

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

Before: **The Panel of the Court of Appeals Chamber**
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon, Registrar

Date: 19 July 2021

Filing Party: Specialist Defence Counsel

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**Defence Reply to Prosecution Response to Appeal Against
the 'Decision on Pjetër Shala's Request for Provisional Release'**

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I. INTRODUCTION

1. The Defence for Mr Pjetër Shala files this Reply to the Prosecution's Response to its Appeal against the Decision on the Defence Motion for Provisional Release.¹
2. The Defence reiterates its position that the Pre-Trial Judge's core findings as identified in paragraph 12 of its Appeal are undermined by serious errors of fact and law as well as unfair and unreasonable exercise of discretion.²
3. The Pre-Trial Judge: (i) failed to assess the Defence arguments and, ultimately, acknowledge the violation of the procedural obligation under Article 29 of the Constitution and Article 5 of the ECHR that requires the Defence to be afforded an effective opportunity to respond to objections to provisional release; (ii) applied an incorrect standard in assessing the risks under Article 41(6)(b) of the Law; (iii) erred in finding that Mr Shala is a flight risk; (iv) erred in finding that there is a risk that Mr Shala will obstruct the proceedings; (v) erred in finding that Mr Shala will commit further crimes; (vi) erred in finding that the risks of obstructing the proceedings or committing further crimes could not be addressed by any possible condition of provisional release; (vii) erred by imposing a "blanket ban" on provisional release due to concerns about the protection of confidentiality of information disclosed to accused persons before the KSC, including Mr Shala; (viii) erred in his assessment of the proportionality of detention; and, lastly, (ix) erred by failing to consider Mr Shala's proposal to be placed under house arrest.

¹ KSC-BC-2020-04, *Specialist Prosecutor v. Pjetër Shala*, Prosecution Response to Defence Appeal Against the 'Decision on Pjetër Shala's Request for Provisional Release', 9 July 2021 (confidential with one public Annex)("Prosecution Response"). See also KSC-BC-2020-04, *Specialist Prosecutor v. Pjetër Shala*, Defence Appeal against the 'Decision on Pjetër Shala's Request for Provisional Release', 28 June 2021 (confidential)("Appeal").

² Appeal, paras. 13-47.

II. SUBMISSIONS IN REPLY

A. *The review of the lawfulness of detention process was unfair*

4. The process of reviewing the lawfulness of Mr Shala's detention has been tainted by the lack of information as to the grounds on which his arrest and continuing detention were requested by the SPO and granted by the Pre-Trial Judge.³ Suggesting that the material in Mr Shala's possession provided sufficient information on the grounds of his arrest and detention because "they contained just three and four redactions" grossly misrepresents the extent of the redactions to the material disclosed to the Defence.⁴
5. In reality, as the Pre-Trial Judge reluctantly acknowledged, the Defence had to "anticipate" the SPO's arguments in order to address them;⁵ in other words, the Defence had to argue its case in the abstract without knowing the exact and precise grounds on which the SPO relied upon to request Mr Shala's arrest and continued detention. The ability to guess the grounds on which the SPO relied on cannot be reasonably equated with a real and effective opportunity to respond to them. The last-minute reclassification ordered by the Pre-Trial Judge, which allowed the Defence merely one working day to consider and respond to the unredacted submissions by the SPO did not amount to "sufficient time" to prepare and present a meaningful response.
6. Until the reclassification, the Defence only had access to selected unredacted extracts of the SPO submissions; it did not have access to the entirety of the relevant SPO arguments, it was not informed of what evidence or incidents the SPO had relied upon in support of its request, and was not in a position to complete its review of the entirety of the material disclosed by the SPO to make

³ Appeal, para. 17.

⁴ Prosecution Response, para. 13.

⁵ Appeal, para. 19.

a more informed guess as to the SPO's submissions. The lack of access to important information and the Pre-Trial Judge's acceptance of the extended redactions without a proper review constituted a procedural violation of 29 of the Constitution and Article 5 of the ECHR.

7. The SPO suggestion that Mr Shala should have requested an extension of time to file his Reply, fails to take into consideration the fact that Mr Shala, who is currently unnecessarily in detention, wishes to be released as soon as possible and does not accept any delay in adjudicating the lawfulness of his detention. Any request for an extension would prolong the period of detention.

B. The Pre-Trial Judge applied an incorrect standard in assessing the risks under Article 41(6)(b)

8. The Prosecution merely contends that the Defence ignores relevant jurisprudence and fails to address the Defence arguments in this respect.⁶

C. The Errors in Finding that Mr Shala is in Risk of Flight should be considered

9. The Pre-Trial Judge's errors in finding that Mr Shala is a flight risk meet the test for appellate review in that they invalidate his decision and occasion a miscarriage of justice on a matter concerning Mr Shala's fundamental right to liberty; a right protected *inter alia* by an automatic right of appeal against decisions on provisional release.
10. The Prosecution argues that the Pre-Trial Judge concluded that Mr Shala's current risk of flight is sufficiently mitigated by his proposed conditions and that, as a result, the Defence submissions on the Pre-Trial Judge's errors in assessing and concluding that Mr Shala is a flight risk should be summarily

⁶ Prosecution Response, paras. 19-22; Appeal, paras. 23-26.

dismissed.⁷ However, the Prosecution erroneously conflates the Pre-Trial Judge's finding that Mr Shala is a flight risk under Article 41(6)(b) of the Law⁸ with his finding concerning whether the proposed conditions could mitigate such risk.⁹

11. As argued in the Appeal, the Pre-Trial Judge's impugned finding violates Mr Shala's right to defend himself by challenging the lawfulness of the establishment of the KSC,¹⁰ be presumed innocent,¹¹ be afforded a real and effective opportunity to respond to the grounds relied upon to justify detention (in connection to the Pre-Trial Judge's reliance on the SPO arguments and underlying material in the *Thaçi* case).¹² These violations of Mr Shala's rights undeniably caused prejudice, invalidate the Pre-Trial Judge's decision and require an appropriate remedy.

12. Even in areas in which a panel enjoys considerable discretion (such as the determination of a request for provisional release), such discretion must be exercised in accordance with the requirement to ensure that trials are fair and conducted with full respect for the rights of the accused.¹³ The Defence recalls that well-established case law of international criminal tribunals requires that "any violation [of the rights of an accused], even if it entails a relative degree of prejudice, requires a proportionate remedy."¹⁴ The SPO position that the Appeals Panel should ignore and summarily dismiss Mr Shala's complaints of violations of his rights has no foundation in law, would result in arbitrary

⁷ Prosecution Response, para. 23.

⁸ See KSC-BC-2020-04, *Specialist Prosecutor v. Pjetër Shala*, Decision on Pjetër Shala's Request for Provisional Release, 15 June 2021 (confidential)("Impugned Decision"), paras. 21-28.

⁹ Impugned Decision, para. 45.

¹⁰ Appeal, para. 27.

¹¹ Appeal, para. 28.

¹² Appeal, para. 30

¹³ MICT, *Karadžić* Appeal Judgment, para. 28 and references made therein.

¹⁴ ICTR, Case No. ICTR-98-42-A, *Nyiramasuhuko et al.* Appeal Judgement, 14 December 2015, para. 42 and references made therein.

treatment contrary to the rule of law, and would deprive Mr Shala access to court for an assessment and determination of his complaints of violations of his fundamental rights (constituting as such a separate violation of Articles 6 and 13 of the ECHR).

D. Errors in Findings that Mr Shala will obstruct the proceedings or reoffend

13. For the reasons set out in the Appeal, the Pre-Trial Judge could not have reasonably concluded that there are articulable grounds to believe that Mr Shala would either obstruct the proceedings or reoffend.¹⁵ There is no evidence that Mr Shala has ever attempted to influence any witness or otherwise interfered with evidentiary material. His honest expression of animosity could not be reasonably equated with willingness to interfere with witnesses or the proceedings.

14. The Defence reiterates its submission that the Pre-Trial Judge failed to consider the impact of the extensive protective measures granted in this case.¹⁶ The Response highlights the absence of any thorough or effective consideration of this point as it refers to the fact that the Pre-Trial Judge merely “noted” the Defence submissions on this issue¹⁷ without effectively addressing them. The SPO also relies on the fact that certain witnesses are not subject to delayed disclosure and their identity is known to Mr Shala. The fact that Mr Shala has access to this information, as he is entitled to, should not undermine his chances of being provisionally released. The SPO ignores that, while the identity of these witnesses might be known, their addresses, contact details and other

¹⁵ Appeal, paras. 31-40.

¹⁶ Appeal, para. 37.

¹⁷ See Response, n. 65 *referring to* Decision, para. 29.

information as to their actual whereabouts is naturally not known to the Defence.

E. The Pre-Trial Judge erred in assessing the necessity of detention

15. The Defence refers the Panel to the submissions made in paragraphs 41 to 44 and 47 of its Appeal. The SPO argument that the Pre-Trial Judge reasonably concluded that no restrictions would suffice “given the proliferation of communication devices available today” ignores the reality that such proliferation is matched by the expansion of aggressive monitoring software and devices capable of limiting the privacy of communications. In light of the existence of a wide array of monitoring possibilities, the Pre-Trial Judge’s finding that “it is only through the communication monitoring framework applicable at the SC detention facilities that Mr Shala’s communications can be effectively restricted and monitored” was unreasonable. This finding was reached without receiving specific submissions on this point that could be supplemented by expert evidence. It is flawed as a matter of fact and law. It also amounts to a “blanket ban” on provisional release. On the basis of the Pre-Trial Judge’s reasoning, no provisional release could be allowed due to the perceived inability to effectively monitor and ensure the confidentiality of information disclosed to the defence.

F. The Pre-Trial Judge failed to properly evaluate the proportionality of detention

16. The Defence refers the Panel to paragraphs 45 to 46 of its Appeal. The SPO fails to identify the conduct of a proper proportionality assessment by the Pre-Trial Judge.

III. RELIEF REQUESTED

17. In light of the above, the Defence respectfully requests the Panel to grant its appeal.

Respectfully submitted,



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Monday, 19 July 2021

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