



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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

Before: Pre-Trial Judge
Judge Marjorie Masselot

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

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**Prosecution response to 'Smakaj Submissions on Third Review of Detention with
Annex 1'**

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I. INTRODUCTION

1. Pursuant to Rule 76 of the Rules,¹ the Specialist Prosecutor's Office ('SPO') hereby responds to the SMAKAJ Submissions.² The issues raised by SMAKAJ do not constitute a meaningful change in circumstances, nor do they impact upon the Pre-Trial Judge's individualised findings. SMAKAJ's request to be conditionally released as a result of the presumption of innocence and his good character³ fails to rebut the articulable grounds previously enumerated, such that his continued detention remains necessary and proportionate.

II. SUBMISSIONS

2. The Pre-Trial Judge has consistently found: (i) a grounded suspicion that SMAKAJ committed crimes within the jurisdiction of the Kosovo Specialist Chambers ('KSC');⁴ (ii) the existence of a risk of flight;⁵ (iii) articulable grounds to believe that SMAKAJ will obstruct the progress of KSC proceedings⁶ and commit further crimes;⁷

¹ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ('KSC'), KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). Unless otherwise indicated, all references to 'Rule(s)' are to the Rules.

² Smakaj Submissions on Third Review of Detention with Annex 1, KSC-BC-2023-12/F00281, 5 May 2025, Confidential ('SMAKAJ Submissions'). *See also* Smakaj Submission of Corrected Annex 1 to the Submissions on the Third Review of Detention, KSC-BC-2023-12/F00292, 12 May 2025, Confidential.

³ Smakaj Submissions, KSC-BC-2023-12/F00281, para.27.

⁴ Second Decision on Review of Detention of Bashkim Smakaj, KSC-BC-2023-12/F00249, 7 April 2025 ('Decision F00249'), paras 22-25. *See also* Public Redacted Version of Decision on the Confirmation of the Indictment, KSC-BC-2023-12/F00036/RED, 29 November 2024, paras 211, 287-288, 313(c); Public Redacted Version of Decision on Request for Arrest Warrants and Related Matters, KSC-BC-2023-12/F00037/RED, 29 November 2024, Confidential ('Decision on Arrest and Transfer'), para.43; Transcript (Initial Appearance), 8 December 2024, pp. 40-43; Decision on Review of Detention of Bashkim Smakaj, KSC-BC-2023-12/F00164, 7 February 2025, Confidential ('Decision F00164'), paras 20-23.

⁵ Decision F00249, KSC-BC-2023-12/F00249, paras 30-32, 39. *See also* Decision on Arrest and Transfer, KSC-BC-2023-12/F00037/RED, paras 69-73, 80; Transcript (Initial Appearance), 8 December 2024, pp. 40-43; Decision F00164, KSC-BC-2023-12/F00164, paras 28-31, 40.

⁶ Decision F00249, KSC-BC-2023-12/F00249, paras 33-36, 39. *See also* Decision on Arrest and Transfer, KSC-BC-2023-12/F00037/RED, paras 74-77, 80; Transcript (Initial Appearance), 8 December 2024, pp. 40-43; Decision F00164, KSC-BC-2023-12/F00164, paras 32-36, 40.

⁷ Decision F00249, KSC-BC-2023-12/F00249, paras 37-39. *See also* Decision on Arrest and Transfer, KSC-BC-2023-12/F00037/RED, paras 78-80; Transcript (Initial Appearance), 8 December 2024, pp. 40-43; Decision F00164, KSC-BC-2023-12/F00164, paras 37-40.

(iv) that no release conditions can mitigate the Article 41(6)(b) of the Law⁸ risks;⁹ and
(v) that SMAKAJ's continued detention is proportional.¹⁰

3. Following these sustained findings, no contrary information or meaningful development has intervened. All articulable risks under Article 41(6)(b) remain clear and present as the pre-trial stage of the proceedings continues to advance. Accordingly, and as a review of detention under Rule 57(2) of the Rules concerns what has changed, if anything, since the prior ruling on detention,¹¹ the SMAKAJ request for release must be denied. Importantly, the Pre-Trial Judge is not required to make findings on the factors already decided upon in an earlier ruling,¹² and need not 'entertain submissions that merely repeat arguments that have already been addressed in previous decisions.'¹³ This is particularly relevant with respect to the repeated SMAKAJ submissions regarding Witness 2 and his attempts at comparison with a co-accused.¹⁴

4. SMAKAJ contends that the closure of the Prosecution's case in *Thaçi et al.* (KSC-BC-2020-06, 'Case 6') is a factor which should be considered as to his continued pre-trial detention.¹⁵ However, this argument ignores the multitude of factors assessed by the Pre-Trial Judge with respect to SMAKAJ's risk of obstruction,¹⁶ all of which remain relevant today, alongside the fact that: (i) the proceedings in Case 6 remain ongoing

⁸ Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

⁹ Decision F00249, KSC-BC-2023-12/F00249, paras 40-42. *See also* Transcript (Initial Appearance), 8 December 2024, pp. 40-43; Decision F00164, KSC-BC-2023-12/F00164, paras 41-45.

¹⁰ Decision F00249, KSC-BC-2023-12/F00249, paras 43-47. *See also* Transcript (Initial Appearance), 8 December 2024, pp. 40-43; Decision F00164, KSC-BC-2023-12/F00164, paras 46-49.

¹¹ *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, KSC-BC-2020-07/IA002/F00005, 9 February 2021 ('*Haradinaj Appeal*'), para.55.

¹² *Haradinaj Appeal*, KSC-BC-2020-07/IA002/F00005, para.55.

¹³ *Specialist Prosecutor v. Pjetër Shala*, Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Review of Detention, KSC-BC-2020-04, IA003/F00005/RED, 11 February 2022, para. 18.

¹⁴ *Contra* SMAKAJ Submissions, KSC-BC-2023-12/F00281, paras 3-11.

¹⁵ SMAKAJ Submissions, KSC-BC-2023-12/F00281, paras 14, 25-26.

¹⁶ Decision F00249, KSC-BC-2023-12/F00249, paras 33-36, 39.

up until a closing under Rule 136 of the Rules; and (ii) the risk of obstruction is assessed not only in relation to Case 6, but also in relation to this case.¹⁷ Relevantly, there are many examples in international criminal law of accused, convicted persons, and third parties attempting to undermine the judicial process, even after the closure of a prosecution phase of evidence.¹⁸ Further, and as the factors underpinning an assessment as to obstruction are inherently relevant with respect to considering the risk of committing further crimes, the SMAKAJ Submissions have no impact with respect to previous findings under Article 41(6)(b)(iii).

5. Separately, SMAKAJ again alludes to the notion that the alleged late disclosure of the interview of Witness 2¹⁹ and the purportedly comparable circumstances of SMAKAJ and KUÇİP²⁰ serve as grounds supporting his requested release. To the degree that SMAKAJ is implying that he should not be detained because of the content of Witness 2's SPO interview, this baseless conjecture continues to misrepresent the confirmed charges in this case and has been soundly rejected in the context of an abuse of process claim.²¹ To the extent that SMAKAJ is repeating his assertion that his

¹⁷ Public Redacted Version of Second Decision on Review of Detention of Fadil Fazliu, KSC-BC-2023-12/F00251/RED, 7 April 2025, para.41

¹⁸ See for example Special Court for Sierra Leone ('SCSL'), *Independent Counsel v. Eric Koi Senessie*, SCSL-2011-01-T, Judgment in Contempt Proceedings, 16 August 2012; International Residual Mechanism for Criminal Tribunals ('IRMCT'), *Prosecutor v. Nzabonimpa et al.*, MICT-18-116-T, Judgment, 25 June 2021; SCSL, *Independent Counsel v. Bangura et al.*, SCSL-2011-02-T, Judgment in Contempt Proceedings, 25 September 2012; IRMCT, *Prosecutor v. Gérard Ntakirutimana*, MICT-12-17-R, Review Judgment, 22 November 2024, paras 57, 62. See also Confidential Redacted Version of 'Prosecution submissions concerning the completion of its case', KSC-BC-2020-06/F02400/CONF/RED, 21 June 2024, para.14; Public Redacted Version of 'Prosecution submission pertaining to periodic detention review of Hashim Thaçi', KSC-BC-2020-06/F01813/RED, para.12.

¹⁹ SMAKAJ Submissions, KSC-BC-2023-12/F00281, paras 3-7.

²⁰ SMAKAJ Submissions, KSC-BC-2023-12/F00281, paras 8-11.

²¹ See Public Redacted Version of Decision on Bashkim Smakaj's Application for Stay of Proceedings, KSC-BC-2023-12/F00247/RED, para.30, which states in relevant part: 'It is worth recalling that, as is clear from the Confirmation Decision, Mr Smakaj's contact with Witness 2 was *one of several* factors and elements considered by the Pre-Trial Judge to determine Mr Smakaj's criminal responsibility. Additionally, the Pre-Trial Judge considers that the Defence manifestly overstates the importance of Mr Smakaj's contact with Witness 2 *vis-à-vis* her conclusions on Mr Smakaj's alleged responsibility and, thereby, misconstrues the Confirmation Decision. Strikingly, the Defence does not engage at all with the entirety of the Pre-Trial Judge's relevant reasoning, but singles out the Witness 2 Interview for the

personal circumstances and those of KUÇI are analogous, this position has also been flatly rejected.²²

6. Ultimately, and while only one of the articulable risk factors in Article 41(6)(b) needs to be met for purposes of SMAKAJ's continued detention,²³ all continue to be clear and present at this time. Further, these risks can only be effectively managed in the KSC Detention Centre, which is the most effective means to limit SMAKAJ's ability to flee, otherwise thwart the KSC proceedings, and/or commit further crimes. Additionally, the assurances offered in the SMAKAJ Submissions²⁴ are insufficient to overcome the concrete risks of release, as previously found by the Pre-Trial Judge.²⁵ When the Article 41(6)(b) conditions are met and no lesser measures than detention are available, the person shall continue to be detained.²⁶

7. SMAKAJ is charged with two counts of Article 15(2) offences and, if convicted, faces a potentially lengthy sentence. Moreover, as noted by the Pre-Trial Judge in Decision F00249, the proceedings in this case continue to move forward expeditiously.²⁷ Indeed, and since Decision F00249: (i) the SPO filed its second Rule 102(3) Notice, and has continued to disclose material; (ii) remaining investigative steps are progressing efficiently; and (iii) preliminary motions have been filed by Specialist

purpose of reaching one particular conclusion.' See also Decision on Smakaj Application for Leave to Appeal Decision F00247, KSC-BC-2023-12, 6 May 2025.

²² See Decision F00249, KSC-BC-2023-12/F00249, 7 April 2025, paras 23, 40, which respectively state in relevant part: '[...] Mr Smakaj's comparison of his situation with that of Mr Kuçi equally fails' and 'Considering the above findings on grounded suspicion against Mr Smakaj, placing him and Mr Kuçi on equal footing, as suggested by the Smakaj Defence, is improper.'

²³ See for example Decision on Isni Kilaj's Appeal Against Decision on Continued Detention, KSC-BC-2023-12/IA001/F00005, 28 January 2025, para.17 ('[i]f one of those conditions is fulfilled, the other conditions do not have to be addresses in order for detention to be maintained').

²⁴ SMAKAJ Submissions, KSC-BC-2023-12/F00281, paras 23, 26.

²⁵ Decision F00249, KSC-BC-2023-12/F00249, paras 40-42.

²⁶ *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, para.51.

²⁷ Decision F00249, KSC-BC-2023-12/F00249, para.45.

Counsel. Finally, and by way of the ongoing disclosure process, SMAKAJ continues to gain increased insight into the evidence against him.²⁸

8. Against this backdrop, SMAKAJ's continued detention remains reasonable and proportionate.

III. CLASSIFICATION

9. This filing is classified as confidential pursuant to Rule 82(4), but can be reclassified as public as it does not contain confidential information.

IV. RELIEF REQUESTED

10. For the foregoing reasons, the Pre-Trial Judge should order SMAKAJ's continued detention.

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²⁸ See Decision F00249, KSC-BC-2023-12/F00249, paras 31, 34.