

Case No.: KSC-BC-2020-04

Before: Court of Appeals Panel

Judge Michèle Picard

Judge Emilio Gatti

Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Date: 24 February 2022

Filing Party: Defence Counsel

Original Language: English

Classification: Public

THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

Public Redacted Version of “Defence Reply to Prosecution Response to Appeal against the ‘Decision on Review of Detention of Pjetër Shala’ ”

Specialist Prosecutor’s Office:
Jack Smith

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

I. INTRODUCTION

1. The Defence for Mr Pjetër Shala (*'Defence'*) files this Reply to the Prosecution's response to the Appeal against the *'Decision on Review of Detention of Pjetër Shala'*.¹
2. Pursuant to Rule 82(4) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (*'Rules'*), this Reply is filed confidentially as it contains confidential information and relates to the Impugned Decision which was issued confidentially. The Defence will be filing a public redacted version of the Appeal and its Reply in due course.
3. While this Reply is limited to the issues raised in the Response, the Defence maintains its original submissions in full and rejects all submissions made by the Prosecution in their entirety.

II. SUBMISSIONS

- A. *Reversal of the Applicable Burden of Proof in Assessing the Risks of Fleeing, Obstructing or Re-Offending*
4. In its response, the SPO relies on the Accused's [REDACTED] in 1999 at Kukes.² This last incident is taken out of context in the allegations set out in the Indictment as the Defence will develop in the presentation of its case.
5. The Prosecution is relying on statements made in questionable circumstances at a time when Mr Shala was being questioned as a suspect without being

¹ KSC-BC-2020-04/IA003, F00003, Prosecution Response to Defence Appeal Against the *'Decision on Review of Detention of Pjetër Shala'* with public Annex 1, 3 December 2021 (confidential) (*'Response'*); KSC-BC-2020-04/IA003, F00001, Defence Appeal against the Decision on Review of Detention of Decision of Pjetër Shala of 10 November 2021, 22 November 2021 (confidential) (*'Appeal'*); 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 Motion concern Case No. KSC-BC-2020-04 unless otherwise indicated.

² See Response, paras. 17, 18 and references cited therein; [REDACTED] of Mr Shala to Belgian authorities, 14 January 2016, ERN 074117-074129-ET RED (074122, 074122, 074124, 074125).

represented by a lawyer. His statements cannot be reasonably construed as a threat or willingness to cause harm to any victim or proposed witness.

6. As to [REDACTED] specifically, the Defence reiterates that when the latter sought to contact Mr Shala, Mr Shala perceived this as a threat and firmly blocked any further contact.³
7. The above statements formed the underlying basis for rejecting the Accused's requests for provisional release to date.⁴ They cannot be treated as a sufficient basis to justify continued and indefinite detention. The Defence understands that [REDACTED] [REDACTED] is identified as victim of murder in the Indictment.⁵ [REDACTED] is benefiting from protective measures and the Accused has no means of knowing his current whereabouts and has no intention to contacting him. For the past two decades, Mr Shala has done his utmost not to have any contact with the particular proposed witness, KLA supporters, or the political elite in Kosovo.
8. In any event, the Defence is objecting to the manner in which the Pre-Trial Judge has reviewed the lawfulness of the Accused's continued detention and the fact that the Pre-Trial Judge has effectively reversed the applicable burden of proof in assessing the risks under Article 41(6)(b) of the Law. In his review, the Pre-Trial Judge relied on his previous findings without a thorough assessment of the Defence submissions and placed inappropriate weight on the SPO generalised argument that the disclosure of additional material to the Defence may have increased such risks.⁶ The Prosecution's statement that *'the Defence failed to*

³ ERN 066866-066882-ET RED (066877); ERN 074117-074129-ET RED (074125).

⁴ F00045, Decision on Request for Provisional Release, 15 June 2021 (confidential); IA001/F00005, Decision on Pjetër Shala's Appeal Against Decision on Provisional Release, 20 August 2021 (confidential); F00075, Decision on Review of Detention of Pjetër Shala, 10 September 2021 (confidential), Response, paras. 31, 36.

⁵ F00098, Corrected Indictment, 1 November 2021, para. 28 (confidential).

⁶ Impugned Decision, paras 29 and 33. The Prosecution's submission was made in the abstract and failed to point to specific material that in its view was capable of increasing such risks. See F00093,

*demonstrate any circumstances warranting the diminution in the assessment of risk*⁷ illustrates the fact that, in reviewing the lawfulness of continued pre-trial detention, it is the Defence that is expected to demonstrated the ‘*diminution in the assessment of risk.*’ Appellate intervention is required to correct this fundamental error.

B. 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

9. While in principle statements by an accused can be legitimately taken into consideration when assessing the existence of risks under Article 41(6)(b) of the Law, the Pre-Trial Judge’s reliance on Mr Shala’s rejection of the legitimacy of the SC (made both at the time of his arrest and as developed by the Defence in the ‘*Preliminary Motion of the Defence of Pjetër Shala to Challenge the Jurisdiction of the KSC*’⁸) is unfair and disproportionate. The Appeals Chamber should correct this error even if it accepts the SPO’s submission that this error in itself cannot change the outcome of the Decision. The Pre-Trial Judge’s approach interferes with the right of Mr Shala to defend himself without fear of repercussions, creates a chilling effect for the Defence, and highlights the need to establish appropriate and fair criteria for reviewing the lawfulness of pre-trial detention.

C. Error in Finding that the Existence of Protective Measures does not Affect the Finding on Risk of Obstruction

Prosecution submissions for second review of detention, 25 October 2021, para. 4. The Pre-Trial Judge nonetheless accepted such concerns as justified. Impugned Decision, paras. 29 and 33.

⁷ Response, para. 18; Appeal, para. 17.

⁸ F00054, Preliminary Motion of the Defence of Pjetër Shala to Challenge the Jurisdiction of the KSC, 12 July 2021.

10. The Defence invites the Appeals Chamber to address its third and fourth grounds of appeal separately, as set forth in the Appeal and not as joined by the Prosecution.⁹
11. The Prosecution's submission that the [REDACTED] does not change the Pre-Trial Judge's 'obstruction analysis' is flawed.¹⁰ The Pre-Trial Judge's analysis was based on the risk of obstruction with regards to [REDACTED].¹¹ The submission that [REDACTED] is entirely speculative and unsubstantiated. The Accused has known of [REDACTED] identity yet he has made no attempt to contact him since 1999 despite the fact that he has been aware of the accusations made against him.¹² To the contrary, when [REDACTED] tried to contact him, the Accused blocked any further contact between them.¹³

D. Error in Finding a Heightened Risk of Obstruction Demonstrated by the Existence of Protective Measures

12. The Impugned Decision and the underlying Prosecution submissions fail to identify a specific link in the recently disclosed evidence with any increased risk. In the absence of any specific link, the Pre-Trial Judge's review was based on impermissible 'abstract, general or stereotyped' considerations that ought to be corrected on appeal.¹⁴ Access to the material the Prosecution intends to rely on at trial protects a fundamental right of the Accused, pursuant to Article 6 of the ECHR, and should not be used to his detriment when assessing the lawfulness of limiting his right not to be arbitrarily detained.

⁹ Appeal, paras. 24, 25-27; Response, paras. 22-26.

¹⁰ Response, para. 24.

¹¹ See, e.g., Impugned Decision, para. 29.

¹² 074117-074129-ET RED and 066866-066882-ET Revised RED. See also, for instance, F00045, Decision on Pjetër Shala's Request for Provisional Release, 15 June 2021, paras. 32-35.

¹³ ERN 066866-066882-ET RED (066877); ERN 074117-074129-ET RED (074125).

¹⁴ ECtHR, *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017, para. 222.

E. 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

13. The Pre-Trial Judge erred by presuming that increased insight into evidence signifies increased risks. The SPO fails to demonstrate any increased risk deriving from recent disclosures. The Defence reiterates that exculpatory disclosures can have the opposite effect and refers specifically in this respect to the exculpatory material disclosed in Disclosure Package 24 which revealed to the Defence for the first time the existence of criminal proceedings against [REDACTED] for providing false testimony.

F. Error in Finding that the Risks of Obstructing and Re-Offending have been Adequately Substantiated

14. The Prosecution does not even attempt to address the Defence challenge to the SPO's failure to meet its burden and demonstrate 'a sufficiently real possibility' of the existence of the Article 41(6) risks. The Prosecution's submissions are based once again solely on the [REDACTED] made by Mr Shala addressed above. Such [REDACTED] cannot form the basis for continued pre-trial detention in the absence of any specific, realistic, and demonstrated risk of obstruction or re-offending.

G. Error in Finding that the Proposed Conditions Cannot Mitigate the Risks under Article 41(6)(b) of the Law

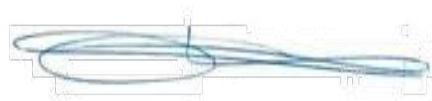
15. The Defence refers the Appeals Chamber to its submissions made in paragraphs 34 to 42 of its Appeal. It reiterates that the Pre-Trial Judge failed to effectively review the proposed conditions put forward by the Defence and failed to give a reasoned opinion in response to the Defence submissions.

H. Error in Setting an Excessively High Standard for Proposed Conditions of Release

16. The Prosecution relies on the above-mentioned [REDACTED] and concedes that no proposed conditions can mitigate the perceived risk of obstruction.¹⁵ This is indeed the underlying rationale of the Pre-Trial Judge's analysis and demonstrates that Mr Shala is being denied of his right to an effective review of detention. Proper review would require re-assessment of the perceived risks in light of the fact that one of the proposed witnesses concerned [REDACTED] and Mr Shala has blocked any contact with [REDACTED].
17. The Prosecution confirms that the standard for accepting proposed conditions of release has been set so high that no condition or assurance will be deemed sufficient. The Prosecution's position – confirmed as it is in the Impugned Decision – undermines the meaningfulness of the detention review regime established by the Law.

III. CONCLUSION

18. In light of the above, the Defence respectfully invites the Appeals Chamber to grant the Appeal on all grounds.



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¹⁵ Response, para. 36. *See also* Response, para. 31.