



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2020-04

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

Registrar: Fidelma Donlon

Date: 20 August 2021

Original language: English

Classification: Public

Public Redacted Version of

Decision on Pjetër Shala's Appeal Against Decision on Provisional Release

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel” or “Panel” and “Specialist Chambers”, respectively),¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”), is seised of an appeal filed on 28 June 2021 by Pjetër Shala (“Appeal”),² challenging the “Decision on Pjetër Shala’s Request for Provisional Release” (“Impugned Decision”).³ Shala requests the Court of Appeals Panel to reverse the Impugned Decision and to order his provisional release, with or without conditions.⁴ The Specialist Prosecutor’s Office (“SPO”) responded on 9 July 2021 that the Appeal should be dismissed in its entirety.⁵ Shala replied on 19 July 2021.⁶

¹ F00002, Decision Assigning a Court of Appeals Panel, 30 June 2021 (confidential).

² F00001, Defence Appeal against the “Decision on Pjetër Shala’s Request for Provisional Release”, 28 June 2021 (confidential) (“Appeal”).

³ F00045/RED, Public Redacted Version of Decision on Pjetër Shala’s Request for Provisional Release, 23 June 2021 (original version filed on 15 June 2021) (“Impugned Decision”).

⁴ Appeal, para. 48; F00004, Defence Reply to Prosecution Response to Appeal Against the ‘Decision on Pjetër Shala’s Request for Provisional Release’, 19 July 2021 (confidential) (“Reply”), para. 17.

⁵ F00003, Prosecution response to Defence appeal against the ‘Decision on Pjetër Shala’s Request for Provisional Release’, 9 July 2021 (confidential) (“Response”), paras 2, 40.

⁶ F00004, Defence Reply to Prosecution Response to Appeal Against the ‘Decision on Pjetër Shala’s Request for Provisional Release’, 19 July 2021 (confidential) (“Reply”).

I. BACKGROUND

1. On 16 March 2021, at the SPO's request,⁷ and further to the confirmation of an indictment⁸ and the issuance of a decision⁹ and an arrest warrant¹⁰ by the Pre-Trial Judge, Shala was arrested in the Kingdom of Belgium ("Belgium").¹¹
2. On 15 April 2021, upon conclusion of the judicial proceedings in Belgium, Shala was transferred to the detention facilities of the Specialist Chambers in The Hague, the Netherlands.¹²
3. On 15 June 2021, the Pre-Trial Judge issued the Impugned Decision, rejecting Shala's application for interim release on the basis that there was a risk that Shala would abscond, obstruct the progress of Specialist Chambers proceedings or commit further crimes against those perceived as being opposed to the Kosovo Liberation Army ("KLA"), including SPO witnesses and/or future witnesses.¹³ The Pre-Trial Judge found that the conditional interim release proposed by Shala ("Proposed Conditions"), as an alternative to unconditional release, could adequately mitigate the risk of flight, but would not sufficiently mitigate the risk of obstructing the progress

⁷ F00002/RED, Public Redacted Version of 'Submission of Indictment for confirmation and related requests', filing KSC-BC-2020-04/F00002 dated 14 February 2020, 26 April 2021 (original version filed on 14 February 2020), para. 21(ii).

⁸ F00007/RED, Public Redacted Version of the Decision on the Confirmation of the Indictment Against Pjetër Shala, 6 May 2021 (original version filed on 12 June 2020); see also F00010/A02, Indictment, 19 June 2020 (strictly confidential and *ex parte*, reclassified as confidential on 29 April 2021); F00038/A01, Submission of Further Lesser Redacted Version of Confirmed Indictment, 25 May 2021 (confidential) ("Indictment").

⁹ F00008/RED, Public Redacted Version of the Decision on Request for Arrest Warrant and Transfer Order, 6 May 2021 (original version filed on 12 June 2020) ("Arrest Warrant Decision").

¹⁰ F00008/A01/RED, Public Redacted Version of Arrest Warrant for Mr Pjetër Shala, 15 April 2021 (original version filed on 12 June 2020) ("Arrest Warrant").

¹¹ F00013, Notification of Arrest of Pjetër Shala Pursuant to Rule 55(4), 16 March 2021 (strictly confidential and *ex parte*, reclassified as public on 29 April 2021).

¹² F00019/RED, Public Redacted Version of 'Notification of Reception of Pjetër Shala in the Detention Facilities of the Specialist Chambers and Conditional Assignment of Counsel', filing F00019 dated 15 April 2021, 26 April 2021 (original version filed on 15 April 2021, para. 2).

¹³ Impugned Decision, paras 24-28, 32-35, 39-41, 50. See also F00039/RED, Public Redacted Version of Motion for Provisional Release, 17 June 2021 (original version filed on 27 May 2021) ("Motion dated 27 May 2021").

of Specialist Chambers proceedings or the risk of committing further crimes.¹⁴ The Pre-Trial Judge further found that Shala's detention was still proportionate.¹⁵

4. In his submissions, Shala develops nine grounds of appeal consisting of alleged errors of law and of fact committed by the Pre-Trial Judge, as well as abuse of discretion.¹⁶ The Panel will address the Appeal as follows: (a) preliminary matters; (b) alleged errors regarding the threshold under Article 41(6)(b) of the Law; (c) alleged errors regarding the assessment of Article 41(6)(b) of the Law; (d) alleged errors regarding the assessment of the proportionality of detention; and (e) alleged errors regarding the assessment of the Proposed Conditions.

II. STANDARD OF REVIEW

5. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.¹⁷ The Court of Appeals Panel recalls that, according to Article 45(2) of the Law, interlocutory appeals lie as of right from decisions or orders relating to detention on remand.

¹⁴ Impugned Decision, paras 45-48.

¹⁵ Impugned Decision, para. 49.

¹⁶ Appeal, paras 2-3, 13; Reply, paras 2-3.

¹⁷ KSC-BC-2020-07, F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati Appeal Decision*"), paras 4-14. See also e.g. KSC-BC-2020-06, F00005, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, 30 April 2021 ("*Veseli Appeal Decision*"), paras 4-7; KSC-BC-2020-06, F00005/RED, Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release, 30 April 2021 (original version filed on 30 April 2021) ("*Krasniqi Appeal Decision*"), paras 4-7; KSC-BC-2020-06, F00005/RED, Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Interim Release, 30 April 2021 (original version filed on 30 April 2021) ("*Selimi Appeal Decision*"), paras 4-7; KSC-BC-2020-06, F00005/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021 (original version filed on 30 April 2021) ("*Thaçi Appeal Decision*"), paras 4-7.

III. DISCUSSION

A. PRELIMINARY MATTERS

1. Public Filings

6. The Panel notes that the Parties have not yet filed public redacted versions of their submissions on appeal.¹⁸ Considering that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential, and that Parties shall file public redacted versions of all submissions filed before the Panel,¹⁹ the Panel orders Shala to file public redacted versions of his Appeal and Reply, and the SPO to file a public redacted version of its Response, within ten days of receiving notification of the present Decision.

2. Formal Requirements on Appeal

7. A party is expected to present its case clearly, logically and exhaustively in order for the Court of Appeals Panel to assess its arguments on appeal. The Panel may dismiss submissions as unfounded without further reasoning, if a party's submissions are "obscure, contradictory, vague or suffer from other formal and obvious insufficiencies".²⁰ The Panel recalls that "an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision".²¹ The Panel's functions cannot be effectively and efficiently carried out without focused, structured, clear and well-reasoned submissions by the parties.²²

¹⁸ The SPO indicated its intention to file a public redacted version of its Response. See Response, para. 3.

¹⁹ See e.g. KSC-BC-2020-07, F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021 ("*Gucati and Haradinaj* Decision on Preliminary Motions"), para. 13; *Thaçi* Appeal Decision, para. 10.

²⁰ *Gucati and Haradinaj* Decision on Preliminary Motions, para. 14 and jurisprudence cited therein.

²¹ *Gucati and Haradinaj* Decision on Preliminary Motions, para. 14 and jurisprudence cited therein.

²² *Gucati and Haradinaj* Decision on Preliminary Motions, para. 14.

8. When applying these basic principles, the Panel has identified, as a general matter, the following arguments as warranting summary dismissal: (i) arguments irrelevant to the Impugned Decision or arguments raised for the first time on appeal; (ii) arguments that fail to identify the challenged findings or misrepresent the findings; and (iii) mere assertions unsupported by any evidence, undeveloped assertions, or failures to articulate errors.²³

9. The Court of Appeals Panel notes that Shala repeatedly fails to identify the specific portions of the Impugned Decision that he is challenging in his Appeal.²⁴ The Panel recalls that pursuant to the Registry Practice Direction, Files and Filings before the Kosovo Specialist Chambers ("Practice Direction"), an appellant is obliged to make specific reference to the filings on which he or she relies.²⁵ The Panel considers that it is nevertheless in the interests of justice to consider the substance of Shala's submissions in his Appeal. However, the Panel reminds Shala to abide strictly by the Practice Direction in any future filing.

B. ALLEGED VIOLATION OF DEFENCE'S RIGHT TO RESPOND EFFECTIVELY TO SPO (GROUND 1)

1. Submissions of the Parties

10. Shala's submissions pertain to alleged procedural flaws that deprived him of an effective opportunity to respond to the SPO's objections to his motion for provisional release.²⁶ Shala submits that fundamental documents underpinning the

²³ See e.g. KSC-BC-2020-07, F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021 ("*Haradinaj Appeal Decision*"), para. 29 and jurisprudence cited therein; *Gucati and Haradinaj* Decision on Preliminary Motions, para. 15.

²⁴ Under Ground 6, direct quotes of the challenged portions of the Impugned Decision but failure to reference in footnote the relevant paragraph(s) (see Appeal, paras 41-42. See also Appeal, para. 12); under Grounds 4 and 8, general mention of the Impugned Decision but failure to identify in footnote any specific paragraph or finding (see Appeal, paras 31, 35-37, 45-46); under Grounds 7 and 9, not a single reference is made to the Impugned Decision (see Appeal, paras 44, 47).

²⁵ KSC-BD-15, Registry Practice Direction, Files and Filings before the Kosovo Specialist Chambers, 17 May 2019, Article 32(2). See also *Gucati and Haradinaj* Decision on Preliminary Motions, para. 17.

²⁶ Appeal, para. 15. See also Appeal, para. 16; Reply, paras 3-6.

orders for his arrest and detention were only disclosed to him on 15 April 2021 in a heavily redacted form.²⁷ On 27 May 2021, he filed an application for interim release.²⁸ On 9 June 2021, the SPO responded to the application, disclosed in its response “some relevant information”, and requested the Pre-Trial Judge to reclassify the above-mentioned documents, as well as others.²⁹ This request was granted by the Pre-Trial Judge and notified to the Defence on Friday, 11 June 2021. Shala contends that it was only at this stage that the Defence could understand the entirety of the SPO’s objections. However, it could only address them through the filing of its 2,000 word reply due by Monday, 14 June 2021.³⁰ Shala submits that the Pre-Trial Judge failed to consider the extent of the prejudice suffered by the Defence due to the late disclosure of crucial information and further failed to assess the complaint of a violation of the Defence’s rights.³¹

11. The SPO responds that the process through which the Pre-Trial Judge reviewed Shala’s detention was fair.³² According to the SPO, even before Shala filed his application for interim release, he had already received several documents enabling him to understand the reasons for his detention and ensuring “equality of arms” with the SPO. The SPO points to the versions of the Arrest Warrant Decision and of the Arrest Warrant that were disclosed to him and that contained only a few redactions.³³ Furthermore, the SPO notes that the Pre-Trial Judge reclassified the relevant documents before Shala filed his reply, and submits that Shala could have requested

²⁷ Appeal, para. 17.

²⁸ Appeal, para. 6. See Motion dated 27 May 2021.

²⁹ Appeal, para. 18, referring to F00042/RED, Public Redacted Version of ‘Prosecution response to Application for Provisional Release on behalf of Mr Pjetër Shala,’ filing KSC-BC-2020-04/F00042, dated 9 June 2021, 22 June 2021 (original version filed on 9 June 2021) (“Response dated 9 June 2021”). See also Appeal, para. 20.

³⁰ Appeal, paras 17-18, 20; Reply, paras 4-6. See also F00044/RED, Public Redacted Version of Reply to Prosecution’s Response to Motion for Provisional Release, 17 June 2021 (original version filed on 14 June 2021) (“Reply dated 14 June 2021”).

³¹ Appeal, paras 19-22.

³² Response, paras 14, 18.

³³ Response, paras 15, 17.

an extension of time had he wished to consider the reclassified documents further.³⁴ Ultimately, the SPO argues that Shala fails to articulate any facts from the previously redacted portions of the reclassified filings that would have altered the Pre-Trial Judge's analysis of the reasons underpinning his detention.³⁵

12. Shala submits in his Reply that the SPO's submission that the material in Shala's possession before the filing of his Motion dated 27 May 2021 contained only a few redactions "grossly misrepresents the extent of the redactions to the material disclosed to the Defence".³⁶ Furthermore, Shala states that he did not wish to request an extension of time for the filing of his reply because he "does not accept any delay in adjudicating the lawfulness of his detention".³⁷

2. Assessment of the Court of Appeals Panel

13. The Panel recalls the requirement that any deprivation of liberty must conform to the substantive and procedural rules established by law.³⁸ Considering the impact of deprivation of liberty on the fundamental rights of the Accused, proceedings by means of which the lawfulness of detention is challenged should meet the basic requirements of a fair trial, including the right to have knowledge of and comment on the observations made or evidence adduced by the other party.³⁹ As stated by the European Court of Human Rights ("ECtHR"): "Information which is essential for the

³⁴ Response, para. 16.

³⁵ Response, paras 15-17.

³⁶ Reply, para. 4.

³⁷ Reply, para. 7.

³⁸ KSC-CC-PR-2017-01, F00004, Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 26 April 2017, para. 111.

³⁹ See *Haradinaj* Appeal Decision, para. 43 (pointing out that there is no specific detention review procedure, but equality of arms must be ensured). See also ECtHR, *Oravec v. Croatia*, no. 51249/11, Judgment, 11 July 2017, para. 67.

assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer".⁴⁰

14. In the Impugned Decision, the Pre-Trial Judge rejected Shala's submissions on the basis that: (i) Shala partly anticipated the SPO's arguments in his application for interim release; (ii) the SPO disclosed the information under consideration in its response; and (iii) the Pre-Trial Judge reclassified the relevant documents so as to allow the Defence to effectively address the SPO's submissions in its reply.⁴¹ The Panel observes that, in its Response dated 9 June 2021, the SPO disclosed some information and requested that the following filings be reclassified from strictly confidential and *ex parte* to confidential: F00002 (Request for arrest warrant and transfer order) and F00008 (Decision on Request for Arrest Warrant and Transfer Order); these filings were reclassified upon an order from the Pre-Trial Judge on 10 June 2021.⁴² In addition, the video recording and the transcript of an interview with the SPO on 11-12 February 2019 were disclosed to the Defence on 11 June 2021.⁴³

15. A review of Shala's Motion dated 27 May 2021 indicates that Shala was able to assess the SPO's arguments opposing provisional release and to provide detailed arguments substantiating his assertion that the SPO failed to demonstrate a basis for believing that the Accused would pose any of the risks listed under Article 41(6)(b) of the Law.⁴⁴ In addition, while Shala submits that it is only on 11 June 2021 that the Defence could understand the entirety of the SPO's objections,⁴⁵ he fails to explain whether or how his own submissions would have been different or whether he would

⁴⁰ ECtHR, *Podeschi v. San Marino*, no. 66357/14, Judgment, 13 April 2017, para. 176; see also ECtHR, *Albrechtas v. Lithuania*, no. 1886/06, Judgment, 19 January 2016, para. 75; ECtHR, *Emilian-George Igna v. Romania*, no. 21249/05, Judgment, 26 November 2013, para. 27. See also *Haradinaj* Appeal Decision, para. 43.

⁴¹ Impugned Decision, para. 12.

⁴² The Defence states that they were notified of the reclassification of these filings on 11 June 2021. See Appeal, para. 18. See also Response dated 9 June 2021, para. 21.

⁴³ See Disclosures 8-9, 11 June 2021.

⁴⁴ Motion dated 27 May 2021, paras 16, 18-53.

⁴⁵ Appeal, paras 17-18, 20. See also Appeal, para. 6; Reply, paras 4-6.

have been able to address any of the SPO's arguments in a specific (different) way had he been able to obtain the documents sooner.

16. The Defence also does not concretely explain which of the SPO's objections it had to address in the Reply dated 14 June 2021.⁴⁶ On the nature of the material to which the Defence gained access on 10 and 11 June 2021 and the extent of the disclosure, the Panel further notes the Defence's own admission that "this new material [disclosed on 11 June 2021] is a video version of previously disclosed transcript of interview of the accused [...]. There are also redacted versions of previously disclosed material that weren't significantly redacted before."⁴⁷

17. When a party alleges on appeal that its right to a fair trial has been infringed, it must demonstrate that this violation caused prejudice considerably restricting its right to an effective defence.⁴⁸ While Shala contends that the Pre-Trial Judge failed to consider the extent of the prejudice he suffered,⁴⁹ he neither substantiates his allegation nor explains what prejudice, if any, he allegedly suffered. To the contrary, Shala provided extensive submissions opposing his detention in his Motion dated 27 May 2021 and in his Reply dated 14 June 2021. Thus, the Panel finds that Shala fails to demonstrate that he suffered any relevant prejudice.

18. Finally, the Panel considers that if Shala had needed more time to file his Reply, he could and should have requested an extension of time from the Pre-Trial Judge. In that regard, the Panel finds the Defence's argument that it did not do so in order not to delay the adjudication of the lawfulness of his detention and because such a request would "prolong the period of detention"⁵⁰ unconvincing. Indeed, in other

⁴⁶ Appeal, paras 6, 17-18, 20; Reply, paras 4-6. See also Reply dated 14 June 2021.

⁴⁷ Transcript of 21 June 2021, p. 58.

⁴⁸ See *Haradinaj* Appeal Decision, para. 44. See also *Haradinaj* Appeal Decision, para. 43. See also ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Judgement, 19 July 2010, para. 17; ICTR, *Renzaho v. Prosecutor*, ICTR-97-31-A, Judgement, 1 April 2011, paras 196, 210.

⁴⁹ Appeal, para. 20.

⁵⁰ Reply, para. 7.

circumstances, the Defence has requested an extension of time for the filing of submissions relevant to the lawfulness of the Accused's detention, such as the filing of its preliminary motion.⁵¹

19. Accordingly, the Panel finds that Shala failed to demonstrate that the Pre-Trial Judge committed an error of law or abused his discretion, resulting in a violation of any of his fundamental rights. The Panel therefore dismisses Shala's first ground of appeal.

C. ALLEGED FAILURE TO APPLY THE CORRECT THRESHOLD UNDER ARTICLE 41(6)(B) OF THE LAW (GROUND 2)

1. Submissions of the Parties

20. Shala argues that, despite the requirements of Article 29(2) of the Kosovo Constitution, international human rights instruments and the clear wording of Article 41(6) of the Law, the Pre-Trial Judge erred in applying a "uniform standard requiring a risk which is more than possible but less than certain to materialise".⁵² Shala further submits that the standard applied by the Pre-Trial Judge is inconsistent with the explicit requirement under Article 41(6)(b)(ii) of the Law to show articulable grounds to believe that the accused *will* obstruct the proceedings, and under Article 41(6)(b)(iii) of the Law requiring a risk of reoffending that *will* materialise.⁵³

21. The SPO responds that the Pre-Trial Judge applied the correct legal standard, and that Shala ignores prior findings of the Court of Appeals Panel clearly setting out the threshold regarding the risk assessment to be conducted under Article 41(6)(b) of the Law.⁵⁴

⁵¹ See e.g. Transcript of 21 June 2021, pp. 56-60.

⁵² Appeal, paras 23-25. See also Appeal, para. 26, referring to Impugned Decision, paras 16, 27-28, 35, 40-41; Reply, paras 3, 8.

⁵³ Appeal, paras 24, 26; Reply, paras 3, 8.

⁵⁴ Response, paras 19-22.

2. Assessment of the Court of Appeals Panel

22. The Panel recalls that, despite the absence of the word “risk” in the formulation of Article 41(6)(b)(ii) of the Law, the threshold remains the same for the three prongs of Article 41(6)(b) of the Law and involves a risk analysis.⁵⁵ Shala fails to identify with precision any inconsistencies in the Pre-Trial Judge’s findings in that regard.

23. As part of the protection against arbitrariness, the Panel highlights the importance of specific reasoning and concrete grounds on which the Pre-Trial Judge must rely in his decisions authorising detention on remand. The standard to be applied is, on the one hand, less than certainty, but, on the other, more than a mere possibility of a risk materialising.⁵⁶

24. In addition, Article 41(6)(b) of the Law does not require the Pre-Trial Judge to be satisfied that the risks specified in subparagraphs (i) to (iii) will in fact occur in the event of provisional release being granted, or to be satisfied that they are substantially likely to occur. The Pre-Trial Judge must be satisfied that there are “articulable grounds to believe” that there is a risk that they will occur. The question posed by Article 41(6)(b) of the Law is whether the SPO presented specific arguments based on evidence supporting the belief of a sufficiently real possibility that (one or more of) the risks under Article 41(6)(b)(i)-(iii) of the Law exist. To that extent, it is a question of fact depending on the individual circumstances of each case.⁵⁷

25. The Court of Appeals Panel recalls that the threshold summarised above has been determined by this Panel in previous decisions and applies to this Decision as well. To the extent that Shala substantiates this ground of appeal, the Panel understands that he is arguing that the Pre-Trial Judge “applied a uniform standard

⁵⁵ *Selimi* Appeal Decision, para. 32; *Krasniqi* Appeal Decision, para. 20.

⁵⁶ See *Thaçi* Appeal Decision, para. 22; *Veseli* Appeal Decision, para. 17; *Selimi* Appeal Decision, para. 40; *Krasniqi* Appeal Decision, para. 26.

⁵⁷ *Thaçi* Appeal Decision, para. 24; *Veseli* Appeal Decision, para. 19; *Selimi* Appeal Decision, para. 44; *Krasniqi* Appeal Decision, para. 28.

requiring a risk which is more than possible but less than certain to materialise”.⁵⁸ The Panel notes in that regard that the Pre-Trial Judge found (in paragraphs 16, 27, 28, 35, 40 and 41 of the Impugned Decision) that each of the risks he identified in the conduct of his assessment “exceeds the mere possibility of this risk materialising”.

26. The Panel finds that Shala’s mere reference to these findings without any further explanation is insufficient to demonstrate that the Pre-Trial Judge erred in his assessment. The Panel notes that, in this ground of appeal, Shala does not identify any instances where the Pre-Trial Judge allegedly failed to provide specific reasoning and concrete grounds in support of his decision.

27. The Panel further finds that while the phrase “exceeds the mere possibility of this risk materialising” might be open to a wide interpretation, it can be reasonably understood taking into account its context, namely as expressing that “articulable grounds to believe” within the meaning of Article 41(6)(b) of the Law exist. In that regard, the Panel notes that the Pre-Trial Judge clearly stated in the Impugned decision that Article 41(6)(b) of the Law echoes the principle that the continued detention of a person can only be justified if there are specific indications of a genuine requirement of public interest, which outweigh the person’s right to liberty.⁵⁹ Recalling that the nature of the assessment under Article 41(6)(b) of the Law involves an element of discretion,⁶⁰ the Panel finds that Shala fails to indicate with sufficient precision how the Pre-Trial Judge erred in the exercise of his discretion. As a result, the Panel dismisses Shala’s second ground of appeal.

⁵⁸ Appeal, para. 26, referring to Impugned Decision, paras 16, 27-28, 35, 40-41 where the Pre-Trial Judge found that the risks he identified in the conduct of his assessment “exceeds the mere possibility of this risk materialising”. See also Appeal, paras 23-25; Reply, paras 3, 8.

⁵⁹ Impugned Decision, para. 16.

⁶⁰ *Gucati* Appeal Decision, paras 49-51. See also Impugned Decision, para. 17, and references cited therein.

D. ALLEGED ERRORS REGARDING ASSESSMENT OF ARTICLE 41(6)(B) OF THE LAW
(GROUNDS 3, 4 AND 5)

1. Article 41(6)(b)(i) of the Law (Ground 3)

28. In the Impugned Decision, the Pre-Trial Judge found that the conditions proposed by Shala in support of his alternative request for conditional interim release could mitigate the risk of Shala absconding.⁶¹

29. The Court of Appeals Panel stresses that, when a party alleges that an error of law or of fact has been committed, that party must go on to show that the alleged error invalidates the decision or occasions a miscarriage of justice. Indeed, the Panel is not required to consider the arguments of a party if they do not allege an error of law invalidating the decision, or an error of fact occasioning a miscarriage of justice.⁶² As the Pre-Trial Judge's conclusion that Shala's detention shall continue is not based on his findings regarding the risk of flight, the Panel summarily dismisses the ground of appeal related to the risk of Shala absconding.⁶³

2. Article 41(6)(b)(ii) of the Law (Ground 4)

(a) Submissions of the Parties

30. Shala recalls that, in the Impugned Decision, the conclusion that there is a risk that he will obstruct the progress of Specialist Chambers proceedings is based on: [REDACTED].⁶⁴ However, according to Shala, there is no evidence that he has ever, directly or indirectly, even attempted to interfere with the proceedings.⁶⁵

⁶¹ Impugned Decision, para. 45.

⁶² See e.g. *Thaçi* Appeal Decision, para. 32; *Selimi* Appeal Decision, para. 50; ICTR, *Rutaganda v. Prosecutor*, ICTR-96-3-A, Judgement, 26 May 2003, para. 18.

⁶³ Appeal, paras 27-30; Reply, paras 3, 9-12. See also Response, para. 23.

⁶⁴ Appeal, paras 31, 34; Reply, para. 3.

⁶⁵ Appeal, para. 32; Reply, para. 13.

31. Shala underlines that [REDACTED], that [REDACTED] in the absence of a lawyer and [REDACTED].⁶⁶ Shala also argues, regarding his awareness of the evidence provided against him and contrary to the Pre-Trial Judge's finding, [REDACTED].⁶⁷ According to Shala, the Pre-Trial Judge failed to consider the possibility that his recent status as an Accused [REDACTED].⁶⁸

32. Shala submits that he was aware of allegations against him [REDACTED].⁶⁹ In his view, there was no reason for the Pre-Trial Judge to conclude that any risk of interfering with witnesses would have increased [REDACTED].⁷⁰ Shala contends that the Pre-Trial Judge further failed to address the Defence's submission that the extensive protective measures granted to date mitigate the risk of obstruction.⁷¹

33. The SPO responds that Shala is merely disagreeing with the Pre-Trial Judge's decision, which is insufficient to establish an error.⁷² The SPO recalls the Pre-Trial Judge's findings on [REDACTED], would be sufficient as a matter of fact and law to sustain the conclusion that he poses a risk of interfering with witnesses.⁷³ The SPO further submits that the Pre-Trial Judge was right to conclude that the risk increased since Shala was formally accused of a crime by way of an indictment.⁷⁴ [REDACTED], the SPO argues that the Pre-Trial Judge rightly rejected the Defence's submissions relating to protective measures in this case.⁷⁵

⁶⁶ Appeal, para. 33.

⁶⁷ Appeal, para. 34.

⁶⁸ Appeal, paras 35-36.

⁶⁹ Appeal, para. 36.

⁷⁰ Appeal, para. 36.

⁷¹ Appeal, para. 37, referring to ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005 ("*Haradinaj* ICTY Decision"), para. 49. See also Reply, para. 14.

⁷² Response, paras 24, 28.

⁷³ Response, paras 25-27.

⁷⁴ Response, para. 28.

⁷⁵ Response, para. 29.

(b) Assessment of the Court of Appeals Panel

34. The Pre-Trial Judge noted that, [REDACTED].⁷⁶ The Pre-Trial Judge further noted that, [REDACTED].⁷⁷ In the Pre-Trial Judge's view, [REDACTED].⁷⁸ The Panel finds that contrary to Shala's submissions,⁷⁹ the Pre-Trial Judge clearly took note of the Defence's argument that Shala refused to engage in any exchange with [REDACTED].⁸⁰ However, according to the Pre-Trial Judge, Shala is now aware that the [REDACTED], which increases the risk of interference.⁸¹

35. The Panel notes that Shala mainly repeats arguments on appeal which failed before the Pre-Trial Judge⁸² without identifying a clear error.⁸³ In any event, the Panel agrees with the Pre-Trial Judge that [REDACTED] and that [REDACTED] in the absence of a lawyer does not offset the seriousness of [REDACTED].⁸⁴

36. A review of [REDACTED] shows that [REDACTED] crimes allegedly occurring between 1998 and 1999 in Kosovo and Albania, respectively.⁸⁵ [REDACTED] may evidence Shala's [REDACTED].⁸⁶ While information on [REDACTED] demonstrate the existence of a risk of obstructing the proceedings before the Specialist Chambers, it still shows, as the Pre-Trial Judge pointed out,⁸⁷ [REDACTED].

37. What is more significant, in the Panel's view, is the fact that [REDACTED].⁸⁸ As Shala himself acknowledges, [REDACTED].⁸⁹

⁷⁶ Impugned Decision, para. 32.

⁷⁷ Impugned Decision, para. 33.

⁷⁸ Impugned Decision, para. 33.

⁷⁹ Appeal, para. 34.

⁸⁰ Impugned Decision, para. 34.

⁸¹ Impugned Decision, para. 34.

⁸² See Appeal, paras 32-34, 36. See also Motion dated 27 May 2021, paras 13-14, 16-19.

⁸³ See e.g. *Gucati* Appeal Decision, para. 64; *Thaçi* Appeal Decision, para. 60.

⁸⁴ See Impugned Decision, para. 32. See also Impugned Decision, para. 33.

⁸⁵ [REDACTED].

⁸⁶ See e.g. [REDACTED].

⁸⁷ Impugned Decision, para. 33.

⁸⁸ See e.g. [REDACTED].

⁸⁹ See Appeal, para. 33.

38. By contrast, [REDACTED], Shala is now aware, as Accused in the case, that [REDACTED] and that the SPO [REDACTED]. As a result, the Panel finds that it was within the Pre-Trial Judge's discretion to take into account, *inter alia*, Shala's status as Accused in his assessment of the risk of obstruction.⁹⁰ In the Panel's view, that Shala was already aware that [REDACTED] is irrelevant to this determination. Consequently, the Panel is not persuaded that it was unreasonable for the Pre-Trial Judge to find that there is a risk that Shala will obstruct the progress of the proceedings.

39. Finally, the Panel notes that, according to Shala, the existence of protective measures has to be taken into account as a factor reducing the risk of obstruction and should have been – at least – considered by the Pre-Trial Judge.⁹¹ He adds that [REDACTED] should not undermine his chances of being provisionally released and that he has no information about their addresses, contact details or whereabouts.⁹²

40. The Panel finds that it would have been preferable for the Pre-Trial Judge to discuss in detail the impact of the existence of protective measures. However, the Panel considers that the reasoning in the Impugned Decision together with its summary of the Defence submissions, including the reference to the existence of protective measures,⁹³ shows that the Pre-Trial Judge was aware of the issue of protective measures in reaching his determination of the risk of obstruction.⁹⁴

41. In any event, Shala provides no support for the proposition that protective measures “have to” be taken into account as a factor reducing the risk of obstruction *in every case*. The Panel recalls that, while the Specialist Chambers are not bound to follow the jurisprudence of international criminal tribunals, there are indeed some

⁹⁰ See Impugned Decision, para. 34.

⁹¹ Appeal, para. 37.

⁹² Reply, para. 14.

⁹³ Impugned Decision, para. 29.

⁹⁴ See Impugned Decision, paras 32-35.

examples of chambers having taken into account the existence of protective measures as a risk-reducing factor when deciding on provisional release.⁹⁵ However, at other times the existence of protective measures was equally viewed as heightening the chamber's concerns about granting provisional release.⁹⁶ At any rate, the abstract issue of whether protective measures should have an impact at all does not need to be decided here as the role of the Panel is limited to assess whether the Defence demonstrated an error or an abuse of discretion in the Pre-Trial Judge's reasoning. The Panel notes that [REDACTED].⁹⁷ As noted by the Pre-Trial Judge, Shala is now aware that [REDACTED].⁹⁸ The Panel therefore finds that the Pre-Trial Judge's omission to address in detail the impact of the existence of protective measures on the obstruction risk does not invalidate his conclusion as to the existence of such a risk given the specific circumstances of this case. Furthermore, while the Panel notes Shala's assertion that [REDACTED] should not necessarily undermine his request for provisional release, the Panel sees no error in the Pre-Trial Judge's finding that "this substantially increases the risk of interference with [REDACTED]".⁹⁹

42. In view of the foregoing, the Panel therefore dismisses Shala's arguments related to the alleged erroneous assessment of Article 41(6)(b)(ii) of the Law.

3. Article 41(6)(b)(iii) of the Law

43. The Court of Appeals Panel recalls that the conditions set forth in Article 41(6)(b) of the Law are alternative to one another.¹⁰⁰ If one of those conditions is fulfilled, the other conditions do not have to be addressed in order for detention to

⁹⁵ *Veseli* Appeal Decision, para. 51, citing to *Haradinaj* ICTY Decision, para. 49; SCSL, *Prosecutor v. Sesay*, SCSL-04-15-PT, Decision on Application of Issa Sesay for Provisional Release, 31 March 2004, para. 54. See also Appeal, para. 37.

⁹⁶ *Veseli* Appeal Decision, para. 51, citing to ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Joint Defence Motion for Provisional Release During Winter Recess, 5 December 2006, para. 13.

⁹⁷ See above, para. 37. See also Impugned Decision, paras 32-34; Reply dated 14 June 2021, para. 19.

⁹⁸ Impugned Decision, para. 34.

⁹⁹ Impugned Decision, para. 34.

¹⁰⁰ See e.g. *Veseli* Appeal Decision, para. 53; *Krasniqi* Appeal Decision, para. 66; *Selimi* Appeal Decision, para. 76; *Thaçi* Appeal Decision, para. 78.

be maintained. Accordingly, the errors Shala alleges with regard to Article 41(6)(b)(iii) of the Law need not be addressed.¹⁰¹ Any findings by the Panel on these arguments would not have an impact on the outcome of the Impugned Decision, given that the Panel has found no error in the Pre-Trial Judge's conclusion that a risk of obstruction existed under Article 41(6)(b)(ii) of the Law, making continued detention necessary. The Panel needs nonetheless to address the Parties' arguments on the proportionality of the detention. The Panel also needs to address whether the Pre-Trial Judge erred in finding that the risk of obstructing the proceedings could not be mitigated by the Proposed Conditions.

E. ALLEGED ERRORS REGARDING ASSESSMENT OF THE PROPORTIONALITY OF
DETENTION (GROUNDS 7 AND 8)

1. Submissions of the Parties

44. Shala argues that, in the absence of any indication as to Shala's possible abuse of private communications to interfere with the proceedings, the reasoning of the Pre-Trial Judge constitutes "a blanket ban on provisional release" that is, according to ECtHR jurisprudence, inconsistent with the principle of proportionality.¹⁰²

45. Shala argues that the Pre-Trial Judge "failed to analyse the proportionality of detention against the importance of the presumption of innocence" and other fundamental rights guaranteed by the European Convention on Human Rights ("ECHR").¹⁰³ Referring to ECtHR jurisprudence, Shala further submits that the

¹⁰¹ See Appeal, paras 38-40; Reply, paras 3, 13.

¹⁰² Appeal, para. 44; Reply, paras 3, 15.

¹⁰³ Appeal, para. 45.

proportionality assessment should not be limited to considering the length of detention.¹⁰⁴

46. The SPO responds that, contrary to Shala's submission that the reasoning of the Pre-Trial Judge constitutes "a blanket ban on provisional release", the Pre-Trial Judge engaged in an individualised case-specific assessment, including of Shala's particular circumstances and the degree to which the concrete risks identified could be adequately mitigated.¹⁰⁵

47. The SPO further responds that Shala's assertions are incorrect.¹⁰⁶ Rather, in evaluating the proportionality of Shala's detention, the Pre-Trial Judge considered the detained person's presumption of innocence, as well as a prior decision of the Court of Appeal Panel summarising the proportionality requirement of Article 5(1)(c) of the ECHR.¹⁰⁷

2. Assessment of the Court of Appeals Panel

48. At the outset, the Panel notes that, in the Impugned Decision, the Pre-Trial Judge "underscore[d] that any analysis of pre-trial detention is taken in the context of the detained person's presumption of innocence".¹⁰⁸ The Panel agrees that any analysis of pre-trial detention, including the assessment of the proportionality of detention, must take the presumption of innocence as its starting point. In addition, the Pre-Trial Judge specifically recalled, albeit briefly, the importance of the proportionality principle in the determination of the reasonableness of pre-trial detention.¹⁰⁹ In this regard, the Panel also recalls Rule 56(2) of the Rules taking up the idea of proportionality by prohibiting detention "for an unreasonable period prior to the opening of the case". Specifically, the Pre-Trial Judge made reference to the length

¹⁰⁴ Appeal, para. 46; Reply, para. 16.

¹⁰⁵ Response, para. 35.

¹⁰⁶ Response, para. 38.

¹⁰⁷ Response, para. 39.

¹⁰⁸ Impugned Decision, para. 13.

¹⁰⁹ Impugned Decision, para. 49.

of time that Shala had already spent in detention to date, since 15 April 2021, and found that detention was still proportional.¹¹⁰ In line with previous decisions issued by the Court of Appeals Chamber, the Panel finds that the Pre-Trial Judge did not err in adopting such an approach at this early stage of the proceedings, especially in light of the periodic review of the necessity of continued detention every two months, including during the pre-trial stage.¹¹¹

49. While Shala contends that the Pre-Trial Judge failed to consider other criteria established by the ECtHR, he again fails to substantiate and explain his allegation. The Panel therefore summarily dismisses this undeveloped assertion.¹¹² Moreover, the Panel finds that the Pre-Trial Judge's approach regarding the inability to monitor communications does not amount to a "blanket ban" on provisional release, since it remains open for the Pre-Trial Judge to reach a different decision at a future juncture, based on different information.¹¹³ The Pre-Trial Judge's assessment therefore does not undermine the presumption of innocence and is not inconsistent with the principle of proportionality.

50. Accordingly, Shala's grounds of appeal related to the assessment of the proportionality of his pre-trial detention are dismissed.

F. ALLEGED ERRORS REGARDING ASSESSMENT OF THE PROPOSED CONDITIONS
(GROUNDS 6 AND 9)

1. Submissions of the Parties

51. Shala submits that no reasonable trier of fact could have found that there are no means to effectively monitor Shala's private communications, should he be provisionally released or placed under house arrest. Shala also submits that the

¹¹⁰ Impugned Decision, para. 49.

¹¹¹ See e.g. *Veseli* Appeal Decision, paras 58-59; *Selimi* Appeal Decision, paras 80-81. See also Rule 57(2) of the Rules; Article 41(10) of the Law.

¹¹² See above, para. 8.

¹¹³ *Contra* Appeal, para. 44.

Pre-Trial Judge failed to properly consider the conditions provided for in Article 41(12) of the Law, concerning restrictions on or monitoring of private communications.¹¹⁴ According to Shala, there are “aggressive monitoring software and devices capable of limiting the privacy of communications”.¹¹⁵ In his view, the Pre-Trial Judge’s finding on this matter was reached without “receiving specific submissions on this point that could be supplemented by expert evidence”.¹¹⁶ Shala further challenges the Pre-Trial Judge’s finding that living in a country in which Albanian is not an official language would render such monitoring more difficult.¹¹⁷ More generally, Shala submits that the Pre-Trial Judge failed to consider the Defence proposal of placing Shala under house arrest at his residence in Belgium.¹¹⁸

52. The SPO responds that Shala made recent statements that relate to potential witnesses in this case and that indicated a willingness to resort to or threaten violence. The SPO argues that against this backdrop, the Pre-Trial Judge’s findings were entirely reasonable.¹¹⁹ The SPO submits that the Pre-Trial Judge specifically and carefully considered both provisional release and house arrest in Belgium.¹²⁰ In addition, the SPO submits that contrary to Shala’s submissions, the Pre-Trial Judge explicitly considered various options for restricting or monitoring private communications but provided reasons for rejecting them and appropriately

¹¹⁴ Appeal, para. 42; Reply, paras 3, 15.

¹¹⁵ Reply, para. 15.

¹¹⁶ Reply, para. 15.

¹¹⁷ Appeal, para. 43.

¹¹⁸ Appeal, para. 47; Reply, para. 3.

¹¹⁹ Response, paras 30-31. See also Response, paras 36-37.

¹²⁰ Response, paras 31-32.

considered some of the practical challenges arising from the fact that Shala resides in Belgium.¹²¹

2. Assessment of the Court of Appeals Panel

53. The Panel will first address Shala's argument that the Pre-Trial Judge failed to consider house arrest as an alternative to pre-trial detention. The Panel finds that it would have been preferable for the Pre-Trial Judge to explain in detail why he was not satisfied that house arrest could mitigate the risks of obstruction and of committing further crimes. However, the Pre-Trial Judge's reasoning in the Impugned Decision together with the summary of Shala's submissions, including the reference to house arrest,¹²² shows that the Pre-Trial Judge considered the alternative proposal for house arrest.

54. The Panel finds that the Pre-Trial Judge's reference to the difficulties in monitoring communications "in a country in which Albanian is not an official language" implicitly refers to the alternative proposal for house arrest in Belgium.¹²³ In addition, the use of the phrase "any other additional limitations imposed by the Pre-Trial Judge",¹²⁴ also implicitly encompasses house arrest. The Panel finds that the Pre-Trial Judge's omission to address in detail the alternative proposal for house arrest does not invalidate his conclusion that the Proposed Conditions, including any additional limitations, would insufficiently address the risk of obstructing the proceedings. This is because the Pre-Trial Judge's findings are primarily based on the difficulty to monitor Shala's communications in light of the "array of communication mediums available".¹²⁵ The Pre-Trial Judge's finding that "it is only through the communication monitoring framework applicable at the SC detention facilities that

¹²¹ Response, paras 33-34.

¹²² Impugned Decision, para. 42, fn. 84, referring to Motion dated 27 May 2021, para. 51.

¹²³ Impugned Decision, para. 47.

¹²⁴ Impugned Decision, para. 48.

¹²⁵ Impugned Decision, para. 46.

Mr Shala's communications can be effectively restricted and monitored"¹²⁶ necessarily implies that the proposal for house arrest cannot, at this stage, sufficiently address the risk of obstruction.

55. The Panel further finds that Shala's argument related to the "potential translation costs" of his communications in Albanian misrepresents the Impugned Decision, as the Pre-Trial Judge at no point made any finding based on the cost of translation: he merely noted that Shala lives in a country where Albanian is not an official language and that this could make the monitoring of his communications more difficult.¹²⁷

56. The Panel further notes Shala's submission that "no reasonable trier of fact could have found that there are no means to monitor effectively Mr Shala's private communications",¹²⁸ which is without any further explanation or support. Moreover, he argues that the Pre-Trial Judge failed to take into account conditions "concerning restrictions on or monitoring of private communications" enumerated in Article 41(12) of the Law.¹²⁹ The Panel recalls that Article 41(12) of the Law proposes a range of measures that may be ordered as an alternative to detention to ensure the presence of the accused during proceedings, to prevent his or her reoffending or to ensure successful conduct of criminal proceedings. The Specialist Chamber of the Constitutional Court has made clear that Article 41(12) of the Law is relevant to the scope of review of detention.¹³⁰ This is confirmed by the Rules, as Rule 57(2) of the Rules explicitly includes Article 41(12) of the Law in the scope of review of detention and Rule 56(5) of the Rules indicates that a panel may impose such conditions upon

¹²⁶ Impugned Decision, para. 46.

¹²⁷ Impugned Decision, para. 47; *Gucati and Haradinaj* Decision on Preliminary Motions, para. 15.

¹²⁸ Appeal, para. 42.

¹²⁹ Appeal, para. 42.

¹³⁰ KSC-CC-PR-2020-09, F00006, Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020, 26 May 2020 ("Constitutional Court Judgment dated 26 May 2020"), para. 70.

the release as deemed appropriate to ensure the presence of the detained person.¹³¹ Thus, the conditions listed under Article 41(12) of the Law are among the more lenient measures a panel may need to consider to fully comply with the constitutional standards when deciding whether a person should be detained.¹³² However, none of the conditions Shala sets out as purportedly arising from this provision is actually mentioned in Article 41(12) of the Law, save for the prohibition on contacting specific persons.¹³³

57. In any event, and contrary to Shala's assertion, the Panel finds that the Pre-Trial Judge duly considered the Proposed Conditions concerning the monitoring of Shala's communications and assessed whether they could mitigate the risk of obstruction. For instance, the Pre-Trial Judge not only considered the possibility of ordering limited access to a controlled single mobile telephone without Internet, as proposed by Shala as part of his Proposed Conditions,¹³⁴ but also additional measures, such as installing a keylogger on Shala's personal computer.¹³⁵ The Pre-Trial Judge's reference to Shala's Proposed Conditions as well as *any additional limitations imposed by the Pre-Trial Judge* further shows that he did not strictly limit his assessment to the arguments raised by the Accused and that he rightly considered relevant and possible more lenient measures.¹³⁶

58. In that regard, Shala also argues that the Pre-Trial Judge erred by ignoring the existence of "aggressive monitoring software and devices capable of limiting the privacy of communications" and that he erred in making a finding about the

¹³¹ See also Impugned Decision, para. 9.

¹³² Constitutional Court Judgment dated 26 May 2020, paras 70, 74.

¹³³ See Article 41(12)(f) of the Law.

¹³⁴ Impugned Decision, paras 42(vi), 46.

¹³⁵ Impugned Decision, para. 46.

¹³⁶ Impugned Decision, paras 46, 48 (emphasis added).

monitoring of communications “without receiving specific submissions on this point that could be supplemented by expert evidence”.¹³⁷

59. The Panel interprets Shala’s submissions as suggesting that the Pre-Trial Judge should have requested expert evidence before making a finding about the monitoring of communications. Although no provisions of the Law or the Rules apply to the specific context of provisional release, Article 39(13) of the Law provides that:

The Pre-Trial Judge may, where necessary, at the request of a party or Victims Counsel or on his or her own motion, issue any other order as may be necessary for the preparation of a fair and expeditious trial.

60. The Panel finds that the preparation of a fair trial could reasonably be interpreted as encompassing detention related matters. In that regard, Article 39(13) of the Law vests the Pre-Trial Judge with the discretionary power to decide, including *proprio motu*, whether or not issuing any order may be necessary, depending on the circumstances of the case.¹³⁸ However, the Panel notes that, while Shala had the opportunity to make such submissions before the Pre-Trial Judge, he did not request the Pre-Trial Judge to issue any order or to facilitate in any way the collection of information he is referring to. In fact, Shala did not bring the issue of expert evidence before the Pre-Trial Judge, and only refers to it on appeal, in his Reply.¹³⁹ In the absence of any attempt to provide the Pre-Trial Judge with substantiated arguments on this matter, the Panel finds that the Defence fails to show that the Pre-Trial Judge abused his discretion for not seeking expert evidence on communications monitoring.

61. In light of the above, the Panel finds that Shala fails to demonstrate how it was unreasonable for the Pre-Trial Judge to find that the Proposed Conditions or any other

¹³⁷ Reply, para. 15.

¹³⁸ In the *Gucati* Appeal Decision, the Panel emphasised that “[t]he very fact that there is discretion does not mean, that a panel may circumvent the plain meaning of the Law. Discretion is a rules-based concept, it does not allow for lawless, arbitrary decisions.” See *Gucati* Appeal Decision, para. 49.

¹³⁹ Reply, para. 15.

measures would still not prevent him from employing electronic devices belonging to his family or acquaintances, or from passing instructions to them. Likewise, Shala fails to show an error in the Pre-Trial Judge's finding that, at this stage, it is only through the communication monitoring framework applicable at the Specialist Chambers Detention Facilities that Shala's communications can be *effectively* restricted and monitored.¹⁴⁰ The Court of Appeals Panel dismisses Shala's grounds of appeal related to the assessment of the Proposed Conditions.

¹⁴⁰ Impugned Decision, para. 46 (emphasis added).

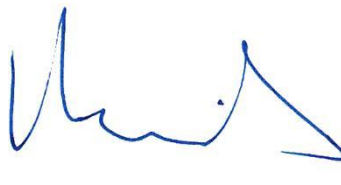
IV. DISPOSITION

62. For these reasons, the Court of Appeals Panel:

DENIES the Appeal;

ORDERS Shala to file public redacted versions of his Appeal and Reply within ten days of receiving notification of the present Decision; and

ORDERS the SPO to file a public redacted version of its Response within ten days of receiving notification of the present Decision.



**Judge Michèle Picard,
Presiding Judge**

Dated this Friday, 20 August 2021

At The Hague, the Netherlands