Case No.:	**KSC-BC-2020-04/IA006**
	Specialist Prosecutor v. Pjetër Shala
Before:	**A Panel of the Court of Appeals Chamber**
	Judge Michèle Picard
	Judge Emilio Gatti
	Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Date:	6 February 2023
Filing Party:	Specialist Defence Counsel
Original Language:	English
Classification:	Public

THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

Defence Appeal Against the "Decision Concerning Prior Statements Given by Pjetër Shala"

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I. INTRODUCTION

1. Pursuant to Article 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law") and Rules 77 and 170 of the Rules of Procedure and Evidence the Kosovo Specialist Chambers ("Rules"), the Defence for Mr Pjetër Shala ("Defence" and "Accused", respectively) files this Appeal against the "Decision concerning prior statements given by Pjetër Shala".[1]

2. On 8 December 2022, the Trial Panel ("Panel") issued the Impugned Decision in which it, *inter alia*: (i) rejected the Defence Motion to Exclude Evidence from the Case File to be Transmitted to the Trial Panel;[2] (2) admitted into evidence the transcripts of the Accused's 2005 and 2007 interviews by the Office of the Prosecutor ("OTP") of the International Criminal Tribunal for the former Yugoslavia ("2015 ICTY Interview" and "2017 ICTY Interview", respectively); (iii) held that the records relating to the 2016 interview given by the Accused to the Belgian Federal Judicial Police ("2016 Interview") and the records relating to the 2019 interview given by the Accused to the Belgian Federal Judicial Police and the Specialist Prosecutor's Office ("SPO") ("2019 Interview") are "not inadmissible" and may be used for the purposes of detention review; and (iv) deferred its decision as to the admission of the records relating to the 2016 Interview and the 2019 Interview.[3]

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[1] KSC-BC-2020-04, F00364COR, Corrected version of Decision concerning prior statements given by Pjetër Shala, 8 December 2022 (confidential) ("Impugned Decision"); the original version of the Decision was filed on 6 December 2022. All further references to filings in this Appeal concern Case No. KSC-BC-2020-04 unless otherwise indicated. Pursuant to Article 36(1) of the Practice Direction on Files and Filings, the Defence requests the Court of Appeals Panel ("Appeals Panel") to extend the word limit for its Appeal by up to 2,030 words. Good cause exists for the requested variation in light of the seriousness and complexity of the matters concerned and the need to be afforded sufficient opportunity to present its submissions on the certified grounds.

[2] 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) ("Motion to Exclude").

[3] Impugned Decision, paras. 52, 80, 110, 114(a), (b), and (c).

3. On 24 January 2023, the Panel issued the "Decision on Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala", in which it granted the Defence leave to appeal the Impugned Decision on three issues.[4]

4. The three certified grounds forming the basis of the Appeal are the following:

   (i) *Whether the Panel erred in law by interpreting Rule 138(2) of the Rules inconsistently with the European Convention on Human Rights ("ECHR") by requiring the existence of a "causal link" between the violation of a suspect's rights and the gathering of evidence;*

   (ii) *Whether the Panel erred in fact and in law by considering that the Accused at the occasion of the ICTY and Belgian Interviews was sufficiently informed of the nature and cause of the suspicions against him as well as of his right to have access to a lawyer, with respect to each interview; and*

   (iii) *Whether the Panel erred in fact and in law by considering that the Accused had provided a well-informed and unequivocal waiver of his right to have access to a lawyer.*[5]

5. The Defence submits that the Panel has committed the above errors which led it to find that the records relating to all interviews were admissible and the records related to the ICTY interviews were admitted into evidence in violation of the right of the Accused to a fair trial as guaranteed by Article 31 of the Constitution of Kosovo, Article 21(2) of the KSC Law, and Article 6 of the ECHR.

II. PROCEDURAL BACKGROUND

[4] F00401, Decision on Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala, 24 January 2023 ("Decision Granting Leave to Appeal"), paras. 43, 60, 73(a).
[5] Decision Granting Leave to Appeal, paras. 6(ii), 30, 43, 60, 73(a).

6. The procedural background is set out in the Impugned Decision and the Decision Granting Leave to Appeal.[6]

7. On 26 January 2023, the President of the Specialist Chambers assigned the Appeals Panel to decide on the appeal against the Impugned Decision.[7]

III. APPLICABLE LAW

8. Pursuant to the jurisprudence of the Appeals Panel, the standard of review for interlocutory appeals requires: (i) an error on a question of law invalidating the decision; (ii) an error of fact which has occasioned a miscarriage of justice; or (iii) a discernible error in that the 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.[8]

IV. GROUNDS OF APPEAL

Ground 1: Error in law by interpreting Rule 138(2) of the Rules inconsistently with the ECHR by requiring the existence of a "causal link" between the violation of a suspect's rights and the gathering of evidence

9. The Panel erred in law in requiring a "causal link" between the violation of the Accused's rights and the gathering of evidence,[9] as well as in its assessment that there was no causal link between the violation of the Accused's rights and the gathering of evidence in the context of the 2016 Interview.[10]

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[6] Impugned Decision, paras. 1-9; Decision Granting Leave to Appeal, paras. 1-5.
[7] IA006, F00001, Decision Assigning a Court of Appeals Panel, 26 January 2023, para. 4.
[8] 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. *See also* IA005, F00005, Decision on Pjetër Shala's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, 19 July 2022 (confidential), para. 11; IA003, F00005, Decision on Pjetër Shala's Appeal Against Decision on Review of Detention, 11 February 2022 (confidential), para. 9.
[9] Impugned Decision, para. 20.
[10] Impugned Decision, para. 78.

10. Rule 138(2) of the Rules provides that:

> Evidence obtained by means of a violation of the Law or the Rules or standards of international human rights law shall be inadmissible if:
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> (a) the violation casts substantial doubt on the reliability of the evidence; or
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> (b) the admission of the evidence would be antithetical to or would seriously damage the integrity of the proceedings.

11. At paragraph 20 of the Impugned Decision, the Panel stated that "[a]ccording to Rule 138(2) of the Rules the evidence must have been 'obtained *by means* of a violation' (emphasis added), suggesting a causal link between the violation and the gathering of evidence". The Panel sought to distinguish in this respect Rule 138(2) from Rule 138(3), noting that in its view evidence obtained "under torture or any other inhumane or degrading treatment" does not require any such link.[11] The Panel sought to introduce "a causal link" on the basis that Rule 138(2) refers to evidence obtained "by means of" instead of "under". The Panel thus interpreted Rule 138(2) of the Rules so as to require a "causal link" between the violation and the gathering of evidence. Neither Rule 138(2) nor international human rights law include such requirement, especially in the way it was interpreted and applied by the Panel. The Panel's interpretation is inconsistent with the jurisprudence of the European Court of Human Rights ("ECtHR").[12] Rule 138(2) of the Rules, just like Rule 138(3) of the Rules, seeks to ensure the fairness and integrity of the proceedings by limiting the admission of evidence obtained in breach of fundamental rights. The difference in the additional

[11] Impugned Decision, para. 20.

[12] *See* ECtHR, *Salduz v. Turkey* [GC], no. 36391/01, 27 November 2008, para. 55; *Panovits v. Cyprus*, no. 4268/04, 11 December 2008, paras. 66, 73, 75, 77, 84, 85; *Çimen v. Turkey*, no. 19582/02, 3 February 2009, paras. 26-28; *Amutgan v. Turkey*, no. 5138/04, 3 February 2009, paras. 18-20; *Aslan and Demir v. Turkey*, nos. 39840/02 and 5197/03, 17 February 2009, paras. 9-11; *Aleksandr Zaichenko v. Russia*, no. 39660/02, 18 February 2010, para. 37; *Shabelnik v. Ukraine*, no. 16404/03, 19 February 2009, para. 52; *Merahi v. France*, no. 38288/15, 20 September 2022, paras. 76, 77, 88-90; *Imbrioscia v. Switzerland*, no. 13972/88, 24 November 1993, para. 36.

conditions imposed by Rule 138(2) reflects ECtHR case law on point that allows the admission of evidence obtained in circumstances that violate an accused's rights in certain circumstances but prohibits evidence obtained as a result of a breach of Article 3 of the ECHR.[13] There is no different "causal link" that needs to be shown depending on whether the alleged violation relates to Article 3 or another provision of the Convention, or in other words Rule 138(2) but not Rule 138(3). Evidently, the violation of a suspect's rights must be linked to the admission of evidence but this applies equally to a violation of a suspect's rights guaranteed under Article 3 of the ECHR and other violations of the Convention. The Panel's interpretation of Rule 138(2) therefore is so unreasonable that constitutes an abuse of discretion and constitutes an error of law that invalidates its decision.

12. In addition, the ECtHR has consistently held that "as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. The rights of the defence *will in principle be irretrievably prejudiced* when incriminating statements made during police interrogation without access to a lawyer are used for a conviction" (emphasis added).[14]

13. As demonstrated above, binding ECtHR jurisprudence requires access to a lawyer "as a rule" to be provided as from the first interrogation unless "compelling" reasons are shown. It explicitly provides as a matter of "principle" that the rights of the defence "will be irretrievably prejudiced" when

[13] See, for instance, *Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010, para. 165, 173 and references cited therein.
[14] ECtHR, *Aleksandr Zaichenko v. Russia*, para. 37; *Beuze v. Belgium* [GC], no. 71409/10, 9 November 2018, paras. 137, 142, 161; *Ibrahim and Others v. the United Kingdom* [GC], paras. 256-258; *Çimen v. Turkey*, paras. 26, 27; ECtHR, *Salduz v. Turkey* [GC], paras. 54, 55.

incriminating statements made during police interrogation without access to a lawyer are used for a conviction.

14. While the ECtHR does allow scope for access to a lawyer to be, exceptionally, delayed, the court consistently applies a "stringent" criterion requiring the existence of "compelling reasons" to justify such a restriction to the right to a fair trial. The ECtHR has held that, given "the fundamental nature and importance of early access to legal advice, in particular at the first interrogation of the suspect," such restrictions may be permitted "only in exceptional circumstances", must be "temporary", and assessed based on individual circumstances.

15. The Accused was not assisted by a lawyer prior to or during *any* of the interviews in question. He was not given adequate notice of the suspicions against him prior to any of these interviews. He was not sufficiently informed of his right to legal aid for the purposes of these interviews. He was evidently misinformed and/or confused as to the fact that he was entitled to legal aid.[15] The Prosecution seeks to rely on statements obtained in this manner to further their case against him. The statements are incriminatory. They cannot be used for a conviction.

16. The Prosecution has entirely failed to plead or demonstrate the existence of "compelling reasons" requiring restriction of the Accused's right to legal assistance and representation. No such compelling reasons existed in relation to the questioning of the Accused concerning crimes allegedly committed 17 and 20 years prior to the two interviews.[16] The statements cannot be admitted into

[15] *See* ERN 066888-TR-ET Part 1 Revised, p. 95: during the 2019 Interview, the Accused stated that "I haven't engaged a lawyer. Because it's normal that a lawyer has to be paid. I don't have the means. For that reason I am going to defend myself. Even in the days of the ICTY I defended myself without engaging a lawyer".

[16] Furthermore, when a systematic statutory restriction on the right to legal assistance exists, the ECtHR has found an automatic violation of Article 6 of the ECHR. Such systematic statutory restriction which was inconsistent with Article 6 was found to exist in Belgium at the time of the first interview with the

evidence as they were obtained in circumstances that violated the Accused's rights as a suspect. The requirements under both Rule 138(2)(c) and Rule 138(2)(d) are met: the violations cast substantial doubt on the reliability of the statements, and their admission would be antithetical to and seriously damage the integrity of the proceedings.[17] They cannot be used for a conviction. The Panel's interpretation of Rule 138(2) of the Rules requiring "a causal link" between the violation of the Accused's rights and the incriminatory statements made by him in the course of these interviews is erroneous, fails to give full effect to the right to legal representation, finds no support in international human rights law and violates the Accused's right to a fair trial. It is an error of law and abuse of discretion that merit appellate intervention.

17. At paragraph 78 of the Impugned Decision, the Panel erred in finding that, even if there was a violation of the Accused's right to legal assistance during the 2016 interview, *no causal link* can be established between this violation and the gathering of the evidence. The Panel reasoned that the records of the 2016 interview cannot be considered to have been obtained by means of a violation of his right of access to a lawyer within the meaning of Rule 138(2) of the Rules "because the Accused subsequently made substantially the same statements in the context of the 2019 Interview, during which his rights as a suspect were fully complied with".[18] The subsequent statements by the Accused given during the 2019 interview are not relevant in determining whether his rights as a suspect were respected for the purposes of the 2016 interview. The Panel erred in relying on the 2019 interview to find that the Accused's rights as a suspect were

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Accused. At the time, the applicable statute did not provide for the right to legal assistance of a suspect during an interview with the police. *See* ECtHR, *Beuze v. Belgium*. As the ECtHR held *in Dayanan v. Turkey*, "[a] systematic restriction of this kind [on legal assistance while in police custody], on the basis of the relevant statutory provisions, is sufficient in itself for a violation of Article 6 to be found."

[17] F00358, Response to Prosecution Motion for Admission of Accused's Statements, 24 November 2022 (confidential) ("Response to Prosecution Motion"), para. 13.

[18] Impugned Decision, para. 78.

respected during the 2016 interview.[19] This error is aggravated by the fact that the Accused was denied of his right to legal assistance for the purposes of the 2019 interview. The Panel's reasoning uses the violation of the Accused's rights for the purposes of the 2019 interview to justify the violation of his rights for the purposes of the 2016 interview. This is a clear abuse of discretion that merits appellate intervention.

18. The Panel erred by relying on an erroneous interpretation of Rule 138(2) of the Rules and applying this interpretation to its assessment as to whether the records of the 2016 Interview are admissible pursuant to Rule 138(2) of the Rules. It erred in finding that the violation of the Accused's rights did not cast a substantial doubt on the reliability of the 2016 records as well as in finding that the admission of the records into evidence would not be antithetical or seriously damage the integrity of the proceedings.[20] Both the Panel's requirement of a "causal link" within the meaning of Rule 138(2) of the Rules and the manner in which this was applied violate the Accused's fair trial rights guaranteed by Article 6 of the ECHR and Article 31 of the Constitution of Kosovo and constitute an error of law that invalidates its impugned decision as well as an abuse of discretion.

Ground 2: Error in fact and in law by considering that the Accused at the occasion of the ICTY and Belgian Interviews was sufficiently informed of the nature and cause of the suspicions against him as well as of his right to have access to a lawyer, with respect to each interview

19. The Panel erred in finding that for each interview, the Accused was sufficiently informed of the nature and cause of the suspicions against him and his right to

[19] Impugned Decision, paras. 78, 79.
[20] Impugned Decision, paras. 79, 80.

have access to a lawyer in compliance with the standards in international human rights law.[21]

2005 ICTY Interview

20. The Panel found the fact that, at the start of the 2005 ICTY Interview, "the Accused was told that the Prosecutor of the ICTY believed that he might be a suspect who was responsible for committing acts which may be chargeable under the statute of the ICTY" was sufficient to inform the Accused of the nature and cause of the suspicions or allegations against him.[22] The Panel also found that the Accused was fully informed of his rights as a suspect and that these rights were respected in the context of the 2005 ICTY Interview.[23]

21. The Panel erred in its assessment as to whether the Accused was sufficiently informed of the nature and cause of suspicions against him. The rights of a suspect require that a suspect be sufficiently informed of the time, location, and specific conduct he is suspected of.[24] Merely notifying a suspect that he is suspected of "committing acts which may be chargeable under the statute of the ICTY" at the start of the interview is overly broad and fails to satisfy this standard. Any suspicions against the Accused in the context of the proceedings at the ICTY would involve serious international crimes potentially committed in the course of a long armed conflict through complex forms of liability. The Accused was not given any information as to what particular crimes he was being suspected of, when and where the crimes were allegedly committed, or how complex any forms of potential criminal liability might be. Contrary to what

[21] Impugned Decision, paras. 32, 33, 38, 39, 42, 44, 45, 49, 50, 70, 73, 77, 103, 104.
[22] Impugned Decision, para. 32; ERN T000-2742-T000-2742-Alb and Eng Transcript – A, pp. 4, 5.
[23] Impugned Decision, paras. 38, 39.
[24] ECtHR, *Penev. v. Bulgaria*, no. 20494/04, 7 January 2010, paras. 33, 34, 42; *Mattoccia v. Italy*, no. 23969/94, 25 July 2000, para. 59; *Pélissier and Sassi v. France* [GC], no. 25444/94, 25 March 1999, paras. 51, 52; *Brozicek v. Italy*, no. 10964/84, 19 December 1989, para. 42.

the Panel found, the Accused was not sufficiently informed of the suspicions against him, not even "in general terms".

22. Furthermore, notification of the nature and cause of the suspicions against the suspect needs to be given prior to the interview and not during such interview. The Accused was only told by the OTP that he might be a suspect responsible for committing acts which may be chargeable under the statute of the ICTY during the interview.

23. At paragraph 33 of the Impugned Decision, the Panel found, based on what the OTP told the Accused at the start of the interview,[25] that the Accused was informed of his right to be assisted by a lawyer of his own choosing and the right to free legal representation if he could not afford it.

24. The Accused was not sufficiently informed of his right to access a lawyer, a right which should be available to him both prior to any questioning as a suspect as well as during the questioning. It is insufficient that the OTP perfunctorily informed him in general terms of such right at the start of the interview. To ensure that the right to access a lawyer is guaranteed in an effective manner, the Accused should have been notified of his right to receive legal representation even if he could not afford it, in advance of the interview at the time that would allow him to seek and obtain effective legal representation for the purposes of the interview. In addition, the assessment of whether an accused is sufficiently informed of this right requires the application of a subjective test that considers the circumstances of the accused, including his background, education level, and ability to comprehend complex legal notions. As a person who only completed lower secondary education, the Accused was never clearly informed of the importance of receiving legal assistance in the context of the complex proceedings he was being interviewed for, nor the potential consequences of

[25] *See also* F00358, Response to Prosecution Motion, para. 18.

proceeding without legal assistance, which would put him in such an unfair, difficult, and precarious situation. He was not sufficiently informed of his right to access a lawyer both before and during the interview. The Panel erred by failing to apply a subjective test in assessing whether the Accused was sufficiently informed of his right to access a lawyer, which constitutes an error of law and fact that merits appellate intervention.

2007 ICTY Interview

25. At paragraph 42 of the Impugned Decision, the Panel stated that for the 2007 interview, the Accused had received an invitation from the ICTY indicating that he was a suspect of war crimes. In addition, the Panel noted that it was only during the interview, that the OTP told the Accused that they wanted to ask him about allegations against him and informed him that "they were in possession of a statement which suggested that he was responsible for transferring an individual into custody where he was subsequently killed".[26] The Panel acknowledged that "the Accused was not informed of these allegations at the start of the interview" while also stating that he was put on notice that he was a suspect given the allegations against him.[27] In reaching the finding that the Accused was informed of the nature and cause of the suspicions or allegations against him, the Panel relied on the fact that the Accused was "made aware in 2005 at the previous ICTY Interview in general terms of the nature and cause of the suspicions or allegations against him".[28] The Panel also found that the Accused was fully informed of his rights as a suspect and that these rights were complied with in the context of the 2007 ICTY Interview.[29]

[26] Impugned Decision, para. 42.
[27] Impugned Decision, para. 42.
[28] Impugned Decision, para. 42.
[29] Impugned Decision, paras. 49, 50.

26. Contrary to the Panel's findings, the Accused was not sufficiently informed of the suspicions against him. Merely notifying him prior to the interview he was suspected of "war crimes", or informing him during the interview that the OTP "were in possession of a statement which suggested that he was responsible for transferring an individual into custody where he was subsequently killed", is plainly inadequate and fails to satisfy the sufficient notification standard required to respect the rights of a suspect.[30] The Accused should be clearly notified of the nature and cause of the suspicions against him prior to the interview and not during the interview. Furthermore, statements such as being suspected of "war crimes" or of being "responsible for transferring an individual into custody where he was subsequently killed" do not provide sufficient information as to what specific crimes the Accused was being suspected of nor of his potential criminal liability. The rights of a suspect require that a suspect be given sufficient notification of the time, location, and specific conduct he is suspected of.[31]

27. Additionally, the Panel erred in relying on the alleged fact that the Accused was "made aware in 2005 at the previous ICTY Interview in general terms of the nature and cause of the suspicions or allegations against him", for finding that he was sufficiently informed at the 2007 ICTY Interview.[32] The Panel's reasoning is flawed. It erred in using the notification for the 2005 interview—which was, in any event, insufficient as noted above—to speculate about the awareness of the Accused and to support the finding that he was sufficiently informed of the nature and cause of the suspicions against him prior to the 2007 interview. The two interviews are distinct, with different relevant facts and background, and

[30] Impugned Decision, para. 42. *Pélissier and Sassi v. France* [GC], para. 51; *Kamasinski v. Austria*, no. 9783/82, 19 December 1989, para. 79;
[31] *Penev. v. Bulgaria*, paras. 33, 34, 42; *Mattoccia v. Italy*, para. 59; *Pélissier and Sassi v. France* [GC], paras. 51, 52; *Brozicek v. Italy*, para. 42.
[32] Impugned Decision, para. 42.

the 2007 interview took place two years later. Whether the Accused was sufficiently notified at the 2005 interview is not relevant as a factor in the assessment of whether he was sufficiently notified at the 2007 interview. That the Accused was allegedly informed only "in general terms" of the nature and cause of the suspicions against him at a prior interview is also clearly inadequate to satisfy the standard of specific and sufficient notification prior to a subsequent interview.

28. At paragraphs 44 and 45 of the Impugned Decision, the Panel found that on both days of the interview, the Accused was informed by the OTP of his right to be assisted by a lawyer of his own choice, the right to free legal representation if he did not have the means to pay for it, and the right to stop the interview should he require legal assistance.[33]

29. Similar to its flawed analysis regarding the 2005 ICTY Interview, the Panel erred in finding that the Accused was sufficiently informed of his right to access a lawyer at the 2007 ICTY Interview. It failed to consider that the Accused should have been informed of his right to access a lawyer, including his right to legal aid if required, both prior to and during the interview and that the OTP's generalised statements informing the Accused of this right at the start of the interview did not constitute sufficient notification.[34]

30. As noted by the Defence for Haradinaj in the ICTY case of *Haradinaj et al.*, the Accused had not been assisted by independent counsel for the purposes of the 2007 ICTY Interview and evidently did not clearly understand the nature of the OTP's allegations against him.[35] It was important for the Accused to be appropriately cautioned as he had the right against self-incrimination and the

[33] *See* ERN T001-0105-1-A-TR, pp. 1, 2; ERN T001-0105-3-A-TR, pp. 1, 2.
[34] *Beuze v. Belgium* [GC], para. 129; *Ibrahim and Others v. the United Kingdom* [GC], para. 272.
[35] Response to Prosecution Motion, para. 19, *referring to* ERN IT-04-84 T9920-T9983, pp. 4-6, 8.

right against compelled testimony in the absence of a knowing and intelligent waiver, particularly given his delicate position as a person who has potential criminal liability.[36]

31. The Panel failed to consider whether the Accused understood the significance of the right of access a lawyer in the context of the serious situation he faced and the potential consequences of proceeding without legal aid. By applying an objective test in assessing whether he was sufficiently informed of his right to legal representation, the Panel committed an error that merits appellate intervention.

2016 Interview

32. At paragraph 73 of the Impugned Decision, the Panel erred in finding that the Accused was sufficiently informed of the nature and cause of the suspicions or allegations against him for the 2016 Interview. The Panel based its finding on the fact that the Accused, prior to the interview, received a summons from the Belgian Federal Judicial Police for an interview informing him that "[y]ou will be interviewed about acts that you could be charged with, more specifically: Serious violations of humanitarian law in Albania in 1999".[37] The Panel also noted the fact that the declaration in the procès-verbal of the 2016 Interview (which has a time stamp of "14 January 2016 at 10:48 hours" that is later than the time stamp of the commencement of the interview of "14 January 2016 at 09: 22 hours") also indicate that the Accused was informed "[p]rior to the commencement of the interview, briefly of the facts about which he will be

[36] Response to Prosecution Motion, para. 19, *referring to* ERN IT-04-84 T9920-T9983, pp. 10, 11.
[37] Impugned Decision, para. 58, *referring to* ERN 101752-101763-ET RED, p. 101760.

interviewed, namely: Serious violations of humanitarian law occurring in Albania in 1999, in the context of the war in KOSOVO".[38]

33. The notification of the investigators' suspicions against the Accused are overly broad and insufficient. Such notification is in breach of the applicable Belgian law at the time, which the Panel failed to take into consideration in its assessment.[39] As stated in the guidelines issued by the Belgian Head of General Prosecutors in 2011, which were binding on all prosecuting and police authorities in Belgium at the time of the 2016 and 2019 interviews, the right of a suspect to be informed of the nature and cause of the suspicions against him requires that he be provided with a brief description of the facts on which he will be questioned, in a manner that allows him to know on which matters he will be questioned, specifying at least certain circumstances (e.g., timing, location, basic events).[40] Vague descriptions would not suffice for the purposes of the law.[41] The same requirement applies to the information set out in a summons.[42] The investigators did not inform the Accused of any specific circumstances relating to facts or acts he was interviewed about. "Serious violations of humanitarian law in Albania in 1999" is a vague description that fails to meet the standard of sufficient notification.

34. Moreover, the timestamp of the declaration in the procès-verbal suggests that the Accused was only informed after the interview had already begun. The notifications fail to respect the Accused's rights as a suspect, and the Panel erred in its analysis.

[38] Impugned Decision, para. 64, *referring to* ERN 074117-074129-ET RED, pp. 074119, 074120.
[39] F00358, Response to Prosecution Motion, para. 22, fn. 24.
[40] F00358, Response to Prosecution Motion, para. 22, fn. 25.
[41] F00358, Response to Prosecution Motion, para. 22, fn. 25.
[42] F00358, Response to Prosecution Motion, para. 22, fn. 25.

35. The Panel erred in finding that Accused was sufficiently informed of his right to access a lawyer prior to the interview, as well as in failing to consider whether the Accused was informed of the right to access a lawyer during the interview.[43] The Panel based its finding that the Accused was informed of the right prior to the interview on the summons sent prior to the interview and the procès-verbal indicating that the Accused was informed that he "has the right, prior his/her first interview, to consult confidentially with a lawyer of his/her own choice".[44] However, as argued above, the Panel erred by failing to note that the Accused had been informed of his right to access a lawyer only after the questioning had already commenced.[45]

36. By merely stating that the Belgian law "only provided for the right to consult confidentially with a lawyer prior to an interview with the police", the Panel failed to consider whether the Accused was even informed of his right to legal representation *during* the interview.[46] The Panel failed to address the Defence submissions that there was an obligation under international human rights law, which goes over and above Belgian law, as applied at the time, that requires a suspect to be clearly and sufficiently informed of his right to legal assistance during an interview.[47] The declaration in the procès-verbal of the 2016 interview—which was signed after the interview had begun—did not constitute sufficient notification as to the Accused's right to be assisted by a lawyer during the interview, his right to have free legal representation during that interview if he cannot afford it, nor his right to suspend the interview should he require legal assistance. The Panel failed to assess whether the investigators had complied

[43] Impugned Decision, para. 77.
[44] Impugned Decision, paras. 64, 77. *See also* ERN 074117-074129-ET RED, p. 074119.
[45] Impugned Decision, paras. 70, 73, 77.
[46] Impugned Decision, para. 77.
[47] *See* F00358, Response to Prosecution Motion, paras. 12, 20, 22, 29, 31, 56, 66, 84; *Panovits v. Cyprus*, paras. 66, 73, 75, 77, 84, 85.

with their obligation to inform the Accused of these rights, in breach of the Accused's fair trial rights.

2019 Interview

37. At paragraph 103 of the Impugned Decision, the Panel erred in finding that the Accused was sufficiently informed of the nature and cause of the suspicions or allegations against him, based on the summons and the statement of rights sent prior to the interview. The summons indicated that the Accused:

> will be interviewed about acts related to an offence punishable by imprisonment which [he] may be charged with, more specifically:
>
> At the request of the prosecutor of the KOSOVO Specialist Chambers, in connection with SERIOUS VIOLATIONS of humanitarian law:
>
> - That occurred at the KLA detention camp in JABLLANICË or in any other location between May and September 1998;
>
> - That occurred at the KLA detention centre in KUKËS or in any other location between March and June 1999.[48]

However, the procès-verbaux of the two-day 2019 Interview do not provide any additional information and simply indicate that the Accused "received a written summons on 30 January 2019. The written summons contained a brief statement of the facts and his rights".[49] The Accused was informed of the reasons why he was being questioned prior to the interview. Merely indicating that he had received a written summons containing a brief statement of the facts and his rights fails to meet the standard of sufficient notification.

[48] ERN 101752-101763-ET, p. 101758.
[49] ERN 066843-066855-ET Revised RED, p. 066845; ERN 066866-066822-ET Revised RED, p. 066868.

38. The Panel also erred in finding that the Accused was sufficiently informed of his right to access a lawyer free of charge prior to the interview as well as during the interview.[50] The Panel acknowledged that "the Accused was not reminded of his right of access to a lawyer at the start of the interview" but stated that as this right "was unequivocally conveyed to him" in the summons and statement of rights sent before the interview, the Accused "was aware of his right of access to a lawyer before attending the interview".[51] The Accused cannot be considered to have been "unequivocally" and effectively informed of this right in such a manner without any notification prior to the interview besides generalised information stating that he had received a written summons containing a brief statement of the facts and his rights.

39. At paragraph 101 of the Impugned Decision, the Panel erred in finding that the Accused was sufficiently informed of his rights as a suspect, which includes his right to access a lawyer, despite the language used by one of the interviewers when informing the Accused of his rights at the start of the interview. The interview records indicate that the Belgian police investigator stated that:

> So, you have been informed of your rights, which were sent to you at the same time as the summons. It's the usual blah blah. You have the right, once you have confirmed your identity, to make a statement, to reply to the questions or to remain silent, and you cannot be compelled to incriminate yourself.[52]

40. The investigator failed to explicitly state that the Accused has the right to access a lawyer free of charge, and such language as "the usual blah blah" in no event can be considered an adequate fulfillment of the obligation to inform him of such right.[53] It actually indicates the investigator's contempt towards the Accused's rights as a suspect which is particularly remarkable given the presence of SPO

[50] Impugned Decision, para. 103.
[51] Impugned Decision, para. 103.
[52] ERN 066864-TR-ET Part 1 Revised, p. 3.
[53] *See* Impugned Decision, para. 101.

officials who failed to correct him. As demonstrated by his statement during the 2019 Interview, the Accused had not "engaged a lawyer" even "in the days of the ICTY" because "a lawyer has to be paid", showing that he was not even properly informed that he had the right to legal assistance free of charge with regard to all four interviews.[54] The Panel committed an error of fact in dismissing the Accused's evident confusion, finding that this statement "does not cast doubt" as to whether the Accused understood his rights and that he clearly had been informed of his rights and "consciously dispensed" with them.[55] To the contrary, the statement clearly demonstrates that the Accused did not understand he had the right to access a lawyer free of charge and that he was never given information on how he could obtain free legal assistance ever since the ICTY interviews.

41. As the interview was being conducted at the request of the KSC prosecutor, the KSC Law and Rules, in addition to international human rights law, should apply to the assessment of whether the 2019 Interview was conducted in compliance with the Accused's rights as a suspect at the time. Pursuant to Article 38(3) of the KSC Law, 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. Rule 43(3) of the Rules 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." The Panel erred by failing to apply the KSC legal framework in its analysis or at least take it into consideration in interpreting the applicable standard.

42. As demonstrated above, the Panel erred in fact and in law in finding that the Accused, at the occasion of the ICTY Interviews and Belgian Interviews, was

[54] ERN 066888-TR-ET Part 1 Revised, p. 95.
[55] Impugned Decision, para. 104.

sufficiently informed of the suspicions against him as well as his right to have access to a lawyer.

Ground 3: Error in fact and in law by considering that the Accused had provided a well-informed and unequivocal waiver of his right to have access to a lawyer

43. The Panel erred in finding that the Accused had properly waived his right to access a lawyer voluntarily and in an unequivocal, knowing, and intelligent manner with regard to each of the four interviews.[56]

2005 ICTY Interview

44. The Panel erred in finding that the Accused had relinquished his right to access a lawyer voluntarily and in an unequivocal, knowing, and intelligent manner based on his declining to have a legal representative present for the interview.[57] The Accused did not provide an informed and valid waiver of his right to legal assistance free of charge.[58] The investigators failed to inform him of the difficult and precarious situation he was in and that legal assistance in such circumstances was essential for the process to be fair. As demonstrated by his statement during the 2019 Interview, the Accused was confused and not properly informed that he had the right to legal assistance free of charge with regard to all four interviews.[59] Given that he was not adequately informed of his right to free legal assistance, he could not be considered to have waived a right he did not even know that he had for any of the interviews. The Panel erred in interpreting the Accused's statement declining legal assistance during the 2005

[56] Impugned Decision, paras. 38, 49, 75, 76, 78, 107, 108.
[57] Impugned Decision, paras. 37, 38, *referring to* ERN T000-2742-T000-2742-Alb and Eng Transcript – A, p. 7.
[58] Response to Prosecution Motion, paras. 38, 39, 51, 52.
[59] ERN 066888-TR-ET Part 1 Revised, p. 95.

interview to constitute an informed and valid waiver of this right. This error of law and fact merits immediate appellate intervention.

2007 ICTY Interview

45. The Panel erred in finding that the Accused had waived his right to access a lawyer implicitly, through his conduct, voluntarily, and in an unequivocal, knowing and intelligent manner, based on the fact that he had allegedly been sufficiently informed of this right and had not invoked this right throughout the interview.[60] The shortcomings in the notification of the Accused's right to access a lawyer prior to this interview mean that the Accused could not have provided a well-informed and valid waiver of his right to legal assistance.

46. The Panel erred in finding that the Accused waived this right implicitly through his conduct. As the ECtHR has consistently found, "[b]efore an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be".[61] The Panel misconstrued the relevant international human rights law and erred in its finding that "the Accused was informed of the potential consequences of giving the interview, namely, that his statements would be recorded". It should have considered whether the Accused could reasonably have foreseen the consequences of waiving his right to access a lawyer in its assessment of whether he had provided a well-informed and unequivocal waiver of this right.

47. The arguments pertaining to the 2005 ICTY interview also applies to the 2007 ICTY interview. None of the investigators ever attempted to explain to the

[60] Impugned Decision, paras. 44, 45, 47, 49, *referring to* ERN T001-0105-1-A-TR, p. 1 and ERN T001-0105-3-A-TR, pp. 1, 2.
[61] ECtHR, *Pishchalnikov v. Russia*, no. 7025/04, 24 September 2009, para. 77, *referring to Talat Tunç v. Turkey*, no. 32432/96, 27 March 2007, para. 59 and *Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003, p. 12.

Accused the potential consequences of participating in the interview without legal assistance in such delicate circumstances which involve providing statements as to his potential criminal liability for international crimes. Moreover, the Panel's reasoning that the Accused had effectively waived his rights as he had not invoked his right to access a lawyer fails to meet the standard that a waiver of fundamental rights is only valid when it is "established in an unequivocal manner".[62]

2016 Interview

48. The Panel erred in finding that the Accused waived his right to access a lawyer implicitly and through his conduct, voluntarily and in an unequivocal, knowing and intelligent manner.[63] Importantly, no waiver of the Accused's "right to confidential legal consultation in a duly dated and signed document", as required in the declaration of the 2016 interview records, is accompanying the records or can be found among the evidentiary material disclosed to the Defence by the SPO.[64]

49. As argued above, the Accused was not properly informed of the potential consequences of proceeding without legal assistance during the interview, and thus, could not be considered to have waived this right. The Panel also erred by engaging in circular reasoning in finding that the Accused had waived his rights as a suspect with regard to the 2016 Interview, based on the fact that he

[62] ECtHR, *Bozkaya v. Turkey*, no. 46661/09, 5 September 2017, para. 48, *referring to Savaş v. Turkey*, no. 9762/03, 8 December 2009, para. 69 and *Simeonovi v. Bulgaria* [GC], no. 21980/04, 12 May 2017, para. 115; *Rodionov v. Russia*, no. 9106/09, 11 December 2018, para. 155; *Volkov and Adamskiy v. Russia*, no. 30863/10, 26 March 2015, para. 53; *Ogorodnik v. Ukraine*, no. 29644/10, 5 February 2015, para. 104; *Aleksandr Dementyev v. Russia*, no. 43095/05, 28 November 2013, para. 41; *Tarasov v. Ukraine*, no. 17416/03, 31 October 2013, para. 93; *Pavlenko v. Russia*, no. 42371/02, 1 April 2010, paras. 101, 102 *referring to Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006, para. 101 and *Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006, para. 86.
[63] Impugned Decision, para. 76.
[64] F00358, Response to Prosecution Motion, para. 54. *See also* F00281, Motion to Exclude, para. 33.

subsequently made what were described as "same" statements in the 2019 Interview.[65] The latter is a clear abuse of discretion that merits appellate intervention.

2019 Interview

50. The Panel erred in finding that the Accused had waived his right to access a lawyer implicitly through his conduct, voluntarily and in an unequivocal, knowing and intelligent manner.[66] The Panel engaged in circular reasoning by basing its finding of a waiver with regard to the 2019 interview on the fact that "by that stage, the Accused had given interviews as a suspect before the ICTY and in 2016 before the Belgian Federal Judicial Police".[67] Whether the Accused had participated in other interviews is not a relevant consideration when assessing whether the Accused had provided an unequivocal waiver, either express or tacit, of his rights as suspect for each interview. In particular, in these circumstances, the four interviews were conducted at different international locations, pertain to different acts, events, and proceedings. The ICTY interviews took place over a decade before the Belgian interviews.

51. Furthermore, the Panel failed to apply the KSC legal framework in its assessment of the existence of a waiver in relation to the 2019 interview. The interview was conducted "[a]t the request of the prosecutor of the KOSOVO Specialist Chambers" and in the presence of the SPO.[68] Rule 43(3) of the Rules provides that "[a] suspect may waive this right [to be assisted by Specialist Counsel] provided that the Specialist Prosecutor ensures that the suspect understands the nature of this right and the consequences of waiving it. When providing such

[65] Impugned Decision, para. 78.
[66] Impugned Decision, para. 108.
[67] Impugned Decision, para. 107. *See, contra,* Response to Prosecution Motion, paras. 37-51; F00281, Motion to Exclude, paras. 20-24.
[68] ERN 101752-101763-ET, p. 101758.

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." Although a waiver may be implicit,[69] in finding that the Accused had waived his right to access a lawyer the Panel failed to assess whether the SPO/or Belgian investigators had ensured that the Accused understood the potential consequences of waiving his rights, whether they had considered the personal circumstances and education level of the Accused and whether the Accused was informed that he could revoke any such waiver during the interview. These requirements were not satisfied either prior to or during the interview. They are requirements of substance, not of form. The Accused had not provided an unequivocal waiver of his right to access a lawyer in any explicit or implicit form.

52. Based on the errors in fact and in law in relation to the three grounds of appeal above, the Panel erroneously concluded that the Accused's rights as a suspect were respected during the four interviews, and as a result, admitted into evidence the transcripts of the 2005 and 2007 ICTY Interviews and held that the records relating to the 2016 and the 2019 Interviews are "not inadmissible".[70] The Impugned Decision violates the Accused's fair trial rights as guaranteed by both the KSC legal framework and the standards of international human rights law. The Panel's errors invalidate the Impugned Decision, cause a miscarriage of justice, and constitute abuse of discretion that must be corrected. If left

[69] F00369, Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala, 13 December 2022, para. 34; *Ibrahim and Others v. the United Kingdom* [GC], para. 272 *referring to Dvorski v. Croatia* [GC], no. 25703/11, 20 October 2015, para. 101; *Pishchalnikov v. Russia*, para. 77.
[70] Impugned Decision, paras. 52, 80, 110, 114(b), and (c).

uncorrected, further prejudice will result and the lawfulness and fairness of these proceedings will be irretrievably undermined.

V. RELIEF REQUESTED

53. For the above reasons, the Defence respectfully requests the Appeals Panel to set aside the Impugned Decision and its erroneous findings and declare inadmissible the records relating to the ICTY Interviews, the 2016 Interview, and the 2019 Interview.

Word count: 8027

Respectfully submitted,

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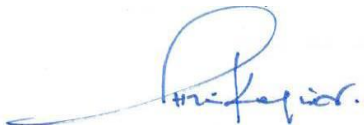

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