



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 22 June 2022

Language: English

Classification: Public

Public Redacted Version of Decision on 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 submitted 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 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 ("Second Court of Appeals Decision").¹⁰

7. On 22 April 2022, following further submissions from the Registrar, the Belgian authorities and the Parties, and in light of Mr Shala's waiver 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,¹¹ the Pre-Trial Judge issued the decision on the

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 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; F00152, Registrar, *Registry Submissions Pursuant to the Order to Provide Information*

remanded Third Detention Decision and on the periodic review of the detention of Mr Shala, ordering the Accused's continued detention ("Fifth Detention Decision").¹²

8. On 4 May 2022, the Defence appealed the Fifth Detention Decision.¹³ The Court of Appeals has not rendered a decision yet.

9. On 8 June 2022, the Specialist Prosecutor's Office ("SPO") filed its submissions on the review of Mr Shala's detention ("SPO Submissions").¹⁴ The Defence responded on 15 June 2022 ("Defence Response").¹⁵

II. SUBMISSIONS

10. The SPO submits that the continued detention of the Accused remains necessary and proportional.¹⁶ It asserts that no new fact or circumstance has intervened capable of changing the findings reached by the Pre-Trial Judge in the Fifth Detention Decision.¹⁷ As regards the risks, the SPO submits that they increased with proceedings

on the Detention Regime (F00145), 22 February 2022, confidential (a public redacted version was submitted on 22 April 2022, F00152/RED); F00160, Specialist Counsel, *Defence Request for an Extension of Time for its Submissions on the Next Review of Detention*, 1 March 2022, public; Transcript, 4 March 2022, public, pp. 189-190; F00171, Specialist Counsel, *Defence Submissions on Review of Detention and Response to the Order of the Pre-Trial Judge*, 30 March 2022, confidential (a public redacted version was issued on 28 April 2022, F00171/RED); F00177, Specialist Prosecutor, *Prosecution Submissions for Fifth Review of Detention*, 7 April 2022, confidential (a public redacted version was issued on 22 April 2022, F00177/RED); F00184, Specialist Counsel, *Defence Reply to 'Prosecution Submissions for Fifth Review of Detention'*, 12 April 2022, public; F00185, Registrar, *Transmission of Correspondence*, 19 April 2022, public, with two Annexes, confidential.

¹² KSC-BC-2020-04, F00188, Pre-Trial Judge, *Decision on Remanded Detention Review Decision and Periodic Review of Detention of Pjetër Shala*, 22 April 2022 (a public redacted version was issued on the same day, F00188/RED).

¹³ KSC-BC-2020-04, IA005/F00001, Specialist Counsel, *Defence Appeal Against the Pre-Trial Judge's Decision on Review of Detention of Pjetër Shala dated 22 April 2022*, 4 May 2022, confidential.

¹⁴ KSC-BC-2020-04, F00213, Specialist Prosecutor, *Prosecution Submissions for Sixth Review of Detention*, 8 June 2022, confidential.

¹⁵ KSC-BC-2020-04, F00221, Specialist Counsel, *Defence Response to "Prosecution Submissions for Sixth Review of Detention"*, 15 June 2022, confidential.

¹⁶ SPO Submissions, paras 1, 10, 12.

¹⁷ SPO Submissions, para. 1.

moving towards the transfer of the case to a Trial Panel and that they can only be mitigated and effectively managed in the SC Detention Facilities.¹⁸

11. The Defence submits that Mr Shala's interim release is warranted as: (i) the SPO has failed to substantiate the alleged risks under Article 41(6) of the Law, in particular the assertion of increased risk as a result of the impending transfer of the case file; and (ii) the protracted length of Mr Shala's pre-trial detention is neither necessary nor proportionate.¹⁹ The Defence therefore requests the Pre-Trial Judge to bring an end to Mr Shala's continued detention and order his interim release or placement in house arrest [REDACTED] subject to any conditions that are deemed appropriate.²⁰

III. APPLICABLE LAW

12. 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.

13. 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.

¹⁸ SPO Submissions, paras 5-9.

¹⁹ Defence Response, paras 2-3, 11-12, 14-15.

²⁰ Defence Response, para. 18.

14. 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.

15. 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

A. APPLICABLE STANDARD

16. The SPO submits 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.²¹ In the SPO's view, that determination inevitably concerns what has changed, if anything, since the previous ruling on detention.²² 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, and that no changes have occurred since the last ruling on detention.²³

17. The Defence invites the Pre-Trial Judge to conduct an effective review of the lawfulness of continued detention and to require the SPO to demonstrate the necessity of detention on the basis of existing and serious risks posed by the prospect of provisional release.²⁴ The Defence submits that detention on remand should be the

²¹ SPO Submissions, para. 3.

²² SPO Submissions, para. 3.

²³ SPO Submissions, para. 3.

²⁴ Defence Response, para. 4.

exception and be strictly necessary and allowed only in cases where no alternative measures can mitigate a risk posed by interim release.²⁵ According to the Defence, the presumption in favour of Mr Shala's innocence and his right to liberty pending trial must form the basis of any assessment as to the existence of any real and serious risk posed by interim release.²⁶

18. The Defence additionally avers that the SPO misrepresents the applicable standard and impermissibly shifts the burden of proof to the Defence by arguing that the Defence has not "identified any relevant change in circumstances since the last ruling on detention".²⁷ According to the Defence, assuming that any accused awaiting trial could be held for as long as the trial might last on account of "unchanged" circumstances is "plainly wrong and profoundly unjust".²⁸ The Defence submits that it is firmly established that "the SPO must provide specific arguments and concrete evidence to establish that continued detention is necessary at the time of the review",²⁹ as Article 41(6)(b) of the Law requires evidence meeting a high standard to rebut the presumption of interim release pending trial.³⁰

19. 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.³¹ The duty to determine whether the circumstances underpinning detention still exist imposes on the competent panel the task to, *proprio motu*, assess whether it

²⁵ Defence Response, para. 8.

²⁶ Defence Response, para. 8.

²⁷ Defence Response, para. 9, referring to SPO Submissions, para. 3. See also Defence Response, para. 10.

²⁸ Defence Response, para. 15.

²⁹ Defence Response, para. 10, referring to Fifth Detention Decision, para. 25.

³⁰ Defence Response, paras 11, 15.

³¹ 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; Fifth Detention Decision, para. 25.

is still satisfied that, at the time of the review and under the specific circumstances of the case when the review takes place, the detention of the Accused remains warranted.³² 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*.³³ 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.³⁴ 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.³⁵ The SPO bears the burden of establishing that the detention of the Accused is necessary.³⁶ 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.

20. 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 SPO Submissions do not establish otherwise.³⁷ 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.³⁸

³² 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; Fifth Detention Decision, para. 25.

³³ *Krasniqi Detention Appeal*, para. 16; Second Court of Appeals Decision, para. 18; Fifth Detention Decision, para. 25.

³⁴ Second Court of Appeals Decision, para. 18; Fifth Detention Decision, para. 25.

³⁵ *Haradinaj Detention Appeal*, para. 55; *Krasniqi Detention Appeal*, para. 17; Second Court of Appeals Decision, para. 18; Fifth Detention Decision, para. 25.

³⁶ First Detention Decision, para. 13, with further references; Fifth Detention Decision, para. 25.

³⁷ See also Second Court of Appeals Decision, para. 15.

³⁸ 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

21. 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.³⁹

22. The SPO submits that, for the reasons set forth in the Confirmation Decision and the Fifth 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.⁴⁰ It adds that there has been no development capable of changing this finding or warranting its re-examination by the Pre-Trial Judge.⁴¹

23. The Defence, while maintaining its previous submissions on the unlawfulness of Mr Shala's continued detention,⁴² does not specifically address this criterion.

24. 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.⁴³ 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.⁴⁴

³⁹ Similarly ECtHR, *Merabishvili v. Georgia* [GC], no. 72508/13, [Judgment](#), 28 November 2017, para. 222, with further references.

⁴⁰ SPO Submissions, paras 2, 4.

⁴¹ SPO Submissions, para. 4.

⁴² Defence Response, para. 7.

⁴³ 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; Fifth Detention Decision, para. 30.

⁴⁴ 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).

25. 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

26. 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.⁴⁵ The Pre-Trial Judge further recalls that, on the basis of the available evidence, the specific articulable grounds must support the "belief"⁴⁶ 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.⁴⁷ In other words, the standard to be applied is less than certainty, but more than a mere possibility of a risk materialising.⁴⁸ 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.⁴⁹

27. 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.⁵⁰ 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

⁴⁵ First Detention Decision, para. 16, with further references.

⁴⁶ See *chapeau* of Article 41(6)(b) of the Law.

⁴⁷ First Detention Decision, para. 16, with further references.

⁴⁸ First Detention Decision, para. 16, with further references.

⁴⁹ 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*.

⁵⁰ Defence Response, para. 7.

have already been addressed in previous decisions.⁵¹ 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

28. According to the SPO, the risk that the Accused will abscond has increased on the basis that, in addition to the established factors previously identified by the Pre-Trial Judge: (i) the proceedings continue to move forward towards the transfer of the case to the Trial Panel; (ii) the SPO has recently disclosed the evidence of additional witnesses, who corroborate the Accused's involvement and important role in the commission of the crimes charged in this case.⁵² The SPO further avers that no circumstance has intervened capable of modifying the reasons underlying the Pre-Trial Judge's determinations with regard to the risks listed under Article 41(6)(b) of the Law, including the risk to abscond.⁵³

29. Besides repeating its previous submissions,⁵⁴ the Defence challenges the SPO's submission that the flight risk increased since the Fifth Detention Decision, in particular due to the advancement of the proceedings.⁵⁵

30. 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

⁵¹ Third Detention Decision, paras 24, 28, 32; Fourth Detention Decision, para. 24; Second Court of Appeals Decision, para. 18; Fifth Detention Decision, para. 33.

⁵² SPO Submissions, paras 5-6, *referring to* Fifth Detention Decision, paras 35-37-38, 40, 42-43; KSC-BC-2020-04, F00205, Pre-Trial Judge, *Decision on Specialist Prosecutor's Rule 102(2) Request*, 30 May 2022, confidential.

⁵³ SPO Submissions, para. 7.

⁵⁴ Defence Response, para. 13.

⁵⁵ Defence Response, para. 12.

members of the Joint Criminal Enterprise (“JCE”) to which he also allegedly belonged; and (ii) rejects the legitimacy of the SC.⁵⁶ In addition: (i) the relatively small size of the 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.⁵⁷ 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

31. In relation to the risk of obstructing the SC proceedings, the SPO advances the same arguments as in connection with the risk of flight.⁵⁸

32. Besides repeating its previous submissions,⁵⁹ the Defence submits that the SPO tries to present “increased risks” as an automatic consequence of the advancement of the proceedings, but fails to link specific evidentiary material to specific risks and to Mr Shala’s conduct and to identify any concrete risk or interference with any protected witness since Mr Shala’s arrest.⁶⁰

⁵⁶ First Detention Decision, paras 24-25; Second Detention Decision, para. 28; Third Detention Decision, para. 25; Fourth Detention Decision, para. 27; Fifth Detention Decision, para. 35.

⁵⁷ First Detention Decision, para. 26; Second Detention Decision, para. 28; Third Detention Decision, para. 25; Fourth Detention Decision, para. 27; Fifth Detention Decision, para. 35. *See also* KSC-BC-2020-07, F00611, Trial Panel II, *Trial Judgment*, 18 May 2022, confidential, with Annexes 1-3, public, paras 576-578 (a public redacted version was issued on the same day, F00611/RED).

⁵⁸ *See* para. 28 above.

⁵⁹ Defence Response, para. 13.

⁶⁰ Defence Response, para. 12.

33. It is recalled that: (i) [REDACTED];⁶¹ 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.⁶²

34. The Pre-Trial Judge further considers that, [REDACTED], the advancement of the pre-trial proceedings following the Fifth Detention Decision – in particular, the near conclusion by the SPO of all its pre-trial disclosure obligations,⁶³ including the recent disclosure of the identities of additional witnesses by the SPO⁶⁴ - 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.⁶⁵

35. The Defence's repeated argument that the increased risk is alleged as an automatic consequence of the advancement of the proceedings⁶⁶ disregards that the risk of obstructing the progress of SC proceedings continues to exist on the basis of: (i) [REDACTED]; and (ii) certain developments relating to this case, which have been found to increase this risk. Considering the aforementioned findings, it cannot be said

⁶¹ 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; Fifth Detention Decision, para. 37.

⁶² Second Detention Decision, para. 31; Third Detention Decision, para. 29; Fourth Detention Decision, para. 31; Second Court of Appeals Decision, paras 32, 34; Fifth Detention Decision, para. 37.

⁶³ KSC-BC-2020-04, Transcript, 14 April 2022, public, p. 299, lines 1-6; F00204, Specialist Prosecutor, *Prosecution detailed notice of disclosure process*, 27 May 2022, public. *See also* Legal Workflow Disclosure Packages Nos 61 (7 June 2022), 62 (10 June 2022) and 63 (14 June 2022).

⁶⁴ 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; F00205, Pre-Trial Judge, *Decision on Specialist Prosecutor's Rule 102(2) Request*, 30 May 2022, confidential; Legal Workflow Disclosure Package No. 61 (7 June 2022); F00216, Specialist Prosecutor, *Submission of Amended Witness and Exhibit Lists*, 10 June 2022, confidential, with Annexes 1-2, strictly confidential and *ex parte* (a confidential redacted version of Annexes 1-2 was submitted on 13 June 2022, F00216/A01/CONF/RED and F00216/A02/CONF/RED).

⁶⁵ *See also* Second Court of Appeals Decision, paras 35-38.

⁶⁶ Defence Response, para. 12; *See also* Fifth Detention Decision, para. 39.

that concrete and specific risks of obstructing the progress of SC proceedings have not been identified. For these reasons, the Defence's arguments are dismissed.

36. 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

37. In relation to the risk of committing further crimes, the SPO advances the same arguments as in connection with the risk of flight.⁶⁷

38. Besides the arguments already rehearsed in relation to the two other Article 41(6)(b) risks and repeating its previous submissions,⁶⁸ the Defence does not provide any other specific submissions regarding the risk of committing further crimes in the Defence Response.

39. 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.⁶⁹ In the view of the Pre-Trial Judge, the risk of Mr Shala committing further crimes continues to exist, considering that [REDACTED].⁷⁰ In addition, as with the risk of obstruction, the Pre-Trial Judge considers that the advancement of the pre-trial proceedings since the Fifth Detention

⁶⁷ See para. 28 above.

⁶⁸ Defence Response, para. 13.

⁶⁹ First Detention Decision, para. 39; Second Detention Decision, para. 36; Third Detention Decision, para. 33; Fourth Detention Decision, para. 35; Fifth Detention Decision, para. 42.

⁷⁰ First Detention Decision, para. 39; Second Detention Decision, para. 36; Third Detention Decision, para. 33; Fourth Detention Decision, para. 35; Fifth Detention Decision, para. 42.

Decision, especially the conclusion by the SPO of its pre-trial disclosure obligations,⁷¹ including the recent disclosure of the identities of additional witnesses by the SPO,⁷² increases the risk of Mr Shala committing further crimes.⁷³ The Defence's arguments that the factors invoked by the SPO are insufficient are set aside for the same reasons identified above.⁷⁴ Accordingly, the Pre-Trial Judge considers that the risk that Mr Shala will commit further crimes continues to exist at present.

4. Conclusion

40. 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.

⁷¹ KSC-BC-2020-04, Transcript, 14 April 2022, public, p. 299, lines 1-6; F00204, Specialist Prosecutor, *Prosecution Detailed Notice of Disclosure Process*, 27 May 2022, public; F00215, Specialist Prosecutor, *Prosecution Notice Concerning Disclosure of Additional Evidence Pursuant to Rule 103*, 10 June 2022, confidential. *See also* Legal Workflow Disclosure Packages Nos 62 (10 June 2022) and 63 (14 June 2022).

⁷² 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); Transcript, 14 April 2022, confidential, pp. 272-273; F00205, Pre-Trial Judge, *Decision on Specialist Prosecutor's Rule 102(2) Request*, 30 May 2022, confidential; Legal Workflow Disclosure Package No. 61 (7 June 2022); F00216, Specialist Prosecutor, *Submission of Amended Witness and Exhibit Lists*, 10 June 2022, confidential, with Annexes 1-2, strictly confidential and *ex parte* (confidential redacted versions of Annexes 1-2 were submitted on 13 June 2022, F00216/A01/CONF/RED and F00216/A02/CONF/RED).

⁷³ *See* para. 34 above.

⁷⁴ *See* para. 35 above.

D. CONDITIONAL RELEASE

41. The SPO avers that the risks listed under Article 41(6)(b) of the Law can only be mitigated and effectively managed through the continued detention of the Accused at the SC Detention Facilities.⁷⁵ The SPO submits that, for the reasons set out by the Pre-Trial Judge in the Fifth Detention Decision, house arrest, and any additional conditions for release imposed by the Pre-Trial Judge are insufficient to mitigate the risks of obstruction or of commission of crimes, and that only through the communication monitoring framework applicable at the SC's Detention Facilities the Accused's communications can be restricted in a manner to sufficiently mitigate the risks.⁷⁶

42. The Defence maintains its position that suitable measures can be implemented which can sufficiently mitigate any potential risk posed by Mr Shala's interim release or placement in house arrest [REDACTED] and repeats Mr Shala's willingness to offer extensive undertakings and be subject to such conditions, as the Pre-Trial Judge deems appropriate.⁷⁷

43. 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.⁷⁸ 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.

⁷⁵ SPO Submissions, para. 9.

⁷⁶ SPO Submissions, para. 8, *referring to* Fifth Detention Decision, para. 52.

⁷⁷ Defence Response, paras 16, 18.

⁷⁸ First Detention Decision, para. 45; Second Detention Decision, para. 40; Third Detention Decision, para. 37; Fourth Detention Decision, para. 39; Fifth Detention Decision, para. 46.

44. 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,⁷⁹ recalls that it has been determined that: (i) these conditions 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.⁸⁰ 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 implemented.⁸¹

45. Furthermore, the Pre-Trial Judge recalls his previous finding 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 provided in the context of the Fifth Detention Decision.⁸²

46. The Pre-Trial Judge also recalls his finding 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. These measures have been described in detail in the Fifth Detention Decision.⁸³ Such measures, as well as additional measures, may be ordered

⁷⁹ *Haradinaj* Detention Appeal, para. 55; *Krasniqi* Detention Appeal, para. 17.

⁸⁰ 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; Fifth Detention Decision, para. 47.

⁸¹ Defence Response, para. 16.

⁸² Fifth Detention Decision, para. 48, *referring to* KSC-BC-2020-04, F00185/A02, Registrar, *Annex 2 to Transmission of Correspondence* ("Belgian Authorities' Response"), 19 April 2022, confidential, p. 2.

⁸³ Fifth Detention Decision, para. 49. *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* Detention Appeal") (a public redacted version was issued on the same day, IA014/F00008/RED).

proprio motu by the Pre-Trial Judge pursuant to Rule 56(6) of the Rules. In this regard, the Pre-Trial Judge emphasises again 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.⁸⁴

47. As to any additional conditions to be imposed, the Pre-Trial Judge recalls that the Court of Appeals has specified that all *reasonable* conditions that could be imposed on an accused must be evaluated.⁸⁵ In this regard, mindful of the Belgian authorities' response,⁸⁶ the Pre-Trial Judge finds that any additional conditions that are reasonable and could sufficiently mitigate the existing risks also cannot be put into place. As previously found, further conditions, such as visits monitored by the Belgian authorities, are particularly [relevant] [inadequate] in view of the fact that Mr Shala has the ability to communicate in a language that is not an official language in Belgium.⁸⁷ Furthermore, in view of the seriousness 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.

48. 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 aforementioned risks. Accordingly, the Pre-Trial Judge finds that the proposed

⁸⁴ See also *mutatis mutandis* Veseli Detention Appeal, para. 41.

⁸⁵ 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).

⁸⁶ Belgian Authorities' Response, p. 2. In view of the clear position of the Belgian authorities, the Pre-Trial Judge finds that no further information is required for the purposes of the present decision. See also Fifth Detention Decision, para. 51.

⁸⁷ Fourth Detention Decision, para. 40; Fifth Detention Decision, para. 50.

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.

E. PROPORTIONALITY OF DETENTION

49. The SPO submits that the continued detention of the Accused is justified and 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 fulfilment of remaining pre-trial disclosure obligations on 27 May 2022.⁸⁸

50. The Defence asserts that assessing the proportionality of the Accused's detention requires consideration of: (i) the effects of continued detention on Mr Shala, including the lack of regular family visits and the financial implications resulting from his detention for his family; and (ii) the significant passage of time since the Fifth Detention Decision, a factor requiring specific consideration as to the interference with Mr Shala's rights to liberty and protection of his private and family life.⁸⁹

51. 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 longer a person remains in pre-trial detention the higher the burden on the SPO to justify continued detention.⁹⁰ 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,

⁸⁸ SPO Submissions, para. 10.

⁸⁹ Defence Response, paras 14-15.

⁹⁰ 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.

the continued detention “stops being reasonable” and the individual needs to be released.⁹¹ 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.⁹²

52. 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) the SPO has, in principle, completed its disclosure under Rules 102(1)(b), 103 and 107 of the Rules,⁹³ the SPO’s Pre-Trial Brief as well as the chart according to Rule 109(c) of the Rules have been filed,⁹⁴ the Parties have submitted their points of agreement on matters of fact,⁹⁵ and the Defence has indicated that it will not make a request for unique investigative opportunities;⁹⁶ (vi) the Pre-Trial Judge had set a tentative date for the transmission of the case file to a Trial Panel, namely 31 May 2022,⁹⁷ but such transmission has been postponed to 31 August 2022 at the request of the Defence, on

⁹¹ 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).

⁹² ECtHR, *Buzadji v. the Republic of Moldova* [GC], para. 90.

⁹³ KSC-BC-2020-04, Transcript, 14 April 2022, public, pp. 252-253, 268, 269, 287, 299, lines 1-6 and 11-15; F00204, Specialist Prosecutor, *Prosecution Detailed Notice of Disclosure Process*, 27 May 2022, public; F00215, Specialist Prosecutor, *Prosecution Notice Concerning Disclosure of Additional Evidence Pursuant to Rule 103*, 10 June 2022, confidential.

⁹⁴ 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); F00144, Specialist Prosecutor, *Prosecution Submission of Rule 109(c) Chart*, 11 February 2022, public, with Annex 1, strictly confidential and *ex parte*, and Annex 2, confidential.

⁹⁵ 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.

⁹⁶ KSC-BC-2020-04, Transcript, 14 April 2022, public, pp. 279-280.

⁹⁷ KSC-BC-2020-04, Transcript, 4 March 2022, public, pp. 242.

account of the SPO's delays in the disclosure process, the pending Defence investigations, and the time requested by the Defence to prepare its Pre-Trial Brief;⁹⁸ and (vii) three SPO requests for protective measures regarding Rule 102(3), 103 material and Rule 102(1)(b) material added pursuant to Rule 102(2) of the Rules will be adjudicated without delay before the case is transmitted to a Trial Panel.⁹⁹ 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.

53. 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 Fifth 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 the Law and the significant advancement of the proceedings, this period of time does not render Mr Shala's detention disproportionate. Furthermore, 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 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 (ii) the limited financial means at the disposal of Mr Shala must be attributed very limited weight in the context of the present case.¹⁰⁰ Accordingly, the Defence's arguments are rejected.

54. 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

⁹⁸ KSC-BC-2020-04, Transcript, 14 April 2022, public, pp. 276-300.

⁹⁹ [REDACTED].

¹⁰⁰ 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; Fifth Detention Decision, para. 57.

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.¹⁰¹

V. DISPOSITION

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

- (a) **ORDERS** Mr Shala's continued detention;
- (b) **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 **Monday, 1 August 2022**, with responses and replies following the timeline set out in Rule 76 of the Rules;
- (c) **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 **Monday, 8 August 2022** and Mr Shala, if he wishes to do so, to file his submissions by no later than **Monday, 15 August 2022**; and
- (d) **ORDERS** the SPO and the Defence to file public redacted versions of F00213 and F00221 by **Thursday, 30 June 2022**.



Judge Nicolas Guillou

Pre-Trial Judge

Dated this Wednesday, 22 June 2022

At The Hague, the Netherlands.

¹⁰¹ 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).