

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: 18 May 2023

Filing Party: Specialist Defence Counsel

Original Language: English

Classification: Public

THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

**Defence Request for Reconsideration of the
“Decision Concerning Prior Statements Given by Pjetër Shala”**

Specialist Prosecutor’s Office

Alex Whiting

Counsel for Victims

Simon Laws KC

Maria Radziejowska

Specialist Defense Counsel

Jean-Louis Gilissen

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Leto Cariolou

I. INTRODUCTION

1. Pursuant to Rule 79(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), the Defence for Mr Pjetër Shala (“Defence” and “Accused”, respectively) respectfully requests that the Trial Panel reconsider its Decision Concerning Prior Statements Given by Pjetër Shala, in light of the Court of Appeals Panel’s (“Appeals Panel”) finding of a violation of the Accused’s right to access a lawyer in its “Decision on Shala’s Appeal Against Decision Concerning Prior Statements”.¹

II. PROCEDURAL BACKGROUND

2. The procedural background is set out in the Appeal Decision.²

III. APPLICABLE LAW

3. Rule 79 of the Rules provides that:

(1) In exceptional circumstances and where a clear error of reasoning has been demonstrated or where reconsideration is necessary to avoid injustice, a Panel may, upon request by a Party or, where applicable, Victims’ Counsel, or *proprio motu* after hearing the Parties, reconsider its own decisions. Judgments are not subject to reconsideration.

(2) A request for reconsideration does not stay the time limits of any legal remedy.

IV. SUBMISSIONS

4. The Defence respectfully submits that reconsideration of the Impugned Decision is warranted within the meaning of Rule 79(1) of the Rules as the

¹ KSC-BC-2020-04, F00364COR, Corrected version of Decision concerning prior statements given by Pjetër Shala, 6 December 2022 (confidential) (“Impugned Decision”); KSC-BC-2020-04, IA006, F00007, Decision on Shala’s Appeal Against Decision Concerning Prior Statements, 5 May 2023 (“Appeal Decision”). All further references to filings in this Request concern Case No. KSC-BC-2020-04 unless otherwise indicated.

² Appeal Decision, paras. 1-6.

Impugned Decision contains several clear errors of reasoning. In addition, reconsideration is necessary to avoid injustice.

5. In the Appeal Decision, the Appeals Panel held that the Trial Panel erred by finding that the Accused, at his interview with the Belgian Federal Judicial Police on 14 January 2016, was sufficiently informed of his right to have access to a lawyer and that the exercise of this right was available to him.³ The Trial Panel erred in concluding that “overall the Accused was not barred from access to a lawyer” and failed to address the Defence submissions.⁴ The Appeals Panel found that a lawyer was not provided for during the interview, that the Accused was not informed of the right to legal assistance, and that the exercise of this right was not available to him.⁵ Moreover, the erroneous findings raise doubts as to whether the Accused was able to waive knowingly and intelligently his right to legal assistance.⁶ The Trial Panel committed clear errors of reasoning. The Appeals Panel concluded that the Accused’s rights were violated by the manner in which the 2016 Belgian Interview was conducted as per Rule 138(2) of the Rules.⁷
6. Furthermore, the Appeals Panel found that the Trial Panel erred by interpreting Rule 138(2) of the Rules inconsistently with the jurisprudence of the European Court of Human Rights (“ECtHR”) by requiring the existence of a “causal link” between the violation of a suspect’s rights and the gathering of evidence.⁸ In addition, the Appeals Panel found that the Trial Panel had erred by considering that no such “causal link” exists in the circumstances of the 2016 Belgian Interview because the Accused made supposedly similar statements at his

³ Appeal Decision, paras. 75, 76, 78; Impugned Decision, paras. 73, 77.

⁴ Appeal Decision, para. 73, *referring to* Impugned Decision, para. 77.

⁵ Appeal Decision, para. 75.

⁶ Appeal Decision, para. 76.

⁷ Appeal Decision, paras. 78, 79, 103.

⁸ Appeal Decision, para. 108; Impugned Decision, para. 20.

interview with the Specialist Prosecutor's Office and the Belgian Federal Judicial Police on 11 and 12 February 2019.⁹ The Appeals Panel held that this is insufficient to demonstrate the lack of a "causal link" between the violation of the Accused's rights and the gathering of evidence during the 2016 Belgian Interview.¹⁰ The Trial Panel's findings, which were reversed by the Appeals Panel, constitute clear errors of reasoning within the meaning of Rule 79 of the Rules.

7. In *Salduz v. Turkey*, the Grand Chamber of the ECtHR found that "[t]he 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."¹¹ In *Çimen v. Turkey*, the ECtHR affirmed that "even though the applicant had the opportunity to challenge the evidence against him at the trial and subsequently on appeal, the absence of a lawyer while he was in police custody irretrievably affected his defence rights."¹² In *Panovits v. Cyprus*, the ECtHR again emphasised the doctrine of the fruit of the poisonous tree: the use in trial of the applicant's confession, which was held to be admissible as evidence, violated his right to a fair trial under Article 6 of the European Convention on Human Rights ("ECHR"), because it was obtained in breach of the applicant's right to legal assistance, which "irreparably undermined his rights of defence."¹³
8. Similarly, in *Delalić*, a Trial Chamber at the International Criminal Tribunal for the former Yugoslavia found that the violation of a suspect's right to legal assistance is inconsistent with the fundamental principles of fairness and

⁹ Appeal Decision, para. 107; Impugned Decision, para. 78.

¹⁰ Appeal Decision, para. 107.

¹¹ ECtHR, *Salduz v. Turkey* [GC], no. 36391/02, 27 November 2008, para. 55.

¹² ECtHR, *Çimen v. Turkey*, no. 19582/02, 3 February 2009, para. 27.

¹³ ECtHR, *Panovits v. Cyprus*, no. 4268/04, 11 December 2008, paras. 75, 84-86.

damages the integrity of the proceedings and that such violation in itself would suffice to render the police statements “null and inadmissible in the proceedings”.¹⁴ It was unequivocally held that evidence *must* be excluded if it was “obtained by means contrary to internationally protected human rights”.¹⁵

9. The Grand Chamber of the ECtHR has repeatedly found that, in relation to the admissibility of evidence that was unlawfully obtained, the question is whether the proceedings as a whole, including the way in which such evidence was obtained, were fair.¹⁶ In this case, as demonstrated above, the impugned statements were obtained during the 2016 Belgian Interview in circumstances that constituted a flagrant breach of the Accused’s rights as a suspect under Article 6(3) of the ECHR. Their admission and use in the proceedings would render the proceedings as a whole unfair.
10. In light of the above, admitting incriminating statements obtained in breach of the Accused’s right to legal assistance will result in impermissible and serious injustice. Reconsideration is necessary to avoid injustice. Reconsideration is necessary to limit further prejudice and prevent a miscarriage of justice. Reconsideration is warranted to protect 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,¹⁷ and Article 6 of the ECHR.
11. To limit further prejudice caused by the Impugned Decision, the Defence respectfully requests that the Trial Panel’s decision on the present Motion be

¹⁴ ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on Zdravko Mucić’s Motion for the Exclusion of Evidence, 2 September 1997, para. 55.

¹⁵ ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on Zdravko Mucić’s Motion for the Exclusion of Evidence, 2 September 1997, para. 35.

¹⁶ ECtHR, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, para. 254; *Jalloh v. Germany* [GC], no. 54810/00, 11 July 2016, para. 95; *Bykov v. Russia* [GC], no. 4378/02, 10 March 2009, para. 89. See also *Ayetullah Ay v. Turkey*, nos. 29084/07 and 1191/08, 27 October 2020, para. 124; *Stephens v. Malta (No. 3)*, no. 35989/14, 14 January 2020, para. 64.

¹⁷ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office.

issued before the next evidentiary block which is scheduled to begin on 30 May 2023.¹⁸ The Trial Panel's decision on the present Motion must be known in advance to enable the Defence to confront the next witness in full knowledge of the Prosecution's case against the Accused.

V. RELIEF REQUESTED

12. The Defence respectfully requests that the Trial Panel reconsider the Impugned Decision pursuant to Rule 79(1) of the Rules in light of the finding of a violation of the Accused's right to access a lawyer for the purposes of the 2016 Belgian Interview.

Word count: 1,402

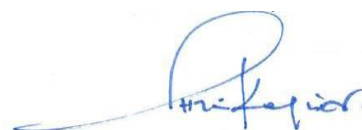
Respectfully submitted,



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¹⁸ F00434, Decision on the Conduct of Proceedings, 24 February 2023 (confidential), para. 24; F00497, Prosecution Notification of Order of Appearance of Witnesses for the Third Evidentiary Block (30 May to 9 June 2023) and for 16 June 2023 with confidential Annex 1, 28 April 2023, para. 1.

Thursday, 18 May 2023

The Hague, the Netherlands