



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2020-04
The Prosecutor v. Pjetër Shala

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 10 September 2021

Language: English

Classification: Public

Public Redacted Version of Decision on Review of Detention of Pjetër Shala

Specialist Prosecutor

Jack Smith

Counsel for the Accused

Jean-Louis Gilissen

THE PRE-TRIAL JUDGE,¹ pursuant to Article 41(6), (10) and (12) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 19 June 2020, further to the decision of the Pre-Trial Judge confirming the indictment ("Confirmation Decision"),² the Specialist Prosecutor submitted the Confirmed Indictment.³

2. On 16 March 2021, further to a decision and an arrest warrant issued by the Pre-Trial Judge,⁴ Pjetër Shala ("Mr Shala" or "Accused") was arrested in the Kingdom of Belgium ("Belgium").⁵

3. On 15 April 2021, upon the 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.⁶

¹ KSC-BC-2020-04, F00001, President, *Decision Assigning a Pre-Trial Judge*, 14 February 2020, public.

² KSC-BC-2020-04, F00007, Pre-Trial Judge, *Decision on the Confirmation of the Indictment Against Pjetër Shala*, 12 June 2020, strictly confidential and *ex parte*. A public redacted version was issued on 6 May 2021, F00007/RED.

³ KSC-BC-2020-04, F00010, Specialist Prosecutor, *Submission of Confirmed Indictment*, 19 June 2020, public, with Annex 1, strictly confidential and *ex parte*, and Annex 2, confidential. A confidential, lesser redacted version and a public, further redacted version of the Confirmed Indictment was submitted on 31 March 2021, F00016/A01, confidential, F00016/A02, public.

⁴ KSC-BC-2020-04, F00008, Pre-Trial Judge, *Decision on Request for Arrest Warrant and Transfer Order*, 12 June 2020, confidential. A public redacted version was issued on 6 May 2021, F00008/RED. KSC-BC-2020-04, F00008/A01, Pre-Trial Judge, *Arrest Warrant for Mr Pjetër Shala*, 12 June 2020, strictly confidential and *ex parte*. A public redacted version was issued on 15 April 2021, F00008/A01/RED.

⁵ KSC-BC-2020-04, F00013, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 16 March 2021, public.

⁶ KSC-BC-2020-04, F00019/RED, Registrar, *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, public, with Annexes 1-2, confidential.

4. On 15 June 2021, the Pre-Trial Judge rejected a request for provisional release submitted by the Defence for Mr Shala ("Defence") and ordered the continued detention of Mr Shala ("First Detention Decision").⁷
5. On 28 June 2021, the Defence appealed the First Detention Decision ("Appeal").⁸
6. On 2 August 2021, as the Defence did not provide submissions on the review of Mr Shala's detention in accordance with the time limit defined in the First Detention Decision,⁹ the Specialist Prosecutor's Office ("SPO") filed its submissions in relation to this matter ("SPO Submissions").¹⁰
7. On 10 August 2021, the Pre-Trial Judge granted the Defence request to make submissions in response to the SPO Submissions by no later than ten days after notification of the decision of the Court of Appeals Panel on the Appeal, and further ordered the SPO to supplement the SPO Submissions by no later than five days after notification of the decision of the Court of Appeals Panel if it wishes to do so.¹¹
8. On 20 August 2021, the Court of Appeals Panel denied the Appeal ("Court of Appeals Decision").¹² The SPO has not supplemented the SPO Submissions following the Court of Appeals Decision.
9. On 1 September 2021, the Defence filed its submissions on the review of Mr Shala's detention ("Defence Submissions").¹³

⁷ KSC-BC-2020-04, F00045, Pre-Trial Judge, *Decision on Pjetër Shala's Request for Provisional Release*, 15 June 2021, confidential. A public redacted version was issued on 23 June 2021, F00045/RED.

⁸ KSC-BC-2020-04, IA001/F00001, Defence for Mr Shala, *Defence Appeal against the "Decision on Pjetër Shala's Request for Provisional Release"*, 28 June 2021, confidential. A public redacted version was filed on 31 August 2021, IA001/F00001/RED.

⁹ First Detention Decision, para. 50(d).

¹⁰ KSC-BC-2020-04, F00058, Specialist Prosecutor, *Prosecution Submissions for First Review of Detention*, 2 August 2021, public; First Detention Decision, para. 50(e).

¹¹ KSC-BC-2020-04, F00060, Pre-Trial Judge, *Decision on the Defence Request for Variation of Time*, 10 August 2021, public, paras 11, 12, 14.

¹² KSC-BC-2020-04, IA001/F00005, Panel of the Court of Appeals, *Decision on Pjetër Shala's Appeal Against Decision on Provisional Release*, 20 August 2021, confidential. A public redacted version was filed on the same day, IA001/F00005/RED.

¹³ KSC-BC-2020-04, F00066, Specialist Counsel, *Defence Response to Prosecution Submissions for First Review of Detention*, 1 September 2021 (notified on 2 September 2021), public.

10. On 9 September 2021, the Registrar submitted a filing addressing the issues raised by the Defence concerning Mr Shala's conditions of detention in the Defence Submissions ("Registrar Submissions").¹⁴

II. SUBMISSIONS

11. The SPO submits that the continued detention of Mr Shala remains necessary and requests the Pre-Trial Judge to order that the Accused remain in detention.¹⁵ In its view, there has been no relevant change of circumstances detracting from the established reasons for detention and the risks under Article 41(6)(b) of the Law have rather increased since the First Detention Decision.¹⁶

12. The Defence requests the Pre-Trial Judge to order the interim release of Mr Shala, subject to any conditions that are deemed appropriate.¹⁷

III. APPLICABLE LAW

13. Article 41(6) of the Law provides that the SC shall only order the detention of a person when there is a grounded suspicion that the person has committed a crime within the jurisdiction of the SC, and there are articulable grounds to believe that the person: (i) is a flight risk; (ii) will destroy, hide, change or forge evidence of a crime, or specific circumstances indicate that the person will obstruct the progress of criminal proceedings; or (iii) will repeat the criminal offence, complete an attempted crime, or commit a crime which he or she has threatened to commit.

14. Article 41(10) of the Law provides that, until a judgment is final or until release, upon the expiry of two (2) months from the last ruling on detention on remand,

¹⁴ KSC-BC-2020-04, F00073, Registrar, *Registrar Submission Pursuant to Rule 23(2) on Conditions of Detention*, 9 September 2021, confidential.

¹⁵ SPO Submissions, paras 1, 8.

¹⁶ SPO Submissions, para. 1.

¹⁷ Defence Submissions, paras 6, 44.

the Pre-Trial Judge or Panel seized with the case shall examine whether reasons for detention on remand still exist and render a ruling by which detention on remand is extended or terminated. This also follows from Rule 57(2) of the Rules.

15. Article 41(12) of the Law provides that, in addition to detention on remand, the following measures may be ordered to ensure the presence of the accused, to prevent reoffending or ensure successful conduct of criminal proceedings: summons, arrest, bail, house detention, promise not to leave residence, prohibition on approaching specific places or persons, attendance at police station or other venue, and diversion.

16. Pursuant to Rule 56(2) of the Rules, the Panel shall ensure that a person is not detained for an unreasonable period prior to the opening of the case and, in case of an undue delay caused by the Specialist Prosecutor, the Panel, having heard the Parties, may release the person under conditions as deemed appropriate.

IV. DISCUSSION

A. APPLICABLE STANDARD

17. The SPO avers that the determination under Rule 57(2) of the Rules inevitably concerns what has changed, if anything, since the previous ruling on detention.¹⁸ It also argues that the Pre-Trial Judge is not required to make findings on the factors already decided upon in the initial ruling on detention.¹⁹

18. The Defence responds that the legal framework of the SC 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.²⁰ It adds that the SPO bears the burden of

¹⁸ SPO Submissions, para. 3.

¹⁹ SPO Submissions, para. 3.

²⁰ Defence Submissions, para. 7.

establishing that the detention of the Accused is necessary, and that the longer Mr Shala remains detained, the higher the burden on the SPO.²¹

19. The Pre-Trial Judge recalls that he has an obligation, under Article 41(10) of the Law, to examine whether the reasons for detention on remand still exist, including the grounds set out in Article 41(6) of the Law, namely whether: (i) there is a grounded suspicion that the person has committed the crime(s); and (ii) there are articulable grounds to believe that any of the risks set out in Article 41(6)(b) of the Law has been fulfilled.²² The Pre-Trial Judge is not required to make findings on the factors already decided upon in the initial ruling on detention but must examine these reasons or circumstances and determine whether they still exist. What is crucial is that the Pre-Trial Judge is satisfied that, at the time of the review decision, grounds for continued detention still exist.²³ The SPO bears the burden of establishing that the detention of the Accused is necessary.²⁴

B. GROUNDED SUSPICION

20. As regards the threshold for continued detention, Article 41(6)(a) of the Law requires, at the outset, a grounded suspicion that the detained person has committed a crime within the jurisdiction of the SC. This is a condition *sine qua non* for the validity of the detained person's continued detention.²⁵

21. According to the SPO, for the reasons set out in the Confirmation Decision, there continues to be a well-grounded suspicion that the Accused committed

²¹ Defence Submissions, paras 4, 7.

²² See for example KSC-BC-2020-07, F00143, Pre-Trial Judge, *Decision on Review of Detention of Hysni Gucati*, 24 February 2021, public, para. 17.

²³ KSC-BC-2020-07, IA002/F00005, Court of Appeals Panel, *Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention*, 9 February 2021, para. 55.

²⁴ First Detention Decision, para. 13, with further references.

²⁵ Similarly, ECtHR, *Merabishvili v. Georgia* [GC], no. 72508/13, [Judgment](#), 28 November 2017, para. 222, with further references.

multiple crimes within the jurisdiction of the SC.²⁶ The Defence has not provided any submissions in relation to this factor.

22. The Pre-Trial Judge recalls that, in the Confirmation Decision, it was found that, pursuant to Article 39(2) of the Law, there is a well-grounded suspicion that Mr Shala is criminally liable for a number of war crimes (arbitrary detention, cruel treatment, torture and murder) under Articles 14(1)(c) and 16(1)(a) of the Law.²⁷ These findings were made on the basis of a standard exceeding the grounded suspicion threshold required for the purposes of Article 41(6)(a) of the Law.²⁸

23. In the absence of any intervening information or development in relation to the present decision, the Pre-Trial Judge finds that the requirement set forth in Article 41(6)(a) of the Law continues to be met.

C. NECESSITY OF DETENTION

24. Once the threshold in Article 41(6)(a) of the Law is met, the grounds that would justify the deprivation of a person's liberty must be articulable in the sense that they must be specified in detail.²⁹ The Pre-Trial Judge further recalls that, on the basis of the available evidence, the specific articulable grounds must support the "belief"³⁰ that any of the risks under the three limbs of Article 41(6)(b) of the Law exists, denoting an acceptance of the possibility, not the inevitability, of a future occurrence.³¹ In other words, the standard to be applied is less than certainty, but more than a mere possibility of a risk materialising.³² When deciding whether a person should be

²⁶ SPO Submissions, paras 1, 2, 5.

²⁷ Confirmation Decision, para. 140(a). *See also* First Detention Decision, para. 15.

²⁸ Confirmation Decision, para. 35.

²⁹ First Detention Decision, para. 16, with further references.

³⁰ *See chapeau* of Article 41(6)(b) of the Law.

³¹ First Detention Decision, para. 16, with further references.

³² First Detention Decision, para. 16, with further references.

released or detained, the Pre-Trial Judge must consider alternative measures to prevent the risks set forth in Article 41(6)(b) of the Law.³³

1. Risk of Flight

25. According to the SPO, a risk of flight in relation to Mr Shala continues to exist.³⁴ It adds that this risk may have increased as he received a significant remaining portion of disclosure under Rule 102(1)(b) of the Rules on 31 July 2021.³⁵

26. The Defence responds that the right to be informed of the evidence is one of the basic procedural rights of any accused, and holding this awareness against Mr Shala as a factor justifying his continued detention is profoundly unjust.³⁶ It further invites the Pre-Trial Judge to reassess his findings as to the existence of a moderate risk of flight and to find that no such risk exists at present in light of Mr Shala's strong connection to Belgium, the fact that he has 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.³⁷ The Defence also invites the Pre-Trial Judge to reassess his findings on Mr Shala's ability to rely on a support network, the context of a general climate of witness intimidation in Kosovo in trials of former Kosovo Liberation Army ("KLA") members, as well as Mr Shala's opposition to the SC, in light of the findings of the Court of Appeals requiring specific findings that an alleged support network exists, sufficient evidence allowing for the reasonable conclusion that the Accused

³³ KSC-CC-PR-2017-01, F00004, Specialist Chamber of the Constitutional Court, *Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017*, 26 April 2017, public, para. 114. See also ECtHR, *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, [Judgment](#), 5 July 2016 ("*Buzadji v. the Republic of Moldova* [GC]"), para. 87 *in fine*; ECtHR, *Idalov v. Russia* [GC], no. 5826/03, [Judgment](#), 22 May 2012, para. 140 *in fine*.

³⁴ SPO Submissions, paras 5, 6.

³⁵ SPO Submissions, paras 1, 4.

³⁶ Defence Submissions, paras 18-19.

³⁷ Defence Submissions, para. 20.

can actually mobilise a support network, and specific grounds for justifying the relevance of an accused's opposition to the SC.³⁸

27. Insofar as the Defence invites the Pre-Trial Judge to reassess the findings regarding the risk of flight arising from the First Detention Decision, the Pre-Trial Judge recalls that, in the latter decision, the facts that Mr Shala has a connection to Belgium, departed from and distanced himself from Kosovo, and complied with summons in the context of different judicial proceedings were explicitly considered.³⁹ However, it was concluded that these considerations either do not negate other factors supporting a risk of flight or insufficiently mitigate this risk.⁴⁰ Similarly, as to the Defence's invitation to reassess several findings arising from the First Detention Decision in light of certain findings made by the Court of Appeals, it was specifically explained that, together with the fact that Mr Shala was made aware of the well-grounded suspicion that he is a member of a Joint Criminal Enterprise ("JCE"), the characteristics of the alleged JCE in this case and Mr Shala's documented rejection of the legitimacy of the SC increase the risk of flight.⁴¹

28. Having examined the factors and circumstances invoked in the First Detention Decision, the Pre-Trial Judge remains satisfied that they continue to exist. Mr Shala: (i) is aware of the serious charges against him, the possibly severe penalty these charges could attract in the event of a conviction, and the final conviction of two of members of the JCE to which he also allegedly belonged; and (ii) rejects the legitimacy of the SC.⁴² In addition: (i) the relatively small size of the group making up the alleged JCE and the fact that the events underlying the charges are easily distinguishable increase the possibility of mutual assistance among its alleged members, including by helping each other to abscond; and (ii) there is a general context of a general, well-

³⁸ Defence Submissions, paras 21-22.

³⁹ First Detention Decision, paras 25-27.

⁴⁰ First Detention Decision, paras 25-27.

⁴¹ First Detention Decision, paras 25-26.

⁴² First Detention Decision, paras 24-25.

established, and ongoing climate of interference with KLA-related criminal proceedings and of witnesses' intimidation.⁴³ These factors and circumstances continue to establish that a moderate risk of flight exists in relation to Mr Shala at present. However, considering that these factors and circumstances are not dependent on the disclosure of material underpinning the charges against Mr Shala and in the absence of specific reasoning by the SPO, the Pre-Trial Judge considers that the disclosure of additional material has not increased the risk of flight.

2. Risk of Obstructing the Progress of SC Proceedings

29. According to the SPO, the risk that Mr Shala will obstruct the progress of SC proceedings continues to exist.⁴⁴ It adds that this risk may have increased as he received a significant remaining portion of disclosure under Rule 102(1)(b) of the Rules on 31 July 2021.⁴⁵

30. The Defence responds that the right to be informed of the evidence is one of the basic procedural rights of any accused, and holding this awareness against Mr Shala as a factor justifying his continued detention is profoundly unjust.⁴⁶ It adds that the SPO has not provided specific evidence establishing a sufficiently real possibility that Mr Shala will obstruct the SC proceedings.⁴⁷ In addition, the Defence adds that the Pre-Trial Judge should consider the extensive protective measures imposed in this case and that there is no evidence to suggest that Mr Shala (or anyone connected to him) has the ability or capacity to circumvent these measures and identify the unidentified protected witnesses or access or otherwise contact the identified protected witnesses, especially in view of the proposed conditions for his release.⁴⁸

⁴³ First Detention Decision, para. 26.

⁴⁴ SPO Submissions, paras 1, 2, 5, 6.

⁴⁵ SPO Submissions, paras 1, 4.

⁴⁶ Defence Submissions, paras 18-19.

⁴⁷ Defence Submissions, para. 24.

⁴⁸ Defence Submissions, paras 25-31.

31. In the view of the Pre-Trial Judge, the Defence's generic argument that the SPO has not provided specific evidence establishing a sufficiently real possibility that Mr Shala will obstruct the SC proceedings is unsubstantiated and, as a consequence, will not be addressed any further. As to the Defence's submissions regarding the existence of protective measures, the Pre-Trial Judge considers that, in the specific circumstances of the present case, the existence of protective measures demonstrates a heightened risk of obstruction. As a result of the relatively limited scope of the charges against Mr Shala, which pertain to a single location and took place over the course of several weeks, the events underlying the charges are easily distinguishable. This renders victims and witnesses in the present case more identifiable than in other proceedings involving more extensive charges. In any event, the Pre-Trial Judge recalls that Mr Shala [REDACTED] and even has [REDACTED].⁴⁹ As a result, the existence of protective measures cannot affect the finding that [REDACTED] Mr Shala will obstruct the progress of SC proceedings.⁵⁰

32. It is recalled that [REDACTED]. In addition, in light of the findings regarding protective measures, the Pre-Trial Judge finds that the additional disclosure of material to Mr Shala increases the risk of obstruction. Accordingly, the risk of Mr Shala obstructing the progress of SC proceedings continues to exist.

3. Risk of Committing Further Crimes

33. According to the SPO, the risk that Mr Shala will commit further crimes continues to exist.⁵¹ It adds that this risk may have increased as he received a significant remaining portion of disclosure under Rule 102(1)(b) of the Rules on 31 July 2021.⁵²

⁴⁹ Court of Appeals Decision, paras 37, 38.

⁵⁰ First Detention Decision, paras 32-35; Court of Appeals Decision, para. 41.

⁵¹ SPO Submissions, paras 1, 2, 5, 6.

⁵² SPO Submissions, paras 1, 4.

34. The Defence responds that the right to be informed of the evidence is one of the basic procedural rights of any accused, and holding this awareness against Mr Shala as a factor justifying his continued detention is profoundly unjust.⁵³ In addition, the Defence repeats its submissions 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.⁵⁴

35. As already found above with regard to the risk of obstruction, the Defence's generic submission that there is no specific evidence to demonstrate a sufficiently real risk that Mr Shala will commit further crimes is unsubstantiated and will not be considered further. In addition, for the reasons set out in relation to the risk of Mr Shala obstructing the progress of SC proceedings, the Pre-Trial Judge considers that, in the circumstances of the present case, the need for protective measures demonstrates a heightened risk of further crimes being committed.

36. In the First Detention Decision, it was found that there is a risk that Mr Shala will commit further crimes since [REDACTED].⁵⁵ The Pre-Trial Judge remains mindful of the fact that the existence of the risk of obstruction does not automatically translate into a risk of committing further crimes, but reiterates that the factors underpinning the former risk are of relevance to the assessment of the latter risk in the present case.⁵⁶ In the view of the Pre-Trial Judge, the risk of Mr Shala committing further crimes continues to exist, considering that Mr Shala [REDACTED]. In addition, as with the risk of obstruction, the Pre-Trial Judge considers that, in light of the preceding finding regarding the existence of protective measures, the disclosure of additional material increases the risk of Mr Shala committing further crimes.

⁵³ Defence Submissions, paras 18-19.

⁵⁴ Defence Submissions, para. 32.

⁵⁵ First Detention Decision, para. 39.

⁵⁶ First Detention Decision, para. 39.

4. Conclusion

37. The Pre-Trial Judge concludes that the risks that Mr Shala will abscond, obstruct the progress of SC proceedings, or commit further crimes against those perceived as being opposed to the KLA, including witnesses who provided evidence to the SPO and/or are due to appear before the SC, continue to exist. The Pre-Trial Judge will assess below whether these risks can be adequately addressed by the conditions proposed by the Defence.

D. CONDITIONAL RELEASE

38. The SPO submits that no conditions sufficiently mitigate the three risks under Article 41(6)(b) of the Law.⁵⁷ It adds that these risks can only be effectively managed in the SC Detention Centre and that any assurances that the Accused may give would be insufficient to guarantee compliance with any conditions or overcome the concrete risks of release.⁵⁸

39. The Defence submits that there is no reason to depart from the conclusion that the moderate risk of flight could be mitigated by appropriate conditions.⁵⁹ It additionally avers that any risk under Article 41(6)(b)(ii)-(iii) of the Law is sufficiently mitigated by the conditions of release or house arrest as detailed in the Defence Submissions.⁶⁰ The Defence requests, in addition, the Pre-Trial Judge to order the production of expert evidence on communications monitoring in general and available in Belgium, including, should it be deemed appropriate, submissions on the capacity to monitor communications in Albanian.⁶¹ Lastly, the Defence reiterates that

⁵⁷ SPO Submissions, para. 5.

⁵⁸ SPO Submissions, para. 7.

⁵⁹ Defence Submissions, para. 23.

⁶⁰ Defence Submissions, paras 37-40.

⁶¹ Defence Submissions, paras 41-42.

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.⁶²

40. As regards the risk of flight, the Pre-Trial Judge previously found that the conditions proposed in relation to the First Detention Decision sufficiently mitigate this risk, namely Mr Shala's undertakings to submit himself to daily checks by authorised Belgian officials, surrender any travel documents, and subject himself to close monitoring by the Belgian authorities.⁶³ Considering that the SPO's generic submissions on this matter are unsubstantiated, the Pre-Trial Judge finds that, in the absence of any intervening information or development in relation to the present decision, the aforementioned conditions remain adequate to mitigate the risk of flight in relation to Mr Shala.

41. However, in the view of the Pre-Trial Judge, the proposed conditions of release are inadequate to prevent unmonitored conversations between Mr Shala and other individuals with a view to potentially obstructing the progress of SC proceedings or committing further crimes.⁶⁴ The reason is that these conditions, while referring to 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,⁶⁵ do not address the possibility of Mr Shala employing communication devices belonging to others or requesting others to use their devices for these purposes.⁶⁶ In addition, these conditions merely contemplate a requirement for daily reporting to officials of the Belgian authorities and random checks by the Belgian police,⁶⁷ which is insufficient to ensure effective monitoring of Mr Shala's communications in light of the risks identified above.

⁶² Defence Submissions, para. 43.

⁶³ First Detention Decision, para. 45.

⁶⁴ Defence Submissions, para. 40(i)-(ix).

⁶⁵ Defence Submissions, para. 40(vi).

⁶⁶ First Detention Decision, para. 46.

⁶⁷ Defence Submissions, para. 40(iv), (ix).

42. Furthermore, the Pre-Trial Judge considers that the possibility of house arrest and attendant conditions would not prevent unmonitored conversations between Mr Shala and approved visitors.⁶⁸ This means that, even if the proposals to have approved visitors surrender any devices and messages, be searched for any device or message, and to have them consent to subsequent monitoring of their devices could be implemented,⁶⁹ messages could be passed on in a number of other ways. For instance, a real possibility exists that Mr Shala could ask a visitor to either pass on a message orally or to use a device belonging to a third person to do so. Conversely, at the SC detention facilities, arrangements can be put in place, upon judicial authorisation where appropriate, to prevent such illicit communications.⁷⁰ Such visits take place in a secured facility and proceed in accordance with specific and detailed rules regulating, *inter alia*, the registration of visitors, an application procedure for visitors and the security of visits.⁷¹ In addition, aside from the question whether they can be implemented in practice, any additional conditions,⁷² such as visits monitored by the Belgian authorities, would insufficiently mitigate this risk due to the possibility of using code or obscure language which cannot be easily recognised or prevented by persons not familiar with SC proceedings.

43. As to the Defence's request to order expert evidence, the Pre-Trial Judge understands that, in light of the reference to the availability of a vast array of effective monitoring software and devices and in the absence of further details,⁷³ the Defence is requesting expert evidence regarding the technical aspects of monitoring Mr Shala's communications by means of different devices. However, the preceding findings that the proposed conditions of release or house arrest insufficiently mitigate the

⁶⁸ Defence Submissions, para. 40(x)-(xxii).

⁶⁹ Defence Submissions, para. 40(xviii)-(xx).

⁷⁰ Articles 4, 7, 15 Registry Practice Direction on Detainees, Visits and Communications ("Visits and Communications Directive"), KSC-BD-09/Rev1/2020, 23 September 2020.

⁷¹ Articles 10-14 Visits and Communications Directive.

⁷² Defence Submissions, paras 40(xxii), 43.

⁷³ Defence Submissions, para. 40.

established risks under Article 41(6)(b)(ii)-(iii) of the Law are not exclusively dependent on Mr Shala's communications by means of different devices. These findings also arise from the fact that the proposed conditions of release or house arrest do not prevent unmonitored conversations between Mr Shala and approved visitors and that oral messages could be passed on during such conversations, including for the purposes of obstructing SC proceedings or committing further crimes. For this reason, the Pre-Trial Judge finds that ordering expert evidence is not necessary for the purposes of the present decision and rejects the Defence request.

44. Having considered the conditions of release or house arrest proposed by the Defence and the possibility of additional measures, the Pre-Trial Judge remains persuaded that it is only through the communication monitoring framework applicable at the SC's detention facilities that Mr Shala's communications can be restricted in a manner to sufficiently mitigate the aforementioned risks. Accordingly, the Pre-Trial Judge finds that the proposed conditions of release, house arrest and any additional limitations imposed by the Pre-Trial Judge are insufficient to mitigate the risk of Mr Shala obstructing SC proceedings or committing further crimes.

E. PROPORTIONALITY OF DETENTION

45. The SPO has not provided any submissions regarding the proportionality of Mr Shala's detention. The Defence contends that, as more than five months have passed since Mr Shala's arrest and with the date of the start of the trial unknown, Mr Shala risks being detained for a disproportionate period of time prior to the start of the trial.⁷⁴ In addition, in the view of the Defence, the effects of detention on Mr Shala are disproportionate as he is facing severe difficulties in obtaining nutrition

⁷⁴ Defence Submissions, paras 3, 34.

and access to appropriate medical care, and the impossibility of regular family visits constitutes an excessive interference with Mr Shala's right to private and family life.⁷⁵

46. At the outset, the Pre-Trial Judge recalls the importance of the proportionality principle in the determination of the reasonableness of pre-trial detention.⁷⁶ The duration of time in detention pending trial is a factor that needs to be considered along with the degree of the risks that are described in Article 41(6)(b) of the Law, in order to determine whether, all factors being considered, the continued detention "stops being reasonable" and the individual needs to be released.⁷⁷ However, the Pre-Trial Judge notes that the question whether a period of time spent in pre-trial detention is reasonable cannot be assessed in the abstract. Whether it is reasonable for an accused to remain in detention must be assessed on the facts of each case and according to its specific features.⁷⁸

47. The Pre-Trial Judge recalls that: (i) Mr Shala has been detained in Belgium since 16 March 2021 and subsequently at the detention facilities of the SC since 15 April 2021; (ii) he is charged with four counts of war crimes that allegedly took place in Albania over the course of several weeks; (iii) he could be sentenced to a lengthy sentence, if convicted; (iv) the risks under Article 41(6)(b)(ii) and (iii) of the Law cannot be mitigated by the proposed conditions for release, house arrest or any additional conditions; (v) all required procedural steps relating to the pre-trial phase of the present case have been, are being or will be completed with a view to transmitting the case for trial at a point in the foreseeable future; and (vi) the relevant time limits have been either met or extended for good cause - also at the request of Mr Shala on certain occasions - and any additional requests for extension of time will

⁷⁵ Defence Submissions, paras 5, 35.

⁷⁶ KSC-BC-2020-07, IA001/F00005, Court of Appeals Panel, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, 9 December 2020, public, paras 72-73.

⁷⁷ Similarly KSC-BC-2020-06, IA004/F00005, Court of Appeals Panel, *Decision on Hashim Thaçi's Appeal Against Decision on Interim Release*, 30 April 2021, confidential, para. 69. A public redacted version was filed on the same day, IA004/F00005/RED.

⁷⁸ [Buzadji v. the Republic of Moldova \[GC\]](#), para. 90.

be evaluated against the applicable legal criteria.⁷⁹ On this basis, the Pre-Trial Judge finds that the time Mr Shala has spent in pre-trial detention is not disproportionate and that, at the present stage, any discussion as to the expected total length of his pre-trial detention is premature and speculative.

48. As to the Defence assertions regarding the difficulties experienced by Mr Shala in obtaining nutrition and access to appropriate medical care, the Pre-Trial Judge notes that the Defence indicates that it will not develop these issues as the competent officials of the Registry are examining Mr Shala's complaints.⁸⁰ Thus, in the absence of specific submissions provided by the Defence and considering that Mr Shala's concerns are being considered even though he has not submitted a formal complaint,⁸¹ the Pre-Trial Judge finds that these matters do not require to be addressed in the context of the present decision. In addition, the impossibility of regular family visits constituted a proportionate and temporary measure that was necessary as a result of public health considerations, namely the current Covid-19 pandemic, and Mr Shala was allowed to communicate with his family in other ways.⁸² These restrictions have now been lifted and additional family visits have been scheduled.⁸³ The Pre-Trial Judge further observes that the Defence's assertion that Mr Shala's family is facing great difficulty to visit him for reasons beyond their control is unsubstantiated.⁸⁴

⁷⁹ See for instance KSC-BC-2020-04, F00051, Specialist Prosecutor, *Request for Modification of Timeline for Preliminary Motions*, 2 July 2021, public; F00059, Specialist Counsel, *Defence Request for an Extension of Time for its Response to the Prosecution Submissions for First Review of Detention*, 9 August 2021, public; F00057, Specialist Prosecutor, *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*, 31 July 2021 (notified on 2 August 2021), strictly confidential and *ex parte* (a confidential redacted version was submitted on 4 August 2021, F00057/CONF/RED); F00074, Specialist Counsel, *Defence Motion for an Extension of Time for its Rule 102(2) [sic] Request*, 9 September 2021 (notified on 10 September 2021).

⁸⁰ Defence Submissions, para. 35.

⁸¹ Registry Submissions, paras 8-10, 13.

⁸² KSC-BC-2020-04, F00022, Registrar, *Submission of the Registrar Pursuant to Rule 23(2) on COVID-19 Risk Mitigation Measures*, 19 April 2021, confidential, para. 37; KSC-BC-2020-04, F00048, Registrar, *Update to Submission of the Registrar Pursuant to Rule 23(2) on COVID-19 Risk Mitigation Measures*, 16 June 2021, confidential, paras 16-17; KSC-BC-2020-04, Transcript, 21 June 2021, public, p. 64, lines 6-7.

⁸³ Registry Submissions, paras 11-12.

⁸⁴ Defence Submissions, para. 35.

Therefore, the Pre-Trial Judge rejects the Defence's assertion that this limitation constitutes an excessive interference with Mr Shala's right to private and family life that renders his detention disproportionate.

V. DISPOSITION

49. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- (a) **ORDERS** Mr Shala's continued detention;
- (b) **ORDERS** Mr Shala, if he wishes to do so, to file submissions on the next review of detention by no later than **Wednesday, 13 October 2021**, with responses and replies following the timeline set out in Rule 76 of the Rules; and
- (c) **ORDERS** the SPO, should Mr Shala decide not to file any submissions by the aforementioned time limit, to file submissions on the next review of Mr Shala's detention by no later than **Monday, 25 October 2021**, and Mr Shala, if he wishes to do so, to file his submissions by no later than **Monday, 1 November 2021**.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Friday, 10 September 2021

At The Hague, the Netherlands.