

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 21 January 2022

Filing Party: Defence Counsel

Original Language: English

Classification: Public

THE SPECIALIST PROSECUTOR
v.
PJETËR SHALA

Defence Response to
'Prosecution Submissions for Third Review of Detention'

Specialist Prosecutor's Office:
Jack Smith

Specialist Counsel for the Accused:
Jean-Louis Gilissen
Hédi Aouini

I. INTRODUCTION

1. The Defence files its Response to the '*Prosecution submissions for third review of detention*' within the timeline set by the Pre-Trial Judge in his '*Decision on Defence Request to Vary the Time Limit for Submissions on the Next Review of Mr Shala's Detention*'.¹
2. The risks alleged under Article 41(6) of Law No. 05/L-053 on the Specialist Chambers and Specialist Prosecutor's Office ('Law') continue to be unsubstantiated.
3. Mr Shala was arrested on 16 March 2021. On 19 April 2021, he pleaded not guilty.² To date, he has been in detention for a total of 311 days. Despite the length of his pre-trial detention, there is still no estimated date as to the beginning of the trial. The Specialist Prosecutor's Office ('SPO') is expected to file its pre-trial brief and Rule 109(c) chart by 11 February 2022.³ It is safe to assume that the trial will not begin before spring this year at the earliest. The Defence submits that such protracted length of pre-trial detention exceeds what is strictly necessary in the circumstances, particularly given the scale of this case.
4. In light of the latter, the Defence reiterates that the Pre-Trial Judge should not compare the length of pre-trial detention in this case to that of other cases before international criminal tribunals in the abstract. There is not a single case of analogous proportions where an accused was detained for a comparable period of time. The Pre-Trial Judge should review pre-trial detention effectively and not

¹ KSC-BC-2020-04, F00128, Prosecution submissions for third review of detention, 11 January 2022 ('Prosecution Submissions'); KSC-BC-2020-04, F00110, Decision on Defence Request to Vary the Time Limit for Submissions on the Next Review of Mr Shala's Detention, 18 November 2021, para. 9(b). *See also* KSC-BC-2020-04, F00121, Order for Submissions, 14 December 2021; KSC-BC-2020-04, F00125, Submissions pursuant to the Pre-Trial Judge's Order Dated 14 December 2021, 16 December 2021, para. 2. All further references to filings in this Response concern Case No. KSC-BC-2020-04 unless otherwise indicated.

² Transcript of 19 April 2021, p. 11.

³ Transcript of 23 September 2021, p. 92, lines 10-20.

simply approve the Prosecution's request for continued detention in the absence of concrete reasoning and substantiation of the relevant risks.

5. The Defence reiterates that assuming that any accused awaiting trial could be held for as long as the trial might last on account of '*unchanged*' circumstances is plainly wrong and profoundly unjust. The lack of an effective review is in breach of the Accused's right to be presumed innocent and not to be deprived of his liberty arbitrarily.
6. On the contrary, the Pre-Trial should take into consideration that the longer Mr Shala remains in pre-trial detention, the higher the burden on the SPO to justify continued detention. Mr Shala has the right to be presumed innocent. He also has the right not to be arbitrarily detained. He has the right to an effective review of his continued detention to establish if the latter remains strictly necessary and any purpose served by it cannot be served by other, less stringent, means. He also has the right to respect for his private and family life. At present, the interferences with all of these rights exceed what is strictly necessary and proportionate. This is particularly the case given that any concerns about provisionally releasing Mr Shala can be addressed by placing him under home detention at his residence in Belgium. The scarce reasoning and substantiation of the relevant risks offered by the Prosecution fail to meet the required standards. The Pre-Trial Judge should conduct an effective review and request substantive submissions to be filed by the Prosecution that justify continued detention.
7. The Defence submits that the duration of Mr Shala's pre-trial detention to date; the limited ability to have meaningful contact with his immediate family through regular family visits, which is further obstructed by the measures applicable for visitors due to COVID-19,⁴ the extensive witness protection regime in place; as

⁴ Transcript of 14 January 2022, p. 181, lines 10–22 (confidential).

well as the availability of effective, alternative and less restrictive measures which meet all purposes served by detention, render Mr Shala's continued detention unnecessary and disproportionate.

8. As a result, Mr Shala should be immediately released, with or without conditions.
9. The Defence underlines the availability of less stringent measures such as home detention accompanied by restrictions on visits and remote monitoring of Mr Shala's communications in Belgium, including communications in Albanian. These can be imposed along other suitable measures addressing any concerns regarding Mr Shala employing communication devices of others or otherwise communicating through others for any illegitimate purpose. The Defence invites the Pre-Trial Judge to invite expert submissions identifying suitable measures which can effectively address concerns arising from provisional release or placement under home detention.
10. In any event, the Defence submits that the legal framework of the Specialist Chambers ('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. The SPO reliance in this respect on Rule 57(2) of the Rules remains inapposite.⁵ Article 41(10) of the Law and Rule 57(1) of the Rules explicitly provide that the Panel seized with a case shall review a decision on detention on remand upon the expiry of two months from the last ruling on detention and shall ensure that a person is not detained for an unreasonable period prior to the opening of the case. The SPO bears the burden of establishing that the detention

⁵ See Prosecution Submissions, paras. 1, 3.

of the Accused is necessary.⁶ The Prosecution Submissions fail to meet this burden.

II. PROCEDURAL BACKGROUND

11. On 12 June 2020, the Pre-Trial Judge confirmed the revised Indictment against the Accused and issued an arrest warrant for him.⁷ On 16 March 2021, upon request by the SPO,⁸ and further to the confirmation of the indictment (*'Confirmation Decision'*),⁹ Mr Shala was arrested in the Kingdom of Belgium (*'Belgium'*),¹⁰ pursuant to the Decision on Arrest Warrant and Detention and an arrest warrant issued by the Pre-Trial Judge.¹¹
12. On 15 April 2021, Mr Shala was transferred to the detention facilities of the SC in The Hague, the Netherlands.¹²

⁶ IA001, F00005, Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Provisional Release, 20 August 2021, para. 24, with further references; F00045, Decision on Pjetër Shala's Request for Provisional Release, 15 June 2021 (confidential) (*'First Detention Decision'*), para. 13, with further references. Similarly, ECtHR, *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017, paras. 222, 234 with further references.

⁷ F000038, Submission of Further Lesser Redacted Version of Confirmed Indictment with confidential Annex 1, 25 May 2021 (confidential); F00008, Confidential Redacted Version of Decision on Request for Arrest Warrant and Transfer Order, 12 June 2020, paras. 20-23 (confidential) (*'Decision on Arrest Warrant and Detention'*). See also F00008, Public Redacted Version of Arrest Warrant for Mr Pjetër Shala, 12 June 2020 (*'Arrest Warrant'*); F00008, Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers, 12 June 2020 (*'Order for Transfer'*).

⁸ F00002, Confidential Redacted Version of 'Submission of Indictment for confirmation and related requests, filing KSC-BC2020-04/F00002 dated 14 February 2020 with confidential Annex 1' (confidential with confidential Annex 1), 26 April 2021.

⁹ F00007, Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Pjetër Shala, 12 June 2020 (confidential) (*'Confirmation Decision'*).

¹⁰ F00013, Notification of Arrest Pursuant to Rule 55(4), 16 March 2021.

¹¹ F00008, Confidential Redacted Version of Decision on Request for Arrest Warrant and Transfer Order, 12 June 2020 (confidential) (*'Decision on Arrest Warrant and Detention'*); F00008, Public Redacted Version of Arrest Warrant for Mr Pjetër Shala, 12 June 2020 (*'Arrest Warrant'*).

¹² F00019, Notification of Reception of Pjetër Shala in the Detention Facilities of the Specialist Chambers and Conditional Assignment of Counsel, 15 April 2021 (confidential).

13. On 15 June 2021, the Pre-Trial Judge rejected a request for provisional release submitted by the Defence and ordered the continued detention of Mr Shala.¹³
14. On 28 June 2021, the Defence appealed against the Decision on Request for Provisional Release.¹⁴ On 20 August 2021, the Appeals Chamber rejected the Defence appeal against the First Detention Decision.¹⁵
15. On 10 September 2021, the Pre-Trial Judge authorised Mr Shala's continued detention.¹⁶
16. On 10 November 2021, the Pre-Trial Judge authorised Mr Shala's continued detention.¹⁷ On 22 November 2021, the Defence appealed the Pre-Trial Judge's Decision of 10 November 2021.¹⁸ This appeal is currently pending.¹⁹

III. SUBMISSIONS

17. At the outset, the Defence fully maintains its previous submissions on Mr Shala's detention and reiterates that there is no proper basis upon which Mr Shala should be detained.²⁰

¹³ First Detention Decision, para. 50(a).

¹⁴ IA001, F00001, Defence Appeal against the 'Decision on Pjetër Shala's Request for Provisional Release', 28 June 2021.

¹⁵ IA001, F00005, Decision on Pjetër Shala's Appeal Against Decision on Provisional Release, 20 August 2021 (confidential), para. 62.

¹⁶ F00075, Decision on Review of Detention of Pjetër Shala, 10 September 2021 (confidential).

¹⁷ F00105, Decision on Review of Detention of Pjetër Shala, 10 November 2021 (confidential).

¹⁸ IA003, F00001, Defence Appeal against the Decision on Review of Detention of Pjetër Shala of 10 November 2021, 22 November 2021 (confidential).

¹⁹ IA003, F00003, Prosecution response to Defence appeal against the 'Decision on Review of Detention of Pjetër Shala' with public Annex 1, 3 December 2021 (confidential); IA003, F00004, Defence Reply to Prosecution Response to Appeal against the 'Decision on Review of Detention of Pjetër Shala', 13 December 2021 (confidential).

²⁰ Defence Response to Prosecution Submissions on First Review of Detention, 1 September 2021, paras. 17-32; IA001, F00001, Defence Appeal against the 'Decision on Pjetër Shala's Request for Provisional Release', 28 June 2021 (confidential); IA001, F00004, Defence Reply to Prosecution Response to Appeal Against the 'Decision on Pjetër Shala's Request for Provisional Release', 19 July 2021, paras. 4-16.

18. The Defence reiterates that the burden of proof to establish that continued detention is necessary at the time of the review lies with the SPO and requires that the latter provide '*specific arguments and concrete evidence*' to demonstrate the relevant risks.²¹ Mere reliance, by the SPO on '*the previous ruling on detention*' and on '*what has changed, if anything*' since such ruling, does not meet the applicable burden and standard of proof.²²
19. Without prejudice to the above, contrary to the submissions by the Prosecution, the Defence submits that changes in the relevant circumstances *have* occurred, including the passing of time in itself, and developments regarding a central witness which inevitably reduce any perceived risks.²³
20. The SPO insufficiently argues in general terms that: (i) each of the Article 41(6)(b) risks exists, remains the same or has potentially increased since the Decision on Review of Detention of 10 November 2021; (ii) such risks can only be mitigated through the continued detention of the Accused. In this respect, the Prosecution tellingly argues that '*[a]ny further assurance that the Accused may give would be insufficient to overcome the concrete risks that release would cause*'.²⁴
21. This view not only ignores the finding made by the Pre-Trial Judge in his first Detention Decision that the moderate risk of flight could be mitigated by appropriate conditions,²⁵ but continues to fail to substantiate any of the alleged

²¹ See e.g. F00105, Decision on Review of Detention of Pjetër Shala, 10 November 2021 (confidential), para. 16, referring to F00045, Decision on Pjetër Shala's Request for Provisional Release, 15 June 2021, para. 13; KSC-BC-2020-06, F00177, Public Redacted Version of Decision on Hashim Thaçi's Application for Interim Release, 22 January 2021, para. 19; ECtHR, *Merabishvili v. Georgia*, no. 72508/13, Judgment ('*Merabishvili v. Georgia*'), 28 November 2017, para. 234.

²² Prosecution Submissions, para. 3.

²³ IA003, F00001, Defence Appeal against the Decision on Review of Detention of Pjetër Shala, 10 November 2021 (confidential), para. 24 and references therein.

²⁴ Prosecution Submissions, paras. 5, 6.

²⁵ F00075, Decision on Review of Detention of Pjetër Shala, 10 September 2021 (confidential), para. 45. See also F000105, Decision on Review of Detention of Pjetër Shala, 10 November 2021 (confidential), para. 37.

risks, by, for instance, revealing or linking any of the material disclosed concerning Mr Shala's alleged criminal activity to a justified substantiation of increased risks.

22. The Defence repeats the submissions made at paragraphs 20 – 35 of the Response to '*Prosecution Submissions for Second Review of Detention*' in relation to the Prosecution's arguments as to the alleged risks and disproportionate nature of continued detention.²⁶
23. In addition, the SPO inaccurately submits that '*[s]ince the last detention review, the SPO has disclosed all items requested by the Defence under Rule 102(3)*' in its effort to argue that Mr Shala's detention is proportional.²⁷ Notably, the SPO did disclose a number of items under Rule 102(3) of the Rules: on 20 November 2021 (Disclosure Package 25), 30 November 2021 (Disclosure Package 26), 15 December 2021 (Disclosure Package 27), and 17 January 2022 (Disclosure Package 30). Several items requested by the Defence under Rule 102(3) remain the subject of *inter partes* communications and disclosure of certain items is awaiting determination of the Prosecution's second request for protective measures concerning requests made by the Defence under Rule 102(3) of the Rules.²⁸
24. In any case, the Defence stresses that increased insight into the evidence does not in itself increase the identified risks, whilst the contrary might as well be true, given that some of the disclosed materials are clearly exculpatory. The Pre-Trial Judge has not to date addressed the impact of the disclosure of exculpatory material for the purposes of his review of pre-trial detention.

²⁶ F00099, Defence Response to '*Prosecution Submissions for Second Review of Detention*', 1 November 2021.

²⁷ Prosecution Submissions, para. 7.

²⁸ F00122, Confidential Redacted Version of '*Second request for protective measures for certain information requested by the Defence pursuant to Rule 102(3)*', 10 January 2022 (confidential).

25. In assessing proportionality, the Pre-Trial Judge should consider the actual effects of detention on Mr Shala. A thorough examination of these demonstrates that the effects of detention on Mr Shala are disproportionate.
26. The lack of regular family visits constitutes an excessive interference with Mr Shala's right to private and family life. Mr Shala is innocent and has the right to be presumed innocent as well as the right requiring respect for his private and family life while being detained far away from his immediate family. The SC prison authorities have a duty to enable and assist him to maintain contact with his close family.²⁹ To date, the family of Mr Shala has only been in a position to visit him on a few occasions, while they are facing great difficulty to visit him again for reasons beyond their control. His family has been financially dependent on Mr Shala and as a result of his detention they have very limited financial means, which makes travelling to The Hague considerably burdensome.
27. In addition, Mr Shala is facing daily difficulties causing him discomfort and anxiety which are mostly caused by his very limited financial capabilities while being detained and unable to make a living.
28. The Defence further invites the Pre-Trial Judge to assess the proposed conditions put forward by the Defence in the context of the Second Review of Detention.³⁰ The Defence requests the Pre-Trial Judge in particular to assess the proposed condition of effective monitoring of Mr Shala's communications, including communications in Albanian, taking into account the vast array of effective

²⁹ See, for instance, ECtHR, *Khoroshenko v. Russia*, no. 41418/04, 30 June 2015, para. 123; ECtHR, *Polyakova et al. v. Russia*, nos. 35090/09, 3 July 2017, paras. 116-118.

³⁰ F00099, Defence Response to 'Prosecution Submissions for Second Review of Detention', 1 November 2021, paras. 33, 34, 37.

monitoring software and devices ensuring that no abuse of any condition of release or home detention takes place.³¹

29. In this context, given the Pre-Trial Judge's concern about the adequate monitoring of Mr Shala's non-privileged communications outside the SC detention facilities and in order to facilitate the Pre-Trial Judge's assessment in this respect, the Defence repeats its request pursuant to Article 39(13) of the Law to order the production of expert evidence on 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. Due to its limited available funds, the Defence depends on an order by the Pre-Trial Judge soliciting such expert advice as it is unable to cover the costs for such expert advice independently.
30. As the Appeals Chamber has noted Article 39(13) of the Law vests the Pre-Trial Judge with the discretionary power to decide whether to issue any order that may be necessary for the preparation of a fair trial and the latter can be interpreted as encompassing detention-related matters.³²
31. Lastly, the Defence reiterates that Mr Shala is willing to offer extensive undertakings and to be subject to such conditions, including house arrest, as the Pre-Trial Judge deems appropriate.

V. RELIEF REQUESTED

32. For these reasons, the Defence respectfully requests the Pre-Trial Judge to end Mr Shala's continued detention and order his interim release or placement in

³¹ F00099, Defence Response to 'Prosecution Submissions for Second Review of Detention', 1 November 2021, paras. 33, 34, 37.


³² IA001, F0005, 'Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Provisional Release', 20 August 2021, paras. 59, 60.

house arrest at his residence in Belgium subject to any conditions that are deemed appropriate.

Respectfully submitted,



Jean-Louis Gilissen
Specialist Defence Counsel



Hedi Aouini
Defence Co-Counsel

21 January 2022

Word count: 2897