

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: 2 June 2023

Filing Party: Specialist Defence Counsel

Original Language: English

Classification: Public

THE SPECIALIST PROSECUTOR
v.
PJETËR SHALA

Public Redacted Version of
“Defence Submissions for the Eleventh Review of Detention”

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I. INTRODUCTION

1. Pursuant to the Trial Panel (“Panel”)’s “Decision on the Tenth Review of Detention of Pjetër Shala”, the Defence for Mr Pjetër Shala (“Defence” and “Accused”, respectively) hereby files its submissions regarding the continued detention of the Accused in response to the “Prosecution submissions for the eleventh review of detention”.¹
2. On 16 March 2021, the Accused was arrested and placed in detention in Belgium.² On 19 April 2021, he pleaded not guilty to all charges set out in the Indictment.³ To date, he has been in detention for a period of two years, two months and ten days. The Accused’s detention for such a prolonged period of time cannot be considered necessary or proportionate.
3. The Accused’s interim release is warranted as the Prosecution has failed to demonstrate that, if released, the Accused will abscond, obstruct the proceedings, or commit further crimes. The Prosecution has therefore failed to meet the requirements of Article 41(6)(b) of Law No. 05/L-053 on the Specialist Chambers and Specialist Prosecutor’s Office (“KSC Law”).

II. PROCEDURAL BACKGROUND

4. The relevant procedural background is set out in the Decision dated 6 April 2023.⁴

¹ KSC-BC-2020-04, F00480, Decision on the Tenth Review of Detention of Pjetër Shala, 6 April 2023, (confidential)(“Decision dated 6 April 2023”), para. 47(c); KSC-BC-2020-04, F00517, Prosecution submissions for the eleventh review of detention, 19 May 2023 (confidential)(“Prosecution Submissions”). 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 T. 19 April 2021 p. 11.

⁴ Decision dated 6 April 2023, paras. 1-6.

5. On 19 May 2023, the Prosecution filed its submissions for the eleventh review of detention.⁵

III. SUBMISSIONS

6. The Defence fully maintains its previous submissions on the unlawfulness of the Accused's continued detention.⁶
7. As recently reiterated by the Panel, the presumption of innocence of the Accused is the starting point for the assessment of continued detention on remand and the burden of establishing that continued detention is necessary lies solely with the Prosecution.⁷ The right to liberty should be the rule and detention the exception; allowed only where shown to be strictly necessary and proportionate in that no alternative measures can mitigate a risk posed by interim release.⁸
8. 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

⁵ Prosecution Submissions.

⁶ F00468, Defence Submissions for the Tenth Review of Detention, 24 March 2023 (confidential), paras. 6-19; F00403, Defence Submissions for Ninth Review of Detention, 26 January 2023 (confidential), paras. 6-21; F00341, Defence Response to "Prosecution submissions for eighth review of detention", 8 November 2022 (confidential), 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 Response to 'Prosecution Submissions for Third Review of Detention', 21 January 2022, paras. 18-32.

⁷ Decision dated 6 April 2023, para. 10; referring to KSC-BC-2020-06, F00177RED, Public Redacted Version of Decision on Hashim Thaçi's Application for Interim Release, 22 January 2021, paras. 17, 19.

⁸ ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Decision on Defence's Application for Interim Release, 18 November 2013, para. 33. See also Article 9(3) of the International Covenant on Civil and Political Rights.

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”.

A. The Absence of Article 41(6)(b) Risks

9. Pursuant to Article 29(2) of the Kosovo Constitution, every person arrested must be released pending trial unless particularly serious reasons substantiate a danger to the community or a substantial risk of fleeing before trial. In this respect, the Defence reiterates that the Prosecution has failed to demonstrate with “articulable” grounds and concrete evidence that such risks are present, real, and existing.⁹
10. Throughout the Prosecution Submissions, the Prosecution relies on whether there are developments “capable of changing” the Panel’s previous findings as set out in its Decision dated 6 April 2023.¹⁰ In doing so, the Prosecution misrepresents the applicable standard and impermissibly ignores the importance of passage of time as a factor to be considered along with the degree of risks under Article 41(6)(b) of the KSC Law. The test to be applied requires that the existence of the Article 41(6) risks be shown as well as that such risks cannot be mitigated by the imposition of appropriate conditions.
11. In addition, the said approach by the Prosecution results in “[q]uasi-automatic prolongation of detention [that] contravenes the guarantees set forth in Article 5 § 3” of the ECHR.¹¹

⁹ See, *inter alia*, Decision dated 6 April 2023, para. 16, where the Panel reiterated that “the grounds that would justify a person’s deprivation of liberty must be ‘articulable’ in the sense that they must be specified in detail”.

¹⁰ Prosecution Submissions *referring* also to “new facts or circumstances”, paras. 1, 4, 5, 10, 12.

¹¹ 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 *Mansurov*.

12. The Prosecution generically claims that “new developments increase [the Article 41(6)(b)] risks, particularly in light of the Accused’s incentive and means, and the persisting climate of intimidation of witnesses and interference with criminal proceedings against former KLA members”.¹²
13. The Defence reiterates that, as the European Court of Human Rights found, the reasons invoked for ordering and prolonging detention must be neither general nor abstract.¹³ To justify continued detention, specific facts are required. It must also be shown that the reasons put forth apply concretely to the specific personal circumstances of a specific applicant.¹⁴ In the view of the Defence, the Prosecution’s persistent invoking of the Accused’s “incentive and means” without any further justification, as well as the said general “climate of intimidation [...] and interference” fail to meet the strict and individualised test to be applied. The Defence stresses that no evidence or other material has been provided to show that the Accused has interfered with or may interfere with any witness in the proceedings.

(a) *Risk of Flight*

14. As recently confirmed by the Panel, the Accused is not a flight risk.¹⁵ The Prosecution submits that the Decision of the Court of Appeals Panel on the admission of the Accused’s prior statements “further merit the Panel’s reassessment of the existence of the risk of flight”, claiming, specifically, that “the

Turkey, 8 June 1995, Series A no. 319-B, para. 55 and *Kalashnikov v. Russia*, no. 47095/99, 15 July 2002, paras. 116-118.

¹² Prosecution Submissions, para. 5.

¹³ 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.

¹⁴ ECtHR, *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.

¹⁵ Decision dated 6 April 2023, para. 17.

Accused provided incriminatory evidence in his own statements”, and that “these statements are now available to the Trial Panel for the purposes of its judgement [and] are in itself enough incentive for the Accused, if released to attempt to abscond”.¹⁶

15. The Defence underlines that in the said Appeals Decision, the Court of Appeals Panel found 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.¹⁷ In light of the Appeal Panel’s finding of a violation of the Accused’s rights, the Defence sought reconsideration of the Panel’s impugned decision the determination of which remains pending.¹⁸ The Prosecution’s arguments based on such statements are therefore misconceived.
16. In any event, the Prosecution’s submissions above are inherently flawed and unsubstantiated. Whereas the “threatening statements” allegedly made by the Accused were relied on by the Panel with respect to the risks of obstruction and of committing further crimes, even prior to their admission as evidence, the consistent finding that the Accused is not a flight risk was never linked to such statements.¹⁹ The Accused has long been aware that these statements have been extensively cited but has never demonstrated the slightest indication of absconding.
17. Importantly, the Appeals Panel additionally stressed that, even if a risk of flight existed, it could be adequately mitigated by conditions to be imposed pursuant

¹⁶ Prosecution Submissions, paras. 10, 12.

¹⁷ IA006, F00007, Decision on Shala’s Appeal Against Decision Concerning Prior Statements, 5 May 2023, paras. 78, 79, 103. *See also* paras. 73, 75, 76.

¹⁸ F00515, Defence Request for Reconsideration of the “Decision Concerning Prior Statements Given by Pjetër Shala”, 18 May 2023, para. 19.

¹⁹ *See*, for instance, Decision dated 6 April 2023, para. 21; F00418, Decision on the Ninth Review of Detention of Pjetër Shala, 6 February 2023 (confidential), paras. 27, 32.

to the KSC Law and Rules, a finding the Prosecution does not even attempt to address.²⁰ The Accused is not a flight risk.

(b) Risk of Obstruction and of Commission of Further Crimes

18. In *Maassen v. The Netherlands*,²¹ the European Court of Human Rights reiterated the principles governing “reasonable time” of detention pending trial under Article 5 § 3, and noted the following:

- (i) the persistence of a reasonable suspicion is a condition *sine qua non* for the validity of pre-trial detention but after a certain lapse of time- that is to say as from the first judicial decision ordering detention on remand, it no longer suffices;
- (ii) where other grounds are cited by the judicial authorities, they must continue to justify the deprivation of liberty and be both “relevant” and “sufficient” while the national authorities must display “special diligence” in the conduct of the proceedings. The assessment of the relevant and sufficient reasons for pre-trial detention cannot be separated from the actual duration thereof;
- (iii) until conviction, an accused must be presumed innocent and the purpose of Article 5 § 3 is essentially to require his or her provisional release once his or her continuing detention ceases to be reasonable. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities;
- (iv) the question of whether a period of time spent in pre-trial detention is reasonable cannot be assessed in the abstract, arguments for and against

²⁰ Decision dated 6 April 2023, para. 17.

²¹ ECtHR, *Maassen v. The Netherlands*, no. 10982/15, 9 February 2021, paras. 53-56, 62, 63 and jurisprudence cited therein.

release must not be “general and abstract” but need to contain specific references to specific facts and the personal circumstances justifying detention; continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention. Detention will continue to be legitimate only if public order remains actually threatened; its continuation cannot be used to anticipate a custodial sentence. More generally, the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the seriousness of the offence. Article 5 § 3 of the Convention cannot be seen as allowing pre-trial detention unconditionally provided that it lasts no longer than a certain period. The longer pre-trial detention lasts, the more substantiation is required for convincingly demonstrating the alleged risk or risks in case of the suspect’s release from pre-trial detention.

19. The Prosecution fails entirely to provide “more substantiation” to convincingly demonstrate the alleged risks. It argues that new procedural developments increase the risk of obstruction since the last review of detention. The Prosecution specifically refers to its presentation of “the evidence of six live witnesses, who provided incriminating testimonies against the Accused” and the fact that the Prosecution *will* present “the evidence of a witness repeatedly challenged on different grounds by the Accused in the next evidentiary session *viva-voce*”.²²
20. The advancement of the trial along with the presentation of the Prosecution’s evidence—including, inherently, incriminating evidence—is not a sufficient

²² Prosecution Submissions, para. 7.

reason, and does not provide “more substantiation” that could justify continued detention in the present circumstances. In light of the protracted length of detention which exceeds two years, the Prosecution must clearly demonstrate real and convincing reasons that justify continuation of the Accused’s detention. The Prosecution has entirely failed to adduce any additional element, any concrete evidence demonstrating that at the present moment there is an increased risk of obstruction in the proceedings by the Accused. It merely repeats its previous submissions.

21. The Prosecution’s suggestion that the Accused’s [REDACTED] “all of whom have the incentives and means to obstruct proceedings and interfere with and intimidate witnesses” increases the risk of obstruction is also plainly inadequate.²³ First, this is a highly speculative argument that is put forward without any effort to demonstrate that it demonstrates a real risk. The unidentified and unspecified “incentives and means” attributed to [REDACTED] contains several layers of completely unsubstantiated assumptions.²⁴ Second, the Prosecution cannot rely on factors beyond the control or responsibility of the Accused as a valid ground to deny interim release. It is the responsibility of the Kosovo Specialist Chambers to decide where the Accused will be detained, and he cannot be blamed for [REDACTED]. If [REDACTED] poses a problem for the Prosecution, it should request a change in the regime of [REDACTED]. The Prosecution has entirely failed to show that any such request was made (and the Prosecution has entirely failed to provide evidence of any impropriety in this respect). In the absence of such request or

²³ Prosecution Submissions, para. 8.

²⁴ F00468, Defence Submissions for the Tenth Review of Detention, 24 March 2023 (confidential), para. 13.

further substantiation, the Prosecution's entirely speculative submissions must be dismissed.

22. As for the alleged risk of re-offending, the Prosecution merely submits that all facts previously noted by the Panel to underpin the existence of such risk continue to apply.²⁵ The Defence maintains its previous submissions on this matter in their entirety, namely that the arguments set forth by the Prosecution in relation to the Accused's additional knowledge of the accusations against him are general, vague and, in any case, plainly insufficient for the purposes of specifically justifying let alone substantiating the risk of the Accused committing any crimes at the present moment and after two years of detention on remand.²⁶
23. The commonly-cited "threatening statements" of the Accused simply do not substantiate a risk of offending which is real at the present moment. The Panel should also assess to what extent it can take into consideration for the purposes of review of detention statements made in breach of the Accused's right as a suspect, as recently acknowledged by the Court of Appeals Panel.²⁷ Allowing the Prosecution to rely on such statements in these proceedings for *any* purpose, including for the purposes of review of continued detention on remand which exceeds two years is simply unfair. The Panel must exclude evidence obtained in breach of the Accused's rights for *all* purposes, including its review of the legality of continued detention.

B. Continued Detention is Disproportionate

²⁵ Prosecution Submissions, para. 9.

²⁶ F00468, Defence Submissions for the Tenth Review of Detention, 24 March 2023 (confidential), para. 14.

²⁷ F00468, Defence Submissions for the Tenth Review of Detention, 24 March 2023 (confidential), para. 15; IA006, F00007, Decision on Shala's Appeal Against Decision Concerning Prior Statements, 5 May 2023, paras. 78, 79, 103 *referring to* the statements made during the 2016 Belgian Interview.

24. The Defence repeats its previous submissions as to the alleged risks and disproportionate nature of the Accused's continued detention.²⁸
25. The Prosecution has failed to substantiate its cursory submission that "[the alleged] risks under Article 41(6)(b) cannot be mitigated outside the Detention Facilities",²⁹ let alone explain why detaining the Accused for a period exceeding two years remains proportionate in the specific circumstances of this case. The reasoning relied on by the Prosecution in support of an alleged increase of the risks of obstruction, commission of crimes, and flight has been repeatedly used before and cannot justify detention in perpetuity. The additional reasons given in support of continued detention are simply the consequences of progress in criminal proceedings against an accused. The fact that additional evidence is presented against him, in itself cannot be considered sufficient reason to maintain detention on remand regardless of the lapse of time.³⁰
26. Instead, the assessment of proportionality requires consideration of the adverse effects continued detention has on the Accused, including his rights to liberty and protection of his private and family life. The passage of time has a central role in the proportionality of detention, yet the Prosecution does not even discuss this factor and appears to rely on the assumption that the Accused can be held for as long as the proceedings will last. This is plainly wrong and profoundly unjust.
27. As the Panel has stressed, "[t]he duration of time in detention pending trial is a factor that needs to be considered along with the degree of the risks that are described in Article 41(6)(b) of the Law, in order to determine whether, all factors

²⁸ See, for instance, F00171, Defence Submissions on Review of Detention and Response to the Order of the Pre-Trial Judge, 30 March 2022 (confidential), paras. 22-24; F00099, Defence Response to 'Prosecution Submissions for Second Review of Detention', 1 November 2021, paras. 20-35.

²⁹ Prosecution Submissions, para. 14.

³⁰ Prosecution Submissions, para. 14.

being considered, the continued detention ‘stops being reasonable’ and the individual needs to be released”.³¹

C. Alternative Measures

28. The Defence maintains its position that suitable measures alternative to detention exist and must be considered. For instance, requiring the Accused to remain in-house arrest at his residence in Belgium can sufficiently mitigate any potential risk posed by the Accused’s interim release. The Accused repeats his willingness to commit himself and provide *any* guarantees deemed appropriate to remain at his home, not change his place of residence, surrender his passport 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

29. Pursuant to Rule 82(3) and 82(4) of the Rules, the present submissions are filed as confidential as they relate to confidential filings. The Defence will file a public redacted version of these submissions in due course.

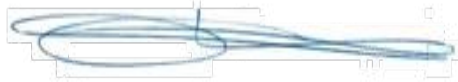
V. RELIEF REQUESTED

30. For the above reasons, the Defence respectfully requests the Panel to bring an end to the Accused’s continued detention and order his interim release or placement in house arrest at his residence in Belgium subject to any conditions that are deemed appropriate.

³¹ Decision dated 6 April 2023, para. 41 and references made therein.

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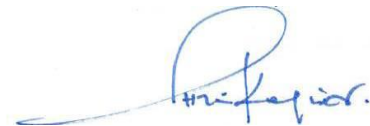
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Friday, 2 June 2023

The Hague, the Netherlands