



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 10 November 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 Rules 56(2) and 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 a decision by the Pre-Trial Judge ("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 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 confidential redacted version and a public redacted version were issued on 6 May 2021, F00007/CONF/RED and 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 were submitted on 31 March 2021, F00016/A01, confidential, F00016/A02, public. A further lesser redacted, confidential version of the Confirmed Indictment was submitted on 25 May 2021, F00038/A01. Following the Pre-Trial Judge's decision on the Defence's motion challenging the form of the Confirmed Indictment, a corrected indictment was submitted on 1 November 2021, F00098/A01, confidential.

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, Registrar, *Notification of Reception of Pjetër Shala in the Detention Facilities of the Specialist Chambers and Conditional Assignment of Counsel*, 15 April 2021, confidential, para. 2, with Annexes 1-2, confidential. A public redacted version was issued on 26 April 2021, F00019/RED.

4. On 15 June 2021, the Pre-Trial Judge rejected a request for provisional release submitted by the Defence for Mr Shala (“Defence”) (“First Detention Decision”).⁷ A Panel of the Court of Appeals upheld the First Detention Decision on 20 August 2021 (“Court of Appeals Decision”).⁸
5. On 10 September 2021, the Pre-Trial Judge reviewed the detention of Mr Shala and ordered his continued detention (“Second Detention Decision”).⁹
6. On 25 October 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 Second Detention Decision,¹⁰ the Specialist Prosecutor’s Office (“SPO”) filed its submissions on the review of Mr Shala’s detention (“SPO Submissions”).¹¹
7. On 1 November 2021, the Defence filed its submissions on the review of Mr Shala’s detention (“Defence Submissions”).¹²

II. SUBMISSIONS

8. The SPO submits that the continued detention of Mr Shala remains necessary and proportional, and requests the Pre-Trial Judge to order that he remain in detention.¹³ In its view, there has been no relevant change of circumstances detracting from the

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/F00005, 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.

⁹ KSC-BC-2020-04, F00075, Pre-Trial Judge, *Decision on Review of Detention of Pjetër Shala*, 10 September 2021, confidential. A public redacted version was issued on the same day, F00075/RED.

¹⁰ Second Detention Decision, para. 49(b).

¹¹ KSC-BC-2020-04, F00093, Specialist Prosecutor, *Prosecution Submissions for Second Review of Detention*, 25 October 2021, public; *see also* Second Detention Decision, para. 49(c).

¹² KSC-BC-2020-04, F00099, Specialist Counsel, *Defence Response to ‘Prosecution Submissions for Second Review of Detention’*, 1 November 2021, public; *see also* Second Detention Decision, para. 49(c).

¹³ SPO Submissions, paras 1, 9.

established reasons for detention as the risks under Article 41(6)(b) of the Law have remained the same or increased since the First and Second Detention Decisions.¹⁴

9. The Defence requests the Pre-Trial Judge to order Mr Shala's interim release immediately, either with or without conditions.¹⁵

III. APPLICABLE LAW

10. 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.

11. 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, 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.

12. 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.

¹⁴ SPO Submissions, para. 1.

¹⁵ Defence Submissions, paras 6, 39.

13. 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

14. 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.¹⁶ 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.¹⁷

15. 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 and that the SPO's reliance on Rule 57(2) of the Rules in this respect remains inapposite.¹⁸ It adds that the SPO bears the burden of establishing that the detention of the Accused is necessary.¹⁹

16. 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.²⁰ The duty to determine whether the circumstances underpinning detention still exist imposes on the competent panel the task to, *proprio motu*, assess whether it

¹⁶ SPO Submissions, para. 3.

¹⁷ SPO Submissions, para. 3.

¹⁸ Defence Submissions, para. 8.

¹⁹ Defence Submissions, paras 4, 8.

²⁰ KSC-BC-2020-07, IA002-F00005, Court of Appeals, *Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention ("Haradinaj Detention Appeal")*, 9 February 2021, public, para. 55.

is still satisfied that, at the time of the review and under the specific circumstances of the case when the review takes place, the detention of the Accused remains warranted.²¹ Although the automatic review every two-months under Rule 57(2) of the Rules is not strictly limited to whether or not a change of circumstances occurred, such a change can nonetheless be determinative and shall be taken into consideration if raised by a Party or *proprio motu*.²² The Pre-Trial Judge is neither required to make findings on the factors already decided upon in the initial ruling on detention nor to entertain submissions that merely repeat arguments that have already been addressed in previous decisions.²³ 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.²⁴ The SPO bears the burden of establishing that the detention of the Accused is necessary.²⁵ This means that the SPO must provide specific arguments and concrete evidence to establish that continued detention is necessary at the time of the review.

B. GROUNDED SUSPICION

17. 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.²⁶

18. According to the SPO, for the reasons set out in the Confirmation Decision and the Second Detention Decision, there continues to be a well-grounded suspicion

²¹ KSC-BC-2020-06, IA006-F00005, Court of Appeals, *Decision on Jakup Krasniqi's Appeal Against Decision on Review of Detention* ("Krasniqi Detention Appeal"), 1 October 2021, confidential, para. 15. A public redacted version was issued on the same day, IA006/F00005/RED.

²² *Krasniqi Detention Appeal*, para. 16.

²³ *Haradinaj Detention Appeal*, para. 55; *Krasniqi Detention Appeal*, para. 17.

²⁴ *Haradinaj Detention Appeal*, para. 55.

²⁵ *First Detention Decision*, para. 13, with further references.

²⁶ *Similarly* ECtHR, *Merabishvili v. Georgia* [GC], no. 72508/13, [Judgment](#), 28 November 2017, para. 222, with further references.

that the Accused committed multiple crimes within the jurisdiction of the SC.²⁷ The Defence has not made any submissions in relation to this criterion.

19. 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.²⁸ 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.²⁹

20. 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

21. 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.³⁰ The Pre-Trial Judge further recalls that, on the basis of the available evidence, the specific articulable grounds must support the "belief"³¹ 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.³² In other words, the standard to be applied is less than certainty, but more than a mere possibility of a risk materialising.³³ When deciding whether a person should be

²⁷ SPO Submissions, paras 2, 5.

²⁸ Confirmation Decision, para. 140(a). *See also* First Detention Decision, para. 15; Second Detention Decision, para. 22.

²⁹ Confirmation Decision, para. 35; *see also* KSC-BC-2020-06, IA008-F00004, Court of Appeals, *Decision on Kadri Veseli's Appeal Against Decision on Review of Detention*, 1 October 2021, confidential, para. 21. A public redacted version was issued on the same day, IA008/F00004/RED.

³⁰ First Detention Decision, para. 16, with further references.

³¹ *See chapeau* of Article 41(6)(b) of the Law.

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

³³ 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.³⁴

1. Risk of Flight

22. According to the SPO, a risk of flight in relation to Mr Shala continues to exist.³⁵ It adds that this risk has remained the same or has increased as he received additional disclosure under Rule 102(1)(b) of the Rules following the Second Detention Decision.³⁶

23. The Defence responds that the SPO's generic submissions cannot justify continued pre-trial detention and that it has not identified any specific evidence or basis establishing a real possibility that Mr Shala presents a risk of flight.³⁷ It also argues that holding Mr Shala's awareness of the evidence against him – a basic procedural right – as a factor justifying his continued detention is profoundly unjust.³⁸ In the view of the Defence, no risk of flight exists in light of Mr Shala's strong connection to Belgium, the fact that he has completely distanced himself from the political elites in Kosovo, the absence of a support network, and his previous cooperation with all judicial and investigative authorities.³⁹ The Defence further invites the Pre-Trial Judge to re-assess whether there is a real risk that Mr Shala would abscond in light of the Court of Appeals' decisions requiring specific evidence and findings as to the existence of an alleged support network, the ability

³⁴ 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*.

³⁵ SPO Submissions, paras 5, 6.

³⁶ SPO Submissions, paras 1, 4.

³⁷ Defence Submissions, paras 2, 19-20.

³⁸ Defence Submissions, para. 19.

³⁹ Defence Submissions, para. 20.

of the Accused to mobilise a support network, and the relevance of an accused's opposition to the SC in relation to Article 41(6) of the Law.⁴⁰

24. The Pre-Trial Judge observes that the factors underpinning the Defence's argument that no risk of flight exists and the aforementioned Court of Appeals' decisions have been previously raised⁴¹ and considered in the First and Second Detention Decisions.⁴² Recalling that the Pre-Trial Judge is neither required to make findings on the factors already decided upon in the initial ruling on detention nor to entertain submissions that merely repeat arguments that have already been addressed in previous decisions,⁴³ these submissions do not require to be addressed any further.

25. Having examined the factors and circumstances invoked in the First and Second Detention Decisions, 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 the members of the Joint Criminal Enterprise ("JCE") to which he also allegedly belonged; and (ii) rejects the legitimacy of the SC.⁴⁴ 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-established, and ongoing climate of interference with criminal proceedings related to the Kosovo Liberation Army ("KLA") and of witness intimidation.⁴⁵ 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

⁴⁰ Defence Submissions, para. 21.

⁴¹ KSC-BC-2020-04, F00066, Specialist Counsel, *Defence Response to Prosecution Submissions for First Review of Detention*, 1 September 2021 ("1 September 2021 Defence Submissions"), public, paras 20-22.

⁴² First Detention Decision, paras 24-27; Second Detention Decision, para. 27.

⁴³ *Haradinaj* Detention Appeal, para. 55; *Krasniqi* Detention Appeal, para. 17.

⁴⁴ First Detention Decision, paras 24-25; Second Detention Decision, para. 28.

⁴⁵ First Detention Decision, para. 26; Second Detention Decision, para. 28.

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 following the Second Detention Decision has not increased the risk of flight.⁴⁶

2. Risk of Obstructing the Progress of SC Proceedings

26. According to the SPO, the risk that Mr Shala will obstruct the progress of SC proceedings continues to exist.⁴⁷ It adds that this risk may have increased as he received additional disclosure under Rule 102(1)(b) of the Rules since the Second Detention Decision, and therefore has even greater knowledge of the evidence against him.⁴⁸

27. The Defence responds that holding Mr Shala's awareness of the evidence against him – a basic procedural right – as a factor justifying his continued detention is profoundly unjust.⁴⁹ It adds that the SPO has failed to provide specific evidence establishing a real possibility that Mr Shala will obstruct the SC proceedings.⁵⁰ In addition, according to the Defence, the Pre-Trial Judge should consider specifically and in detail the impact of the extensive protective measures regime imposed in this case which substantially mitigates any alleged risk of obstruction of the proceedings or witness interference.⁵¹ The Defence further avers that Mr Shala's distant family relationship with a witness does not make the risk of contacting this person any greater, given the protective measures in force.⁵²

28. The Pre-Trial Judge notes that the Defence's submissions regarding the disclosure of additional material, the existence of protective measures, and Mr Shala's

⁴⁶ *Similarly* Second Detention Decision, para. 28.

⁴⁷ SPO Submissions, paras 1, 2, 5, 6.

⁴⁸ SPO Submissions, paras 1, 4.

⁴⁹ Defence Submissions, para. 19.

⁵⁰ Defence Submissions, para. 23.

⁵¹ Defence Submissions, paras 5, 23, 24.

⁵² Defence Submissions, para. 23.

ability to interfere with witnesses have been previously raised⁵³ and considered in the Second Detention Decision.⁵⁴ Recalling that the Pre-Trial Judge is neither required to make findings on the factors already decided upon in the initial ruling on detention nor to entertain submissions that merely repeat arguments that have already been addressed in previous decisions,⁵⁵ these submissions do not require to be addressed any further.

29. It is recalled that [REDACTED].⁵⁶ The existence of protective measures in the present case does not affect the finding that there is a risk of obstruction in relation to [REDACTED].⁵⁷ In addition, more generally, the necessity for such measures demonstrates a heightened risk of obstruction given that the events underlying the charges are easily distinguishable as a result of the relatively limited scope of the charges against Mr Shala.⁵⁸ The Pre-Trial Judge further finds that, in view of [REDACTED], the additional disclosure of incriminating material to Mr Shala following the Second Detention Decision increases the risk of obstruction considering that he has acquired a better understanding of the SPO's case, including the witnesses that it will rely upon at trial. Accordingly, the risk of Mr Shala obstructing the progress of SC proceedings continues to exist.

⁵³ 1 September 2021 Defence Submissions, paras 18, 25-31.

⁵⁴ Second Detention Decision, paras 31-32.

⁵⁵ *Haradinaj* Detention Appeal, para. 55; *Krasniqi* Detention Appeal, para. 17.

⁵⁶ First Detention Decision, paras 32-35; Court of Appeals Decision, paras 35-42; Second Detention Decision, para. 32.

⁵⁷ First Detention Decision, paras 32-33; Court of Appeals Decision, para. 41; Second Detention Decision, para. 31.

⁵⁸ Second Detention Decision, para. 31.

3. Risk of Committing Further Crimes

30. According to the SPO, the risk that Mr Shala will commit further crimes continues to exist.⁵⁹ It adds that this risk may have increased as he received additional disclosure under Rule 102(1)(b) of the Rules since the Second Detention Decision.⁶⁰

31. The Defence responds 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.⁶¹

32. As mentioned in relation to the risk of Mr Shala obstructing the progress of SC proceedings, the Defence's repeated submissions regarding the existence of protective measures need not be addressed any further. The Pre-Trial Judge further finds that 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.

33. In the First and Second Detention Decisions, it was found that there is a risk that Mr Shala will commit further crimes since [REDACTED].⁶² 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.⁶³ 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 the disclosure of additional material increases the risk of Mr Shala committing further crimes.

⁵⁹ SPO Submissions, paras 1, 2, 5, 6.

⁶⁰ SPO Submissions, paras 1, 4.

⁶¹ Defence Submissions, para. 26.

⁶² First Detention Decision, para. 39; Second Detention Decision, para. 36.

⁶³ First Detention Decision, para. 39; Second Detention Decision, para. 36.

4. Conclusion

34. 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 imposing conditions in connection with the interim release of Mr Shala.

D. CONDITIONAL RELEASE

35. The SPO submits that the proposed conditions insufficiently mitigate the risks under Article 41(6)(b) of the Law.⁶⁴ It adds that these risks can only be effectively managed in the SC detention facilities 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.⁶⁵

36. The Defence avers that there is no reason to depart from the conclusion that the moderate risk of flight could be mitigated by appropriate conditions.⁶⁶ It further submits that, should the Pre-Trial Judge consider that the risk of Mr Shala obstructing the proceedings or committing further crimes remains, any such risk is sufficiently mitigated by a number of conditions falling short of house arrest (“Proposed Conditions”).⁶⁷ The Defence proposes, in the alternative to the Proposed Conditions, that Mr Shala be placed under house arrest at his residence in Belgium, together with various conditions.⁶⁸ Lastly, the Defence requests the Pre-Trial Judge pursuant to Article 39(13) of the Law to order the production of expert evidence on

⁶⁴ SPO Submissions, para. 2.

⁶⁵ SPO Submissions, para. 7.

⁶⁶ Defence Submissions, paras 22, 36.

⁶⁷ Defence Submissions, paras 5, 33, 37(i)-(x), 38.

⁶⁸ Defence Submissions, paras 4, 5, 7, 23, 24, 25, 32, 33, 37(xi)-(xxiii), 38.

communications monitoring in general and the means for such remote monitoring that are available in Belgium, including, should it be deemed appropriate, submissions on the capacity to monitor communications in Albanian.⁶⁹

37. 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.⁷⁰ 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.

38. The Pre-Trial Judge notes that the Proposed Conditions and the possibility of house arrest with attendant conditions have been previously raised⁷¹ and considered in the First and Second Detention Decisions.⁷² While these repeated submissions need not be considered any further,⁷³ the Pre-Trial Judge recalls, in any event, that: (i) the Proposed Conditions do not address the possibility of Mr Shala employing communication devices belonging to others or requesting others to use their devices for these purposes, and the enforcement conditions are insufficient to ensure effective monitoring of Mr Shala's communications in light of the risks identified under Article 41(6)(b)(ii)-(iii) of the Law; and (ii) the possibility of house arrest and attendant conditions would not prevent unmonitored conversations between Mr Shala and

⁶⁹ Defence Submissions, paras 7, 34-35.

⁷⁰ First Detention Decision, para. 45; Second Detention Decision, para. 40.

⁷¹ 1 September 2021 Defence Submissions, para. 40.

⁷² First Detention Decision, paras 46-48; Court of Appeals Decision, paras 53-58, 61; Second Detention Decision, paras 41-42.

⁷³ *Haradinaj* Detention Appeal, para. 55; *Krasniqi* Detention Appeal, para. 17.

approved visitors.⁷⁴ It is further recalled that it has been determined that additional conditions, 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, whereas such communications would still be submitted to some degree of monitoring in the controlled environment of the SC's detention facilities, including communications in Mr Shala's native language.⁷⁵ In the absence of guarantees provided by Belgium and having found that the Proposed Conditions, house arrest and additional conditions are insufficient, the Pre-Trial Judge considers that there is no basis for requesting further information from Belgium.⁷⁶

39. Furthermore, even though the Defence's request to order expert evidence does not need to be assessed considering that it has been raised⁷⁷ and addressed⁷⁸ previously,⁷⁹ the Pre-Trial Judge recalls that the insufficiency of the Proposed Conditions, house arrest and additional conditions is not exclusively dependent on Mr Shala's communications by means of different devices and, therefore, such expert evidence is not necessary for the present purposes.⁸⁰

40. Therefore, 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, house arrest and any additional conditions imposed by the Pre-Trial

⁷⁴ First Detention Decision, paras 46-48; Court of Appeals Decision, paras 53-58; Second Detention Decision, paras 41-42.

⁷⁵ Second Detention Decision, para. 42; KSC-BC-2020-06, IA010-F00008, Court of Appeals, *Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention* ("Thaçi Detention Appeal"), 27 October 2021, confidential, para. 68. A public redacted version was issued on the same day, IA010-F00008/RED.

⁷⁶ See also Thaçi Detention Appeal, paras 64, 67.

⁷⁷ 1 September 2021 Defence Submissions, para. 41.

⁷⁸ Second Detention Decision, para. 43.

⁷⁹ Haradinaj Detention Appeal, para. 55; Krasniqi Detention Appeal, para. 17.

⁸⁰ Second Detention Decision, para. 43.

Judge are insufficient to mitigate the risk of Mr Shala obstructing SC proceedings or committing further crimes.

E. PROPORTIONALITY OF DETENTION

41. The SPO asserts that the continued detention of the Accused is proportional.⁸¹ It argues that Mr Shala is charged with four counts of war crimes and, if convicted, could face a lengthy sentence, and the Pre-Trial Judge has found that the risks under Articles 41(6)(b)(ii) and (iii) of the Law cannot be mitigated by any conditions.⁸² In addition, according to the SPO, the necessary procedural points relating to the pre-trial phase of the case continue to move towards completion with a view to transmitting the case for trial at a point in the foreseeable future and extensions to the disclosure schedule have been requested and/or agreed to by both parties.⁸³

42. The Defence responds that Mr Shala's detention is disproportionate.⁸⁴ It asserts that Mr Shala, who has the right to be presumed innocent, has been detained for eight months while realistically his trial will not commence before April 2022 at the earliest.⁸⁵ According to the Defence, this period of detention is exacerbated by the sanitary measures related to the pandemic and the interference with Mr Shala's private and family life due to the fact that his family has only been in a position to visit him on three occasions, while they are facing great difficulty to visit him again since they are financially dependent on Mr Shala.⁸⁶ In addition, the Defence contends that Mr Shala is facing daily difficulties causing him discomfort and anxiety.⁸⁷

⁸¹ SPO Submissions, paras 1, 2, 8.

⁸² SPO Submissions, para. 8.

⁸³ SPO Submissions, para. 8.

⁸⁴ Defence Submissions, paras 5, 29.

⁸⁵ Defence Submissions, paras 3, 28.

⁸⁶ Defence Submissions, paras 4, 5, 29-31.

⁸⁷ Defence Submissions, para 31.

43. At the outset, the Pre-Trial Judge recalls the importance of the proportionality principle in the determination of the reasonableness of pre-trial detention.⁸⁸ 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.⁸⁹ 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.⁹⁰

44. 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, house arrest and/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 – in particular, the SPO has nearly completed its disclosure under Rule 102(1)(b) of the Rules (including additional items that were the subject to a decision by the Pre-Trial Judge),⁹¹ further

⁸⁸ 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.

⁸⁹ Similarly KSC-BC-2020-06, IA002/F00005, Court of Appeals Panel, *Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release*, 30 April 2021, confidential, para. 69. A public redacted version was filed on the same day, IA002/F00005/RED.

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

⁹¹ KSC-BC-2020-04, F00080, Specialist Prosecutor, *Prosecution Submissions for Third Status Conference*, 17 September 2021, public, para. 1; Transcript, 23 September 2021, public, p. 71, lines 2-19, p. 76, lines 8-15; F00100, Pre-Trial Judge, *Decision on Request for Authorisation to Disclose Additional Material under Rule 102(1)(b) of the Rules*, 4 November 2021, public; F00102, Specialist Prosecutor, *Prosecution*

progress in the disclosure process pursuant to Rules 102(3), 103 and 107 of the Rules has been made,⁹² and the Pre-Trial Judge has set the time limit for the SPO's Pre-Trial Brief and has issued two decisions on the Defence's preliminary motions;⁹³ 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 be evaluated against the applicable legal criteria.⁹⁴ Furthermore, pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules, Mr Shala's detention shall be reviewed every two months or as soon as a change in circumstances arises.

45. As to the Defence's submissions regarding the sanitary measures related to the pandemic and the interference with Mr Shala's private and family life, the Pre-Trial Judge finds that the impossibility of regular family visits constituted a proportionate and temporary measure that was necessary as a result of public health considerations, Mr Shala was allowed to communicate with his family in other ways, and these restrictions have now been lifted.⁹⁵ Moreover, the frequency of family visits is not attributable to the SC and, in any event, Mr Shala retains the possibility to communicate with his family members in other ways. Lastly, the Pre-Trial Judge considers that the submissions regarding the discomfort and anxiety experienced by Mr Shala is unsubstantiated and must anyhow be attributed very limited weight in

Submissions for Fourth Status Conference, 9 November 2021 ("9 November 2021 SPO Submissions"), confidential, para. 1 (a public redacted version was issued on the same day, F00102/RED).

⁹² 9 November 2021 SPO Submissions, paras 2-8.

⁹³ KSC-BC-2020-04, Transcript, 23 September 2021, public, p. 92, lines 10-20; F00088, Pre-Trial Judge, *Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers*, 18 October 2021, public; F00089, Pre-Trial Judge, *Decision on Motion Challenging the Form of the Indictment*, 18 October 2021, confidential (a public redacted version was issued on the same day, F00089/RED).

⁹⁴ See for instance KSC-BC-2020-04, F00074, *Specialist Counsel, Defence Motion for an Extension of Time for its Rule 102(2) [sic] Request*, 9 September 2021, public; KSC-BC-2020-04, F00076, *Specialist Prosecutor, Prosecution Response to KSC-BC-2020-04/F00074 and Related Request for Modification of Deadlines*, 10 September 2021, public; KSC-BC-2020-04, Transcript, 23 September 2021, public, p. 92, lines 10-20; KSC-BC-2020-04, F00086, *Specialist Counsel, Defence Request for Variation of Time Limit for its Rule 102(2) [sic] Request*, 13 October 2021, public.

⁹⁵ Second Detention Decision, para. 48.

view of the serious allegations made against Mr Shala and the existence of the aforementioned risks under Article 41(6)(b)(ii)-(iii) of the Law.

46. On this basis, the Pre-Trial Judge finds that the time Mr Shala has spent in pre-trial detention is not disproportionate. In addition, considering that there is no agreement as to the start of the trial,⁹⁶ any discussion as to the expected total length of his pre-trial detention remains premature and speculative.⁹⁷

V. DISPOSITION

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

- (a) **ORDERS** Mr Shala's continued detention;
- (b) **ORDERS** the Defence, if it wishes to do so, to file submissions on the next review of detention of Mr Shala by no later than **Friday, 17 December 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 **Thursday, 23 December 2021**, and

⁹⁶ Defence Submissions, para. 3.

⁹⁷ See also *Krasniqi Detention Appeal*, para. 43; *Thaçi Detention Appeal*, para. 51.

Mr Shala, if he wishes to do so, to file his submissions by no later than
Wednesday, 5 January 2022.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Wednesday, 10 November 2021

At The Hague, the Netherlands.