

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

Before: **President of Kosovo Specialist Chambers**
Judge Ekaterina Trendafilova

Registrar: Dr Fidelma Donlon

Date: 31 August 2021

Filing Party: Specialist Defence Counsel

Original Language: English

Classification: Public

THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

Public Redacted Version of Defence Appeal against the “Decision on Pjetër Shala’s Request for Provisional Release”

Specialist Prosecutor’s Office:
Jack Smith

Specialist Counsel for the Accused:
Jean-Louis Gilissen
Hedi Aouini

I. INTRODUCTION

1. The Defence for Mr Pjetër Shala files this appeal against the Decision of the Pre-Trial Judge rejecting Pjetër Shala's Request for Provisional Release pursuant to Articles 41(2), 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("the Law") and Rules 58(2) and 170 of the Rules of Procedure and Evidence ("Rules").¹
2. The Defence submits that there are nine grounds of appeal which consist of: (i) a series of errors of law, including violations of fundamental human rights; (ii) a series of flagrant factual errors amounting to findings that were not reasonably open to the Pre-Trial Judge on the evidence; (iii) a series of instances in which the Judge took into account irrelevant considerations, and failed to take into account relevant considerations; and, in consequence, (iv) a series of discernible errors in the exercise of the Pre-Trial Judge's discretion.
3. These errors, individually and cumulatively, led to the erroneous finding that the continued detention of Mr Shala is justified. The Defence requests the Court of Appeals to correct these errors and provisionally release Mr Shala.

II. PROCEDURAL BACKGROUND

4. On 12 June 2020, the Pre-Trial Judge confirmed the revised Indictment against the Accused and issued an arrest warrant for him.² On 16 March 2021, upon

¹ KSC-BC-2020-04, F00045, Pre-Trial Judge, Decision on Pjetër Shala's Request for Provisional Release, 15 June 2021 (confidential) ("Impugned Decision"). All further references to filings in this Motion concern Case No. KSC-BC-2020-04 unless otherwise indicated.

² F000038, Specialist Prosecutor, Submission of Further Lesser Redacted Version of Confirmed Indictment with confidential Annex 1, 25 May 2021 (confidential); F00008, Pre-Trial Judge, Confidential Redacted Version of Decision on Request for Arrest Warrant and Transfer Order, 12 June 2020, paras. 20-23 (confidential) ("Decision on Arrest Warrant and Detention"). *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").

request of the Specialist Prosecutor's Office ("SPO"),³ and further to the confirmation of an indictment ("Confirmation Decision"),⁴ Mr Shala was arrested in the Kingdom of Belgium ("Belgium"),⁵ pursuant to the Decision on Arrest Warrant and Detention and an arrest warrant issued by the Pre-Trial Judge.⁶

5. On 15 April 2021, upon conclusion of the judicial proceedings in Belgium, Mr Shala was transferred to the detention facilities of the Specialist Chambers ("SC") in The Hague, the Netherlands.⁷
6. On 27 May 2021, the Defence filed an application for interim release of Mr Shala ("Motion").⁸ On 9 June 2021, the SPO responded to the Motion ("Response").⁹ On 14 June 2021, the Defence replied to the Response ("Reply").¹⁰
7. On 15 June 2021, the Pre-Trial Judge rejected the Motion.¹¹

III. APPLICABLE LAW

8. Article 29(2) of the Kosovar Constitution provides that "everyone who is arrested shall be entitled to [...] release pending trial, unless the judge

³ 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, 26 April 2021.

⁴ F00007, Pre-Trial Judge, Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Pjetër Shala, 12 June 2020 (confidential) ("Confirmation Decision").

⁵ F00013, Registrar, Notification of Arrest Pursuant to Rule 55(4), 16 March 2021.

⁶ 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"); F00008, Pre-Trial Judge, Public Redacted Version of Arrest Warrant for Mr Pjetër Shala, 12 June 2020 ("Arrest Warrant").

⁷ F00019, Registrar, Notification of Reception of Pjetër Shala in the Detention Facilities of the Specialist Chambers and Conditional Assignment of Counsel, 15 April 2021 (confidential).

⁸ F00039, Defence for Mr Shala, Motion for Provisional Release, 27 May 2021 (confidential).

⁹ F00042, Specialist Prosecutor, Prosecution Response to Application for Provisional Release on Behalf of Mr Pjetër Shala, 9 June 2021 (confidential).

¹⁰ F00044, Defence for Mr Shala, Reply to Prosecution's Response to Motion for Provisional Release, 14 June 2021 (confidential).

¹¹ Impugned Decision, para. 50.

concludes that the person is a danger to the community or presents a substantial risk of fleeing before trial". 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."

9. 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.
10. Since the Impugned Decision relates to detention on remand, Mr Shala may appeal as of right pursuant to Article 45(2) of the Law.¹²
11. The Court of Appeals has held that the standard of review applicable to interlocutory appeals would be the equivalent of the standard of review provided for under Article 46(1) of the Law to appeals against judgments, requiring:(i) an error of law invalidating the judgment; (ii) an error of fact occasioning a miscarriage of justice; or, regarding discretionary decisions, (iii) a discernible error in that the decision is based on an incorrect interpretation of governing law, a patently incorrect conclusion of fact, or is so unfair or unreasonable that it constitutes an abuse of discretion.¹³

IV. GROUNDS OF APPEAL

12. On 15 June 2021, the Pre-Trial Judge rejected the Motion, finding that: (i) the Defence has had "a sufficient opportunity" to set out its view in relation to the

¹² KSC-BC-2020-07, IA001/F00005, Court of Appeals Chamber, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, paras. 15, 18 ("Gucati Appeal Decision").

¹³ KSC-BC-2020-06, IA001-F00005, Appeals Chamber, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, 30 April 2021 ("Decision on Veseli's Appeal"), paras. 4-7; Gucati Appeal Decision, paras. 10-14.

SPO's objections to provisional release"; (ii) "a [moderate] risk of flight exists in relation to Mr Shala, which exceeds the mere possibility of this risk materialising"; (iii) there is a risk that Mr Shala "will obstruct the progress of SC proceedings, which exceeds the mere possibility of this risk materialising"; (iv) there is a risk that he "will commit further crimes, which exceeds the mere possibility of this risk materialising"; and (v) as regards the risks of obstructing the progress of SC proceedings or committing further crimes, "none of the Proposed Conditions, nor any other additional limitations imposed by the Pre-Trial Judge, could restrict Mr Shala's ability to access information and resources that would facilitate any attempts to communicate with victims, their families or his support network;" (vi) Mr Shala's "detention is still proportionate" due to the total length of detention since 15 April 2021.

13. Mr Shala submits that each of these findings are undermined by serious errors of fact and law as well as unfair and unreasonable exercise of discretion. Specifically, the Pre-Trial Judge: (i) failed to assess and acknowledge the violation of the procedural obligation under Article 29 of the Constitution and Article 5 of the ECHR in light of the procedural flaws that prevented the Defence to respond effectively to the SPO's 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 progress of the proceedings; (v) erred in finding that Mr Shala will commit further crimes; (vi) erred in finding that the risks of obstructing the progress of SC proceedings or committing further crimes could not be addressed by any possible condition of provisional release; (vii) erred by imposing effectively a "blanket ban" on provisional release due to concerns about the effective protection of confidentiality of information disclosed to accused persons before the KSC, including Mr Shala, and thus depriving detainees of any hope of provisional

release contrary to the spirit and rationale of Article 46(1) of the Law and Article 5 of the ECHR; (viii) erred in his assessment of the proportionality of detention; (ix) erred by failing to consider altogether Mr Shala's proposal to be placed under house arrest, an option that could address any concerns that the Pre-Trial Judge may have as to the risks of Article 41(6)(b) of the Law.

Ground One: Failure to assess and acknowledge the procedural violation of Article 29 of the Constitution and Article 5 of the ECHR

14. The SC of the Constitutional Court ("Constitutional Court") have held that any deprivation of liberty must conform to the substantive and procedural rules established by law and should keep with the key purpose of protecting the individual from arbitrariness.¹⁴ In this context, any request for provisional release must be considered in light of the detained person's right to be presumed innocent.¹⁵
15. The Pre-Trial Judge has failed to assess and acknowledge the violation under Article 29 of the Constitution and Article 5 of the ECHR in light of the procedural flaws that deprived the Defence of an effective opportunity to respond to the SPO's objections to provisional release.
16. 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. Thus, proceedings reviewing the lawfulness of detention, such as the adjudication of the Defence Motion for Provisional

¹⁴ 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.

¹⁵ 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.

Release in this case, must meet the basic requirements of a fair trial as guaranteed by Article 6 of the ECHR. They “must be adversarial and must always ensure 'equality of arms' between the parties, the prosecutor and the detained person”.¹⁶ Well-established case law of the European Court of Human Rights (“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”.¹⁷ Equality of arms is violated if the individual detained on remand does not have the possibility to challenge effectively the allegations against him.

17. Mr Shala was arrested on the basis of the Arrest Warrant and Decision on Arrest Warrant and Detention which were issued on 12 June 2020 *ex parte*. These decisions were disclosed to him on 15 April 2021 in a heavily redacted form. The extent of the redactions to the relevant SPO’s submissions and decisions by the Pre-Trial Judge undermined to a substantial extent the ability of the Defence to respond to the SPO’s objections to provisional release. This was done to such a degree that it breached Mr Shala’s right not to be deprived of his liberty in an arbitrary manner as guaranteed by the applicable Kosovo and international law.
18. The SPO acknowledged that the considerable redactions were not necessary at the time Mr Shala’s motion for provisional release was being adjudicated and on 9 June 2021 it requested in its Response for the Arrest Warrant Decision and its Submission of Indictment for Confirmation and Related Requests to be reclassified from strictly confidential and *ex parte* to confidential.¹⁸ The Pre-Trial Judge granted this request and his order to this effect was notified to the

¹⁶ 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.

¹⁷ *Mooren v. Germany*, para. 124, and authorities cited therein.

¹⁸ Response, ns. 2, 30.

Defence on Friday, 11 June 2021, in an e-mail notification while the deadline for the Defence to file its Reply to the Response was running and due to expire on Monday, 14 June 2021. The Defence only gained access to all relevant information following the notification of the Pre-Trial Judge's order on 11 June 2021 and it is only after this point that it could understand and evaluate the entirety of the SPO's objections. The Defence therefore had merely one working day to reply to the SPO's objections in merely 2,000 words.¹⁹

19. The Pre-Trial Judge dealt with the Defence complaint of a procedural violation of Article 5 of the ECHR by observing that "the Defence partly anticipated the arguments of the SPO and addressed them" and the reclassification of the relevant documents allowed the Defence the opportunity to address the SPO submissions in its Reply.²⁰ In his view this gave a sufficient opportunity to the Defence "to set out its view" on this matter.
20. The Pre-Trial Judge considered that "the SPO disclosed the information under consideration in its Response".²¹ In fact, as stated above although some relevant information was disclosed in the Response it is only following the notification of the Pre-Trial Judge's reclassification order that the Defence gained full access to the relevant submissions and references to the underlying material provided by the SPO in support. The omission of the Pre-Trial Judge to consider the extent and impact of the non-disclosure of crucial information to the Defence is important as it shows his failure to consider the extent of the prejudice suffered by the Defence. The Pre-Trial Judge failed to properly evaluate the circumstances in which the Defence could respond to the SPO's objections to provisional release.

¹⁹ Article 41 of Registry Practice Direction on Files and Filings Before the Kosovo Specialist Chambers (providing that any reply to a response shall not exceed 2,000 words).

²⁰ Impugned Decision, para. 12.

²¹ Ibid.

21. In addition, the Pre-Trial Judge wrongly attributed the weight he did to the fact that the Defence managed to “partly anticipate” the SPO submissions. The ability of the Defence to blindly guess possible objections by the SPO cannot be equated with knowledge of such objections and having a real and effective opportunity to respond to them.
22. Furthermore, the Pre-Trial Judge failed to assess the complaint of a violation of the Defence rights in this respect with the thoroughness and attention that a complaint of violation of fundamental rights merited.

Ground Two: Failure to apply the correct standard in assessing the risks under Article 41(6)(b) of the Law

23. Article 29(2) of the Kosovar Constitution provides that “everyone who is arrested shall be entitled 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”. 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 (emphasis added).”
24. Article 41(6) of the Law provides that an accused can be detained when there are articulable grounds to believe that “there is a risk of flight”; or “he or she *will* [...] obstruct the progress of criminal proceedings”; or “[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 (emphasis added).”

25. The applicable international human rights instruments require that pre-trial detention be ordered only when no other measure can mitigate a *clearly identifiable and realistic* risk.²²
26. Despite the clear wording of Article 41(6) and the different standards expressly provided for in its text regarding each of the risks identified in Articles 41(6)(b)(i)-(iii), the Pre-Trial Judge applied a uniform standard requiring a risk which is more than possible but less than certain to materialise.²³ This standard has a significantly broad spectrum. At its lowest, it includes effectively any risk that *might* – as opposed to *may* – occur capturing what is possible, probable, certain, and anything in between. However, this interpretation stands in stark contrast with the requirements of Article 29(2) of the Constitution that require a “substantial” risk and that deprivation of liberty be “necessary” and Article 5 of the ECHR requiring a “concrete” and “realistic” risk. Importantly, as to the risk of obstructing the proceedings or reoffending, the standard applied by the Pre-Trial Judge is inconsistent with the explicit requirement of Article 41(6)(b)(ii) to show articulable grounds to believe that the accused “will” obstruct the proceedings and Article 41(6)(b)(iii) requiring a risk of reoffending that “will” materialise.²⁴

Ground Three: Error in finding that Mr Shala is a flight risk

27. While the Pre-Trial Judge correctly acknowledged that the risk of absconding cannot be gauged solely on the basis of the severity of the sentence faced, he

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. See 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.

²³ Impugned Decision, paras. 16, 27, 28, 35, 40, 41.

²⁴ See Article 41(6) (providing that an accused can be detained when there are articulable grounds to believe that he or she *will* [...] obstruct the progress of criminal proceedings”; or “[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 (emphasis added).”

proceeded in his assessment by taking into consideration flawed or irrelevant considerations. First, he took into consideration the fact that Mr Shala does not accept the legitimacy of the establishment of the KSC,²⁵ despite the fact that Mr Shala is entitled to do so as part of his exercise of his fair trial rights.²⁶ In this regard the “equality of arms and fairness more generally militate in favour of a free and even forceful exchange of arguments between the parties.”²⁷ Article 6 of the ECHR does not provide for an unlimited right to use any defence arguments, particularly arguments amounting to a criminal offence. Mr Shala’s challenges to the legitimacy of the KSC clearly do not reach such limit. Mr Shala cannot be penalised or punished (by being held in detention) for making such statements. What is more, challenges to the KSC jurisdiction are specifically permitted under the KSC Rules and form a very important aspect of Mr Shala’s defence.²⁸ Drawing any conclusions from Mr Shala’s statements on the legitimacy of KSC to his detriment when assessing the necessity of pre-trial detention amounts to an unjustified interference with Mr Shala’s right to defend himself and would inhibit him from freely exercising this right during the trial, in violation of Article 6 of the ECHR.

28. Second, the Pre-Trial Judge took into account the entirely speculative consideration that Mr Shala could draw support from the alleged small-size group of JCE members who may help each other to abscond.²⁹
29. Article 21(3) of the Law expressly protects the right to “be presumed innocent until proved guilty beyond reasonable doubt”. In this context, any request for

²⁵ Impugned Decision, para. 25.

²⁶ ECtHR, *Milijevic v. Croatia*, no. 68317/13, 25 June 2020, paras. 54, 55. “Where pending criminal proceedings are concerned, consideration must also be given to everyone’s right to a fair hearing as secured under Article 6 of the Convention.” See also, ECtHR, *Brandstetter v. Austria*, 28 August 1991, Series A no. 211, para. 52.

²⁷ *Milijevic v. Croatia*, para. 54.

²⁸ Rule 97 of the Rules.

²⁹ Impugned Decision, para. 26.

provisional release must be considered in light of the detained person's right to be presumed innocent.³⁰ The Pre-Trial Judge's reliance on a speculation based on a core allegation of the Indictment, which he appears to accept, is inconsistent with Mr Shala's right to be presumed innocent. This is particularly the case given the current stage of the proceedings and the fact that the evidence against Mr Shala supporting this allegation has not been heard or challenged in court.

30. Third, the Pre-Trial Judge considered what he referred to as the general context surrounding KLA-related cases that entailed "well-established" concerns. In this respect, the Pre-Trial Judge referred to paragraph 43 of the Decision on Hashim Thaçi's Application for Interim Release.³¹ In that decision however, the alleged position and role of Mr Thaçi within the KLA featured prominently in the Pre-Trial Judge's assessment of the general context of KLA-related cases.³² Mr Shala's circumstances differ significantly from the circumstances considered in that decision, particularly given Mr Shala's limited links with the KLA and the fact that he has completely distanced himself from the political elites in Kosovo and has no support network. Importantly, the Defence has no access to the SPO arguments and underlying material in the *Thaçi* case, which in any event are not part of the record in Mr Shala's case, and the Defence could not meaningfully respond to such arguments nor could it be reasonably expected to do so. The Pre-Trial Judge's reliance on such submissions, considerations and any underlying evidence is another procedural violation of Article 5 of the ECHR that requires the defence to be afforded a real and

³⁰ Decision on Veseli's Appeal, para. 14; SCCC 26 April 2017 Judgment, para. 113.

³¹ Impugned Decision, para. 26, n. 59 *referring to* KSC-BC-2020-06, F00177, Pre-Trial Judge, Public Redacted Version of Decision on Hashim Thaçi's Application for Interim Release, 22 January 2021 ("Thaçi First Decision on Detention").

³² Thaçi First Decision on Detention, para. 43, and references in n. 86.

effective opportunity to respond to the grounds relied upon to justify detention.

Ground Four: Error in finding that Mr Shala will obstruct the proceedings

31. The Impugned Decision concluded that there was a risk that Mr Shala will obstruct the progress of SC proceedings. This conclusion was based on: (i) statements of Mr Shala regarding [REDACTED], a potential witness to the events underlying the charges against Mr Shala, expressed during Mr Shala's interview with the Belgian Federal Police on 14 January 2016; (ii) statements that Mr Shala made during his interviews with the Belgian Federal Police on 14 January 2016 and the SPO on 12 February 2019 regarding Mr [REDACTED] and [REDACTED] Mr [REDACTED]; and (iii) Mr Shala's awareness of the fact that Mr [REDACTED] provided evidence against him.
32. However, there is no evidence that Mr Shala has ever, directly or indirectly, influenced or attempted to influence any witness or in any other way attempted to interfere with the evidentiary material. Had the Pre-Trial Judge examined all the circumstances of the present case and applied the correct standard, he could not have reasonably concluded that there are articulable grounds to believe that Mr Shala will obstruct the proceedings.
33. Mr Shala's statements referred to events that took place more than 20 years ago when Mr Shala was questioned in the absence of a lawyer by investigating authorities as a suspect and not an Accused. His statements were therefore made in the abstract and concerned persons he felt threatened by without knowing that such persons would be witnesses against him. His expression of animosity could not be reasonably equated with expressing an intention or willingness to interfere with witnesses in these proceedings.

34. As regards Mr Shala's awareness of the evidence provided by Mr [REDACTED], the Defence notes, first, that the Pre-Trial Judge erroneously refers to the attempt of Mr [REDACTED] in 2015 to establish contact with Mr Shala, as an "exchange [that] happened in 2015".³³ The Pre-Trial Judge failed to consider and attribute the appropriate weight to the fact that Mr Shala refused to engage in *any* exchange with the particular proposed witness and firmly blocked any communication with him. The Pre-Trial Judge also failed to consider that, in fact, it was the proposed witness that tried to initiate contact with Mr Shala and not the other way round.
35. In addition, the Pre-Trial Judge erroneously considered relevant the timing of the failed attempt of Mr [REDACTED] to establish contact with Mr Shala, noting that the attempted contact took place when Mr Shala was a suspect and not an Accused and assuming that Mr Shala would have reacted differently once he became aware of the confirmed Indictment and the evidence against him provided by Mr [REDACTED]. However, this assumption fails to consider the possibility – which in fact is much more consistent with common sense as well as Mr Shala's firm reaction and wish to block any contact with Mr [REDACTED] – that Mr Shala's status as an accused would be a significant additional reason to avoid all contact with a proposed witness against him.
36. The Pre-Trial Judge erroneously gave significant weight to the assertion, which was not supported by any evidence, that Mr Shala's motivation for interference with potential witnesses has automatically increased once he became an accused and obtained knowledge of the evidence against him provided by the witnesses mentioned in his interviews. At the same time, the Pre-Trial Judge ignored the fact that Mr Shala was previously summoned to appear as a suspect before the Belgian investigation authorities (2016), and the SPO (2019). During

³³ Impugned Decision, para. 34.

his interviews in 2016 and 2019, Mr Shala was 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. This was when he was being questioned as a suspect. Furthermore, the proposed witness referred to in the January 2016 interview had made his allegations against Mr Shala, which are also set out in the Confirmed Indictment, in his testimony before the International Criminal Tribunal for the former Yugoslavia (“ICTY”) in [REDACTED]. The unreasonableness of Pre-Trial Judge’s conclusions on the allegedly increased risk of interfering with witnesses as a result of Mr Shala finally being charged, is further evident from the fact that Mr Shala has been aware of the detailed allegations made against him by investigative authorities with power to prosecute him for almost two decades and his firm position has been to avoid and block all contact with persons involved in the events relevant to the accusations against him.

37. The Defence further submits that the Pre-Trial Judge failed to consider or address the Defence submission as to the proposed witnesses’ protection by the extensive protective measures granted to date, which include even the anonymity of certain witnesses at the present stage. Even though protective measures as such are not capable of excluding all risks of interference, they have to be taken into account as a mitigating factor that should have been -at least- considered by the Pre-Trial Judge.³⁴

Ground Five: Error in finding that Mr Shala will re-offend

³⁴ ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, Decision on Ramush Haradinaj’s Motion for Provisional Release, 6 June 2005, para. 49.

38. In the Impugned Decision the Pre-Trial Judge concluded that there was a risk that Mr Shala “will” commit further crimes. This conclusion was based on findings relating to the risk that Mr Shala would obstruct SC proceedings.³⁵
39. This conclusion is flawed due to the fact that it is based on the erroneous finding of a risk that Mr Shala *will* obstruct proceedings. Mr Shala has never threatened to resort to physical violence against witnesses. His previous statements cannot be taken out of context and cannot be reasonably interpreted to amount to the expression of willingness to resort to violence against victims or witnesses.³⁶
40. In addition, there is absolutely no evidence that Mr Shala has a support network or any ability to establish or mobilise any support. The basis of the Pre-Trial Judge’s assertion to the contrary has no basis and appears arbitrary.³⁷ Mr Shala left Kosovo more than 20 years ago and has completely distanced himself from what has been going on in Kosovo in the last two decades. He has never held any public function or position of authority in the post-war Kosovo. As emphasized by Mr Shala on several occasions, he has cut all ties with Kosovo and has no relationship with its political elites.

Ground Six: Error in assessing possible conditions of release

41. The Impugned Decision found that no conditions were capable of mitigating the risks of obstructing the progress of SC proceedings or committing further crimes because any limitations imposed on Mr Shala could not “restrict Mr Shala’s ability to access information and resources that would facilitate any attempts to communicate with victims, their families or his support network.”

³⁵ Impugned Decision, para. 39.

³⁶ 066866-066882-ET Revised RED, p. 9 (066876).

³⁷ Impugned Decision, para. 39.

42. The Pre-Trial Judge further considered that “[t]he array of communication mediums available is so varied that it is only through the communication monitoring framework applicable at the SC detention facilities that Mr Shala’s communications can be effectively restricted.” The Defence submits that no reasonable trier of fact could have found that there are no means to monitor effectively Mr Shala’s private communications should he be provisionally released or placed under house arrest. The Pre-Trial Judge also failed to properly consider the conditions provided for in Article 41(12) of the Law, concerning restrictions on or monitoring of private communications, prohibiting Mr Shala contacting specific persons; requiring him to use specific devices that would facilitate monitoring or restricting his telephone calls. The Pre-Trial Judge also failed to properly consider the proposed condition of no or limited internet access and access to a single mobile phone for limited communication purposes, such as communication with Mr Shala’s legal team. The conditions stipulated in Article 41(12) were included for a reason; they should not be lightly dismissed as ineffective.
43. In addition, the Pre-Trial Judge considered that “living in a country in which Albanian is not an official language, monitoring any communications by Mr Shala in this language, especially when using code or obscure language, would present significant obstacles”.³⁸ The Defence submits that Mr Shala’s residence in Belgium should not be held against him, [REDACTED]. More importantly, potential translation costs related to Mr Shala potentially communicating in Albanian cannot bear any weight when balancing these considerations against Mr Shala’s right to provisional release pending trial, which is enshrined in Article 5 of the ECHR and Article 29 of the Kosovar Constitution.

³⁸ Ibid., para. 47.

Ground Seven: Error by imposing a “blanket ban” on provisional release due to concerns about protecting confidentiality of disclosed information

44. In the absence of any concrete evidence or indication or concern as to Mr Shala’s possible abuse of private communications to interfere with the proceedings, the reasoning of the Pre-Trial Judge constitutes in effect a blanket ban on provisional release. It deprives all accused of any hope of being provisionally released regardless of the circumstances. It is inconsistent with Article 41(6) of the Law and Article 5 of the ECHR that guarantee the right to be released pending trial. It is also inconsistent with the presumption of innocence guaranteed by Article 6(2) of the ECHR. There is no evidence before the KSC that Mr Shala has ever used private communications to interfere with witnesses despite having known about the allegations against him for several years and the likelihood to be prosecuted on such basis. The SPO fails to show any concrete risk in this respect. The Pre-Trial Judge cannot impose a blanket ban on provisional release due to concerns about monitoring of an accused’s communication and a fear for purely hypothetical disclosures to third parties. Well-established ECHR case-law provides that blanket bans are inconsistent with the principle of proportionality.³⁹

Ground Eight: Erroneous assessment of proportionality of detention

45. The Impugned Decision, having identified that certain risks existed, failed to analyse the proportionality of detention against the importance of the presumption of innocence and Mr Shala's rights to liberty and protection of his family life. The Pre-Trial Judge failed to make an attempt to strike a fair balance between the various fundamental considerations at stake.

³⁹ ECtHR, *Dickson v. the United Kingdom* [GC], no. 44362/04, ECHR 2007-V, paras. 84, 85; ECtHR, *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, ECHR 2005-IX, para. 82.

46. In addition, the Pre-Trial Judge erred by limiting his assessment of the proportionality of detention to merely considering the length of detention contrary to established ECHR criteria.⁴⁰

Ground Nine: Failure to assess the proposal for Mr Shala to be placed under house arrest

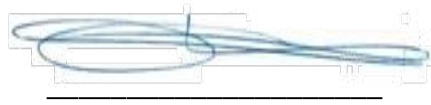
47. The Pre-Trial Judge failed altogether to consider the Defence proposal put forward as an alternative to detention of placing Mr Shala under house arrest at his residence in Belgium.

V. RELIEF REQUESTED

48. For these reasons, the Pre-Trial Judge's findings are undermined by serious errors of fact and law as well as unfair and unreasonable exercise of discretion that have materially affected the Impugned Decision. The Defence respectfully requests the Court of Appeals Panel to:
- a) **REVERSE** the Impugned Decision; and
 - b) **GRANT** the request for provisional release upon such conditions as the Panel considers necessary and appropriate.

⁴⁰ ECtHR, *McKay v. the United Kingdom* [GC], no. 543/03, ECHR 2006-X, paras. 41-45.

Respectfully submitted,



Jean-Louis Gilissen
Specialist Defence Counsel



Hedi Aouini
Defence Co-Counsel

Monday, 31 August 2021

The Hague, the Netherlands

Word count: 5556