



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2023-10
The Specialist Prosecutor v. Sabit Januzi, Ismet Bahtijari and Haxhi Shala

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

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Public Redacted Version of Decision on Review of Detention of Haxhi Shala

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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 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 11 December 2023, Haxhi Shala ("Mr Shala" or "Accused") was arrested,² pursuant to a decision ("Decision on Arrest")³ and an arrest warrant issued by the Pre-Trial Judge,⁴ upon request of the Specialist Prosecutor's Office ("SPO"),⁵ and further to the confirmation of an indictment against him ("Confirmation Decision").⁶
2. On 12 December 2023, Mr Shala was transferred to the Specialist Chambers ("SC") Detention Facilities in The Hague, the Netherlands.⁷
3. On 13 December 2023, the initial appearance of the Accused before the Pre-Trial Judge took place.⁸

¹ KSC-BC-2023-11, F00001, President, *Decision Assigning a Pre-Trial Judge*, 20 November 2023, public.

² KSC-BC-2023-11, F00008, Registrar, *Notification of Arrest of Haxhi Shala Pursuant to Rule 55(4)*, 11 December 2023, public, para. 4.

³ KSC-BC-2023-11, F00006, Pre-Trial Judge, *Decision on Request for Warrant of Arrest and Transfer Order*, 4 December 2023, confidential, with Annexes 1-2, strictly confidential. A public redacted version of the decision was issued on 22 December 2023, F00006/RED.

⁴ See KSC-BC-2023-11, F00006/A01, Pre-Trial Judge, *Arrest Warrant for Haxhi Shala*, 4 December 2023, strictly confidential.

⁵ KSC-BC-2023-11, F00002, Specialist Prosecutor, *Submission of Indictment for Confirmation and Related Requests* ("Submission of Indictment"), 20 November 2023, strictly confidential and *ex parte*, para. 25(ii), with Annexes 1, 3, strictly confidential and *ex parte*, and Annex 2, confidential. A confidential redacted version and a public redacted version of the main filing were submitted on 14 December 2023, F00002/CONF/RED and F00002/RED.

⁶ KSC-BC-2023-11, F00005, Pre-Trial Judge, *Decision on the Confirmation of the Indictment*, 4 December 2023, confidential. A public redacted version of the decision was filed on 30 January 2024, F00005/RED.

⁷ KSC-BC-2023-11, F00011, Registrar, *Notification of Reception of Haxhi Shala in the Detention Facilities of the Specialist Chambers*, 12 December 2023, public, with Annex 1, strictly confidential and *ex parte*.

⁸ KSC-BC-2023-11, Transcript of Hearing, 13 December 2023, public, pp. 1-15; F00014, Pre-Trial Judge, *Decision Setting the Date for the Initial Appearance of Haxhi Shala and Related Matters*, 12 December 2023, public.

4. On 25 January 2024, the Pre-Trial Judge issued a scheduling order for submissions on the periodic review of Mr Shala's detention.⁹ Pursuant to it, the SPO filed its submissions on 31 January 2024¹⁰ and the Defence for Mr Shala ("Defence") filed a response on 4 February 2024.¹¹

II. SUBMISSIONS

5. The SPO submits that Mr Shala's detention remains necessary, as the criteria set out in Article 41(6) of the Law are met.¹² In particular, it submits that a grounded suspicion that Mr Shala committed or attempted to commit crimes within the jurisdiction of the SC continues to exist.¹³ It also contends that, if released from detention, the Accused (i) poses a flight risk;¹⁴ (ii) may obstruct the criminal proceedings;¹⁵ and (iii) may commit further criminal offences.¹⁶

6. Additionally, the SPO avers that no modalities of conditional release are able to sufficiently mitigate the abovementioned risks,¹⁷ and that detention is both reasonable and proportional at this stage of proceedings.¹⁸ For those reasons, the SPO submits that Mr Shala should remain in detention.¹⁹

⁹ KSC-BC-2023-11, F00034, Pre-Trial Judge, *Scheduling Order for Submissions on Review of Detention*, 25 January 2024, public.

¹⁰ KSC-BC-2023-11, F00037, Specialist Prosecutor, *Prosecution Submission Pertaining to Periodic Detention Review of Haxhi Shala* ("SPO Submissions"), 31 January 2024, confidential. A public redacted version was filed on 5 February 2024, F00037/RED.

¹¹ KSC-BC-2023-11, F00039, Defence for Haxhi Shala, *Response to Prosecution Submission Pertaining to Periodic Detention of Haxhi Shala* ("Defence Submissions"), 4 February 2024, confidential. A public redacted version as filed on 7 February 2024, F00039/RED.

¹² SPO Submissions, paras 1, 15.

¹³ SPO Submissions, paras 16-17.

¹⁴ SPO Submissions, paras 18-24.

¹⁵ SPO Submissions, paras 25-32.

¹⁶ SPO Submissions, paras 33-34.

¹⁷ SPO Submissions, paras 1, 35-41.

¹⁸ SPO Submissions, paras 1, 42.

¹⁹ SPO Submissions, para. 44.

7. The Defence submits that (i) Mr Shala's continued detention does not comply with Articles 5(1)(c) and 5(3)-(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR");²⁰ and (ii) the conditions for detention under Article 41(6) of the Law are not met.²¹ For those reasons, the Defence requests that the Pre-Trial Judge (i) dismisses the SPO Submissions;²² (ii) finds that the Accused's continued detention is unlawful, or refers the question of the constitutional compatibility of the SC legal framework governing the initial review of the detention of a person to a Constitutional Court Panel, in accordance with Article 113(8) of the Constitution of Kosovo;²³ (iii) finds that the requirements of Article 41(6) of the Law are not met;²⁴ and (iv) orders the unconditional release of Mr Shala from detention, or, in the alternative, orders his release subject to one or more conditions.²⁵

III. APPLICABLE LAW

8. 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.

²⁰ Defence Submissions, paras 28-49.

²¹ Defence Submissions, paras 28, 50-68.

²² Defence Submissions, para. 73(i).

²³ Defence Submissions, paras 48-49, 73(ii)-(iii).

²⁴ Defence Submissions, para. 73(iv).

²⁵ Defence Submissions, paras 1, 28, 69-72, 73(v).

9. Pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules, until a judgment is final or until release, upon expiry of the two (2) months from the last ruling on detention on remand, the Pre-Trial Judge or Panel seized with the case shall examine whether reasons for detention on remand still exist, and render a ruling by which detention on remand is extended or terminated.

10. 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. 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.

11. 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, and, in case of an undue delay caused by the Specialist Prosecutor, the Panel, having heard the Parties, may release the person under conditions as deemed appropriate.

IV. DISCUSSION

A. LAWFULNESS OF DETENTION

12. The Pre-Trial Judge finds it necessary, as a preliminary matter, to address the challenge of the Defence concerning the lawfulness of Mr Shala's detention. In particular, the Defence submits that the procedure set out in the Law is not compatible with Articles 5(1)(c) and 5(3)-(4) of the ECHR, because the arrest warrant and transfer order cannot constitute adequate legal bases for continued detention.²⁶ Since the

²⁶ Defence Submissions, paras 14, 28, 30, 33-34, 37, 39, 41-42, 46-48.

Pre-Trial Judge did not consider the legality or merit of the arrest, transfer and detention during or after Mr Shala's initial appearance on 13 December 2023, the Defence submits that the Accused's continued detention is unlawful and requests his release.²⁷ The Defence further submits that, in the event that the Pre-Trial Judge does not accept the release of Mr Shala on the grounds set out above, he should refer the question of the constitutional compatibility of the SC's relevant legal framework to a Panel of the Constitutional Court, in accordance with Article 113(8) of the Constitution of Kosovo.²⁸

13. The Pre-Trial Judge notes that the Defence cites the ECtHR case *Aquilina v. Malta* to justify its assertions that (i) the arrest warrant and transfer order do not constitute legal bases for continued detention; and (ii) judicial control of the detention must be automatic and not be made dependent on a previous application by the detained person.²⁹ However, the cited caselaw refers to a factual scenario where the arrest was not authorised beforehand by a judge, but rather subject to *ex post facto* judicial control.³⁰ In the present case, the Accused's arrest was undertaken pursuant to a judicial order issued by the Pre-Trial Judge, annexed to the Decision on Arrest. In this decision, the Pre-Trial Judge reviewed all substantial requirements for the detention of Mr Shala under Article 41(6) of the Law, namely the existence of a grounded suspicion and the necessity of the arrest.³¹ These are the same criteria as the ones required for any decision on detention under the SC legal framework. The Pre-Trial Judge further notes that the Defence is afforded the early opportunity to challenge that decision under Article 41(2) of the Law, but has chosen not to do so. The Defence's

²⁷ Defence Submissions, paras 28, 30-31, 35-37, 39-40, 48, 73(ii).

²⁸ Defence Submissions, paras 49, 73(iii).

²⁹ Defence Submissions, paras 30, 35.

³⁰ ECtHR, *Aquilina v. Malta*, no. 25642/94, Judgment, 29 April 1999, paras 8-9, 43.

³¹ Decision on Arrest, paras 17-24.

argument that it is “clearly not sufficient to allow the Accused to file a written request”, is unsubstantiated.³²

14. Additionally, the Pre-Trial Judge recalls that the Constitutional Court Chamber of the SC has determined the compatibility of the relevant provisions of the SC legal framework with the Constitution of Kosovo.³³ For that reason, the Pre-Trial Judge considers that referring the matter to the Constitutional Court Chamber is not warranted.

15. In light of foregoing, the Pre-Trial Judge (i) denies the Defence request for release of Mr Shala on the basis of the unlawfulness of his continued detention; and (ii) denies the Defence request for the Pre-Trial Judge to refer the question of the compatibility of the SC legal framework governing the initial review of the detention of a person with the Constitution of Kosovo to the Constitutional Court Chamber.

B. APPLICABLE STANDARD

16. 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. In the absence of a challenge to the detention, it is incumbent on the Pre-Trial Judge to promptly review the Accused’s detention within two months from the last

³² Defence Submissions, para. 41. *See also* Defence Submissions, para. 36.

³³ 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 Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office* (“SCCC 26 April 2017 Judgment”), 26 April 2017, public, paras 108-123.

ruling on arrest, as dictated by Article 41(10) of the Law and Rule 57(2) of the Rules.³⁴ The Pre-Trial Judge recalls that he has an obligation, under Article 41(10) of the Law, to examine anew whether the reasons for detention on remand still exist,³⁵ including the grounds set out in Article 41(6) of the Law, namely whether (i) there is a grounded suspicion that the person has committed the crime(s), and (ii) there are articulable grounds to believe that any of the risks set out in Article 41(6)(b) of the Law has been fulfilled.³⁶

17. The Pre-Trial Judge likewise underscores that any analysis of Mr Shala's detention must duly consider his presumption of innocence.³⁷ This means, as a consequence, that pre-trial detention cannot be maintained lightly, and that the SPO bears the burden of establishing that the detention of the Accused is necessary.

C. GROUNDED SUSPICION

18. As regards the threshold for continued detention, Article 41(6)(a) of the Law requires at the outset a grounded suspicion that the detained person has committed a

³⁴ The same approach was taken in the case of the *Specialist Prosecutor v. Salih Mustafa*, see KSC-BC-2020-05, F00052, Pre-Trial Judge, *Decision on Review of Detention*, 23 November 2020, public, para. 11.

³⁵ See, for example, KSC-BC-2020-07, IA002/F00005, Court of Appeals Panel, *Decision on Nasim Haradinaj's Appeal on Decision Reviewing Detention* ("First Haradinaj Detention Appeals Decision"), 9 February 2021, public, para. 55; KSC-BC-2020-06, IA006/F00005/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Review of Detention* ("Second Krasniqi Detention Appeals Decision"), 1 October 2021, public, para. 15. See also KSC-BC-2020-04, F00224/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Review of Detention of Pjetër Shala* ("Sixth P. Shala Detention Decision"), 22 June 2022, public, para. 19.

³⁶ See for example, First Haradinaj Detention Appeals Decision, para. 55; KSC-BC-2020-04, F00075/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Review of Detention of Pjetër Shala*, 10 September 2021, public, para. 19; KSC-BC-2020-07, F00143, Pre-Trial Judge, *Decision on Review of Detention of Hysni Gucati*, 24 February 2021, public, para. 17.

³⁷ SCCC 26 April 2017 Judgment, 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 Release Appeals 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.

crime within the jurisdiction of the SC. This is a condition *sine qua non* for the validity of the detained person's continued detention.³⁸

19. The SPO submits that the Pre-Trial Judge's finding of grounded suspicion in the Confirmation Decision and the Decision on Arrest still stands, and that no developments since those decisions detract from the Pre-Trial Judge's determination.³⁹

20. The Defence submits that the requirement under Article 41(6)(a) of the Law has not been fulfilled because the Pre-Trial Judge based his findings only on hearsay or circumstantial evidence of actions of the Accused.⁴⁰

21. The Pre-Trial Judge recalls that, in the Confirmation Decision, it was determined that, pursuant to Article 39(2) of the Law, there is a well-grounded suspicion that Mr Shala is criminally liable, under various forms of criminal responsibility, 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 and Articles 15(2) and 16(3) of the Law.⁴¹

22. As regards the Defence challenge as to the nature of the evidence upon which the Pre-Trial Judge found a grounded suspicion, the Pre-Trial Judge observes that (i) the evidentiary threshold under Article 41(6)(a) of the Law is lower than that applied in the Confirmation Decision or a judgment at trial;⁴² (ii) at this stage, the evidence must point only to one of several reasonable conclusions;⁴³ (iii) there is no

³⁸ KSC-BC-2020-04, F00045, Pre-Trial Judge, *Decision on Pjetër Shala's Request for Provisional Release* ("First P. Shala Detention Decision"), 23 June 2021, public, para. 14. See also ECtHR, *Merabishvili v. Georgia*, no. 72508/13, Judgment, 28 November 2017, para. 222.

³⁹ SPO Submissions, paras 16-17.

⁴⁰ Defence Submissions, paras 51-52.

⁴¹ Confirmation Decision, paras 101, 117, 129, 132, 136, 140, 144, 149. See also Decision on Arrest, para. 17.

⁴² Confirmation Decision, para. 24. See also Decision on Arrest, para. 17.

⁴³ Similarly, ICC, *Prosecutor v. Omar al Bashir*, ICC-02/05-01/09-73, *Judgment on the Appeal of the Prosecutor Against the "Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir"*, 3 February 2010, paras 1, 33, 39.

procedural bar to the introduction of or reliance on hearsay evidence in the SC legal framework;⁴⁴ and (iv) while the fact that hearsay evidence may be afforded less weight, this ultimately depends upon the infinitely variable circumstances which surround hearsay evidence.⁴⁵ In the absence of any concrete argument as to why the evidence relied upon is unreliable, the Pre-Trial Judge will not revisit the evidentiary findings entered in the Decision on Arrest. The trial is the most appropriate stage for the Defence to challenge the nature of this evidence.

23. Therefore, in the absence of any contrary intervening information or developments, the Pre-Trial Judge finds that there continues to be a grounded suspicion that Mr Shala has committed offences within the subject-matter jurisdiction of the SC within the meaning of Article 41(6)(a) of the Law.

D. NECESSITY OF DETENTION

24. 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.⁴⁶ In this regard, Article 41(6)(b) of the Law echoes the

⁴⁴ See KSC-BC-2020-05, F00494/RED3/COR, Trial Panel I, *Further Redacted Version of Corrected Version of Public Redacted Version of Trial Judgment ("Mustafa Trial Judgment")*, 16 December 2022, public, para. 44; KSC-BC-2020-07, Trial Panel II, *Public Redacted Version of the Trial Judgment*, 18 May 2022, public, para. 24.

⁴⁵ *Mustafa Trial Judgment*, para. 44. Similarly, ICC, *Prosecutor v. Ngudjolo Chui*, ICC-01/04-02/12-271-Corr, Appeals Chamber, *Judgment on the Prosecutor's Appeal Against the Decision of Trial Chamber II Entitled "Judgment Pursuant to Article 74 of the Statute"*, 7 April 2015, para. 226; *Prosecutor v. Jean-Pierre Bemba et al.*, ICC-01/05-01/13-2275-Red, Appeals Chamber, *Public Redacted Judgment on the Appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido Against the Decision of Trial Chamber VII Entitled "Judgment Pursuant to Article 74 of the Statute"*, 8 March 2018, para. 874; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Appeals Chamber, *Judgment*, 30 January 2015, para. 1307.

⁴⁶ 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 P. Shala Detention Decision*, para. 16; KSC-BC-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.

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.⁴⁷ Therefore, the Pre-Trial Judge must rely on case-specific reasoning and concrete grounds in deciding whether to continue detention.

25. The Pre-Trial Judge further recalls that, on the basis of the available evidence, the specific articulable grounds must support the "belief"⁴⁸ that any of the risks specified under the three limbs of Article 41(6)(b) of the Law exist, denoting an acceptance of the possibility, not the inevitability, of a future occurrence.⁴⁹ In other words, the standard to be applied is less than certainty, but more than a mere possibility of a risk materialising.⁵⁰ 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.⁵¹

26. 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,⁵² 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.⁵³ When assessing the

⁴⁷ SCCC 26 April 2017 Judgment, para. 113.

⁴⁸ See chapeau of Article 41(6)(b) of the Law.

⁴⁹ Decision on Arrest, para. 19. See *Veseli Interim Release Appeals Decision*, para. 17. Similarly, ICC, *Prosecutor v. Bemba Gombo et al.*, ICC-01/05-01/13-558, Appeals Chamber, *Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled "Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba'"*, 11 July 2014, para. 107.

⁵⁰ *Thaçi Interim Release Appeals Decision*, para. 22; *First P. Shala Detention Decision*, para. 16.

⁵¹ Decision on Arrest, para. 19. See *First P. Shala Detention Decision*, para. 20; KSC-BC-2020-06, F00177/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Hashim Thaçi's Application for Interim Release ("First Thaçi Interim Release Decision")*, 22 January 2021, public, para. 25, with further references.

⁵² *First Thaçi Interim Release Decision*, para. 21, with further references.

⁵³ See also *First P. Shala Detention Decision*, para. 17; *First Thaçi Interim Release Decision*, para. 21, with further references; similarly, ECtHR, *Aleksanyan v. Russia*, no. 46468/06, Judgment, 22 December 2008, para. 179.

relevant factors, the Pre-Trial Judge may not conduct a piecemeal assessment, but must weigh all relevant factors taken together.⁵⁴

27. Lastly, in relation to the grounds set forth in Article 41(6)(b)(ii)-(iii) of the Law, the Pre-Trial Judge emphasises that it suffices 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.⁵⁵

1. Risk of Flight

28. The SPO argues that (i) the increasingly strong unity of interests of the Accused with influential individuals from within the former senior Kosovo Liberation Army ("KLA") leadership, [REDACTED],⁵⁶ (ii) the prevailing climate of obstruction in connection with KLA-related criminal proceedings,⁵⁷ (iii) the seriousness of the charges and resultant possibility of a serious sentence in the event of conviction,⁵⁸ and (iv) the increasing disclosure of incriminating evidence,⁵⁹ all contribute to elevate Mr Shala's risk of flight.

29. The Defence submits that the threshold for risk of flight has not been reached, given that (i) the SPO's arguments are based on the assumption that the Accused wishes to evade justice;⁶⁰ (ii) it cannot be stated that the Accused has demonstrated a blatant disregard for the laws and rules of the SC as he is entitled to the presumption of innocence;⁶¹ (iii) [REDACTED];⁶² and (iv) the SPO's arguments regarding the risk of

⁵⁴ First *P. Shala* Detention Decision, para. 17; First *Thaçi* Interim Release Decision, para. 21, with further references.

⁵⁵ First *P. Shala* Detention Decision, para. 19; First *Thaçi* Interim Release Decision, para. 24.

⁵⁶ SPO Submissions, para. 19.

⁵⁷ SPO Submissions, para. 20.

⁵⁸ SPO Submissions, para. 21.

⁵⁹ SPO Submissions, paras 21, 23.

⁶⁰ Defence Submissions, paras 55-56, 59.

⁶¹ Defence Submissions, para. 55.

⁶² Defence Submissions, para. 56.

Mr Shala's relying on [REDACTED] and the prevailing climate of obstruction are vague and speculative.⁶³

30. As regards the risk of flight under Article 41(6)(b)(i) of the Law, the Pre-Trial Judge considers that Mr Shala's awareness of the seriousness of the charges against him and potential sentence in the event of a conviction⁶⁴ is one of the factors that has a bearing upon the assessment of the flight risk, and provides the Accused with a motive to evade justice.⁶⁵ 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.⁶⁶

31. Furthermore, the Pre-Trial Judge is attentive to the fact that the Accused has also gained increased insight into the evidence underpinning these charges through the ongoing disclosure process.⁶⁷ Such evidence includes an audio recording [REDACTED] wherein Mr Shala is implicated in the charged offences,⁶⁸ as well as [REDACTED].⁶⁹

32. In addition, the Pre-Trial Judge is of the view that Mr Shala, a former commander of Brigade 121 of the KLA, has strong ties with influential individuals from within the former senior KLA leadership, [REDACTED].⁷⁰ It is further recalled that Mr Shala is alleged to be criminally responsible, together with others, for offences

⁶³ Defence Submissions, paras 57-58.

⁶⁴ Decision on Arrest, para. 20.

⁶⁵ Decision on Arrest, para. 20. *Similarly*, First *Haradinaj* Detention Appeals Decision, para. 61.

⁶⁶ See KSC-BC-2018-01, F00503/RED, Single Judge, *Public Redacted Version of Reasons for Continued Detention*, 9 November 2023, public, para. 39; First *P. Shala* Detention Decision, para. 24. See also ECtHR, *Becciev v. Moldova*, no. 9190/03, Judgment, 4 October 2005, para. 58.

⁶⁷ See KSC-BC-2023-10, F000161/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Request for Joinder and Amendment of the Indictment* ("Joinder Decision"), 8 February 2024, public, para. 33.

⁶⁸ See KSC-BC-2023-11, Disclosure Package No. 2, 21 December 2023. See also SPO Submissions, paras 7, 23.

⁶⁹ See KSC-BC-2023-11, Disclosure Package No. 5, 19 January 2024. See also SPO Submissions, para. 8.

⁷⁰ Decision on Arrest, para. 20, with further references.

aimed at undermining the evidence against Mr Selimi, one of the four Accused in the case of *The Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi* (“Case 06”).⁷¹ In this context, the Pre-Trial Judge recalls previous findings [REDACTED].⁷² Accordingly, the Pre-Trial Judge is of the view that Mr Shala’s [REDACTED] cannot be ignored when assessing the risk that he may revert to other like-minded individuals to find the means and assets to abscond.⁷³ The same argument can be made in relation to [REDACTED]. The Pre-Trial Judge is attentive to the fact that Mr Shala (i) [REDACTED]; and (ii) [REDACTED].⁷⁴ The Defence argument that [REDACTED]⁷⁵ does not negate [REDACTED] or rule out the risk that Mr Shala may revert to other like-minded individuals to find the means and assets to abscond, [REDACTED].

33. The Pre-Trial Judge is further considerate of the fact that, in principle, Mr Shala has the opportunity to evade justice, including by traveling freely to jurisdictions beyond the reach of SC.⁷⁶

34. On the other hand, the Pre-Trial Judge observes that the SPO provides no further information about the Accused’s personal circumstances, such as his home, occupation, assets or family ties.⁷⁷

35. Therefore, in light of the above, and in the absence of any contrary intervening information, the Pre-Trial Judge concludes that the risk of flight in relation to Mr Shala continues to exist, even though it is moderate.

⁷¹ Confirmation Decision, paras 92-93, 97, 105, 115.

⁷² [REDACTED]; [REDACTED].

⁷³ Decision on Arrest, para. 20.

⁷⁴ Decision on Arrest, para. 20, with further references.

⁷⁵ Defence Submissions, para. 56.

⁷⁶ Decision on Arrest, para. 20. *See also* Submission of Indictment, para. 9.

⁷⁷ *See* ECtHR, *Becciev v. Moldova*, no. 9190/03, Judgment, 4 October 2005, para. 58.

2. Risk of Obstructing the Progress of the SC Proceedings

36. The SPO submits that Mr Shala continues to present a risk of obstructing SC proceedings.⁷⁸ In particular, the SPO asserts that (i) such obstruction could be magnified through or in conjunction with the KLA networks discussed above, [REDACTED];⁷⁹ and (ii) Mr Shala's receipt of highly sensitive witness-related information only increases the risk of obstruction.⁸⁰ It makes these arguments against the backdrop of the pervasive climate of fear and intimidation in Kosovo against witnesses and potential witnesses.⁸¹

37. The Defence submits that (i) the SPO's arguments are broad sweeping allegations for which there is no independently objective evidence;⁸² (ii) both Sabit Januzi ("Mr Januzi") and Ismet Bahtijari ("Mr Bahtijari"), the co-Accused in this case, are currently in detention, thereby removing the alleged means by which Mr Shala committed the criminal offences;⁸³ and (iii) the Accused has no incentive to compound his alleged criminal activity by taking any further acts of obstruction.⁸⁴

38. As regards the risk of obstructing proceedings under Article 41(6)(b)(ii) of the Law, the Pre-Trial Judge recalls his findings in the Confirmation Decision that Mr Shala acted in close coordination with Mr Januzi and Mr Bahtijari in relation to their approaches to Witness 1 with a view to dissuading the latter from further participating in SC proceedings as a witness.⁸⁵ Mr Shala appears to have purposefully targeted his co-Accused, [REDACTED], who would be better suited to persuade

⁷⁸ SPO Submissions, para. 32.

⁷⁹ SPO Submissions, para. 26.

⁸⁰ SPO Submissions, para. 28.

⁸¹ SPO Submissions, para. 27.

⁸² Defence Submissions, para. 61.

⁸³ Defence Submissions, para. 62.

⁸⁴ Defence Submissions, para. 62.

⁸⁵ Confirmation Decision, paras 92-93, 96-98, 115, 119-123.

Witness 1 to withdraw his testimony [REDACTED].⁸⁶ In the opinion of the Pre-Trial Judge, this shows that Mr Shala has both the means and intent to obtain and misuse witness-related information to obstruct and interfere with SC proceedings. The close coordination between Mr Shala and his co-Accused in relation to their approaches to Witness 1 is also indicative of the Accused's persistence in intimidation and obstruction efforts in the context of SC proceedings.⁸⁷

39. The Pre-Trial Judge is not persuaded by the Defence argument that the detention of Mr Januzi and Mr Bahtijari removes Mr Shala's means to commit further criminal offences.⁸⁸ The Pre-Trial Judge is of the view that Mr Shala's unity of interests with influential individuals from within the former KLA leadership, [REDACTED], and his likely access to their associated networks and resources, are important factors in assessing the risk of obstruction of proceedings.⁸⁹ In this context, the Pre-Trial Judge notes that the risk of obstruction need not materialise in Mr Shala personally tampering with evidence or exerting pressure on Witness 1, but may materialise, for instance, through further coordination with the associated network of [REDACTED].⁹⁰

40. Further to the above, the Pre-Trial Judge notes that Mr Shala has received increasing access to sensitive witness-related information as a result of the ongoing disclosure process,⁹¹ which, in the view of the Pre-Trial Judge, is another important factor in assessing the risk of obstruction of proceedings. Therefore, with the knowledge acquired so far and in the present circumstances, the Pre-Trial Judge is

⁸⁶ Decision on Arrest, para. 21.

⁸⁷ See Decision on Arrest, para. 21.

⁸⁸ Defence Submissions, para. 62.

⁸⁹ Similarly, KSC-BC-2023-10, F000116/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on Ismet Bahtijari's Request for Interim Release* ("Bahtijari Interim Release Decision"), 29 November 2023, public, para. 37; KSC-BC-2023-10, F00156, Pre-Trial Judge, *Decision on Review of Detention of Ismet Bahtijari* ("Bahtijari Detention Decision"), 29 January 2024, confidential, para. 24.

⁹⁰ Similarly, Bahtijari Interim Release Decision, para. 37.

⁹¹ See KSC-BC-2023-11, Disclosure Package No. 2, 21 December 2023; Disclosure Package No. 4, 10 January 2024; Disclosure Package No. 5, 19 January 2024; Disclosure Package No. 7, 1 February 2024.

also not convinced by the Defence's generic claim that the Accused has no incentive to commit further acts of obstruction. Rather, the Pre-Trial Judge is of the view that the risk of collusion for the purpose of obstructing the proceedings is particularly high.⁹²

41. Lastly, the Pre-Trial Judge assesses the above factors bearing in mind the pervasive climate of fear and intimidation in Kosovo against witnesses and potential witnesses of the SC.⁹³

42. Therefore, in light of the above, and in the absence of any contrary intervening information, the Pre-Trial Judge concludes that there continues to exist a risk that Mr Shala will obstruct the progress of SC proceedings.

3. Risk of Committing Further Crimes

43. The SPO submits that, considering that the relevant factors to be considered are the same as those with respect to the obstruction of proceedings, there are concrete and objective risks that Mr Shala may commit further crimes.⁹⁴

44. The Defence responds that the SPO submissions are based on the inference that there are concrete and objective risks that the Accused may commit further offences, for which it has provided no relevant and sufficient reasons.⁹⁵

45. As regards the further commission of crimes under Article 41(6)(b)(iii) of the Law, the Pre-Trial Judge recalls that, even though the existence of a risk of obstruction does not automatically translate into a risk of committing further offences, the factors underpinning the former are of relevance to the assessment of the latter in the

⁹² *Similarly, Bahtijari Detention Decision, para. 25. See also SPO Submissions, para. 30.*

⁹³ *Decision on Arrest, para. 21, with further references. Similarly, Bahtijari Detention Decision, para. 26.*

⁹⁴ *SPO Submissions, paras 33-34.*

⁹⁵ *Defence Submissions, paras 66-68.*

circumstances of the present case.⁹⁶ In particular, the Pre-Trial Judge finds that the Accused has the means and incentive to repeat the offences alleged to have been committed by him.⁹⁷

46. In light of the foregoing, and in the absence of any contrary intervening information, the Pre-Trial Judge concludes that the risk that Mr Shala will commit further crimes continues to exist.

4. Conclusion

47. As a result, the Pre-Trial Judge finds that there are articulable grounds to believe that Mr Shala 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. The Pre-Trial Judge will assess below whether these risks can be adequately mitigated by any conditions for his release.

E. CONDITIONAL RELEASE

48. The SPO submits that no modalities of conditional release can sufficiently mitigate the existing risks.⁹⁸ In particular, the SPO argues that (i) such risks can only be effectively managed through the communication monitoring framework at the SC Detention Facilities;⁹⁹ (ii) passport surrender and home confinement would be ineffective, since Mr Shala could remove any electronic monitoring devices and flee, legally or illegally, to a country outside the jurisdiction of the SC;¹⁰⁰ and (iii) a

⁹⁶ Decision on Arrest, para. 22. *See also* First *P. Shala* Detention Decision, para. 39; *Bahtijari* Detention Decision, para. 29.

⁹⁷ *See* paras 38-40 of the present decision.

⁹⁸ SPO Submissions, paras 1, 35, 41.

⁹⁹ SPO Submissions, paras 35, 37-38.

¹⁰⁰ SPO Submissions, para. 36.

monetary surety would be equally insufficient, considering Mr Shala's access to resources.¹⁰¹ The SPO further submits that the rejection of extremely robust combinations of conditions by the Pre-Trial Judge in the context of other cases has been confirmed by both the Court of Appeals and the Supreme Court.¹⁰²

49. The Defence submits that, in the event that the Pre-Trial Judge denies the unconditional release of the Accused, there are sufficient grounds for his conditional release.¹⁰³ The Defence asserts that Mr Shala would consent to the following conditions, together with attendance at all proceedings by video-conference: (i) condition of residence; (ii) not leaving his place of current residence except to comply with any order of the Court or any conditions of his bail; (iii) an electronically tagged curfew between the hours of 18:00-08:00; (iv) reporting to the Kosovo Police on Monday, Wednesday and Friday each week between the hours of 08:00-10:00; (v) not to be in possession of nor to apply for any international travel documents; (vi) not to approach any international transfer hub or any international border; (vii) 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/or (viii) payment of a monetary security of [REDACTED].¹⁰⁴ In the view of the Defence, the threshold for attaining the Article 41(6)(b) grounds will not be reached if one or more of the conditions, to which the Accused has consented, are imposed.¹⁰⁵

¹⁰¹ SPO Submissions, para. 36.

¹⁰² SPO Submissions, paras 39-40, with further references.

¹⁰³ Defence Submissions, para. 69.

¹⁰⁴ Defence Submissions, para. 70.

¹⁰⁵ Defence Submissions, para. 72.

50. The Pre-Trial Judge recalls that, when deciding on whether a person should be released or detained, the Pre-Trial Judge must consider alternative measures to prevent the risks in Article 41(6)(b) of the Law.¹⁰⁶

51. As regards the question of conditional release, the Pre-Trial Judge observes at the outset that the Defence merely lists some of the conditions agreed upon by Mr Shala. 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 Shala 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.¹⁰⁷

52. 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 Shala. In this regard, the Pre-Trial Judge positively notes the Accused's readiness to remain in house arrest at his residence, abide to an electronically-tagged curfew (albeit temporarily limited), report periodically to the Kosovo Police, give up possession of his travel documents, and/or not to approach any international transfer hub or any international border.

53. However, the Pre-Trial Judge finds that none of the conditions put forth by the Defence could limit the risk or 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 Shala 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 Shala's communications. In this regard, the Pre-Trial Judge

¹⁰⁶ As regards the obligation to consider "alternative measures", see SCCC 26 April 2017 Judgment, para. 114. See also ECtHR, *Buzadji v. the Republic of Moldova*, no. 23755/07, Judgment ("*Buzadji v. Moldova*"), 5 July 2016, para. 87; *Idalov v. Russia*, no. 5826/03, Judgment, 22 May 2012, para. 140.

¹⁰⁷ Similarly, *Bahtijari* Interim Release Decision, para. 50.

is particularly mindful of the fact that the Accused likely has access to the associated networks and resources of senior KLA leadership. Accordingly, should he be released, Mr Shala would have the motive, means and opportunity to exert pressure on Witness 1 [REDACTED], or to otherwise tamper with evidence. The Pre-Trial Judge considers that this risk can be effectively managed only through the communications monitoring regime available at the SC Detention Facilities.¹⁰⁸

54. Likewise, while the Pre-Trial Judge may, in principle, order Mr Shala to refrain from contacting Witness 1, [REDACTED], he is of the view that such a commitment can neither be enforced nor monitored. The Pre-Trial Judge considers 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.¹⁰⁹ 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. 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; (ii) the very reason for establishing the SC was that criminal proceedings against former KLA members could not be conducted in Kosovo; and (iii) the procedural framework and operational practice of the SC have been specifically designed to ensure, to the maximum extent possible, the protection

¹⁰⁸ Similarly, *Bahtijari* Interim Release Decision, para. 52, with further references.

¹⁰⁹ Similarly, KSC-BC-2020-06, IA010/F00008, Court of Appeals, *Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention*, 27 October 2021, confidential, para. 68. A public redacted version was filed on the same day, IA010/F00008/RED.

of witnesses, victims as well as others at risk with a view to implementing the mandate of the SC.¹¹⁰

55. For the same reasons, the Pre-Trial Judge considers that no *additional* reasonable conditions imposed by the Pre-Trial Judge¹¹¹ are available to adequately mitigate the existing risks.

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

F. PROPORTIONALITY OF DETENTION

57. The SPO submits that, in light of its arguments, the stage of proceedings, the progress and disclosure already made, and the framework and calendar set for pre-trial proceedings, Mr Shala's detention remains reasonable and proportional.¹¹² The Defence does not make submissions on this matter.

58. At the outset, the Pre-Trial Judge recalls the importance of the proportionality principle in the determination of the reasonableness of pre-trial detention, as reflected in Rule 56(2) of the Rules.¹¹³ In the present case, and observing that Mr Shala has been detained since 11 December 2023 only, the Pre-Trial Judge is of the view that no question of proportionality arises at this stage.

59. That being said, the Pre-Trial Judge notes that: (i) Mr Shala is charged with two counts of obstructing official persons in performing official duties and one count of

¹¹⁰ *Similarly, Bahtijari Interim Release Decision*, para. 53, with further references.

¹¹¹ 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.

¹¹² SPO Submissions, paras 1, 42.

¹¹³ 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.

intimidation during criminal proceedings, which carry a possible sentence of up to five years and ten years of imprisonment, respectively; (ii) the risks under Article 41(6)(b)(ii) and (iii) of the Law cannot be mitigated by the proposed conditions for release, house arrest or any additional conditions; and (iii) all required procedural steps relating to the pre-trial phase of the present case have been, are being or will be completed with a view to transmitting the case for trial by Friday, 3 May 2024.¹¹⁴ The Pre-Trial Judge considers that the proceedings are moving forward expeditiously, notably since (i) the SPO has already discharged its disclosure obligations under Rules 102(1)(a),¹¹⁵ 102(1)(b)¹¹⁶ and 103¹¹⁷ of the Rules, and has provided notice under Rule 102(3) of the Rules,¹¹⁸ (ii) the case against Mr Shala has been joined with that of his co-Accused;¹¹⁹ and (iii) a status conference will be held on Tuesday, 13 February 2024, where a timeline for the remainder of the pre-trial phase will be adopted.¹²⁰ The Pre-Trial Judge further recalls that, pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules, Mr Shala's detention shall be reviewed every two (2) months or as soon as a change in circumstances arises.

60. On this basis, the Pre-Trial Judge finds that the detention of Mr Shala has not become unreasonable within the meaning of Rule 56(2) of the Rules.

¹¹⁴ KSC-BC-2023-10, F00163, Pre-Trial Judge, *Order Setting the Date for Status Conference and for Submissions* ("Scheduling Order"), 8 February 2024, public, para. 14(6)(a).

¹¹⁵ See KSC-BC-2023-11, Disclosure Package No. 2, 21 December 2023; Disclosure Package No. 4, 10 January 2024; Disclosure Package No. 7, 1 February 2024.

¹¹⁶ See KSC-BC-2023-11, Disclosure Package No. 5, 19 January 2024.

¹¹⁷ See KSC-BC-2023-11, Disclosure Package No. 3, 21 December 2023; Disclosure Package No. 6, 26 January 2024.

¹¹⁸ See KSC-BC-2023-11, F00036, Specialist Prosecutor, *Prosecution's Rule 102(3) Notice*, 26 January 2024, public, with Annex 1, confidential.

¹¹⁹ Joinder Decision, para. 58(a).

¹²⁰ Scheduling Order, paras 13-16.

V. DISPOSITION

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

- a. **ORDERS** Mr Shala's continued detention;
- b. **ORDERS** Mr Shala, if he wishes to do so, to file submissions on the next review of detention by **Tuesday, 12 March 2024 at 16h00**, with responses and replies following the timeline set out in Rule 76 of the Rules; and
- c. **ORDERS** the SPO, should Mr Shala decide not to file any submissions by the aforementioned time limit, to file submissions on the next review of Mr Shala's detention by **Tuesday, 19 March 2024**, and Mr Shala, if he wishes to do so, to file his submissions by no later than **Tuesday, 26 March 2024**.



Judge Nicolas Guillou

Pre-Trial Judge

Dated this Friday, 9 February 2024

At The Hague, the Netherlands.