



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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

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

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

Date: 14 March 2024

Language: English

Classification: Public

**Public redacted version of 'Prosecution response to 'BAHTIJARI REVIEW OF
DETENTION SUBMISSIONS''**

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I. INTRODUCTION

1. Pursuant to Article 41 of the Law¹ and Rule 57 of the Rules,² the Specialist Prosecutor's Office ('SPO') makes the following submissions in support of the need for the continued detention of Ismet Bahtijari. The Pre-Trial Judge has previously held that Bahtijari's detention is justified on multiple bases, that no conditions short of detention in the Kosovo Specialist Chambers ('KSC') detention facilities would be sufficient to minimise the risks, and that the detention period—taking all relevant circumstances into account—is reasonable. Since the most recent determination of the Pre-Trial Judge on 29 January 2024,³ there has been no change in circumstances that merits deviating from that determination. Indeed, continued disclosure and the steady progression of the case continue to give Bahtijari further access to sensitive information in the case against him and reinforce the necessity and reasonableness of detention.

II. PROCEDURAL HISTORY

2. On 29 January 2024, the Pre-Trial Judge issued his Decision denying Bahtijari's request for interim release.

3. On 8 February 2024, the Pre-Trial Judge joined the indictments charging Bahtijari and his two co-Accused under case KSC-BC-2023-10.⁴ The SPO has since harmonized

¹ Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

³ Public Redacted Version of Decision on Review of Detention of Ismet Bahtijari, KSC-BC-2023-10/F00156/RED, 29 January 2024 ('Decision').

⁴ Public Redacted Version of Decision on Request for Joinder and Amendment of the Indictment, KSC-BC-2023-10/F00161/RED, 8 February 2024 ('Joinder Decision').

disclosure between the three Accused⁵ and submitted, *inter alia*, an amended indictment,⁶ and its Pre-Trial Brief (with accompanying materials).⁷

4. On 13 February 2024, a status conference was held, during which the Pre-Trial Judge indicated that transfer of the case file to the Trial Panel would be addressed at the next status conference,⁸ scheduled for 22 March 2024.

5. On 1 March 2024, Bahtijari filed the Defence Submission requesting his release from detention.⁹

III. SUBMISSIONS

6. The Pre-Trial Judge has noted the law applicable to deciding such matters as set out in Article 41 of the Law, and Rules 56 and 57.¹⁰

7. Since the most recent Decision, there have been no developments that diminish the factors supporting the need for and reasonableness of detention. Indeed, the continued progression of the case and attendant disclosure of sensitive information in the case against Bahtijari augment the necessity of detention.

8. These highly relevant issues are largely ignored by Bahitjari, who instead repeatedly references his possible health conditions and funding issues, without connecting these to

⁵ See Disclosure Packages 16-18, disclosed on 16 February 2024.

⁶ See Submission of amended Indictment, KSC-BC-2023-10/F00176, 16 February 2024 ('Indictment Submission').

⁷ See Submission of Prosecution Pre-Trial Brief, witness and exhibit lists, and Rule 109(c) chart, KSC-BC-2023-10/F00177, 16 February 2024 ('Pre-Trial Brief Package').

⁸ Transcript (Status Conference), 13 February 2024, p.188.

⁹ BAHTIJARI REVIEW OF DETENTION SUBMISSIONS, KSC-BC-2023-10/F00195, 1 March 2024, Confidential ('Defence Submission').

¹⁰ Decision, KSC-BC-2023-10/F00156/RED, paras 5-8.

any relevant basis for release from detention¹¹ or providing any supporting documentation or other substantiation for his ill-defined claims.¹² Moreover, Bahtijari relies on misstatements or misrepresentations of fact or law.

9. For instance, detainees at the KSC detention facilities enjoy at least the same standards of health care as are available in the Host State,¹³ including the availability of specialist treatment¹⁴ and independent medical specialists.¹⁵ Therefore, to any extent necessary to his well-being, the expert assessment repeatedly invoked by Bahtijari is, in fact, currently fully available to him in his present location, and irrespective of the availability of defence funding from the Kosovo Ministry of Justice. Bahtijari has not specified how the medical care currently available to him falls short.¹⁶

A. GROUNDED SUSPICION

10. Article 41(6)(a) requires a grounded suspicion that the detained person has committed a crime within the jurisdiction of the KSC.¹⁷ There remains a grounded suspicion that Bahtijari has done so.¹⁸ In the Confirmation Decision, the Pre-Trial Judge determined that there is a suspicion that Bahtijari is liable for intimidation during criminal proceedings and obstructing official persons in performing official duties within

¹¹ See Defence Submission, KSC-BC-2023-10/F00195, para.3 [REDACTED], para.5 [REDACTED], para.20 [REDACTED].

¹² See Defence Submission, KSC-BC-2023-10/F00195, paras 7-8.

¹³ Rules of Detention, KSC-BD-08-Rev1, 23 September 2020 ('Rules of Detention'), Detention Rule 30(2). *Contra* Defence Submission, KSC-BC-2023-10/F00195, paras 16, 21, 35, 39. This includes interpretation being available to enable the Detainee to communicate freely (Detention Rule 8(2)). See also ICTY, *Prosecutor v. Sainović et al.*, Case No. IT-05-87-A, Decision on Vladimir Lazarević's Motion for Temporary Provisional Release on Compassionate Grounds, 17 May 2010.

¹⁴ Rules of Detention, KSC-BD-08-Rev1, Detention Rule 32.

¹⁵ Rules of Detention, KSC-BD-08-Rev1, Detention Rule 33.

¹⁶ [REDACTED]. See Defence Submission, KSC-BC-2023-10/F00195, para.19.

¹⁷ Decision, KSC-BC-2023-10/F00156/RED, para.11.

¹⁸ Decision, KSC-BC-2023-10/F00156/RED, para.14.

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,¹⁹ to a standard that exceeds that required for detention based on ‘grounded suspicion.’²⁰ Nothing has occurred since the Confirmation Decision was filed that would detract from the Pre-Trial Judge’s determination.²¹ Indeed, it has only been reinforced that there remains a well-grounded suspicion that Bahtijari has committed crimes within the KSC’s jurisdiction.²²

B. DETENTION IS JUSTIFIED UNDER ALL ARTICLE 41(6)(B) FACTORS

i. Risk of Flight (Article 41(6)(b)(i))

11. The Pre-Trial Judge has previously concluded that Bahtijari presents a moderate risk of flight.²³ Bahtijari is aware of the serious confirmed charges against him, the possible lengthy prison sentence that may result therefrom, and—through the ongoing disclosure process—he is gaining more and more knowledge about the evidence to be presented against him in relation to those crimes.²⁴ In particular, since the last review of detention, Bahtijari has received an additional disclosure package and been informed that transfer of the case to the Trial Panel would be addressed at the upcoming status conference.

¹⁹ Confirmation Decision, KSC-BC-2023-10/F00008/RED/COR, paras 95, 111, 123, 126, 131, 135, 139, 144.

²⁰ Decision, KSC-BC-2023-10/F00156/RED, para.13.

²¹ *Contra* Defence Submission, KSC-BC-2023-10/F00195, para.4.

²² See Prosecution submission pertaining to periodic detention review of Ismet Bahtijari, KSC-BC-2023-10/F00147, 15 January 2024, Confidential, para.9; Consolidated Prosecution response to Bahtijari Defence submissions on detention on remand, KSC-BC-2023-10/F00089, 3 November 2023, Confidential, paras 18-19.

²³ Decision, KSC-BC-2023-10/F00156/RED, para.22.

²⁴ See Decision, KSC-BC-2023-10/F00116/RED, para.20; see also *See Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Rexhep Selimi’s Application for Interim Release, KSC-BC-2020-06/F00179/RED, 22 January 2021, para.31.

Further, the Pre-Trial Judge has also noted that Bahtijari would have both the means and opportunity to flee if released.²⁵

12. Bahtijari responds by reiterating arguments already considered by the Pre-Trial Judge,²⁶ along with the unsupported and self-serving contention that [REDACTED].²⁷ None of this meaningfully rebuts the finding that Bahtijari presents a risk of flight, especially given the Pre-Trial Judge's prior determination.

ii. Risk of Obstruction of Proceedings (Article 41(6)(b)(ii))

13. Bahtijari continues to present a risk of obstructing the proceedings. The Pre-Trial Judge has previously concluded that the risk that Bahtijari will obstruct the progress of KSC proceedings continues to exist.²⁸

14. The Pre-Trial Judge recalled his previous conclusions, in particular, that (i) Bahtijari has both the motive and the means to obtain and misuse witness-related information to obstruct and interfere with KSC proceedings, including by exerting pressure on Witness 1 [REDACTED] to dissuade him from participating as an SPO witness in KSC proceedings; (ii) Bahtijari's increased opportunity to directly interfere with Witness [REDACTED]; (iii) Bahtijari's unity of interests with influential individuals from within the former KLA leadership, such as Haxhi Shala [REDACTED], and his likely access to their associated networks and resources; and (iv) Bahtijari's proneness to following directions from more senior individuals in the KLA hierarchy, and his persistence in intimidation and obstruction efforts in the context of KSC proceedings, as evidenced by

²⁵ Decision, KSC-BC-2023-10/F00156/RED, para.20.

²⁶ See Defence Submission, KSC-BC-2023-10/F00195, paras 17-19; Decision, KSC-BC-2023-10/F00156/RED, para.21.

²⁷ See Defence Submission, KSC-BC-2023-10/F00195, para.23.

²⁸ Decision, KSC-BC-2023-10/F00156/RED, para.27.

the close coordination between Shala, Januzi and Bahtijari in their approaches to Witness 1.²⁹

15. Further to the above, the Pre-Trial Judge has also noted that, as a result of the ongoing disclosure process, Bahtijari has received increasing access to sensitive witness-related information, which is an important factor in assessing the risk of obstruction of proceedings.³⁰ With the knowledge acquired so far, in the present circumstances, the risk of collusion for the purpose of obstructing the proceedings is particularly high.³¹

16. The Pre-Trial Judge assessed the above factors against the backdrop of the pervasive climate of fear and intimidation in Kosovo against witnesses and potential witnesses of the KSC,³² which the Court of Appeals has agreed is a relevant 'contextual consideration.'³³ Similar findings were made in the *Mustafa* Trial Judgment³⁴ and the *Gucati and Haradinaj* Appeal Judgment.³⁵ The Trial Panel in KSC-BC-2020-07 ('Case 07') considered that 'witness protection has continued to be a live and critical issue in Kosovo,'³⁶ and credited the testimony of defence expert Robert Reid, who remarked that,

²⁹ Decision, KSC-BC-2023-10/F00156/RED, para.24.

³⁰ Decision, KSC-BC-2023-10/F00156/RED, para.25.

³¹ Decision, KSC-BC-2023-10/F00156/RED, para.25.

³² Decision, KSC-BC-2023-10/F00156/RED, para.26.

³³ *Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention, KSC-BC-2020-06/IA017/F00011/RED, 5 April 2022, paras 41-48; *Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, KSC-BC-2020-06/IA014/F00008/RED, 31 March 2022, para.50; *Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, KSC-BC-2020-06/IA015/F00005/RED, 25 March 2022, para.43.

³⁴ *Specialist Prosecutor v. Mustafa*, Further Redacted Version of Corrected Version of Public Redacted Version of Trial Judgment, KSC-BC-2020-05/F00494/RED3/COR, 16 December 2022 ('*Mustafa* Trial Judgment'), para.57.

³⁵ *Specialist Prosecutor v. Gucati and Haradinaj*, Appeal Judgment, KSC-CA-2022-01/F00114, 2 February 2023 (*Gucati and Haradinaj* Appeal Judgment), para.438 (quoting KSC-BC-2020-07, Transcript, 18 May 2022, pp.3858-3859).

³⁶ *Specialist Prosecutor v. Gucati and Haradinaj*, Public Redacted Version of the Trial Judgment, KSC-BC-2022-01/F00611/RED, 18 May 2022 ('Case 7 Judgment'), para.579.

in over 20 years in the field, he had never seen witness intimidation on the level that exists in Kosovo.³⁷

17. In this regard, the SPO notes that, as held by the Trial Panel in Case 07, 'the mere fact that the Accused is entitled to disclosure of relevant material does not mean that the Panel ought to ignore the risks that come with such disclosure, especially in the context of conditional release.'³⁸

iii. Risk of Criminal Offences (Article 41(6)(b)(iii))

18. In previously finding that Bahtijari may commit further crimes, the Pre-Trial Judge recalled 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 circumstances of the present case.³⁹

19. Additionally, Trial Panel II in KSC-BC-2020-06 ('Case 06') has held that especially once information regarding sensitive witnesses has been disclosed to the Defence, any risk of the further commission of crimes must be avoided.⁴⁰ Therefore, and especially in

³⁷ Case 7 Judgment, KSC-BC-2020-07/F00611/RED, para.577.

³⁸ *Specialist Prosecutor v. Gucati and Haradinaj*, Public Redacted Version of Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07/F00507/RED, 21 December 2021, para.36.

³⁹ Decision, KSC-BC-2023-10/F00156/RED, paras 29-30.

⁴⁰ See e.g., *Specialist Prosecutor v. Thaçi et al.*, Decision on Periodic Review of Detention of Hashim Thaçi, KSC-BC-2020-06/F02125, 15 February 2024, para.26; *Specialist Prosecutor v. Thaçi et al.*, Decision on Periodic Review of Detention of Kadri Veseli, KSC-BC-2020-06/F02126, 15 February 2024, para.27.

light of continuing disclosure, the unacceptable risk for the commission of further crimes mandates Bahtijari's continued detention.

20. None of the entirely conclusory assurances of Bahtijari to the contrary⁴¹ meaningfully address these considerations, nor is there any reason to depart from the previous determination.

C. NO MODALITIES OF CONDITIONAL RELEASE ARE ABLE TO SUFFICIENTLY MITIGATE THE RISKS

21. As the Pre-Trial Judge has previously concluded, the relevant risks can only be effectively managed at the KSC's detention facilities.⁴² Specifically regarding the risk of flight, the Pre-Trial Judge had previously found that the conditions proposed by Bahtijari could sufficiently mitigate this risk.⁴³ However, this finding should be reconsidered given the recent relevant development of travel to the EU without a visa now being possible for Kosovo citizens.⁴⁴

22. In any case, the Pre-Trial judge found that none of Bahtijari's proposed conditions for release, nor any additional measures foreseen in Article 41(12), could sufficiently mitigate the existing risks related to obstruction and the commission of further crimes.⁴⁵ In this regard, the Pre-Trial Judge was particularly mindful of the fact that Bahtijari [REDACTED] who likely has access to the associated networks of Shala [REDACTED],

⁴¹ See Defence Submission, KSC-BC-2023-10/F00195, paras 32-34.

⁴² Decision, KSC-BC-2023-10/F00156/RED, paras 36-37.

⁴³ Decision, KSC-BC-2023-10/F00156/RED, para.34. Neither this finding nor the relevant conditions are invoked by Bahtijari, rather a comparison is made to a similar ruling and conditions in KSC-BC-2020-07 (see Defence Submission, KSC-BC-2023-10/F00195, paras 26-32)

⁴⁴ European Commission, 'Visa-free travel for Kosovo citizens to the EU', 3 January 2024, accessed at https://home-affairs.ec.europa.eu/news/visa-free-travel-kosovo-citizens-eu-2024-01-03_en#:~:text=As%20of%201%20January%202024,Kosovo%20without%20issuing%20a%20visa.

⁴⁵ Decision, KSC-BC-2023-10/F00156/RED, paras 34-36.

and should he be released, would have the motive, means and opportunity to exert pressure on Witness 1 [REDACTED] to dissuade him from participating in the proceedings, or to otherwise tamper with evidence.⁴⁶

23. The Pre-Trial Judge recognized that while the risk of illicit messages and instructions cannot be entirely eliminated, the measures in place at the KSC detention facilities, viewed as a whole, provide robust assurances against unmonitored visits and communications with family members and pre-approved visitors with a view to minimising the risks of obstruction and commission of further crimes.⁴⁷ In this regard, the Pre-Trial Judge and the Registrar, who have unrestricted access to confidential information concerning witnesses and victims, may take action more promptly than other authorities acting under a distinct framework.⁴⁸

24. The Pre-Trial Judge has also recognized that (i) previous rulings in Case 06 have found that the Kosovo Police do not have the capacity to implement corresponding measures that sufficiently mitigate the existing risks; (ii) the very reason for establishing the KSC was that criminal proceedings against former KLA members could not be conducted in Kosovo; and (iii) the procedural framework and operational practice of the KSC 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 KSC.⁴⁹

25. Bahtijari does not meaningfully engage with these findings,⁵⁰ and nothing has occurred since the Pre-Trial Judge's previous determination warranting a different

⁴⁶ Decision, KSC-BC-2023-10/F00156/RED, para.35.

⁴⁷ Decision, KSC-BC-2023-10/F00156/RED, para.35.

⁴⁸ See Public Redacted Version of Decision on Review of Detention of Haxhi Shala, KSC-BC-2023-10/F00165/RED, 9 February 2024 ('Shala Decision'), para.54.

⁴⁹ Shala Decision, KSC-BC-2023-10/F00165/RED, para.54.

⁵⁰ See Defence Submission, KSC-BC-2023-10/F00195, paras 32-34.

assessment, either generally or for a discrete period of time; rather, the progression of the case and attendant further disclosures render the underlying risks higher than ever.

D. DETENTION IS PROPORTIONAL

26. Detention remains proportional. At the last detention review, the Pre-Trial Judge found that the time Bahtijari has spent in pre-trial detention is not unreasonable within the meaning of Rule 56(2).⁵¹

27. Whether it is reasonable for an accused to remain in detention must be assessed based on the facts of each case and according to its specific features, which in this case include that: (i) Bahtijari has been detained since his arrest on 5 October 2023; (ii) he is charged with two counts of obstructing official persons in performing official duties and one count of intimidation during criminal proceedings, which carry a possible sentence of up to five years and ten years of imprisonment, respectively; (iii) 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; (iv) 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 at a point in the foreseeable future; and (v) Bahtijari's detention shall be reviewed every two months or as soon as a change in circumstances arises.⁵²

28. The proceedings continue to move forward expeditiously. On 8 February 2024, the Pre-Trial Judge granted joinder.⁵³ The SPO has since harmonized disclosure between the

⁵¹ Decision, KSC-BC-2023-10/F00156/RED, para.41

⁵² Decision, KSC-BC-2023-10/F00156/RED, paras 39-40.

⁵³ Joinder Decision, KSC-BC-2023-10/F00161/RED.

three co-Accused⁵⁴ and submitted, *inter alia*, an amended indictment,⁵⁵ and its Pre-Trial Brief (with accompanying materials).⁵⁶ On 13 February 2024, a status conference was held, during which the Pre-Trial Judge indicated that the transfer of the case file to the Trial Panel would be addressed at the next status conference,⁵⁷ scheduled for 22 March 2024.

29. Given all of the above, detention remains both reasonable and proportional at this time.

IV. CLASSIFICATION

30. This filing is submitted confidentially pursuant to Rule 82(4). A public redacted version will be filed.

V. CONCLUSION

31. For the foregoing reasons, the SPO respectfully submits that Bahtijari should continue to be detained.

⁵⁴ See Disclosure Packages 16-18, disclosed on 16 February 2024.

⁵⁵ See Indictment Submission, KSC-BC-2023-10/F00176.

⁵⁶ See Pre-Trial Brief Package, KSC-BC-2023-10/F00177.

⁵⁷ Transcript (Status Conference), 13 February 2024, p.188.

Word count: 2,946



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Thursday, 14 March 2024

At The Hague, the Netherlands