



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2020-04

Before: **A Panel of the Court of Appeals Chamber**
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Fidelma Donlon

Date: 11 February 2022

Original language: English

Classification: Public

Public Redacted Version of

Decision on Pjetër Shala's Appeal Against Decision on Review of Detention

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively)¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”) is seised of an appeal filed on 22 November 2021 by Mr Pjetër Shala (“Appeal” and “Shala”, respectively),² against the “Decision on Review of Detention of Pjetër Shala” (“Impugned Decision”).³ The Specialist Prosecutor’s Office (“SPO”) responded on 3 December 2021 (“Response”) that the Appeal should be rejected.⁴ Shala replied on 14 December 2021 (“Reply”).⁵

I. BACKGROUND

1. On 16 March 2021, Shala was arrested in the Kingdom of Belgium (“Belgium”)⁶ pursuant to an arrest warrant issued by the Pre-Trial Judge⁷ and further to the confirmation of an indictment against him.⁸

¹ F00002, Decision Assigning a Court of Appeals Panel, 24 November 2021 (confidential, reclassified as public on 10 February 2022).

² F00001, Defence Appeal against the Decision on Review of Detention of Pjetër Shala of 10 November 2021, 22 November 2021 (confidential) (“Appeal”).

³ F00105/RED, Public Redacted Version of Decision on Review of Detention of Pjetër Shala, 10 November 2021 (confidential version filed on 10 November 2021) (“Impugned Decision”).

⁴ F00003, Prosecution response to Defence appeal against the ‘Decision on Review of Detention of Pjetër Shala’, 3 December 2021 (confidential) (“Response”), paras 2, 38.

⁵ F00004, Defence Reply to Prosecution Response to Appeal against the ‘Decision on Review of Detention of Pjetër Shala’, 14 December 2021 (confidential) (“Reply”).

⁶ F00013, Notification of Arrest of Pjetër Shala Pursuant to Rule 55(4), 16 March 2021 (strictly confidential and *ex parte*, reclassified as public on 29 April 2021).

⁷ F00008/A01/RED, Public Redacted Version of Arrest Warrant for Mr Pjetër Shala, 15 April 2021 (strictly confidential and *ex parte* version filed on 12 June 2020, reclassified as confidential on 19 October 2021).

⁸ F00007/RED, Public Redacted Version of the Decision on the Confirmation of the Indictment Against Pjetër Shala, 6 May 2021 (strictly confidential and *ex parte* version filed on 12 June 2020); see also F00010/A02, Indictment, 19 June 2020 (strictly confidential and *ex parte*, reclassified as confidential on 29 April 2021). A corrected indictment, namely the operative indictment, was filed on 1 November 2021 by the SPO pursuant to the Pre-Trial Judge’s Decision on Motion Challenging the Form of the Indictment. See F00098/A01, Corrected Indictment, 1 November 2021 (confidential); see also F00107/A01, Public Redacted Version of Corrected Indictment, 16 November 2021. See also F00089, Public Redacted Version of Decision on Motion Challenging the Form of the Indictment, 18 October 2021 (confidential version filed on 18 October 2021), para. 118.

2. On 15 April 2021, Shala was transferred to the detention facilities of the Specialist Chambers (“Detention Facilities”) in The Hague, the Netherlands.⁹
3. On 15 June 2021, the Pre-Trial Judge rejected Shala’s application for interim release.¹⁰
4. On 20 August 2021, the Court of Appeals Panel denied Shala’s appeal against the First Detention Decision.¹¹
5. On 10 September 2021, the Pre-Trial Judge reviewed Shala’s detention and ordered his continued detention.¹²
6. On 10 November 2021, after having received submissions from the SPO and Shala,¹³ the Pre-Trial Judge issued the Impugned Decision, ordering Shala’s continued detention on the basis that there continues to be a grounded suspicion that Shala has committed crimes within the subject-matter jurisdiction of the Specialist Chambers.¹⁴ The Pre-Trial Judge also found that the risk that Shala will abscond, obstruct the progress of Specialist Chambers proceedings or commit further crimes against those

⁹ F00019/RED, Public Redacted Version of ‘Notification of Reception of Pjetër Shala in the Detention Facilities of the Specialist Chambers and Conditional Assignment of Counsel’, filing F00019 dated 15 April 2021, 26 April 2021 (strictly confidential and *ex parte* version filed on 15 April 2021, reclassified as confidential on 29 April 2021), para. 2.

¹⁰ F00045/RED, Public Redacted Version of Decision on Pjetër Shala’s Request for Provisional Release, 23 June 2021 (confidential version filed on 15 June 2021) (“First Detention Decision”); F00039/RED, Public Redacted Version of Motion for Provisional Release, 17 June 2021 (confidential version filed on 27 May 2021).

¹¹ F00005/RED, Public Redacted Version of Decision on Pjetër Shala’s Appeal Against Decision on Provisional Release, 20 August 2021 (confidential version filed on 20 August 2021) (“First Appeal Decision”); F00001/RED, Public Redacted Version of Defence Appeal against the “Decision on Pjetër Shala’s Request for Provisional Release”, 31 August 2021 (confidential version filed on 28 June 2021).

¹² F00075/RED, Public Redacted Version of Decision on Review of Detention of Pjetër Shala, 10 September 2021 (confidential version filed on 10 September 2021) (“Second Detention Decision”).

¹³ F00093, Prosecution Submissions for Second Review of Detention, 25 October 2021; F00099, Defence Response to ‘Prosecution Submissions for Second Review of Detention’, 1 November 2021 (“Shala Response to SPO Submissions on Detention Review”).

¹⁴ Impugned Decision, paras 17-20.

perceived as being opposed to the Kosovo Liberation Army (“KLA”), including potential witnesses, continue to exist.¹⁵

7. The Pre-Trial Judge further found that the conditions Shala proposed for his conditional release (“Proposed Conditions”) could sufficiently mitigate the risk of flight, but that these conditions, the condition of house arrest with attendant conditions alternatively proposed by Shala (“Alternative Conditions”) or any additional conditions imposed by the Pre-Trial Judge are insufficient to mitigate the risk of Shala obstructing the progress of Specialist Chambers proceedings or committing further crimes.¹⁶ Finally, he found that Shala’s detention remained proportionate.¹⁷

8. In the Appeal, Shala develops eight grounds of appeal consisting of alleged errors, failure to consider relevant considerations and abuse of discretion committed by the Pre-Trial Judge.¹⁸ Shala requests that the Court of Appeals Panel grant the Appeal and order his immediate release or placement under house arrest at his residence in Belgium with any conditions found appropriate.¹⁹

II. STANDARD OF REVIEW

9. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.²⁰

¹⁵ Impugned Decision, paras 25, 28-29, 32-34.

¹⁶ Impugned Decision, paras 37-40.

¹⁷ Impugned Decision, paras 43-46.

¹⁸ Appeal, paras 3, 14.

¹⁹ Appeal, paras 46-47.

²⁰ KSC-BC-2020-07, F00005, Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention, 9 December 2020, paras 4-14. See also First Appeal Decision, para. 5.

III. PRELIMINARY MATTERS

10. The Appeals Panel notes that Shala and the SPO have not yet filed public redacted versions of their respective Appeal, Response and Reply.²¹ Considering that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential, and that Parties shall file public redacted versions of all non-public submissions filed before the Panel,²² the Panel orders the Parties to file public redacted versions of the above-mentioned filings within ten days of receiving notification of the present Decision.

IV. DISCUSSION

A. ALLEGED ERROR REGARDING THE BURDEN OF PROOF AND THE STANDARD APPLICABLE TO REVIEW OF DETENTION (GROUND 1)

1. Submissions of the Parties

11. Shala argues that, although the Pre-Trial Judge acknowledged the correct evidentiary standard, which is that the SPO bears the burden of proof and must provide specific arguments and concrete evidence to establish that continued detention is necessary at the time of review,²³ he did not apply this standard when assessing the existence of risks under Article 41(6)(b) of the Law and, in fact, reversed the burden of proof.²⁴ In Shala's view, the Pre-Trial Judge erred in relying on his previous findings without conducting a thorough assessment of the Defence

²¹ The Panel notes that Shala indicated in his Reply that he will file a public redacted version of the Appeal and Reply in due course; however, he has not yet done so.

²² See e.g. First Appeal Decision, para. 6. See also KSC-BC-2020-06, F0004/RED, Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention, 1 October 2021 (confidential version filed on 1 October 2021) ("*Veseli* Second Appeal Decision"), para. 9 (encouraging the parties to file public redacted versions of their filings as soon as possible, without waiting for an order to do so).

²³ Appeal, para. 15, referring to Impugned Decision, para. 16.

²⁴ Appeal, paras 15-16, referring to Impugned Decision, paras 28-29, 32. See also Reply, para. 8.

submissions and without determining whether there is any evidence provided by the SPO to demonstrate that the risks continue to exist.²⁵

12. On the one hand, Shala submits that the Pre-Trial Judge erred in dismissing arguments previously made simply because they “have already been addressed” and in relying on an “inappropriate interpretation” of the Court of Appeals Panel’s case law.²⁶

13. On the other hand, Shala argues that the Pre-Trial Judge, by shifting the applicable burden of proof to the Defence, allowed the SPO to evade its obligation to demonstrate that the requirements for detention continue to exist.²⁷ Shala further submits that the Pre-Trial Judge erred in accepting the SPO’s only new and yet “wholly speculative” argument that the disclosure of additional material to the Defence may have increased the risks under Article 41(6)(b) of the Law.²⁸

14. The SPO responds that the Pre-Trial Judge did not reverse the burden of proof and that rather, having considered the Parties’ submissions and applied the correct legal standard, he found that the SPO had demonstrated that the risks continued to exist and had potentially increased in light of additional disclosures of evidentiary material.²⁹ The SPO also submits that the Pre-Trial Judge was not required to consider submissions that had already been raised by Shala and addressed by the Pre-Trial Judge in prior decisions.³⁰ In the SPO’s view, the Pre-Trial Judge’s findings on the risks are based on specific, substantiated risks, in line with the jurisprudence of the European Court of Human Rights (“ECtHR”).³¹

²⁵ Appeal, paras 16, 18, referring to Impugned Decision, paras 25-26, 28-29, 33. See also Reply, para. 8.

²⁶ Appeal, paras 17-20.

²⁷ Appeal, paras 15-16, 21. See also Reply, para. 8

²⁸ Appeal, para. 16. See also Reply, para. 8

²⁹ Response, para. 16.

³⁰ Response, para. 16.

³¹ Response, paras 17-19.

2. Assessment of the Court of Appeals Panel

15. At the outset, the Panel notes that the Pre-Trial Judge correctly identified that the SPO: (i) bears the burden of establishing that the detention of the Accused is necessary and (ii) must provide specific arguments based on evidence that continued detention remains necessary at the time of the review.³² Although Shala acknowledges that the Pre-Trial Judge sets out the correct legal standard, he in essence challenges the Pre-Trial Judge's findings, and the Appeals Panel's jurisprudence,³³ 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" but must simply determine whether grounds for continued detention still exist.³⁴

16. The Panel finds that Shala's mere reference to these findings without any further explanation is insufficient to demonstrate that the Pre-Trial Judge erred in his approach. In any event, the Court of Appeals Panel recalls its findings in the *Haradinaj* Appeal Decision:

The competent panel has an obligation to review the reasons or circumstances underpinning detention and determine whether these reasons continue to exist under Article 41(6) of the Law. The competent panel is not required to make findings on the factors already decided upon in the initial ruling on detention but must examine these reasons or circumstances and determine whether they still exist. What is crucial is that the competent panel is satisfied that,

³² Impugned Decision, para. 16; First Appeal Decision, paras 24, 41. See also KSC-BC-2020-06, F00005, Decision on Kadri Veseli's Appeal Against Decision on Interim Release, 30 April 2021, para. 19.

³³ KSC-BC-2020-07, F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021 ("*Haradinaj* Appeal Decision"), para. 55; KSC-BC-2020-06, F00005/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021 (confidential version filed on 30 April 2021), para. 60; KSC-BC-2020-06, F00005/RED, Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Review of Detention, 1 October 2021 (confidential version filed on 1 October 2021), paras 14, 17.

³⁴ Impugned Decision, paras 16, 24, 28. See also Impugned Decision, paras 32, 38-39. Contra Appeal, para. 20

at the time of the review decision, grounds for continued detention still exist.³⁵

17. In this regard, the Panel also recalls that the duty to determine whether the circumstances underpinning detention “still exist”³⁶ is not a light one. It imposes on the competent panel the task to, *proprio motu*, assess whether it is still satisfied that, at the time of the review and considering the specific circumstances of the case when the review takes place, the detention of the Accused remains warranted.

18. The Panel found, in previous decisions,³⁷ that 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 in the case, such a change can nonetheless be determinative and shall be taken into consideration if raised before the Panel or *proprio motu*.³⁸ The Appeals Panel further considers that a panel may refer to findings in prior decisions if it is satisfied that the evidence or information underpinning those decisions still supports the findings made at the time of the review.³⁹ Additionally, the Panel recalls that the Pre-Trial Judge should not be expected to entertain submissions that merely repeat arguments that have already been addressed in his previous decisions.⁴⁰ In light of the foregoing, the Panel is satisfied that the Pre-Trial Judge applied the correct standard⁴¹ in line with the practice of the ECtHR.⁴²

³⁵ *Haradinaj* Appeal Decision, para. 55.

³⁶ See Article 41(10) of the Law: “whether reasons for detention on remand still exist”.

³⁷ See e.g. *Veseli* Second Appeal Decision, para. 15; KSC-BC-2020-06, F00008/RED Public Redacted Version of Decision on Hashim Thaçi’s Appeal Against Decision on Review of Detention, 27 October 2021 (confidential version filed on 27 October 2021) (“*Thaçi* Second Appeal Decision”), para. 19.

³⁸ Rule 57(2) of the Rules.

³⁹ See similarly ICC, *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-992-Red, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled “Decision on Mr Gbagbo’s Detention”, 19 July 2017, para. 39.

⁴⁰ See e.g. *Veseli* Second Appeal Decision, para. 16; *Thaçi* Second Appeal Decision, para. 20.

⁴¹ See Impugned Decision, para. 16. See also Impugned Decision, paras 24-25, 28-29, 32-33. Contra Appeal, para. 18; see also Appeal para. 20.

⁴² See e.g. ECtHR, *Merabishvili v. Georgia*, no. 72508/13, Judgement, 28 November 2017, para. 222 (reasoning must be based on specific substantiated risks).

19. To the extent that Shala argues that the Pre-Trial Judge erred in his assessment of whether the risks under Article 41(6)(b) of the Law continue to exist, the Panel will address these allegations directly in the relevant parts of the discussion below.⁴³

20. As a result, the Court of Appeals Panel finds that Shala has failed to show that the Pre-Trial Judge erred in his application of the proper standard to his review of Shala's continued detention. Shala's first ground of appeal is therefore dismissed.

**B. ALLEGED ERRORS REGARDING ASSESSMENT OF ARTICLE 41(6)(B) OF THE LAW
(GROUNDS 2, 3, 4, 5 AND 6)**

1. Article 41(6)(b)(i) of the Law (Ground 2)

21. At the outset, the Panel notes that under the second ground of appeal, Shala makes arguments which address solely the risk of flight under Article 41(6)(b) of the Law.⁴⁴ As the Pre-Trial Judge's conclusion that Shala's detention shall continue is not based on his findings regarding the risk of flight,⁴⁵ the Panel summarily dismisses this ground of appeal.⁴⁶

2. Article 41(6)(b)(ii) of the Law (Grounds 3, 4, 5 and 6)

(a) Submissions of the Parties

22. First, Shala submits that the Pre-Trial Judge erred in finding that the existence of protective measures does not affect the finding that there is a risk of obstruction.⁴⁷ In Shala's view, given the protective measures in force, he is not aware of the present

⁴³ See e.g. Appeal, para. 16; Reply, para. 8 (disclosure of evidence). The Panel will not further consider Shala's arguments regarding past statements about potential witnesses as they have been addressed and dismissed in the First Appeal Decision. See Reply, paras 4-7; see also First Appeal Decision, paras 34-38, 41-42.

⁴⁴ See Appeal, paras 22-23. See also Reply, para. 9.

⁴⁵ Impugned Decision, para. 37.

⁴⁶ See also First Appeal Decision, paras 28-29.

⁴⁷ Appeal, paras 14, 24, referring to Impugned Decision, para. 29.

whereabouts or contact details of protected witnesses, [REDACTED].⁴⁸ Shala further notes that [REDACTED] greatly reduced any perceived risk of obstruction.⁴⁹

23. Second, Shala argues that the Pre-Trial Judge erroneously found that the existence of protective measures demonstrated a “heightened” risk of obstruction.⁵⁰ In Shala’s view, this “generic finding” lacks reasoning and fails to take into account the particular reasons for the imposition of protective measures, their extent, and their relevance to the risk of obstruction in the present case.⁵¹

24. Third, Shala submits that the Pre-Trial Judge erred in finding that his increased insight into the material the SPO intends to rely on at trial augments the risks of obstruction and re-offending,⁵² given that (i) neither the Pre-Trial Judge nor the SPO has identified any specific material disclosed since the Second Detention Decision that would impact the risks;⁵³ (ii) the disclosure of exculpatory material may decrease the risks;⁵⁴ and (iii) the Accused’s fundamental right to access evidence against him should not be used to his detriment when assessing the necessity of detention.⁵⁵

25. Fourth, Shala argues that the Pre-Trial Judge erred in finding that the risks of obstructing and re-offending have been adequately substantiated by the SPO.⁵⁶ In his view, the SPO’s submissions on those risks are not more reasoned than its submissions on the risk of flight which the Pre-Trial Judge found to be generic and unsubstantiated.⁵⁷

⁴⁸ Appeal, para. 24.

⁴⁹ Appeal, para. 24.

⁵⁰ Appeal, paras 14, 25, referring to Impugned Decision, para. 29.

⁵¹ Appeal, paras 24-27. See also Reply, para. 12.

⁵² Appeal, para. 28, referring to Impugned Decision, paras 29, 33.

⁵³ Appeal, para. 29. See also Reply, para. 13.

⁵⁴ Appeal, para. 30. See also Reply, para. 13.

⁵⁵ Appeal, para. 31.

⁵⁶ Appeal, paras 32-33. See also Reply, para. 14.

⁵⁷ Appeal, para. 32, referring to *inter alia* Impugned Decision, para. 37.

26. With regard to protective measures, the SPO responds that Shala's argument that a broader protective measures regime decreases the risk of obstruction has already been addressed and rejected by the Court of Appeals Panel.⁵⁸ The SPO further argues that [REDACTED], increases the risk of obstruction [REDACTED].⁵⁹

27. Furthermore, the SPO submits that the Pre-Trial Judge's finding that the need for protective measures shows a heightened risk of obstruction in fact is based on objectively justifiable risks which protective witnesses face and the relatively limited scope of this case, which facilitates the identification of witnesses.⁶⁰

28. The SPO argues that Shala fails to articulate any error in the Pre-Trial Judge's conclusion that the Accused's increased knowledge of incriminating evidence aggravates the risk of obstruction.⁶¹ In the SPO's view, this finding is supported by the decision of the Court of Appeals Panel.⁶² The SPO argues that Shala fails to address the multiple incriminating disclosure batches which occurred between the Second Detention Decision and the Impugned Decision but instead refers to exculpatory material disclosed only after the Impugned Decision.⁶³

29. The SPO finally submits that the Pre-Trial Judge did not err in finding that the risks of obstructing and re-offending have been adequately substantiated as the Impugned Decision is based on specific and substantiated facts, including [REDACTED].⁶⁴

30. Shala replies that the SPO's submission that [REDACTED] increases the risk of obstruction [REDACTED], is entirely speculative and unsubstantiated.⁶⁵

⁵⁸ Response, paras 22-23, referring to First Appeal Decision, para. 41.

⁵⁹ Response, para. 24.

⁶⁰ Response, para. 25.

⁶¹ Response, paras 27, 29.

⁶² Response, para. 28, referring to First Appeal Decision, para. 38.

⁶³ Response, para. 27.

⁶⁴ Response, para. 30, referring to Impugned Decision, paras 29, 33.

⁶⁵ Reply, para. 11.

(b) Assessment of the Court of Appeals Panel

31. In his assessment of the risk of obstructing the progress of the Specialist Chambers proceedings under Article 41(6)(b)(ii) of the Law, the Pre-Trial Judge relied on the following factors: (i) [REDACTED]; and (ii) his increased insight into the evidence underpinning the charges against him, based on the additional disclosure of incriminating material following the Second Detention Decision.⁶⁶ The Pre-Trial Judge also found that “the necessity for [protective] 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.”⁶⁷

32. The Appeals Panel first turns to Shala’s arguments with regard to the existence of protective measures.⁶⁸ As to the impact of the existence of protective measures on the risk of obstruction [REDACTED],⁶⁹ the Panel agrees with the SPO that Shala primarily repeats arguments on appeal which were unsuccessful, not only before the Pre-Trial Judge, but also previously before the Panel.⁷⁰ Similarly, the Panel finds no error in the Pre-Trial Judge’s conclusion that the existence of protective measures in the present case does not affect the finding that there is a risk of obstruction,⁷¹ nor that the Pre-Trial Judge failed to provide specific reasoning in support of this conclusion.

33. On appeal, Shala argues for the first time that the Pre-Trial Judge’s risk assessment is undermined by [REDACTED] – which in his view greatly reduces the

⁶⁶ Impugned Decision, para. 29.

⁶⁷ Impugned Decision, para. 29.

⁶⁸ Shala’s third ground of appeal; see Appeal, para. 24.

⁶⁹ Appeal, paras 24-27. See also Reply, paras 7, 11.

⁷⁰ See First Appeal Decision, paras 40-41, wherein the Panel found that the Pre-Trial Judge was aware of the existence of protective measures in reaching his determination of the risk of obstruction and did not err in reaching his conclusion as to the existence of such a risk given the specific circumstances of the case, namely in light of [REDACTED] referred to by the Pre-Trial Judge, the fact that [REDACTED] and [REDACTED]. See also Response, paras 2, 22-23.

⁷¹ Impugned Decision, para. 29.

risk of obstruction.⁷² This information seems to have been disclosed to the Pre-Trial Judge and the Defence only in the SPO's submissions for the fourth status conference filed on 9 November 2021,⁷³ namely one day before the expiration of the deadline for the issuance of the decision on detention review,⁷⁴ and has not been considered as a factor in the Impugned Decision. In any event, in the Panel's view, [REDACTED].⁷⁵ Consequently, the Panel finds that it is still not unreasonable for the Pre-Trial Judge to conclude that the risk of Shala obstructing the progress of proceedings continues to exist.⁷⁶

34. Likewise, the Panel sees no error in the Pre-Trial Judge's finding that, in the present case, the necessity for protective measures demonstrates a heightened risk of obstruction.⁷⁷ Contrary to Shala's contention,⁷⁸ this does not constitute a "generic finding" applicable to all cases where protective measures have been granted. Rather, the Pre-Trial Judge explicitly considered the specificities of the present case.⁷⁹ The risk of obstruction is not "heightened" solely on account of the existence of protective measures. The "heightened" degree of risk is also based on the fact that the scope of the charges is limited, which makes the events underlying the charges easily distinguishable,⁸⁰ and thus witnesses and victims more easily identifiable than in other proceedings involving more extensive charges.⁸¹ The Panel notes furthermore that the Pre-Trial Judge's finding does not merely concern

⁷² Appeal, para. 24. See also Reply, para. 11.

⁷³ F00102, Prosecution submissions for fourth status conference, 9 November 2021 (confidential), para. 10. A public redacted version is also available. See F00102/RED, Public Redacted Version of Prosecution submissions for fourth status conference, 9 November 2021, para. 10.

⁷⁴ Article 41(10) of the Law and Rule 57(2) of the Rules.

⁷⁵ See First Appeal Decision, para. 36, referring to First Detention Decision, para. 33.

⁷⁶ Impugned Decision, para. 29.

⁷⁷ See Impugned Decision, para. 29.

⁷⁸ Shala's fourth ground of appeal; see Appeal, paras 25-27.

⁷⁹ Impugned Decision, para. 29.

⁸⁰ See Impugned Decision, para. 29. In the Second Detention Decision, the Pre-Trial Judge specified that the relatively limited scope of the charges "renders victims and witnesses in the present case more identifiable than in other proceedings involving more extensive charges". See Second Detention Decision, para. 31.

⁸¹ See Second Detention Decision, para. 31.

[REDACTED], but all witnesses and victims in this case, [REDACTED].⁸² Shala fails to demonstrate an error in the Pre-Trial Judge's approach or any failure to provide adequate reasoning.

35. Turning next to Shala's arguments on the impact of the Accused's increased insight into incriminating evidence,⁸³ the Panel notes that the Pre-Trial Judge found that the additional disclosure of incriminating material following the last review of detention increases the risk of obstruction considering that Shala "has acquired a better understanding of the SPO's case, including the witnesses that it will rely upon at trial."⁸⁴

36. The Panel recalls that while disclosure of evidence may be a relevant factor, it is but one factor that may be taken into account when determining whether continued detention appears necessary.⁸⁵ It is however not sufficient in itself to suggest that the Accused will pose a danger to witnesses or obstruct the proceedings.⁸⁶ The Panel observes that in the Impugned Decision, the Pre-Trial Judge considered this factor together with other factors to determine the existence of a risk of obstruction.⁸⁷

⁸² See e.g. F00053/CONF/RED, Confidential Redacted Version of Second Decision on Specialist Prosecutor's Request for Protective Measures, 12 July 2021 (confidential) (strictly and *ex parte* version filed on 12 July 2021), paras 16-18, 30(a); F00072/CONF/RED, Confidential Redacted Version of Consolidated Decision on Deferred Request for Protective Measures and Request to Defer Disclosure Obligations, 9 September 2021 (confidential) (strictly and *ex parte* version filed on 9 September 2021), paras 15, 22(a).

⁸³ Shala's fifth ground of appeal; see Appeal, paras 28-31.

⁸⁴ Impugned Decision, para. 29.

⁸⁵ *Veseli* Second Appeal Decision, para. 31, referring to ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-278-Red, Public redacted version of Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", 26 October 2012, para. 65.

⁸⁶ ICTY, *Prosecutor v. Stanišić*, IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005, para. 28; ICTY, *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000, para. 19. See also ICTY, *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, Decision on Motion by Momir Talić for Provisional Release, 28 March 2001, para. 34.

⁸⁷ Impugned Decision, para. 29.

37. In that respect, the Panel notes that between the issuance of the Second Detention Decision on 10 September 2021 and the issuance of the Impugned Decision on 10 November 2021, 109 pieces of incriminating evidentiary material were disclosed to the Defence.⁸⁸ In the Panel's view, the fact that Shala may have become aware of the existence of exculpatory material – an argument raised for the first time on appeal – is irrelevant.⁸⁹ It would not change the fact that increased access to the evidence provides an increased *ability* to obstruct the proceedings as more detailed evidence becomes available to the Accused.⁹⁰

38. Shala fails to show that it was unreasonable for the Pre-Trial Judge to rely on his increased awareness of the evidence underlying the charges against him, and to conclude that, in view of [REDACTED], it contributes to the risks identified under Article 41(6)(b)(ii) of the Law. For these reasons, contrary to Shala's affirmation,⁹¹ the Pre-Trial Judge's assessment does not undermine the presumption of innocence and is not inconsistent with Shala's fundamental procedural rights.

39. Moreover, the Panel finds that Shala's mere reference to "unsubstantiated and generic submissions of the SPO" without any further explanation is insufficient to demonstrate that the Pre-Trial Judge erred in his assessment.⁹² The Panel therefore summarily dismisses this undeveloped assertion. In any event, the Panel has already found that the Pre-Trial Judge applied the proper standard to his review of Shala's continued detention.⁹³

⁸⁸ This figure takes into account one disclosure batch of materials under Rule 102(1)(a) of the Rules, and six disclosure batches of materials under Rule 102(1)(b) of the Rules, containing a total of 109 pieces of incriminating material, comprising just over 2400 pages. This includes all materials within these batches, and therefore does not account for duplication of information due to the inclusion of translated, redacted and/or revised versions of certain materials within these disclosure batches.

⁸⁹ See Appeal, para. 30, referring to Disclosure 24. The Panel observes that in his Appeal, Shala refers in particular to a Rule 103 package, which was disclosed after the Impugned Decision was issued and which "contains serious exculpatory material".

⁹⁰ *Thaçi* Second Appeal Decision, para. 40.

⁹¹ Appeal, para. 31; Reply, para. 12.

⁹² Shala's sixth ground of appeal; see Appeal, paras 32-33.

⁹³ See above, para. 20.

40. Consequently, Shala's third and fourth grounds of appeal and the relevant parts of Shala's fifth and sixth grounds of appeal are dismissed.

3. Article 41(6)(b)(iii) of the Law (Grounds 5 and 6)

41. The Panel notes that under his fifth and sixth grounds of appeal, Shala makes arguments which simultaneously address the risks under Article 41(6)(b)(ii) and (iii) of the Law.⁹⁴ Given that the Panel has found no error in the Pre-Trial Judge's conclusion that a risk of obstruction existed under Article 41(6)(b)(ii) of the Law, making continued detention necessary, it does not need to address the alleged errors with regard to Article 41(6)(b)(iii) of the Law.⁹⁵

42. The Panel shall turn to address whether the Pre-Trial Judge erred in finding that the risks of obstruction and of committing further crimes could not be mitigated by the Proposed or Alternative Conditions.

C. ALLEGED ERRORS REGARDING ASSESSMENT OF CONDITIONS OF RELEASE (GROUNDS 7 AND 8)

1. Submissions of the Parties

43. Shala submits that the Pre-Trial Judge erred in finding that the Proposed and Alternative Conditions, namely house arrest in Belgium with attendant conditions, are insufficient to mitigate the risks under Article 41(6)(b) of the Law without providing adequate reasoning or thoroughly assessing the conditions.⁹⁶ In particular, Shala submits that in his finding on the possibility of using devices belonging to others, the Pre-Trial Judge ignored the proposed condition that any visitor would be

⁹⁴ Appeal, paras 28-33.

⁹⁵ See e.g. First Appeal Decision, para. 43.

⁹⁶ Appeal, paras 34-35, 42, referring to Impugned Decision, paras 38, 40. See also Reply, para. 15.

required to surrender their electronic device before entering Shala's residence and would be subject to subsequent search and monitoring.⁹⁷

44. Shala further argues that the Pre-Trial Judge's finding that no possible condition could mitigate the risk of unlawful communication using code or obscure language is "speculative and unsubstantiated", and presumes criminal conduct on the part of the Accused, his family, and the security staff.⁹⁸ In Shala's view, the Pre-Trial Judge also erred in finding that the only possibility for "effective monitoring" is within the "controlled environment" of the Detention Facilities, thus misunderstanding the reality at the Detention Facilities.⁹⁹ According to Shala, the Pre-Trial Judge failed to explore the possibility of monitoring, including in Shala's native language, in the event of provisional release and house arrest in Belgium.¹⁰⁰ In particular, the Pre-Trial Judge erred in finding that the "the absence of guarantees provided by Belgium" was a reason for "not requesting further information from Belgium".¹⁰¹

45. Furthermore, Shala submits that the Pre-Trial Judge erred in denying, without reasoning, his request for admission of expert evidence on the capability of monitoring Shala's communications if released or under house arrest in Belgium.¹⁰²

46. Finally, Shala concludes that, because of the errors identified above,¹⁰³ the Pre-Trial Judge set an excessively high and untenable standard for proposed conditions of release which cannot be satisfied by any conditions, rendering it "virtually impossible" for the Accused "to entertain the slightest hope of provisional release".¹⁰⁴

⁹⁷ Appeal, para. 36.

⁹⁸ Appeal, paras 37, 39.

⁹⁹ Appeal, paras 37-38, 45.

¹⁰⁰ Appeal, para. 37.

¹⁰¹ Appeal, para. 37, referring to Impugned Decision, para. 38.

¹⁰² Appeal, paras 40-41.

¹⁰³ See above, paras 43-45.

¹⁰⁴ Shala's eighth ground of appeal; see Appeal paras 14, 43-45.

47. The SPO responds that contrary to Shala's assertion, the Pre-Trial Judge did consider the conditions proposed by Shala, including the new proposals that, *inter alia*, would require visitors to surrender electronic devices before entering Shala's residence, but found that they would be insufficient to mitigate certain risks.¹⁰⁵ In the SPO's view, the Proposed and Alternative Conditions also fail to address the risk that confidential information could be communicated by Shala to others inside the residence by a wide variety of means.¹⁰⁶ The SPO further contends that unlike the applicable regime at the Detention Facilities, the Belgian authorities would not be in a position to recognise confidential information in this case, including references to protected witnesses, and notes that Shala merely dismisses these concerns that he calls speculative.¹⁰⁷ With respect to the expert evidence requested by Shala, the SPO submits that the Pre-Trial Judge was correct in finding that such evidence was unnecessary.¹⁰⁸

48. Finally, the SPO considers that the Pre-Trial Judge applied the correct standard in evaluating the proposed conditions of release as is demonstrated by his case-specific analysis and finding that certain proposed conditions are adequate to mitigate the moderate risk of flight posed by Shala, but setting conditions to mitigate the risk of obstruction or new criminal conduct is more difficult.¹⁰⁹

49. Shala replies that the SPO's concession that no proposed conditions can mitigate the perceived risk of obstruction confirms that the standard in evaluating proposed conditions of release has been set too high.¹¹⁰

¹⁰⁵ Response, para. 32.

¹⁰⁶ Response, para. 33.

¹⁰⁷ Response, para. 34.

¹⁰⁸ Response, para. 35.

¹⁰⁹ Response, paras 36-37.

¹¹⁰ Reply, paras 16-17.

2. Assessment of the Court of Appeals Panel

50. The Pre-Trial Judge found that the Proposed Conditions would not mitigate the risk of Shala employing a device belonging to a third person or asking others to use their devices for the purpose of obstructing the proceedings or committing further crimes, nor would they ensure effective monitoring of Shala's communication.¹¹¹ With regard to the possibility of house arrest in Belgium, Shala's country of residence, and attendant conditions, the Pre-Trial Judge found that these options would not prevent unmonitored conversations between Shala and approved visitors.¹¹² In the Pre-Trial Judge's view, any further conditions, such as visits monitored by the Belgian authorities, would insufficiently mitigate the risk of obstruction or new criminal conduct, and it is only through the communication monitoring framework applicable at the Detention Facilities that Shala's communications can be sufficiently restricted and monitored.¹¹³ Furthermore, given the absence of guarantees from Belgium and the inadequacy of the conditions, the Pre-Trial Judge did not find any basis for requesting further information from Belgium.¹¹⁴ Finally, the Pre-Trial Judge did not find that expert evidence on communication monitoring as requested by the Defence was necessary.¹¹⁵

51. The Court of Appeals Panel will first address Shala's claim that the Pre-Trial Judge failed to conduct a thorough assessment of the conditions of release.

52. The Panel notes that Shala proposed extensive conditions, in particular the Alternative Conditions, which may, in the abstract, restrict and monitor his communications outside of the Detention Facilities.¹¹⁶ For example, Shala proposed that visitors surrender their electronic devices prior to entering his residence, be

¹¹¹ Impugned Decision, para. 38.

¹¹² Impugned Decision, para. 38.

¹¹³ Impugned Decision, paras 38, 40.

¹¹⁴ Impugned Decision, para. 39.

¹¹⁵ Impugned Decision, para. 39.

¹¹⁶ Shala Response to SPO Submissions on Detention Review, paras 37-38.

searched or consent to subsequent monitoring, in order to prevent him from using electronic devices belonging to others. The Panel first observes that contrary to Shala's contention,¹¹⁷ the Pre-Trial Judge did not ignore these Alternative Conditions but considered them and found that they would not prevent unmonitored conversations between Shala and approved visitors.¹¹⁸ The Panel considers that the Pre-Trial Judge's finding that Shala's communications can only be sufficiently restricted and monitored at the Detention Facilities to address the risk of obstruction implies that the Alternative Conditions cannot sufficiently address such risk.

53. The Panel nonetheless considers that Shala is correct to note that he may still have unsupervised visits while in detention;¹¹⁹ and that illicit messages and instructions could still be passed on in the Detention Facilities. However, such unmonitored communications are strictly limited. For instance, the accused are allowed unmonitored "private visits" but only for certain close family members and within limited time periods.¹²⁰ The Panel recalls that communications and visits in detention are subject to some degree of monitoring in the controlled environment of the Detention Facilities, in accordance with the applicable legal framework.¹²¹

¹¹⁷ Appeal, para. 36.

¹¹⁸ Impugned Decision, para. 38. See also Impugned Decision, para. 36 (especially fn. 68).

¹¹⁹ See Appeal, para. 38.

¹²⁰ See Registry Practice Direction on Detainees Visits and Communications, KSC-BD-09/Rev1/2020, 23 September 2020 ("Practice Direction on Visits and Communications"), Article 24. According to this provision, "[a] Detainee shall be allowed to spend time with his or her spouse or partner and/or children in a private visit at least once every three (3) months for a period of up to three (3) hours. Private visits shall be conducted outside the sight and hearing of Detention Officer." See also e.g. *Veseli* Second Appeal Decision, fn. 95; KSC-BC-2020-06, F00005, Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Review of Detention, 1 October 2021 (confidential version filed on 1 October 2021) ("*Selimi* Second Appeal Decision"), fn. 125.

¹²¹ See notably Practice Direction on Visits and Communications. In the Detention Facilities, visits with a detainee are conducted within the sight and hearing of Detention Officers and they may order the recording, listening to, summarising, and transcribing of visits with certain visitors (Article 15 of the Practice Direction). In cases of urgency, for instance if it is perceived that a detainee is using coded language to interfere with the proceedings, the detention regime allows the Chief Detention Officer or a Detention Officer, to apply urgent security measures, in particular restrictions on a detainee's visits and communications. See Practice Direction on Visits and Communications, Article 8(1). Comparable urgent security measures are also permitted during Counsel visits and communications. See Practice Direction on Counsel Visits and Communications, KSC-BD-10/Rev1, 23 September 2020, Article 16. See

However, the Panel considers that whether a similar level of monitoring of conversations can be implemented inside as well as outside the Detention Facilities, in particular under conditions of house arrest in Belgium, remains unknown.

54. In that respect, the Panel finds that further information on the detention regime at the Detention Facilities, notably on the available restrictions on visits and communications and the communication monitoring regime, would have been beneficial to assist the Pre-Trial Judge in making an informed decision. The Panel notes that the Pre-Trial Judge requested submissions from the Registrar to this effect in another case before him and considers that such information would assist the Pre-Trial Judge in his assessment of the mitigation of the identified risks in the current case.¹²² The Panel therefore instructs the Pre-Trial Judge to request further submissions from the Registrar on the detention regime at the Detention Facilities.

55. Turning next to the issue of guarantees, the Pre-Trial Judge found that there was no basis for requesting further information from Belgium given the “absence of guarantees provided by Belgium” and the insufficiency of the Proposed and Alternative Conditions.¹²³ In the present case, the Panel observes that Shala requests to be released in Belgium under various conditions to be implemented by the Belgian authorities, but he does not appear to have sought the consent of the Belgian authorities nor requested any further information on Belgium’s ability to enforce such conditions. Shala also did not request the Pre-Trial Judge to consult with Belgium regarding the conditions of release or to obtain guarantees, and only refers to the fact that the Pre-Trial Judge did not do so on appeal.¹²⁴

also Practice Direction on Visits and Communications, Article 8(3). See also e.g. *Veseli* Second Appeal Decision, para. 47; *Selimi* Second Appeal Decision, para. 53.

¹²² See KSC-BC-2020-06, F00522, Order to the Registrar to Provide Information on the Detention Regime, 13 October 2021 (confidential, reclassified as public on 3 December 2021). See also KSC-BC-2020-07, F00393, Order to the Registrar to Provide Information on the Detention Regime, 22 October 2021.

¹²³ Impugned Decision, para. 38.

¹²⁴ See Appeal, para. 37.

56. However, the Panel finds merit in Shala's contention that the Pre-Trial Judge's reasoning, according to which "the absence of guarantees provided by Belgium" was a reason for "not requesting further information from Belgium", is *circular* and thus insufficient.¹²⁵ In fact, if the Pre-Trial Judge considered that preliminary guarantees from Belgium were needed before he requested further information, he should have invited the Defence to first inquire with the Belgian authorities whether they would consent to Shala's conditional release on their territory and could effectively enforce the conditions, such as monitoring visits. The Panel recalls that conducting such consultation would fall within the discretionary powers the Pre-Trial Judge is vested with pursuant to Article 39(13) of the Law with regard to detention related matters, depending on the circumstances of the case.¹²⁶ The Panel considers that while it is incumbent upon the Pre-Trial Judge to consider all reasonable alternative conditions,¹²⁷ the Pre-Trial Judge's enquiry shall be guided by the Parties' submissions and proposals.

57. In light of the specific circumstances of this case, the Panel finds that the Pre-Trial Judge abused his discretion when concluding that none of the Proposed or Alternative Conditions, nor any additional condition, could mitigate the identified risks without first inviting the Defence to inquire into Belgium's willingness and capacity to implement such conditions. The Panel considers that more specific information would have put the Pre-Trial Judge in a position to assess the feasibility of implementing the conditions proposed by Shala. The Panel stresses though that given that an individual's liberty is at stake when considering conditional release, the lack of preliminary guarantees from a Third State does not prevent a panel from

¹²⁵ See Appeal, para. 37.

¹²⁶ First Appeal Decision, paras 59-60 and references therein.

¹²⁷ See KSC-BC-2020-06, F00005, Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Interim Release, 30 April 2021 (confidential version filed on 30 April 2021), paras 85-86, referring in fn. 141 to KSC-CC-PR-2020-09, F00006, Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020, 26 May 2020, para. 70.

requesting information from that state if the Defence, or more generally the Parties, have failed to obtain said guarantees or if the information provided by that state is not sufficient to enable the panel to make an informed decision.¹²⁸

58. The Panel will now address Shala's argument that the Pre-Trial Judge should have requested expert evidence on communication monitoring outside of the Detention Facilities, and in particular in Belgium, including its capacity to monitor communications in Albanian.¹²⁹ The Panel recalls that it is also within the discretion of the Pre-Trial Judge to decide whether it is necessary to seek expert evidence on communication monitoring, depending on the circumstances of the case.¹³⁰ In the present case, while the Panel finds that more specific information would have put the Pre-Trial Judge in a position to assess the feasibility of implementing the conditions proposed by Shala, the Panel considers that the production of expert evidence would be premature *at this stage*, prior to the Defence seeking information and guarantees from Belgium. In fact, the Panel is of the view that the Belgian authorities, in particular the Belgian judicial and police authorities, are best placed to provide information regarding Belgium's capacity to monitor communications in a situation of conditional release, and in general its ability to enforce the Proposed and Alternative Conditions, or any further condition the Pre-Trial Judge identifies as necessary to mitigate the identified risks.¹³¹ Accordingly, at this stage, the Panel dismisses Shala's arguments with regard to possible expert evidence.

59. Finally, in relation to Shala's ground of appeal that the Pre-Trial Judge erred in setting an excessively high standard for proposed conditions of release,¹³² in light of

¹²⁸ See e.g. *Veseli* Second Appeal Decision, paras 49-51.

¹²⁹ Appeal, paras 40-41. See also Shala Response to SPO Submissions on Detention Review, paras 7, 34.

¹³⁰ First Appeal Decision, para. 60.

¹³¹ See Shala Response to SPO Submissions on Detention Review, paras 7, 34. See also Appeal, paras 40-41.

¹³² Appeal, paras 43-46; Reply, paras 16-17.

the fact that the Panel grants in part Shala's seventh ground of appeal, it finds it is unnecessary to consider this ground of appeal.

60. In light of the above, the Court of Appeals Panel grants, in part, Shala's seventh ground of appeal and remands the matter to the Pre-Trial Judge in order to (i) seek information from the Registrar on the detention regime applicable to Shala at the Detention Facilities; (ii) invite the Defence to consult with the Belgian authorities on their willingness and capacity to enforce the Proposed Conditions, the Alternative Conditions or any additional conditions; and accordingly (iii) assess whether such conditions could mitigate the identified risks. The Panel notes though that seeking information in order to make an informed decision does not in any way oblige a panel to grant conditional release; rather, it merely provides a more solid basis for a panel to take a sufficiently informed decision. Finally, the Court of Appeals Panel declares that Shala's eighth ground of appeal is moot.

V. DISPOSITION

61. For these reasons, the Court of Appeals Panel:

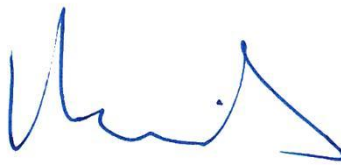
GRANTS in part Shala's seventh ground of appeal;

REMANDS the matter to the Pre-Trial Judge for further consideration consistent with paragraphs 54, 56 to 57, and 60 of this Decision;

DISMISSES all other aspects of the Appeal (Shala's first, second, third, fourth, fifth, sixth and eighth grounds of appeal);

ORDERS Shala to file public redacted versions of his Appeal and Reply within ten days of receiving notification of the present Decision; and

ORDERS the SPO to file a public redacted version of its Response within ten days of receiving notification of the present Decision.



**Judge Michèle Picard,
Presiding Judge**

Dated this Friday, 11 February 2022

At The Hague, the Netherlands