



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2020-04/IA005

Before: **A Panel of the Court of Appeals Chamber**
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Fidelma Donlon

Date: 19 July 2022

Original language: English

Classification: Public

**Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision
on Remanded Detention Review and Periodic Review of Detention**

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively)¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”) is seised of an appeal filed on 4 May 2022 by Pjetër Shala (“Appeal” and “Shala” or “Defence”, respectively)² against the “Decision on Remanded Detention Review Decision and Periodic Review of Detention of Pjetër Shala” (“Impugned Decision”).³ The SPO responded on 16 May 2022 that the Appeal should be rejected (“Response”).⁴ Shala replied on 23 May 2022 (“Reply”).⁵

I. BACKGROUND

1. On 16 March 2021, Shala was arrested in the Kingdom of Belgium (“Belgium”),⁶ pursuant to an arrest warrant issued by the Pre-Trial Judge⁷ and further to the confirmation of an indictment against him.⁸

¹ IA005/F00002, Decision Assigning a Court of Appeals Panel, 6 May 2022 (confidential, reclassified as public on 19 July 2022).

² IA005/F00001, 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”).

³ F00188/RED, Public Redacted Version of Decision on Remanded Detention Review Decision and Periodic Review of Detention of Pjetër Shala, 28 April 2022 (confidential version filed on 22 April 2022) (“Impugned Decision”).

⁴ 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”).

⁵ IA005/F00004, Defence Reply to Response to Appeal Against the Pre-Trial Judge’s Decision on Review of Detention of Pjetër Shala dated 22 April 2022, 23 May 2022 (confidential) (“Reply”).

⁶ F00013, Notification of Arrest of Pjetër Shala Pursuant to Rule 55(4), 16 March 2021 (strictly confidential and *ex parte*, reclassified as public on 29 April 2021).

⁷ F00008/A01/RED, Public Redacted Version of Arrest Warrant for Mr Pjetër Shala, 15 April 2021 (strictly confidential and *ex parte* version filed on 12 June 2020, reclassified as confidential on 19 October 2021).

⁸ F00007/RED, Public Redacted Version of the Decision on the Confirmation of the Indictment Against Pjetër Shala, 6 May 2021 (strictly confidential and *ex parte* version filed on 12 June 2020); see also F00010/A02, Indictment, 19 June 2020 (strictly confidential and *ex parte*, reclassified as confidential on 29 April 2021). A corrected indictment, namely the operative indictment, was filed on 1 November 2021 by the SPO pursuant to the Pre-Trial Judge’s Decision on Motion Challenging the Form of the Indictment. See F00098/A01, Corrected Indictment, 1 November 2021 (confidential); F00107/A01, Public Redacted Version of Corrected Indictment, 16 November 2021. See also F00089/RED, Public Redacted Version of Decision on Motion Challenging the Form of the Indictment, 18 October 2021 (confidential version filed on 18 October 2021).

2. On 15 April 2021, Shala was transferred to the Detention Facilities of the Specialist Chambers (“Detention Facilities”) in The Hague, the Netherlands.⁹
3. On 15 June 2021, the Pre-Trial Judge rejected Shala’s request for interim release (“First Detention Decision”),¹⁰ in a decision which was upheld by the Court of Appeals Panel on 20 August 2021 (“First Appeal Decision”).¹¹
4. On 10 September 2021, 10 November 2021 and 28 January 2022, the Pre-Trial Judge reviewed Shala’s detention and ordered his continued detention (“Second Detention Decision”, “Third Detention Decision”, and “Fourth Detention Decision”, respectively).¹²
5. On 11 February 2022, the Court of Appeals Panel issued its decision on Shala’s appeal against the Third Detention Decision (“Second Appeal Decision”),¹³ finding that the Pre-Trial Judge abused his discretion when concluding that none of the conditions proposed by Shala (“Proposed Conditions”), nor any additional

⁹ F00019/RED, Public Redacted Version of ‘Notification of Reception of Pjetër Shala in the Detention Facilities of the Specialist Chambers and Conditional Assignment of Counsel’, filing F00019 dated 15 April 2021, 26 April 2021 (strictly confidential and *ex parte* version filed on 15 April 2021, reclassified as confidential on 29 April 2021), para. 2.

¹⁰ F00045/RED, Public Redacted Version of Decision on Pjetër Shala’s Request for Provisional Release, 23 June 2021 (confidential version filed on 15 June 2021) (“First Detention Decision”); F00039/RED, Public Redacted Version of Motion for Provisional Release, 17 June 2021 (confidential version filed on 27 May 2021).

¹¹ IA001/F00005/RED, Public Redacted Version of Decision on Pjetër Shala’s Appeal Against Decision on Provisional Release, 20 August 2021 (confidential version filed on 20 August 2021) (“First Appeal Decision”); IA001/F00001/RED, Public Redacted Version of Defence Appeal against the “Decision on Pjetër Shala’s Request for Provisional Release”, 31 August 2021 (confidential version filed on 28 June 2021).

¹² F00075/RED, Public Redacted Version of Decision on Review of Detention of Pjetër Shala, 10 September 2021 (confidential version filed on 10 September 2021) (“Second Detention Decision”); F00105/RED, Public Redacted Version of Decision on Review of Detention of Pjetër Shala, 10 November 2021 (confidential version filed on 10 November 2021) (“Third Detention Decision”); F00133/RED, Public Redacted Version of Decision on Review of Detention of Pjetër Shala, 28 January 2022 (confidential version filed on 28 January 2022) (“Fourth Detention Decision”).

¹³ IA003/F00005/RED, Public Redacted Version of Decision on Pjetër Shala’s Appeal Against Decision on Review of Detention, 11 February 2022 (confidential version filed on 11 February 2022) (“Second Appeal Decision”); IA003/F00001/RED, Public Redacted Version of “Defence Appeal against the Decision on Review of Detention of Pjetër Shala of 10 November 2021”, 21 February 2022 (confidential version filed on 22 November 2021) (“Second Appeal”).

conditions, could mitigate the identified risks without first inviting the Defence to inquire into Belgium's willingness and capacity to implement such conditions; and granting in part Shala's seventh ground of appeal relating to the assessment of the release conditions.¹⁴ The Appeals Panel remanded the matter to the Pre-Trial Judge in order to (i) seek information from the Registrar on the detention regime applicable to Shala at the Detention Facilities, (ii) invite the Defence to consult with the Belgian authorities on their willingness and capacity to enforce the Proposed Conditions or any additional conditions, and (iii) assess whether such conditions could mitigate the identified risks.¹⁵

6. On 22 February 2022, the Registrar, further to an order by the Pre-Trial Judge,¹⁶ provided submissions on the detention regime at the Detention Facilities.¹⁷

7. On 30 March 2022, Shala filed his submissions on the review of detention in which he indicated, *inter alia*, that, further to the Second Appeal Decision and to an order by the Pre-Trial Judge, he contacted, through the Registry, the Belgian authorities to enquire into their willingness and capacity to implement the Proposed Conditions and/or any additional conditions.¹⁸ He was informed by the Registry that

¹⁴ Second Appeal Decision, paras 56-58, 60-61.

¹⁵ Second Appeal Decision, paras 54-58, 60-61. The Second Appeal Decision was issued after the Fourth Detention Decision, as Shala indicated that he would not request a further variation of the time limit following his appeal against the Third Detention Decision. See F00125, Submissions Pursuant to the Pre-Trial Judge's Order Dated 14 December 2021, 16 December 2021, para. 2. See also F00110, Decision on Defence Request to Vary the Time Limit for Submissions on the Next Review of Mr Shala's Detention, 18 November 2021, para. 9.

¹⁶ F00145, 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 ("Order for Submissions"), paras 9, 11; F00145/A01, Annex to 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 (confidential, reclassified as public on 21 April 2022).

¹⁷ F00152/RED, Public Redacted Version of Registry Submissions Pursuant to the Order to Provide Information on the Detention Regime (F00145), filing F00152 of 22 February 2022, 22 April 2022 (confidential version filed on 22 February 2022).

¹⁸ F00171/RED, Public Redacted Version of "Defence Submissions on Review of Detention and Response to the Order of the Pre-Trial Judge", 28 April 2022 (confidential version filed on 30 March 2022) ("Shala Submissions"), para. 6. On 14 February 2022, the Pre-Trial Judge, *inter alia*, invited Shala to inquire into Belgium's willingness and capacity to implement any conditions of release it has proposed and/or any additional conditions and ordered Shala to provide submissions on the next

the Belgian authorities responded that [REDACTED].¹⁹ The SPO responded on 7 April 2022²⁰ and Shala replied on 12 April 2022.²¹

8. On 19 April 2022, further to an order by the Pre-Trial Judge,²² the Registrar filed the correspondence with the Belgian authorities.²³

9. On 22 April 2022, the Pre-Trial Judge issued the Impugned Decision confirming the Third Detention Decision to the extent that it was remanded by the Appeals Panel and ordering Shala's continued detention on the basis, *inter alia*, that there is a grounded suspicion that he has committed crimes within the jurisdiction of the Specialist Chambers, and that the risks that he will abscond, obstruct the progress of Specialist Chambers proceedings or commit further crimes against those perceived as being opposed to the Kosovo Liberation Army, including potential witnesses, continue to exist.²⁴

10. In the Appeal, Shala develops five grounds of appeal consisting of alleged errors of law and fact and abuse of discretion committed by the Pre-Trial Judge.²⁵ Shala requests that the Court of Appeals Panel grant the Appeal and order his immediate release or placement under house arrest with any conditions found appropriate.²⁶

review of his detention no later than 2 March 2022. See Order for Submissions, paras 10-11. On 4 March 2022, the Pre-Trial Judge, upon Shala's request, extended the time limit for Shala to provide his submissions by 30 March 2022. See Transcript, 4 March 2022, pp. 189-190. See also F00160, Defence Request for an Extension of Time for its Submissions on the Next Review of Detention, 1 March 2022, paras 2, 8-11.

¹⁹ Shala Submissions, para. 6.

²⁰ F00177/RED, Public Redacted Version of 'Prosecution submissions for fifth review of detention', KSC-BC-2020-04/F00177, dated 7 April 2022, 22 April 2022 (confidential version filed on 7 April 2022).

²¹ F00184, Defence Reply to 'Prosecution submissions for fifth review of detention', 12 April 2022 (confidential, reclassified as public on 25 April 2022) ("Shala Reply to SPO Submissions").

²² Transcript, 14 April 2022, pp. 248-249, 296; F00185, Transmission of Correspondence, 19 April 2022.

²³ F00185/A01, Annex 1 to Transmission of Correspondence, 19 April 2022 (confidential); F00185/A02, Annex 2 to Transmission of Correspondence, 19 April 2022 (confidential) ("Belgian Authorities Correspondence"). In their response to Shala's inquiry, the Belgian authorities indicated that [REDACTED]. See Belgian Authorities Correspondence, p. 2.

²⁴ Impugned Decision, paras 31, 35, 40, 42-43, 52, 59.

²⁵ Appeal, paras 3, 17-36.

²⁶ Appeal, paras 5, 37.

II. STANDARD OF REVIEW

11. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.²⁷

III. PRELIMINARY MATTERS

12. The Appeals Panel notes that Shala and the SPO have not yet filed public redacted versions of their respective Appeal, Response and Reply.²⁸ Considering that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential, and that Parties shall file public redacted versions of all non-public submissions filed before the Panel,²⁹ the Panel orders the Parties to file public redacted versions of the above-mentioned filings within ten days of receiving notification of the present Decision.

13. The Panel encourages the Parties once again to file public redacted versions of their filings as soon as possible, without waiting for an order to do so.³⁰

IV. DISCUSSION

A. ALLEGED ERROR REGARDING THE STANDARD OF PROOF APPLICABLE TO REVIEW OF DETENTION (GROUND 1)

1. Submissions of the Parties

14. Shala argues that although the Pre-Trial Judge acknowledged the correct evidentiary standard, namely that the SPO bears the burden of proof and must

²⁷ KSC-BC-2020-07, IA001/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati Appeal Decision*"), paras 4-14. See also Second Appeal Decision, para. 9.

²⁸ The Panel notes that the SPO indicated in its Response that it will file a public redacted version of it; however, it has not yet done so.

²⁹ See e.g. First Appeal Decision, para. 6; Second Appeal Decision, para. 10.

³⁰ See Second Appeal Decision, fn. 22, referring to KSC-BC-2020-06, IA008/F0004/RED, Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention, 1 October 2021 (confidential version filed on 1 October 2021) ("*Veseli Second Appeal Decision*"), para. 9.

provide specific arguments and concrete evidence to establish that continued detention is necessary at the time of review,³¹ he erred in his application of this standard when assessing the existence of the risks under Article 41(6)(b) of the Law.³² In Shala's view, the Pre-Trial Judge failed to conduct a thorough assessment of the Defence submissions and erred in relying entirely on pre-existing factors and inevitable developments while expecting the Defence to provide specific submissions on the risks of flight, obstruction and committing further offences.³³

15. Shala submits that the Pre-Trial Judge erred and contravened the European Convention on Human Rights by dismissing the Defence's arguments simply because they "have already been addressed", and by relying on an erroneous interpretation of the Appeals Panel's case law.³⁴ Furthermore, Shala argues that by shifting the burden of proof to the Defence, the Pre-Trial Judge allowed the SPO to evade its obligations to provide concrete evidence and to demonstrate that the requirements for detention continue to exist.³⁵

16. The SPO responds that Shala merely repeats unfounded arguments that have already been rejected by the Appeals Panel.³⁶ The SPO submits that the Pre-Trial Judge applied the correct standard and burden of proof,³⁷ that the Pre-Trial Judge's findings on the risk of Shala obstructing the proceedings or committing further crimes are based on concrete grounds and ample evidence, and that the Defence failed to bring "any circumstances warranting a diminution of the established risk".³⁸ In the SPO's view, Shala not only misread the Impugned Decision,³⁹ but he also ignored that the

³¹ Appeal, para. 18, referring to Impugned Decision, paras 25, 32.

³² Appeal, paras 18-19. See also Reply, para. 4.

³³ Appeal, para. 20, referring to Impugned Decision, paras 28, 34, 36, 41-42, 54. See also Reply, paras 6-7.

³⁴ Appeal, paras 22-24. See also Appeal, para. 20; Reply, paras 5-6, 8.

³⁵ Appeal, paras 21-22, 25; Reply, paras 4, 6.

³⁶ Response, para. 17. See also Response, paras 18, 23-25.

³⁷ Response, paras 18-20, 23, referring to Impugned Decision, paras 25-26, 32.

³⁸ Response, paras 20-22.

³⁹ Response, para. 23, referring to Appeal, para. 20, citing Impugned Decision, paras 34, 36, 41.

Appeals Panel has already confirmed that the Pre-Trial Judge's approach was consistent with the European Court of Human Rights ("ECtHR") jurisprudence.⁴⁰

2. Assessment of the Court of Appeals Panel

17. At the outset, the Panel observes that in the Appeal, Shala largely repeats unsuccessful arguments previously made before the Panel, and rejected by it in the Second Appeal Decision.⁴¹ The Panel will nevertheless address these arguments in the context of the Impugned Decision below.

18. The Panel notes that, as acknowledged by the Defence, the Pre-Trial Judge identified the correct standard and burden of proof, namely that the SPO: (i) bears the burden of establishing that the detention of the Accused is necessary; and (ii) must provide specific arguments and concrete evidence that continued detention remains necessary at the time of the review.⁴²

19. The Defence essentially argues that the Pre-Trial Judge erred in applying this standard to his assessment of the Article 41(6)(b) risks by allegedly relying entirely on pre-existing factors and inevitable developments, such as the advancement of the proceedings, while expecting the Defence (not the SPO) to provide specific submissions regarding risks.⁴³

20. The Panel recalls, as correctly stated by the Pre-Trial Judge,⁴⁴ that the competent panel has the duty to examine the reasons or circumstances underpinning detention and to determine whether they "still exist", but is not required to entertain

⁴⁰ Response, paras 24-25.

⁴¹ Compare Appeal, paras 18-25 *with* Second Appeal Decision, paras 15-20 and Second Appeal, paras 15-21.

⁴² Impugned Decision, paras 25, 32; Appeal, para. 18. See also Second Appeal Decision, para. 15; First Appeal Decision, paras 24, 41.

⁴³ Appeal, paras 19-25.

⁴⁴ Impugned Decision, paras 16, 25, 33.

submissions that merely repeat arguments already addressed or to make findings on the factors already decided upon in its previous decisions.⁴⁵

21. In the present case, the Panel observes that the Pre-Trial Judge has specifically indicated that after a thorough examination of the factors and circumstances underpinning the previous detention decisions, these factors still exist at the time of the review.⁴⁶ The Panel also notes that the Pre-Trial Judge correctly assessed that the majority of Shala's submissions merely repeated arguments already rejected in previous decisions and decided not to address them again.⁴⁷ In addition, and contrary to Shala's assertion, the Pre-Trial Judge in fact specifically addressed his arguments in response to the SPO's submissions on the risk of obstruction.⁴⁸ Moreover, the Panel notes that the Pre-Trial Judge thoroughly assessed the new submissions and evidence presented by the SPO, finding on some occasions shortcomings in the SPO's arguments.⁴⁹ In light of the foregoing, the Appeals Panel finds that Shala has failed to show that the Pre-Trial Judge erred in his application of the proper standard of proof to his review of Shala's continued detention. Shala's first ground of appeal is therefore dismissed.

⁴⁵ Second Appeal Decision, paras 16-18; KSC-BC-2020-07, IA002/F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021, para. 55. See also Article 41(10) of the Law: "whether reasons for detention on remand still exist".

⁴⁶ Impugned Decision, paras 35, 37, 42, 46, 47.

⁴⁷ Impugned Decision, paras 33, 34, 36, 41, 47. See Shala Submissions, paras 16 (wherein the Defence "notes that it fully maintains its previous submissions on the unlawfulness of Mr Shala's continued detention"), 22 (wherein the Defence "repeats the submissions it previously made in relation to the alleged risks"), 24 (wherein the Defence "maintains its position that suitable measures can be implemented"). The Panel notes that the remainder of Shala's arguments before the Pre-Trial Judge mostly concerned the standard and burden of proof. See Shala Submissions, paras 17, 20-21; Shala Reply to SPO Submissions, paras 3, 5, 7.

⁴⁸ Impugned Decision, paras 36, 38-40. Contra Appeal, para. 24.

⁴⁹ Impugned Decision, paras 35, 46.

B. ALLEGED ERRORS REGARDING ASSESSMENT OF THE RISK OF ABSCONDING (GROUNDS 2 AND 3)

22. The Panel notes that under his second and third grounds of appeal, Shala makes arguments which address solely the risk of flight under Article 41(6)(b)(i) of the Law.⁵⁰ Given that the Pre-Trial Judge's conclusion that Shala's detention shall continue is not based on his findings regarding the risk of flight,⁵¹ the Panel summarily dismisses Shala's second and third grounds of appeal.⁵²

C. ALLEGED ERRORS REGARDING THE THRESHOLD FOR CONDITIONAL RELEASE (GROUND 4)

1. Submissions of the Parties

23. Shala submits that the Pre-Trial Judge erred by setting an untenable threshold for conditional release upon periodic review of detention.⁵³ First, Shala argues that the Pre-Trial Judge relied heavily on Shala's [REDACTED] and a speculative assumption that [REDACTED].⁵⁴ This, according to Shala, combined with the assumption that the advancement of the proceedings inherently increases the risks under Article 41(6)(b) of the Law,⁵⁵ and moreover, that no proposed or additional conditions are capable of sufficiently mitigating the risks, "predetermines the fate of every decision on review of detention".⁵⁶

24. The SPO responds that the Pre-Trial Judge applied the correct standard in evaluating the existence of Article 41(6)(b) risks and did not "impermissibly assume" that [REDACTED].⁵⁷ In the SPO's view, the Pre-Trial Judge clearly articulated the

⁵⁰ Appeal, paras 26-30; Reply, paras 9-11.

⁵¹ Impugned Decision, paras 46, 52.

⁵² See similarly First Appeal Decision, para. 29; Second Appeal Decision, para. 21.

⁵³ Appeal, paras 17, 33.

⁵⁴ Appeal, paras 31-32, referring to Impugned Decision, paras 37-40.

⁵⁵ Appeal, para. 33.

⁵⁶ Appeal, para. 33.

⁵⁷ Response, para. 36.

reasons for finding that there was a real possibility that Shala may obstruct the progress of proceedings,⁵⁸ and that this has been previously upheld by the Appeals Panel.⁵⁹ Furthermore, the SPO submits that, by arguing that the Pre-Trial Judge's findings on Article 41(6)(b) risks predetermines the fate of every decision, Shala misrepresents the legal framework for detention review⁶⁰ and merely repeats arguments previously rejected by the Panel.⁶¹

25. Shala replies that the SPO falsely suggests that this ground of appeal has already been rejected by the Panel, failing to indicate in which decision. Shala argues that in fact, the Panel had found it "unnecessary" to consider a similar ground of appeal as a result of partially granting another ground of appeal.⁶²

2. Assessment of the Court of Appeals Panel

26. The Panel notes that while Shala states that he is challenging the threshold set by the Pre-Trial Judge for conditional release, Shala's arguments under this ground relate primarily to the Pre-Trial Judge's assessment of the risks of obstructing the progress of proceedings and committing further crimes.⁶³

27. At the outset, the Panel recalls that the standard to be applied by the Pre-Trial Judge to the assessment of the risks under Article 41(6)(b) of the Law is, on the one hand, less than certainty, but, on the other hand, more than a mere possibility of a risk materialising.⁶⁴

⁵⁸ Response, para. 37, referring to Impugned Decision, paras 37-40.

⁵⁹ Response, para. 37, referring to Second Appeal Decision, paras 33, 38.

⁶⁰ Response, para. 38, referring to Impugned Decision, paras 25, 55.

⁶¹ Response, para. 39.

⁶² Reply, para. 12, referring to Second Appeal Decision, para. 59, wherein the Appeals Panel found that, having partially granted Shala's seventh ground of appeal against the Third Detention Decision, it was unnecessary to consider Shala's eighth ground of appeal (related to the alleged excessively high standard set by the Pre-Trial Judge for proposed conditions of release).

⁶³ See Appeal, paras 31-33.

⁶⁴ First Appeal Decision, para. 23 and references therein. See also First Appeal Decision, paras 22, 24.

28. The Panel observes that in his assessment of the risk of obstructing the progress of the proceedings, the Pre-Trial Judge relied on the following factors: (i) [REDACTED];⁶⁵ (ii) the necessity for protective measures, which demonstrates a heightened risk given that the events underlying the charges are easily distinguishable;⁶⁶ and (iii) Shala's increased insight into the case against him due to the advancement of the pre-trial proceedings.⁶⁷

29. With regard to the Pre-Trial Judge's reliance on Shala's [REDACTED], the Panel finds that Shala merely disagrees with the Pre-Trial Judge's analysis of this factor and repeats unsuccessful arguments which have already been addressed by the Pre-Trial Judge and the Appeals Panel.⁶⁸ The Panel considers that Shala has not identified a specific error and moreover that the Pre-Trial Judge clearly explained why Shala's [REDACTED] – an assessment with which the Panel agrees.⁶⁹ Therefore, and given that [REDACTED] should be considered within the overall context of detention, together with the other factors mentioned above,⁷⁰ the Panel dismisses Shala's arguments in this respect.

30. Second, the Panel observes that contrary to Shala's arguments, the Pre-Trial Judge did not *assume* that the advancement of the pre-trial proceedings *inherently* increases the risks under Article 41(6)(b) of the Law, but rather took into consideration the specific circumstances of the present case, namely the filing of the SPO's Pre-Trial Brief and the imminent disclosure of the identities [REDACTED].⁷¹ The Panel recalls that the Accused's increased knowledge of the SPO's case through the disclosure of evidence, including the identities [REDACTED], may be a relevant factor, when

⁶⁵ Impugned Decision, paras 37-40.

⁶⁶ Impugned Decision, para. 37.

⁶⁷ Impugned Decision, paras 38-40.

⁶⁸ See First Appeal Decision, paras 34-38, 41-42; First Detention Decision, paras 32-35. See also Second Appeal Decision, fn. 43, paras 32-33.

⁶⁹ Impugned Decision, paras 37-40. See also First Appeal Decision, para. 36; Second Appeal Decision, para. 33.

⁷⁰ See above, para. 28.

⁷¹ Impugned Decision, paras 38, 40.

considered together with other factors, to determine the existence of a risk of obstruction.⁷²

31. In the present case, Shala fails to show that it was unreasonable for the Pre-Trial Judge to conclude that his increased awareness of the case against him, combined with other factors, including Shala's [REDACTED], contributes to the risks identified under Article 41(6)(b)(ii) of the Law. As a result, the Panel finds that the Pre-Trial Judge did not err in his assessment that the risk of obstruction continues to exist.

32. Given that the conditions set forth in Article 41(6)(b) of the Law are alternative to each other and that any findings by the Panel on these same arguments in relation to the risk of committing further crimes would not have an impact on the outcome of the Impugned Decision, the Panel does not need to address them.

33. Finally, the Panel observes that on the one hand, Shala argues that the above factors, together with the Pre-Trial Judge's finding that no proposed or additional conditions are capable of sufficiently mitigating the aforesaid risks, have the effect of "predetermining" every decision on detention review. However, on the other hand, he does not identify any concrete error in the Pre-Trial Judge's finding regarding conditional release to substantiate such assertion.⁷³ In this respect, the Panel observes that the Pre-Trial Judge carefully considered the possibility of conditional release, and found, particularly in light of the Belgian authorities' response, [REDACTED],⁷⁴ and that no conditions were sufficient, at this stage, to mitigate the risk of Shala obstructing the proceedings or committing further crimes.⁷⁵

⁷² *Veseli* Second Appeal Decision, para. 31, referring to ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-278-Red, Public redacted version of Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", 26 October 2012, para. 65.

⁷³ Appeal, para. 33; Reply, para. 12.

⁷⁴ Belgian Authorities Correspondence, p. 2.

⁷⁵ Impugned Decision, paras 46-52.

34. In light of the foregoing, the Panel finds that Shala failed to demonstrate that the Pre-Trial Judge set an untenable standard for conditional release. Shala's fourth ground of appeal is therefore dismissed.

D. ALLEGED ERRORS REGARDING THE ASSESSMENT OF THE PROPORTIONALITY OF DETENTION (GROUND 5)

1. Submissions of the Parties

35. Shala submits that although the Pre-Trial Judge correctly acknowledged that the duration of detention pending trial should be considered together with the degree of the risks under Article 41(6)(b) of the Law in deciding whether the continued detention "stops being reasonable",⁷⁶ he erred in relying on the gravity of the charges and on "stereotyped formulae".⁷⁷ Shala argues that this renders the passage of time ineffective as to any assessment of proportionality and is thus inconsistent with ECtHR case law.⁷⁸

36. The SPO responds that the Defence merely disagrees with the Pre-Trial Judge's reasoning and conclusions, without providing an explanation as to why the multitude of factors relied on by the Pre-Trial Judge constitute "stereotyped formulae".⁷⁹ In the SPO's view, the Pre-Trial Judge correctly articulated and applied the relevant standard, giving appropriate consideration to the passage of time in the context of the other case-specific factors.⁸⁰

2. Assessment of the Court of Appeals Panel

37. The Appeals Panel notes that the Pre-Trial Judge correctly recalled the importance of the proportionality principle in determining the reasonableness of pre-

⁷⁶ Appeal, para. 34, referring to Impugned Decision, para. 55. See also Reply, para. 13.

⁷⁷ Appeal, para. 36.

⁷⁸ Appeal, paras 35-36. See also Reply, paras 13-14.

⁷⁹ Response, para. 40.

⁸⁰ Response, para. 41, referring to Impugned Decision, paras 55-57.

trial detention.⁸¹ The reasonableness of an accused's continued detention must be assessed on the facts of each case and according to its special features.⁸² The length of time spent in detention pending trial is a factor that needs to be considered along with the risks that are described in Article 41(6)(b) of the Law, in order to determine whether, all factors being weighed, the continued detention "stops being reasonable" and the individual needs to be released.⁸³ Moreover, the longer a person remains in pre-trial detention the higher the burden on the Specialist Chambers to justify continued detention.⁸⁴

38. The Panel notes that in the present case, the Pre-Trial Judge considered the following factors to reach his conclusion that the time Shala has spent in pre-trial detention thus far is not unreasonable: (i) Shala has been detained since 16 March 2021; (ii) the serious nature of the charges against him, namely that he

⁸¹ See Impugned Decision, para. 55. The Panel also recalls that according to Rule 56(2) of the Rules, the Pre-Trial Judge "shall ensure that a person is not detained for an unreasonable period prior to the opening of the case". See e.g. KSC-BC-2020-06, IA017/F00011/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention, 5 April 2022 (confidential version filed on 5 April 2022) ("*Thaçi Third Appeal Decision on Detention*"), para. 65.

⁸² See e.g. *Thaçi Third Appeal Decision on Detention*, para. 65, referring to ECtHR, *Buzadji v. Moldova*, no. 23755/07, Judgment, 5 July 2016 ("*Buzadji v. Moldova Judgment*"), para. 90; ECtHR, *Wemhoff v. Germany*, no. 2122/64, Judgment, 27 June 1968, para. 10.

⁸³ See e.g. KSC-BC-2020-06, IA010/F00008/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention, 27 October 2021 (confidential version filed on 27 October 2021), para. 49 and jurisprudence cited therein; KSC-BC-2020-06, IA003/F00005/RED, Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Interim Release, 30 April 2021 (confidential version filed on 30 April 2021), para. 79.

⁸⁴ *Gucati Appeal Decision*, para. 73 referring to IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Order to Show Cause, 1 October 2019, paras 11-13. The Panel recalls that the ECtHR held that "after a certain lapse of time [the persistence of reasonable suspicion that the person arrested has committed an offence] no longer suffices" and, therefore, found it necessary that other grounds must exist to justify the continued deprivation of liberty. See KSC-BC-2020-06, IA016/F00005/RED, Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, 25 March 2022 (confidential version filed on 25 March 2022), para. 49, referring to *inter alia* ECtHR, *Kalashnikov v. Russia*, no. 47095/99, Judgment, 15 October 2002 ("*Kalashnikov v. Russia Judgment*"), para. 114; *Buzadji v. Moldova Judgment*, para. 87; ECtHR, *Bykov v. Russia*, no. 4378/02, Judgment, 10 March 2009, para. 64; ECtHR, *Letellier v. France*, no. 12369/86, Judgment, 26 June 1991, para. 35. Among the factors to be considered in this regard are, for example, the complexity and special characteristics of the investigation, the danger of absconding, the risk of pressure being brought to bear on witnesses or of evidence being tampered with, the risk of collusion, the risk of reoffending, the risk of causing public disorder and the need to protect the detainee. See *Kalashnikov v. Russia Judgment*, para. 114; *Buzadji v. Moldova Judgment*, para. 88.

is charged with four counts of war crimes; (iii) if convicted, Shala's sentence could be lengthy; (iv) the risks under Article 41(6)(b)(ii) and (iii) of the Law cannot be mitigated by any less restrictive measures than detention; (v) the advancement of the pre-trial proceedings, namely the fact that all required procedural steps have been or will be completed with a view to transmitting the case to trial in the foreseeable future; (vi) a tentative date for the transmission of the case file to a Trial Panel has been set; and (vii) the relevant time limits have been or continue to be met notwithstanding any specific time limits which have been or would be extended for good cause.⁸⁵

39. In arguing that the Pre-Trial Judge erred in his assessment of proportionality, Shala relies on jurisprudence stating that the ECtHR "has frequently found a violation of Article 5 § 3 of the Convention where the domestic courts have extended an applicant's detention relying essentially on the gravity of the charges and using stereotyped formulae without addressing specific facts or considering alternative preventive measures."⁸⁶

40. In the present case, the Panel finds that contrary to Shala's assertions and unlike the decisions of domestic courts criticized by the ECtHR,⁸⁷ the Pre-Trial Judge carefully assessed the proportionality of continued detention in light of the circumstances of this case, taking into consideration the factors listed above in paragraph 38 of this Decision, including the passage of time.⁸⁸ Moreover, the Pre-Trial Judge duly considered the Defence's arguments weighing them against the

⁸⁵ Impugned Decision, paras 56-57.

⁸⁶ Appeal, para. 35, referring *inter alia* to ECtHR, no. 5826/03, *Idalov v. Russia*, Judgment, 22 May 2012, para. 147.

⁸⁷ See Appeal, paras 35-36, and ECtHR jurisprudence cited therein.

⁸⁸ Impugned Decision, paras 56-57.

listed factors⁸⁹ and carefully examined measures alternative to detention.⁹⁰ The Panel is therefore satisfied that the Pre-Trial Judge's reasoning is not inconsistent with the cited ECtHR case law.

41. As a result, the Panel considers that Shala has failed to establish that the Pre-Trial Judge erred in finding that Shala's ongoing detention was proportionate. Accordingly, the Panel dismisses Shala's fifth ground of appeal.

⁸⁹ Impugned Decision, paras 53 (referring to Shala Submissions, paras 3, 5, 19, 23), 57. The Pre-Trial Judge assessed in particular Shala's arguments regarding: (i) the additional time he spent in detention following the Fourth Detention Decision, including the resulting increase of the SPO's burden to justify Shala's continued detention; (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.

⁹⁰ Impugned Decision, paras 46-52; Order for Submissions, paras 9-11; Transcript, 14 April 2022, pp. 248-249, 296.

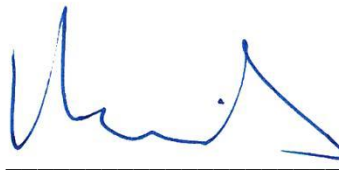
V. DISPOSITION

42. For these reasons, the Court of Appeals Panel:

DENIES the Appeal;

ORDERS Shala to file public redacted versions of his Appeal and Reply within ten days of receiving notification of the present Decision; and

ORDERS the SPO to file a public redacted version of its Response within ten days of receiving notification of the present Decision.



**Judge Michèle Picard,
Presiding Judge**

Dated this Tuesday, 19 July 2022

At The Hague, the Netherlands