

**Case No.:** KSC-BC-2020-04  
**Before:** Court of Appeals Panel  
Judge Michèle Picard  
Judge Kai Ambos  
Judge Nina Jørgensen  
**Registrar:** Dr Fidelma Donlon  
**Date:** 23 May 2022  
**Filing Party:** Defence Counsel  
**Original Language:** English  
**Classification:** Confidential

**THE SPECIALIST PROSECUTOR**

v.

**PJETËR SHALA**

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**Defence Reply to Response to  
Appeal Against the Pre-Trial Judge's Decision on Review of Detention of  
Pjetër Shala dated 22 April 2022**

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**Specialist Prosecutor's Office:**  
Jack Smith

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

**Counsel for Victims**  
Simon Laws QC  
Maria Radziejowska

## I. INTRODUCTION

1. The Defence for Mr Pjetër Shala (“Defence” and “Accused”, respectively) files this Reply to the Prosecution’s Response to the Appeal against the Decision on Review of Detention of Pjetër Shala dated 22 April 2022.<sup>1</sup>
2. 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 Specialist Prosecutor’s Office (“SPO”) in their entirety.
3. The Defence maintains its position that the findings identified in paragraph 17 of its Appeal entail errors of law and fact as well as abuse of discretion.

## II. SUBMISSIONS

### *A. Error in applying the standard of proof when assessing the Article 41(6)(b) risks*

4. For the reasons developed in the Appeal, the Defence submits that the Pre-Trial Judge erroneously applied the standard of proof and reversed the burden that ought to be met by the Prosecution.<sup>2</sup>
5. The SPO inappropriately characterises the Defence’s submissions as “unsupported” and “repeat[ing] baseless arguments previously rejected by the

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<sup>1</sup> KSC-BC-2020-04/IA005, F00003, Prosecution response to ‘Defence Appeal against the Pre-Trial Judge’s Decision on Review of Detention of Pjetër Shala dated 22 April 2022’, 16 May 2022 (confidential)(“Response”); KSC-BC-2020-04/IA005, F00005, Defence Appeal Against the Pre-Trial Judge’s Decision on Review of Detention of Pjetër Shala dated 22 April 2022, 4 May 2022 (confidential)(“Appeal”); KSC-BC-2020-04, F00188, Decision on Remanded Detention Review Decision and Periodic Review of Detention of Pjetër Shala, 22 April 2022 (confidential)(“Impugned Decision”). All further references to filings in this Motion concern Case No. KSC-BC-2020-04 unless otherwise indicated.

<sup>2</sup> Appeal, paras. 18 – 25.

Panel”.<sup>3</sup> It purports to rely in this respect on paragraphs 15 to 20 of the Appeals Chamber Decision of 11 February 2022,<sup>4</sup> which held that: (i) the determination of whether the circumstances underpinning detention “still exist” is not a light one; (ii) a *change* of circumstances occurred in the case *can* be determinative and shall be taken into consideration if raised before the Panel or *proprio motu* but the automatic periodic review “is not strictly limited to whether or not a change of circumstances occurred in the case”; and (iii) the Pre-Trial Judge should not be expected to entertain submissions that merely repeat arguments that have already been addressed in his previous decisions.<sup>5</sup>

6. Contrary to what the SPO suggests, the Defence does not allege that the Pre-Trial Judge should entertain submissions that he previously addressed. The Defence submits that the Pre-Trial Judge erred due to his mere reliance on previous findings and failure to conduct a new assessment, while accepting the SPO’s failure to provide any specific arguments and concrete evidence justifying Mr Shala’s continued detention.<sup>6</sup> In his assessment of the existence of risks, the Pre-Trial Judge begins and bases his analysis on the consideration that “[t]he Defence does not provide any specific submissions regarding the risk[s].”<sup>7</sup> Contrary to the Prosecution’s submissions, the Defence cannot be required to demonstrate “circumstances warranting a diminution of the established risk.”<sup>8</sup> Taken together with the lack of any specific arguments or concrete evidence put forward by the Prosecution to justify continued

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<sup>3</sup> Response, paras. 17, 18 (footnotes omitted).

<sup>4</sup> Response, para. 17 *referring to* IA003/F00005, Decision on Pjetër Shala’s Appeal Against Decision on Review of Detention, 11 February 2022 (confidential)(“Appeals Chamber Decision of 11 February 2022”), paras. 15- 20.

<sup>5</sup> Appeals Chamber Decision of 11 February 2022, paras. 17-18.

<sup>6</sup> Response, paras. 19. *See also* Response, paras. 20-22; Appeal, paras. 19-22.

<sup>7</sup> Impugned Decision, paras. 35, 36, 41.

<sup>8</sup> Response, para. 22.

detention, the Pre-Trial Judge's decision has effectively reversed the applicable burden of proof.

7. In his findings, the Pre-Trial Judge clearly noted his expectation that "the Defence [should] provide [...] specific submissions regarding the risk of obstruction" and that "the Defence [should] provide [...] specific submissions regarding the risk of committing further crimes".<sup>9</sup> His expectation for "specific submissions" provided by the Defence is to be contrasted with his position concerning the Prosecution and the lack of "specific arguments and concrete evidence" or "articulable grounds" justifying continued detention despite the fact that as a matter of law the burden of proof lies with the Prosecution.<sup>10</sup>
8. In these circumstances,<sup>11</sup> the periodic review of detention conducted by the Pre-Trial Judge is not meaningful and fails to offer a real and effective remedy for the purposes of Article 5 of the European Convention on Human Rights.

***B. Error in finding that Mr Shala's rejection of the legitimacy of the SC is a factor to be taken into consideration for assessing the risk of absconding***

9. While statements by an accused can be taken into consideration in assessing the risk of absconding, Mr Shala's arguments contesting the legitimacy of the SC was a lawful exercise of his fair trial rights and could not be taken into consideration in determining whether he is willing and/or able and/or inclined to abscond. As noted in the Appeal, this error should not be summarily dismissed in view of its chilling effect on Mr Shala's exercise of his fair trial rights. The Pre-Trial Judge's error should be corrected so that future assessments of the risk of absconding are based on legitimate considerations

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<sup>9</sup> Impugned Decision, paras. 36, 41.

<sup>10</sup> Appeal, para. 19.

<sup>11</sup> See also Appeal, paras. 31-36.

and are not invalidated by abuse of discretion. The Pre-Trial Judge's repeated reliance on Mr Shala's statements challenging the legitimacy of the KSC for these purposes prejudices Mr Shala's right to set forth his defence case without fear of repercussions.<sup>12</sup>

*C. Error in considering the purported existence of a climate of interference with criminal proceedings related to the KLA and witness intimidation as a factor demonstrating the risk of absconding*

10. The SPO's defence of the Impugned Decision's conclusion as to the existence of a general and well-established climate of interference with criminal proceedings related to the KLA is not persuasive.<sup>13</sup> The Response fails to refer to any evidence capable of substantiating this assertion.<sup>14</sup>

11. The Pre-Trial Judge erred in the above finding not only in relation to the existence of such "climate" but also as to its relevance for assessing the risk that Mr Shala may abscond. The preconceived views that are implicit in the Pre-Trial Judge's relevant considerations violate Mr Shala's right to be presumed innocent.<sup>15</sup>

*D. Error in setting an untenable threshold for conditional release upon periodic review of detention*

12. The SPO mischaracterises the submissions of the Defence as a mere disagreement with the Pre-Trial Judge's findings. It also falsely suggests that this ground of appeal has been "previously rejected by the Panel" and fails to indicate in which decision that might have been the case.<sup>16</sup> In fact, the Appeals

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<sup>12</sup> See also Appeal, para. 27.

<sup>13</sup> Response, paras. 28-33.

<sup>14</sup> Response, paras. 28-33.

<sup>15</sup> Appeal, para. 30.

<sup>16</sup> Response, para. 39.

Chamber decided that it was “unnecessary” to consider a similar ground of appeal “in light of the fact that the Panel grant[ed] in part Shala’s seventh ground of appeal”.<sup>17</sup>

*E. Error in assessing the proportionality of continued detention without adequately considering the passage of time*

13. The Impugned Decision did not specifically consider the effect of passage of time on the proportionality of continued detention despite expressly acknowledging its importance.<sup>18</sup> Contrary to the position of the SPO, the Defence explained why the multitude of factors relied on by the Pre-Trial Judge constitute stereotyped formulae and have the *de facto* effect of rendering the passage of time ineffective as to the assessment of proportionality.<sup>19</sup>

14. Stereotyped formulae are employed in assessing the indicated Article 41(6)(b)(ii) and (iii) risks in circumstances such as the present where the Pre-Trial Judge repeatedly relies on the same reasoning justifying continued detention on past conduct, the serious nature of the charges against Mr Shala and the advancement of the proceedings, allowing thus no space for a real and effective review as to whether the reasons for detention may have moderated or ceased to exist.

### III. CONCLUSION

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

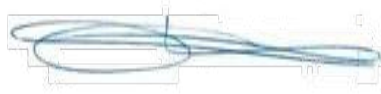
Respectfully submitted,

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<sup>17</sup> Appeals Chamber Decision of 11 February 2022, para. 59.

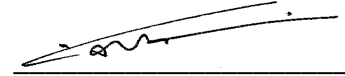
<sup>18</sup> Appeal, para. 34; Impugned Decision, para. 55.

<sup>19</sup> Appeal, paras. 35, 36.



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