

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 1 September 2021

Filing Party: Specialist Defence Counsel

Original Language: English

Classification: Public

THE SPECIALIST PROSECUTOR
v.
PJETËR SHALA

**Defence Response to Prosecution Submissions for First Review of
Detention**

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I. INTRODUCTION

1. The Defence for Mr Pjetër Shala files this response to the “Prosecution Submissions for First Review of Detention” pursuant to the order by the Pre-Trial Judge dated 10 August 2021.¹
2. The Defence maintains its position that the risks alleged under Article 41(6) of Law No. 05/L-053 on the Specialist Chambers and Specialist Prosecutor’s Office (“Law”) are unsubstantiated.
3. Mr Shala was arrested on 16 March 2021. On 19 April 2021, he pleaded not guilty.² He has been in detention for a total of 169 days. At present, the Specialist Prosecutor’s Office (“SPO”) has failed to provide any indication of even an estimated date as to the beginning of the trial. By the next review date, two months thereafter, Mr Shala will have been in custody for more than eight months.
4. The Defence reiterates that the longer Mr Shala remains detained, the higher the burden on the SPO to justify his continued detention. Mr Shala has the right to be presumed innocent. He also has the right not to be unnecessarily detained. His continued detention that interferes with his right to liberty and respect for his private and family life needs to be strictly necessary and proportionate.
5. The Defence submits that the duration of Mr Shala’s pre-trial detention to date; the inability to have regular meaningful contact with his immediate family through family visits; the extensive witness protection regime in place; as well as the availability of less stringent measures which meet all purposes served by

¹ KSC-BC-2020-04, F00058, Prosecution submissions for first review of detention, 2 August 2021 (“Prosecution Submissions on First Review of Detention”); KSC-BC-2020-04, F00060, Decision on the Defence Request for Variation of Time, 10 August 2021. All further references to filings in this Motion concern Case No. KSC-BC-2020-04 unless otherwise indicated.

² Transcript of 19 April 2021, p. 11.

detention, render Mr Shala's continued detention unnecessary and disproportionate.

6. As a result, Mr Shala should be released immediately, with or without conditions.
7. In any event, the Defence submit that the Kosovo Specialist Chambers ("SC") legal framework does not require the existence of a change in circumstances to conduct a thorough assessment as to whether the reasons for detention continue to exist. The SPO reliance in this respect on Rule 57(2) of the Rules is inapposite.³ Article 41(10) of the Law and Rule 57(1) of the Rules explicitly provide that the Panel seized with a case shall review a decision on detention on remand upon the expiry of two months from the last ruling on detention and shall ensure that a person is not detained for an unreasonable period prior to the opening of the case. The SPO bears the burden of establishing that the detention of the Accused is necessary.⁴ The Prosecution Submissions on First Review of Detention fail to meet this burden.

II. PROCEDURAL BACKGROUND

8. On 12 June 2020, the Pre-Trial Judge confirmed the revised Indictment against the Accused and issued an arrest warrant for him.⁵ On 16 March 2021, upon

³ See Prosecution Submissions on First Review of Detention, para. 3. See also Prosecution Submissions on First Review of Detention, para. 1.

⁴ First Detention Decision, para. 13, with further references. Similarly, ECtHR, *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017, para. 234. 20 *Merabishvili v. Georgia* [GC], para. 222, with further references.

⁵ F000038, Submission of Further Lesser Redacted Version of Confirmed Indictment with confidential Annex 1, 25 May 2021 (confidential); F00008, 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, Public Redacted Version of Arrest Warrant for Mr Pjetër Shala, 12 June 2020 ("Arrest Warrant"); F00008, Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers, 12 June 2020 ("Order for Transfer").

request by the SPO,⁶ and further to the confirmation of the indictment (“Confirmation Decision”),⁷ Mr Shala was arrested in the Kingdom of Belgium (“Belgium”),⁸ pursuant to the Decision on Arrest Warrant and Detention and an arrest warrant issued by the Pre-Trial Judge.⁹

9. On 15 April 2021, upon conclusion of the judicial proceedings in Belgium, Mr Shala was transferred to the detention facilities of the SC in The Hague, the Netherlands.¹⁰
10. On 15 June 2021, the Pre-Trial Judge rejected a request for provisional release submitted by the Defence and ordered the continued detention of Mr Shala.¹¹ In this decision, the Defence was ordered to make submissions on the next review of detention, if it so wishes, by 23 July 2021 or, by 9 August 2021, in response to any submissions by the SPO.
11. On 2 August 2021, the SPO filed their submissions on the first review of detention.¹²
12. On 10 August 2021, the Pre-Trial Judge extended the time for the Defence to make submissions in response to the SPO Submissions on the first review of detention until ten days following the notification of the decision of the Court

⁶ F00002, 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.

⁷ F00007, Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Pjetër Shala, 12 June 2020 (confidential) (“Confirmation Decision”).

⁸ F00013, Notification of Arrest Pursuant to Rule 55(4), 16 March 2021.

⁹ F00008, Confidential Redacted Version of Decision on Request for Arrest Warrant and Transfer Order, 12 June 2020 (confidential) (“Decision on Arrest Warrant and Detention”); F00008, Public Redacted Version of Arrest Warrant for Mr Pjetër Shala, 12 June 2020 (“Arrest Warrant”).

¹⁰ F00019, Notification of Reception of Pjetër Shala in the Detention Facilities of the Specialist Chambers and Conditional Assignment of Counsel, 15 April 2021 (confidential).

¹¹ F00045, Decision on Pjetër Shala’s Request for Provisional Release, 15 June 2021 (confidential) (“First Detention Decision”).

¹² Prosecution Submissions on First Review of Detention.

of Appeals Panel (“Appeals Chamber”) on the pending appeal against the First Detention Decision filed by the Defence.¹³

13. On 20 August 2021, the Appeals Chamber rejected the Defence appeal.¹⁴

III. APPLICABLE LAW

14. Article 41(10) of the Law provides that “upon the expiry of two (2) months from the last ruling on detention on remand, the Pre-Trial Judge [...] shall examine whether reasons for detention on remand still exist and render a ruling by which detention on remand is extended or terminated”.¹⁵ The SPO bears the burden of establishing that the detention of the Accused is necessary.¹⁶
15. Rule 57(2) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”) provides that the Panel seized with a case shall review a decision on detention on remand upon the expiry of two (2) months from the last ruling on detention, in accordance with Article 41(6), (10), (11) and (12) of the Law or at any time upon request by the Accused or the Specialist Prosecutor, or *proprio motu*, where a change in circumstances since the last review has occurred.
16. Rule 56(2) imposes a separate obligation on the Pre-Trial Judge to ensure that the accused is not detained for an unreasonable period pre-trial.

IV. SUBMISSIONS

¹³ F00060, Decision on the Defence Request for Variation of Time, 10 August 2021.

¹⁴ IA001-F00005, Decision on Pjetër Shala’s Appeal Against Decision on Provisional Release, 20 August 2021 (confidential).

¹⁵ See, KSC-BC-2020-07, IA002/F00005, Decision on Nasim Haradinaj’s Appeal Against Decision Reviewing Detention, 9 February 2021, para. 55.

¹⁶ First Detention Decision, para. 13, with further references. Similarly, ECtHR, *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017, paras. 222, 234, with further references.

17. At the outset, the Defence fully maintains its previous submissions on Mr Shala's detention and reiterates that there is no proper basis upon which Mr Shala should be detained.

A. Prosecution Submissions

18. The Defence submits that the SPO has not met the burden of showing that the detention of Mr Shala remains necessary. The SPO merely argues that "Article 41(6)(b) risks have increased since the Detention Decision"¹⁷, especially since "on 31 July 2021 the Accused received a significant remaining portion of Rule 102(1)(b) disclosure, and therefore has even greater knowledge of the evidence against him"¹⁸. The Defence cannot accept this sole, abstract, argument as capable of justifying continued pre-trial detention. The right to be informed of the Prosecution's evidence is one of the basic procedural rights of any accused. Holding Mr Shala's awareness of the evidence against him as a factor justifying his continued detention is profoundly unjust. It would also imply that any accused awaiting his trial could be held for as long as the trial might last merely on this ground.
19. The Defence invites the Pre-Trial Judge to find that the SPO has failed to put forward a proper basis capable of justifying continued detention.

B. Risk of Flight

20. The Defence maintains that the SPO has not identified any specific evidence establishing a sufficiently real possibility that Mr Shala presents a risk of flight. The Pre-Trial Judge is invited to reassess his previous findings as to the existence of a moderate risk of flight¹⁹ and find that no such risk exists at present in light of Mr Shala's strong connection to Belgium, the fact that he has

¹⁷ Prosecution Submissions on First Review of Detention, para 1.

¹⁸ Prosecution Submissions on First Review of Detention, para. 4.

¹⁹ First Detention Decision, para. 28.

completely distanced himself from the political elites in Kosovo and has no support network, in addition to Mr Shala's prior history of excellent cooperation with judicial and investigative authorities.

21. The Defence notes that the Pre-Trial Judge's finding regarding the risk of flight was based *inter alia* on the hypothetical ability of Mr Shala to rely on a support network, including the members of the alleged JCE described in the Indictment, the context of a general climate of witness intimidation in Kosovo in trials of former KLA members, as well as Mr Shala's opposition to the Specialist Chambers.²⁰
22. The Pre-Trial Judge is invited to re-assess whether there is a real risk that Mr Shala would abscond should he be provisionally released in light of the Appeals Chamber findings in the *Krasniqi* and *Selimi* Decisions on Appeals Against Decisions on Interim Release. Notably, in these decisions the Appeals Chamber required the SPO to adduce concrete evidence and the Pre-Trial Judge to make specific findings as to the existence of an alleged support network, focusing for instance on such network's capacity or resources, as well as the alleged influence exerted on individuals within such alleged support networks.²¹ The Appeals Chamber also required the existence of sufficient evidence that allows inferring the reasonable conclusion that the accused in question *can* actually mobilise a support network.²² Lastly, the Appeals Chamber required specific grounds for justifying the relevance of an accused's

²⁰ First Detention Decision, paras. 25, 26.

²¹ KSC-BC-2020-06, Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release, 30 April 2021, para. 55; KSC-BC-2020-06/IA003, F00005, Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Interim Release, 30 April 2021, para. 66.

²² Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release, 30 April 2021, para. 57; KSC-BC-2020-06/IA003, F00005, Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Interim Release, 30 April 2021, para. 67.

opposition to the Specialist Chambers for the purposes of an assessment of the Article 41(6) risks.²³

23. In any event, the Pre-Trial Judge in the First Detention Decision found that the moderate risk of flight could be mitigated by appropriate conditions.²⁴ In this respect, the Pre-Trial Judge “note[d] favourably” Mr Shala’s undertakings to submit himself to daily checks by authorized officials from the Government of Belgium, surrender any travel documents and be subject to close monitoring by the Belgian authorities.²⁵ There is no reason to depart from this conclusion.

C. Risk of Obstruction

24. The Defence maintains that the SPO has not provided specific evidence establishing a sufficiently real possibility that Mr Shala will obstruct the KSC proceedings.
25. For the purposes of the present review and in addition to previous submissions on the alleged risk of obstruction,²⁶ the Pre-Trial Judge should consider the extensive protective measures imposed in this case which substantially mitigate any alleged risk of obstruction of the proceedings or witness interference.²⁷
26. As it stands, the witness protection regime encompasses the following:
- The delayed disclosure of the identity of three witnesses until 30 days before trial and withholding evidentiary material related to one of these

²³ KSC-BC-2020-06/IA003, F00005, Public Redacted Version of Decision on Rexhep Selimi’s Appeal Against Decision on Interim Release, 30 April 2021, para. 65.

²⁴ First Detention Decision, para. 45.

²⁵ First Detention Decision, para. 45.

²⁶ Motion for Provisional Release, 27 May 2021 (confidential), paras. 29-41; Reply to Prosecution’s Response to Motion for Provisional Release, 14 June 2021 (confidential), paras. 13-20.

²⁷ F00036, Confidential Redacted Version of First Decision on Specialist Prosecutor’s Request for Protective Measures, 17 May 2021 (confidential); F00053, Confidential Redacted Version of Second Decision on Specialist Prosecutor’s Request for Protective Measures, 12 July 2021 (confidential).

witnesses until the disclosure of the identity of that witness to the defence;

- Deferral of the Pre-Trial Judge's decision on protective measures for one witness whose identity remains to date unknown; and
- extensive in-court protective measures for all protected witnesses.

27. In addition, the SPO is expected to request further protective measures in the future.²⁸
28. The protective measures regime undoubtedly impacts severely Mr Shala's ability to prepare his defence. This regime must be considered effective in mitigating the risk of obstruction, in order to warrant the encroachment on Mr Shala's right to have adequate notice of the case and evidence against him. The Pre-Trial Judge, having accepted the protective measures in place to reduce the risk to participating witnesses, must now take this broad-ranging protective measures regime into consideration in determining whether Mr Shala should be provisionally released.
29. The Pre-Trial Judge must consider and thoroughly assess the impact of the extensive protective measures imposed in this case on the alleged risk of Mr Shala obstructing the proceedings particularly given the fact that Mr Shala has no information about the identity of the anonymous witnesses and no information about the addresses, contact details or whereabouts of identified protected witnesses. The Pre-Trial Judge should explicitly consider the likelihood of Mr Shala obtaining access to protected information about these witnesses and actually contacting them either directly or indirectly while detained in house arrest at his residence in Belgium or provisionally released

²⁸ Confidential redacted version of Notice to the Pre-Trial Judge regarding the disclosure of Rule 102(1)(b) materials and request for limited deferral of disclosure obligations for select items 4 August 2021 (confidential), para. 2.

under the proposed conditions set out below, which include severe limitations on his ability to use the internet and when all his telephone communications, visits, and telephone communications of his visitors can be effectively monitored.

30. There is no evidence to suggest that Mr Shala (or anyone connected to him) has the ability or capacity to circumvent the protective measures and identify the unidentified protected witnesses or access or otherwise contact the identified protected witnesses. The protective measures in place thus substantially reduce any alleged risk of interference with these witnesses to the extent that detention can no longer be considered justified.
31. The absence of concrete evidence suggesting that Mr Shala (or anyone connected to him) is capable of circumventing the protective measures regime in this case and the uncontested fact that he has never been involved in witness interference compel a finding that at present there is no real risk that Mr Shala can and will obstruct in any way the SC proceedings should he be released.

D. Risk of Further Commission of Crimes

32. The Pre-Trial Judge in the First Detention Decision 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.²⁹ The Defence repeat their submissions above that there is no specific evidence to demonstrate a sufficiently real risk that Mr Shala will commit further crimes, especially in light of the extensive witness protection regime in place.

E. Proportionality of Detention

²⁹ First Detention Decision, para. 39.

33. In assessing the proportionality of Mr Shala's detention, the Pre-Trial Judge and the Appeals Chamber have already confirmed that the length of time spent in detention pending trial is a relevant factor to be taken into consideration.³⁰
34. The Defence draws the Pre-Trial Judge's attention to the fact that more than five months have passed since Mr Shala's arrest. With the date of the start of the trial unknown (but realistically expected to be in 2022), the Accused risks being detained for an inordinate period of time prior to the start of the trial. This period of detention, which is exacerbated by the sanitary measures related to the pandemic and interference with Mr Shala's private and family life, is disproportionate and unreasonable.
35. In assessing proportionality, the Pre-Trial Judge should consider the actual effects of detention on Mr Shala. A thorough examination of these demonstrates that the effects of detention on Mr Shala are disproportionate. Mr Shala is facing severe difficulties in obtaining nutrition and access to appropriate medical care while in detention. The Defence will not develop these issues at present as the competent officials of the SC Registry are examining Mr Shala's complaints in this respect. In addition, the impossibility of regular family visits constitutes an excessive interference with Mr Shala's right to private and family life. Mr Shala has the right to respect for his private and family life while being detained at the SC facilities far away from his immediate family and the SC prison authorities have a duty to enable and assist him to maintain contact with his close family.³¹ To date, the family of Mr Shala have only been in a position to visit him only once while they are facing great difficulty to visit him again for reasons beyond their control.

³⁰ First Detention Decision, para. 49; KSC-BC-2020-04/IA001, F00005, Decision on Pjetër Shala's Appeal Against Decision on Provisional Release, 20 August 2021 (confidential), para. 48.

³¹ See, for instance, ECtHR, *Khoroshenko v. Russia*, no. 41418/04, 30 June 2015, para. 123; ECtHR, *Polyakova et al. v. Russia*, nos 35090/09, 3 July 2017, paras. 116-118.

F. Proposed Conditions of Release

36. In the First Detention Decision, the Pre-Trial Judge considered that the proposed conditions adequately addressed the risk of flight but found, as regards the risks of obstructing the progress of SC proceedings or committing further crimes, that “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”.³²
37. Should the Pre-Trial Judge consider that, even at this stage and taking into account the aforementioned submissions, the risk of Mr Shala obstructing the proceedings or committing further crimes remains, any such risk is now reduced and sufficiently mitigated by the proposed conditions set out below. The Pre-Trial Judge is in any event obliged to thoroughly assess whether less stringent measures other than detention can suffice.
38. In this connection, the Defence notes that the Pre-Trial Judge’s previous finding on the sufficiency of the proposed conditions was based on the sole consideration 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”.³³ The Defence submits that the protective measures regime in place addresses any risk of prohibited access to and/or communication with protected witness and there is no need for specific monitoring.
39. The Pre-Trial Judge previously found that Mr Shala’s commitment not to contact witnesses and/or their families could neither be enforced nor monitored. Even additional measures, such as installing a keylogger on Mr

³² First Detention Decision, para. 46.

³³ First Detention Decision, para. 46.

Shala's personal computer or ordering limited access to a controlled single mobile telephone without internet connection would not prevent Mr Shala from employing other electronic devices belonging to other persons, including his family or acquaintances or from passing on instructions to other persons with a view to intimidating and/or interfering with witnesses. The Pre-Trial Judge thus concluded that "the 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 and monitored, thereby mitigating the risks of him obstructing SC proceedings or engaging in or contributing to crimes."³⁴ The Pre-Trial Judge was also concerned that monitoring Mr Shala's communications in Albanian would present significant obstacles that could seriously endanger witnesses, victims, or others.³⁵

40. The Defence maintains its previous submissions as to the availability of a vast array of effective monitoring software and devices that are capable of ensuring that no abuse of any condition of release or house arrest takes place. The Defence submits that the following conditions which allay any concerns that the Pre-Trial Judge may have can be safely imposed:
- i. surrender of Mr Shala's passport and any other document/s in his possession that could be used for travelling purposes;
 - ii. a requirement that Mr Shala lives and sleeps each night at his home address in Belgium and be subject to a curfew and daily checks by authorized officials from the Government of Belgium;

³⁴ First Detention Decision, para. 46.

³⁵ First Detention Decision, para. 47.

- iii. consent to electronic monitoring or tagging by installation of an ankle bracelet with GPS location monitoring whilst on provisional release;
- iv. a requirement for daily reporting to authorized officials from the Government of Belgium;
- v. a prohibition to contact any potential witness or any member of their family, directly or indirectly;
- vi. restricted or limited access to a single mobile telephone that is not internet-enabled for limited communication purposes only that can be monitored by SC or Belgian authorities as appropriate;
- vii. consent to attend proceedings before the SC by video-conference facilities;
- viii. return to the SC when instructed to do so and comply with any variation or termination of the interim release;
- ix. consent that the Belgian police perform random checks on Mr Shala's residence in order to verify whether Mr Shala and/or each and every visitor comply with all conditions of interim release;

or to the alternative:
- x. Mr Shala be placed under house arrest at his residence in Belgium;
- xi. a prohibition from leaving his residence at all times, except in the event of medical or other emergency, in which case he will remain the physical custody of a police officer or other official assigned for this purpose at all times, until his return;
- xii. surrender his passport and any other document/s in his possession that could be used for travelling purposes;

- xiii. a prohibition to contact any potential witness or any member of their family, directly or indirectly;
- xiv. a prohibition from having any telephone, telecommunication device or internet-enabled equipment inside Mr Shala's residence;
- xv. a requirement that Mr Shala's residence be searched for any telecommunication devices or internet-enabled equipment and all such devices be removed prior to Mr Shala's arrival;
- xvi. the prohibition of any visits to Mr Shala with the exception of persons whose names appear on a pre-approved list of visitors that has been approved by the Pre-Trial Judge;
- xvii. that visits by pre-approved persons be coordinated in advance by way of notice to the Belgian police;
- xviii. that any visitor is required to surrender any telephone, telecommunication device or internet-enabled equipment, written message, or other documents prior to entering Mr Shala's residence;
- xix. that any visitor be searched for the possession of any telephone, telecommunication device or internet-enabled equipment, written message, or other document prior to entering and upon leaving Mr Shala's residence;
- xx. that any visitor consent to the subsequent monitoring of their telecommunication devices or internet-enabled equipment for the duration of Mr Shala's period of interim release;
- xxi. that the Belgian police perform random checks on Mr Shala's residence in order to verify whether Mr Shala and/or each and every visitor comply with all conditions of house arrest; and

xxii. any additional limitations found appropriate by the Pre-Trial Judge.

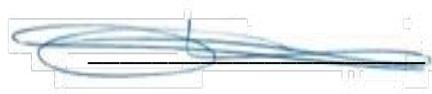
41. In addition, given the Pre-Trial Judge's concern about the adequate monitoring of Mr Shala's non-privileged communications outside the SC detention facilities and in order to facilitate the Pre-Trial Judge's assessment in this respect, the Defence request the Pre-Trial Judge pursuant to Article 39(13) of the Law to order the production of expert evidence on communications monitoring in general and that available in Belgium, including, should it be deemed appropriate, submissions on the capacity to monitor communications in Albanian.
42. As the Appeals Chamber has noted Article 39(13) of the Law vests the Pre-Trial Judge with the discretionary power to decide whether to issue any order that may be necessary for the preparation of a fair trial and the latter could reasonably be interpreted as encompassing detention related matters.³⁶
43. Lastly, the Defence reiterates that Mr Shala is willing to offer extensive undertakings and to be subject to such conditions, including house arrest, as the Pre-Trial Judge deems appropriate.

V. RELIEF REQUESTED

44. For these reasons, the Defence respectfully requests the Pre-Trial Judge to order the interim release of Mr Shala subject to any conditions are deemed appropriate.

³⁶ KSC-BC-2020-04/IA001, Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Provisional Release, paras. 59, 60.

Respectfully submitted,



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Wednesday, 1 September 2021

The Hague, the Netherlands

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