



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: 28 January 2022

Language: English

Classification: Public

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

Specialist Prosecutor

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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, and 16 November 2021, F00107/A01, 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); 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 The Court of Appeals upheld the First Detention Decision on 20 August 2021 (“First Court of Appeals Decision”).⁸
5. On 10 September 2021 and 10 November 2021, the Pre-Trial Judge reviewed the detention of Mr Shala and ordered his continued detention (“Second Detention Decision” and “Third Detention Decision” respectively).⁹
6. On 18 November 2021, the Pre-Trial Judge, further to a request by Mr Shala, who waived his right to have his detention reviewed before the expiry of the two-month limit set out in Article 41(10) of the Law and Rule 57(2) of the Rules,¹⁰ varied the time limit for the Defence to file submissions on the next review of Mr Shala’s detention by 17 December 2021 or, should it not wish to do so, to respond to any submissions by the Specialist Prosecutor’s Office (“SPO”) by 21 January 2022 (“18 November 2021 Decision”).¹¹
7. On 16 December 2021, the Defence, further to an order by the Pre-Trial Judge,¹² indicated that it will not request a further variation of the time limit following its appeal against the Third Detention Decision,¹³ and that it will file its submissions in

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); F00105, *Decision on Review of Detention of Pjetër Shala*, 10 November 2021, confidential (a public redacted version was issued on the same day, F00105/RED).

¹⁰ KSC-BC-2020-04, F00108, Specialist Counsel, *Defence Request for Variation of Time Limit for its Submissions on the Review of Mr Shala’s Detention*, 16 November 2021, public, para. 3.

¹¹ KSC-BC-2020-04, F00110, Pre-Trial Judge, *Decision on Defence Request to Vary the Time Limit for Submissions on the Next Review of Mr Shala’s Detention*, 18 November 2021, public, para. 9.

¹² KSC-BC-2020-04, F00121, Pre-Trial Judge, *Order for Submissions*, 14 December 2021, public.

¹³ KSC-BC-2020-04, IA003/F00001, Specialist Counsel, *Defence Appeal against the Decision on Review of Detention of Pjetër Shala of 10 November 2021*, 22 November 2021, confidential (“Defence Appeal Third Detention Decision”).

accordance with the schedule set out in the 18 November 2021 Decision by providing a response to any submissions by the SPO by 21 January 2022.¹⁴

8. On 11 January 2022, the SPO filed its submissions on the review of Mr Shala's detention ("SPO Submissions").¹⁵

9. On 21 January 2022, the Defence filed its submissions ("Defence Submissions").¹⁶

II. SUBMISSIONS

10. 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.¹⁷ In its view, there has been no relevant change since the Pre-Trial Judge reached this finding in the Third Detention Decision.¹⁸

11. The Defence requests the Pre-Trial Judge to order Mr Shala's interim release immediately, either with or without conditions.¹⁹

III. APPLICABLE LAW

12. 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

¹⁴ KSC-BC-2020-04, F00125, Specialist Counsel, *Submissions Pursuant to the Pre-Trial Judge's Order Dated 14 December 2021*, 16 December 2021, public, para. 2.

¹⁵ KSC-BC-2020-04, F00128, Specialist Prosecutor, *Prosecution Submissions for Third Review of Detention*, 11 January 2022, public.

¹⁶ KSC-BC-2020-04, F00131, Specialist Counsel, *Defence Response to "Prosecution Submissions for Third Review of Detention"*, 21 January 2022, public.

¹⁷ SPO Submissions, paras 1, 8.

¹⁸ SPO Submissions, paras 1-2.

¹⁹ Defence Submissions, paras 8, 32.

proceedings; or (iii) will repeat the criminal offence, complete an attempted crime, or commit a crime which he or she has threatened to commit.

13. 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.

14. 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.

15. 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

16. 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.²⁰ 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.²¹

²⁰ SPO Submissions, para. 3.

²¹ SPO Submissions, para. 3.

17. The Defence responds that the Pre-Trial Judge should review pre-trial detention effectively and not simply approve the SPO's request for continued detention in the absence of concrete reasoning and substantiation of the relevant risks.²² In the view of the Defence, 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.²³ Lastly, it avers that assuming that any accused awaiting trial could be held as long as the trial might last on account of "unchanged" circumstances is plainly wrong and profoundly unjust.²⁴

18. 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.²⁵ The duty to determine whether the circumstances underpinning detention still exist imposes on the competent panel the task to, *proprio motu*, assess whether it 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.²⁶ 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*.²⁷ The Pre-Trial Judge is neither required to make

²² Defence Submissions, paras 4-6.

²³ Defence Submissions, para. 10.

²⁴ Defence Submissions, para. 5.

²⁵ 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.

²⁶ 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.

²⁷ *Krasniqi Detention Appeal*, para. 16.

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.²⁸ 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.²⁹ The SPO bears the burden of establishing that the detention of the Accused is necessary.³⁰ 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

19. 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.³¹

20. According to the SPO, for the reasons set out in the Confirmation Decision and the Third Detention Decision, there continues to be a well-grounded suspicion that the Accused committed multiple crimes within the jurisdiction of the SC.³² The Defence has not made any submissions in relation to this criterion.

21. 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.³³ These findings

²⁸ *Haradinaj* Detention Appeal, para. 55; *Krasniqi* Detention Appeal, para. 17.

²⁹ *Haradinaj* Detention Appeal, para. 55.

³⁰ First Detention Decision, para. 13, with further references.

³¹ Similarly ECtHR, *Merabishvili v. Georgia* [GC], no. 72508/13, [Judgment](#), 28 November 2017, para. 222, with further references.

³² SPO Submissions, paras 2, 4.

³³ Confirmation Decision, para. 140(a); *see also* First Detention Decision, para. 15; Second Detention Decision, para. 22; Third Detention Decision, para. 19.

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.³⁴

22. 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

23. 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.³⁵ The Pre-Trial Judge further recalls that, on the basis of the available evidence, the specific articulable grounds must support the "belief"³⁶ 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.³⁷ In other words, the standard to be applied is less than certainty, but more than a mere possibility of a risk materialising.³⁸ When deciding whether a person should be 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.³⁹

24. At the outset, the Pre-Trial Judge notes that the Defence submits that it fully maintains its previous submissions on Mr Shala's detention and reiterates that there

³⁴ 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.

³⁵ First Detention Decision, para. 16, with further references.

³⁶ *See chapeau* of Article 41(6)(b) of the Law.

³⁷ First Detention Decision, para. 16, with further references.

³⁸ First Detention Decision, para. 16, with further references.

³⁹ 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*.

is no proper basis upon which Mr Shala should be detained.⁴⁰ As already specified above and in the Third Detention Decision, 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.⁴¹ Therefore, the Pre-Trial Judge will not entertain these submissions any further and, accordingly, the ensuing sections will exclusively address arguments not previously raised and considered.

1. Risk of Flight

25. According to the SPO, a risk of flight in relation to Mr Shala continues to exist.⁴² It adds that this risk has remained the same or has increased as the proceedings continued to move forward towards the start of the trial since the Third Detention Decision.⁴³

26. The Defence responds that the SPO insufficiently argues in general terms that the risks under Article 41(6)(b) of the Law exist, remain the same or have potentially increased since the Third Detention Decision, and that the SPO continues to fail to substantiate any of the alleged 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.⁴⁴ It also argues that increased insight into the evidence does not in itself increase the identified risks, whilst the contrary might as well be true in view of the disclosure of clearly exculpatory material.⁴⁵

27. Having examined the factors and circumstances invoked in the First, Second and Third Detention Decisions, the Pre-Trial Judge remains satisfied that they continue to

⁴⁰ Defence Submissions, paras 17, 22.

⁴¹ Third Detention Decision, paras 24, 28, 32.

⁴² SPO Submissions, paras 2, 5.

⁴³ SPO Submissions, paras 2, 5.

⁴⁴ Defence Submissions, paras 20-21.

⁴⁵ Defence Submissions, para. 24.

exist. More specifically, the Pre-Trial Judge considers that 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.⁴⁶ 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.⁴⁷ These factors and circumstances continue to establish that a moderate risk of flight exists in relation to Mr Shala at present. However, the Pre-Trial Judge considers that the risk of flight has not increased as a result of the advancement of the proceedings considering that the aforementioned factors and circumstances are not dependent on such developments. The Defence, by generically arguing that the SPO fails to substantiate this risk, fails to appreciate that the aforementioned factors and circumstances have already been substantiated in previous decisions and that, for the purposes of the present decision, it is determinative that they continue to exist and establish a moderate risk of flight.

2. Risk of Obstructing the Progress of SC Proceedings

28. According to the SPO, the risk that Mr Shala will obstruct the progress of SC proceedings continues to exist.⁴⁸ It adds that this risk may have increased with the

⁴⁶ First Detention Decision, paras 24-25; Second Detention Decision, para. 28; Third Detention Decision, para. 25.

⁴⁷ First Detention Decision, para. 26; Second Detention Decision, para. 28; Third Detention Decision, para. 25.

⁴⁸ SPO Submissions, paras 2, 5.

advancement of the pre-trial stage of the proceedings since the Third Detention Decision.⁴⁹

29. Besides the submissions set out above in connection with the risk of flight,⁵⁰ the Defence asserts that developments regarding a central witness [REDACTED] inevitably reduce any perceived risks.⁵¹

30. It is recalled that [REDACTED].⁵² [REDACTED]. [REDACTED].⁵³ [REDACTED]. [REDACTED].

31. In this regard, the Pre-Trial Judge also recalls that the existence of protective measures in the present case is not contrary to the finding that there is a risk of obstruction in the circumstances of the present case and, more generally, the necessity for such measures demonstrates a heightened risk given that the events underlying the charges are easily distinguishable.⁵⁴

32. The Pre-Trial Judge further finds that [REDACTED] the further advancement of the pre-trial proceedings following the Third Detention Decision, especially the imminent filing of the SPO's Pre-Trial Brief by 28 January 2022, increases the risk of obstruction considering that it will provide Mr Shala with more details as to the case against him and will eventually lead to certain protective measures being lifted. The Defence's contention that some materials disclosed by the SPO are exculpatory does not affect this finding. It ignores the fact that Mr Shala's increased insight into the case against him must be assessed against [REDACTED].

33. Furthermore, the Defence's generic assertion that the risk of obstruction is unsubstantiated is to no avail since it fails to take into account that the factors and

⁴⁹ SPO Submissions, paras 2, 5.

⁵⁰ See para. 26 above; Defence Submissions, paras 20-21, 24.

⁵¹ Defence Submissions, para. 19 referring to Defence Appeal Third Detention Decision, para. 24.

⁵² First Detention Decision, paras 32-35; Court of Appeals Decision, paras 35-42; Second Detention Decision, para. 32; Third Detention Decision, para. 29.

⁵³ See also First Court of Appeals Decision, para. 36.

⁵⁴ Second Detention Decision, para. 31; Third Detention Decision, para. 29.

circumstances underpinning this risk have been established in previous detention decisions and upheld on appeal.⁵⁵ In this regard, it is determinative for the purposes of the present decision that the risk of Mr Shala obstructing the progress of SC proceedings continues to exist on the basis that [REDACTED].

3. Risk of Committing Further Crimes

34. According to the SPO, the risk that Mr Shala will commit further crimes continues to exist.⁵⁶ It adds that this risk may have increased with the advancement of the pre-trial stage of the proceedings since the Third Detention Decision.⁵⁷ The Defence's submissions have been set out above in connection with the risks of flight and obstruction.⁵⁸

35. In the First, Second and Third Detention Decisions, it was found that there is a risk that Mr Shala will commit further crimes since [REDACTED].⁵⁹ 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.⁶⁰ In the view of the Pre-Trial Judge, the risk of Mr Shala committing further crimes continues to exist, considering that [REDACTED]. In addition, as with the risk of obstruction, the Pre-Trial Judge considers that the advancement of the pre-trial proceedings since the Third Detention Decision, especially the imminent filing of the SPO's Pre-Trial Brief, increases the risk of Mr Shala committing further crimes. Lastly, the Defence's submissions that the risk of

⁵⁵ See *in particular* First Detention Decision, paras 32-35; First Court of Appeals Decision, paras 34-42.

⁵⁶ SPO Submissions, paras 2, 5.

⁵⁷ SPO Submissions, paras 2, 5.

⁵⁸ See paras 26 and 29 above; Defence Submissions, paras 19-21, 24.

⁵⁹ First Detention Decision, para. 39; Second Detention Decision, para. 36; Third Detention Decision, para. 33.

⁶⁰ First Detention Decision, para. 39; Second Detention Decision, para. 36; Third Detention Decision, para. 33.

Mr Shala committing further crimes is unsubstantiated must be set aside for the same reasons identified in relation to the risk of obstruction.⁶¹

4. Conclusion

36. 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

37. The SPO submits that the Pre-Trial Judge previously found that the proposed conditions insufficiently mitigate the risks under Article 41(6)(b) of the Law.⁶² It adds that these risks can only be effectively mitigated through the continued detention of the Accused and that any assurances that the Accused may give would be insufficient to overcome the concrete risks that release would cause.⁶³

38. The Defence avers that the SPO ignores the Pre-Trial Judge's finding in the First Detention Decision that the moderate risk of flight could be mitigated by appropriate conditions.⁶⁴ It further invites the Pre-Trial Judge to assess the conditions put forward by the Defence in connection with the Third Detention Decision, in particular the proposed condition of effective monitoring of Mr Shala's communications, including communications in Albanian ("Proposed Conditions").⁶⁵ The Defence

⁶¹ See paras 30-33 above.

⁶² SPO Submissions, para. 2.

⁶³ SPO Submissions, para. 6.

⁶⁴ Defence Submissions, para. 21.

⁶⁵ Defence Submissions, paras 7, 9, 28, 31, 32.

also proposes that Mr Shala be placed under house arrest at his residence in Belgium, together with various conditions.⁶⁶ Lastly, the Defence requests the Pre-Trial Judge, 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.⁶⁷ The Defence argues that it depends on an order by the Pre-Trial Judge soliciting such expert advice as it is unable to cover the costs independently, due to its limited available funds.⁶⁸

39. 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.⁶⁹ 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.

40. The Pre-Trial Judge notes that the Proposed Conditions and the possibility of house arrest with attendant conditions have been previously raised⁷⁰ and considered in the First, Second and Third Detention Decisions.⁷¹ While these repeated submissions need not be considered any further,⁷² the Pre-Trial Judge recalls, in any

⁶⁶ Defence Submissions, paras 6, 9, 28, 31, 32.

⁶⁷ Defence Submissions, paras 9, 29.

⁶⁸ Defence Submissions, para. 29.

⁶⁹ First Detention Decision, para. 45; Second Detention Decision, para. 40; Third Detention Decision, para. 37.

⁷⁰ See for instance KSC-BC-2020-04, F00099, Specialist Counsel, *Defence Response to 'Prosecution Submissions for Second Review of Detention'*, 1 November 2021, public ("1 November 2021 Defence Submissions"), para. 37.

⁷¹ First Detention Decision, paras 46-48; Court of Appeals Decision, paras 53-58, 61; Second Detention Decision, paras 41-42; Third Detention Decision, para. 38.

⁷² *Haradinaj* Detention Appeal, para. 55; *Krasniqi* Detention Appeal, para. 17.

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 approved visitors.⁷³ 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.⁷⁴ 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.⁷⁵

41. Furthermore, even though the Defence's request to order expert evidence does not need to be assessed considering that it has been raised⁷⁶ and addressed⁷⁷ previously,⁷⁸ the Pre-Trial Judge recalls that the insufficiency of the Proposed Conditions, house arrest and additional conditions is not exclusively dependent on

⁷³ First Detention Decision, paras 46-48; Court of Appeals Decision, paras 53-58; Second Detention Decision, paras 41-42; Third Detention Decision, para. 38.

⁷⁴ Second Detention Decision, para. 42; Third Detention Decision, para. 38; 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.

⁷⁵ Third Detention Decision, para. 38; *see also* Thaçi Detention Appeal, paras 64, 67.

⁷⁶ 1 November 2021 Defence Submissions, para. 34.

⁷⁷ Second Detention Decision, para. 43; Third Detention Decision, para. 39.

⁷⁸ Haradinaj Detention Appeal, para. 55; Krasniqi Detention Appeal, para. 17.

Mr Shala's communications by means of different devices and, therefore, such expert evidence is not necessary for the present purposes.⁷⁹

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

E. PROPORTIONALITY OF DETENTION

43. The SPO asserts that the continued detention of the Accused is proportional.⁸⁰ 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.⁸¹ In addition, according to the SPO, the necessary procedural steps 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 as the SPO has disclosed all items requested by the Defence under Rule 102(3) of the Rules and has made further progress in obtaining clearance pursuant to Rule 107 of the Rules.⁸²

44. The Defence responds that Mr Shala's detention is disproportionate.⁸³ It argues that, in view of Mr Shala's protracted pre-trial detention and the scale of the present case, the Pre-Trial Judge should not compare the length of pre-trial detention in this

⁷⁹ Second Detention Decision, para. 43; Third Detention Decision, para. 39.

⁸⁰ SPO Submissions, paras 1, 2, 7.

⁸¹ SPO Submissions, para. 7.

⁸² SPO Submissions, para. 7.

⁸³ Defence Submissions, paras 7, 22, 25.

case to that of other cases before international criminal tribunals in the abstract.⁸⁴ The Defence further asserts that Mr Shala, who has the right to be presumed innocent, has been detained for more than 300 days while it is safe to assume that his trial will not commence before spring this year at the earliest.⁸⁵ The Defence avers that 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.⁸⁶ In its view, the passage of time constitutes a change in circumstances.⁸⁷ The Defence adds that the SPO incorrectly asserts that all materials under Rule 102(3) of the Rules have been disclosed.⁸⁸ 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 a few occasions, while they are facing great difficulty to visit him again since they are financially dependent on Mr Shala.⁸⁹ In addition, the Defence contends that Mr Shala is facing discomfort and anxiety which are mostly caused by his very limited financial capabilities while being detained and unable to make a living.⁹⁰

45. At the outset, the Pre-Trial Judge recalls the importance of the proportionality principle in the determination of the reasonableness of pre-trial detention and that the longer a person remains in pre-trial detention the higher the burden on the SPO to justify continued detention.⁹¹ 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

⁸⁴ Defence Submissions, paras 3-4.

⁸⁵ Defence Submissions, paras 3, 26.

⁸⁶ Defence Submissions, para. 6.

⁸⁷ Defence Submissions, para. 19.

⁸⁸ Defence Submissions, para. 23.

⁸⁹ Defence Submissions, paras 6, 7, 26.

⁹⁰ Defence Submissions, para. 27.

⁹¹ 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.

released.⁹² 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.⁹³

46. 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 with only a small number of items outstanding,⁹⁴ further progress in the disclosure process pursuant to Rules 102(3), 103 and 107 of the Rules has been made (notably, the SPO has not challenged the materiality of items requested by the Defence under Rule 102(3) of the Rules,⁹⁵ has indicated that it will review all outstanding material for exculpatory evidence in accordance with Rule 103 of the Rules in the following weeks and, at the latest, by the next status conference,⁹⁶ and [REDACTED])⁹⁷, and the SPO's Pre-Trial Brief as well as the chart according to Rule 109(c) of the Rules will be filed imminently,

⁹² 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.

⁹³ *Buzadji v. the Republic of Moldova* [GC], para. 90.

⁹⁴ KSC-BC-2020-04, Transcript, 14 January 2022, confidential, pp 139-140, p. 142.

⁹⁵ KSC-BC-2020-04, F00127, Specialist Prosecutor, *Prosecution Submissions for Fifth Status Conference*, 11 January 2022, para. 2; Transcript, 14 January 2022, confidential, pp 144, 145.

⁹⁶ KSC-BC-2020-04, Transcript, 14 January 2022, confidential, pp 150, 158.

⁹⁷ [REDACTED].

namely by 28 January 2022 and 11 February 2022,⁹⁸ and (vi) the relevant time limits – some of which have been extended upon good cause having been demonstrated, including upon request from the Defence⁹⁹ - have been or continue to be met and any additional requests for extension of time will be evaluated against the applicable legal criteria. 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.

47. As to the Defence's assertion 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, the Pre-Trial Judge recalls that the review of Mr Shala's detention, including the proportionality assessment, is exclusively conducted on the basis of the legal parameters applicable to the SC as set out above.¹⁰⁰ The Pre-Trial Judge also recalls that the previous reviews of Mr Shala's detention have not proceeded on the basis of any such abstract comparison.¹⁰¹ In addition, with regard to the Defence's submission that the passage of time constitutes a change in circumstances, the Pre-Trial Judge has duly appraised the additional time spent in detention by Mr Shala following the Third Detention Decision, including the resulting increase of the SPO's burden to justify Mr Shala's continued detention. However, weighed against the remaining factors and, in particular, the serious nature of the charges against Mr Shala, the impossibility to mitigate the risks under Article 41(6)(b)(ii) and (iii) of the Law and the advancement of the proceedings, this period of time does not render Mr Shala's detention disproportionate. Furthermore,

⁹⁸ KSC-BC-2020-04, Transcript, 23 September 2021, public, p. 92; Transcript, 14 January 2022, confidential, p. 183.

⁹⁹ 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; F00076, *Specialist Prosecutor, Prosecution Response to KSC-BC-2020-04/F00074 and Related Request for Modification of Deadlines*, 10 September 2021, public; Transcript, 23 September 2021, public, p. 92, lines 10-20; F00086, *Specialist Counsel, Defence Request for Variation of Time Limit for its Rule 102(2) [sic] Request*, 13 October 2021, public.

¹⁰⁰ See para. 18 above.

¹⁰¹ See for example Third Detention Decision, para. 16.

contrary to the Defence's submission, the fact that not all materials under Rule 102(3) of the Rules have been disclosed is also insufficient to consider Mr Shala's detention disproportionate since, as acknowledged by the Defence, progress has been made in the disclosure of such materials and, in addition, [REDACTED].¹⁰²

48. As to the Defence's submissions regarding Mr Shala's right to be presumed innocent, the Pre-Trial Judge finds that Mr Shala's detention has been ordered in accordance with the Law and Rules, which does not affect his right to be presumed innocent. In addition, regarding the Defence's arguments based on Mr Shala's right to a private and family life, the impossibility of regular family visits constituted, as previously determined,¹⁰³ a proportionate and temporary measure that was necessary as a result of public health considerations, which has now been lifted.¹⁰⁴ Moreover, the Registry has regularly updated the Defence on the applicable measures,¹⁰⁵ which has also been acknowledged by the Defence.¹⁰⁶ In any event, the frequency of family visits is not attributable to the SC and it is important that 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 as a result of his limited financial means must be attributed very limited weight and does not affect the proportionality assessment in view of the serious allegations made against Mr Shala and the continued existence of the aforementioned risks under Article 41(6)(b)(ii)-(iii) of the Law.

49. 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

¹⁰² KSC-BC-2020-04, F00090, Pre-Trial Judge, *Decision on Request to Vary the Time Limit for the Defence's Rule 102(3) Request*, 19 October 2021, public, paras 16, 18(b).

¹⁰³ Second Detention Decision, para. 48; Third Detention Decision, para. 45.

¹⁰⁴ KSC-BC-2020-04, Transcript, 14 January 2022, confidential, p. 181.

¹⁰⁵ See for instance KSC-BC-2020-04, Transcript, 23 September 2021, public, pp 96-97; Transcript, 14 January 2022, confidential, pp. 181-182.

¹⁰⁶ See for instance KSC-BC-2020-04, Transcript, 21 June 2021, public, p. 64.

agreement as to the start of the trial,¹⁰⁷ any discussion as to the expected total length of his pre-trial detention remains premature and speculative.¹⁰⁸

V. DISPOSITION

50. 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 **Wednesday, 2 March 2022**, 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, 10 March 2022** and Mr Shala, if he wishes to do so, to file his submissions by no later than **Friday, 18 March 2022**.



Judge Nicolas Guillou

Pre-Trial Judge

Dated this Friday, 28 January 2022

At The Hague, the Netherlands.

¹⁰⁷ Defence Submissions, para. 3.

¹⁰⁸ See also *Krasniqi* Detention Appeal, para. 43; *Thaçi* Detention Appeal, para. 51.