109] Referral, paras 18, 36(i).
[110] Referral, paras 20, 22, 35.

Article 5(3) of the Convention cannot be discharged by 'prior judicial involvement'".[111] In this regard, the Applicant criticized the Supreme Court panel's reliance on the steps taken by the pre-trial judge prior to his arrest, and argued that the pre-trial judge failed to decide on the merits of the Applicant's detention at his initial appearance hearing.[112] Moreover, he reiterated the argument made before the criminal chambers as to the compatibility of the SC's legal framework governing the initial review of a person's detention with the Constitution and the Convention, and alleged that Article 41(5)-(6) of the Law does not include the requirement for a decision on the merits of detention at the initial appearance, when the detained person is brought before a judge.[113]

B. THE CHAMBER'S ASSESSMENT

35. At the outset, the Chamber recalls that, pursuant to Article 53 of the Constitution, in examining the merits of the Applicant's constitutional grievance, it shall refer to the general principles developed in the case law of the ECtHR.[114]

36. The Chamber notes in this respect that Article 5(3) of the Convention reads as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

37. Further to the above, the Chamber observes that, as established in the case law of the ECtHR, Article 5(3) of the Convention provides persons arrested or detained on suspicion of having committed a criminal offence with a guarantee against arbitrary or unjustified deprivation of liberty.[115] It is structurally concerned with two separate

[111] Referral, para. 29, referring to ECtHR, *Harkmann v. Estonia*, cited above, paras 36-38.
[112] Referral, paras 23-24, 26-28, 30-34.
[113] Referral, paras 25, 28.
[114] See above, para. 30; *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, paras 45, 75.
[115] ECtHR, *Stephens v. Malta (no. 2)*, no. 33740/06, 21 April 2009, para. 52; *Aquilina v. Malta* [GC], no. 25642/94, 29 April 1999, para. 47.

matters, namely (i) the early stages following an arrest, when an individual is taken into the power of the authorities, and (ii) the period pending any trial before a criminal court, during which the individual may be detained or released without conditions. These two limbs confer distinct rights and are not, on their face, logically or temporally linked.[116] Therefore, what is described in the ECtHR's case law as "the opening part of [Article 5(3) of the Convention]" guarantees the right to be brought promptly before a judge or "other officer", while the second part of the provision guarantees the right to trial within a reasonable time or release pending trial.[117]

38. In this context, the Chamber recalls that the Referral is concerned with the initial stages of the Applicant's detention, therefore engaging the first limb of Article 5(3) of the Convention. The ECtHR's case law has established that, at the initial stage under the first limb, an individual arrested or detained on suspicion of having committed a criminal offence must be protected through judicial control. Such control is aimed to provide effective safeguards against the risk of ill-treatment, which is at its greatest in this early stage of detention, and against abuse of power by law enforcement officers or other authorities.[118] The Chamber further notes that, according to the relevant case law, judicial control must satisfy certain requirements, as set out below.

39. *Promptness.* The judicial control on the first appearance of an arrested individual must above all be prompt, to allow for detection of any ill-treatment and to keep to a minimum any unjustified interference with an individual's liberty.[119] Specifically, the ECtHR has considered any period in excess of four (4) days *prima facie* too long,[120] but shorter periods have also been found to breach this requirement if there are no special

[116] ECtHR, *Magee and Others v. the United Kingdom*, nos 26289/12, 29062/12, 29891/12, 12 May 2015, para. 75; *Stephens v. Malta (no. 2)*, cited above, para. 52.
[117] ECtHR, *Stephens v. Malta (no. 2)*, cited above, para. 52. See also ECtHR, *Assenov and Others v. Bulgaria*, no. 24760/94, 28 October 1998, para. 143.
[118] ECtHR, *Vakhitov and Others v. Russia*, nos 18232/11, 42945/11, 31596/14, 31 January 2017, para. 46; *Magee and Others v. the United Kingdom*, cited above, para. 76.
[119] ECtHR, *McKay v. the United Kingdom* [GC], no. 543/03, 3 October 2006, para. 33.
[120] See, for example, ECtHR, *Brogan and Others v. the United Kingdom*, nos 11209/84, 11234/84, 11266/84, 11386/85, 29 November 1988, para. 62.

difficulties or exceptional circumstances preventing the authorities from bringing the arrested person before a judge sooner.[121]

40. *Automatic nature of the review.* Furthermore, judicial control of detention must be automatic, and not depend on an application by the detained person. In this regard, Article 5(3) must be distinguished from Article 5(4) of the Convention, which provides the detained person with the right to apply for release.[122] The automatic nature of the review is necessary to fulfil the purpose of Article 5(3) of the Convention, as a person subject to ill-treatment, or other vulnerable categories of arrested persons, such as the mentally frail or those who do not speak the language of the judicial officer, might be incapable of lodging an application asking for a judge to review their detention.[123]

41. *The characteristics and powers of the judicial officer.* A first condition as to the judicial officer is that he or she must offer the requisite guarantees of independence from the executive, and must have the power to order release, after hearing the individual and reviewing the lawfulness of, and justification for detention.[124] Regarding the scope of that review, the ECtHR's long-established case law has held that, under Article 5(3) of the Convention, there is both a procedural and a substantive requirement. Specifically, the former places the "officer" under the obligation of hearing himself the individual brought before him, whereas the latter imposes on him the obligation of reviewing 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.[125]

[121] See, for example, ECtHR, *Gutsanovi v. Bulgaria*, no. 34529/10, 15 October 2013, paras 154-159.
[122] ECtHR, *McKay v. the United Kingdom* [GC], cited above, para. 34; *Aquilina v. Malta* [GC], cited above, para. 49.
[123] ECtHR, *Magee and Others v. the United Kingdom*, cited above, para. 79; *McKay v. the United Kingdom* [GC], cited above, para. 34; *Aquilina v. Malta* [GC], cited above, para. 49.
[124] ECtHR, *McKay v. the United Kingdom* [GC], cited above, para. 35. See also ECtHR, *Assenov and Others v. Bulgaria*, cited above, para. 146.
[125] ECtHR, *Schiesser v. Switzerland*, no. 7710/76, 4 December 1979, para. 31.

42. In this respect, the Chamber notes that the ECtHR has stopped short of defining the exact content and/or form of analysis required by Article 5(3) of the Convention.[126] However, it has clarified that this review must not necessarily cover, as a matter of automatic obligation, issues such as conditional release,[127] and may be more limited in scope in the particular circumstances of a case than a review under Article 5(4) of the Convention.[128] Specifically, the ECtHR has held that the initial automatic review of arrest and detention must be capable of examining lawfulness issues, and whether there is a reasonable suspicion that the arrested person has committed an offence, namely that the detention falls within the permitted exception set out in Article 5(1)(c) of the Convention.[129]

43. The ECtHR has further found that the requirements under Article 5(3) of the Convention, as set out above, also apply to situations in which a person is arrested on the basis of a detention order issued by a court in his or her absence,[130] and clarified that the wording of Article 5(3) of the Convention does not provide for any possible exceptions, not even on grounds of prior judicial involvement.[131] In this regard, the Chamber further notes that, in cases concerning situations such as these, the ECtHR has found a violation of Article 5(3) of the Convention on, *inter alia*, the grounds that: (i) subsequent to arrest, the detained person was not brought promptly before a judge, being denied the chance to present the court with possible personal reasons militating against detention;[132] (ii) the person was arrested and thereafter detained on the basis of a court order issued in his or her absence, and the domestic law did not provide for

[126] ECtHR, *Magee and Others v. the United Kingdom*, cited above, para. 98.
[127] ECtHR, *Magee and Others v. the United Kingdom*, cited above, paras 84, 101; *McKay v. the United Kingdom* [GC], cited above, paras 36-39.
[128] ECtHR, *Stephens v. Malta (no. 2)*, cited above, paras 58.
[129] ECtHR, *Magee and Others v. the United Kingdom*, cited above, para. 83; *McKay v. the United Kingdom* [GC], cited above, para. 40.
[130] ECtHR, *Vakhitov and Others v. Russia*, cited above, para. 50, with further references to case law.
[131] See, for example, ECtHR, *Harkmann v. Estonia*, cited above, para. 38.
[132] ECtHR, *Vakhitov and Others v. Russia*, cited above, paras 52-54; *Kornev and Karpenko v. Ukraine*, no. 17444/04, 21 October 2010, paras 45-48; *Bergmann v. Estonia,* no. 38241/04, 29 May 2008, paras 42-47; *Harkmann v. Estonia*, cited above, paras 37-40.

an initial automatic review of detention, rendering it dependent on an application by the detained person;[133] and (iii) upon arrest, the person was brought promptly and automatically before a judge, but the latter failed to take that person's statements and to examine the circumstances militating for or against detention, confining himself or herself to verifying the identity of the detained person and notifying him or her about the arrest warrant against them.[134]

44. Before turning to the application of the above principles to the instant case, in light of the claim made by the Applicant that Article 41(5) of the Law does not include the requirement for a decision on detention to be made at the first appearance before a judge of an arrested person,[135] the Chamber finds it necessary to make a preliminary remark. Specifically, it notes that Article 41(5) of the Law reflects, *mutatis mutandis*, the language of Article 5(3) of the Convention. Recalling that, pursuant to Articles 22(2) and 53 of the Constitution, the guarantees set forth in the Convention apply directly at the constitutional level, and the fundamental rights and freedoms guaranteed by the Constitution must be interpreted consistent with the case law of the ECtHR,[136] the Chamber considers that the requirements of Article 5(3) of the Convention, as outlined in the foregoing paragraphs, also apply in the context of the SC.

45. As to the present case, the Chamber recalls, first, that the Applicant was arrested by the SPO in Kosovo on 11 December 2023 and, on 12 December 2023, transferred to the SC Detention Facilities in The Hague, pursuant to an arrest warrant and transfer order issued by the pre-trial judge on 4 December 2023.[137] The arrest warrant served on the Applicant specified that he would be brought without delay before the pre-trial

[133] ECtHR, *Piotr Nowak v. Poland*, no. 7337/05, 7 December 2010, paras 61-62; *Ladent v. Poland*, no. 11036/03, 18 March 2008, paras 75-76.
[134] ECtHR, *Vedat Doğru v. Turkey*, no. 2469/10, 5 April 2016, paras 55-57; *Abdulsitar Akgül v. Turkey*, no. 31595/07, 25 June 2013, paras 20-22; *Salih Salman Kiliç v. Turkey*, no. 22077/10, 5 March 2013, paras 26-29.
[135] Referral, para. 25. See also above, para. 34.
[136] See above, paras 29-30.
[137] See above, paras 7-8.

judge, pursuant to Article 41(5) of the Law.[138] On 13 December 2023, the Applicant appeared before the pre-trial judge.[139] Noting that the Applicant was brought before the pre-trial judge within two (2) days and six (6) hours of his arrest, and also bearing in mind that the Applicant had to be transferred from Kosovo to the Netherlands for that purpose,[140] the Chamber finds that he was brought promptly and automatically before a judge within the meaning of Article 5(3) of the Convention. At any rate, the Chamber notes that the Applicant has not advanced any arguments to the contrary. Likewise, the Chamber observes that the independence of the pre-trial judge within the meaning of Article 5(3) of the Convention is not in dispute. Thus, it is common ground that the pre-trial judge was independent.[141]

46. Further, having regard to, *inter alia*, Article 41(10) of the Law and Rule 57(2) of the Rules, the Chamber is of the view that there is nothing in the Law or the Rules to suggest that the pre-trial judge did not have the power to examine issues related to the lawfulness of detention and whether there was a reasonable suspicion that the Applicant had committed an offence (i.e. that the detention fell within the permitted exception set out in Article 5(1)(c) of the Convention), to take into account the various circumstances militating for or against detention, and to order release if there were no such reasons. Indeed, while it is true that, as observed by the appeals panel, the SC's legal framework does not expressly prescribe the issuance of a detention decision at the initial appearance hearing,[142] the Chamber takes the position that the language of Article 41(10) of the Law and Rule 57(2) of the Rules, which relate to the duty of the pre-trial judge to review detention in relation to the "last ruling on detention" does not, *a priori*, preclude that such a decision may be made by the pre-trial judge at the initial appearance hearing.[143]

[138] See above, para. 8.
[139] See above, paras 8-10.
[140] See above, paras 8-10.
[141] See, similarly, ECtHR, *Magee and Others v. the United Kingdom*, cited above, para. 96.
[142] See above, para. 18.
[143] *Cf.* Decision on interlocutory appeal, para. 29. See also above, para. 18.

47. It therefore remains to be examined whether, at the initial appearance hearing on 13 December 2023, the pre-trial judge considered the lawfulness and merits of the Applicant's detention. The Chamber is of the view that, since the arrest warrant and transfer order of 4 December 2023 were issued *ex parte*, without hearing the Applicant on the possible personal reasons militating against his detention, the requirements of Article 5(3) of the Convention enjoined the pre-trial judge to hear the Applicant prior to deciding whether his detention was justified.[144] For the Chamber, the fact that the judge before whom the Applicant was brought following his arrest and transfer was the same judge who issued the arrest and transfer order does not alter the applicability of these principles.[145]

48. The Chamber recalls that, in the instant case, at the initial appearance hearing, the pre-trial judge duly informed the Applicant about the finding of a well-grounded suspicion that he had committed a criminal offence within the SC's jurisdiction, the charges against him, as set out in the confirmed indictment, and his rights before the SC, and also instructed the Applicant to enter a plea.[146] In addition, the pre-trial judge explicitly asked the Applicant whether he wished to raise any issues "in relation to [his] arrest, the transfer to The Hague, or [his] detention",[147] thus affording him the chance to present the pre-trial judge with possible personal reasons militating against his detention. The Chamber observes in this regard that, at that time, the Applicant had been sufficiently informed of the pre-trial judge's reasoning as to the merits of his detention.[148] Nonetheless, in the presence of duty counsel, the Applicant responded that he had "nothing to add", and that "[e]verything [was] fine".[149]

[144] See, for example, ECtHR, *Harkmann v. Estonia*, cited above, paras 37-40.
[145] See, similarly, ECtHR, *Abdulsitar Akgül v. Turkey*, cited above, paras 5, 8, 20-21; *Kornev and Karpenko v. Ukraine*, cited above, paras 11-12, 45-47; *Harkmann v. Estonia*, cited above, paras 13-14, 16, 37-39.
[146] See above, para. 10.
[147] See above, para. 11.
[148] See above, para. 8.
[149] See above, para. 11.

49. In the absence of any submissions from the Applicant, the Chamber finds that the pre-trial judge cannot be reproached for not entering into further details as to the circumstances militating for or against the Applicant's detention. What the Chamber finds important is that the pre-trial judge examined the Applicant, afforded him the possibility to be heard, and was satisfied that there existed a well-grounded suspicion that he had committed a criminal offence within the SC's jurisdiction, namely that the Applicant's detention fell within the permitted exception set out in Article 5(1)(c) of the Convention. Granted that the lawfulness and merits of the Applicant's continued detention could have been addressed more explicitly, the Chamber is of the view that the pre-trial judge's decision,[150] although succinct, cannot be taken to signify that the pre-trial judge did not consider these aspects. Rather, having not received any further submissions from the Applicant that would warrant a reassessment of the decision on arrest and transfer, it is sufficient in the specific circumstances that the pre-trial judge upheld his earlier findings in the decision on arrest and transfer, and understandable that the reasons outlined therein implicitly supported the pre-trial judge's decision at the initial appearance hearing on 13 December 2023.

50. The Chamber therefore finds that the Applicant's initial appearance before the pre-trial judge on 13 December 2023 complied with the requirements of Article 5(3) of the Convention.

### C. CONCLUSION

51. In light of the foregoing, the Chamber finds that there has been no violation of Article 5(3) of the Convention.

## VIII. RELATED REQUESTS

52. In addition to his complaint under Article 5(3) of the Convention, the Applicant also requested that, upon a finding of a violation of Article 5(3) of the Convention, the

[150] See above, para. 11.

Chamber likewise (i) declare that the Applicant's detention from 13 December 2023 until the decision on the review of detention of 9 February 2024 was unlawful;[151] and (ii) indicate that the Applicant may file a request with the President for compensation or other appropriate redress for the period of time during which he was unlawfully detained.[152]

53. Recalling its above conclusion that there has been no violation Article 5(3) of the Convention in the instant case, the Chamber finds that the Applicant's related requests have been rendered moot as a result.

FOR THESE REASONS,

The Specialist Chamber of the Constitutional Court, unanimously,

1. *Declares* the Referral of Mr Haxhi Shala admissible;

2. *Finds* that there has been no violation of Article 5(3) of the Convention; and

3. *Dismisses* the Applicant's related requests as moot.

**Judge Vidar Stensland**

**Presiding Judge**

Done in English on Thursday, 6 March 2025
At The Hague, the Netherlands

[151] Referral, para. 36(ii).
[152] Referral, para. 36(iii).