

Case No.: KSC-BC-2020-04
Specialist Prosecutor v. Pjetër Shala

Before: Pre-Trial Judge
Judge Nicolas Guillou,

Registrar: Dr Fidelma Donlon, Registrar

Date: 27 May 2021

Filing Party: Specialist Defence Counsel

Original Language: English

Classification: Public

THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

Public Redacted Version of Motion for Provisional Release

Specialist Prosecutor's Office:
Mr Jack Smith

Specialist Counsel for the Accused:
Mr Jean-Louis Gillissen

1. The Defence for Mr Pjetër Shala (“Defence” and “Accused”, respectively) files this Motion for the Accused’s provisional release pursuant to Article 41(2) and (5) of the Law and Rules 48 and 75(1) of the Rules of Procedure and Evidence. The Motion is filed confidentially pending its examination by the Pre-Trial Judge. The Defence intends to re-classify it as public once the Pre-Trial Judge issues his decision.

I. PROCEDURAL HISTORY

2. On 12 June 2020, the Pre-Trial Judge confirmed the Indictment against the Accused finding that there is a well-grounded suspicion that the Accused committed crimes within the jurisdiction of the Specialist Chambers (“SC”) and issued an arrest warrant for him.¹
3. On the same date, the Pre-Trial Judge issued his Decision on Arrest Warrant and Detention in which he found that the arrest of Mr Shala was necessary in accordance with Article 41(6)(b) of the Law, as all three risks envisaged under Article 41(6)(b)(i)-(iii) of the Law exist.² Specifically, he considered that “there are articulable grounds to believe that [the Accused]: (i) is a flight risk, as he is aware of publicly reported convictions of alleged co-perpetrators, is aware of the charges against him, as contained in the Confirmed Indictment, and the potential penalties, resides in a jurisdiction in which the Specialist Chambers do not have any direct means to compel his appearance at trial, and has the ability to travel freely to neighbouring countries; (ii) may obstruct proceedings

¹ KSC-BC-2020-04, F00007, Pre-Trial Judge, Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Pjetër Shala, 12 June 2020 (confidential) (“Confirmation Decision”). All further references to filings in this Motion concern Case No. KSC-BC-2020-04 unless otherwise indicated.

² F00008, Pre-Trial Judge, Confidential Redacted Version of Decision on Request for Arrest Warrant and Transfer Order, 12 June 2020 (confidential) (“Decision on Arrest Warrant and Detention”), paras. 20-23. *See also* F00008, Pre-Trial Judge, Public Redacted Version of Arrest Warrant for Mr Pjetër Shala, 12 June 2020 (“Arrest Warrant”); F00008, Pre-Trial Judge, Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers, 12 June 2020 (“Order for Transfer”).

by interfering with witnesses, victims or accomplices; and (iii) considering his past conduct, may commit further crimes.”³

4. On 30 July 2020, the Registrar requested the cooperation of the competent Belgian authorities in the arrest of Mr Shala and his transfer to the SC detention facilities in the Host State.⁴ On 2 December 2020, the Liège Council Chamber declared the arrest warrant issued by the SC enforceable pursuant to Article 86 of the Belgian Law on Cooperation.⁵
5. On 16 March 2021, Mr Shala was arrested in the Kingdom of Belgium (“Belgium”) by Belgian Police in the presence of representatives of the Specialist Prosecutor’s Office (“SPO”).⁶ Following his arrest, Mr Shala filed an appeal before the Belgian courts, pursuant to Article 86(1) of the Belgian Law on Cooperation. On 6 April 2021, his appeal was dismissed by the Court of Appeal of Liege.
6. On 15 April 2021, Mr Shala was transferred to the SC detention facilities in the Hague, the Netherlands (“Host State”).⁷ On the same date, the Registrar assigned Counsel for the Accused pursuant to Section 14(3) of the Directive on Counsel and Regulation 11 of the Legal Aid Regulations.⁸

³ Arrest Warrant, para. 4.

⁴ F00011, Annex 1 to Request for Authorisation to Disclose the Confirmed Indictment to the Competent Authorities of a Third State, 18 September 2020 (strictly confidential and *ex parte*).

⁵ F00014, Annex 1 to the Interim Report on the Execution of the Order for Transfer of Pjetër Shala, 17 March 2021, pp. 56-70 (Consolidated version of Title VI^{ter} of Act of 29 March 2004 concerning the cooperation with the International Criminal Court and the International Criminal Tribunals) (“Belgian Law on Cooperation”).

⁶ F00013, Registrar, Notification of Arrest Pursuant to Rule 55(4), 16 March 2021 (strictly confidential and *ex parte*); *Feuille d’Audition*, 16 March 2021.

⁷ F00019, Registrar, Notification of Reception of Pjetër Shala in the Detention Facilities of the Specialist Chambers and conditional Assignment of Counsel, 5 April 2021 (strictly confidential and *ex parte*) (“Notification of Reception”), with Annexes 1-2 (strictly confidential and *ex parte*), para. 2.

⁸ Notification of Reception, para. 2.

7. On 19 April 2021, the initial appearance of Mr Shala took place in the presence of his counsel. Mr Shala entered a plea of not guilty.⁹
8. On 23 April 2021, a first status conference took place before the Pre-Trial Judge.¹⁰
9. On 17 May 2021, the Pre-Trial Judge issued the First Decision on the SPO's Request for Protective Measures. On 19 May 2021, the SPO completed their disclosure of Rule 102(1)(a) material and on 25 May 2021, the SPO filed its "Submission of Further Lesser Redacted Version of Confirmed Indictment with Confidential Annex 1".¹¹ These filings enabled the Defence to have clarity as to what information related to the grounds supporting the request for an arrest warrant and continued detention would be disclosed to Mr Shala by the SPO.

II. APPLICABLE LAW

10. Article 29(2) of the Kosovar Constitution provides that "everyone who is arrested shall be entitled to trial within a reasonable time and to release pending trial, unless the judge concludes that the person is a danger to the community or presents a substantial risk of fleeing before trial".¹² It also states that "[n]o one shall be deprived of liberty except in the cases foreseen by law and [...] when deprivation of liberty is reasonably considered necessary to prevent commission of another criminal act, and only for a limited time before trial."
11. Article 41(1) and (6) of the Law provide, in so far as relevant, as follows:

⁹ Transcript ("T.") 1- 6 (19 April 2021).

¹⁰ T. 17-48 (23 April 2021).

¹¹ F000038, Submission of Further Lesser Redacted Version of Confirmed Indictment with confidential Annex 1, 25 May 2021 (confidential).

¹² See also Article 41(5) of the Law.

“1. No one shall be deprived of his or her liberty by or on behalf of the Specialist Chambers or Specialist Prosecutor, save in such circumstances and in accordance with such proceedings as are prescribed by this Law and the protections enshrined in Article 29 of the Constitution.

[...]

6. The Specialist Chambers or the Specialist Prosecutor 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 Specialist Chambers; and

b. there are articulable grounds to believe that:

i. there is a risk of flight;

ii. He or she will [...] obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices; or

iii. [there is a risk that] he or she will repeat the criminal offence, complete an attempted crime or commit a crime which he or she has threatened to commit.”

12. The SC of the Constitutional Court (“Constitutional Court”) has held that any deprivation of liberty must conform to the substantive and the procedural rules established by law and should keep with the key purpose of protecting the individual from arbitrariness.¹³ In this context, any request for provisional release must be considered in light of the detained person’s right to be presumed innocent.¹⁴ It follows that detention pending trial cannot be

¹³ KSC-CC-PR-2017-01, F00004, SC 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 SC and SPO, 26 April 2017 (“SCCC 26 April 2017 Judgment”), para. 111.

¹⁴ KSC-BC-2020-06, IA001-F00005, Appeals Chamber, Decision on Kadri Veseli’s Appeal Against Decision on Interim Release, 30 April 2021, para. 14; SCCC 26 April 2017 Judgment, para. 113.

maintained lightly.¹⁵ The Prosecution bears the burden of showing that the criteria set forth by Article 41(6) are met but also that any other measure specified in Article 41(12) of the Law is insufficient to mitigate the risks identified.¹⁶

13. These principles are also confirmed in the applicable international human rights instruments which guarantee the presumption of innocence and require that pre-trial detention be ordered only when no other measure can mitigate a clearly identifiable and realistic risk.¹⁷ Accordingly, any restrictions on liberty ordered by the Pre-Trial Judge must be exceptional and strictly proportionate.¹⁸

III. SUBMISSIONS

14. Mr Shala was arrested and is currently detained on the basis of the Decision on Arrest Warrant and Detention and related arrest warrant that was issued on 12 June 2020 *ex parte*.¹⁹ This is the first time that he can respond to the SPO's submissions seeking his arrest and continued detention.²⁰ Accordingly, the Pre-Trial Judge is called upon to make a fresh determination on the existence of facts justifying detention in light of the arguments advanced by the Parties.²¹

¹⁵ KSC-BC-2020-06, IA004-F00005, Appeals Chamber, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021, para. 17.

¹⁶ SCCC 26 April 2017 Judgment, para. 115.

¹⁷ Article 5(1) and Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"); Article 9(1) and Article 14(2) the International Covenant on Civil and Political Rights.

¹⁸ KSC-BC-2020-07, IA001-F00005, Appeals Chamber, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, paras. 72, 73.

¹⁹ The Defence was subsequently only provided with a public redacted version of the Arrest Warrant.

²⁰ F00002, Specialist Prosecutor, Confidential Redacted Version of 'Submission of Indictment for confirmation and related requests', filing KSC-BC2020-04/F00002 dated 14 February 2020 with confidential Annex 1 ("Submission of Indictment and Related Requests"), 26 April 2021.

²¹ KSC-BC-2020-07, F00058, Single Judge, Decision on Request for Immediate Release of Nasim Haradinaj, 27 October 2020, para. 13.

Importantly, the Pre-Trial Judge has not previously considered whether any more lenient measures would mitigate the SPO's concerns.²²

15. The Defence stresses at the outset that the extent of the redactions to the relevant SPO's submissions and relevant decisions by the Pre-Trial Judge undermine its ability to respond to such a degree that violates Mr Shala's right not to be deprived of his liberty in an arbitrary manner as guaranteed by the applicable Kosovo and international law.²³
16. To the extent that the Defence is notified of the SPO's arguments and objections to provisional release, these are speculative and unsubstantiated.²⁴ The SPO has failed to show a basis for believing that the Accused would pose a flight risk. There is no foundation for concluding that the Accused would interfere with the administration of justice. There is no realistic basis for fearing that the Accused may commit any offence. Absent any detailed and evidence-based risk assessment, the SPO fails to show that there are articulable grounds that justify detaining the Accused on remand.
17. In addition, should the Pre-Trial Judge be inclined to consider that such articulable grounds exist, the Accused's pre-trial detention would be disproportionate in the present circumstances in light of the proposed conditions for provisional release.

A. Mr Shala is not a flight risk

18. The SPO has argued that "[o]nce Mr SHALA learns of the crimes for which he is charged and of the corresponding penalties for those crimes, he has an incentive to avoid being tried and risk conviction. His incentive to flee may

²² ECtHR, *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, 22 October 2018 ("*S., V. and A. v. Denmark*"), para. 77.

²³ See submissions made at paras. 31-35.

²⁴ Submission of Indictment and Related Requests.

further be influenced by knowledge of the publicly-reported convictions of his co-perpetrators Sabit GECI and Xhemshit KRASNIQI for crimes committed against detainees held by certain Kosovo Liberation Army ('KLA') members in Kukës."²⁵ The SPO has also argued that "Mr SHALA also has the means and opportunity to evade justice" and that he "lives in a jurisdiction in which the Specialist Chambers does not have any direct means to compel his appearance at trial." The SPO has also suggested that "[h]e has the right to move freely within the European Union" and that "he would not encounter systematic border controls." Lastly, the SPO has maintained that "[n]one of Mr SHALA's children live with him."

19. The Pre-Trial Judge, who did not have the benefit of submissions by Defence Counsel at the time of issuing the Decision on Arrest Warrant and Detention, accepted the SPO's submissions in their entirety.
20. The Defence submits that there are a number of factual errors in the arguments made by the SPO that were relied upon by the Pre-Trial Judge for the purposes of his finding that detention was necessary in these circumstances.
21. The Defence also stresses that there is no basis in Mr Shala's statements, conduct or any other available information that allows a reasonable trier of fact to infer that Mr Shala would abscond or fail to appear at trial if he is granted provisional release. All of the evidence points in the opposite direction.
22. First, Mr Shala was previously summoned to appear as a suspect and/or a witness in proceedings before the International Criminal Tribunal for the former Yugoslavia ("ICTY") on multiple occasions (2005 and 2007),²⁶ the

²⁵ Submission of Indictment and Related Requests, para. 6.

²⁶ ERN T000-2742-T000-2742-A (Transcript of Interview with Mr Shala, 22 January 2005); ERN T001-0105-1-A-TR (Transcript of Interview with Mr Shala, 21 May 2007); ERN T001-0105-3-A-TR (Transcript

Belgian investigation authorities (2016),²⁷ and the SPO (2019)²⁸. He has not only appeared each and every time as requested but he has also cooperated to the best of his ability and in full honesty with the relevant authorities. His attitude, behaviour, and cooperation with the relevant authorities throughout the processes in which he has been involved have been exemplary. He has every intent to cooperate fully with the KSC authorities and undertakes to appear for trial as and when requested to do so.

23. Second, as regards Mr Shala's personal and family situation, contrary to the SPO submissions, it should be noted that, right until his arrest, Mr Shala lived within the same building with two of his children in Belgium.²⁹ Mr Shala has an active role in the lives of these children and is very closely connected with them. His arrest and transfer to the Host State has constituted an interference with his right to protection of his private and family life that is not proportionate given his track record of cooperating with international and domestic investigating and law enforcement authorities. In light of the dire financial situation of his family, his children are not able to travel and visit him at the detention facilities in the Host State. The proposed conditions for provisional release listed below,³⁰ would strike a fair balance between the need to ensure respect for Mr Shala's private and family and guarantee that he appears for trial.

of Interview with Mr Shala, 22 May 2007); ERN IT-04-84 T9920-T9983 (Transcript from ICTY *Haradinaj et al.* case 30 October 2007).

²⁷ ERN 074117-074129-ET RED (Federal Judicial Police Brussels District, Supplementary Proces-Verbal 002157/2016, 14 January 2016).

²⁸ ERN 066843-066855-ET RED (Federal Judicial Police Brussels Capital Region, Supplementary Proces-Verbal 005265/2019, 11 February 2019); ERN 066866-066882-ET RED (Federal Judicial Police Brussels Capital Region, Supplementary Proces-Verbal 005577/2019, 12 February 2019).

²⁹ F00015, Specialist Prosecutor, Confidential Version of 'Prosecution report on search and seizure pursuant to KSC-BC-2020-04-F00009', filing KSC-BC-2020-04-F00015 dated 30 March 2021, with confidential redacted Annex 1, 26 April 2021 (confidential), para. 4.

³⁰ See below para. 49.

24. Third, the SPO's submissions that Mr Shala "has the means and opportunity to evade justice" is simply untrue.³¹ Mr Shala has no intent to evade justice. In addition, he is indigent and has no means at his disposal which could be used to evade justice. He left Kosovo in 1999 and in 2002 [REDACTED]. Mr Shala is not a public figure and is not well known in Kosovo or abroad. He has never been politically active and has not played any role in the post-war Kosovo. There is not even a slight indication as to the existence of any network of supporters or of Mr Shala having access to any funds or means that could facilitate his travel or hiding. He maintains no links or connections to the political elites in Kosovo and has no other support that could feasibly be used to evade justice. Mr Shala has maintained a low-profile life in Belgium for more than twenty years, he has clearly distanced himself from politics in Kosovo, and was always transparent as to his whereabouts and activities. His residence in Belgium should not be held against him for the purposes of this Motion, particularly given the grounds [REDACTED], which directly relate to events taking place in Kosovo in the 1990s, as well as his established private and family life in Belgium.
25. Belgium has fully cooperated with the KSC authorities when requested to do so with regard to Mr Shala's arrest and transfer to the Host State. In doing so, the Belgian authorities relied on the clear legislative framework facilitating cooperation between the Belgian and KSC authorities established by the Belgian Law on Cooperation, which includes a specific chapter on cooperation with the KSC.³² In addition, Belgium and Kosovo are parties to an international agreement on mutual judicial assistance in criminal matters.³³ Given the

³¹ Submission of Indictment and Related Requests, para. 7.

³² Belgian Law on Cooperation, as amended on 11 July 2018 when Title VI concerning Belgium's cooperation with the KSC was added to the Law (OJ 18 July 2018).

³³ Convention on Extradition and Legal Cooperation in Criminal Matters between the Socialist Federal Republic of Yugoslavia and the Kingdom of Belgium from 4 June 1971, effective from 1972.

circumstances of Mr Shala's arrest and the full and efficient cooperation of the Belgian and KSC authorities,³⁴ there is no indication to support the assumption implicit in the SPO submissions that Belgium may refuse to cooperate with the KSC in the future, should Mr Shala be provisionally released to Belgium pending trial.

26. Fourth, as regards to Mr Shala being informed of the charges against him and the corresponding penalties he may face in the event of a conviction, the Defence recalls that "the expectation of a lengthy sentence cannot be held against the accused *in abstracto*, however, because all accused before the Tribunal face lengthy sentences if convicted."³⁵ Well-established case law of the European Court of Human Rights ("ECtHR") provides that the gravity of the charges cannot by itself justify long periods of detention on remand and that, as to the existence of the risk of absconding, it cannot be gauged solely on the basis of the severity of the sentence faced.³⁶ The SPO has the burden of showing specific and realistic grounds to fear that Mr Shala may abscond that suffice to justify detention pending trial.³⁷ The SPO has clearly failed to discharge its burden in the present circumstances.
27. As to Mr Shala being informed of the convictions of his alleged co-perpetrators,³⁸ the Defence submits that the relevant judgments were publicly available, including through the internet, since 2011 and 2016. Mr Shala has been informed of their existence at the latest during his interviews in 2016 and

³⁴ See above paras. 5, 6.

³⁵ ICTY, Case no. IT-04-82-PT, *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Decision on Johan Tarčulovski's Motion for Provisional Release, 18 July 2005, para. 15.

³⁶ ECtHR, *Panchenko v. Russia*, no. 45100/98, 8 February 2005, paras. 102, 106.

³⁷ SCCC 26 April 2017 Judgment, para. 115.

³⁸ Submission of Indictment and Related Requests, para. 6. See Kosovo, Basic Court of Mitrovica, *Case against X. KRASNIQI*, Case P.No.184/15, Judgement, 8 August 2016; Kosovo, District Court of Mitrovica, *Case against S. GECL*, Case P.No.45/10, Judgement, 29 July 2011.

2019.³⁹ During these interviews, Mr Shala was also confronted with the incriminating allegations made against him by several witnesses in relation to his involvement in the events at the core of the indictment.⁴⁰ Even though Mr Shala has been fully aware of an increased jeopardy for his arrest and prosecution before the KSC, he has never attempted to flee or hide nor has he any intention do so at the present stage.

28. Finally, Mr Shala is ready to surrender his passport and any other travel documents in his possession to the KSC and/or Belgian authorities and commits to report to such authorities as regularly as it may be deemed necessary. The principle of necessity, as interpreted by the Constitutional Court Chamber and the ECtHR in the context of detention on remand, obliges the Pre-Trial Judge to consider alternative measures of ensuring a person's appearance at trial when deciding whether to grant provisional release.⁴¹ In this context, the Pre-Trial Judge is required to consider measures alternative to detention and explore whether any diplomatic assurances by Belgium would sufficiently address any concerns about releasing Mr Shala to Belgium on any conditions deemed appropriate and ensuring his appearance at trial.

B. Mr Shala poses no risk of interference with the administration of justice

29. The SPO submitted that "Mr SHALA's previous acts and conduct [...] demonstrate a risk that he might interfere with witnesses, victims or accomplices, and otherwise seek to obstruct the proceedings".⁴² The SPO also argued that "[h]e has the incentive, means and opportunity to do so." The remainder of the SPO's arguments as well as any factual basis referred to in

³⁹ ERN 074117-074129-ET RED (074129); ERN 066843-066855-ET RED (066846); ERN 066864-TR-ET Part 1 RED, pp. 9-13.

⁴⁰ ERN 074117-074129-ET RED (074125-074129); ERN 066866-066882-ET RED (066879). *See also* para. 40 below.

⁴¹ SCCC 26 April 2017 Judgment, para. 114; *S., V. and A. v. Denmark*, para. 77.

⁴² Submission of Indictment and Related Requests, para. 8.

support have been entirely redacted from the version of these submissions served on the Defence.

30. The nature and grounds of the Pre-Trial Judge's findings on this crucial part of his decision have also been redacted in their entirety from the version of that decision served on the Defence.⁴³
31. The extent of these redactions prevents the Defence from responding to the SPO's allegations and making any meaningful submissions on this point. The Defence submits that it would be unlawful and manifestly unjust for the Pre-Trial Judge to base his decision to refuse provisional release on allegations that cannot be addressed in adversarial proceedings.
32. Article 3(2)(3) of the Law provides that international human rights law setting criminal justice standards, including the European Convention on Human Rights ("ECHR"), are to be attributed "superiority" over other provisions of Kosovo law by virtue of Article 22 of the Constitution.
33. Under Article 5 § 4 of the ECHR, arrested or detained persons are entitled to a review consistent with the procedural and substantive guarantees, including the guarantees of a judicial procedure, which are essential for the "lawfulness" of any deprivation of liberty.⁴⁴ Thus, proceedings reviewing the lawfulness of detention, such as the adjudication of the present Motion, must meet the basic requirements of a fair trial as guaranteed by Article 6 of the ECHR.⁴⁵ They "must be adversarial and must always ensure 'equality of arms' between the parties, the prosecutor and the detained person".⁴⁶ The well-established case

⁴³ Decision on Arrest Warrant and Detention, para. 21.

⁴⁴ See, e.g., ECtHR, *Oravec v. Croatia*, no. 51249/11, 11 July 2017, para. 67; ECtHR, *Lietzow v. Germany*, no. 24479/94, 13 February 2001, para. 44.

⁴⁵ ECtHR, *Albrechtas v. Lithuania*, no. 1886/06, 19 January 2016, para. 73.

⁴⁶ ECtHR, *Podeschi v. San Marino*, no. 66357/14, 13 April 2017, para. 171; ECtHR, *Mooren v. Germany* [GC], no. 11364/03, 9 July 2009, para. 124.

law of the ECtHR provides that “[e]quality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention”.⁴⁷ Equality of arms is violated if the individual detained on remand does not have the possibility to challenge effectively the allegations against him.⁴⁸

34. The extent of the redactions in the SPO's request for an arrest warrant and detention is such that the Pre-Trial Judge, in assessing the existence of an alleged risk of interference with these proceedings, must disregard the redacted allegations.⁴⁹ This is the most fair manner to uphold Mr Shala's rights to be informed of the allegations against him under Article 21 of the Law and Article 29 of the Constitution.
35. To the alternative, the Defence should be provided with information on the grounds put forward in support of the alleged risk of interference with these proceedings, in order to have a proper opportunity to respond to such submissions.
36. In any event, the Defence reiterates that any assessment as to whether there is a risk of an interference with the administration of justice cannot be done in *abstracto*, but a concrete danger must be identified.⁵⁰ There are no grounds to conclude that, if released, Mr Shala would interfere with the administration of justice. There is no evidence that he has ever, directly or indirectly, influenced

⁴⁷ *Mooren v. Germany*, para. 124, and authorities cited therein.

⁴⁸ *Podeschi v. San Marino*, para. 179.

⁴⁹ See KSC-BC-2020-06, F00178, Pre-Trial Judge, Decision on Kadri Veseli's Application for Interim Release, 22 January 2021, para. 41.

⁵⁰ See, e.g., *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case no. IT-04-82-PT, Decision on Johan Tarčulovski's Motion for Provisional Release, 18 July 2005, para. 18; ECtHR, *Becciev v. Moldova*, no. 9190/03, 4 January 2006, para. 59.

or attempted to influence any witness. The SPO's submissions on the alleged risk that Mr Shala would interfere with witnesses are speculative.

37. The Defence also reiterates that Mr Shala left Kosovo more than 20 years ago. He has led a quiet life in Belgium and has completely distanced himself from what has been going on in Kosovo in the last two decades. As emphasized by the Accused on several occasions, he has cut all ties with Kosovo and has no relationship with its political elites.⁵¹ He has never held any public function or position of authority in the post-war Kosovo. Mr Shala has no support network or any ability to establish or mobilise any support.
38. Moreover, there is no indication in the evidence that the Accused has ever attempted to interfere with the evidentiary material, or to search for or try to contact any of the witnesses or attempt to cause any harm to them. In this context, the Defence also submits that the protective measures in place should also be taken into account as an additional safeguard for the protection of the potential witnesses concerned with Mr Shala's provisional release.⁵²
39. In so far as [REDACTED],⁵³ [REDACTED] Mr Shala was questioned by investigating authorities without having the opportunity to benefit from legal advice.
40. [REDACTED] This is confirmed by the fact that Mr Shala has been aware of the allegations made against him for almost two decades and has never attempted

⁵¹ ERN U009-9370-U009-9379-ET (Office of the Commissioner General for Refugees and Stateless Persons, Notes taken during the interview, 21 March 2001); ERN 074117-074129-ET RED (074120-074121).

⁵² ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, para. 49; SCSL, *Prosecutor v. Sesay*, SCSL-04-15-PT, Decision on Application of Issa Sesay for Provisional Release, 31 March 2004, para. 54.

⁵³ Decision on Arrest Warrant and Detention, n. 28, referring to ERN 074117-074129-ET RED (074126).

to contact or influence the relevant witnesses in any manner.⁵⁴ The prospective witness referred to in the [REDACTED] had made his allegations against Mr Shala, which are also set out in the Confirmed Indictment, in his testimony before the ICTY in 2002.⁵⁵ In addition, when another witness sought to establish contact with Mr Shala and threatened him, Mr Shala simply refused to engage in any exchange with that person and firmly blocked any further contact.⁵⁶

41. Contrary to the submissions by the SPO, there is no evidence that Mr Shala has ever, directly or indirectly, contacted, influenced, threatened or attempted to contact, influence, or threaten any witness.

C. Mr Shala poses no risk of further offences

42. The SPO submitted that “there is a real risk that [Mr Shala] might commit other crimes, including through conduct similar to that alleged in the Indictment, in order to avoid being brought to account for the crimes charged, including use of physical violence or threats of violence, or attempt to procure or incite others to undertake acts of violence or make threats of violence [REDACTED] against potential witnesses”.⁵⁷
43. In his Decision on Arrest Warrant and Detention, the Pre-Trial Judge accepted the SPO’s submissions in their entirety.⁵⁸

⁵⁴ See, e.g., ERN SITF00013852-00013869 RED2 (ICTY Witness statement, 17-19 January 2003) (SITF00013857, SITF00013860); ERN SITF00013736-SITF00013767 RED2 (District Public Prosecutor’s Office in Pristina Record of Witness hearing, 15 December 2009)(SITF00013744).

⁵⁵ ERN 003-1373-003-1381 RED2 (ICTY Witness statement, 28 November 2002)(U0031378). These allegations were repeated before the SPO in 2018. ERN 082892-TR-ET Part 1 RED2 (Transcript of SPO interview with a witness, 4 December 2018), p. 88; ERN 082892-TR-ET Part 2 RED2 (Transcript of SPO interview with a witness, 5 December 2018), pp. 14, 18-19, 30-31; ERN 082892/TR/ET Part 3 RED2 (Transcript of SPO interview with a witness, 6 December 2018), p. 26.

⁵⁶ ERN 066866-066882-ET RED (066877); ERN 074117-074129-ET RED (074125).

⁵⁷ Submission of Indictment and Related Requests, para. 11.

⁵⁸ Decision on Arrest Warrant and Detention, para. 22.

44. However, the SPO's allegations are entirely speculative. The only possible basis for inferring a risk of future offending relates to the supposed risk of obstruction of justice. However, as outlined above, the essential information regarding the arguments put forward by the SPO for drawing such an inference have been redacted from the Defence and should therefore be disregarded. In any event, as explained at length above, the SPO submissions on this issue lack any foundation in fact or evidence.⁵⁹ Mr Shala has never threatened to resort to physical violence against witnesses. [REDACTED].⁶⁰ It follows that there is no separate objection to be made on the ground of an articulable risk of future offences.

D. Proposed Conditions for Provisional Release

45. The Defence submits that there are alternative and more lenient measures that can sufficiently mitigate any feared risk of absconding, obstructing the proceedings or committing any crime.
46. The SC of the Constitutional Court has held that "to fully comply with constitutional standards, a panel must consider more lenient measures when deciding whether a person should be detained."⁶¹ The ECtHR has also consistently held that the detention of an individual can only be justified as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the interest which might require that the person concerned be detained.⁶² Thus, detention must be subject to a necessity and

⁵⁹ See above paragraph 40.

⁶⁰ Decision on Arrest Warrant and Detention, n. 28.

⁶¹ KSC-CC-PR-2020-09, F000006, SC of the Constitutional Court, Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020, 22 May 2020, para. 70.

⁶² See, e.g., *S., V. and A. v. Denmark*, paras. 75-77; ECtHR, *Ladent v. Poland*, no. 11036/03, 18 March 2008, paras. 47, 48.

proportionality test, according to which less severe measures must first be considered before any decision on detention on remand is ordered.⁶³

47. Similarly, the Kosovo Code of Criminal Procedure provides that “[i]n deciding which measure to apply, the court shall be obliged to take account of the conditions specified for the individual measures and to ensure that it does not apply a more severe measure if a less severe measure would suffice.”⁶⁴
48. It follows that, if the Pre-Trial Judge were to conclude that the SPO has discharged the burden of establishing the articulable grounds specified in Article 41(5), the Pre-Trial Judge must nevertheless grant provisional release on conditions unless the SPO is able to establish in addition that (i) pre-trial detention is the least restrictive measure available to achieve its goals; and (ii) pre-trial detention is, in all the circumstances, a proportionate restriction on Mr Shala’s rights.
49. The SPO has failed to demonstrate that pre-trial detention is a proportionate restriction of Mr Shala’s rights. The Defence submits that the following conditions are capable of addressing any concerns as to Mr Shala’s appearance for trial and alleged risk of interference with witnesses or committing further offences:
- (i) surrender of Mr Shala’s passport and any other document/s in his possession that could be used for travelling purposes;
 - (ii) a requirement that Mr Shala lives and sleeps each night at his home address in Belgium and be subject to a curfew and daily checks by authorized officials from the Government of Belgium;

⁶³ *S., V. and A. v. Denmark*, para. 161.

⁶⁴ Article 173(2) of the Kosovo Code of Criminal Procedure.

- (iii) consent to electronic monitoring or tagging by installation of an ankle bracelet with GPS location monitoring whilst on provisional release;
 - (iv) a requirement for daily reporting to authorized officials from the Government of Belgium;
 - (v) a prohibition to contact any potential witness or any member of their family, directly or indirectly;
 - (vi) restricted or limited internet access and access to a single mobile telephone for limited communication purposes only that can be monitored by KSC or Belgian authorities as appropriate;
 - (vii) consent to attend proceedings before the KSC by video-conference facilities; and
 - (ix) any additional limitations found appropriate by the Pre-Trial Judge.
50. Having regard to the above and pursuant to Article 41(12) of the Law, the Defence request that Mr Shala be provisionally released on the basis of the above conditions.
51. In the alternative, the Defence request that Mr Shala be placed under house arrest at his residence in Belgium under any limitations or additional conditions found appropriate by the Pre-Trial Judge as long as he is provided with limited means to ensure his basic subsistence. In this respect, it is noted that Mr Shala is indigent and depends for survival on his income from employment in the construction sector.
52. The Defence submits that the proposed conditions sufficiently address any alleged risk that Mr Shala may abscond, obstruct the proceedings or commit further offences. His proposed release would not entail any concrete risks. The proposed conditions and any further conditions the Pre-Trial Judge may find

appropriate, provide sufficient basis to guarantee that, if released, Mr Shala will appear for trial and will not pose any danger to a victim, witness, or other person. The proposed conditions thus eliminate all the Article 41(6)(b) risks.

IV. RELIEF REQUESTED

53. For these reasons, the Defence respectfully submits that the grounds for detention under Article 41(6) are not met. As a result, the Accused's detention is not lawful and he must be provisionally released. Any concern as to the alleged risk posed by his provisional release, can be mitigated by such conditions as the Pre-Trial Judge considers appropriate.

Respectfully submitted,



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