



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2020-04
The Prosecutor v. Pjetër Shala

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 22 April 2022

Language: English

Classification: Public

**Public Redacted Version of Decision on Remanded Detention Review Decision
and Periodic Review of Detention of Pjetër Shala**

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 41(6), (10) and (12) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 56(2) and 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 19 June 2020, further to a decision by the Pre-Trial Judge ("Confirmation Decision"),² the Specialist Prosecutor submitted the Confirmed Indictment.³
2. On 16 March 2021, further to a decision and an arrest warrant issued by the Pre-Trial Judge,⁴ Pjetër Shala ("Mr Shala" or "Accused") was arrested in the Kingdom of Belgium ("Belgium").⁵
3. On 15 April 2021, upon conclusion of the judicial proceedings in Belgium, Mr Shala was transferred to the Detention Facilities of the Specialist Chambers ("SC") in the Hague, the Netherlands.⁶

¹ KSC-BC-2020-04, F00001, President, *Decision Assigning a Pre-Trial Judge*, 14 February 2020, public.

² KSC-BC-2020-04, F00007, Pre-Trial Judge, *Decision on the Confirmation of the Indictment against Pjetër Shala*, 12 June 2020, strictly confidential and *ex parte*. A confidential redacted version and a public redacted version were issued on 6 May 2021, F00007/CONF/RED and F00007/RED.

³ KSC-BC-2020-04, F00010, Specialist Prosecutor, *Submission of Confirmed Indictment*, 19 June 2020, public, with Annex 1, strictly confidential and *ex parte*, and Annex 2, confidential. A confidential, lesser redacted version and a public, further redacted version of the Confirmed Indictment were submitted on 31 March 2021, F00016/A01, confidential, F00016/A02, public. A further lesser redacted, confidential version of the Confirmed Indictment was submitted on 25 May 2021, F00038/A01. Following the Pre-Trial Judge's decision on the Defence's motion challenging the form of the Confirmed Indictment, a corrected indictment was submitted on 1 November 2021, F00098/A01, confidential, and 16 November 2021, F00107/A01, public.

⁴ KSC-BC-2020-04, F00008, Pre-Trial Judge, *Decision on Request for Arrest Warrant and Transfer Order*, 12 June 2020, confidential (a public redacted version was issued on 6 May 2021, F00008/RED); F00008/A01, Pre-Trial Judge, *Arrest Warrant for Mr Pjetër Shala*, 12 June 2020, strictly confidential and *ex parte* (a public redacted version was issued on 15 April 2021, F00008/A01/RED).

⁵ KSC-BC-2020-04, F00013, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 16 March 2021, public.

⁶ KSC-BC-2020-04, F00019, Registrar, *Notification of Reception of Pjetër Shala in the Detention Facilities of the Specialist Chambers and Conditional Assignment of Counsel*, 15 April 2021, confidential, para. 2, with Annexes 1-2, confidential. A public redacted version was issued on 26 April 2021, F00019/RED.

4. On 15 June 2021, the Pre-Trial Judge rejected a request for provisional release submitted by the Defence for Mr Shala (“Defence”) (“First Detention Decision”).⁷ The Court of Appeals upheld the First Detention Decision on 20 August 2021 (“First Court of Appeals Decision”).⁸

5. On 10 September 2021, 10 November 2021 and 28 January 2022, the Pre-Trial Judge reviewed the detention of Mr Shala and ordered his continued detention (“Second Detention Decision”, “Third Detention Decision” and “Fourth Detention Decision” respectively).⁹

6. On 11 February 2022, the Court of Appeals issued its decision on the Defence’s appeal against the Third Detention Decision (“Second Court of Appeals Decision”).¹⁰ It, *inter alia*, remanded the Third Detention Decision to the Pre-Trial Judge for further consideration in order to request further submissions from the Registrar on the detention regime at the SC Detention Facilities, and to invite the Defence to inquire into Belgium’s willingness and capacity to implement any conditions of release proposed by Mr Shala or any additional conditions.¹¹

7. On 14 February 2022, the Pre-Trial Judge, further to the Second Court of Appeals Decision: (i) ordered the Registrar to provide submissions on the detention regime at the SC Detention Facilities; (ii) invited the Defence to inquire into Belgium’s willingness and capacity to implement any conditions of release it has proposed

⁷ KSC-BC-2020-04, F00045, Pre-Trial Judge, *Decision on Pjetër Shala’s Request for Provisional Release*, 15 June 2021, confidential. A public redacted version was issued on 23 June 2021, F00045/RED.

⁸ KSC-BC-2020-04, IA001/F00005, Court of Appeals, *Decision on Pjetër Shala’s Appeal Against Decision on Provisional Release*, 20 August 2021, confidential. A public redacted version was filed on the same day, IA001/F00005/RED.

⁹ KSC-BC-2020-04, F00075, Pre-Trial Judge, *Decision on Review of Detention of Pjetër Shala*, 10 September 2021, confidential (a public redacted version was issued on the same day, F00075/RED); F00105, *Decision on Review of Detention of Pjetër Shala*, 10 November 2021, confidential (a public redacted version was issued on the same day, F00105/RED); F00133, *Decision on Review of Detention of Pjetër Shala*, 28 January 2022, confidential (a public redacted version was issued on the same day, F00133/RED).

¹⁰ KSC-BC-2020-04, IA003/F00005, Court of Appeals, *Decision on Pjetër Shala’s Appeal Against Decision on Review of Detention*, 11 February 2022, confidential. A public redacted version was issued on the same day, IA003/F00005/RED.

¹¹ Second Court of Appeals Decision, paras 54-57, 60, 61.

and/or any additional conditions; and (iii) ordered the Defence to provide its submissions on the next review of detention of Mr Shala by no later than 2 March 2022 and, in the same submissions, to address any response received from Belgium and the aforementioned Registry submissions (“14 February 2022 Order”).¹²

8. On 22 February 2022, the Registry provided the aforementioned submissions pursuant to the 14 February 2022 Order (“Registry Submissions”).¹³

9. On 4 March 2022, the Pre-Trial Judge, further to a request by the Defence to vary the time limit defined in the 14 February 2022 Order and following an indication that Mr Shala has waived his right to have his detention reviewed before the expiry of the two-month time limit set out in Article 41(10) of the Law and Rule 57(2) of the Rules,¹⁴ ordered the Defence to provide its submissions on the review of Mr Shala’s detention by no later than 30 March 2022, with the response and reply to be submitted in accordance with the timeline set out in Rule 76 of the Rules.¹⁵

10. On 30 March 2022, the Defence filed its submissions on the review of Mr Shala’s detention (“Defence Submissions”).¹⁶ The Specialist Prosecutor’s Office (“SPO”) responded on 7 April 2022 (“Response”).¹⁷ The Defence replied on 12 April 2022 (“Reply”).¹⁸

¹² KSC-BC-2020-04, F00145, Pre-Trial Judge, *Order to the Registrar to Provide Information on the Detention Regime and for Submissions on the Review of Detention of Pjetër Shala*, 14 February 2022, public, paras 9-11, with Annex 1, public.

¹³ KSC-BC-2020-04, F00152, Registrar, *Registry Submissions Pursuant to the Order to Provide Information on the Detention Regime (F00145)*, 22 February 2022, confidential. A public redacted version was submitted on 22 April 2022, F00152/RED.

¹⁴ KSC-BC-2020-04, F00160, Specialist Counsel, *Defence Request for an Extension of Time for its Submissions on the Next Review of Detention*, 1 March 2022, public, paras 2, 8-11.

¹⁵ KSC-BC-2020-04, Transcript, 4 March 2022, public, pp. 189-190.

¹⁶ KSC-BC-2020-04, F00171, Specialist Counsel, *Defence Submissions on Review of Detention and Response to the Order of the Pre-Trial Judge*, 30 March 2022, confidential.

¹⁷ KSC-BC-2020-04, F00177, Specialist Prosecutor, *Prosecution Submissions for Fifth Review of Detention*, 7 April 2022, confidential.

¹⁸ KSC-BC-2020-04, F00184, Specialist Counsel, *Defence Reply to ‘Prosecution Submissions for Fifth Review of Detention’*, 12 April 2022, confidential.

11. On 14 April 2022, the Pre-Trial Judge ordered the Defence and/or the Registrar, as the case may be, to file in the record any correspondence with the Belgian authorities regarding its willingness and capacity to implement any conditions of release in relation to Mr Shala.¹⁹ The Registrar filed the aforementioned correspondence on 19 April 2022 (“Correspondence Belgian Authorities”).²⁰

II. SUBMISSIONS

12. The Defence requests the Pre-Trial Judge to end Mr Shala’s continued detention and order his interim release, subject to any conditions that may be deemed necessary.²¹ It submits that: (i) the SPO has failed to demonstrate the alleged risks under Article 41(6) of the Law and any basis justifying the Accused’s continued detention; and (ii) the protracted length of Mr Shala’s pre-trial detention is neither necessary nor proportionate.²²

13. According to the SPO, the continued detention of the Accused remains necessary and proportional.²³ It asserts that no new fact or circumstance has intervened capable of changing the findings reached in the Fourth Detention Decision.²⁴

14. In the Reply, the Defence reiterates its request to end Mr Shala’s detention and order his interim release with any conditions that may be deemed necessary.²⁵

¹⁹ KSC-BC-2020-04, Transcript, 14 April 2022, confidential, pp. 248-249, 296.

²⁰ KSC-BC-2020-04, F00185, Registrar, *Transmission of Correspondence*, 19 April 2022, public, with two Annexes, confidential.

²¹ Defence Submissions, paras 1, 5, 25.

²² Defence Submissions, paras 2-3.

²³ Response, para. 1.

²⁴ Response, paras 1, 3-4, 7.

²⁵ Reply, para. 8.

III. APPLICABLE LAW

15. Article 41(6) of the Law provides that the SC shall only order the detention of a person when there is a grounded suspicion that the person has committed a crime within the jurisdiction of the SC, and there are articulable grounds to believe that the person: (i) is a flight risk; (ii) will destroy, hide, change or forge evidence of a crime, or specific circumstances indicate that the person will obstruct the progress of criminal proceedings; or (iii) will repeat the criminal offence, complete an attempted crime, or commit a crime which he or she has threatened to commit.

16. Article 41(10) of the Law provides that, until a judgment is final or until release, upon the expiry of two (2) months from the last ruling on detention on remand, the Pre-Trial Judge or Panel seized with the case shall examine whether reasons for detention on remand still exist and render a ruling by which detention on remand is extended or terminated. This also follows from Rule 57(2) of the Rules.

17. Article 41(12) of the Law provides that, in addition to detention on remand, the following measures may be ordered to ensure the presence of the accused, to prevent reoffending or ensure successful conduct of criminal proceedings: summons, arrest, bail, house detention, promise not to leave residence, prohibition on approaching specific places or persons, attendance at police station or other venue, and diversion.

18. Pursuant to Rule 56(2) of the Rules, the Panel shall ensure that a person is not detained for an unreasonable period prior to the opening of the case and, in case of an undue delay caused by the Specialist Prosecutor, the Panel, having heard the Parties, may release the person under conditions as deemed appropriate.

IV. DISCUSSION

19. In the present decision, the Pre-Trial Judge will: (i) address the Third Detention Decision to the extent that it was remanded by the Court of Appeals; and (ii) carry out

the periodic review of the detention of Mr Shala pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules.

A. APPLICABLE STANDARD

20. The Defence invites the Pre-Trial Judge to assess the need for continued pre-trial detention on the basis of the facts and circumstances of this case.²⁶ It submits that the remand of Mr Shala into custody is only to be used in exceptional cases of last resort and that the presumption in favour of Mr Shala's liberty pending trial must form the basis of any assessment as to any identifiable risk and any identifiable risk must not be based on a mere possibility or speculative assumptions.²⁷ It is also of the view that the Pre-Trial Judge must examine the purported justification for the protracted duration of Mr Shala's detention taking into account Rule 56(2) of the Rules, which provides that the Accused is not detained for an unreasonable period and that pre-emptive action to prevent unreasonable detention is duly considered.²⁸

21. The Defence further invites the Pre-Trial Judge to require that the SPO demonstrate the existence of concrete risks posed by the prospect of provisional release.²⁹ It asserts that the longer Mr Shala remains in pre-trial detention, the higher the burden is on the SPO to justify continued detention, whereas it is not incumbent upon Mr Shala to demonstrate that reasons warranting his release exist.³⁰

22. The Defence additionally avers that there is no requirement that there be a change in circumstances for an in-depth and effective review to take place with respect to the necessity and proportionality of Mr Shala's continued detention, especially after such a protracted period of detention.³¹ It submits that the test to be applied is whether any

²⁶ Defence Submissions, para. 4.

²⁷ Defence Submissions, paras 3, 17, 21.

²⁸ Defence Submissions, para. 18.

²⁹ Defence Submissions, para. 4.

³⁰ Defence Submissions, paras 4, 21.

³¹ Defence Submissions, para. 20.

concrete risks under Article 41(6) of the Law have been substantiated and whether any such risks can be mitigated by the imposition of suitable conditions.³²

23. The SPO responds that, for purposes of a detention review under Rule 57(2) of the Rules, the reasons or circumstances underpinning detention must be reviewed in order to determine whether these reasons continue to exist under Article 41(6) of the Law.³³ In its view, that determination inevitably concerns what has changed, if anything, since the previous ruling on detention.³⁴ The SPO additionally contends that the Pre-Trial Judge is not required to make findings on the factors already decided upon in the initial ruling on detention.³⁵

24. The Defence replies that the SPO's position reverses the burden of proof that requires it to justify continued detention and extinguishes the purpose of having continued detention periodically reviewed every two months pursuant to Rule 57(2) of the Rules.³⁶ It adds that the SPO appears to address instead the standard for reconsideration pursuant to Rule 57(2) of the Rules.³⁷

25. The Pre-Trial Judge recalls that he has an obligation, under Article 41(10) of the Law, to examine whether the reasons for detention on remand still exist, including the grounds set out in Article 41(6) of the Law, namely whether: (i) there is a grounded suspicion that the person has committed the crime(s); and (ii) there are articulable grounds to believe that any of the risks set out in Article 41(6)(b) of the Law has been fulfilled.³⁸ The duty to determine whether the circumstances underpinning detention still exist imposes on the competent panel the task to, *proprio motu*, assess whether it is still satisfied that, at the time of the review and under the specific circumstances of

³² Defence Submissions, para. 20.

³³ Response, para. 3.

³⁴ Response, para. 3.

³⁵ Response, para. 3.

³⁶ Reply, para. 3.

³⁷ Reply, para. 3.

³⁸ KSC-BC-2020-07, IA002-F00005, Court of Appeals, *Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention ("Haradinaj Detention Appeal")*, 9 February 2021, public, para. 55; Second Court of Appeals Decision, para. 16.

the case when the review takes place, the detention of the Accused remains warranted.³⁹ Although the automatic review every two-months under Rule 57(2) of the Rules is not strictly limited to whether or not a change of circumstances occurred, such a change can nonetheless be determinative and shall be taken into consideration if raised by a Party or *proprio motu*.⁴⁰ 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.⁴¹ It 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.⁴² The SPO bears the burden of establishing that the detention of the Accused is necessary.⁴³ This means that the SPO must provide specific arguments and concrete evidence to establish that continued detention is necessary at the time of the review.

26. Contrary to the Defence's argument, the principles set out in the preceding paragraph explicitly stipulate that the burden of proof remains with the SPO and the Response does not establish otherwise.⁴⁴ Furthermore, these principles are firmly established in the jurisprudence and do not extinguish the guarantee under Article 41(10) of the Law and Rule 57(2) of the Rules.⁴⁵

³⁹ KSC-BC-2020-06, IA006-F00005, Court of Appeals, *Decision on Jakup Krasniqi's Appeal Against Decision on Review of Detention ("Krasniqi Detention Appeal")*, 1 October 2021, confidential, para. 15 (a public redacted version was issued on the same day, IA006/F00005/RED); Second Court of Appeals Decision, para. 17.

⁴⁰ *Krasniqi Detention Appeal*, para. 16; Second Court of Appeals Decision, para. 18.

⁴¹ Second Court of Appeals Decision, para. 18.

⁴² *Haradinaj Detention Appeal*, para. 55; *Krasniqi Detention Appeal*, para. 17; Second Court of Appeals Decision, para. 18.

⁴³ First Detention Decision, para. 13, with further references.

⁴⁴ See also Second Court of Appeals Decision, para. 15.

⁴⁵ Indeed, a similar challenge by the Defence against the Court of Appeals' jurisprudence was recently rejected, see Second Court of Appeals Decision, paras 15-18.

B. GROUNDED SUSPICION

27. As regards the threshold for continued detention, Article 41(6)(a) of the Law requires, at the outset, a grounded suspicion that the detained person has committed a crime within the jurisdiction of the SC. This is a condition *sine qua non* for the validity of the detained person's continued detention.⁴⁶

28. The Defence, while maintaining its previous submissions on the unlawfulness of Mr Shala's continued detention,⁴⁷ does not specifically address this criterion.

29. The SPO responds that, for the reasons set forth in the Confirmation Decision and the Fourth Detention Decision, there continues to be a well-grounded suspicion that the Accused committed multiple crimes within the jurisdiction of the SC, thereby exceeding the grounded suspicion standard required for the purposes of Article 41 of the Law.⁴⁸ It adds that there has been no development capable of changing this finding or warranting its re-examination by the Pre-Trial Judge, whereas [REDACTED] provide further corroboration to the body of evidence on which the findings of the Pre-Trial Judge were based.⁴⁹

30. The Pre-Trial Judge recalls that, in the Confirmation Decision, it was found that, pursuant to Article 39(2) of the Law, there is a well-grounded suspicion that Mr Shala is criminally liable for a number of war crimes (arbitrary detention, cruel treatment, torture and murder) under Articles 14(1)(c) and 16(1)(a) of the Law.⁵⁰ These findings were made on the basis of a standard exceeding the grounded suspicion threshold required for the purposes of Article 41(6)(a) of the Law.⁵¹

⁴⁶ Similarly ECtHR, *Merabishvili v. Georgia* [GC], no. 72508/13, [Judgment](#), 28 November 2017, para. 222, with further references.

⁴⁷ Defence Submissions, para. 16.

⁴⁸ Response, para. 4.

⁴⁹ Response, para. 4.

⁵⁰ Confirmation Decision, para. 140(a); *see also* First Detention Decision, para. 15; Second Detention Decision, para. 22; Third Detention Decision, para. 19; Fourth Detention Decision, para. 21.

⁵¹ Confirmation Decision, para. 35; *see also* KSC-BC-2020-06, IA008-F00004, Court of Appeals, *Decision on Kadri Veseli's Appeal Against Decision on Review of Detention*, 1 October 2021, confidential, para. 21. A public redacted version was issued on the same day, IA008/F00004/RED.

31. In the absence of any intervening information or development in relation to the present decision, the Pre-Trial Judge finds that the requirement set forth in Article 41(6)(a) of the Law continues to be met.

C. NECESSITY OF DETENTION

32. Once the threshold in Article 41(6)(a) of the Law is met, the grounds that would justify the deprivation of a person's liberty must be articulable in the sense that they must be specified in detail.⁵² The Pre-Trial Judge further recalls that, on the basis of the available evidence, the specific articulable grounds must support the "belief"⁵³ that any of the risks under the three limbs of Article 41(6)(b) of the Law exists, denoting an acceptance of the possibility, not the inevitability, of a future occurrence.⁵⁴ In other words, the standard to be applied is less than certainty, but more than a mere possibility of a risk materialising.⁵⁵ When deciding whether a person should be released or detained, the Pre-Trial Judge must consider alternative measures to prevent the risks set forth in Article 41(6)(b) of the Law.⁵⁶

33. At the outset, the Pre-Trial Judge notes that, in connection with its submission that Mr Shala's continued detention is unlawful and its request for his immediate release, the Defence fully maintains its previous submissions.⁵⁷ As already specified above and in previous decisions reviewing Mr Shala's detention, 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

⁵² First Detention Decision, para. 16, with further references.

⁵³ See *chapeau* of Article 41(6)(b) of the Law.

⁵⁴ First Detention Decision, para. 16, with further references.

⁵⁵ First Detention Decision, para. 16, with further references.

⁵⁶ KSC-CC-PR-2017-01, F00004, Specialist Chamber of the Constitutional Court, *Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017*, 26 April 2017, public, para. 114; see also ECtHR, *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, [Judgment](#), 5 July 2016 ("*Buzadji v. the Republic of Moldova* [GC]"), para. 87 *in fine*; ECtHR, *Idalov v. Russia* [GC], no. 5826/03, [Judgment](#), 22 May 2012, para. 140 *in fine*.

⁵⁷ Defence Submissions, paras 7, 16, 22.

have already been addressed in previous decisions.⁵⁸ Therefore, the Pre-Trial Judge will not entertain these submissions any further and, accordingly, the ensuing sections will exclusively address arguments not previously raised and considered.

1. Risk of Flight

34. Besides repeating its previous submissions,⁵⁹ the Defence does not provide any specific submissions regarding the risk of flight. According to the SPO, the risk that the Accused will abscond has further increased on the basis that: (i) the proceedings continue to move forward towards the start of the trial, including with the setting of a tentative date for transfer of the case to the Trial Panel; (ii) the SPO has filed its Pre-Trial Brief and other Rule 95(4) documents, which provided the Accused with more details about the evidence against him and its sources, and will eventually lead to a progressive lifting of protective measures granted to witnesses in this case; and (iii) the Accused will soon be made privy to the identity [REDACTED], who corroborate his involvement and important role in the commission of the crimes charged in this case.⁶⁰

35. Having examined the factors and circumstances invoked in the decisions reviewing Mr Shala's detention, the Pre-Trial Judge remains satisfied that they continue to exist. More specifically, the Pre-Trial Judge considers that Mr Shala: (i) is aware of the serious charges against him, the possibly severe penalty these charges could attract in the event of a conviction, and the final conviction of two of the members of the Joint Criminal Enterprise ("JCE") to which he also allegedly belonged; and (ii) rejects the legitimacy of the SC.⁶¹ In addition: (i) the relatively small size of the

⁵⁸ Third Detention Decision, paras 24, 28, 32; Fourth Detention Decision, para. 24; Second Court of Appeals Decision, para. 18.

⁵⁹ Defence Submissions, para. 22.

⁶⁰ Response, paras 2, 5, 6.

⁶¹ First Detention Decision, paras 24-25; Second Detention Decision, para. 28; Third Detention Decision, para. 25; Fourth Detention Decision, para. 27.

group making up the alleged JCE and the fact that the events underlying the charges are easily distinguishable increase the possibility of mutual assistance among its alleged members, including by helping each other to abscond; and (ii) there is a general context of a general, well-established, and ongoing climate of interference with criminal proceedings related to the Kosovo Liberation Army (“KLA”) and of witness intimidation.⁶² However, the Pre-Trial Judge considers that, contrary to the SPO’s submission, the risk of flight has not increased as a result of the advancement of the proceedings considering that the aforementioned factors and circumstances are not dependent on such developments. For these reasons, a moderate risk of flight in relation to Mr Shala continues to exist at present.

2. Risk of Obstructing the Progress of SC Proceedings

36. Besides repeating its previous submissions,⁶³ the Defence does not provide any specific submissions regarding the risk of obstruction in the Defence Submissions. The arguments set out by the SPO in its Response have been detailed above in connection with the risk of flight.⁶⁴ The Defence replies that none of the factors invoked by the SPO show a risk of obstructing the proceedings or committing further crimes.⁶⁵ It further contends that the SPO’s submission that each of the Article 41(6)(b) risks increased since the last review of continued detention because the proceedings continue to move forward is plainly inadequate as the fundamental right to liberty requires the application of a presumption in favour of liberty.⁶⁶

⁶² First Detention Decision, para. 26; Second Detention Decision, para. 28; Third Detention Decision, para. 25; Fourth Detention Decision, para. 27.

⁶³ Defence Submissions, para. 22.

⁶⁴ See para. 34 above.

⁶⁵ Reply, para. 4.

⁶⁶ Reply, paras 5-7.

37. It is recalled that: (i) [REDACTED];⁶⁷ and (ii) the existence of protective measures is not contrary to the finding that there is a risk of obstruction in the circumstances of the present case and, more generally, the necessity for such measures demonstrates a heightened risk given that the events underlying the charges are easily distinguishable.⁶⁸

38. The Pre-Trial Judge further considers that, [REDACTED], the advancement of the pre-trial proceedings following the Fourth Detention Decision – in particular, the filing of the SPO's Pre-Trial Brief,⁶⁹ as well as the imminent disclosure of the identities [REDACTED]⁷⁰ - increases the risk of obstruction considering that it will provide Mr Shala with more details as to the case against him and will eventually lead to certain protective measures being lifted.⁷¹

39. The Defence's arguments contained in the Reply misconstrue the test applicable to the review of detention. It disregards that it has been established that the risk of obstructing the progress of SC proceedings continues to exist on the basis of the [REDACTED], while certain developments relating to this case have been found to increase this risk. Therefore, it cannot be said that the aforementioned finding hinges exclusively on the progression of the case and, as a result, the submission that these factors are inadequate is misplaced. For these reasons, the Defence's arguments are dismissed.

⁶⁷ First Detention Decision, paras 32-35; First Court of Appeals Decision, paras 35-42; Second Detention Decision, para. 32; Third Detention Decision, para. 29; Fourth Detention Decision, para. 30; Second Court of Appeals Decision, para. 33.

⁶⁸ Second Detention Decision, para. 31; Third Detention Decision, para. 29; Fourth Detention Decision, para. 31; Second Court of Appeals Decision, paras 32, 34.

⁶⁹ KSC-BC-2020-04, F00135/A01, *Specialist Prosecutor*, Prosecution Pre-Trial Brief, 28 January 2022, strictly confidential and *ex parte* (a confidential redacted version was submitted on 31 January 2022, F00136/A01; a confidential, lesser redacted version was submitted on 8 February 2022, F00139/A01).

⁷⁰ KSC-BC-2020-04, F00169, *Specialist Prosecutor*, *Prosecution Request pursuant to Rule 102(2) and to Amend its Witness and Exhibit Lists*, 25 March 2022, confidential (a public redacted version was submitted on 28 March 2022, F00169/RED); KSC-BC-2020-04, Transcript, 14 April 2022, confidential, pp. 272-273.

⁷¹ See also Second Court of Appeals Decision, paras 35-38.

40. Accordingly, the Pre-Trial Judge finds that the risk of Mr Shala obstructing the progress of SC proceedings continues to exist on the basis that [REDACTED] and the advancement of the pre-trial proceedings is providing Mr Shala additional insight into the case against him.

3. Risk of Committing Further Crimes

41. Besides repeating its previous submissions,⁷² the Defence does not provide any specific submissions regarding the risk of committing further crimes in the Defence Submissions. The arguments set out by the SPO in its Response have been detailed above in connection with the risk of flight.⁷³ The arguments provided by the Defence in the Reply have been described above in relation to the risk of obstruction.⁷⁴

42. The Pre-Trial Judge remains mindful of the fact that the existence of the risk of obstruction does not automatically translate into a risk of committing further crimes, but reiterates that the factors underpinning the former risk are of relevance to the assessment of the latter risk in the present case.⁷⁵ In the view of the Pre-Trial Judge, the risk of Mr Shala committing further crimes continues to exist, considering that [REDACTED].⁷⁶ In addition, as with the risk of obstruction, the Pre-Trial Judge considers that the advancement of the pre-trial proceedings since the Fourth Detention Decision, especially the submission of the SPO's Pre-Trial Brief and the imminent disclosure of the identities of [REDACTED], increases the risk of Mr Shala committing further crimes.⁷⁷ The Defence's arguments that the factors invoked by the

⁷² Defence Submissions, para. 22.

⁷³ See para. 34 above.

⁷⁴ See para. 36 above.

⁷⁵ First Detention Decision, para. 39; Second Detention Decision, para. 36; Third Detention Decision, para. 33; Fourth Detention Decision, para. 35.

⁷⁶ First Detention Decision, para. 39; Second Detention Decision, para. 36; Third Detention Decision, para. 33; Fourth Detention Decision, para. 35.

⁷⁷ See para. 38 above.

SPO are insufficient are set aside for the same reasons identified above.⁷⁸ Accordingly, the Pre-Trial Judge considers that the risk that Mr Shala will commit further crimes continues to exist at present.

4. Conclusion

43. The Pre-Trial Judge concludes, for the purposes of the periodic review of the detention of Mr Shala pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules, that the risks that Mr Shala will abscond, obstruct the progress of SC proceedings, or commit further crimes against those perceived as being opposed to the KLA, including witnesses who provided evidence to the SPO and/or are due to appear before the SC, continue to exist. The Pre-Trial Judge will assess below whether these risks can be adequately addressed by imposing conditions in connection with the interim release of Mr Shala.

D. CONDITIONAL RELEASE

44. The Defence reiterates its request for Mr Shala's immediate release subject to the conditions previously proposed or any conditions deemed appropriate, and repeats Mr Shala's willingness to offer extensive undertakings and be subject to such conditions the Pre-Trial Judge deems appropriate.⁷⁹ It adds that, following its enquiry with the Government of Belgium as to its willingness and capacity to implement the conditions of release proposed by the Defence, the Belgian Federal Ministry of Justice [REDACTED].⁸⁰ As a result, the Defence does not invite the Pre-Trial Judge to consider the option of [REDACTED] without prejudice.⁸¹

⁷⁸ See para. 39 above.

⁷⁹ Defence Submissions, paras 5, 24, 25.

⁸⁰ Defence Submissions, paras 6, 15.

⁸¹ Defence Submissions, para. 7.

45. The SPO avers that the risks can only be mitigated and effectively managed through the continued detention of the Accused at the SC Detention Facilities.⁸² It adds that, on the basis of the Registry Submissions, the monitoring and restriction of communications that can be enforced by highly trained Detention Officers at the SC Detention Facilities are uniquely suited to address the risks identified by the Pre-Trial Judge and, in addition, special *ad hoc* restrictions can be put in place at any time if deemed necessary by the Pre-Trial Judge or a Trial Panel.⁸³ The SPO is also of the view that none of these measures can be applied and effectively enforced outside the SC Detention Facilities, especially after the Belgian authorities' refusal to implement the release conditions proposed by the Defence.⁸⁴

46. As regards the risk of flight, the Pre-Trial Judge recalls that it has been previously found that the conditions proposed in relation to the First Detention Decision sufficiently mitigate this risk, namely Mr Shala's undertakings to submit himself to daily checks by authorised Belgian officials, surrender any travel documents, and subject himself to close monitoring by the Belgian authorities.⁸⁵ Considering that the SPO's generic submissions on this matter are unsubstantiated, the Pre-Trial Judge finds that, in the absence of any intervening information or development in relation to the present decision, the aforementioned conditions remain adequate to mitigate the risk of flight in relation to Mr Shala.

47. Turning to the risks of obstructing the progress of SC proceedings and committing further crimes, the Pre-Trial Judge, although noting that the Defence's proposed conditions have been addressed previously and hence would not need to be considered any further,⁸⁶ recalls that it has been determined that: (i) these conditions

⁸² Response, paras 8, 10.

⁸³ Response, para. 9.

⁸⁴ Response, para. 9.

⁸⁵ First Detention Decision, para. 45; Second Detention Decision, para. 40; Third Detention Decision, para. 37; Fourth Detention Decision, para. 39.

⁸⁶ *Haradinaj* Detention Appeal, para. 55; *Krasniqi* Detention Appeal, para. 17.

do not address the possibility of Mr Shala employing communication devices belonging to others or requesting others to use their devices for these purposes; and (ii) the enforcement conditions are insufficient to ensure the effective monitoring of Mr Shala's communications.⁸⁷ There is no intervening information or development warranting an adjustment of these findings, in particular because the Defence does not specify its generic assertion that suitable measures can be imposed.⁸⁸

48. Furthermore, the Pre-Trial Judge observes that, notwithstanding the question whether the possibility of house arrest would sufficiently mitigate the aforementioned risks, this measure cannot be implemented in view of the Belgian authorities' response that [REDACTED].⁸⁹

49. At the same time, the Registry Submissions confirm that the measures in place at the SC Detention Facilities, viewed as a whole, provide robust assurances against unmonitored visits and communications with family members and pre-approved visitors with a view to minimising the risks of obstruction and commission of further crimes as much as possible, considering that: (i) all telephone conversations on the non-privileged telephone line are passively monitored; (ii) if necessary and proportionate, the Registrar may decide to actively monitor telephone conversations for a limited period of up to thirty consecutive calendar days, which is renewable for an additional period of up to thirty consecutive calendar days, or to impose after-the-fact-listening; (iii) unmonitored communications are strictly limited considering that detainees are only allowed unmonitored "private visits" for certain close family members and within limited time periods; (iv) in person and video visits are, as a rule, conducted within the sight and general hearing of SC Detention Facilities Officers, and the Registrar may also impose additional safeguards for such visits, including

⁸⁷ First Detention Decision, paras 46-48; First Court of Appeals Decision, paras 53-58, 61; Second Detention Decision, paras 41-42; Third Detention Decision, para. 38; Fourth Detention Decision, para. 40.

⁸⁸ Defence Submissions, para. 24.

⁸⁹ Annex 2 to Correspondence Belgian Authorities, p. 2.

active monitoring and after-the-fact-listening; (v) all correspondence is subjected to the security controls; (vi) additional restrictions relating to visits (both video and in-person), telephone conversations, and correspondence can be implemented; (vii) should a communication of concern relate to protecting the safety, security, rights, or freedoms of others [REDACTED]; and (viii) the SC Detention Facilities are a high-security environment, and the SC Detention Facilities Officers are highly qualified, [REDACTED], and receive training on applying the visits and communications regime at the SC Detention Facilities.⁹⁰ The aforementioned measures, as well as additional measures, may also be ordered *proprio motu* by the Pre-Trial Judge pursuant to Rule 56(6) of the Rules. In this regard, the Pre-Trial Judge emphasises that the Registrar and the Panel, who have unrestricted access to confidential information concerning witnesses and victims, may take action more promptly than other authorities acting under a distinct framework.⁹¹

50. As to any additional conditions to be imposed, the Pre-Trial Judge recalls that that the Court of Appeals has specified that all *reasonable* conditions that could be imposed on an accused must be evaluated.⁹² In this regard, the Pre-Trial Judge considers that the Belgian authorities' response [REDACTED] necessarily entails that any additional conditions that are reasonable and could sufficiently mitigate the existing risks also cannot be put into place. However, as previously found, further conditions, such as visits monitored by the Belgian authorities, are particularly relevant in view of the fact that Mr Shala has the ability to communicate in a language that is not an official language in Belgium.⁹³ Furthermore, in view of the seriousness

⁹⁰ Registry Submissions, paras 17-47; *see also* Second Court of Appeals Decision, para. 53; KSC-BC-2020-06, IA014-F00008, Court of Appeals, *Decision on Kadri Veseli's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention*, 31 March 2022, confidential, paras 38, 41, 44 ("Veseli 31 March 2022 Detention Appeal") (a public redacted version was issued on the same day, IA014/F00008/RED).

⁹¹ *See also mutatis mutandis* Veseli 31 March 2022 Detention Appeal, para. 41.

⁹² KSC-BC-2020-06, IA017-F00011, Court of Appeals, *Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention*, 5 April 2022, confidential, para. 51 (emphasis in original) (a public redacted version was issued on the same day, IA017/F00011/RED).

⁹³ Fourth Detention Decision, para. 40.

of the risks set out above, any other measures falling short of house arrest with attendant conditions sufficiently approximating the regime at the SC Detention Facilities would be insufficient or would be so impractical that they would become unreasonable. For these reasons, the Pre-Trial Judge considers that no additional conditions are available to adequately mitigate the existing risks.

51. Lastly, it is recalled that the Court of Appeals has found that, given that an individual's liberty is at stake, the lack of preliminary guarantees from a Third State does not prevent a panel from 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.⁹⁴ For this reason, the Defence and/or Registrar were ordered to file any correspondence with Belgium in the record so as to assess whether there is a need to revert to the competent Belgian authorities. While mindful of the fundamental right to liberty, the Pre-Trial Judge finds that further information from Belgium is not required for the purposes of the present decision in view of the fact that: (i) Belgium has been explicitly requested to provide its views on the matters under consideration and it categorically indicated that [REDACTED]; (ii) the Defence has been afforded the opportunity to file its observations on this matter and decided not to invite the Pre-Trial Judge to further consider the possibility of house arrest; (iii) the Defence omits to specify how any other conditions could sufficiently mitigate the existing risks; (iv) the risks identified above are serious and continue to exist; and (v) measures falling short of house arrest with attendant conditions are insufficient to address these risks.

52. Therefore, the Pre-Trial Judge remains persuaded that it is only through the communication monitoring framework applicable at the SC Detention Facilities that Mr Shala's communications can be restricted in a manner to sufficiently mitigate the

⁹⁴ Second Court of Appeals Decision, para. 57.

aforementioned risks. Accordingly, the Pre-Trial Judge finds that the proposed conditions and any additional conditions imposed by the Pre-Trial Judge are insufficient to mitigate the risk of Mr Shala obstructing the progress of SC proceedings or committing further crimes. It follows that the Third Detention Decision, to the extent that it was remanded by the Court of Appeals, is confirmed. This conclusion extends, for the same reasons, to the current periodic review of the detention of Mr Shala pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules.

E. PROPORTIONALITY OF DETENTION

53. The Defence asserts that Mr Shala's detention is disproportionate in view of: (i) the protracted length of detention, namely 379 days; (ii) the scale of the case; (iii) the lack of regular family visits and the financial implications resulting from his detention for his family; and (iv) the fact that the disclosure process has not been completed and that the Defence will require additional time to analyse the disclosed material, conduct all necessary investigations and prepare its pre-trial brief.⁹⁵

54. The SPO responds that the continued detention of the Accused is proportional since: (i) he is charged with four counts of war crimes and, if convicted, could face a lengthy sentence; (ii) the risks under Articles 41(6) of the Law cannot be mitigated outside the SC Detention Facilities; (iii) the Pre-Trial Judge has already tentatively scheduled the transmission of the case file to the Trial Panel; and (iv) the SPO has continued to discharge its disclosure obligations, including the review and disclosure of all materials potentially falling under Rule 103 of the Rules, with the exception of documents requiring protective measures.⁹⁶

55. At the outset, the Pre-Trial Judge recalls the importance of the proportionality principle in the determination of the reasonableness of pre-trial detention and that the

⁹⁵ Defence Submissions, paras 3, 5, 19, 23.

⁹⁶ Response, paras 1, 11.

longer a person remains in pre-trial detention the higher the burden on the SPO to justify continued detention.⁹⁷ The duration of time in detention pending trial is a factor that needs to be considered along with the degree of the risks that are described in Article 41(6)(b) of the Law, in order to determine whether, all factors being considered, the continued detention “stops being reasonable” and the individual needs to be released.⁹⁸ However, the Pre-Trial Judge notes that the question whether a period of time spent in pre-trial detention is reasonable cannot be assessed in the abstract. Whether it is reasonable for an accused to remain in detention must be assessed on the facts of each case and according to its specific features.⁹⁹

56. The Pre-Trial Judge recalls that: (i) Mr Shala has been detained in Belgium since 16 March 2021 and subsequently at the SC Detention Facilities since 15 April 2021; (ii) he is charged with four counts of war crimes that allegedly took place in Albania over the course of several weeks; (iii) he could be sentenced to a lengthy sentence, if convicted; (iv) the risks under Article 41(6)(b)(ii) and (iii) of the Law cannot be mitigated by the proposed conditions and/or any additional conditions; (v) all required procedural steps relating to the pre-trial phase of the present case have been, are being or will be completed with a view to transmitting the case for trial at a point in the foreseeable future – in particular, the SPO has, in principle, completed its disclosure under Rules 102(1)(b) and 103 of the Rules while it has nearly completed its disclosure under Rule 107 of the Rules,¹⁰⁰ further progress in the disclosure process pursuant to Rule 102(3) of the Rules has been made (notably, the SPO has provided a notice under Rule 102(3) of the Rules with partially revised descriptions at the request

⁹⁷ KSC-BC-2020-07, IA001/F00005, Court of Appeals Panel, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, 9 December 2020, public, paras 72-73.

⁹⁸ Similarly KSC-BC-2020-06, IA002/F00005, Court of Appeals Panel, *Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release*, 30 April 2021, confidential, para. 69. A public redacted version was filed on the same day, IA002/F00005/RED.

⁹⁹ ECtHR, *Buzadji v. the Republic of Moldova* [GC], para. 90.

¹⁰⁰ KSC-BC-2020-04, Transcript, 14 April 2022, confidential, pp. 252-253, 268, 269, 287.

of the Defence,¹⁰¹ [REDACTED],¹⁰² the SPO has completed its review of its notice under Rule 102(3) of the Rules for exculpatory evidence,¹⁰³ and the SPO has been granted leave to further amend its notice under Rule 102(3) of the Rules¹⁰⁴), the SPO's Pre-Trial Brief as well as the chart according to Rule 109(c) of the Rules have been filed,¹⁰⁵ and the Parties have submitted their points of agreement on matters of fact;¹⁰⁶ (vi) the Pre-Trial Judge has set a tentative date for the transmission of the case file to a Trial Panel, namely 31 August 2022, and defined further time limits regarding certain outstanding pre-trial obligations;¹⁰⁷ and (vii) the relevant time limits – some of which have been extended upon good cause having been demonstrated, including upon request from the Defence¹⁰⁸ - have been or continue to be met and any additional requests for extension of time will be evaluated against the applicable legal criteria. Furthermore, pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules, Mr Shala's detention shall be reviewed every two months or as soon as a change in circumstances arises.

57. As to the Defence's submission regarding the length of Mr Shala's detention, the Pre-Trial Judge has duly appraised the additional time spent in detention by Mr Shala following the Fourth Detention Decision, including the resulting increase of the SPO's burden to justify Mr Shala's continued detention. However, weighed against the remaining factors and, in particular, the serious nature of the charges against Mr Shala, the impossibility to mitigate the risks under Article 41(6)(b)(ii) and (iii) of

¹⁰¹ KSC-BC-2020-04, F00167, Specialist Prosecutor, *Prosecution Rule 102(3) notice Containing Partially Revised Descriptions*, 18 April 2022, public, with one Annex, confidential.

¹⁰² [REDACTED].

¹⁰³ KSC-BC-2020-04, Transcript, 4 March 2022, public, p. 212.

¹⁰⁴ KSC-BC-2020-04, Transcript, 14 April 2022, confidential, p. 297.

¹⁰⁵ See footnote 69 above.

¹⁰⁶ KSC-BC-2020-04, F00178, Specialist Prosecutor, *Prosecution Submissions on Points of Agreement on Matters of Fact*, 8 April 2022, public, with one Annex, confidential.

¹⁰⁷ KSC-BC-2020-04, Transcript, 14 April 2022, confidential, pp. 298-300.

¹⁰⁸ See for instance KSC-BC-2020-04, F00074, Specialist Counsel, *Defence Motion for an Extension of Time for its Rule 102(2) [sic] Request*, 9 September 2021, public; F00076, Specialist Prosecutor, *Prosecution Response to KSC-BC-2020-04/F00074 and Related Request for Modification of Deadlines*, 10 September 2021, public; Transcript, 23 September 2021, public, p. 92, lines 10-20; F00086, Specialist Counsel, *Defence Request for Variation of Time Limit for its Rule 102(2) [sic] Request*, 13 October 2021, public; Transcript, 14 April 2022, confidential, pp. 276-287.

the Law and the advancement of the proceedings, this period of time does not render Mr Shala's detention disproportionate. Furthermore, in relation to the Defence's reference to the scale of the present case, the Pre-Trial Judge considers that the gravity of the charges do not support a finding that Mr Shala's continued detention is disproportionate. In addition, any additional time required by the Defence does not, as such, suffice to consider Mr Shala's detention disproportionate and, in any event, this matter has already been adjudicated and the Pre-Trial Judge has set a tentative date for transmitting the case file to a Trial Panel and other time limits for completing the pre-trial phase.¹⁰⁹ Lastly, in relation to the Defence's arguments based on Mr Shala's right to a private and family life, the Pre-Trial Judge recalls that it has already been established that: (i) the impossibility of regular family visits constituted a proportionate and temporary measure that was necessary as a result of public health considerations, which has now been lifted; (ii) the frequency of family visits is not attributable to the SC and Mr Shala retains the possibility to communicate with his family members in other ways; and (iii) the limited financial means at the disposal of Mr Shala must be attributed very limited weight in the context of the present case.¹¹⁰ Accordingly, the Defence's argument are rejected.

58. On this basis, the Pre-Trial Judge concludes that, for the purposes of the periodic review of the detention of Mr Shala pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules, the time Mr Shala has spent in pre-trial detention is not disproportionate. In addition, considering that there is no agreement as to the start of the trial, any discussion as to the expected total length of his pre-trial detention remains premature and speculative.¹¹¹

¹⁰⁹ KSC-BC-2020-04, Transcript, 14 April 2022, confidential, pp. 298-300.

¹¹⁰ Second Detention Decision, para. 48; Third Detention Decision, para. 45; Fourth Detention Decision, para. 48; KSC-BC-2020-04, Transcript, 14 January 2022, public, p. 181.

¹¹¹ See also *Krasniqi Detention Appeal*, para. 43; KSC-BC-2020-06, IA010-F00008, Court of Appeals, *Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention*, 27 October 2021, confidential, para. 51 (a public redacted version was issued on the same day, IA010-F00008/RED).

V. DISPOSITION

59. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- (a) **DECIDES** to confirm the Third Detention Decision to the extent that it was remanded by the Court of Appeals;
- (b) **ORDERS** Mr Shala's continued detention as a result of the periodic review of his detention pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules;
- (c) **ORDERS** the Defence, if it wishes to do so, to file submissions on the next review of detention of Mr Shala by no later than **Wednesday, 1 June 2022**, with responses and replies following the timeline set out in Rule 76 of the Rules; and
- (d) **ORDERS** the SPO, should Mr Shala decide not to file any submissions by the aforementioned time limit, to file submissions on the next review of Mr Shala's detention by no later than **Wednesday, 8 June 2022** and Mr Shala, if he wishes to do so, to file his submissions by no later than **Wednesday, 15 June 2022**.



Judge Nicolas Guillou

Pre-Trial Judge

Dated this Friday, 22 April 2022

At The Hague, the Netherlands.