



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2018-01
Before: Single Judge Panel
Judge Nicolas Guillou
Registrar: Dr Fidelma Donlon
Date: 5 March 2024
Language: English
Classification: Public

Public Redacted Version of Decision on Review of Detention of Isni Kilaj

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THE SINGLE JUDGE,¹ pursuant to Articles 33(2), 41(6), (10) and (12) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), and Rule 57(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 2 November 2023, Isni Kilaj ("Mr Kilaj") was arrested pursuant to an order by the Specialist Prosecutor's Office ("SPO"),² and following the execution of a judicially authorised search and seizure of Mr Kilaj's residence(s), vehicle(s) and person aimed at seizing evidence of an offence within the meaning of Article 15(2) of the Law ("Search and Seizure Decision").³

2. On 3 November 2023, Mr Kilaj was transferred to the Specialist Chambers ("SC") Detention Facilities in The Hague, the Netherlands⁴ pursuant to an order for transfer issued by the Single Judge,⁵ as requested by the SPO.⁶

¹ KSCPR-2018, F00004, President, *Decision Assigning a Single Judge Pursuant to Article 33(2) of the Law*, 29 May 2018, public.

² KSC-BC-2018-01, F00489, Specialist Prosecutor, *Urgent Rule 52(1) Notification of Arrest of Isni Kilaj*, 2 November 2023, public; F00492/A01, Specialist Prosecutor, *Annex 1 to Prosecution Report on Arrest of Isni Kilaj*, 3 November 2023, confidential. A public redacted version was submitted on 8 November 2023, F00492/RED/A01/RED.

³ KSC-BC-2018-01, F00484, Single Judge, *Decision Authorising Search and Seizure and Special Investigative Measures*, 20 October 2023, strictly confidential and *ex parte*, with Annexes 1-2, strictly confidential. A confidential redacted version of the main filing was issued on 12 December 2023, F00484/CONF/RED.

⁴ KSC-BC-2018-01, F00493, Registrar, *Notification of Reception of Isni Kilaj in the Detention Facilities of the Specialist Chambers*, 3 November 2023, strictly confidential, with Annex 1, strictly confidential; F00495, Registrar, *Report on the Transfer of Isni Kilaj to the Detention Facilities*, 3 November 2023, strictly confidential and *ex parte*, with Annexes 1-2, strictly confidential and *ex parte*. A public redacted version of the main filing and confidential redacted versions of Annexes 1-2 were submitted on 8 November 2023, F00495/RED, F00495/RED/A01/CONF/RED, and F00495/RED/A02/CONF/RED, respectively.

⁵ KSC-BC-2018-01, F00491/COR, Single Judge, *Corrected Version of Decision on Transfer Order Pursuant to Arrest by the Specialist Prosecutor*, 3 November 2023, confidential, with Annex 1, confidential. A public redacted version of the main filing was issued on 5 November 2023, F00491/COR/RED.

⁶ KSC-BC-2018-01, F00490, Specialist Prosecutor, *Urgent Request for Transfer Order*, 2 November 2023, confidential. A public redacted version was submitted on 3 November 2023, F00490/RED.

3. On 6 November 2023, pursuant to a request by the SPO,⁷ the Single Judge ordered the continued detention of Mr Kilaj (“Decision on Continued Detention”),⁸ and issued reasons thereto on 9 November 2023 (“First Detention Decision”).⁹
4. On 5 January 2024, the Single Judge ordered Mr Kilaj’s continued detention (“Second Detention Decision”).¹⁰
5. On 11 January 2024, the Court of Appeals Panel upheld the First Detention Decision (“First Appeals Decision”).¹¹
6. On 12 February 2024, the SPO filed its submissions on the review of Mr Kilaj’s detention (“SPO Submissions”).¹² The Defence responded on 22 February 2024 (“Response”).¹³
7. On 26 February 2024, the Court of Appeals Panel upheld the Second Detention Decision (“Second Appeals Decision”).¹⁴

⁷ KSC-BC-2018-01, F00496, Specialist Prosecutor, *Prosecution Request for Continued Detention of Isni Kilaj*, 3 November 2023, strictly confidential and *ex parte*, with Annexes 1-2, strictly confidential and *ex parte*. Confidential redacted versions of the SPO request and annexes were submitted on the same day, F00496/CONF/RED, F00496/CONF/RED/A01, F00496/CONF/RED/A02, respectively. A public redacted version of the main filing was submitted on 7 November 2023, F00496/RED2.

⁸ KSC-BC-2018-01, F00499, Single Judge, *Decision on Continued Detention*, 6 November 2023, public, para. 15.

⁹ KSC-BC-2018-01, F00503, Single Judge, *Reasons for Continued Detention*, 9 November 2023, confidential. A public redacted version was issued on 13 November 2023, F00503/RED.

¹⁰ KSC-BC-2018-01, F00547, Single Judge, *Decision on Review of Detention of Isni Kilaj*, 5 January 2024, confidential. A public redacted version was issued on 18 January 2024, F00547/RED.

¹¹ KSC-BC-2018-01, IA004/F00006, Court of Appeals Panel, *Decision on Isni Kilaj’s Appeal Against Decision on Continued Detention*, 11 January 2024, confidential. A public redacted version was issued on the same day, IA004/F00006/RED.

¹² KSC-BC-2018-01, F00575, Specialist Prosecutor, *Prosecution Submissions on Review of Detention*, 12 February 2024, confidential.

¹³ KSC-BC-2018-01, F00589, Defence for Mr Kilaj, *Kilaj Response to Prosecution Submissions on Review of Detention*, 22 February 2024, confidential.

¹⁴ ¹⁴ KSC-BC-2018-01, IA005/F00005, Court of Appeals Panel, *Decision on Isni Kilaj’s Appeal Against Decision on Review of Detention*, 26 February 2024, confidential. A public redacted version was issued on the same day, IA005/F00005/RED.

II. SUBMISSIONS

8. The SPO submits that the continued detention of Mr Kilaj remains necessary and requests that he remain in detention.¹⁵ It submits that there has been no change in circumstances detracting from the established reasons for detention in the First Detention Decision.¹⁶ It maintains that, on the contrary, the basis for the grounded suspicion under Article 41(6)(a) of the Law has only strengthened since.¹⁷ It also avers that, [REDACTED], the risks set forth in Article 41(6)(b) of the Law have also increased.¹⁸ The SPO maintains that no modalities of conditional release are able to sufficiently mitigate the existing risks with respect to Mr Kilaj.¹⁹ The SPO reiterates its position that the previously proposed cash bail of EUR 30,000 would only minimally disincentivise Mr Kilaj from obstructing the proceedings and/or violating any release condition.²⁰ According to the SPO, Mr Kilaj's detention is proportionate at this time.²¹

9. The Defence responds that the SPO repeats its previous submissions with respect to the grounds for continued detention under Article 41(6)(a)-(b) of the Law and rejects them.²² In this respect, it recalls that (i) Mr Kilaj has lodged an appeal against the Second Detention Decision, and (ii) should the Court of Appeals Panel grant the appeal and order Mr Kilaj's provisional release, the SPO's submissions will become moot.²³ The Defence further repeats its previous submissions that there is no sufficient basis to conclude that there is a grounded suspicion that Mr Kilaj has committed offences under Article 15(2) of the Law.²⁴ The Defence further

¹⁵ SPO Submissions, paras 2, 12, 28.

¹⁶ SPO Submissions, para. 2.

¹⁷ SPO Submissions, paras 2, 13.

¹⁸ SPO Submissions, paras 2, 14, 18, 19.

¹⁹ SPO Submissions, para. 25.

²⁰ SPO Submissions, para. 22.

²¹ SPO Submissions, para. 26.

²² Response, paras 3-4.

²³ Response, para. 4.

²⁴ Response, para. 4.

contests the SPO's submission that the proposed cash bail of EUR 30,000 would not amount to a significant disincentive for Mr Kilaj to breach his release conditions and upholds its proposal for bail.²⁵ Lastly, the Defence contends that [REDACTED] and that [REDACTED] must render Mr Kilaj's continued detention less proportionate.²⁶

III. APPLICABLE LAW

10. 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 at 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 that the person has threatened to commit.

11. Pursuant to Article 41(10) of the Law, until a judgment is final or until release, upon expiry of the two (2) months from the last ruling on detention on remand, the 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.

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 his or her place of residence, prohibition on approaching specific places or persons, attendance at police station or other venue, and diversion. Pursuant to

²⁵ Response, paras 7-9.

²⁶ Request, paras 10-12.

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 Panel shall ensure that a person is not detained for an unreasonable period prior to the opening of the case. 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.

14. Pursuant to Rule 57(1) of the Rules, before the assignment of a Pre-Trial Judge pursuant to Article 33(1)(a) of the Law, the detention of a Suspect shall be reviewed by the Single Judge every two (2) months or at any time earlier upon request by the Suspect or the SPO, or *proprio motu*, where a change of circumstances since the last review has occurred. In addition to the grounds provided for in Article 41(6) of the Law, each request for an extension shall be justified by investigative measures to be taken by the SPO. The total duration of the detention under this provision shall not exceed one (1) year.

IV. DISCUSSION

A. APPLICABLE STANDARD

15. The Single Judge recalls that his obligation under Article 41(10) of the Law is to examine whether the reasons for detention on remand continue to exist,²⁷ 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) under Article 41(6)(a) of the Law; 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.²⁸ The duty to

²⁷ 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 Appeal"), 9 February 2021, public, para. 55.

²⁸ First Haradinaj Detention Appeal, para. 55. See also KSC-BC-2020-04, F00075/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Review of Detention of Pjetër Shala* ("Second Shala Detention Decision"), 10 September 2021, public, para. 19; F00224/RED, Pre-Trial Judge, *Public Redacted Version*

determine whether the circumstances underpinning detention still exist imposes on the Single Judge the task to, *proprio motu*, assess whether he is still satisfied that, at the time of the review and under the specific circumstances of the case when the review takes place, the detention of the person remains warranted.²⁹ The two (2)-month automatic review is not strictly limited to whether or not a change of circumstances occurred, but such a change can be determinative and shall be taken into consideration if raised by a Party or *proprio motu*.³⁰ Furthermore, the Single Judge may refer to findings in previous decisions if he is satisfied that the evidence or information underpinning those decisions still supports the findings made at the time of the review.³¹ The Single Judge is neither required to make findings on the factors already decided upon in the initial ruling on detention, nor to entertain submissions that merely repeat arguments that have already been addressed in earlier decisions.³²

16. The Single Judge likewise underscores that any analysis of Mr Kilaj's detention is duly considering his presumption of innocence. This means, as a consequence, that his detention cannot be taken lightly and that the SPO bears the burden of establishing that the detention of the person is necessary.³³ This means that the SPO

of *Decision on Review of Detention of Pjetër Shala* ("Sixth Shala Detention Decision"), 22 June 2022, public, para. 19.

²⁹ 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 Appeal"), 1 October 2021, public, para. 15. See also *Sixth Shala Detention Decision*, para. 19. Although these standards were established in the context of reviews of detention undertaken under Rule 57(2) of the Rules, the Single Judge sees no reason to depart therefrom for the purpose of the present review.

³⁰ See *Second Krasniqi Detention Appeal*, para. 16. See also *Sixth Shala Detention Decision*, para. 19.

³¹ KSC-BC-2020-04, IA003/F00005/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Review of Detention* ("Second Shala Detention Appeal"), 11 February 2022, public, para. 18. See also *Sixth Shala Detention Decision*, para. 19.

³² *First Haradinaj Detention Appeal*, para. 55; *Second Krasniqi Detention Appeal*, para. 17; *Second Shala Detention Appeal*, para. 18; *Sixth Shala Detention Decision*, para. 19.

³³ See, for example, 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-2020-06, F00177/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Hashim Thaçi's Application for Interim Release* ("First Thaçi Decision on Detention"), 22 January 2021, public,

must provide specific arguments and concrete evidence to establish that continued detention is necessary at the time of the review.³⁴

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 SC's jurisdiction. This is a condition *sine qua non* for the validity of the detained person's continued detention.³⁵ It suffices to say that the evidentiary threshold of "grounded suspicion"³⁶ need not be of the same level as those necessary to justify a conviction, or even the bringing of a charge.³⁷

18. The SPO recalls the Single Judge's findings in the First Detention Decision that there is a grounded suspicion that Mr Kilaj has committed offences under Article 15(2) of the Law and recalls that these findings have been upheld on appeal and further buttressed by additional evidence.³⁸ According to the SPO, the basis for grounded suspicion under Article 41 6(a) of the Law has only increased since the First Detention Decision.³⁹

19. The Defence avers that it does not have a precise idea of the offences [REDACTED].⁴⁰ It nevertheless repeats its previous submissions that the SPO did not adduce any evidence in support of its allegations that Mr Kilaj (i) revealed, or

para. 19, with further references. *See also* ECtHR, *Merabishvili v. Georgia*, no. 72508/13, Judgment ("*Merabishvili v. Georgia*"), 28 November 2017, para. 234.

³⁴ Sixth *Shala* Detention Decision, para. 19.

³⁵ First *Shala* Detention Decision, para. 14. *See also* ECtHR, *Merabishvili v. Georgia*, para. 222.

³⁶ *See* Article 19(1)(1.9) of the 2022 Kosovo Criminal Procedure Code, Code No. 08/L-032 ("*KCPC*"). *Similarly, see* Article 5(1)(c) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights in, *inter alia*, ECtHR, *Fox, Campbell and Hartley v. United Kingdom*, no. 1244/86; 12245/86; 12383/86, Judgment, 30 August 1990, para. 32; *Erdagöz v. Turkey*, no. 21890/93, Judgment, 22 October 1997, para. 51; *Ilgar Mammadov v. Azerbaijan*, no. 15172/12, Judgment, 22 May 2014, para. 88; *Selahattin Demirtaş (no. 2) v. Turkey*, no. 14305/17, Judgment, 22 December 2020, para. 314.

³⁷ ECtHR, *Merabishvili v. Georgia*, para. 184, with further references.

³⁸ SPO Submissions, para. 13.

³⁹ SPO Submissions, para. 13.

⁴⁰ Response, para. 5.

attempted to reveal, secret information and/or (ii) participated in a group of persons which by common action *in fact* obstructed or attempted to obstruct an official person in performing official duties, within the meaning of Articles 392 and 401(2) of the 2019 Kosovo Criminal Code, Code No. 06/L-074 (“KCC”).⁴¹ [REDACTED].⁴²

20. At the outset, the Single Judge notes the Defence’s contentions that it does not have a precise idea of the offences [REDACTED]. [REDACTED]. The Single Judge, however, recalls that the question of establishing “grounded suspicion”, as required by Article 41(6)(a) of the Law, embodies an assessment of specific facts and information that need not be conclusive or rise to the same level as that justifying a conviction or the bringing of a charge. For the purpose of determining whether Mr Kilaj’s detention is appropriate under Article 41(6)(a) of the Law, it suffices that the Single Judge finds a grounded suspicion that Mr Kilaj may have committed Article 15(2) offences, based on the material and information submitted by the SPO. This has been shared with the Defence.

21. In this regard, the Single Judge recalls that, in the First Detention Decision, he determined, under Article 41(6)(a) of the Law, that there is a grounded suspicion that Mr Kilaj has committed, alone or together with others, offences under Article 15(2) of the Law, namely those under Articles 392 (violating secrecy of proceedings) and 401 (obstructing official persons in performing official duties) of the KCC.⁴³ These findings rest on: (i) previous findings in the Search and Seizure Decision of a grounded suspicion that evidence of an offence under Article 15(2) of the Law can be found in the residence(s), vehicle(s), and/or on the person of Mr Kilaj, and that the search will result in the discovery and seizure thereof accordingly; as well as (ii) the Single Judge’s further considerations and findings

⁴¹ Response, para. 5.

⁴² [REDACTED].

⁴³ First Detention Decision, paras 24-32.

with respect to the confidential [REDACTED] material seized by the SPO during the search of Mr Kilaj's residence on 2 November 2023 ("Seized Material").⁴⁴

22. Specifically, the Single Judge found that a grounded suspicion exists that [REDACTED], as part of the Seized Material, were either intended or actually used for the purpose of interfering with the administration of justice, and that Mr Kilaj may have been involved in the commission of an offence under Article 15(2) of the Law.⁴⁵ The Single Judge also recalls that (i) in the First Appeals Decision, the Court of Appeals Panel upheld his findings of the First Detention Decision,⁴⁶ and (ii) in the Second Detention Decision, he found that the additional evidence provided by the SPO as a result of its ongoing investigation, has only strengthened such findings.⁴⁷

23. The Single Judge notes that the Defence's claims that the SPO has not adduced evidence to support the allegations that Mr Kilaj (i) revealed, or attempted to reveal, secret information and/or (ii) participated in a group of persons which by common action *in fact* obstructed or attempted to obstruct an official person in performing official duties, in the meaning of Articles 392 and 401(2) of the 2019 KCC, were raised and dismissed in the First Detention Decision.⁴⁸ Accordingly, they will not be entertained again in the present decision.

24. In light of the foregoing, in the absence of any contrary intervening information or development concerning the grounded suspicion established in the First Detention Decision, the Single Judge finds that the requirement set forth under Article 41(6)(a) of the Law continues to be met.

⁴⁴ First Detention Decision, paras 24-32.

⁴⁵ First Detention Decision, para. 24; Second Detention Decision, para. 36.

⁴⁶ First Appeals Decision, paras 17-34.

⁴⁷ Second Detention Decision, para. 34-36.

⁴⁸ First Detention Decision, paras. 27-31.

C. NECESSITY OF DETENTION

25. 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.⁴⁹ In this regard, Article 41(6)(b) of the Law echoes the 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.⁵⁰ Therefore, the Panel must rely on case-specific reasoning and concrete grounds in deciding to continue detention.⁵¹ The Single Judge further recalls that, on the basis of the available evidence, the specific articulable grounds must support the "belief"⁵² 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.⁵³ In other words, the standard to be applied is less than certainty, but more than a mere possibility of a risk materialising.⁵⁴ The Single Judge further observes that these grounds are in the alternative, and that the existence of one ground suffices to determine the necessity of detention.⁵⁵

⁴⁹ See Article 19(1.31) of the KCPC, 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, KSC-BC-2020-06, IA001/F00005, Court of Appeals Panel, *Decision on Kadri Veseli's Appeal Against Decision on Interim Release ("First Veseli Detention Appeal")*, 30 April 2021, public, para. 15.

⁵⁰ 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.

⁵¹ SCCC 26 April 2017 Judgment, para. 115; 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 ("First Thaçi Detention Appeal")*, 30 April 2021, public, para. 22. See also ECtHR, *Khudoyorov v. Russia*, no. 6847/02, Judgment ("*Khudoyorov v. Russia*"), 8 November 2005, para. 173; First *Shala* Detention Decision, para. 16.

⁵² See chapeau of Article 41(6)(b) of the Law.

⁵³ First *Shala* Detention Decision, para. 16; First *Thaçi* Detention Decision, para. 20, with further references.

⁵⁴ First *Veseli* Detention Appeal, para. 17; First *Shala* Detention Decision, para. 16.

⁵⁵ First *Shala* Detention Decision, para. 20; First *Thaçi* Detention Decision, para. 25.

26. As regards the nature of the assessment under Article 41(6)(b) of the Law, the Single Judge recalls that, while the evaluation involves an element of discretion,⁵⁶ 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.⁵⁷ When assessing the relevant factors, the Single Judge may not conduct a piecemeal assessment, but must weigh all relevant factors taken together.⁵⁸

27. Lastly, in relation to the grounds set forth in Article 41(6)(b)(ii)-(iii) of the Law, the Single 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.⁵⁹

1. Risk of Flight

28. The SPO recalls the Single Judge's previous finding that Mr Kilaj presents a moderate flight risk, that is nevertheless sufficient to necessitate his continued detention, and the considerations set out in this respect.⁶⁰ It adds that [REDACTED], the risk that he may flee the SC jurisdiction has increased, as his prospect of facing serious charges has become more likely.⁶¹ According to the SPO, the risk of flight found by the Single Judge continues therefore to exist.⁶²

29. As regards the flight risk under Article 41(6)(b)(i) of the Law, the Single Judge recalls that (i) Mr Kilaj's knowledge of potential serious charges, (ii) the severity of the potential sentence, (iii) his awareness that [REDACTED], and (iv) the evidence

⁵⁶ First *Thaçi* Detention Decision, para. 21, with further references.

⁵⁷ 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.

⁵⁸ First *Shala* Detention Decision, para. 17; First *Thaçi* Detention Decision, para. 21, with further references.

⁵⁹ First *Shala* Detention Decision, para. 19; First *Thaçi* Detention Decision, para. 24.

⁶⁰ SPO Submissions, para. 14.

⁶¹ SPO Submissions, para. 16.

⁶² SPO Submissions, para. 14.

adduced against him exceeds what he had previously foreseen on the basis of the material seized at his residence, are some of the factors that have a bearing upon the assessment of the flight risk.⁶³ In this regard, the Single Judge pays heed to the fact that, Mr Kilaj is aware that [REDACTED]. In addition, the Single Judge recalls his previous findings that Mr Kilaj would, in principle, have the means and opportunity to evade justice, including by traveling freely to jurisdictions beyond the reach of the SC, such as Albania, but not only.⁶⁴

30. The Single Judge also recalls the considerations favourable to Mr Kilaj concerning his settled family life and ties with the community, and his willingness to cooperate with the SPO on the day of his arrest, and continues to find that these factors only diminish, but do not eliminate the risk of flight.

31. In light of the above, and in the absence of any contrary intervening information, the Single Judge concludes that a moderate risk of flight in relation to Mr Kilaj continues to exist at present.

2. Risk of Obstructing the Progress of SC Proceedings

32. The SPO recalls the Single Judge's previous finding that there is a risk that Mr Kilaj will obstruct the progress of criminal proceedings, which was upheld on appeal in the First Appeals Decision.⁶⁵ The SPO further recalls that in the Second Detention Decision, the Single Judge found that the risk increased as a result of the developments in the SPO's investigation and of Mr Kilaj's increasing awareness of the allegations against him and the evidence in support thereof.⁶⁶ According to the

⁶³ First Detention Decision, para 39; Second Detention Decision, para. 43. *See, similarly*, First Haradinaj Detention Appeal, para. 61.

⁶⁴ First Detention Decision, para. 40; Second Detention Decision, para. 45.

⁶⁵ SPO Submissions, para. 16.

⁶⁶ SPO Submissions, para. 17.

SPO, [REDACTED] he has further incentive to continue his efforts to obstruct the progress of criminal proceedings.⁶⁷

33. As regards the risk of obstructing proceedings under Article 41(6)(b)(ii) of the Law, the Single Judge recalls that Mr Kilaj's possession of the Seized Material demonstrates a willingness to violate court orders and to intervene in proceedings to which he is not a Party.⁶⁸ The Single Judge also recalls that in the Second Detention Decision he was persuaded that, in light of the additional information that had emerged as a result of the SPO's investigation, and as Mr Kilaj has gained progressively knowledge of the allegations against him and the evidence in support thereof, the risk that he may obstruct proceedings in which he may be a Party is increased.⁶⁹

34. Further to the above, the Single Judge also notes that Mr Kilaj is now also aware that REDACTED, which is an important factor in assessing the risk of obstruction of proceedings. [REDACTED], the risk of collusion for the purpose of obstructing the proceedings remains particularly high.

35. The Single Judge further recalls that he makes the aforementioned findings, bearing in mind the pervasive climate of fear and intimidation in Kosovo against witnesses or potential witnesses of the SC.⁷⁰

36. In light of the above, the Single Judge finds that the risk that Mr Kilaj may obstruct the progress of criminal proceedings continues to exist.

3. Risk of Committing Further Crimes

⁶⁷ SPO Submissions, para. 18.

⁶⁸ First Detention Decision, para. 46; Second Detention Decision, para. 49.

⁶⁹ Second Detention Decision, para. 50.

⁷⁰ First Detention Decision, para. 47; Second Detention Decision, para. 51. *See also, amongst others, KSC-BC-2023-10, F00009/RED, Public Redacted Version of the Decision on Request for Arrest Warrants and Transfer Orders, 2 October 2023, public, para. 21; KSC-BC-2020-07, F00611/RED, Trial Panel II, Public Redacted Version of the Trial Judgment, 18 May 2022, public, paras 576-581.*

37. The SPO recalls that the Single Judge has previously considered that the factors underpinning the risk of obstruction of criminal proceedings are also relevant to the assessment of the risk of criminal offences.⁷¹ The SPO submits that these factors have increased.⁷²

38. As regards the further commission of crimes under Article 41(6)(b)(iii) of the Law, the Single Judge continues to be of the opinion that the relevant factors to be considered are the same as those recited with respect to the obstruction of the proceedings.⁷³ The Single Judge remains mindful that the existence of such a risk does not automatically translate into a risk of committing further crimes, but considers that the factors underpinning the former are of relevance to the assessment of the latter in the present case.⁷⁴ In particular, the Single Judge remains persuaded that there is a risk that Mr Kilaj will repeat the offences alleged to have been committed by him.

39. In light of the above, and in the absence of any contrary intervening information, the Single Judge considers that the risk that Mr Kilaj may commit further offences continues to exist.

4. Conclusion

40. As a result, the Single Judge finds that there are articulable grounds to believe that a moderate risk that Mr Kilaj may flee exists, and that there is a risk that he may obstruct the progress of the criminal proceedings, and commit further offences, thus necessitating Mr Kilaj's continued detention, in accordance with Article 41(6)(b) of the Law. The Single Judge will assess below whether these risks can be adequately addressed by imposing conditions in connection with the provisional release of Mr Kilaj.

⁷¹ SPO Submissions, para. 18.

⁷² SPO Submissions, para. 18.

⁷³ First Detention Decision, para. 52; Second Detention Decision, para. 55.

⁷⁴ First Detention Decision, para. 52. *See* First *Shala* Detention Decision, para. 39.

D. CONDITIONAL RELEASE

41. The SPO submits that no modalities of conditional release can sufficiently mitigate the existing risks. It recalls the Single Judge's previous findings that the risk of Mr Kilaj obstructing the proceedings or committing further offences can only be effectively managed through the communications monitoring regime available at the SC Detention Facilities.⁷⁵ The SPO also adds that the cash bail of EUR 30,000 proposed by the Defence would not overcome the challenges associated with provisional release.⁷⁶ According to the SPO, it would only minimally disincentivise Mr Kilaj from obstructing the proceedings and/or violating any imposed condition because: (i) Mr Kilaj, [REDACTED], could use a device belonging to a family member to convey a message, or ask a family member to do so, which would be difficult to detect; and (ii) given [REDACTED], any cash bail amount could be covered by associates whose interests are closely aligned in this instance.⁷⁷

42. The Defence responds that the SPO's contention that the proposed cash bail of EUR 30,000 would not amount to a significant disincentive for Mr Kilaj to obstruct proceedings because violations of any conditions of provisional release would be difficult to detect is flawed.⁷⁸ According to the Defence, there is always a risk [REDACTED] would report any attempt by Mr Kilaj to obstruct with the proceedings [REDACTED], a risk that Mr Kilaj would not take if confronted with the potential loss of EUR 30,000.⁷⁹ The Defence further adds that the SPO's argument that any cash bail amount could be covered by associates of whose interested are closely aligned with those of Mr Kilaj is unproved and speculative.⁸⁰ According to the Defence, the SPO does not adduce any evidence that

⁷⁵ SPO Submissions, paras 20-21.

⁷⁶ SPO Submissions, para. 22.

⁷⁷ SPO Submissions, para. 22.

⁷⁸ Response, para. 7.

⁷⁹ Response, para. 7.

⁸⁰ Response, para. 8.

Mr Kilaj has associates who are able or willing to forfeit EUR 30,000 in the event he were to violate conditions of provisional release, and/or that Mr Kilaj would not feel disincentivised from incurring any such debt.⁸¹ It also adds that the SPO bases such assertion on its prejudicial hostility against Mr Kilaj as a former member of the KLA, which according to the Defence infringes on Mr Kilaj's presumption of innocence.⁸²

43. The Single Judge recalls that, when deciding on whether a person should be released or detained, he must consider all proposed and alternative measures to prevent the risks in Article 41(6)(b) of the Law.⁸³

44. Regarding the risk of flight, the Single Judge recalls that he has previously found that the conditions proposed by the Defence could mitigate the risk of flight in relation to Mr Kilaj.⁸⁴ Noting that the SPO and the Defence do not make (new) submissions in this respect, the Single Judge finds that the conditions proposed by the Defence continue to sufficiently address the risk of flight in relation to Mr Kilaj.

45. However, as regards the risk of obstructing the progress of SC proceedings or committing further offences, the Single Judge remains persuaded that none of the conditions put forth by the Defence, nor any additional conditions imposed by the Single Judge, could adequately restrict Mr Kilaj's ability to obstruct the progress of SC proceedings and commit further offences.⁸⁵ The Single Judge is particularly mindful that, by virtue of possessing the Seized Material, Mr Kilaj has knowledge of [REDACTED], as well as other confidential [REDACTED] information that pertains to SC proceedings.⁸⁶ The Single Judge remains of the view that, were Mr Kilaj to be released, and despite his previous assurances to the contrary, he

⁸¹ Response, para. 8.

⁸² Response, para. 9.

⁸³ 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; ECtHR, *Idalov v. Russia*, no. 5826/03, Judgment, 22 May 2012, para. 140.

⁸⁴ First Detention Decision, para. 59; Second Detention Decision, para. 62.

⁸⁵ First Detention Decision, paras 60-63; Second Detention Decision, paras 63-67.

⁸⁶ First Detention Decision, para. 60; Second Detention Decision, para. 63.

could use a device belonging to a family member to convey a message, or ask a family member to do so, whether by means of such a communications device, the internet, or orally.

46. For the foregoing reasons, the Single Judge remains convinced that, the risk of Mr Kilaj obstructing the proceedings and committing further offences, including witness interference and destruction of, or otherwise tampering with evidence, can be effectively managed only through the communications monitoring regime available at the SC Detention Facilities.⁸⁷ The Single Judge further recalls and assesses the aforementioned findings bearing in mind that: (i) according to prior rulings in case KSC-BC-2020-06, the Kosovo Police does not have the capacity to implement corresponding measures that sufficiently mitigate the existing risks;⁸⁸ (ii) the very reason for establishing the SC was that criminal proceedings against former KLA members could not be conducted in Kosovo;⁸⁹ 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.⁹⁰

47. As to the proposed EUR 30,000 bail as a disincentive for Mr Kilaj's potential attempts to obstruct the proceedings and/or committing further offences, the Single Judge notes that this matter has already been raised and considered in the Second

⁸⁷ First Detention Decision, para. 60; Second Detention Decision, para. 64. *See, similarly*, First Shala Detention Decision, para. 46. *Similarly*, 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*, 20 August 2021, public, para. 61; 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.

⁸⁸ *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* ("Third Krasniqi Detention Decision"), 26 November 2021, public, para. 77; IA016/F00005/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention*, 25 March 2022, public, paras 28-36.

⁸⁹ Third *Krasniqi* Detention Decision, para. 80, with further references.

⁹⁰ Second Detention Decision, para. 64. *See also* Third *Krasniqi* Detention Decision, para. 80, with further references. *See, similarly*, Seventh *Shala* Detention Decision, para. 33.

Detention Decision and in the Second Appeals Decision.⁹¹ While it need not be considered any further,⁹² the Single Judge recalls, for the sake of completeness, that the proposed EUR 30,000 bail is not sufficient to address the risks of Article 41(6)(b)(ii)-(iii) of the Law because Mr Kilaj's apprehension to lose such amount in case of breach of the conditions would not overcome the challenges associated with these risks, as recalled in paragraphs 45 and 46.⁹³ In the Single Judge's view, the additional arguments presented by the Parties do not reveal any change in the circumstances of the case as to warrant a further assessment of this matter.⁹⁴

48. For the same reasons, the Single Judge remains also persuaded that no *additional* reasonable conditions, imposed by the Single Judge,⁹⁵ are available to adequately mitigate the existing risks.

49. Accordingly, the Single Judge concludes that the conditions for Mr Kilaj's provisional release proposed by the Defence remain insufficient to adequately mitigate the risks under Article 41(6)(b)(ii)-(iii) of the Law.

⁹¹ Second Detention Decision, para. 65; Second Appeals Decision, paras 16-23, 32-34.

⁹² See, similarly, First *Haradinaj* Detention Appeal, para. 55; Second *Krasniqi* Detention Appeal, para 17; Second *Shala* Detention Decision paras 41-42; KSC-BC-2020-04, F00105/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Review of Detention of Pjetër Shala*, 10 November 2021, public, para 38; 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*, 20 August 2021, public, paras 53-58.

⁹³ Second Detention Decision, para. 65; Second Appeals Decision, paras 16-23, 32-34.

⁹⁴ See KSC-CC-PR-2020-09, F00006, Specialist Chamber of the Constitutional Court, *Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020*, 22 May 2020, public, para. 67.

⁹⁵ See KSC-BC-2020-06, IA017/F00011, Court of Appeals Panel, *Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention*, 5 April 2022, confidential, para. 51. A public redacted version was issued on the same day, IA017/F00011/RED.

E. PROPORTIONALITY OF DETENTION

50. The SPO submits that Mr Kilaj's detention remains reasonable and proportional.⁹⁶

51. The Defence responds that [REDACTED] and invites the Single Judge to [REDACTED].⁹⁷ According to the Defence, if (i) [REDACTED], and (ii) [REDACTED], this must render Mr Kilaj's continued detention less proportionate.⁹⁸

52. At the outset, the Single Judge recalls the importance of the proportionality principle in the determination of the reasonableness of pre-trial detention.⁹⁹ Mindful of Rule 57(1) of the Rules, the Single Judge notes that, since Mr Kilaj's arrest, the SPO has progressively taken additional investigative steps, and provided further evidence and details on the facts at issue.¹⁰⁰ The Single Judge also positively notes that [REDACTED].¹⁰¹ The Single Judge recalls that [REDACTED].¹⁰²

53. As regards the Defence's request to the Single Judge to [REDACTED], the Single Judge observes that [REDACTED].¹⁰³ Accordingly, the Single Judge considers that the Defence allegation of [REDACTED].¹⁰⁴

54. Furthermore, the SC legal framework expressly foresees [REDACTED].¹⁰⁵ In the present case, the Single Judge pays heed to the fact that, while Mr Kilaj has been detained since November 2023, progress in the investigation have been made and

⁹⁶ SPO Submissions, para. 26.

⁹⁷ Response para. 11.

⁹⁸ Response, paras 11-12.

⁹⁹ KSC-BC-2020-07, IA001/F00005, Court of Appeals Panel, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, ("First Gucati Detention Appeal"), 9 December 2020, public, paras 72-73.

¹⁰⁰ Second Detention Decision, para. 69.

¹⁰¹ [REDACTED].

¹⁰² [REDACTED].

¹⁰³ [REDACTED].

¹⁰⁴ Response, paras 11-12.

¹⁰⁵ [REDACTED].

[REDACTED]. Moreover, the Single Judge recalls, pursuant to Article 41(10) of the Law and Rule 57(1) of the Rules, Mr Kilaj's detention shall be reviewed every two (2) months.

55. Lastly, when considering the proportionality of Mr Kilaj's detention, the Single Judge remains also particularly attentive of the fact that the risks of obstruction and the commission of further offences, as found in this decision, remain and cannot be mitigated by any proposed or additional conditions.¹⁰⁶

56. In light of the foregoing, the Single Judge finds that the detention of Mr Kilaj has not become unreasonable within the meaning of Rule 56(2) of the Rules.

V. CLASSIFICATION

57. The Single Judge notes that both Parties classified their submissions confidential, without submitting at the same time a public redacted version thereof,¹⁰⁷ contrary to what was ordered in the Second Detention Decision.¹⁰⁸ The Single Judge underlines, once again, that the proceedings before the SC are governed by the principle of publicity and reminds the Parties to comply with the Single Judge's direction in this regard.

VI. DISPOSITION

58. For the above-mentioned reasons, the Single Judge hereby:

- a. **ORDERS** Mr Kilaj's continued detention;
- b. **ORDERS** the SPO to submit a public redacted version of the SPO Submissions by Friday, **8 March 2024**, or to indicate that its filing may be reclassified as public;

¹⁰⁶ *Supra*, paras 32-36, 37-39.

¹⁰⁷ Despite its undertaking, the SPO did not submit a public redacted version of its submissions, *see* SPO Submissions, para. 27.

¹⁰⁸ Second Detention Decision, para. 71.

- c. **ORDERS** the Defence to file a public redacted version of the Response by Friday, **8 March 2024**, or to indicate that its filing may be reclassified as public;
- d. **ORDERS** the Defence, if it wishes to do so, to file submissions on the next review of detention by **Friday, 5 April 2024**, with responses and replies following the timeline set out in Rule 76 of the Rules; and
- e. **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 April 2024**, with the Defence filing its response by **Monday, 22 April 2024**, if it so wishes.



Judge Nicolas Guillou

Single Judge

Dated this Tuesday, 5 March 2024

At The Hague, the Netherlands