



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: **KSC-BC-2023-10**
Specialist Prosecutor v. Sabit Januzi and Ismet Bahtijari

Before: **Pre-Trial Judge**
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 29 November 2023

Language: English

Classification: **Public**

Public Redacted Version of Decision on Ismet Bahtijari's Request for Interim Release

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 41 of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 56(2) and 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 5 October 2023, Ismet Bahtijari ("Mr Bahtijari" or "Accused") was arrested pursuant to a decision ("Decision on Arrest")² and an arrest warrant issued by the Pre-Trial Judge,³ upon request of the Specialist Prosecutor's Office ("SPO" and "SPO Request for Arrest"),⁴ and further to the confirmation of an indictment against him and Sabit Januzi ("Mr Januzi" and "Confirmation Decision").⁵
2. On 6 October 2023, Mr Bahtijari was transferred to the Specialist Chambers ("SC") Detention Facilities in The Hague, the Netherlands.⁶
3. On 11 October 2023, the Defence for Mr Bahtijari ("Defence") filed an application for interim release ("Request").⁷

¹ KSC-BC-2023-10, F00001, President, *Decision Assigning a Pre-Trial Judge*, 11 September 2023, public.

² KSC-BC-2023-10, F00009, Pre-Trial Judge, *Decision on Request for Arrest Warrants and Transfer Orders*, 2 October 2023, confidential, with Annexes 1-4, confidential. A public redacted version of the decision was issued on 12 October 2023, F00009/RED.

³ See KSC-BC-2023-10, F00009/A03, Pre-Trial Judge, *Arrest Warrant for Ismet Bahtijari*, 2 October 2023, confidential; F00011, Registrar, *Notification of Arrest of Ismet Bahtijari Pursuant to Rule 55(4)*, 5 October 2023, public.

⁴ KSC-BC-2023-10, F00002, Specialist Prosecutor, *Submission of Indictment for Confirmation and Related Requests*, 11 September 2023, strictly confidential and *ex parte*, para. 32(ii), with Annexes 1-3, strictly confidential and *ex parte*. A confidential redacted version and a public redacted version of the main filing were submitted on 12 October 2023, F00002/CONF/RED and F00002/RED.

⁵ KSC-BC-2023-10, F00008, Pre-Trial Judge, *Decision on the Confirmation of the Indictment*, 2 October 2023, strictly confidential and *ex parte*. A confidential redacted version and a public redacted version of the decision were filed on 12 October 2023, F00008/CONF/RED and F00008/RED. A corrected version of the public redacted version of the decision was filed on 12 October 2023, F00008/RED/COR.

⁶ KSC-BC-2023-10, F00014, Registrar, *Notification of the Reception of Ismet Bahtijari in the Detention Facilities of the Specialist Chambers*, 6 October 2023, public, with Annex 1, strictly confidential and *ex parte*.

⁷ KSC-BC-2023-10, F00030, Defence for Mr Bahtijari, *Submission on Detention on Remand*, 11 October 2023, public. The filing was notified on 12 October 2023.

4. On 12 October 2023, the first status conference took place, during which the Defence indicated, and the Pre-Trial Judge accepted, that it intends to supplement its Request.⁸

5. On 25 October 2023, the Defence filed supplementary submissions to the Request (“Supplement to the Request”).⁹

6. On 3 November 2023, upon an extension of time,¹⁰ the SPO filed a consolidated response to the Request and the Supplement to the Request (“Response”).¹¹

7. The Defence did not reply to the Response.

II. SUBMISSIONS

8. The Defence submits that Mr Bahtijari’s detention cannot be considered as either necessary or proportionate.¹² In particular, the Defence avers that the SPO has not provided sufficiently specific evidence to demonstrate that the Accused (i) is a flight risk; (ii) would obstruct the progress of the criminal proceedings; or (iii) commit further offences.¹³ The Defence further maintains that, should these risks be deemed to exist, house arrest at Mr Bahtijari’s residence, coupled with any other conditions deemed appropriate, could sufficiently mitigate the risks.¹⁴

9. The SPO opposes the Request and contends that (i) subsequent developments have strengthened the basis for the Pre-Trial Judge’s finding of a well-grounded

⁸ KSC-BC-2023-10, Transcript of Hearing, 12 October 2023, public, p. 69, lines 8-23.

⁹ KSC-BC-2023-10, F00078, Defence for Mr Bahtijari, *Defence Supplement on Submission on Detention on Remand*, 25 October 2023, confidential.

¹⁰ KSC-BC-2023-10, F00075, Pre-Trial Judge, *Decision on the Prosecution Request for Extension of Time*, 24 October 2023, public.

¹¹ KSC-BC-2023-10, F00089, Specialist Prosecutor, *Consolidated Prosecution Response to Bahtijari Defence Submissions on Detention on Remand*, 3 November 2023, confidential. A public redacted version was filed on 8 November 2023, F00089/RED.

¹² Request, para. 4.

¹³ Request, paras 6-8, 10; Supplement to Request, paras 1-4, 6-17.

¹⁴ Request, paras 7, 9, 11-12. *See also* Supplement to Request, para. 18.

suspicion that Mr Bahtijari committed or attempted to commit offences within the jurisdiction of the SC; and (ii) the grounds for detention set out in Article 41(6)(b) of the Law, as previously found by the Pre-Trial Judge in the Decision on Arrest, continue to justify the Accused's detention.¹⁵ It further argues that no modalities of conditional release can sufficiently mitigate the existing risks with respect to Mr Bahtijari.¹⁶

III. APPLICABLE LAW

10. Pursuant to Article 41(2) of the Law, any person deprived of his or her liberty by arrest or detention shall be entitled to challenge the lawfulness of his or her arrest, and to have such challenge decided speedily by the SC and his or her release ordered if the detention is not lawful.

11. Pursuant to Article 41(6) of the Law, the SC shall only order the arrest and detention of a person when (a) there is a grounded suspicion that he or she has committed a crime within the jurisdiction of the SC; and (b) there are articulable grounds to believe that the person: (i) is a risk of flight; (ii) will destroy, hide, change or forge evidence of a crime, or will obstruct the progress of the criminal proceedings by influencing witnesses, victims or accomplices; or (iii) will repeat the criminal offence, complete an attempted crime, or commit a crime which he or she has threatened to commit.

12. Pursuant to Article 41(12) of the Law, in addition to detention on remand, the following measures may be ordered by the SC to ensure the presence of the Accused, including by video-teleconference, to prevent reoffending or to ensure successful conduct of criminal proceedings: summons, arrest, bail, house detention, promise not to leave residence, prohibition on approaching specific places or persons, attendance at police station or other venue, and diversion.

¹⁵ Response, paras 15-38.

¹⁶ Response, paras 40-46.

Pursuant to Rule 56(5) of the Rules, the Panel may impose such conditions upon the release as deemed appropriate to ensure the presence of the detained person.

13. Pursuant to Rule 56(2) of the Rules, the Pre-Trial Judge shall ensure that a person is not detained for an unreasonable period prior to the opening of the case.

14. Pursuant to Rule 57(2) of the Rules, after the assignment of a Pre-Trial Judge and until a judgment is final, the Panel seized with a case shall review a decision on detention upon the expiry of two (2) months from the last ruling on detention or at any time upon request by the Accused or the SPO, or *proprio motu*, where a change in circumstances since the last review has occurred.

IV. DISCUSSION

A. APPLICABLE STANDARDS

15. The Pre-Trial Judge recalls that, while an arrest warrant under Article 41(6) of the Law is issued *ex parte*, without participation of the Defence, Article 41(2) of the Law provides the detained person with an early opportunity to challenge the lawfulness of his or her arrest, including the grounds set out in Article 41(6) of the Law. Thus, the Pre-Trial Judge is called upon to inquire anew into the existence of facts justifying detention in light of the arguments advanced by the Parties.¹⁷

16. The Pre-Trial Judge also underscores that any analysis of pre-trial detention is undertaken in the context of the detained person's presumption of innocence.¹⁸ This

¹⁷ KSC-BC-2020-04, F00045/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Pjetër Shala's Request for Provisional Release ("First Shala Detention Decision")*, 23 June 2021, public, para. 13; KSC-BC-2020-07, F00058, Single Judge, *Decision on Request for Immediate Release of Nasim Haradinaj*, 27 October 2020, public, paras 12-13.

¹⁸ KSC-CC-PR-2017-01, F00004, Specialist Chamber of the Constitutional Court, *Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("SCCC 26 April 2017 Judgment")*, 26 April 2017, public, para. 113; KSC-BC-2020-06, IA004/F00005/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release ("Thaçi Interim Appeal Decision")*, 30 April 2021, public, para. 17, with further references. *See, similarly*, ECtHR, *McKay v. the United Kingdom*, no. 543/03, Judgment, 3 October 2006, para. 43.

means, as a consequence, that pre-trial detention cannot be maintained lightly,¹⁹ and that the SPO bears the burden of establishing that the detention of Mr Bahtijari is necessary.²⁰

B. GROUNDED SUSPICION

17. As regards the threshold for continued detention, Article 41(6)(a) of the Law requires a grounded suspicion that the detained person has committed a crime within the jurisdiction of the SC. This is a condition *sine qua non* for the validity of the detained person's continued detention.²¹

18. In this regard, the Pre-Trial Judge recalls that, in the Confirmation Decision, he determined, pursuant to Article 39(2) of the Law, that there is a well-grounded suspicion that Mr Bahtijari is criminally liable for offences within the jurisdiction of the SC, namely intimidation during criminal proceedings and obstructing official persons in performing official duties within the meaning of Articles 387 and 401(1), (2) and (5) of the 2019 Kosovo Criminal Code, Code No. 06/L-074 ("KCC") and Articles 15(2) and 16(3) of the Law.²² These findings were made on the basis of a standard exceeding the grounded suspicion threshold required for the purposes of Article 41(6)(a) of the Law.²³

19. Further to the above, the Pre-Trial Judge notes that the Defence does not reject the existence of a grounded suspicion, but claims that, at present, it cannot test the strength of the suspicion.²⁴ Nevertheless, the Pre-Trial Judge observes that (i) upon filing the Request and the Supplement to the Request, the Defence had access to

¹⁹ *Thaçi* Interim Appeal Decision, para. 17.

²⁰ First *Shala* Detention Decision, para. 13; KSC-BC-2020-06, F00177/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Hashim Thaçi's Application for Interim Release* ("First *Thaçi* Detention Decision"), 22 January 2021, public, para. 19, with further references. *See also* ECtHR, *Merabishvili v. Georgia*, no. 72508/13, Judgment ("*Merabishvili v. Georgia*"), 28 November 2017, para. 234.

²¹ First *Shala* Detention Decision, para. 14. *See also* ECtHR, *Merabishvili v. Georgia*, para. 222.

²² Confirmation Decision, paras 95, 111, 123, 126, 131, 135, 139, 144. *See also* Decision on Arrest, para. 17.

²³ Confirmation Decision, para. 24.

²⁴ Request, paras 5-6.

both the indictment and the Confirmation Decision; and (ii) since its initial submissions, the Defence has received three disclosure packages from the SPO.²⁵ Moreover, the Pre-Trial Judge observes that, even though it received the material supporting the indictment under Rule 102(1)(a) on 31 October 2023,²⁶ the Defence did not file a reply to the SPO's Response of 3 November 2023, despite having ample time to do so.

20. The Pre-Trial Judge also takes note of the SPO's submissions regarding developments subsequent to the Confirmation Decision, in particular that, in voluntary interviews to the SPO, Mr Bahtijari and Mr Januzi confirmed several pieces of inculpatory information related to Mr Bahtijari, most notably (i) the timing of the Accused's meetings with Witness 1 and Co-Perpetrator 1; as well as (ii) the fact that Mr Januzi discussed the witness status of Witness 1 with both Mr Bahtijari and Co-Perpetrator 1.²⁷

21. Therefore, in the absence of any contrary intervening information or development concerning the well-grounded suspicion found in the Confirmation Decision, the Pre-Trial Judge finds that the requirement set forth in Article 41(6)(a) of the Law continues to be met.

C. NECESSITY OF DETENTION

22. Once the threshold in Article 41(6)(a) of the Law is met, the grounds that would justify the deprivation of a person's liberty must be *articulable* in the sense that they must be specified in detail.²⁸ In this regard, Article 41(6)(b) of the Law echoes the

²⁵ Disclosure Package No. 2, 31 October 2023; Disclosure Package No. 3, 3 November 2023; Disclosure Package No. 4, 16 November 2023.

²⁶ Disclosure Package No. 2, 31 October 2023.

²⁷ Response, paras 17-19. *See also* 116065-TR-ET Part 1 RED, pp. 9-11; 116063-TR-ET Part 1, pp. 18-24, 30, 36; 116063-TR-ET Part 2, pp. 6-7; 116063-TR-ET Part 3, pp. 6-7; 116063-TR-ET Part 1, pp. 27-32; 116063-TR-ET Part 3, pp. 9-10.

²⁸ *See* Article 19(1.31) of the 2022 Kosovo Criminal Procedure Code, Code No. 08/L-032, which defines "articulable" as: "the party offering the information or evidence must specify in detail the information or evidence being relied upon". *See also, for example*, First *Shala* Detention Decision, para. 16; KSC-BC-

principle that the continued detention of a person can only be justified if there are specific indications of a genuine requirement of public interest, which outweigh the person's right to liberty.²⁹ Therefore, the Panel must rely on case-specific reasoning and concrete grounds in deciding to continue detention.³⁰ The Pre-Trial Judge further recalls that, on the basis of the available evidence, the specific articulable grounds must support the "belief"³¹ that any of the risks specified under the three limbs of Article 41(6)(b) of the Law exists, denoting an acceptance of the possibility, not the inevitability, of a future occurrence.³² In other words, the standard to be applied is less than certainty, but more than a mere possibility of a risk materialising.³³ The Pre-Trial Judge further observes that these grounds are in the alternative, and that the existence of one ground suffices to determine the necessity of detention.³⁴

23. As regards the nature of the assessment under Article 41(6)(b) of the Law, the Pre-Trial Judge recalls that, while the evaluation involves an element of discretion,³⁵ it must be based on the facts of the case and must be undertaken on an individual basis in light of the personal circumstances of the detained person.³⁶ When assessing the relevant factors, the Pre-Trial Judge may not conduct a piecemeal assessment, but must weigh all relevant factors taken together.³⁷

2020-06, IA001/F00005, Court of Appeals Panel, *Decision on Kadri Veseli's Appeal Against Decision on Interim Release ("Veseli Interim Release Appeals Decision")*, 30 April 2021, public, para. 15.

²⁹ SCCC 26 April 2017 Judgment, para. 113.

³⁰ SCCC 26 April 2017 Judgment, para. 115; *Thaçi Interim Appeal Decision*, para. 22; *First Shala Detention Decision*, para. 16. *See also* ECtHR, *Perstner v. Luxembourg*, no. 7446/21, Judgment, 16 February 2023, para. 33; *Khudoyorov v. Russia*, no. 6847/02, Judgment, 8 November 2005, para. 173.

³¹ *See* chapeau of Article 41(6)(b) of the Law.

³² *First Shala Detention Decision*, para. 16; *First Thaçi Detention Decision*, para. 20, with further references.

³³ *Veseli Interim Appeal Decision*, para. 17; *First Shala Detention Decision*, para. 16.

³⁴ *First Shala Detention Decision*, para. 20; *First Thaçi Detention Decision*, para. 25.

³⁵ *First Thaçi Detention Decision*, para. 21, with further references.

³⁶ *See* *First Shala Detention Decision*, para. 17; *First Thaçi Detention Decision*, para. 21, with further references; *similarly*, ECtHR, *Aleksanyan v. Russia*, no. 46468/06, Judgment, 22 December 2008, para. 179.

³⁷ *First Shala Detention Decision*, para. 17; *First Thaçi Detention Decision*, para. 21, with further references.

24. Lastly, in relation to the grounds set forth in Article 41(6)(b)(ii)-(iii) of the Law, the Pre-Trial Judge emphasises that the risks may materialise as a result of the detained person's acts or omissions, but they do not require physical execution on his or her part.³⁸

1. Risk of Flight

25. The Defence submits that Mr Bahtijari is not a flight risk because (i) he is a construction worker with a very limited income, who is rooted in his residential area; (ii) has no financial or actual ability to evade justice for long periods of time; (iii) he has turned himself in upon request, being voluntarily questioned by the SPO, and there was no evidence of any attempts to make himself untraceable to the authorities after the interrogation; and (iv) given the suspicion, should it come to a conviction at all, it is unlikely that the punishment that would follow is such that years of flight from the authorities is within reason.³⁹

26. The SPO responds that Mr Bahtijari is a flight risk. At first, it recalls the Pre-Trial Judge's previous considerations set out in the Decision on Arrest, that is: (i) the gravity of the offences charged, together with the potential sentence; (ii) the opportunity to evade justice, including by travelling freely to jurisdictions beyond the reach of the SC; and (iii) the Accused's demonstrated blatant disregard for the laws and rules of the SC, in particular court-ordered protective measures.⁴⁰ It adds that information about Mr Bahtijari's associated networks and personal circumstances heighten the risk of flight and supplement related earlier considerations: (i) the Accused's connection to Co-Perpetrator 1, [REDACTED] with strong ties to [REDACTED], with whom he and his family have maintained contact until at least 2023; (ii) the Accused's unity of interests with influential individuals from within the former senior KLA leadership, such as [REDACTED];

³⁸ First *Shala* Detention Decision, para. 19; First *Thaçi* Detention Decision, para. 24.

³⁹ Request, paras 8, 10; Supplement to Request, paras 6-9.

⁴⁰ Response, para. 20.

(iii) [REDACTED]'s support network that has the means and incentive to assist those (perceived to be) aligned with [REDACTED], including the Accused, in his firm opposition to the SC; and (iv) the prevailing climate of obstruction in connection with KLA-related criminal proceedings, both in and outside Kosovo, allowing for the mobilisation of supporters to assist the Accused to flee.⁴¹ The SPO also adds that Mr Bahtijari's knowledge of the serious confirmed charges against him, as well as the substantial prison sentence he could face if convicted, increasingly gained through the disclosure process, establish his risk of flight as a "sufficiently real possibility".⁴² In this context, it submits that Mr Bahtijari is gaining increasingly knowledge about the strength of the evidence to be presented against him.⁴³

27. The SPO argues that (i) the Defence does not specifically indicate any physical or medical condition or family obligation that would root Mr Bahtijari to his place of residence; (ii) the Defence inaccurately asserts that the Accused turned himself in for questioning upon request; and (iii) at that time of the interview, he was not yet aware of the nature of the charges against him or the substance of the evidence.⁴⁴

28. As regards the risk of flight under Article 41(6)(b)(i) of the Law, the Pre-Trial Judge considers that Mr Bahtijari's awareness of the serious charges and underlying evidence⁴⁵ against him, together with the potential sentence, is a relevant factor in the assessment of a flight risk,⁴⁶ and provides the Accused with a motive to evade justice.⁴⁷ In this regard, the Pre-Trial Judge further recalls that Hysni Gucati ("Mr Gucati") and Nasim Haradinaj ("Mr Haradinaj"), who were

⁴¹ Response, paras 21-24, 27.

⁴² Response, paras 25-26.

⁴³ Response, para. 25.

⁴⁴ Response, paras 27-28.

⁴⁵ See Disclosure Package No. 2, 31 October 2023; and Disclosure Package No. 3, 3 November 2023.

⁴⁶ KSC-BC-2020-07, IA002/F0005, Court of Appeals Panel, *Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention*, 9 February 2021, public, para. 61.

⁴⁷ See, similarly, *Decision on Arrest*, para. 20.

also charged with offences against the administration of justice, were finally sentenced to four years and three months of imprisonment,⁴⁸ a sentence that Mr Bahtijari is likely aware of. Having said that, the Pre-Trial Judge is mindful that the risk of the Accused absconding cannot be gauged solely on the grounds of the severity of the prison sentence faced, but must be assessed with reference to other relevant factors justifying detention.⁴⁹

29. As regards the means to flee, the Pre-Trial Judge notes that, even though Mr Bahtijari may not have held a high-ranking position in the hierarchy of the KLA, he and his brother have maintained contact with Co-Perpetrator 1, [REDACTED] with strong ties to [REDACTED], and [REDACTED] during the war, until at least 2023.⁵⁰ In this context, the Pre-Trial Judge further notes that Mr Bahtijari is alleged to have committed or attempted to commit, jointly with others, including Mr Januzi and Co-Perpetrator 1, offences aimed at undermining the evidence against [REDACTED].⁵¹ The Pre-Trial Judge thus considers that the Accused has a strong unity of interests with influential individuals from within the former senior KLA leadership, such as Co-Perpetrator 1 and [REDACTED].

30. In this context, the Pre-Trial Judge recalls previous findings in Case 06 regarding [REDACTED], enabling his influence and ability to mobilise support networks, including present and former subordinates.⁵² Accordingly, the Pre-Trial Judge is of the view that Mr Bahtijari's close relationship to Co-Perpetrator 1, [REDACTED] with strong ties to [REDACTED], cannot be ignored in assessing the risk that he may revert to other like-minded individuals to find the means and assets to abscond. Likewise, whereas the Pre-Trial Judge accepts, as the Defence

⁴⁸ KSC-CA-2022-01, F00114, Court of Appeals, *Appeal Judgment*, 2 February 2023, public, para. 442.

⁴⁹ See KSC-BC-2018-01, F00503/RED, Single Judge, *Public Redacted Version of Reasons for Continued Detention* ("Kilaj Reasons for Continued Detention"), 9 November 2023, public, para. 39; First *Shala Detention Decision*, para. 24. See also ECtHR, *Becciev v. Moldova*, no. 9190/03, Judgment, 4 October 2005, para. 58.

⁵⁰ 116065-TR-ET Part 1 RED, pp. 7-9.

⁵¹ [REDACTED].

⁵² [REDACTED].

submits, that the Accused has limited income, he is satisfied, in light of the foregoing, that Mr Bahtijari could have access to the resources of Co-Perpetrator 1 or [REDACTED] for the purpose of fleeing to evade justice. On the other hand, in the absence of additional information, the Pre-Trial Judge is not persuaded by the SPO's claim that the prevailing climate of obstruction in connection with KLA-related criminal proceedings, both in and outside Kosovo, and the media coverage of the Accused's case, allows for the mobilisation of supporters to assist the Accused in fleeing.⁵³

31. As regards the opportunity to flee, the Pre-Trial Judge notes that, in principle, Mr Bahtijari would have the opportunity to evade justice, including by traveling freely to jurisdictions beyond the reach of SC.⁵⁴

32. Conversely, the Pre-Trial Judge takes note of the Defence assertion that the Accused is rooted in his residential area. It is also observed that the Accused, subsequent to his arrest on 5 October 2023, voluntarily submitted to questioning by the SPO.⁵⁵ The Pre-Trial Judge notes favourably Mr Bahtijari's readiness to cooperate with the SPO and the SC after having initially refused to sign a series of documents upon his arrest.⁵⁶ On balance, the Pre-Trial Judge considers that these factors only diminish, but do not eliminate, the risk of flight. At this juncture, it is worth recalling that it is the risk, not the inevitability of flight, that must be assessed.

⁵³ See *Selimi* Interim Release Appeals Decision, paras 66-67. See also KSC-BC-2020-06, IA002/F00005/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release*, 30 April 2021, public, para. 55.

⁵⁴ Decision on Arrest, para. 20.

⁵⁵ KSC-BC-2023-10, F00021, Registrar, *Report on the Arrest and Transfer of Ismet Bahtijari to the Detention Facilities* ("Bahtijari Arrest Report"), confidential, para. 14, with Annexes 1-3, strictly confidential and *ex parte*. A public redacted version of the main filing and confidential redacted and *ex parte* versions of the three annexes were submitted on 8 November 2023, F00021/RED, F00021/RED/A01/CONF/RED, F00021/RED/A02/CONF/RED, F00021/RED/A03/CONF/RED.

⁵⁶ *Bahtijari* Arrest Report, para. 11.

33. In light of the above, the Pre-Trial Judge finds that, while moderate, a risk of flight continues to exist in relation to Mr Bahtijari.

2. Risk of Obstructing the Progress of SC Proceedings

34. The Defence submits that Mr Bahtijari does not pose a risk of obstructing the progress of the criminal proceedings,⁵⁷ and argues that this risk cannot be relied upon *in abstracto*, but must be supported by factual evidence.⁵⁸ The Defence further avers that, during the time he has been in pre-trial detention, Mr Bahtijari has no record of attempting to contact or interfere with any witness, and that there are no indications that he has had any unauthorised contacts with the Witness 1 after April 2023.⁵⁹ The Defence maintains that, since the suspicion on which the Accused is detained (in relation to which detailed statements would have already been made about it and (digital) material seized) is relatively straightforward, there are no reasons to fear undue interference on the part of the Accused.⁶⁰ It adds that, given the current suspicion, influencing witnesses is not in the interest of Mr Bahtijari, if it could ever be in his interest.⁶¹

35. The SPO responds that there are concrete and objective risks that Mr Bahtijari may obstruct the conduct of the criminal proceedings.⁶² To this end, the SPO recalls the previous considerations of the Pre-Trial Judge in the Decision on Arrest.⁶³ The SPO argues that these bases are specific and reasoned, and not general or abstract, as argued by the Defence.⁶⁴ It adds that, having once attempted to obstruct [REDACTED] it is even more likely for Mr Bahtijari to do so in proceedings in which he is the Accused.⁶⁵ The SPO also submits that such obstruction could be

⁵⁷ Request, paras 8, 10.

⁵⁸ Supplement to Request, para. 10.

⁵⁹ Supplement to Request, para. 11.

⁶⁰ Supplement to Request, para. 12.

⁶¹ Supplement to Request, para. 13.

⁶² Response, para. 35.

⁶³ Response, para. 30, with reference to Decision on Arrest, para. 21.

⁶⁴ Response, paras 30-31.

⁶⁵ Response, para. 31.

done through or in conjunction with the networks of support discussed above, including Co-Perpetrator 1 and [REDACTED], and that, regardless of Mr Bahtijari's level in the KLA hierarchy, he has demonstrated that he is prone to direction from more senior individuals.⁶⁶ According to the SPO, the lack of further relevant obstructive conduct by the Accused after April 2023 or during his pre-trial detention further underlines the necessity of detention.⁶⁷

36. As regards the risk of obstructing proceedings under Article 41(6)(b)(ii) of the Law, the Pre-Trial Judge recalls at the outset his findings in the Confirmation Decision concerning the existence of a well-grounded suspicion that Mr Bahtijari, jointly with others, including Mr Januzi and Co-Perpetrator 1, individually approached Witness 1 on two separate occasions for the purpose of inducing him to refrain from testifying [REDACTED].⁶⁸ The Pre-Trial Judge further recalls that, on the first occasion, Mr Bahtijari confirmed to Witness 1 that failure to withdraw his testimony could result in [REDACTED].⁶⁹

37. In light of the above, the Pre-Trial Judge attaches weight to the fact that the Accused has both the motive and the means to obtain and misuse witness-related information to obstruct and interfere with SC proceedings, including by exerting pressure on Witness 1 [REDACTED] to dissuade him from participating as an SPO witness in the proceedings against Mr Bahtijari.⁷⁰ In particular, since Mr Bahtijari is [REDACTED],⁷¹ the Pre-Trial Judge considers that the Accused has an increased opportunity to directly interfere with Witness 1 [REDACTED].⁷² Moreover, in light of the above findings in paragraphs 29-30, the Pre-Trial Judge is of the view that Mr Bahtijari's (i) unity of interests with influential individuals from within the

⁶⁶ Response, paras 32, 34.

⁶⁷ Response, para. 33.

⁶⁸ Confirmation Decision, paras 88-89.

⁶⁹ Confirmation Decision, paras 76, 88.

⁷⁰ Decision on Arrest, para. 21.

⁷¹ Confirmation Decision, para. 72. *See also* 116065-TR-ET Part 1 RED, p. 11.

⁷² Decision on Arrest, para. 21.

former KLA leadership, such as Co-Perpetrator 1 and [REDACTED]; and (ii) his likely access to their associated networks and resources are important factors in assessing the risk of obstruction of proceedings.⁷³ In this context, the Pre-Trial Judge notes that the risk of obstruction need not materialise in Mr Bahtijari personally tampering with evidence or exerting pressure on Witness 1, but may materialise, for instance, through further coordination with Co-Perpetrator 1, or the associated network of [REDACTED].

38. Further to the above, the Pre-Trial Judge likewise notes the close coordination between Co-Perpetrator 1, Mr Januzi and Mr Bahtijari as regards their approaches to Witness 1,⁷⁴ which he finds indicative of the Accused's proneness to following directions from more senior individuals in the KLA hierarchy, and his persistence in intimidation and obstruction efforts in the context of SC proceedings.⁷⁵

39. The Pre-Trial Judge assesses the above factors against the backdrop of the pervasive climate of fear and intimidation in Kosovo against witnesses and potential witnesses of the SC.⁷⁶

40. Lastly, the Pre-Trial Judge finds unpersuasive the Defence's argument that, since detailed statements have already been taken and (digital) material seized, there are no reasons to fear undue interference on the part of Mr Bahtijari. The Pre-Trial Judge agrees that, in the normal course of events, the risks alleged diminish with the passing of time as the inquiries are effected, statements taken and verifications carried out.⁷⁷ However, he is of the view that in the present circumstances, the risk of collusion for the purpose of obstructing the proceedings

⁷³ Similarly, First *Selimi* Detention Decision, para. 37; *Selimi* Interim Release Appeals Decision, paras 61-63.

⁷⁴ Confirmation Decision, paras 72-87, 113-117.

⁷⁵ Confirmation Decision, paras 91-94, 108-110.

⁷⁶ See, amongst many, *Kilaj* Reasons for Continued Detention, para. 47; Decision on Arrest, para. 21, with further references; KSC-BC-2020-07, F00611/RED, Trial Panel II, *Public Redacted Version of the Trial Judgment*, 18 May 2022, public, paras 576-581.

⁷⁷ ECtHR, *Clooth v. Belgium*, no. 12718/87, Judgment, 12 December 1991, para. 43.

is particularly high.⁷⁸ By the same token, the Pre-Trial Judge attaches limited weight to the Defence's generic assertion that the Accused has not approached Witness 1 since April 2023 and that interfering with witnesses is not in his interest.

41. The Pre-Trial Judge accordingly finds that there continues to exist a risk that Mr Bahtijari will obstruct the progress of SC proceedings.

3. Risk of Committing Further Crimes

42. The Defence submits that there is no reason to believe that Mr Bahtijari would commit further crimes.⁷⁹ It contends that, for detention to be justified under this ground, it must be demonstrated 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 detention.⁸⁰ The Defence further adds that the mere fact that someone is a suspect does not create a risk of recurrence, especially when the circumstances have changed, and the person is aware of the suspicion and the investigation.⁸¹

43. The SPO responds that there are concrete and objective risks that Mr Bahtijari may commit further crimes.⁸² It submits that, as found by the Pre-Trial Judge the Decision on Arrest, the relevant factors to be considered for this ground are the same as those with respect to the obstruction of proceedings.⁸³ It recalls in this regard that the Pre-Trial Judge determined that there exists a risk that the Accused will repeat the offences alleged to have been committed by them.⁸⁴ The SPO likewise argues that the standard suggested by the Defence under this ground is only applicable to preventive detention outside of criminal proceedings.⁸⁵

⁷⁸ See, similarly, ECtHR, *Štvrtecký v. Slovakia*, no. 55844/12, Judgment, 5 June 2018, para. 61.

⁷⁹ Request, paras 8, 10.

⁸⁰ Supplement to Request, para. 15.

⁸¹ Supplement to Request, para. 16.

⁸² Response, para. 38.

⁸³ Response, para. 36.

⁸⁴ Response, para. 36.

⁸⁵ Response, para. 37.

44. As regards the further commission of crimes under Article 41(6)(b)(iii) of the Law, the Pre-Trial Judge wishes to address, at the outset, the Defence argument that detention may be justified under this ground only if demonstrated 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 detention. The Pre-Trial Judge notes in this regard that the standard cited by the Defence only applies to situations falling under the second limb of Article 5(1)(c) of the (European) Convention on Human Rights and Fundamental Freedoms, which provides a distinct ground for detention, namely when reasonably necessary to prevent a person from committing an offence outside the context of criminal proceedings.⁸⁶ Conversely, the requirement that the specific articulable grounds must support the “belief” that the risk under Article 41(6)(b)(iii) of the Law exists, denotes a lower standard than certainty.⁸⁷ The Defence argument is therefore untenable.

45. Having said that, the Pre-Trial Judge is of the view that the relevant factors to be considered are the same as those outlined in paragraphs 36-40 above with respect to obstruction of proceedings. While the existence of such a risk does not automatically translate into a risk of committing further offences, the factors that underpin the former are of relevance to the assessment of the latter in the present case.⁸⁸ In particular, the Pre-Trial Judge considers that there exists a risk that the Accused will repeat the offences alleged to have been committed by him.

46. Accordingly, the Pre-Trial Judge finds that there continues to exist a risk that Mr Bahtijari will commit further offences.

⁸⁶ ECtHR, *Kurt v. Austria*, no. 62903/15, Judgment, 15 June 2021, para. 186.

⁸⁷ See above, para. 22.

⁸⁸ Decision on Arrest, para. 22; First *Shala* Detention Decision, para. 39.

4. Conclusion

47. As a result, the Pre-Trial Judge finds that there are articulable grounds to believe that Mr Bahtijari may flee (although this risk is moderate), obstruct the progress of SC proceedings, or commit further offences, therefore necessitating his continued detention in accordance with Article 41(6)(b) of the Law.

D. CONDITIONAL RELEASE

48. The Defence submits that, in the event that there should be to some extent risks under Article 41(6)(b) of the Law, these could be sufficiently mitigated by existing suitable measures alternative to detention.⁸⁹ The Defence proposes that Mr Bahtijari (i) remain in house arrest at his residence; (ii) not change his place of residence; (iii) surrender his passport and other travel documents, report daily to the police or other relevant authorities; (iv) be subject to close monitoring by the authorities; and (v) appear in court whenever ordered to do so; and/or (vi) be subject to any other conditions deemed appropriate and ordered by the SC.⁹⁰

49. The SPO responds that the Defence fails to explain (i) how the conditions it proposes might address any of the Article 46(1)(b) risks, and (ii) how they would be monitored or enforced.⁹¹ It claims that, even if Mr Bahtijari were to (i) surrender his passport; (ii) remain confined to his home with electronic monitoring; or (iii) provide a monetary surety, it would still not address the fact that (a) international travel from Kosovo is legally and illegally possible without a passport, including to countries with no obligation to transfer the Accused to the SC; (b) Mr Bahtijari could remove any monitoring devices and flee the borders of Kosovo; and (c) he would have access to resources via Co-Perpetrator 1 and his associated networks.⁹² The SPO avers that, given the varied forms of

⁸⁹ Request, paras 7, 9, 11; Supplement to Request, para. 18.

⁹⁰ Request, paras 11-13.

⁹¹ Response, para. 41.

⁹² Response, para. 42.

communication available between Mr Bahtijari and Co-Perpetrator 1, the communications monitoring framework in place at the SC Detention Facilities is particularly important to ensure that the Accused does not continue to engage in obstructive and/or criminal behaviour.⁹³ It adds that the measures in place at the SC Detention Facilities provide robust assurances against unmonitored visits and communications with family members and pre-approved visitors with a view to minimising the risks of obstruction and commission of further offences, and that in previous cases, the Kosovo Police have not provided guarantees establishing that they have the capacity to implement corresponding measures that sufficiently mitigate the existing risks.⁹⁴ The SPO further recalls the reasons why proceedings were relocated away from Kosovo, and notes that various international organisations have recently documented that corruption continues to affect the criminal justice sector in Kosovo.⁹⁵

50. As regards the question of conditional release, the Pre-Trial observes that the Defence merely lists some of the conditions under Article 41(12) of the Law. It does not explain how they might address the risks foreseen under Article 41(6)(b) of the Law, in particular the ground set forth in Article 41(6)(b)(ii) of the Law, given that Mr Bahtijari has both the motive and the means to interfere with proceedings before the SC, and in particular Witness 1 in the context of the proceedings against him.

51. As regards the flight risk, the Pre-Trial Judge finds that some of the conditions proposed by the Defence could mitigate such a risk in relation to Mr Bahtijari. In this regard, the Pre-Trial Judge positively notes the Accused's readiness to remain in house arrest at his residence, not change his place of residence, surrender his passport and any other travel documents, report daily to the police and any other

⁹³ Response, paras 40, 43-44.

⁹⁴ Response, para. 45.

⁹⁵ Response, para. 46

relevant authorities or be subject to close monitoring by them, to appear in court whenever ordered to do so, and/or be subject to any other conditions deemed by the Pre-Trial Judge as appropriate.

52. However, as regards the risk of obstructing the progress of SC proceedings or committing further crimes, the Pre-Trial Judge finds that none of the conditions put forth by the Defence could restrict the ability of the Accused to obstruct the progress of SC proceedings and commit further offences. Notably, the Pre-Trial Judge is of the view that the conditions proposed by the Defence (i) do not address the possibility of Mr Bahtijari employing communication devices belonging to other persons or requesting others to use their devices for these purposes; and (ii) cannot ensure the effective monitoring of Mr Bahtijari's communications.⁹⁶ In this regard, the Pre-Trial Judge is particularly mindful of the fact that the Accused is [REDACTED] with likely access to the associated networks and resources of Co-Perpetrator 1 and [REDACTED]. Accordingly, should he be released, Mr Bahtijari would have the motive, means and opportunity to exert pressure on Witness 1 [REDACTED] to dissuade him from participating in the proceedings, or to otherwise tamper with evidence.⁹⁷ The Pre-Trial Judge considers that this risk can be effectively managed only through the communications monitoring regime available at the SC Detention Facilities.⁹⁸

53. Likewise, while the Pre-Trial Judge may, in principle, order Mr Bahtijari to refrain from contacting Witness 1, or any other potential witnesses, he is of the view that such a commitment can neither be enforced nor monitored. The Pre-Trial Judge considers

⁹⁶ See, similarly, First Shala Detention Decision, para. 46; Kilaj Reasons for Continued Detention, para. 60; KSC-BC-2020-04, IA001/F00005/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Provisional Release* ("Shala Provisional Release Appeals Decision"), 20 August 2021, public, paras 53-61.

⁹⁷ See also above, para. 37.

⁹⁸ See, similarly, First Shala Detention Decision, para. 46; Shala Provisional Release Appeals Decision, para. 61; Kilaj Reasons for Continued Detention, para. 60. See also KSC-BC-2020-04, F00282/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Review of Detention of Pjetër Shala* ("Seventh Shala Detention Decision"), 21 September 2022, public, paras 33-34.

in this regard that the measures in place at the SC Detention Facilities, viewed as a whole, are designed to provide assurances against unmonitored visits and communications with family members and pre-approved visitors with a view to minimising the risks of obstruction and commission of further crimes as much as possible.⁹⁹ In this regard, the Pre-Trial Judge emphasises that the Registrar and the Panel, who have unrestricted access to confidential information concerning witnesses and victims, may take action more promptly than other authorities acting under a distinct framework.¹⁰⁰ The Pre-Trial Judge further recalls that (i) previous rulings in Case 06 have found that the Kosovo Police does not have the capacity to implement corresponding measures that sufficiently mitigate the existing risks;¹⁰¹ (ii) the very reason for establishing the SC was that criminal proceedings against former KLA members could not be conducted in Kosovo;¹⁰² and (iii) the procedural framework and operational practice of the SC have been specifically designed to ensure, to the maximum extent possible, the protection of witnesses, victims as well as others at risk with a view to implementing the mandate of the SC.¹⁰³

54. For the same reasons, the Pre-Trial Judge considers that no *additional* reasonable conditions imposed by the Pre-Trial Judge¹⁰⁴ are available to adequately mitigate the existing risks.

55. The Pre-Trial Judge accordingly finds that the conditions proposed by the Defence for Mr Bahtijari's interim release are insufficient to mitigate the risk of obstructing SC proceedings or committing further crimes.

⁹⁹ Seventh *Shala* Detention Decision, para. 33; *Kilaj* Reasons for Continued Detention, para. 61.

¹⁰⁰ Seventh *Shala* Detention Decision, para. 33; *Kilaj* Reasons for Continued Detention, para. 61.

¹⁰¹ See KSC-BC-2020-06, F00582/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Remanded Detention Review Decision and Periodic Review of Detention of Jakup Krasniqi* ("*Krasniqi* Remanded Detention Decision"), 26 November 2021, public, para. 77.

¹⁰² *Krasniqi* Remanded Detention Decision, para. 80, with further references.

¹⁰³ *Krasniqi* Remanded Detention Decision, para. 80, with further references.

¹⁰⁴ KSC-BC-2020-06, IA017/F00011/RED, Court of Appeals, *Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention*, 5 April 2022, public, para. 51.

E. PROPORTIONALITY OF DETENTION

56. The Pre-Trial Judge takes note of the Defence's submission that detention must be proportional, and further recalls the importance of the proportionality principle in the determination of the reasonableness of pre-trial detention.¹⁰⁵ In the present case, and observing that Mr Bahtijari has been detained since 5 October 2023 only, the Pre-Trial Judge is of the view that no question of proportionality arises at this stage.

57. That being said, the Pre-Trial Judge notes that (i) the SPO has already discharged its disclosure obligations under Rules 102(1)(a) and 103 of the Rules,¹⁰⁶ (ii) with additional disclosure obligations due to be completed shortly;¹⁰⁷ (iii) two status conferences have been held, and a third status conference will be convened before Court Recess;¹⁰⁸ and (iv) the proceedings are thus moving forward expeditiously. Furthermore, the Pre-Trial Judge recalls that, pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules, the Accused's detention shall be reviewed every two months.

58. In light of the foregoing, the Pre-Trial Judge finds that the detention of Mr Bahtijari has not become unreasonable within the meaning of Rule 56(2) of the Rules.

V. DISPOSITION

59. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **REJECTS** the Request;

¹⁰⁵ KSC-BC-2020-07, IA001/F00005, Court of Appeals, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, 9 December 2020, public, paras 72-73.

¹⁰⁶ See Disclosure Package No. 2, 31 October 2023; Disclosure Package No. 3, 3 November 2023; Disclosure Package No. 4, 16 November 2023.

¹⁰⁷ KSC-BC-2023-10, F00076, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 24 October 2023, confidential, para. 122(d)-(e). A public redacted version was filed on the same day, F00076/RED.

¹⁰⁸ KSC-BC-2023-10, Transcript of Hearing, 3 November 2023, public, p. 90, lines 17-19.

- b. **ORDERS** the Defence to file a public redacted version of the Supplement to the Request by **Friday, 1 December 2023**, or to indicate that this filing may be reclassified as public;
- c. **ORDERS** the Defence, if it so wishes, to file submissions on the next review of detention by **Monday, 8 January 2024 at 16h00**, with responses and replies following the timeline set out in Rule 76 of the Rules, namely **Thursday, 18 January 2024 at 16h00** for the response, and **Tuesday, 23 January 2024** for the reply; and
- d. **ORDERS** the SPO, should the Defence decide not to file any submissions by the aforementioned time limit, to file submissions on the next review of detention by **Monday, 15 January 2024**, with the Defence filing its submissions by **Monday, 22 January 2024**, if it so wishes.



Judge Nicolas Guillou

Pre-Trial Judge

Dated this Wednesday, 29 November 2023

At The Hague, the Netherlands.