

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

**Before:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Date:** 26 October 2021

**Filing Party:** Specialist Defence Counsel

**Original Language:** English

**Classification:** Confidential

**THE SPECIALIST PROSECUTOR**  
**v.**  
**PJETËR SHALA**

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**Defence Application for Leave to Appeal the Decision on Motion**  
**Challenging the Form of the Indictment**

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**Specialist Prosecutor's Office:**  
Jack Smith

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

## I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law 05/L-053 ('Law') and Rule 77 of the Rules of Procedure and Evidence ('Rules'), the Defence of Mr. Shala ('Defence') hereby files this Application for Leave to Appeal the Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers ('Impugned Decision').<sup>1</sup>
2. The Defence proposes the following issues for certification:
  - (i) *Whether the Impugned Decision erred by failing to consider whether the defects in the Indictment confirmation procedure violate the rights of Mr Shala as an accused that are guaranteed by Article 6 of the European Convention on Human Rights ('ECHR') and equivalent provisions of the Kosovo Constitution;*
  - (ii) *Whether the Impugned Decision erred by failing to consider whether the cumulative charges in the Indictment against Mr Shala are compatible with Article 6 of the ECHR and the equivalent provisions of the Kosovo Constitution;*
  - (iii) *Whether the Impugned Decision erred by failing to consider whether the lack of sufficient particulars as to the members of the alleged JCE is compatible with the Prosecution's obligation to give sufficient notice of its case as well as Article 6 of the ECHR and the equivalent provisions of the Kosovo Constitution;*

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<sup>1</sup> KSC-BC-2020-04, F00089, Decision on Motion Challenging the Form of the Indictment, 18 October 2021 (notified on 19 October 2021). All further references to filings in this Motion concern Case No. KSC-BC-2020-04 unless otherwise indicated. The Defence notes that the present application is filed confidentially as the Impugned Decision was filed as confidential. The application can be reclassified as public as it stands whenever the Pre-Trial Judge deems it appropriate.

(iv) *Whether the Impugned Decision erred by failing to consider whether the lack of sufficient particulars as to the victims of Mr Shala's alleged criminal activities, including their status at the moment of arrest, is compatible with the Prosecution's obligation to give sufficient notice of its case and Mr Shala's rights under Article 6 of the ECHR and the equivalent provisions of the Kosovo Constitution.*

## II. APPLICABLE LAW

3. Article 45(2) of the Law and Rule 77 provide the legal test for leave to appeal through certification. The party seeking certification must demonstrate the existence of an issue which: (1) significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial; and (2) the immediate resolution of which by a Court of Appeals Panel may materially advance the proceedings.
4. For an 'issue' to be appealable, it must relate to a discrete matter that emanates from the Impugned Decision and does not amount to abstract questions or hypothetical concerns, or a mere disagreement with the decision.<sup>2</sup>

## III. SUBMISSIONS

### A. The issues are appealable

5. The issues are precise, specific, and arise directly from the Impugned Decision.
6. At paragraphs 23 and 24, the Pre-Trial Judge dismissed the Defence submissions that the indictment confirmation procedure violated Mr Shala's

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<sup>2</sup> KSC-BC-2020-06, F00172, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2011, para. 11.

fair trial rights. The Pre-Trial Judge noted *inter alia* that Articles 242, 244, and 245 of the Kosovo Criminal Procedure Code ('KSPC') have not been expressly incorporated in the Law and found that, as such, the Defence reliance on them is misplaced.<sup>3</sup> However, the Pre-Trial Judge failed to examine whether the application of a different legal regime with weaker procedural guarantees than those applicable under the KSPC is justified and compatible with the fair trial guarantees that are binding on these proceedings.

7. At paragraphs 46-51, the Pre-Trial Judge dismissed the Defence submission that the manner in which the charges are presented in the Indictment deprive Mr Shala adequate notice of the Prosecution case against him, force him to focus the scarce resources available to his defence team on multiple similar charges, will unnecessarily prolong the trial and pose a heavy burden on the Defence in preparing and presenting its case. The Defence submitted that the SPO's cumulative charging renders the Indictment defective and that it is essential for the fairness of these proceedings for the issues in the Indictment to be clarified and narrowed at the outset to allow a focus and efficient trial that respects the right of Mr Shala to fair proceedings.
8. The Pre-Trial Judge did not address the impact of cumulative charging on the fairness of these proceedings. Equally, he did not assess the interference with Mr Shala's right to a fair trial. Allowing 'the future Trial Chamber to decide on the most appropriate charges'<sup>4</sup> does not sufficiently protect Mr Shala's right to a fair trial. The Defence made its arguments as to the prejudice it will suffer as a result of the SPO's cumulative charging to the best of its ability and stands ready to provide further particulars as to the extent of the adverse impact on its case and the resulting undue burden if required. Declining to consider the

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<sup>3</sup> F00089, Decision on Motion Challenging the Form of the Indictment, 18 October 2021 (notified on 19 October 2021), para. 23.

<sup>4</sup> Impugned Decision, para. 47.

substance of these crucial matters at the present stage, constitutes a serious interference with Mr Shala's right to a fair trial.

9. Lastly, the Pre-Trial Judge evidently misinterpreted the Defence reference to Article 4 of Protocol No. 7 of the ECHR.<sup>5</sup> The Defence invited the Pre-Trial Judge to consider, when assessing the compatibility of the SPO's cumulative charging with Mr Shala's right to a fair trial, the rationale of the *non bis in idem* guarantee, which seeks to prevent prejudice to an accused by being penalized more than once in relation to the same conduct.<sup>6</sup> The Pre-Trial Judge failed to consider the prejudice suffered by being prosecuted for multiple offences in relation to the same conduct and its impact in light of the limited resources available to the Defence.
10. At paragraph 57, the Pre-Trial Judge dismissed the Defence submission that the lack of sufficient particulars as to the members of the alleged JCE violates Mr Shala's right to a fair trial. The Defence submits that, given the Pre-Trial Judge's previous finding as to the small size of the alleged JCE in the present case, Mr Shala is entitled to be provided with better particulars of the Prosecution's case in order to ensure his right to adequate time and facilities to present his answer to the Prosecution's case.
11. At paragraph 109, the Pre-Trial Judge dismissed the Defence submission that Mr Shala is entitled to better particulars as to the victims of his alleged criminal activities, considering that such information is an evidentiary matter to be developed at trial. However, the Pre-Trial Judge failed to consider the adverse impact for the purposes of preparing the Defence case caused by the lack of clarity on such crucial information at present. The Pre-Trial Judge failed to enforce the obligation on the Prosecution to plead the material facts

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<sup>5</sup> Impugned Decision, para. 50.

<sup>6</sup> F00083, Defence Reply to the Prosecution Response to the Preliminary Motion of Pjeter Shala Challenging the Form of the Indictment, 24 September 2021 (confidential), paras. 11, 12.

underpinning each of the charges and ensure that the Defence is properly notified of the case against the accused and has sufficient time and information to prepare its case.

12. The Pre-Trial Judge's analysis on which the above findings are based, failed to assess properly the Defence submissions and provide sufficient reasons in support of the rejection of fundamental issues raised in those submissions.

**B. The issues significantly affect the fair conduct of the proceedings as well as the outcome of the trial**

13. The issues identified in paragraph 2 go to the core of the guarantees of fair trial protected by the Constitution and the ECHR. If the Defence is correct, reliance on Mr Shala's trial will proceed in breach of the guarantees provided for by Article 6 of the ECHR and the equivalent provisions of the Kosovo Constitution and the prejudice suffered will be irreparable.

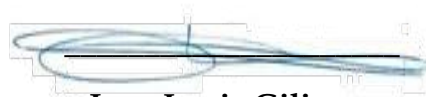
**C. An immediate resolution by the Appeals Chamber will materially advance the proceedings**

14. A prompt determination by the Appeals Chamber would provide certainty on whether the proceedings are continuing in compliance with fundamental guarantees of fairness. The specificity of the information provided in the Prosecution's primary accusatory instrument is crucial for giving the Defence proper notice of the case against Mr Shala and enable his effective preparation for trial. Appellate intervention at the present stage will ensure that the trial can proceed in a narrow and effective way that respects the rights of Mr Shala. If the Defence is right, the consequences of proceeding without determination of these issues on appeal would be irreparable.


C. CONCLUSION

15. For these reasons, the Defence respectfully requests the Pre-Trial Judge to grant the application and certify the issues proposed in paragraph 2.

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