

**Case No.:** KSC-BC-2020-04  
**Before:** President of Kosovo Specialist Chambers  
Judge Ekaterina Trendafilova  
**Registrar:** Dr Fidelma Donlon  
**Date:** 20 July 2022  
**Filing Party:** Defence Counsel  
**Original Language:** English  
**Classification:** Public

**THE SPECIALIST PROSECUTOR**

**v.**

**PJETËR SHALA**

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**Public Redacted Version of  
Defence 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**  
Jack Smith

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

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

## I. INTRODUCTION

1. Pursuant to Articles 41(2) and 45(2) of Law No. 05/L-053 (*"KSC Law"*) and Rules 58(1), 58(2) and 170 of the Rules of Procedure and Evidence (*"Rules"*), the Defence for Mr Pjetër Shala (*"Defence"* and *"Accused"*, respectively) hereby submits its appeal against the *"Decision on Remanded Detention Review Decision and Periodic Review of Detention of Pjetër Shala"* (*"Impugned Decision"*).<sup>1</sup>
2. The Impugned Decision confirmed, *inter alia*, the detention decision of 10 November 2021 *"to the extent that it was remanded by the Court of Appeals"* and ordered Mr Shala's continued detention, finding that: (i) no conditions imposed on provisional release could mitigate the risks under Article 41(6)(b)(ii); (ii) the risks cannot be mitigated by the proposed conditions; and (iii) the time Mr Shala has spent in pre-trial detention is not disproportionate.<sup>2</sup>
3. The Defence submits that there are five grounds of appeal entailing: (i) a series of errors of law, including violations of fundamental human rights; (ii) a series of flagrant factual errors amounting to findings that were not reasonably open to the Pre-Trial Judge on the evidence; (iii) a series of instances in which the Pre-Trial Judge took into account irrelevant considerations and failed to take into account relevant considerations; and, in consequence, (iv) a series of discernible errors in the exercise of the Pre-Trial Judge's discretion.
4. These errors, individually and cumulatively, led to the erroneous finding that Mr Shala's continued detention in these circumstances is necessary and proportionate.

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<sup>1</sup> KSC-BC-2020-04, F00188, Decision on Remanded Detention Review Decision and Periodic Review of Detention of Pjetër Shala, 22 April 2022 (confidential). All further references to filings in this Appeal concern Case No. KSC-BC-2020-04 unless otherwise indicated.

<sup>2</sup> Impugned Decision, paras. 56-58 and 59(a) and (b); F00105, Decision on Review of Detention of Pjetër Shala, 10 November 2021 (confidential) (*"Detention Decision of 10 November 2021"*).

5. The Defence requests a panel of the Appeals Chamber to reverse the Impugned Decision, correct these errors, and order the interim release of Mr Shala with any conditions that may be deemed necessary.

## II. PROCEDURAL BACKGROUND

6. The relevant procedural background is set out in the Appeals Chamber's Decision on Pjetër Shala's Appeal Against Decision on Review of Detention of 11 February 2022 ("*Appeal Decision of 11 February 2022*").<sup>3</sup> This decision granted in part Mr Shala's appeal against the Detention Decision of 10 November 2021, finding that the Pre-Trial Judge "*abused his discretion when concluding that none of the Proposed or Alternative Conditions, nor any additional condition, could mitigate the identified risks without first inviting the Defence to inquire into Belgium's willingness and capacity to implement such conditions*" and remanded the matter to the Pre-Trial Judge for further consideration.<sup>4</sup>
7. On 14 February 2022, pursuant to the aforesaid decision of the Appeals Chamber, the Pre-Trial Judge: (i) ordered the Registrar to provide submissions on the detention regime at the Specialist Chambers Detention Facilities; (ii) invited the Defence to inquire into willingness and capacity of the Government of Belgium ("*Belgium*") to implement the proposed conditions of release and/or any additional conditions; (iii) ordered the Defence to provide its submissions on the next review of detention of Mr Shala by 2 March 2022 and address any response received from Belgium and the aforementioned Registry submissions.<sup>5</sup>

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<sup>3</sup> IA003/F00005, Decision on Pjetër Shala's Appeal Against Decision on Review of Detention, 11 February 2022 (confidential).

<sup>4</sup> Appeal Decision of 11 February 2022, paras. 54, 56, 57, 60, 61.

<sup>5</sup> 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 of 14 February 2022*"), paras. 9-11, Annex 1.

8. On 22 February 2022, the Registry provided its submissions pursuant to the Order of 14 February 2022.<sup>6</sup>
9. On 28 February 2022, the Defence, through the Defence Office Coordination of the Registry, contacted the relevant Belgian authorities and enquired into Belgium's willingness and capacity to implement the conditions of provisional release proposed by the Defence.<sup>7</sup>
10. On 1 March 2022, the Defence informed the Pre-Trial Judge that Mr Shala wished to waive his right to have his detention reviewed until the position of the Belgian Government on the conditions of provisional release and/or house arrest was communicated and requested additional time for filing the Defence submissions on the next review of detention.<sup>8</sup> On 4 March 2022, at the Sixth Status Conference, the Pre-Trial Judge issued an oral order granting the request.<sup>9</sup>
11. On 30 March 2022, the Defence was notified by the Immediate Office of the Registrar of the response by the Belgian Federal Ministry of Justice, which noted that [REDACTED].<sup>10</sup>
12. On the same date, the Defence filed its submissions on the review of detention of Mr Shala.<sup>11</sup> On 7 April 2022, the Specialist Prosecutor's Office ("SPO") submitted its Response to the Defence Submissions.<sup>12</sup> On 12 April 2022, the Defence replied to the SPO's Response.<sup>13</sup>

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<sup>6</sup> F00152, Registry Submissions Pursuant to the Order to Provide Information on the Detention Regime (F00145), 22 February 2022 (confidential).

<sup>7</sup> Letter to the Government of Belgium, 28 February 2022 (confidential).

<sup>8</sup> F00160, Defence Request for an Extension of Time for its Submissions on the Next Review of Detention, 1 March 2022, para. 2.

<sup>9</sup> Transcript of 4 March 2022, pp. 189, 190.

<sup>10</sup> Email to Defence Counsel by the Registry, 30 March 2022, at 6:14 pm.

<sup>11</sup> F00171, Defence Submissions on Review of Detention and Response to the Order of the Pre-Trial Judge, 30 March 2022 (confidential).

<sup>12</sup> F00177, Prosecution Submissions for Fifth Review of Detention, 7 April 2022 (confidential).

<sup>13</sup> F00184, Defence Reply to 'Prosecution Submissions for Fifth Review of Detention', 12 April 2022 (confidential).

13. On 22 April 2022, the Pre-Trial Judge issued the Impugned Decision confirming the Detention Decision of 10 November 2021 and ordering Mr Shala's continued detention.

### III. APPLICABLE LAW

14. Pursuant to the jurisprudence of the Appeals Chamber, the standard of review that applies to interlocutory appeals requires: (i) an error of law invalidating the decision; (ii) an error of fact occasioning a miscarriage of justice; or, (iii) a discernible error in the exercise of discretion, in that the impugned decision is based on an incorrect interpretation of governing law, a patently incorrect conclusion of fact, or is so unfair or unreasonable as to constitute an abuse of discretion.<sup>14</sup>
15. Article 29(2) of the Kosovo Constitution provides that *"everyone who is arrested shall be entitled to [...] release pending trial, unless the judge concludes that the person is a danger to the community or presents a substantial risk of fleeing before trial"*. Article 29(1) also states that *"[n]o one shall be deprived of liberty except in the cases foreseen by law and [...] only when deprivation of liberty is reasonably considered necessary to prevent commission of another criminal act, and only for a limited time before trial."*
16. Article 3(2)(e) of the KSC Law provides that international human rights law setting criminal justice standards, including the European Convention on Human Rights (*"ECHR"*), are to be attributed *"superiority"* over other provisions of Kosovo law by virtue of Article 22 of the Constitution.

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<sup>14</sup> KSC-BC-2020-07/IA001/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, paras. 4-14; IA001/F00005, Decision on Pjetër Shala's Appeal Against Decision on Provisional Release, 20 August 2021 (confidential), para. 5 and the authorities cited therein.

#### IV. GROUNDS OF APPEAL

17. The Defence raises the following five grounds of appeal: (i) the Pre-Trial Judge erred in his application of the applicable standard of proof in assessing the risks of fleeing, obstruction or re-offending; (ii) the Pre-Trial Judge erred in finding that Mr Shala's rejection of the legitimacy of the Specialist Chambers is a factor to be taken into consideration against him for the purposes of assessing the risk of absconding; (iii) the Pre-Trial Judge erred in finding that there is a general and well-established climate of interference with criminal proceedings related to the Kosovo Liberation Army and of witness intimidation and in finding that such a climate is a consideration against Mr Shala for the purposes of assessing the risk of absconding; (iv) the Pre-Trial Judge erred in setting an untenable threshold for conditional release upon periodic review of detention; and (v) the Pre-Trial Judge erred in assessing the proportionality of continued detention without adequately considering the passage of time.

**Ground 1: Error in applying the required standard of proof in assessing the risks of fleeing, obstructing or re-offending under Article 41(6)(b) of the KSC Law**

18. The Pre-Trial Judge correctly acknowledges that: (i) "[t]he SPO bears the burden of establishing that the detention of the Accused is necessary [...]"; (ii) "[t]his means that the SPO must provide specific arguments and concrete evidence to establish that continued detention is necessary at the time of the review"<sup>15</sup>; and (iii) "[o]nce the threshold in Article 41(6)(a) of the KSC Law is met, the grounds that would justify the

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<sup>15</sup> Impugned Decision, para. 25.

*deprivation of a person's liberty must be articulable in the sense that they must be specified in detail.*"<sup>16</sup>

19. However, the Pre-Trial Judge erred in his application of this evidentiary standard when assessing the existence of risks under Article 41(6)(b) of the KSC Law.<sup>17</sup> Despite acknowledging the aforesaid principles, the Pre-Trial Judge did not base his findings on "*specific arguments and concrete evidence*" nor "*articulable*" grounds justifying the deprivation of Mr Shala's liberty and did not thoroughly assess the Defence submissions.
20. The Pre-Trial Judge relied entirely on pre-existing factors and inevitable developments such as the advancement of the proceedings—including the submission of the SPO's Pre-Trial Brief, fixing a tentative date for the transmission of the case file to the Trial Panel, and the "*imminent disclosure of the identities of additional witnesses*";<sup>18</sup> while he expected the Defence to "*provide any specific submissions regarding the risk of flight*",<sup>19</sup> "*provide any specific submissions regarding the risk of obstruction*"<sup>20</sup> and "*provide any specific submissions regarding the risk of committing further crimes*".<sup>21</sup>
21. Effectively, the Impugned Decision has reversed the standard of proof and/or misapplied it.
22. The Defence reiterates that it is incumbent on the SPO to demonstrate that continued detention remains necessary.<sup>22</sup> Instead, the Pre-Trial Judge

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<sup>16</sup> Impugned Decision, para. 32, referring to F00045, Decision on Pjetër Shala's Request for Provisional Release, 15 June 2021 (confidential), para. 16 with further references.

<sup>17</sup> Impugned Decision, paras. 35, 37-40, 42, 43, 46, 47.

<sup>18</sup> Impugned Decision, paras. 28, 42, 54.

<sup>19</sup> Impugned Decision, para. 34.

<sup>20</sup> Impugned Decision, para. 36.

<sup>21</sup> Impugned Decision, para. 41.

<sup>22</sup> IA001/F00005, Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Provisional Release, 20 August 2021, para. 24, with further references. Similarly, ECtHR, *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017, paras. 222, 234 with further references.

erroneously found that the Defence (and not the SPO) failed to make specific submissions and dismissed as unsubstantiated the Defence submissions that there is no specific evidence to demonstrate a sufficiently real risk that Mr Shala will abscond, obstruct the proceedings, or commit further crimes.<sup>23</sup>

23. The Defence recalls that binding case law from the ECtHR requires that “[the] risks must be duly substantiated and the authorities’ reasoning on those points cannot be abstract, general or stereotyped.”<sup>24</sup> Yet, this is exactly an accurate description of the Pre-Trial Judge’s assessment which merely relied on his previous findings and failed to conduct a new assessment and determine specifically whether there is any evidence provided by the SPO that demonstrates the risk of obstruction and re-offending, other than the inevitable progress of the proceedings.
24. For instance, the Pre-Trial Judge’s generic dismissal of arguments previously made simply because they “have already been addressed” and “these submissions do not require to be addressed any further” deprives the Accused of his right of access to court and an effective determination on his submissions challenging the grounds for his continued detention in breach of Articles 5 and 6 of the ECHR.<sup>25</sup> In support of his position, the Pre-Trial Judge refers to the Appeals Chamber’s decisions in different cases where the Panel noted that “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>26</sup> The Appeals Chamber’s justified concern about judicial economy cannot be interpreted as leave to dismiss the core of Defence submissions that depend on a new evaluation of relevant circumstances that change over time. For instance, if the Defence suggests that the SPO has

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<sup>23</sup> Impugned Decision, paras. 34, 36, 41.

<sup>24</sup> ECtHR, *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017, para. 222.

<sup>25</sup> Impugned Decision, paras. 25, 33.

<sup>26</sup> See Impugned Decision, para. 24 referring to *Haradinaj* Detention Appeal, para. 55, and KSC-BC-2020-06/IA006/F00005, Public Redacted Version of Decision on Jakup Krasniqi’s Appeal Against Decision on Review of Detention, 1 October 2021, para. 17.



failed to show at a given time that there is a real risk of obstruction of the proceedings in light of the particular circumstances existing at the relevant time, the Pre-Trial Judge cannot decline to consider a similar submission made subsequently arguing that the SPO failed to show a real risk of obstruction at a different time and on the basis of different circumstances. The Pre-Trial Judge's understanding of his duties concerning the periodic review of an accused's detention deprives the Accused of an effective review of the lawfulness of his detention in breach of Article 5 of the ECHR and should be corrected by the Appeals Chamber.

25. As a result of this erroneous shift of the applicable burden to the Defence, the Pre-Trial Judge erred in his assessment of the material before him while the SPO was effectively allowed to evade its obligation to provide concrete evidence and submissions and adequately demonstrate to the requisite standard that the requirements for detention continue to exist.

**Ground 2: Error in finding that Mr Shala's rejection of the legitimacy of the Specialist Chambers is a factor to be taken into consideration against him for the purposes of assessing the risk of absconding**

26. At paragraph 35, the Pre-Trial Judge found that Mr Shala's rejection of the legitimacy of the SC is a factor to be taken into consideration against him for assessing the existence of a real risk of absconding.
27. The Defence reiterates the right of Mr Shala to challenge the legitimacy of the SC through the lawful exercise of his right to a fair trial. His submissions challenging the legitimacy of the SC have no bearing on a reasonable assessment as to the risk that he may abscond, especially when this challenge has no bearing on either his intention to cooperate with the present proceedings or his appearance for

trial. In considering the exercise of the aforesaid right a factor denoting *inter alia* Mr Shala's risk to abscond, the Pre-Trial Judge violated Mr Shala's right to put forward his defence case without fear of repercussions by having his submissions considered out of context. This error should not be summarily dismissed as it prejudices Mr Shala and creates a chilling effect for the purposes of his efforts to defend himself. If corrected, the Pre-Trial Judge would be required to conduct a lawful assessment of the risk of absconding and revise his relevant findings in this respect that are repeated automatically in the context of his periodic reviews of continued detention.

**Ground 3: Error in finding that there is a general and well-established climate of interference with criminal proceedings related to the Kosovo Liberation Army and of witness intimidation and in finding that such a climate is a consideration against Mr Shala for the purposes of assessing the risk of absconding**

28. At paragraph 35, the Pre-Trial Judge finds that a factor supporting the conclusion that a moderate risk of flight continues to exist is the fact that "*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*". In the same paragraph, the Impugned Decision also noted that 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 the alleged members, including by helping each other to abscond.
29. The Defence respectfully submits that, in terms of the actual existence of the said "*climate*", this finding is unfounded, highly speculative and simply untrue. In this respect, it is recalled that Mr Shala has been living outside Kosovo and

consistently distanced himself from Kosovo affairs for the last 20 years. The Pre-Trial Judge relied on hypothetical assumptions and failed to refer to any evidence suggesting that Mr Shala is in a position, would be supported by any person whether within or outside Kosovo, or has any intention to abscond.

30. The Defence reiterates the right of Mr Shala to have the presumption of innocence fully respected at all stages of the proceedings. Under Article 6(2) of the ECHR, the presumption of innocence requires *inter alia* that, when carrying out their duties, all members of a court do not start on the preconceived idea that the accused has committed the offence (or offences) charged and the burden of proof is on the prosecution and any doubt should benefit the accused.<sup>27</sup> The Pre-Trial Judge's assumptions as to the general context of proceedings related to the KLA and hypothetical support for Mr Shala, which are entirely unsupported by relevant evidence, apply preconceived ideas about Mr Shala and his intentions that violate the presumption of innocence.

**Ground 4: Error in setting an untenable threshold for conditional release upon periodic review of detention**

31. The Pre-Trial Judge relied on [REDACTED] "*in relation to individuals on whose evidence the SPO intends to rely at trial*" and impermissibly assumed that they "*displ[ay] [REDACTED]*".<sup>28</sup> The Impugned Decision relied heavily on such alleged isolated conduct to dismiss the arguments of the Defence and found that in view of the advancement of the pre-trial proceedings and the filing of the SPO's Pre-Trial Brief, the risks of Mr Shala obstructing the process of the SC proceedings and of committing further crimes, continue to exist.

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<sup>27</sup> See for instance ECtHR, *Barberà, Messegué and Jabardo v. Spain*, no. 10590/83, para. 77.

<sup>28</sup> Impugned Decision, paras. 37-40.

32. The Pre-Trial Judge erred in relying on a speculative assumption of [REDACTED]. This view is unsubstantiated and fails to meet the applicable standard.<sup>29</sup>
33. Reliance on the aforesaid [REDACTED] combined with the assumption that the advancement of the proceedings inherently increase the identified Article 41(6)(b) risks, is a formula that may only and always lead to the same conclusion that the identified risks continue to exist and constantly increase. This, together with the finding that no proposed or additional conditions are capable of sufficiently mitigating the aforesaid risks, predetermines the fate of every decision on review of detention and confirms the submission of the Defence that the very purpose of having continued detention periodically reviewed pursuant to Rule 57(2) of the Rules is extinguished.

**Ground 5: Error in assessing the proportionality of continued detention without adequately considering the passage of time**

34. The Pre-Trial Judge acknowledged that *“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 KSC Law, in order to determine whether, all factors being considered, the continued detention ‘stops being reasonable’ and the individual needs to be released”*,<sup>30</sup> yet finds that, in view of the serious nature of the charges against him, the indicated Article 41(6)(b)(ii) and (iii) risks and the advancement

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<sup>29</sup> F00171, Defence Submissions on Review of Detention and Response to the Order of the Pre-Trial Judge, 30 March 2022 (confidential), paras. 3, 17, 21 (emphasis placed on the Defence submissions that the presumption in favour of Mr Shala’s liberty pending trial must form the basis of any assessment as to any identifiable risk and any identifiable risk must not be based on a mere possibility or speculative assumptions).

<sup>30</sup> Impugned Decision, para. 55.

of the proceedings, the time Mr Shala has spent in pre-trial detention is not disproportionate.<sup>31</sup>

35. The factors on which the Pre-Trial Judge relied have the *de facto* effect of rendering the passage of time ineffective as to any assessment of proportionality, in that, irrespective of the duration of detention on remand, the remaining factors will continue to exist. As the ECtHR noted, “[t]he Court 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”.<sup>32</sup>
36. The reasoning in the Impugned Decision is one that *essentially* relies on the gravity of the charges and on *stereotyped formulae* implemented with respect to assessing the proportionality of continued detention and is thus inconsistent with ECtHR case law.

## V. RELIEF REQUESTED

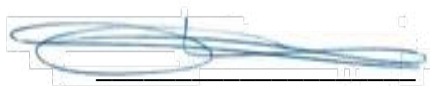
37. For the above reasons, the Defence respectfully requests the Appeals Chamber to set aside the Impugned Decision and its erroneous findings and order the Accused’s immediate release or placement in house arrest with any conditions found appropriate.

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<sup>31</sup> Impugned Decision, paras. 56, 57.

<sup>32</sup> ECtHR, *Idalov v. Russia* [GC], no. 5826/03, 22 May 2012, para. 147; referring to *Khudobin v. Russia*, no. 59696/00, 26 October 2006, paras. 103 et seq.; *Khudoyorov v. Russia*, no. 6847/02, 8 November 2005, paras. 172 et seq.; *Dolgova v. Russia*, no. 11886/05, 2 March 2006, paras. 38 et seq.; *Rokhlina v. Russia*, no. 54071/00, 7 April 2005, paras. 63 et seq.; *Panchenko v. Russia*, no. 11496/05, 11 June 2015, paras. 91 et seq.; *Smirnova v. Russia*, nos. 46133/99 and 48183/99, 24 July 2003, paras. 56 et seq.; *Tretyakov v. Ukraine*, no. 16698/05, 29 September 2011, para. 59; and *Vasilkoski and Others v. the former Yugoslav Republic of Macedonia*, no. 28169/08, 28 October 2010, para. 64.

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**Jean-Louis Gilissen**  
**Specialist Defence Counsel**



**Hédi Aouini**  
**Defence Co-Counsel**