

**In:** KSC-BC-2023-11  
**Specialist Prosecutor v. Haxhi Shala**

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

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Haxhi Shala

**Date:** 04 February 2024

**Language:** English

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**Public Redacted Version of Response to Prosecution Submission Pertaining to  
Periodic Detention of Haxhi Shala**

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## I. INTRODUCTION

1. The Defence for Mr. Haxhi Shala (“Defence”) hereby responds to the Prosecution submission pertaining to periodic detention review of Haxhi Shala<sup>1</sup> (“SPO Submission”) and requests the unconditional release of Mr. Haxhi Shala (“Accused”) or, in the alternative, his conditional release from detention.

## II. PROCEDURAL BACKGROUND

2. On 20 November 2023 the Specialist Prosecutor’s Office (“SPO”) submitted a request for confirmation of an Indictment and the issuance of an arrest warrant and transfer order for the Accused.<sup>2</sup>
3. On 4 December 2023 the Pre-Trial Judge granted the SPO’s requests.<sup>3</sup>

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<sup>1</sup> KSC-BC-2023-11/F00037, 31 January 2024, confidential.

<sup>2</sup> KSC-BC-2023-11/F00002, Submission of Indictment for confirmation and related requests with strictly confidential and ex parte Annexes 1-3, 20 November 2023, para. 25. A public redacted version was issued on 12 December 2023.

<sup>3</sup> KSC-BC-2023-11/F00006, Decision on Request for Warrant of Arrest and Transfer Order, 4 December 2023, confidential, paras. 29(a), (b).

4. On 6 December 2023, the SPO submitted the indictment of the Accused, as confirmed by the Pre-Trial Judge.<sup>4</sup>
5. On 11 December 2023, the Accused was arrested in Prishtinë, Republic of Kosovo, at around 07:45, and was held at the EULEX premises without access to a lawyer or his family.
6. At approximately 10:30 on the same day, a family member of the Accused was informed of the arrest and provided with a copy of the arrest warrant. Later that day, the same family member of the Accused was again contacted by a EULEX Officer to provide clothing for the Accused.
7. On 12 December 2023, the Accused was transferred to the Kosovo Specialist Chambers Detention Management Unit in The Hague, the Netherlands.<sup>5</sup> At 17:34 that day the Accused was able to contact a member of his family for the first time since his arrest.

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<sup>4</sup> KSC-BC-2023-11/F00007, Submission of Confirmed Indictment, 6 December 2023, strictly confidential and ex parte, with confidential Annex 1. A public redacted version was filed on 12 December 2023, F00013/A01.

<sup>5</sup> KSC-BC-2023-11/F00014, Decision Setting the Date for the Initial Appearance of Haxhi Shala and Related Matters, 12 December 2023, paras. 4-5.

8. During the first period of custody in Kosovo, which lasted approximately 24 hours, the Accused was not produced before a judge, nor was he provided with access to a lawyer or access to his family.
9. On 13 December 2023, an initial appearance before the Pre-Trial Judge took place at 14:00,<sup>6</sup> this was approximately 54 hours following his initial arrest.
10. At the hearing, the Pre-Trial Judge stated that the Initial Appearance was regulated by Article 39 of the Law on Specialist Chambers and Specialist Prosecutor's Office<sup>7</sup> ("Law"), and Rule 92 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers<sup>8</sup> ("Rules").<sup>9</sup> The Pre-Trial Judge, in particular, stated that the Accused had the right to request review of decisions on detention,<sup>10</sup> but then failed to issue any decision on the arrest, transfer and continued detention of the Accused.
11. At the first Status Conference held on 15 December 2023 the Accused entered pleas of not guilty to each charge in the indictment.<sup>11</sup> No ruling was made on the arrest, transfer and continued detention of the Accused.

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<sup>6</sup> KSC-BC-2023-11, First Appearance, Transcript, 13 December 2023, pp. 1-15.

<sup>7</sup> Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015.

<sup>8</sup> KSC-BD-03/Rev3/2020.

<sup>9</sup> KSC-BC-2023-11, First Appearance, Transcript, 13 December 2023, p. 5, line 3.

<sup>10</sup> *Ibid*, p. 9, lines 19-22.

<sup>11</sup> KSC-BC-2023-11, Status Conference, Transcript, 15 December 2023, p. 42.

12. On 25 January 2024 the Pre-Trial Judge noted that the first review of the Accused's detention was due on 9 February 2024 and ordered the SPO to file submissions by 31 January 2024 and the Defence, if it so wished, to file a response by 5 February 2024.<sup>12</sup> The two-month review from the date of arrest, namely the 11 December 2024, would have fallen on a Sunday, and therefore the Pre-Trial Judge set a deadline of the preceding Friday, 9 February 2024. This clearly demonstrates that no other decision on detention has been issued.
13. On 31 January the SPO submitted that the Accused should remain in detention.<sup>13</sup>
14. At the time of filing, the Accused has now been detained for a period of 55 days solely on the basis of the 'Decision on Request for Warrant of Arrest and Transfer Order'.<sup>14</sup> However, whilst that decision may provide a legal basis for the Accused's arrest and transfer to The Hague it does *not* provide a legal basis for his continued detention. No further 'detention order' has been issued.

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<sup>12</sup> KSC-BC-2023-11/F00034, Scheduling Order for Submissions on Review of Detention, 25 January 2024, paras. 3-4.

<sup>13</sup> SPO Submission, para. 44.

<sup>14</sup> KSC-BC-2023-11/F00006, Decision on Request for Warrant of Arrest and Transfer Order, 4 December 2023, confidential, paras. 29(a), (b).

15. The ‘Scheduling Order for Submissions on Review of Detention’<sup>15</sup> issued by the Single Judge on 25 January 2024 invites submissions from the parties on the ‘review of detention’, but is not a ‘detention order’.

### III. APPLICABLE LAW

16. Pursuant to Article 41(6) of the Law, the Specialist Chambers (“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 (i) there is a risk of flight; (ii) the person 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) he or she will repeat the criminal offence, complete an attempted crime, or commit a crime that he or she has threatened to commit (“the three limbs of Article 41(6)(b) of the Law”).
17. On the basis of the available evidence, the specific articulable grounds given in Article 41(6) of the Law must support the “belief” that any of the risks under the three limbs of Article 41(6)(b) of the Law exists, denoting an acceptance of

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<sup>15</sup> KSC-BC-2023-11/F00034.

the possibility, not the inevitability, of a future occurrence.<sup>16</sup> In other words, the standard to be applied is less than certainty, but more than a mere possibility of a risk materialising.<sup>17</sup> It is submitted that the proper test is that there are articulable and substantial grounds to believe<sup>18</sup> or the approach of the European Court of Human Rights of ‘relevant and sufficient reasons’.<sup>19</sup>

18. The Specialist Chamber of the Constitutional Court has itself held that to fully accord with the Constitution, Panels should also consider alternative measures of ensuring the person’s appearance at trial when deciding whether a person should be released or detained.<sup>20</sup>
19. Article 39 of the Law sets out the Powers and Functions of the Pre-Trial Judge. Article 39(4) sets out that a person, against whom an indictment has been confirmed and an order or warrant issued, shall be taken into custody. Article 39(5) sets out the Powers and Functions of the Pre-Trial Judge at the Initial

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<sup>16</sup> KSC-BC-2023-10/F00123, Public Redacted Version of Decision on Sabit Januzi’s Request for Interim Release, 5 January 2024 (Date of original: 8 December 2023), para. 32.

<sup>17</sup> *Ibid.*

<sup>18</sup> *R. (Thompson) v Central Criminal Court* [2005] EWHC 2345 (Admin); [2006] A.C.D. 9, QBD. See also See also [3-73], Archbold: Criminal Pleading, Evidence and Practice 2024.

<sup>19</sup> *Wemhoff v. Germany*, judgment of 27 June 1968, Series A no. 7, para. 12.

<sup>20</sup> KSC-CC-PR-2017-01/F00004, 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 Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 26 April 2017, para. 114.

Hearing. The provision is silent on the procedure for challenging the legality of arrest, transfer and detention at the Initial Hearing.

20. Article 41(3) of the Law regulates that a person deprived of liberty *without* an order from the Specialist Chambers shall be brought within 48 hours of deprivation of liberty before a Judge of the Specialist Chambers. However, the same guarantees do not appear to be afforded to persons who have been arrested pursuant to an order of the Specialist Chambers.
21. Rule 56 of the Rules sets out the general procedure regulating detention. However, the provision is silent on the procedure for challenging the legality of arrest, transfer, and detention at the Initial Hearing or first appearance.
22. Rule 92 sets out the procedure for Initial Appearance and Plea. The provision is also silent on the procedure for challenging the legality of arrest, transfer, and detention at the Initial Hearing.
23. Pursuant to Article 22(2) of the Constitution of the Republic of Kosovo<sup>21</sup> (“Constitution”), human rights and fundamental freedoms guaranteed by, *inter alia*, the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) are guaranteed by the Constitution, are

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<sup>21</sup> Constitution of the Republic of Kosovo, Official Gazette of the Republic of Kosovo No. K-09042008 of 9 April 2008



directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions.

24. Article 5(1)(c) of the ECHR provides that one of situations in which a person may be deprived of their liberty in accordance with a procedure prescribed by law is “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”.

25. Article 5(3) of the ECHR provides:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”<sup>22</sup>

26. Article 5(4) of the ECHR provides:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his

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<sup>22</sup> Cf. Law, Article 41(2).

detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”<sup>23</sup>

27. Article 113(8) of the Constitution provides:

“The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that the referring court’s decision on that case depends on the compatibility of the law at issue.”

#### IV. SUBMISSIONS

28. The Defence contends that the SPO Submission should be dismissed and that the Accused should be unconditionally released from detention because the requirements imposed by Articles 5(3) and 5(4) of the ECHR have not been complied with and because the grounds set forth in Article 41(6) of the Law are not met, or in the alternative that the Accused should be released subject to conditions to which he has consented.

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<sup>23</sup> Cf. Constitution, Article 29(4); Law, Article 41(2).

*The unlawfulness of the detention of the Accused*

29. When granting the request for an arrest warrant and transfer order the Pre-Trial Judge found that there was a 'well-grounded' suspicion that the Accused had committed or attempted to commit, agreed to commit, or assisted in the commission of offences within the jurisdiction of the SC, namely intimidation during criminal proceedings within the meaning of Article 387 of the Kosovo Criminal Code<sup>24</sup> (KCC) and Article 15(2) of the Law, and obstructing official persons in performing official duties within the meaning of Article 401(1), (2) and (5) of the KCC and Article 15(2) of the Law.<sup>25</sup> He further found that there were articulable grounds to believe that there was a risk that the Accused might flee (although this risk was moderate) and that he might obstruct the progress of the criminal proceedings, or commit further offences, therefore necessitating his arrest and detention, in accordance with Article 41(6)(b) of the Law.<sup>26</sup>
30. It is submitted that the arrest warrant and transfer order may provide the legal basis for the initial arrest and transfer of the Accused; however, it is not a legal basis for the continued detention of the Accused thereafter. Further, it is not

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<sup>24</sup> Code No. 06/L-074, Official Gazette of the Republic of Kosovo No. 2/14 January 2019.

<sup>25</sup> KSC-BC-2023-11/F00006, para. 17.

<sup>26</sup> KSC-BC-2023-11/F00006, paras. 20-23.

for the Accused to apply for provisional release at the Initial Hearing, the Judge, before whom the Accused is brought, is required to consider the legality of arrest, transfer, and detention.<sup>27</sup>

31. The Defence submits that the failure to consider both the legality and merit of detention at the Accused's first appearance on 13 December 2023, and his continued detention therefrom, renders his continued detention unlawful so that he should be released.
32. It is submitted that the legality of his arrest, transfer, and detention is to be considered separate to any request for provisional release, as these are separate, free-standing rights under the legal and regulatory framework upon which the SC is bound, including the Constitution and ECHR.
33. Reliance on the KSC Law and the Rules is not sufficient. In examining the lawfulness of detention consideration must be given to whether the detention conforms with the substantive and procedural rules of domestic law and, even if in compliance with domestic law, whether detention was nevertheless arbitrary.<sup>28</sup> It is submitted that whilst the procedure adopted by the Pre-Trial

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<sup>27</sup> *Aquilina v. Malta*, Judgment, 29 April 1999, Appl. no. 25642/94, para. 49.

<sup>28</sup> *Ibid.*

Judge is consistent with the Law, that procedure is not strictly compatible with Articles 5(3) and 5(4) of the ECHR.

34. In *Aquilina v. Malta*, the European Court of Human Rights (“ECtHR”) set out the considerations in relation to detention at the stage at which a person is brought before a judge or other judicial officer under Article 5(3) of the ECHR.<sup>29</sup> It held that Article 5(3) provides persons arrested or detained on suspicion of having committed a criminal offence with a guarantee against any arbitrary or unjustified deprivation of liberty and that it is essentially the object of Article 5(3), which forms a whole with paragraph 5(1)(c), to require provisional release once detention ceases to be reasonable.<sup>30</sup> The Court found that the judge or other judicial officer before whom an arrested person has been brought must consider the merits of detention:

“The fact that an arrested person had access to a judicial authority is not sufficient to constitute compliance with the opening part of Article 5 § 3. This provision enjoins the judicial officer before whom the arrested person appears to review the circumstances militating for or against detention, to decide by reference to legal criteria whether there are reasons to justify detention, and to order release if there are

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<sup>29</sup> *Kemmache v. France (No. 3)*, judgment of 24 November 1994, Series A no. 296-C, paragraphs 36-37.

<sup>30</sup> *Aquilina v. Malta*, para. 47.

no such reasons. In other words, Article 5 § 3 requires the judicial officer to consider the merits of the detention.”<sup>31</sup>

35. As noted earlier, judicial control of the detention must be automatic, and it cannot be made to depend on a previous application by the detained person.<sup>32</sup>

The Court indicated the scope of the review as follows:

“The matters which, by virtue of Article 5 § 3, the judicial officer must examine go beyond the one ground of lawfulness cited by the Government. The review required under Article 5 § 3, being intended to establish whether the deprivation of the individual’s liberty is justified, must be sufficiently wide to encompass the various circumstances militating for or against detention.”<sup>33</sup>

36. At the first appearance of the Accused on 13 December 2023, the Pre-Trial Judge did not consider the merits of his detention as required by Article 5(3) of the ECHR nor did he issue any detention order outside of the previously issued arrest warrant and transfer order, which was issued following an *ex parte* application. The Pre-Trial Judge informed the Accused that he had a right to request review of decisions on his detention, in writing, and to appeal

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<sup>31</sup> *Ibid.* para. 47 (footnotes omitted).

<sup>32</sup> *Ibid.* para. 49.

<sup>33</sup> *Ibid.* para. 52.

such decisions directly before the Court of Appeal<sup>34</sup> and that he may challenge his detention on remand in accordance with Rule 57.<sup>35</sup> Both Duty Counsel and the Accused were expressly given an opportunity to raise other issues at the hearing.<sup>36</sup> However, providing information and an opportunity to raise issues does not meet the formal requirements of Article 5(3) of the ECHR, because as noted above judicial control of detention must be automatic at this stage.<sup>37</sup> Furthermore, the Pre-Trial Judge specifically stated that any challenge to detention in accordance with Rule 57 would be dealt with in writing, i.e. not during the hearing.<sup>38</sup>

37. It follows that the continued detention of the Accused subsequent to his arrest and transfer was in violation of Articles 5(1)(c) and 5(3) of the ECHR. The lawfulness and reasonableness of his detention were not considered at that hearing or subsequently. At the time of filing, there is no lawful order that regulates his detention. The detention of the Accused therefore remains unlawful.

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<sup>34</sup> KSC-BC-2023-11, First Appearance, Transcript, 13 December 2023, p. 9.

<sup>35</sup> *Ibid.* p. 15.

<sup>36</sup> *Ibid.* pp. 14-15.

<sup>37</sup> *Ibid.* para. 49.

<sup>38</sup> KSC-BC-2023-11, First Appearance, Transcript, 13 December 2023, p. 15, lines 5-7.

38. Article 5(1)(c) permits "...the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so." That means that the detention must be covered, at all times, by a lawful order of the court and complying with the procedural guarantees under Articles 5(3) and 5(4) of the ECHR.
39. The 'Decision on Request for Warrant of Arrest and Transfer Order' of 4 December 2023 *grants* the request for the arrest and transfer of the Accused.<sup>39</sup> It further *directs* the Registrar and the SPO on certain steps related to the arrest and transfer of the Accused.<sup>40</sup> At no stage in the Pre-Trial Judge's Decision does it regulate his continued detention after the Initial Hearing nor has any further decision been issued by the Pre-Trial Judge following the Initial Hearing that regulates his continued detention.
40. Pursuant to Article 5(4) of the ECHR and Article 41(2) of the Law, the lawfulness of his detention shall be decided speedily by a court and release

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<sup>39</sup> KSC-BC-2023-11/F00006, confidential, paras. 29(a), (b).

<sup>40</sup> *Ibid.* paras. 29(c), (d), (e), (f), (g).



ordered if detention is not lawful. The Accused submits that because of the ongoing unlawfulness of his detention his release must be ordered.

41. It is submitted that the procedure, that draws a distinction between persons detained pursuant to a judicial order and those persons arrested without a prior judicial order, is not in conformity with Article 5 of the ECHR. The issuance of a judicial order cannot replace or circumvent the procedural guarantees. In this case an *ex parte* judicial order was issued in circumstances where the Accused had no effective opportunity to challenge it and the appropriate judge at the first appearance failed to separately consider the legality and merit of detention as required by Articles 5(3) and 5(4) of the ECHR. It is clearly not sufficient to allow the Accused to file a written request when the issue should have been dealt with by the Pre-Trial Judge at the Initial Hearing.

42. It is to be recalled that the procedural safeguards in Articles 5(3) and 5(4) of the ECHR are to protect individuals from being arbitrarily deprived of their liberty and to ensure that any period of detention following arrest is kept as short as possible.<sup>41</sup> It is submitted that the procedure adopted in the present case, according to the legal and regulatory framework of the SC, falls to be

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<sup>41</sup> *Schiesser v. Switzerland*, Judgment of 4 December 1979, Series A. no. 34, para. 30.

considered under the first limb of Article 5(3) of the ECHR, namely whether the Pre-Trial Judge, can be considered a “judge or other officer authorised by law to exercise judicial power”. In *Schiesser*,<sup>42</sup> the European Court laid down criteria for determining whether a person can be regarded as such a person:

- a. independence from the executive and from the parties;
- b. the officer is obliged to hear personally the applicant brought before him; and
- c. there is a substantive requirement which places the officer under an obligation to review “the circumstances militating for or against detention” and to decide “by reference to legal criteria whether there are justifications for maintaining detention” and, if there are not, to order the release.

43. There is no indication to suggest that the Pre-Trial Judge lacks independence or impartiality, neither is it suggested that the Accused was not physically brought before the Pre-Trial Judge; he was. However, it is the third criterion that requires careful consideration.

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<sup>42</sup> *Ibid.* para. 31.

44. In *Vlatko Buzuk v. the Federation of Bosnia and Herzegovina*,<sup>43</sup> the Human Rights Chamber of Bosnia and Herzegovina, applying the jurisprudence of the European Court of Human Rights, considered the third criterion where a discretionary authority was removed. The Human Rights Chamber held:

“99. The third criterion places a positive obligation on the “judge” or “officer authorised by law” to consider the reasons for maintaining detention. Moreover, it requires that the “judge” or “officer authorised by law” must have the power to discontinue detention if there are no justifications for continuing detention. In *De Jong, Baljet and Van Den Brink v. The Netherlands* (Eur. Court HR, judgment of 4 May 1984, Series A no. 77), the European Court of Human Rights held, referring to the requirements in *Schiesser*, that if an officer of the court lacked the power to release the applicant, then the continued detention would be unlawful in this respect...”

45. The European Court has consistently stated that any case where judicial discretion is removed (or curtailed) by law will be incompatible with the ECHR and any detention based on such provisions unlawful.<sup>44</sup> In the *Buzuk*

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<sup>43</sup> Human Rights Chamber of Bosnia and Herzegovina, Case No. CH/01/7488, *Vlatko Buzuk*, decision on admissibility and merits of 3 July 2002, paragraphs 98 to 101, Decisions July-December 2002.

<sup>44</sup> *De Jong, Baljet and Van Den Brink v. The Netherlands* (Eur. Court HR, judgment of 4 May 1984, Series A no. 77, paras. 47-48. See also *Vlatko Buzuk*, para. 100

case discretion was partly curtailed by reference to the nature of certain offences and the notion of mandatory custody, notwithstanding the applicability of grounded suspicion. As a result of the removal of discretion, the law was amended due to the incompatibility with Article 5(3) of the ECHR.

46. In the present circumstances, the curtailment refers to the distinction between those persons arrested subject to a prior judicial order applied for following an *ex parte* application and the requirement for any challenge to be in writing following the hearing. The fact that the Pre-Trial Judge at the Initial Hearing could not consider the legality or merits of detention at that hearing means that the procedure is not in conformity with Article 5(3) of the ECHR.
47. Further, the mere fact that the Pre-Trial Judge has issued a judicial order on arrest and transfer and the fact that the Accused was provided with a copy of the order at the time of his arrest does not in any way satisfy the requirements of the first limb of Article 5(3) of the ECHR.
48. For the foregoing reasons, for the period from 13 December 2023 until now, the Accused's rights as guaranteed under the first limb of Article 5(3) of the ECHR have been violated. Accordingly, the Accused's detention remains unlawful, and his release should be ordered.

49. The Defence submits that in the event that the Pre-Trial Judge does not accept that the Accused should be released on the grounds set out above, he should refer to the Panel of the Constitutional Court pursuant to Article 113(8) of the Constitution the question of the constitutional compatibility of the legal framework governing the initial review of the detention of a person who has been deprived of his or her liberty pursuant to an order of the Specialist Chambers. Specifically, the Panel should be asked whether the lack of provisions in the Law and the Rules requiring the Pre-Trial Judge to decide on such a person's detention or release at the first appearance is compatible with the Constitution.

*Conditions for detention under Article 41(6) of the Law*

50. In the Defence's submission, the unconditional release of the Accused should be ordered because none of the requirements under Article 41(6) of the Law are met. The Defence gives notice that it may make additional submissions in later stages of the proceedings regarding the items of evidence referred to in this filing.

51. The Defence contends that the requirement under 41(6)(a) of the Law of a grounded suspicion that the Accused committed a crime within the jurisdiction of the SC has not been fulfilled because there is only hearsay

evidence of the actions of the Accused alleged in the Indictment that may constitute a criminal offence.<sup>45</sup>

52. Rule 86(3)(b) of the Rules provides that the Indictment shall be filed with a detailed outline demonstrating the relevance of each item of evidentiary material to each allegation, with particular reference to the conduct of the suspect with respect to the alleged crime(s). The outline in this case shows that the *only* evidence of actions on the part of the Accused that may instantiate crimes is what at meetings with Witness 1 on 5 and 12 April 2023 Ismet Bahtijari and Sabit Januzi allegedly report the Accused as having said.<sup>46</sup> Allegations in the Indictment of communications by the Accused with Sabit Januzi and Ismet Bahtijari at particular times<sup>47</sup> amount only to circumstantial evidence to which little weight can be given. For these reasons the evidential requirement of Article 41(6)(a) of the Law has not been met.

53. With respect to flight risk, the SPO supports its submissions by setting out the considerations of the Pre-Trial Judge in his decision on arrest and transfer,<sup>48</sup>

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<sup>45</sup> Indictment, paras. 9, 15, 16.

<sup>46</sup> [REDACTED].

<sup>47</sup> Indictment, paras. 8, 13-14, 15, 18.

<sup>48</sup> KSC-BC-2023-11/F00037, para. 18.

[REDACTED],<sup>49</sup> the prevailing climate of obstruction<sup>50</sup> and the Accused's awareness of the charges and evidence against him.<sup>51</sup>

54. The Pre-Trial Judge held that the risk of flight in the case of the Accused was moderate.<sup>52</sup> In the Defence's submission the threshold for risk of flight given in Article 41(6)(b)(i) has not been reached.

55. The Pre-Trial Judge found that "considering that the Accused has already demonstrated a blatant disregard for the laws and rules of the SC, in particular court-ordered protective measures, [he was] not convinced that a summons would ensure the presence of the Accused during the proceedings".<sup>53</sup> In response, it is respectfully submitted that whilst the Indictment alleges that the Accused has sought to interfere with SC proceedings, it does not follow that the Accused would himself wish to evade justice. The Accused is entitled to the presumption of innocence at this stage and therefore it cannot be said that he has demonstrated a blatant disregard, as alleged.

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<sup>49</sup> *Ibid.* para. 19.

<sup>50</sup> *Ibid.* para. 20.

<sup>51</sup> *Ibid.* paras. 21-23.

<sup>52</sup> KSC-BC-2023-11/F00006, para. 20.

<sup>53</sup> *Ibid.* para. 20.

56. The Pre-Trial Judge also attaches weight to [REDACTED].<sup>54</sup> However, this would only acquire significance if there were a wish on the part of the Accused to escape justice. [REDACTED]
57. The SPO takes a similar position. [REDACTED]. [REDACTED].
58. The SPO's claim that the prevailing climate of obstruction in connection with KLA-related criminal proceedings, both in and outside Kosovo, allows for the mobilisation of supporters to assist the Accused in fleeing to evade justice<sup>55</sup> is also vague and highly speculative.
59. The SPO submits that the Accused's current awareness of the serious charges and the strength of case against him and the sentence which he might receive contributes to his flight risk.<sup>56</sup> However, this reasoning again assumes that the Accused would wish to evade justice.
60. It has not been established that there is more than a mere possibility of risk of flight materialising. Accordingly, there are no articulable or substantial grounds to believe that there is such a risk.

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<sup>54</sup> KSC-BC-2023-11/F00006, para. 20.

<sup>55</sup> *Ibid.* para. 20.

<sup>56</sup> *Ibid.* paras. 21-23.



61. The SPO submits that there are concrete and objective risks that the Accused may obstruct the progress of criminal proceedings for the following reasons: the facts alleged against him in the Indictment;<sup>57</sup> [REDACTED];<sup>58</sup> the backdrop of the pervasive climate of fear and intimidation in Kosovo against witnesses and potential witnesses at the SC;<sup>59</sup> and the highly sensitive information received by the Accused.<sup>60</sup> These are broad sweeping allegations for which there is no independently objective evidence.
62. The SPO alleges that the Accused directed Sabit Januzi and Ismet Bahtijari to apply pressure on Witness 1 in connection with criminal proceedings at the SC. Both Sabit Januzi and Ismet Bahtijari are currently in detention,<sup>61</sup> thereby removing the alleged means by which the Accused committed the criminal offences with which he has been charged. Since the Accused has been charged and detained in connection with alleged acts of interference with the administration of justice directed at Witness 1, he would have no incentive to compound his alleged criminal activity by taking any further acts of

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<sup>57</sup> *Ibid.* para. 25.

<sup>58</sup> *Ibid.* para. 26.

<sup>59</sup> *Ibid.* para. 27.

<sup>60</sup> *Ibid.* paras. 28-31.

<sup>61</sup> KSC-BC-2023-10/F00123, Public Redacted Version of Decision on Sabit Januzi's Request for Interim Release, 5 January 2024 (Date of original: 8 December 2023), para. 77; KSC-BC-2023-10/F00156, Public Redacted Version of Decision on Review of Detention of Ismet Bahtijari, 30 January 2024 (Date of original: 29 January 2024), para. 42.

obstruction of justice related to the present case. This lack of incentive is not removed by his possession of “highly sensitive information”.<sup>62</sup> The claims of possible obstruction of justice that the SPO has adduced are based on allegations in the Indictment and do not justify a belief that the Accused would obstruct proceedings beyond those allegations.

63. [REDACTED]

64. Taken at its highest, the “backdrop of the pervasive climate of fear and intimidation in Kosovo against witnesses and potential witnesses at the KSC”<sup>63</sup> is only a general consideration. It would be wholly unjust to regard it as a reason for determining that there was an articulable risk of obstruction of justice whenever a person arrested by the SC sought release whatever the individual merits of their case.

65. For these reasons the SPO has not shown that there are articulable grounds to believe that the Accused will engage in obstruction of justice if released from detention.

66. The SPO points out that in finding that the Accused may commit further offences, the Pre-Trial Judge concluded that the relevant factors to be

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<sup>62</sup> KSC-BC-2023-11/F00037, paras. 28-31.

<sup>63</sup> *Ibid.* para. 27.

considered were the same as those with respect to the obstruction of proceedings.<sup>64</sup> The SPO infers that there are concrete and objective risks that the Accused may commit further offences.<sup>65</sup>

67. The Defence has made submissions to the effect that the SPO has not proven to the requisite standard that the Accused will obstruct justice in the present proceedings.<sup>66</sup> Therefore, there are no articulable grounds to believe that he will commit any criminal offences in this regard. The SPO has not provided justification for believing that he might commit a criminal offence of any other type. Accordingly, the third limb of Article 41(6)(b) has not been established.

68. The SPO makes broad sweeping allegations that are general in nature and do not amount to 'relevant and sufficient reasons' as required by Article 5(3).<sup>67</sup> The SPO has not shown either that the Accused has committed a crime within the jurisdiction of the SC or that there are articulable grounds to believe that any of the three limbs of Article 41(6)(b) apply. It follows that the Accused should be released from detention.

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<sup>64</sup> *Ibid.* para. 33 (referring to F00006, para. 22).

<sup>65</sup> *Ibid.* para. 34.

<sup>66</sup> *Trzaska v. Poland*, no. 25792/94, para. 65, 11 July 2000. The danger of hindering the proper conduct of the proceedings cannot be relied upon *in abstracto*, it has to be supported by factual evidence.

<sup>67</sup> See *Merabishvili v. Georgia*, Grand Chamber, no. 72508/13, 28 November 2017, para. 222; *Letellier v. France*, judgment of 26 June 1991, Series A no. 207, para. 51; *Neumeister v. Austria*, judgment of 27 June 1968, Series A no. 8, para. 10

*Grounds for conditional release*

69. If it is not accepted that the Accused should be released from detention on the grounds either that his detention is unlawful or that the requirements of Article 41(6) are not met, the Defence submits that there are sufficient grounds for his conditional release.
70. The Accused would consent to any one or to any combination of the following conditions for his release to Kosovo together with attendance at all proceedings by video-conference:
- a. Condition of residence;
  - b. Not leaving his place of current residence except to comply with any order of the Court or any conditions of his bail;
  - c. An electronically tagged curfew between the hours of 18:00 – 08:00;
  - d. Reporting to the Police on Monday, Wednesday and Friday each week between the hours of 08:00 – 10:00;
  - e. Not to be in possession of nor to apply for any international travel documents;
  - f. Not to approach any international transfer hub or any international border;

- g. Not to approach or have any contact with, directly or indirectly, any person named in the Indictment or any other named persons or the place of residence or work of such persons and
- h. Payment of a monetary security of [REDACTED].

71. It should be noted that the Accused's willingness to accept these conditions was not known to the Pre-Trial Judge when he issued the order for the Accused's arrest and transfer.<sup>68</sup>

72. If the Pre-Trial Judge were to find that there are sufficient grounds for detention under Article 41(6) of the Law, the Defence submits that the threshold for attaining those grounds will not be reached if one or more of the conditions to which the Accused has consented are imposed. The reasons already given for the unconditional release of the Accused apply *mutatis mutandis*.

## V. CONCLUSION

73. For the foregoing reasons the Defence requests that the Pre-Trial Judge:

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<sup>68</sup> KSC-BC-2023-11/F00006.

- (i) Dismiss the SPO Submission;
- (ii) Find that the Accused's detention is unlawful; or
- (iii) Refer the matter to a Panel of the Constitutional Court in accordance with Article 113(8) of the Constitution for a declaration on compatibility; or
- (iv) Find that the requirements for detention under Article 41(6) of the Law are not met; and
- (v) Order the unconditional release of the Accused from detention or, in the alternative, order his release subject to one or more of the conditions to which he would consent.

**Word Count: [5,992 words]**



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**Toby Cadman**

**Specialist Counsel**

**Sunday, 4 February 2024**

**At London, United Kingdom**