

Case No.: KSC-BC-2020-04
Specialist Prosecutor v. Pjetër Shala

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: 26 January 2023

Filing Party: Specialist Defence Counsel

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THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

Defence Submissions for Ninth Review of Detention

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I. INTRODUCTION

1. Pursuant to the “Decision on the Eighth Review of Detention of Pjetër Shala”, the Defence for Mr Pjetër Shala (“Defence” and “Accused”, respectively) files these submissions on the ninth review of detention of the Accused.¹
2. On 16 March 2021, the Accused was arrested and detained in Belgium.² On 15 April 2021, he was transferred to the Detention Facilities of the Specialist Chambers (“SC”) in the Hague, the Netherlands.³ On 19 April 2021, he pleaded not guilty to all charges set out in the Indictment.⁴ To date, the Accused has already been in detention at the SC Detention Facilities for over 21 months. The Accused’s continued detention is unjustified as it is neither necessary nor proportional.
3. The Specialist Prosecutor’s Office (“SPO”) bears the burden of establishing that the detention of the Accused is necessary.⁵ The longer the Accused remains in pre-trial detention, the higher the burden on the SPO to justify continued detention.⁶ The SPO has failed to substantiate that the Accused, if released, will abscond, obstruct the proceedings, or commit further crimes, and thus, has failed to meet the requirements of Article 41(6)(b) of the Law No. 05/L-053 on the Specialist Chambers and Specialist Prosecutor’s Office (“KSC Law”). The SPO

¹ KSC-BC-2020-04, F00365, Decision on the Eighth Review of Detention of Pjetër Shala, 6 December 2022 (confidential) (“Eighth Detention Decision”), para. 40(c). All further references to filings in these submissions concern Case No. KSC-BC-2020-04 unless otherwise indicated.

² F00013, Notification of Arrest of Pjetër Shala Pursuant to Rule 55(4), 16 March 2021, para. 5.

³ F00019, 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.

⁴ T. 19 April 2021 p. 11. *See also* F00010, A01, Annex 1 to Submission of confirmed indictment with strictly confidential and *ex parte* Annexes 1-2, 19 June 2020. A corrected indictment was submitted on 1 November 2021: F00098, A01, Annex 1 to Submission of corrected indictment with confidential Annex 1.

⁵ Eighth Detention Decision, para. 14.

⁶ IA005, F00005, Decision on Pjetër Shala’s Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, 19 July 2022 (confidential), para. 37; Eighth Detention Decision, paras. 37, 38.

has failed to produce any concrete grounds capable of showing that the Accused's continued detention is necessary as well as proportional.

II. PROCEDURAL BACKGROUND

4. The procedural background is set out in the Trial Panel ("Panel")'s Eighth Detention Decision issued on 6 December 2022.⁷
5. On 18 January 2023, the SPO filed its submissions on the ninth review of detention.⁸

III. SUBMISSIONS

6. The Defence fully maintains its previous submissions on the unlawfulness of the Accused's continued detention.⁹
7. Article 5 § 3 of the European Convention on Human Rights ("ECHR"), Article 29(2) of the Constitution of Kosovo, and Article 41(5) of the KSC Law guarantee that any person detained "shall be entitled to trial within a reasonable time or to release pending trial". Similarly, Rule 56(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules") provides that the Panel "shall ensure that a person is not detained for an unreasonable period prior to the opening of the case".

⁷ Eighth Detention Decision, paras. 1-10.

⁸ F00390, Prosecution submissions for ninth review of detention, 18 January 2023 ("SPO Submissions").

⁹ F00341, Defence Response to "Prosecution submissions for eighth review of detention", 8 November 2022, paras. 2-4, 7-20; F00273, Defence Response to "Prosecution submissions for seventh review of detention", 12 September 2022 (confidential), paras. 9-23; F00221, Defence Response to "Prosecution Submissions for Sixth Review of Detention", 15 June 2022 (confidential), paras. 7-16; 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), paras. 4-14; 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), paras. 14-37; IA001, F00004, Defence Reply to Prosecution Response to Appeal Against the 'Decision on Pjetër Shala's Request for Provisional Release', 19 July 2021, paras. 4-16; F00131, Defence Reponse to 'Prosecution Submissions for Third Review of Detention', 21 January 2022, paras. 18-32.

8. The Panel concluded that the Accused is not a flight risk.¹⁰ The SPO submits that this finding warrants reconsideration as the Accused's risk of flight has increased due to: (i) recently disclosed evidence, consisting of four new witness interviews and associated exhibits; and (ii) the Panel's decision that certain statements of the Accused are admissible.¹¹ The SPO argues that this is especially the case after the conviction of the accused in the *Mustafa* case at the SC, as the Accused in the present case is charged with the same types of war crimes and the discovery and admissibility status of new incriminatory evidence "cannot but increase, in the eyes of the Accused, the possibility of a similarly lengthy conviction".¹²
9. The SPO's submissions are cursory and misleading. The SPO attempts to speculate about the expected outcome of the trial, whereas the *Mustafa* case and this case are distinct with different facts and background. In the case of *Haradinaj et al.*, a Trial Chamber at the International Criminal Tribunal for the former Yugoslavia ("ICTY") found that "the expectation of a lengthy sentence cannot be held against an accused *in abstracto* because all accused before this Tribunal, if

¹⁰ Eighth Detention Decision, paras. 20, 31. See also F00282, Decision on Review of Detention of Pjetër Shala, 21 September 2022 (confidential), para. 32; F00224, Decision on Review of Detention of Pjetër Shala, 22 June 2022 (confidential), para. 43; F00188, Decision on Remanded Detention Review Decision and Periodic Review of Detention of Pjetër Shala, 22 April 2022 (confidential), para. 46; F00133, Decision on Review of Detention of Pjetër Shala, 28 January 2022 (confidential), para. 39; F00105, Decision on Review of Detention of Pjetër Shala, 10 November 2021 (confidential), para. 37; F00075, Decision on Review of Detention of Pjetër Shala, 10 September 2021 (confidential), para. 40; F00045, Decision on Pjetër Shala's Request for Provisional Release, 15 June 2021 (confidential), 45.

¹¹ SPO Submissions, para. 7, referring to F00367, Prosecution request to amend the Exhibit List with confidential Annexes 1-4 and strictly confidential and *ex parte* Annexes 5-8, 9 December 2022 (confidential), para. 13 and F00364COR, Corrected version of Decision concerning prior statements given by Pjetër Shala, 8 December 2022 (confidential), paras. 80: "the Panel concludes that the 2016 Belgian Interview is not inadmissible pursuant to Rule 138(2) of the Rules and therefore can be considered by the Panel in accordance with Rule 139(1)", 110: "the Panel concludes that the 2019 Belgian Interview is not inadmissible and therefore can be considered by the Panel in accordance with Rule 139(1) of the Rules".

¹² SPO Submissions, para. 7.

convicted, are likely to face heavy sentences".¹³ The conviction of the accused in *Mustafa* is not relevant as a factor justifying the Accused's continued detention.

10. Moreover, the SPO also perfunctorily submits, without any explanation, that "the advancement of the proceedings towards the start of trial and the Accused's insight into the case against him" increases the risk of flight.¹⁴ Contrary to this argument, the European Court of Human Rights ("ECtHR") held that the danger of flight necessarily decreases with the passage of time spent in detention.¹⁵
11. In *Becciev v. Moldova*, the ECtHR found that the risk of flight must be "assessed in light of the factors relating to the person's character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is prosecuted. The expectation of heavy sentence and the weight of evidence may be relevant but is not as such decisive".¹⁶ As the Defence submitted, the Accused has left Kosovo since 1999 and has no links to any network there; he has Belgian nationality, a permanent residence in Belgium, a family relationship with his children, two of which live in the same building in Belgium, and economic and social ties to Belgium for more than twenty years; and he has consistently cooperated with authorities in Belgium, at the SC and the ICTY.¹⁷ Moreover, the Accused is indigent and has no means at his disposal which could be used to evade justice.¹⁸ By failing to consider these essential factors but instead relying on insufficient justifications, the SPO failed to establish that the Accused is a flight risk.

¹³ ICTY, *Prosecutor v. Haradinaj et al.*, Case no. IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, para. 24.

¹⁴ SPO Submissions, para. 10.

¹⁵ ECtHR, *Neumeister v. Austria*, no. 1936/63, 27 June 1968, para. 10.

¹⁶ ECtHR, *Becciev v. Moldova*, no. 9190/03, 4 October 2005, para. 58.

¹⁷ F00039, Motion for Provisional Release, 27 May 2021 (confidential), paras. 22, 23, 24, 25. *See also* Eighth Detention Decision, para. 20.

¹⁸ F00039, Motion for Provisional Release, 27 May 2021 (confidential), para. 24.

12. Regarding the risk of obstruction and the risk of commission of further crimes, the SPO argues that they are increased due to: (i) the imminent start of trial; and (ii) the SPO's request to amend its Exhibit List with the transcripts of the four new witness interviews and associated exhibits.¹⁹ In particular, the SPO contends that the disclosure of the transcripts of its interview with TW4-10—which it alleges contains incriminatory information which corroborates evidence already known to the Defence, including certain statements of the Accused which the Panel has found admissible—increases the risk that the Accused will attempt to interfere, either directly or indirectly, with the source of that information.²⁰
13. As the Defence submitted, the SPO's argument that these transcripts contain corroborative evidence is false.²¹ Review of the relevant material shows that TW4-10 has recently changed his evidence, which contradicts his previous statements in 2019 and 2022.²² These contradictions raise serious doubts about the reliability of these transcripts. The assessment of any risks for the review of detention should not be based on such unreliable information.

¹⁹ SPO Submissions, paras. 1, 6, *referring to* F00367, Prosecution request to amend the Exhibit List with confidential Annexes 1-4 and strictly confidential and *ex parte* Annexes 5-8 (confidential), 9 December 2022.

²⁰ SPO Submissions, para. 6, *referring to* F00367, Prosecution request to amend the Exhibit List with confidential Annexes 1-4 and strictly confidential and *ex parte* Annexes 5-8 (confidential), 9 December 2022, para. 9 and F00364COR, Corrected version of Decision concerning prior statements given by Pjetër Shala, 8 December 2022 (confidential), paras. 80: "the Panel concludes that the 2016 Belgian Interview is not inadmissible pursuant to Rule 138(2) of the Rules and therefore can be considered by the Panel in accordance with Rule 139(1)", 110: "the Panel concludes that the 2019 Belgian Interview is not inadmissible and therefore can be considered by the Panel in accordance with Rule 139(1) of the Rules".

²¹ F00382, Defence Response to "Prosecution request to amend the Exhibit List with confidential Annexes 1-4 and strictly confidential and *ex parte* Annexes 5-8", 11 January 2023, para. 9. *See also* F00367, Prosecution request to amend the Exhibit List with confidential Annexes 1-4 and strictly confidential and *ex parte* Annexes 5-8 (confidential), 9 December 2022, para. 10.

²² F00382, Defence Response to "Prosecution request to amend the Exhibit List with confidential Annexes 1-4 and strictly confidential and *ex parte* Annexes 5-8", 11 January 2023, paras. 9, 11.

14. In any event, in the newly disclosed transcripts, TW4-10 explicitly stated that he “didn’t have any contacts with [the Accused]”.²³ During the whole time he has been in pre-trial detention, the Accused has no record of attempting to contact, let alone attempting to interfere with TW4-10 or any other witness who has provided evidence in the case or is due to appear before the Panel. This is confirmed by records provided in November 2022 by the Detention Management Unit on the Accused’s communications and visits during his time in detention, which show that at no point in time has the Accused ever attempted to interfere with witnesses, victims, or the progress of the proceedings.²⁴ The Accused’s interim release would not endanger witnesses or victims nor lead to the obstruction of the court proceedings.
15. In the *Abd-Al-Rahman* case, the Appeals Chamber of the International Criminal Court found that, when the Prosecutor asserts the existence of a risk of the accused or his supporters interfering with court proceedings if the accused is granted interim release, the Prosecutor should “provide as many concrete elements of fact as possible to the relevant chamber on a regular basis regarding the context of the accused’s detention”.²⁵ The ECtHR also held that “[t]he danger of the accused’s hindering the proper conduct of the proceedings cannot be relied upon *in abstracto*, it has to be supported by factual evidence”.²⁶ The SPO in

²³ F00367, A03, Annex 3 to Prosecution request to amend the Exhibit List with confidential Annexes 1-4 and strictly confidential and *ex parte* Annexes 5-8, ERN 108836-TR-ET Part 1 RED, 9 December 2022 (confidential), p. 29.

²⁴ F00363, Defence Response to Prosecution Request for Restrictions of the Accused’s Communications with Strictly Confidential and *Ex Parte* Annex 1, 2 December 2022 (confidential), para. 35. *See also* Email to Defence Counsel by Detention Management Unit Legal Communication, 11 November 2022, at 5:04 pm; Email to Defence Counsel by Detention Management Unit Legal Communication, 22 November 2022, at 4:59 pm.

²⁵ ICC, *The Prosecutor v. Abd-Al-Rahman*, Case No. ICC-02/05-01/20 OA10, Judgment on the appeal of Ali Muhammad Ali Abd-Al-Rahman against Trial Chamber I’s “Decision on the review of detention”, 17 December 2021, para. 28.

²⁶ *Becciev v. Moldova*, para. 59, referring to *Trzaska v. Poland*, no. 25792/94, 11 July 2000, para. 65.

this case has failed to provide any concrete factual circumstances to support its argument that a risk of obstruction exists, let alone that it has increased.

16. As to the risk of committing further crimes, the Grand Chamber of the ECtHR held that, for detention to be justified under this ground, it “must [be] show[n] convincingly that the person concerned would in all likelihood have been involved in the concrete and specific offence, had its commission not been prevented by the detention” (emphasis added).²⁷ The SPO’s generic allegations about the danger of the Accused committing crimes, including by attempting to interfere with TW4-10, are unsubstantiated and implausible, as demonstrated above. The SPO fails to “show convincingly” that the Accused would likely commit any “concrete and specific offence” or pose a danger to TW4-10 if he is granted interim release.
17. In relation to the proportionality of the Accused’s continued detention, the SPO invokes reasons—including the charges of four counts of war crimes, the possibility of a lengthy sentence, and the advancement of the proceedings towards the start of trial—without any attempt to demonstrate how continued detention on remand for over 21 months is proportionate in the specific circumstances of this case.²⁸ Throughout its submissions, the SPO did not even attempt to explain how the advancement of the proceedings towards the start of the trial increases the risks of flight, obstruction of the proceedings, and commission of further crimes in this case.²⁹

²⁷ ECtHR, *Kurt v. Austria* [GC], no. 62903/15, 15 June 2021, para. 186; *S., V. and A. v. Denmark* [GC], no. 35553/12, 36678/12 and 36711/12, 22 October 2018, paras. 89, 91.

²⁸ SPO Submissions, para. 10.

²⁹ SPO Submissions, paras. 1, 6, 10.

18. As the ECtHR noted, the reasons invoked for ordering and prolonging detention must not be general, abstract, or stereotyped,³⁰ but must contain references to specific facts and show why the reasons apply concretely to the specific personal circumstances of the applicant to justify his detention.³¹
19. The SPO's repeated general and stereotyped arguments regarding the proportionality of the Accused's continued detention make no more than an abstract mention of allegedly relevant factors, and are, as such, plainly inadequate. The SPO has not produced sufficient justifications for keeping the Accused in detention for such a protracted period of time.
20. The Defence reiterates that ordering continued detention on account of "no change in circumstances"³² is profoundly unjust and results in "[q]uasi-automatic prolongation of detention [that] contravenes the guarantees set forth in in Article 5 § 3 [of the ECHR]".³³ In the absence of any concrete grounds capable of showing that the Accused's detention is necessary and proportionate, his continued detention is unlawful. He should be granted interim release.
21. Furthermore, the Defence maintains that any potential risks under Article 41(6)(b) of the KSC Law can be sufficiently mitigated by alternative measures, including by placing the Accused in house arrest at his residence in Belgium. The Accused repeats that he is willing to commit himself and provide guarantees to remain at his home, not change his place of residence, surrender his passport

³⁰ ECtHR, *Buzadji v. Moldova* [GC], no. 23755/07, 5 July 2016, para. 122; *Boicenco v. Moldova*, no. 41088/05, 11 July 2006, para. 142, referring to *Smirnova v. Russia*, nos. 46133/99 and 48183/99, 24 July 2003, para. 63 and *Sarban v. Moldova*, no. 3456/05, 4 October 2005, para. 99; *Khudoyorov v. Russia*, no. 6847/02, 8 November 2005, para. 173.

³¹ *Buzadji v. Moldova* [GC], para. 122; *Rubtsov and Balayan v. Russia*, nos. 33707/14 and 3762/15, 10 April 2018, paras. 30-32; *Aleksanyan v. Russia*, no. 46468/06, 11 December 2008, para. 179, referring to *Panchenko v. Russia*, no. 45100/98, 8 February 2005, para. 107.

³² SPO Submissions, para. 9. See also SPO Submissions, paras. 1, 4, 5.

³³ F00341, Defence Response to "Prosecution submissions for eighth review of detention", 8 November 2022, para. 19, referring to ECtHR, *Tase v. Romania*, no. 29761/02, 10 June 2008, para. 40. See also *Mansur v. Turkey*, 8 June 1995, Series A no. 319-B, para. 55 and *Kalashnikov v. Russia*, no. 47095/99, 15 July 2002, paras. 116-118.

and other travel documents, report daily to the Belgian police or other relevant authorities, be subject to close monitoring by the authorities, return to the SC and appear in court whenever ordered to do so, and/or be subject to any other conditions deemed appropriate and ordered by the Panel.

IV. CLASSIFICATION

22. Pursuant to Rule 82(3) of the Rules, these submissions are filed as public as they do not contain any confidential information.

V. RELIEF REQUESTED

23. For the above reasons, the Defence respectfully requests the Panel to order the Accused's interim release or placement in house arrest at his residence in Belgium or any other conditions deemed appropriate.

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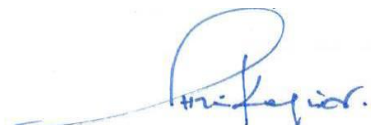
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Thursday, 26 January 2023
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