Case No.:	**KSC-BC-2020-04**
Before:	**Trial Panel I**
	Judge Mappie Veldt-Foglia, Presiding Judge
	Judge Roland Dekkers
	Judge Gilbert Bitti
	Judge Vladimir Mikula, Reserve Judge
Registrar:	Dr Fidelma Donlon
Date:	16 January 2023
Filing Party:	Specialist Defence Counsel
Original Language:	English
Classification:	Confidential

THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

Defence Reply to Prosecution Response to "Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala"

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I. INTRODUCTION

1. The Defence for Mr Pjetër Shala ("Defence" and "Accused", respectively) hereby files this Reply to the Response of the Specialist Prosecutor's Office ("SPO") to the "Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala".[1]

2. While this Reply is limited to specific issues raised in the Response, the Defence fully maintains its original submissions and rejects all arguments made by the SPO in their entirety.[2]

3. The Reply is being filed confidentially in accordance with Rule 82(4) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules") as it relates to previous filings that are currently confidential.

II. SUBMISSIONS

4. The Defence proposed ten specific issues for certification and submitted that the Impugned Decision is based on a number of errors and violates the rights of the Accused under Article 6 of the European Convention on Human Rights ("ECHR").[3]

5. Appellate intervention at the present stage will ensure that the proceedings can proceed in a way that effectively respects the rights of the Accused. Proceeding with the trial without affording the Accused the procedural safeguard of

[1] KSC-BC-2020-04, F00371, Decision on Variation of Time Limits and Related Matters, 14 December 2022, para. 9(b); KSC-BC-2020-04, F00380, Prosecution Response to Defence Request for Leave to Appeal the Decision Concerning the Prior Statements of the Accused, 10 January 2023 (confidential)("Response"); KSC-BC-2020-04, F00369, Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala, 13 December 2022 (confidential)("Request"); KSC-BC-2020-04, F00364COR, Corrected version of Decision concerning prior statements given by Pjetër Shala, 6 December 2022 (confidential)("Impugned Decision"). All further references to filings in this Reply concern Case No. KSC-BC-2020-04 unless otherwise indicated.
[2] Request, paras. 1-48.
[3] Request, paras. 3, 4.

appellate interlocutory review of matters fundamental to the fairness of the proceedings would be an error and a distinct violation of the guarantees of a fair trial and the right to an effective remedy. The prejudice caused by proceeding with the trial (having had the Accused's statements admitted into evidence despite the fact that they were obtained in breach of his rights as a suspect) would be irremediable.[4] The issues arising from the Impugned Decision lie at the heart of the notion of a fair procedure under Article 6, concern the protection of the Accused from improper compulsion by the authorities, and are exactly the sort of issues that require immediate resolution by an Appeals Panel in order to materially advance the proceedings.[5]

6. The SPO's response is based on the flawed premise that "the impact of the use of the Accused's statements on the fairness of the proceedings is not to be assessed in isolation, but in the context of the proceedings as a whole".[6] On this basis, the SPO alleges that assessing the impact on the fairness of the proceedings caused by the Impugned Decision would be "premature" and "because" such assessment would be "premature" it "would not materially advance the proceedings".[7]

7. The Defence invites the Panel to reject the SPO's erroneous proposition and circular reasoning. The SPO fails to understand the essential nature of review by the European Court of Human Rights ("ECtHR") and the ECtHR's subsidiary protection; the ECtHR reviews a case and complaints of breaches of the Convention only after the relevant domestic remedies have been exhausted. By definition, the ECtHR only reviews the fairness of a criminal trial after the relevant proceedings have been definitively concluded and therefore considers

[4] Request, para. 47.
[5] Request, paras. 45-47.
[6] Response, para. 2.
[7] Response, para. 2. *See also* Response, paras. 31-36.

the fairness of the proceedings taken as a whole. The nature of the ECtHR's review has no bearing and cannot be applied in the context of an interlocutory request for certification to appeal a first-instance decision that includes complaints of serious violations of the right to a fair trial.

8. Granting certification would ensure the availability of the fundamental procedural safeguard of interlocutory appellate review that can "cure" the serious defects at the investigation stage of the case that violated the Accused's rights as a suspect.[8] The use of statements obtained in breach of the fundamental rights of a suspect, just like "the fruit of the poisonous tree" can "contaminate" and prejudice the proceedings as a whole.[9] In light of the length, complexity, and importance of these proceedings, as well as the duration of the Accused's pre-trial detention, it is not justified to leave appellate review of the fairness of the use of statements obtained in breach of fundamental rights heard and determined at the end of the trial (in the context of appellate review of the trial judgment). The only remedy available then would be a re-trial. Interlocutory appellate review would ensure that the trial proceeds in a fair manner.

9. In the alternative, should the Panel accept the SPO submission that the fairness of the proceedings needs to be assessed when it can be examined taken as a

[8] The ECtHR examines the availability of safeguards as part of its enquiry into the legal framework governing pre-trial proceedings and the admissibility of evidence at trial. *See, for instance,* ECtHR, *Beuze v. Belgium* [GC], no. 71409/10, 9 November 2018, para. 171; ECtHR, *Ibrahim and others v. the United Kingdom* [GC], nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, para. 274. *See also mutatis mutandis*, ECtHR, *Micallef v. Malta* [GC], no. 17056/06, 15 October 2009, para. 80 ("Against this background the Court no longer finds it justified to automatically characterise injunction proceedings as not determinative of civil rights and obligations. Nor is it convinced that a defect in such proceedings would necessarily be remedied at a later stage, namely in proceedings on the merits governed by Article 6 *since any prejudice suffered in the meantime may become irreversible and with little realistic opportunity to redress the damage caused*, except perhaps for the possibility of pecuniary compensation.")(emphasis added).

[9] *See, for instance,* the Joint Concurring Opinion of Judges Spielmann and Jebens in ECtHR, *Panovits v. Cyprus*, no. 4268/04, 11 December 2008, para. 11.

whole (which in the view of the Defence in the present circumstances would be inconsistent with Article 6 of the Convention), granting certification to appeal is merited. Although the question whether the requirements of a fair trial have been respected must be examined having regard to the proceedings as a whole, the Grand Chamber of the ECtHR has explicitly observed that "it cannot be ruled out that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage of the proceedings".[10] The Defence respectfully submits that the admissibility of the Accused's statements is exactly such a decisive and specific factor that requires assessment at the present stage.

10. The SPO's reasoning would deprive the Accused of a fundamental procedural safeguard that can cure the defects that occurred at the investigation stage. Denying the possible avenue of redress offered by an interlocutory appeal would constitute a separate violation of the Accused's right to an effective remedy. The SPO's submissions fail to give due weight to the principle that a violation of a fundamental right must be raised, acknowledged, and remedied as quickly as possible.

11. In addition, given the case law establishing a high threshold for consideration of violation of fundamental rights on appeal (requiring the party alleging a fair trial violation on appeal to prove that it has suffered "prejudice that amounts to an error of law invalidating the judgment")[11] it is by no means certain that the Accused will have an effective remedy for the breach of his rights at the investigation stage in the context of an appeal against a trial judgment. An

[10] ECtHR, *Beuze v. Belgium*, para. 121.
[11] *See, for instance,* MICT, *Prosecutor v. Radovan Karadzic*, Case No. MICT-13-55-A, Appeal Judgement, 20 March 2019, para. 356, *referring to Nyiramasuhuko et al.* Appeal Judgement, para. 346; *Ndindiliyimana et ale* Appeal Judgement, para. 29; *Sainovic et al.* Appeal Judgement, para. 29 and references cited therein.

interlocutory appeal is the most appropriate remedy to assess and remedy the violations complained of.

12. At paragraph 7 of the Response, the SPO submitted that the Defence "mischaracterised the Decision by selectively quoting the relevant reasoning of the Panel" and "failed to demonstrate that the Panel's interpretation of Rule 138(2) amounts to an issue warranting certification". This argument misreads the Defence submissions.[12] As previously argued, the Trial Panel interpreted Rule 138(2) of the Rules so as to require a "causal link" between the violation and the gathering of evidence whereas such requirement does not exist in international human rights law and is inconsistent with ECtHR jurisprudence.[13] Furthermore, as the Defence submitted, not only this requirement but also the manner in which it was applied merit appellate consideration.

13. The SPO's argument that the Defence has failed to explain how the application of international human rights by the Panel *in lieu* of the Kosovo Specialist Chambers ("KSC") legal framework was essential to the outcome of the Decision is false.[14] The Panel's finding rendering the KSC legal framework and guarantees inapplicable, taken in conjunction with its interpretation of the obligations imposed by international human rights law, led to the application of weaker procedural guarantees. Specifically, at paragraph 23 of the Impugned Decision the Panel found that "the Material had not been obtained under the Law and the Rules. As a result, the Panel will assess whether each interview record was obtained by means of a violation of the *standards of international human rights law*". The rejection of the arguments of the Defence as to the applicability of the KSC Law and Rules, and the Panel's interpretation of

[12] Request, paras. 12-14.
[13] Request, para. 13; Impugned Decision, paras. 20, 78.
[14] Request, paras. 28-30.

the said "standards of international human rights", effectively deprived the Accused of the protection afforded in the KSC legal framework, including the explicit guarantees protecting suspects during an investigation which, as the Defence submitted extensively, were clearly violated.[15] The position of the Defence is that the KSC legal framework should have been applied and that failure to apply it and abide by its guarantees led to the violation of the rights of the Accused as a suspect.[16] In the alternative, the Defence has submitted that the Panel should have interpreted international human rights law standards in the light of the guarantees provided in the KSC framework and the Panel erred by applying weaker standards.[17]

III. RELIEF REQUESTED

[15] F00281, Motion to Exclude Evidence from the Case File to be Transmitted to the Trial Panel with Confidential Annexes 1-3, 20 September 2022 (confidential with confidential Annexes 1-3), paras. 25-29; *referring* to Rule 43(3) of the Rules, which provides that "[a]ny investigative act requiring the presence of a suspect, in particular any questioning […] shall not proceed without the presence of Specialist Counsel. A suspect may waive this right provided that the Specialist Prosecutor ensures that the suspect understands the nature of this right and the consequences of waiving it. When providing such information, the Specialist Prosecutor shall take into account the personal circumstances of the suspect, including his or her age, mental and physical condition. A waiver and the circumstances in which it was given shall be recorded in writing by the Specialist Prosecutor and shall be signed by the suspect"; Rule 43(4) of the Rules provides that "[a] suspect shall be informed that he or she may revoke the waiver at any point during his or her interview. Where a suspect revokes a waiver, the questioning shall cease and shall only resume in the presence of Specialist Counsel. Questioning or any other act carried out prior to the revocation of the waiver shall be valid and shall not be repeated"; Rule 44(1) of the Rules provides that "[t]he questioning shall be vide-recorded" and "if the Specialist Prosecutor files an indictment against the suspect, the recording shall be transcribed"; Rule 45 of the Rules provides that "[a]n out of court confession by a suspect […] during questioning by the Specialist Prosecutor shall be considered free and voluntary if the Specialist Prosecutor shows that the requirements of Rule 43 and Rule 44 have been complied with strictly"; and Article 38(3) of the KSC Law provides that a suspect shall have or shall be informed prior to questioning of the rights to be assisted by a counsel and to be questioned in the presence of a counsel. *See also* F00358, Defence Response to Prosecution Motion for Admission of Accused's Statements, 24 November 2022 (confidential), para. 28.

[16] F00281, Motion to Exclude Evidence from the Case File to be Transmitted to the Trial Panel with Confidential Annexes 1-3, 20 September 2022 (confidential with confidential Annexes 1-3), paras. 27-29; KSC-BC-2020-04, F00358, Defence Response to Prosecution Motion for Admission of Accused's Statements, 24 November 2022 (confidential), paras. 28, 66; Request, paras. 28-30, 34, 36.

[17] Request, para. 30.

14. The Defence respectfully requests the Trial Panel to grant certification to appeal the issues in paragraph 4 of the Request.

Word count: 2158

Respectfully submitted,

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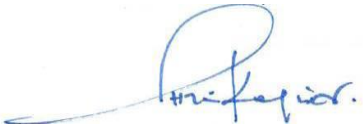

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Monday, 16 January 2023
The Hague, the Netherlands