



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: **KSC-BC-2020-05**
The Prosecutor v. Salih Mustafa

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

Registrar: Dr Fidelma Donlon

Date: 23 November 2020

Language: English

Classification: **Public**

Decision on Review of Detention

Specialist Prosecutor
Jack Smith

Counsel for the Accused
Julius von Bóné

THE PRE-TRIAL JUDGE,¹ pursuant to Article 41 of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 12 June 2020, the Pre-Trial Judge confirmed the indictment ("Confirmed Indictment") against Salih Mustafa ("Mr Mustafa"),² and issued a warrant for his arrest³ together with an order for his transfer to the detention facilities of the Specialist Chambers ("SC").⁴

2. On 24 September 2020, Mr Mustafa was arrested and transferred to the detention facilities of the SC in The Hague, the Netherlands.⁵

3. On 16 November 2020, the Pre-Trial Judge requested the Parties to file written submissions on whether reasons for the continued detention of Mr Mustafa still exist.⁶

4. On 20 November 2020, the Defence for Mr Mustafa ("the Defence")⁷ and the Specialist Prosecutor's Office ("SPO")⁸ filed their respective submissions pursuant to the Pre-Trial Judge's order.

¹ KSC-BC-2020-05, F00001, President, *Decision Assigning a Pre-Trial Judge*, 14 February 2020, public.

² KSC-BC-2020-05, F00008/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on the Confirmation of the Indictment Against Salih Mustafa* ("Confirmation Decision"), 5 October 2020, public.

³ KSC-BC-2020-05, F00009/A01/RED, Pre-Trial Judge, *Public Redacted Version of Arrest Warrant for Mr Salih Mustafa* ("Arrest Warrant"), 12 June 2020, public.

⁴ KSC-BC-2020-05, F00009/A02/RED, Pre-Trial Judge, *Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers*, 12 June 2020, public.

⁵ KSC-BC-2020-05, F00013, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 24 September 2020, public; F00014, Registrar, *Notification of Reception in the Detention Facilities of the Specialist Chambers*, 24 September 2020, public, with Annex 1, strictly confidential and *ex parte*.

⁶ KSC-BC-2020-05, F00048, Pre-Trial Judge, *Order for Submissions on the Review of Detention*, 16 November 2020, public, para. 7.

⁷ KSC-BC-2020-05, F00050, Defence, *Defence Submission for the Review on the Detention of the Accused* ("Defence Submission"), 20 November 2020, public.

⁸ KSC-BC-2020-05, F00051, Specialist Prosecutor, *Prosecution Submission on the Review of Detention* ("SPO Submission"), 20 November 2020, public.

II. SUBMISSIONS

5. The Defence requests that Mr Mustafa be released from detention.⁹ The Defence submits that detention for a particular charge cannot continue if no additional objective material has been presented for that charge.¹⁰ In the alternative, the Defence contends Mr Mustafa should be released with conditions if the Pre-Trial Judge finds any of the Article 41(6)(b) risks exist.¹¹

6. The SPO requests that the Pre-Trial Judge order Mr Mustafa to remain in detention.¹² The SPO submits that Article 41(6)(a) of the Law remains fulfilled and nothing necessitates reconsideration of Pre-Trial Judge's finding in this regard.¹³ As regards the Article 41(6)(b) risks, the SPO contends that such risks have increased.¹⁴ The SPO submits that the risks posed by Mr Mustafa's release can only be effectively managed from detention and thus release with or without conditions should not be granted.¹⁵

III. APPLICABLE LAW

7. Article 41(6) of the Law provides that the SC shall only order the arrest and detention of a person when: there is a grounded suspicion that the person has committed a crime within the jurisdiction of the SC; and there are articulable grounds to believe that the person: (i) is a flight risk, (ii) will destroy, hide, change or forge evidence or specific circumstances indicate that the person will obstruct the progress of criminal proceedings; or (iii) will repeat or attempt to repeat the criminal offence(s).

⁹ Defence Submission, para. 18.

¹⁰ Defence Submission, paras 15-17.

¹¹ Defence Submission, paras 19-20.

¹² SPO Submission, para. 13

¹³ SPO Submission, para. 4.

¹⁴ SPO Submission, para. 3.

¹⁵ SPO Submission, para. 12.

8. Article 41(10) of the Law provides that, until judgement is final or until release, upon the expiry of 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.

9. Article 41(12) of the Law provides that, in addition to detention on remand, the following measures may be ordered to ensure the presence of the Accused, to prevent reoffending or 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.

10. Pursuant to Rule 57(2) of the Rules, the Pre-Trial Judge shall review a decision on detention on remand upon expiry of two (2) months from the last ruling on detention.

IV. DISCUSSION

11. Article 41(10) of the Law obliges the Pre-Trial Judge to examine whether reasons for detention on remand still exist, including the grounds set out in Article 41(6) of the Law, namely whether (i) there is grounded suspicion that the person committed the crime(s); and (ii) there are articulable grounds to believe that any of the requirements set out in Article 41(6)(b) of the Law has been fulfilled.

A. GROUNDED SUSPICION

12. Under the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123, the evidentiary threshold of “grounded suspicion” is defined as “knowledge of information which would satisfy an objective observer that a criminal offence has

occurred, is occurring or there is a substantial likelihood that one will occur and the person concerned is more likely than not to have committed the offence".¹⁶

13. The Defence submits that the Pre-Trial Judge must review Mr Mustafa's detention, and in particular whether well-grounded suspicion regarding the commission of crimes has been established, in light of the current case material.¹⁷ The Defence contends that, as detention is prolonged, the SPO is under an obligation to support each of its allegations with "harder and more objective evidence" and not solely on the basis of witness statements.¹⁸

14. The SPO submits that well-grounded suspicion that Mr Mustafa committed crimes within the jurisdiction of the KSC remains and that nothing necessitates reconsideration of Pre-Trial Judge's finding in this regard.¹⁹

15. At the outset, the Pre-Trial Judge notes that the Defence does not challenge the finding that there is well-grounded suspicion that Mr Mustafa committed crimes within the jurisdiction of the SC, namely the war crimes of arbitrary detention, cruel treatment, torture and murder in violation of Article 14(1)(c) of the Law.²⁰ Rather, the Defence asserts that at this stage of the proceedings, the SPO is obligated to present "more objective evidence" in support of its allegations.

16. The Pre-Trial Judge recalls that, pursuant to Rule 86(4) of the Rules, in determining that there is well-grounded suspicion that Mr Mustafa committed crimes within the jurisdiction of the SC, a review of the supporting material was undertaken

¹⁶ *Haradinaj* Release Decision, para. 16. See also Article 5(1)(c) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms European, as interpreted by the European Court of Human Rights, *Fox, Campbell and Hartley v. United Kingdom*, no. 12244/86; 12245/86; 12383/86, Judgment, 30 August 1990, vol. 182, Series A, p. 16, para. 32; *K.-F. v. Germany*, no. 144/1996/765/962, Judgment, 27 November 1997, Reports 1997-VII, para. 57; *Labita v. Italy*, no. 26772/95, Judgment, 6 April 2000, para. 155; *Berktaş v. Turkey*, no. 22493/93, Judgment, 1 March 2001, para. 199; *O'Hara v. United Kingdom*, no. 37555/97, Judgment, 16 October 2001, para. 34.

¹⁷ Defence Submission, paras 9-11, 15.

¹⁸ Defence Submission, paras 6, 12-15.

¹⁹ SPO Submission, para. 4.

²⁰ Confirmation Decision, paras 123, 129, 133, 138, 141, 145, 151.

in relation to each of the charges against the requisite evidentiary threshold.²¹ Neither the Law nor the Rules mandates the type of material that must be presented by the SPO at this stage in support of its allegations. The Defence's claim the SPO is under an obligation to support each of its allegations with "harder and more objective evidence" or cannot rely solely on witness statements is unsubstantiated and disregards the nature of the current stage of the proceedings.

17. As noted by the Defence, the veracity and strength of the supporting material has not been tested.²² This process of evaluating the evidence in support of the SPO's allegations, as set out in the Confirmed Indictment, will occur during the trial phase of the proceedings when Mr Mustafa's guilt or innocence is being determined. For the purposes of determining whether detention is appropriate, Article 41(6)(a) of the Law simply requires grounded suspicion that a crime within the jurisdiction of the SC has been committed. Requiring anything more at this juncture would pre-judge the evidence before the SPO has an opportunity to present its case before a Trial Panel.

18. The Pre-Trial Judge accordingly finds that Article 41(6)(a) of the Law continues to be met.

B. NECESSITY OF ARREST AND DETENTION

19. Once the threshold in Article 41(6)(a) of the Law is met, the grounds that allow the Pre-Trial Judge to deprive a person of his liberty must be articulable.²³ In this regard, it is recalled that determining the existence of either risks under Article 41(6)(b)(i)-(iii) of the Law, so as to make the arrest of the person necessary, is a

²¹ See Confirmation Decision, para. 37.

²² Defence Submission, paras 6-7.

²³ Article 19.1.9 of the KCPC.

matter of assessing the possibility, as opposed to the unavailability that such risks materialise.²⁴

1. Risk of Flight

20. The Defence submits that Mr Mustafa: (i) resides in Kosovo with his family and wishes to resume his current employment; (ii) voluntarily submitted to be interviewed by the SPO; (iii) will voluntarily surrender his passport; and (iv) will appear before the SC when summoned.²⁵

21. The SPO responds that, since the disclosure of supporting material to the indictment and other material the SPO may use at trial, Mr Mustafa has increased incentive to flee as he is now aware of the concrete possibility of conviction and the possible imposition of a lengthy sentence.²⁶ The SPO also contends that the risk of flight is heightened by the limited number of countries in which Kosovo has extradition agreements.²⁷

22. With regard to the Accused's flight risk under Article 41(6)(b)(i) of the Law, the Pre-Trial Judge recalls his finding that Mr Mustafa's knowledge of the charges against him and potential penalties, awareness of publicly reported convictions of senior Llap Operational Zone commanders, links to the Kosovo intelligence apparatus with resultant access to information and resources, and ability to travel freely to countries not requiring a visa demonstrated that he had both an incentive

²⁴ *Haradinaj* Release Decision, para. 25. 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.

²⁵ Defence Submissions, paras 21, 23.

²⁶ SPO Submission, para. 6.

²⁷ SPO Submission, para. 7.

and the means to flee.²⁸ The Pre-Trial Judge further considers that disclosure of the supporting material to the indictment increases the incentive for Mr Mustafa to flee as it elucidates the seriousness of the charges and makes more concrete the possibility of conviction and the possible imposition of a lengthy sentence.

23. The fact that Mr Mustafa resides with his family in Kosovo, voluntarily submitted to be interviewed by the SPO, and promises to appear before the SC when summoned does not negate the assessment that he has the incentive and means to flee. In addition, the promise to surrender his passport does not mitigate the risk of flight when Mr Mustafa's position within the Kosovo intelligence apparatus would facilitate his ability to leave Kosovo through illegal borders, if necessary.

24. The Pre-Trial Judge accordingly finds that Mr Mustafa remains a flight risk.

2. Obstruction of the Progress of Criminal Proceedings

25. The Defence submits that Mr Mustafa has not in any manner been uncooperative or done anything to impair the investigations of the SPO.²⁹ The Defence further contends that no incidents in this regard have been reported or put in the case material, and if assumptions were made in this regard, then they are without any factual foundation.³⁰

26. The SPO submits that Rule 102(1) disclosures have increased Mr Mustafa's incentive, intention, and opportunity to interfere with victims and witnesses.³¹ The SPO further argues that the limited scope of the case along with Mr Mustafa's

²⁸ KSC-BC-2020-05, F00009, Pre-Trial Judge, *Decision on Request for Arrest Warrant and Transfer Order* ("Decision on Arrest and Transfer"), 12 June 2020, strictly confidential and *ex parte*, para. 20; Arrest Warrant, para. 5.

²⁹ Defence Submission, para. 22.

³⁰ Defence Submission, para. 22.

³¹ SPO Submission, para. 9.

experience as an intelligence officer with the technical knowledge and network to interfere with victims and witnesses is relevant to the assessment of this risk.³²

27. With regard to the risk that proceedings may be obstructed through the Accused's interference with victims and witnesses under Article 41(6)(b)(ii) of the Law, the Pre-Trial Judge recalls his finding that there are articulable grounds to believe that this risk may exist.³³ That finding has not been negated by the submissions of the Defence. The Pre-Trial Judge further considers that, for an experienced intelligence officer such as Mr Mustafa, the limited temporal and geographical scope of the case would facilitate the process of identifying and interfering with the victims and witnesses. In addition, and as noted above, at this stage of the proceedings, the concrete risk of conviction and the consequent imposition of penalties, increases Mr Mustafa's incentives to interfere with victims and witnesses.

28. The Pre-Trial Judge accordingly finds that the risk that Mr Mustafa may obstruct the progress of proceedings by interfering with victims and witnesses remains.

3. Commission of Further Offences

29. The Defence submits that not a single incident has ever been reported or put in the current case material.³⁴

30. The SPO submits that Mr Mustafa is now aware of the evidentiary basis supporting the charges against him as well as the possibility that a lengthy prison

³² SPO Submission, para. 10.

³³ Decision on Arrest and Transfer, para. 21; Arrest Warrant, para. 5.

³⁴ Defence Submission, para. 22.

sentence may be imposed and that these developments only increase the risk that he could resort to threats of physical violence against witnesses.³⁵

31. As regards the risk that the Accused will repeat the criminal offence under Article 41(6)(b)(iii) of the Law, the Pre-Trial Judge recalls his finding that Mr Mustafa publicly bragged about the execution of Serbs in a press conference around 14 June 1999 in Prishtinë/Priština thereby demonstrating a risk that he may resort to physical violence or threats of physical violence against victims and witnesses.³⁶ The Pre-Trial Judge further considers that, for the reasons discussed above with regard to the obstruction of proceeding, the risk that Mr Mustafa may commit further crimes remains.

4. Conclusion

32. The Pre-Trial Judge finds that the Defence's submissions do not undermine the determination that there are articulable grounds to believe that all three risks envisaged under Article 41(6)(b)(i)-(iii) of the Law exist.³⁷

C. CONDITIONAL RELEASE

33. The Defence alternatively requests conditional release and expresses a willingness to comply with any of the conditions set out in Article 41(12) of the Law.³⁸ The Defence notes in particular that Mr Mustafa will appear before the SC as ordered by the Pre-Trial Judge, will voluntarily submit his passport, and seek permission for any work related trips.³⁹ The Defence maintains that Mr Mustafa

³⁵ SPO Submission, para. 11.

³⁶ Decision on Arrest and Transfer, para. 22; Arrest Warrant, para. 5.

³⁷ Arrest Warrant, para. 5.

³⁸ Defence Submission, para. 24.

³⁹ Defence Submission, para. 23.

would otherwise remain at home with his family and resume his employment within the Ministry of Defence.⁴⁰

34. The SPO responds that Mr Mustafa's personal assurances are insufficient to guarantee compliance with any conditions or overcome the concrete risks of release.⁴¹

35. As concerns the Defence's request for release with conditions, the Pre-Trial Judge notes that it fails to explain how such conditions might address any of the Article 41(6)(b) risks.

36. The Pre-Trial Judge considers that the risks of flight, obstructing proceedings, and committing further offences can only be effectively managed from detention. This is particularly so when Mr Mustafa's position within the Kosovo security and intelligence apparatus affords him access to information and resources that will facilitate any attempts to flee, obstruct proceedings through the interference with victims and witnesses, or commit further crimes. In these circumstances, the Pre-Trial Judge finds that conditional release would be insufficient to overcome the Article 41(6)(b) risks identified above.

37. The Pre-Trial Judge accordingly finds that none of the conditions set out in Article 41(12) of the Law are sufficient to mitigate the Article 41(6)(b) risks enumerated above.

⁴⁰ Defence Submission, para. 23. *See also* KSC-BC-2020-05, Transcript, 28 September 2020, public, p. 3, lines 22-24.

⁴¹ SPO Submission, para. 12.

V. DISPOSITION

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

ORDERS Mr Mustafa's continued detention.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Monday, 23 November 2020
At The Hague, the Netherlands