

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: Public

THE SPECIALIST PROSECUTOR
v.
PJETËR SHALA

**Defence Application for Leave to Appeal the Decision on Motion
Challenging the Establishment and Jurisdiction of the Specialist Chambers**

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').¹
2. The Defence proposes the following issues for certification:
 - (i) *Whether the Impugned Decision erred by failing to consider whether the Law and procedure applicable to the KSC offer weaker procedural guarantees for the rights of an accused in breach of Articles 6 and 7 of the ECHR and the equivalent provisions of the Kosovo Constitution;*
 - (ii) *Whether the Impugned Decision erred by failing to consider whether the KSC has been established in accordance with the law as an impartial and independent tribunal as required by 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 purported primacy granted by the Law to Customary International Law ('CIL') violates Article 7 of the ECHR and the equivalent provisions of the Kosovo Constitution; and*

¹ KSC-BC-2020-04, F00088, Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, 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.

- (iv) *Whether the Impugned Decision erred by failing to consider that the charges against the Accused (a) for the crime of arbitrary detention and (b) that rely on the doctrine of Joint Criminal Enterprise violate Article 7 of the ECHR and the equivalent guarantees 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.²

III. SUBMISSIONS

A. The issue is appealable

5. The issues are precise, specific, and arise directly from the Impugned Decision.
6. At paragraph 74, the Pre-Trial Judge dismissed the Defence submission that the procedure governing proceedings before the KSC offers weaker procedural guarantees compared to the Kosovo Code of Criminal Procedure. This conclusion was based on Rule 76 of the Rules and the Pre-Trial Judge’s finding

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

that this submission was raised for the first time in the Defence Reply. However, the Defence has duly raised this submission in paragraphs 2 and 7 of its Motion, in which it argued that “[t]he Law ... deviates from the Constitution of Kosovo and the domestic Code of Criminal Procedure and breaches the overriding principle of legality.”³

7. The submission was raised in the Motion both in relation to the complaint of a violation of the guarantee of a fair trial and the principle of legality under Articles 6 and 7 of the ECHR and the equivalent Constitutional provisions. In its Reply, the Defence provided an example in support and argued that the procedural guarantees available to an accused under Articles 242, 244, and 245 of the Kosovo Code of Criminal Procedure are not available to an accused charged before the KSC, while the equivalent provisions of the Law provide for a significantly weaker protection.⁴
8. At paragraphs 75, 76, 77 and 79, the Pre-Trial Judge rejected the Defence submission that the KSC have not been established in accordance with the law as an independent and impartial tribunal, finding: (i) the blanket discriminatory exclusion of Kosovo Albanians from any involvement with the KSC legitimate (as the Law implements international obligations that allow trial and appeal proceedings against accused before the KSC to proceed by international staff only and the Defence arguments challenging the legality of the KSC establishment due to its discriminatory character under Article 14 of the ECHR and Protocol No. 12 to the ECHR did not raise a “legal issue”); (ii) the KSC do not operate outside the legal framework of Kosovo; (iii) the jurisdiction of the KSC is “general and abstract enough” and thus the KSC

³ F00054, Preliminary Motion of the Defence of Pjetër Shala to Challenge the Jurisdiction of the KSC, 12 July 2021 (“Motion”), paras. 2, 7.

⁴ F00084, Defence Reply to the Prosecution Response to the Preliminary Motion of Pjetër Shala Challenging the Jurisdiction of the KSC, 24 September 2021, para. 13.

could not be considered as unlawfully established as an extraordinary court (without putting forward any evidence in support of this conclusion or considering the actual cases that are pending before the KSC) nor could it be considered that the KSC operate outside the Kosovo legal framework (despite the different substantive and procedural regime that is applicable under the Law).

9. At paragraph 77, the Pre-Trial Judge rejected the Defence submission that the application of Articles 3(2)(d) and 12 of the Law in this case violates Article 7 of the ECHR and the equivalent guarantees under the Kosovo Constitution.
10. At paragraph 78, the Pre-Trial Judge rejected the Defence submission that the charges against the Accused violate Article 33 of the Constitution and Article 7 of the ECHR. He considered in this respect the Defence submission as unsubstantiated in that the Defence did not specify which charged offences and modes of liability violate the principle of legality. However, the Defence dedicated significant sections of its Motion to arguing precisely that the charges against Mr Shala that rely on the doctrine of joint criminal enterprise as well as the charge of arbitrary detention violate the principle of legality.⁵
11. The analysis featured in the Impugned Decision on which the above findings are based fails 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

12. 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

⁵ Motion, paras. 20-45 (reliance on JCE doctrine) and 46-60 (count 1: arbitrary detention).

on Mr Shala's trial will proceed in breach of the guarantees provided for by Article 6 and Article 7 of the ECHR and the prejudice suffered will be irreparable.

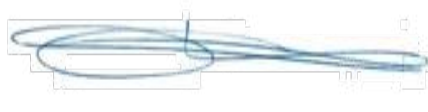
C. An immediate resolution by the Appeals Chamber will materially advance the proceedings

13. A prompt determination by the Appeals Chamber would provide certainty on whether the proceedings are continuing in compliance with fundamental guarantees of fairness and legality. If the Defence is right, the consequences of proceeding without determination of these issues on appeal would be irremediable.

C. CONCLUSION

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

Word count: 1207



Jean-Louis Gilissen
Specialist Defence Counsel



Hedi Aouini
Defence Co-Counsel