

Case No.: KSC-BC-2020-04
Before: President of Kosovo Specialised Chambers
Judge Ekaterina Trendafilova
Registrar: Dr Fidelma Donlon
Date: 21 February 2022
Filing Party: Defence Counsel
Original Language: English
Classification: Public

THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

**Public Redacted Version of “Defence Appeal against the Decision on
Review of Detention of Pjetër Shala of 10 November 2021”**

Specialist Prosecutor’s Office
Jack Smith

Specialist Counsel for the Accused
Jean-Louis Gilissen
Hedi Aouini

I. INTRODUCTION

1. Pursuant to Articles 41(2) and 45(2) of Law No. 05/L-053 ('Law') and Rules 58(1), 58(2) and 170 of the Rules of Procedure and Evidence ('Rules'), the Defence for Mr Pjetër Shala ('Defence' and 'Accused' respectively) hereby submits its appeal against the Decision on Review of Detention of Pjetër Shala ('Impugned Decision').¹
2. The Impugned Decision ordered Mr Shala's continued detention, finding that there is a risk that Mr Shala will abscond, obstruct the progress of SC proceedings, or commit further crimes and that no conditions imposed on provisional release could mitigate the risk of obstructing the proceedings or committing further crimes, while the time Mr Shala has spent in pre-trial detention is proportionate.²
3. The Defence submits that there are eight grounds of appeal entailing: (i) a series of errors of law, including violations of fundamental human rights; (ii) a series of flagrant factual errors amounting to findings that were not reasonably open to the Pre-Trial Judge on the evidence; (iii) a series of instances in which the Pre-Trial Judge took into account irrelevant considerations, and failed to take into account relevant considerations; and, in consequence, (iv) a series of discernible errors in the exercise of the Pre-Trial Judge's discretion.
4. These errors, individually and cumulatively, led to the erroneous finding that Mr Shala's continued detention in these circumstances is justified.

¹ KSC-BC-2020-04, F00105, Decision on Review of Detention of Pjetër Shala, 10 November 2021 (confidential) ('Impugned Decision'). All further references to filings in this Appeal concern Case No. KSC-BC-2020-04 unless otherwise indicated.

² Impugned Decision, paras. 25, 29, 33, 34, 40, 46, 47.

5. The Defence requests the Appeals Chamber to correct these errors and provisionally release Mr Shala.

II. PROCEDURAL BACKGROUND

6. The relevant procedural background is set out in the Appeals Chamber's Decision on Pjetër Shala's Appeal Against Decision on Provisional Release of 20 August 2021, which denied the appeal against the Pre-Trial Judge's first decision on the Defence request for provisional release.³
7. On 2 August 2021 and 1 September 2021 respectively, the Specialist Prosecutor's Office ('SPO') and the Defence filed their submissions on the first review of detention.⁴ On 9 September 2021, the Registrar made submissions on issues raised by the Defence concerning Mr Shala's conditions of detention.⁵ On 10 September 2021, the Pre-Trial Judge issued his Decision on Review of Detention of Pjetër Shala.⁶
8. On 25 October 2021, the SPO filed its submissions for the purposes of the second review of detention.⁷
9. On 1 November 2021, the Defence filed its response to the SPO's submissions.⁸
10. On 10 November 2021 the Pre-Trial Judge issued the Impugned Decision.

³ IA001, F00005, Decision on Pjetër Shala's Appeal Against Decision on Provisional Release, 20 August 2021 (confidential); F00045, Decision on Pjetër Shala's Request for Provisional Release, 15 June 2021 (confidential) ('First Detention Decision').

⁴ F00058, Prosecution submissions for first review of detention, 2 August 2021; F00066, Defence Response to Prosecution Submissions for First Review of Detention, 1 September 2021.

⁵ F00073, Registrar Submission Pursuant to Rule 23(2) on Conditions of Detention, 9 September 2021 (confidential).

⁶ F00075, Decision on Review of Detention of Pjetër Shala, 10 September 2021 (confidential).

⁷ F00093, Prosecution submissions for second review of detention, 25 October 2021.

⁸ F00099, Defence Response to Prosecution Submissions for Second Review of Detention, 1 November 2021.

III. APPLICABLE LAW

11. According to the jurisprudence of the Appeals Chamber, the standard of review that applies to interlocutory appeals requires: (i) an error of law invalidating the decision; (ii) an error of fact occasioning a miscarriage of justice; or, (iii) a discernible error in the exercise of discretion, in that the impugned decision is based on an incorrect interpretation of governing law, a patently incorrect conclusion of fact, or is so unfair or unreasonable as to constitute an abuse of discretion.⁹
12. Article 29(2) of the Kosovo Constitution provides that *'everyone who is arrested shall be entitled to [...] release pending trial, unless the judge concludes that the person is a danger to the community or presents a substantial risk of fleeing before trial'*. It also states that *"[n]o one shall be deprived of liberty except in the cases foreseen by law and [...] when deprivation of liberty is reasonably considered necessary to prevent commission of another criminal act, and only for a limited time before trial.'*
13. Article 3(2)(3) of the Law provides that international human rights law setting criminal justice standards, including the European Convention on Human Rights ('ECHR'), are to be attributed *'superiority'* over other provisions of Kosovo law by virtue of Article 22 of the Constitution.

IV. GROUNDS OF APPEAL

14. The Defence raises the following eight grounds of appeal: (i) the Pre-Trial Judge erroneously reversed the applicable burden of proof in assessing the risk of fleeing, obstructing or re-offending; (ii) the Pre-Trial Judge erred in finding that Mr Shala's rejection of the legitimacy of the SC is a factor to be taken into consideration against him for the purposes of assessing the risk of absconding;

⁹ KSC-BC-2020-07/IA001/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, paras. 4-14; IA001, F00005, Decision on Pjetër Shala's Appeal Against Decision on Provisional Release, 20 August 2021 (confidential), para. 5 and authorities cited therein.

(iii) the Pre-Trial Judge erred by finding that the existence of protective measures does not affect the finding on risk of obstruction; (iv) the Pre-Trial Judge erroneously found a 'heightened' risk of obstruction demonstrated by the existence of protective measures; (v) the Pre-Trial Judge erred in finding that Mr Shala' s increased insight into material the Prosecution intends to rely at trial increased the risks of obstruction and re-offending; (vi) the Pre-Trial Judge erroneously found that the risks of obstructing and re-offending have been adequately substantiated; (vii) the Pre-Trial Judge erroneously found that the proposed conditions cannot mitigate the risks under Article 41(6)(b) of the Law; and (viii) the Pre-Trial Judge set an excessively high and untenable standard for proposed conditions of release.

Ground One: Reversal of Applicable Burden of Proof in Assessing the Risks of Fleeing, Obstructing or Re-Offending

15. Although the Pre-Trial Judge correctly acknowledges that '*[t]he SPO bears the burden of establishing that the detention of the Accused is necessary. [...]*' and that '*[t]his means that the SPO must provide specific arguments and concrete evidence to establish that continued detention is necessary at the time of the review*',¹⁰ the Pre-Trial Judge did not apply this evidentiary standard when assessing the existence of risks under Article 41(6)(b) of the Law.¹¹
16. Instead of anticipating such '*specific arguments and concrete evidence*' establishing the necessity of the continuation of detention '*at the time of the review*' by the SPO, the Pre-Trial Judge relied on his previous findings without a thorough assessment of the Defence submissions and accepted the SPO's *only* new and wholly speculative argument that the risk of obstructing the Specialist Chambers

¹⁰ Impugned Decision, para. 16.

¹¹ Impugned Decision, paras. 28, 29, 32.

(‘SC’) proceedings and committing further crimes *may* have increased due to the SPO’s disclosure of additional material to the Accused.¹²

17. The Defence recalls that the burden is not on Mr Shala but on the SPO to demonstrate that it remains necessary to detain Mr Shala.¹³ Instead, the Pre-Trial Judge erroneously found that the Defence (and not the SPO) made generic submissions and dismissed as unsubstantiated the Defence submission that there is no specific evidence that can demonstrate a sufficiently real risk that Mr Shala will abscond, obstruct the proceedings, or commit further crimes.¹⁴
18. The Defence recalls that binding case law from the ECtHR requires that ‘[the] risks must be duly substantiated and the authorities’ reasoning on those points cannot be abstract, general or stereotyped.’¹⁵ Yet, this is exactly an accurate description of the Pre-Trial Judge’s assessment, since the Pre-Trial Judge merely relied on his previous findings and failed to conduct an effective assessment and determine specifically whether there is any evidence provided by the SPO that demonstrates the risk of obstruction and re-offending.
19. The Pre-Trial Judge erroneously shifted the applicable burden of proof to the Defence as demonstrated by his finding that any examination of even core arguments raised by the Defence was unnecessary.¹⁶
20. For instance, the Pre-Trial Judge’s generic dismissal of arguments previously made simply because they ‘*have already been addressed*’ and ‘*these submissions do not require to be addressed any further*’ deprive the Accused of his right of access to

¹² F00093, Prosecution submissions for second review of detention, 25 October 2021, para. 4; Impugned Decision paras. 25, 26, 28, 29 and 33.

¹³ IA001, F00005, Public Redacted Version of Decision on Pjetër Shala’s Appeal Against Decision on Provisional Release, 20 August 2021, para. 24, with further references. Similarly, ECtHR, *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017, paras. 222, 234 with further references.

¹⁴ Impugned Decision, paras. 28, 29 and 32.

¹⁵ ECtHR, *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017, para. 222.

¹⁶ Impugned Decision, paras. 28, 32 and 38 respectively.

court and an effective determination on his submissions challenging the grounds for his continued detention in breach of Articles 5 and 6 of the ECHR.¹⁷ In support of his position, the Pre-Trial Judge refers to the Appeals Chamber's decisions in different cases where it was noted 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.'*¹⁸ The Appeals Chamber's legitimate concern about judicial economy cannot be interpreted as leave to dismiss the core of Defence submissions that request a new evaluation of relevant circumstances that are not static but change over time. For instance, if the Defence suggests that the Prosecution failed to show at a given time that there is a real risk of obstruction in light of particular circumstances existing at that time, the Pre-Trial Judge cannot decline to consider a similar submission made in subsequent proceedings without ascertaining the relevant circumstances simply because he has considered and rejected a similar submission in the past. His interpretation of his duties would render the purpose of having regular review of detention void. His inappropriate interpretation and reliance on the above extract from appellate case-law deprives the Accused of an effective review of the lawfulness of his detention in breach of Article 5 of the ECHR and should be corrected by the Appeals Chamber.

21. As a result of this erroneous shift of the applicable burden to the Defence, the Pre-Trial Judge assessed the material before him under an incorrect standard, due to a serious misinterpretation of the Law, while the SPO was effectively allowed to evade its obligation to provide concrete evidence and adequately

¹⁷ Impugned Decision, para. 24. *See also* Impugned Decision, paras. 28, 32 and 38, 39.

¹⁸ *See* Impugned Decision, para. 24 referring to *Haradinaj* Detention Appeal, para. 55, and KSC-BC-2020-06, Public Redacted Version of Decision on Jakup Krasniqi's appeal Against Decision on Review of Detention, 1 October 2021, para. 17.

demonstrate to the requisite strict standard that the requirements for detention continue to exist.

Ground Two: Error in Finding that Mr Shala's Rejection of the Legitimacy of the SC is a Factor to be taken into Consideration Against him for the Purposes of Assessing the Risk of Absconding

22. At paragraph 25, the Pre-Trial Judge found that the fact that Mr Shala rejects the legitimacy of the SC is a factor to be taken into consideration against him for assessing the existence of a real risk of absconding.
23. The Defence submits that the Pre-Trial Judge erred in this respect as Mr Shala has a right to challenge the legitimacy of the SC and this submission is simply irrelevant to his intention to cooperate with the present proceedings against him or the assessment of the risk that he may abscond. As the Defence previously argued the fact that Mr Shala disputes in strong terms the legitimacy of the proceedings and the truth of the Prosecution's allegations against him constitutes a lawful exercise of his right to a fair trial and has no bearing on his willingness to cooperate and appear for trial.¹⁹ The Pre-Trial Judge violates Mr Shala's right to put forward his defence case without fear of repercussions by considering his submissions out of context in assessing whether the interference with his right to be protected from arbitrary detention is justified.

Ground Three: Error in Finding that the Existence of Protective Measures does not Affect the Finding on Risk of Obstruction

24. At paragraph 29 of the Impugned Decision, the Pre-Trial Judge found that '[t]he existence of protective measures in the present case does not affect the finding that there is a risk of obstruction in relation to these individuals [on whose

¹⁹ F00044, Reply to Prosecution's Response to Motion for Provisional Release, 14 June 2021, paras. 9, 20.

evidence the SPO intends to rely at trial]’ as their identities have been disclosed to Mr Shala and he has [REDACTED] with one of them.’ The Defence notes that this finding concerns two persons on whose evidence the SPO intends to rely at trial.²⁰ The Defence recalls in this respect, that, as the Pre-Trial Judge acknowledges, it invited him to consider in detail for the purposes of his review the impact of the extensive protective measures regime on the alleged risk of obstruction and witness interference.²¹ The Defence argued that Mr Shala’s [REDACTED] with a witness does not make the risk of contacting this person any greater, given the protective measures in force.²² However, the Pre-Trial Judge failed to address these issues, the Defence arguments or, generally, explain the basis for assuming that Mr Shala’s [REDACTED] with one witness makes it any more likely or plausible that he can contact such person. In particular, the Pre-Trial Judge failed to take into consideration the fact that, on the basis of the protective measures regime, Mr Shala is not aware of the present whereabouts or contact details of protected witnesses including the proposed witness in question. In any event, the Defence notes that, in light of the Prosecution’s recent submission that one of these proposed witnesses [REDACTED], any perceived risk is greatly reduced and this is a factor that undermines the Pre-Trial Judge’s risk assessment.²³ In addition, the Pre-Trial Judge’s speculative reasoning fails to

²⁰ F00042, Prosecution Response to Application for Provisional Release on Behalf of Pjetër Shala, 9 June 2021, para. 12.

²¹ Impugned Decision, para. 27.

²² Impugned Decision, para. 27.

²³ F00102, Prosecution submissions for fourth status conference, 9 November 2021, para. 10. In this respect, the Defence notes that it was not aware of this development at the time of making its submissions on the second review of Mr Shala’s detention and that given the protective measures in place it could not have been aware of such a development. The Defence submits that the Appeals Chamber is not estopped from considering this matter merely because it was not raised in the Defence submissions at first instance given that the SPO was duly aware of this development and failed to raise it in time for this factor to be considered for the purposes of assessing the various risks under Article 41(1)(b) of the Law and Mr Shala’s continued detention. The prejudice suffered by the Defence by the SPO’s lack of notification of this crucial fact can only be remedied if this matter is now properly considered on appeal. This is consistent with the obligations under the Law that the review of detention must ‘[ensure] that *new* relevant factors [...] can be assessed.’ See KSC-CC-PR-2020-09, F00006,

meet the requisite standard and provide adequate reasoning for his dismissal of the Defence invitation to consider thoroughly the impact of the protective measures regime on the alleged risk of obstruction. These findings by the Pre-Trial Judge constitute an error of law that merits appellate intervention.

Ground Four: Error in Finding a Heightened Risk of Obstruction Demonstrated by the Existence of Protective Measures

25. At paragraph 29 of the Impugned Decision, the Pre-Trial Judge found that ‘*a heightened risk of obstruction*’ in this case is ‘*demonstrated*’ by the mere existence of protective measures. The Pre-Trial Judge erred in his generic finding that fails to take into consideration the particular reasons for the existence of the protective measures in this case and the relevance of the latter to his assessment of the risk of obstruction. The imposition of protective measures (in the great variety that the applicable rules provide for) is justified in order to protect witnesses and cannot be equated in the abstract with a risk of obstructing the proceedings. This is particularly the case in the present circumstances where Mr Shala does not have access to the actual whereabouts or contact details of any protected witness]. In addition, instead of taking into account the extent of the specific protective measures in force as a factor potentially counterbalancing any purported risk of obstruction or re-offending, the Pre-Trial Judge erroneously removed that from the equilibrium and resorted to a circular argument that ‘*the necessity for such [protective] measures demonstrates a heightened risk of obstruction.*’²⁴
26. There are protective measures in all cases pending before the SC and the Pre-Trial Judge’s reasoning seems to suggest that the mere existence of such measures demonstrates a ‘heightened risk of obstruction’ in all cases before this tribunal. Lastly, the Pre-Trial Judge does not explain at all why the purported

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. 67.

²⁴ Impugned Decision, para. 29.

risk of obstruction he found is actually '*heightened*' on account of the existence of protective measures.

27. The Pre-Trial Judge's blanket reasoning is in clear error and violates the Accused's right to an effective review of his continued detention. In addition, the Pre-Trial Judge's failure to provide adequate reasoning in this respect constitutes a further error of law that warrants appellate intervention.

Ground Five: Error in Finding that Mr Shala's Increased Insight into Material the Prosecution Intends to Rely at Trial Increases the Risks of Obstruction and Re-Offending

28. In concluding that there is a risk of Mr Shala obstructing the progress of the SC proceedings, the Pre-Trial Judge took into account that '*the additional disclosure of incriminating material to Mr Shala following the Second Detention Decision increases the risk of obstruction considering that he has acquired a better understanding of the SPO's case, including the witnesses that it will rely upon at trial.*'²⁵ Similarly, in assessing whether there is a risk of re-offending the Pre-Trial Judge found that '*the disclosure of additional material increases the risk of Mr Shala committing further crimes.*'²⁶
29. However, neither the SPO's submissions, nor the Impugned Decision specifically reveal or link the disclosed evidence concerning Mr Shala's alleged criminal liability to any justified substantiation of increased risks. The submissions of the SPO fail to make any reference to material disclosed after 10 September 2021 that, in its view, make an impact or are relevant to the determination of the alleged risk. The Impugned Decision impermissibly relieved the SPO from yet another of its legal duties.

²⁵ Impugned Decision, para. 29.

²⁶ Impugned Decision, para. 33.

30. Increased insight into the evidence does not in itself increase the identified risks. In addition, the contrary cannot be excluded. Namely, additional disclosures are also likely to reveal exculpatory and not merely incriminating material. This was the case with Disclosure Package 24 which was disclosed to the Defence on 12 November 2021 and contains serious exculpatory material.
31. Furthermore, the Pre-Trial Judge has erroneously failed to take into account that access to the evidence against an accused reflects one of the most fundamental procedural rights and that Mr Shala must be presumed innocent in real and effective terms. Access to the disclosed evidence is a legitimate exercise of a procedural and fundamental right pursuant to Article 6 of the ECHR and should not be used to the Accused's detriment when assessing the lawfulness of limiting another fundamental right, namely the right not to be arbitrarily detained.

Ground Six: Error in Finding that the Risks of Obstructing and Re-Offending have been Adequately Substantiated

32. With respect to the risk of flight, the Pre-Trial Judge found that the SPO's submissions were generic and did not substantiate that the proposed conditions insufficiently mitigate the risk of flight, maintaining its previous findings that the conditions proposed sufficiently mitigate such risk.²⁷ However, the Pre-Trial Judge failed to acknowledge the equally unsubstantiated and generic submissions of the SPO in relation to the increase of a risk of obstructing the SC proceedings and the risk of committing further crimes.
33. The Pre-Trial Judge erred in accepting the SPO's failure to comply with its obligation to present '*specific reasoning based on evidence supporting the belief of a*

²⁷ Impugned Decision, para. 37. See also F00045, Decision on Request for Provisional Release, 15 June 2021, para. 45, F00075, Decision on Review of Detention of Pjetër Shala, 10 September 2021 (confidential), para. 40.

sufficiently real possibility that the risks of Article 41(6)(b)(ii) and (iii) of the Law exist.²⁸

Ground Seven: Error in Finding that the Proposed Conditions Cannot Mitigate the Risks under Article 41(6)(b) of the Law

34. The Impugned Decision erroneously concluded 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'*.²⁹
35. The Pre-Trial Judge failed to adequately assess the proposed Conditions put forward by the Defence and summarily dismissed them without providing adequate reasoning, in breach of his duty to do so and Mr Shala's right for adequately reasoned decisions.
36. The Pre-Trial Judge found the proposed conditions insufficient in that they could not ensure effective monitoring of Mr Shala's communications as they did not address- in his view- the possibility of the Accused employing communication devices belonging to others or requesting others to use their devices for these purposes.³⁰ However, the Pre-Trial Judge completely ignored the condition proposed by the Defence that explicitly provided that *'any visitor [to Mr Shala] be required to surrender any telephone, telecommunication device or internet-enabled equipment, written message, or other documents prior to entering Mr Shala's residence'* and that *'any visitor be searched for the possession of any telephone, telecommunication device or internet-enabled equipment, written message, or other document prior to entering and upon leaving Mr Shala's residence'*.³¹ In light of this, the Pre-Trial Judge

²⁸ See, for instance, KSC-BC-2020-06/IA004, F00005, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021, para. 24.

²⁹ Impugned Decision, para. 40.

³⁰ Impugned Decision, para. 38.

³¹ F00099, Defence Response to 'Prosecution Submissions for Second Review of Detention, 1 November 2021, para. 37 (xx).

clearly erred in finding that the proposed conditions did not address the possibility of using devices belonging to others. As to the possibility of requesting others to use their devices for unlawful purposes, the Pre-Trial Judge ignored the proposed condition that reflects the very intrusive measure that *'any visitor [be required to] consent to the subsequent monitoring of their telecommunication devices or internet-enabled equipment for the duration of Mr Shala's period of interim release.'*³² He also failed to acknowledge the relevance to this concern of the proposed condition of effective monitoring of Mr Shala's communications.

37. 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. The Pre-Trial Judge failed to explore the possibility of monitoring, including in Mr Shala's native language, in the event of provisional release or house arrest. The Pre-Trial Judge erred in finding that the only possibility for *'effective monitoring'* is that *'in the controlled environment of the SC's detention facilities.'*³³ He also erred in his finding that *'there is no basis for requesting further information from Belgium'* and in his circular reasoning according to which *'the absence of guarantees provided by Belgium'* was a reason for *'not requesting further information from Belgium.'*³⁴

38. It is simply not (and cannot reasonably be assumed to be) true that the risks and concerns raised by the Pre-Trial Judge may only be sufficiently mitigated within the *'controlled environment of the SC's detention facilities'*. The Pre-Trial Judge seems to ignore the fact that Mr Shala can have unsupervised visits while detained at SC detention facilities.

³² F00099, Defence Response to 'Prosecution Submissions for Second Review of Detention, 1 November 2021, para. 37 (xxi).

³³ Impugned Decision, para. 38.

³⁴ Impugned Decision, para. 38.

39. In line with this, the Defence adopts the submissions made by counsel for Thaçi that aptly describe the Pre-Trial Judge's analogous findings in the *Thaçi et al.* case as relying on *'layer upon layer of speculation, and literally inventing scenarios which presume criminal conduct on the part of [the accused], his family members, and presumably the security staff who would "necessarily be in contact with him at his assigned residence"'*.³⁵
40. The above findings aggravate the Pre-Trial Judge's additional error in denying the Defence request for admission of expert evidence on the capability of monitoring Mr Shala's communications outside the SC facilities. Notably, the Pre-Trial Judge failed to provide any reasoning in support of this decision in violation of the Accused's right to a reasoned opinion. In addition, the Pre-Trial Judge failed to consider the conditions proposed by the Defence that ensured sufficient monitoring of Mr Shala's communications.³⁶
41. The request for expert evidence on communications monitoring aimed exactly at securing information as to the implementation of the proposed conditions in Belgium.³⁷ The lack of adequate reasoning and assessment of the Defence proposed conditions demonstrates the need for such expert evidence that could sufficiently inform the Pre-Trial Judge as to the effectiveness of monitoring regimes outside detention facilities. The Pre-Trial Judge rejected the Defence request noting that *'the insufficiency of the Proposed Conditions, house arrest and additional conditions is not exclusively dependent on Mr Shala's communications by means of different devices and, therefore, such expert evidence is not necessary for the*

³⁵ KSC-BC-2020-06/IA010, F0004, Public Redacted Version of Thaçi Defence Appeal against Decision on Review of Detention of Hashim Thaçi, 14 September 2021, para. 49.

³⁶ F00099, Defence Response to 'Prosecution Submissions for Second Review of Detention, 1 November 2021, para. 37. *See also* F00066, Defence Response to Prosecution Submissions for First Review of Detention, 1 September 2021, para. 40.

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

*present purposes.*³⁸ The Defence request for expert evidence did not solely concern Mr Shala's communications by means of different devices; the Pre-Trial Judge erred in fundamentally misconstruing the Defence submissions on this matter and summarily dismissing them without providing adequate reasoning.

42. The Pre-Trial Judge failed to conduct a genuine and thorough assessment of the multiple potentials entailed in the conditions proposed with a view to address any concerns with Mr Shala's interim release or placement in house arrest at his residence in Belgium.

Ground Eight: Error in Setting an Excessively High Standard for Proposed Conditions of Release

43. The findings of the Pre-Trial Judge that the proposed conditions insufficiently mitigate the risks of obstructing or re-offending, for the reasons set out in paragraph 38 of the Impugned Decision essentially accept that no conditions whatsoever can sufficiently mitigate such risks as illustrated by the hypothetical scenarios considered by the Pre-Trial Judge. As the SPO submitted and, importantly, the Pre-Trial Judge accepted '*these risks can only be effectively managed in the SC detention facilities and [...] any assurances that the Accused may give would be insufficient to guarantee compliance with any conditions to overcome the concrete risks of release*'.³⁹
44. The errors identified above demonstrate that, in the absence of appellate intervention, any further review of Mr Shala's pre-trial detention is futile. The hypothetical scenarios relied upon as basis for the Pre-Trial Judge's findings taken in conjunction with his repeated denial of the request for admission of expert evidence on monitoring communications outside detention facilities leave little hope that Mr Shala can have the lawfulness of his detention effectively

³⁸ Impugned Decision, para. 39.

³⁹ Impugned Decision, para. 35; F00093, Prosecution submissions for second review of detention, 25 October 2021, para. 7.

reviewed before his case is referred to a Trial Chamber. The Pre-Trial Judge's reasoning presents such insurmountable, imaginary obstacles for provisional release and demonstrates such a degree of distrust (*'the possibility of using code or obscure language which cannot be easily recognised or prevented by persons not familiar with SC proceedings'*) that renders it virtually impossible for the Accused (or indeed any accused in SC proceedings) to entertain the slightest hope of provisional release regardless of what conditions are put forward and irrespective of the actual and anticipated duration of pre-trial detention. This is a clear violation of Mr Shala's rights under Article 5 of the ECHR that warrants appellate intervention.

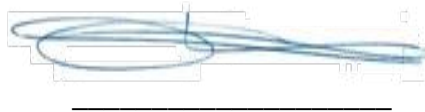
45. The Pre-Trial Judge's adoption of an impossibly high standard for assessing proposed conditions of provisional release is an error of law and abuse of his discretion, primarily owed to his unwillingness to adequately assess the effectiveness of the proposed conditions and maintaining as point of reference, detention in prison facilities under constant surveillance. The Defence reiterates that the regime envisaged by the Pre-Trial Judge is not reflecting the reality at the SC detention facilities for good reason: it would be incompatible with the rights of detained persons.
46. The Defence respectfully requests the Appeals Chamber to correct these errors, identify the correct applicable legal standard, reverse the decision that the proposed conditions for interim release or placement in house arrest are insufficient and ensure that the proceedings against Mr Shala proceed in a manner that ensures the protection of his fundamental rights.

III. RELIEF

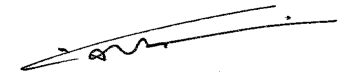
47. For the above reasons, the Defence respectfully requests the Appeals Chamber to set aside the Impugned Decision and its erroneous findings and order the

Accused' s immediate release or placement in house arrest at his residence in Belgium with any conditions found appropriate.

Word Limit: 4987



Jean-Louis Gilissen
Specialist Defence Counsel



Hedi Aouini
Defence Co-Counsel