

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

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

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Defence

**Date:** 18 January 2021

**Language:** English

**Classification:** Public

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**Defence submission for the**

review on the detention of the Accused

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**Specialist Prosecutor's Office**

Mr. Jack Smith

**Counsel for the Accused**

Mr. Julius von Bóné

## **I. The status of the case and the order of the Pre-Trial judge**

1. The defence has taken note of the content of the Order of the Pre-Trial Judge regarding the review of the detention of the accused. In the current case, the detention is founded on the content of confirmed indictment, the arrest warrant, and the transfer order dated 12 June 2020. The arrest was executed on 24 September 2020, and the accused was transferred on the same day to the Detention Facility of the KSC in The Hague.

2. The Accused, mr. Salih Mustafa, is accused of a number of crimes allegedly committed in 1999. The confirmation of the indictment states that there is a well-grounded suspicion that mr. Mustafa committed or participated in the commission of the alleged crimes. That well-grounded suspicion has been affirmed by the previous decision regarding the prolongation of his detention.

3. Mr. Mustafa has pleaded not guilty to each of the charges.

4. It is a common rule that an accused is presumed innocent until the charges have been proved beyond a reasonable doubt before an independent judge.

5. It is to this end, that the well-grounded suspicion as formulated in the confirmed indictment, has to be reviewed. In other words: how well-grounded is the suspicion today, after the material that until now has been disclosed by the SPO?

## **II. Risk that the accused could commit crimes when released**

6. The defence submits that, following the confirmation of the indictment, it must be contemplated whether it would be necessary to detain an accused, who has been at liberty for over 20 years. Within that period of time, while living in Kosovo, the accused has never been convicted of any crime. And he has hardly left his home country.

7. Moreover, it is important to understand the position of mr. Mustafa. He vehemently denies the charges and has no fear whatsoever to face the current indictment as he is convinced about his innocence to the charges.

8. Mr. Mustafa has been to the KSC at a previous occasion when he was interviewed as a suspect by the SPO. He left The Netherlands back to his country and has never undertaken anything against anybody. In fact, he committed no criminal offence at all within that period of time. To state that he is a threat or would be a threat for anybody is therefore a completely unfounded and baseless and unsubstantiated claim. The claim is fundamentally ill-founded.

### **III. Risk of flight**

9. The claim that for some reason the Accused would pose any risk of flight is also unfounded and baseless. During the period that he was in his home country before being arrested, he never even contemplated to flee his home country. The claim that he would pose a risk for fleeing the country is equally unfounded and baseless. He would have had many opportunities to do so if he would fear anything from the SPO.

10. The defence submits that after more than nine months after the confirmation of the indictment, of which 4 months in detention, the Pre-Trial Judge should make a finding regarding mr. Mustafa, rather than make a presumption that mr. Mustafa would indeed pose a risk of flight. The claim of the SPO to that end is baseless. The assumption is without any factual ground. The risk has never even been assessed.

11. The defence submits that the Pre -Trial Judge has to review the detention rather on the basis that it needs to be determined in findings rather than assumptions that the accused would flee his home country. Mr. Mustafa has at an earlier occasion submitted that he can remain under house arrest or any other form of detention without being in custody here in The Netherlands. Even technical devices could be installed in his home and on him personally in order to ensure that he would not leave his home in Kosovo.

12. The detention of any individual should not be a decision that is to be taken lightly and without taking into consideration what the impact is on an individual to be suddenly deprived of his freedom, and being taken out of his family life, his professional life (his work), just on the basis of some statements implicating him in a criminal offense. During the time of his detention, the accused had to endure the loss of some dear friends which makes the detention even more difficult.

**IV. Measures to ensure that the accused remains at home (or at any other pre-determined location) will have as a consequence that there is no risk of interference in any trial proceeding, or with any of the witnesses.**

13. The accused can be released under conditions to be determined by the Court (be it the Pre-Trial Judge or the Panel).

14. It is the design of those measures that can avoid or eliminate the risk that the accused would interfere either with any kind of the proceedings or with witnesses or victims.

15. Article 41 (12) of the Law is the basis on which the Court can design the measures that it finds appropriate in view of any type of risk it might want to eliminate, and at the same time ensure that the accused will not avoid his trial proceedings.

16. The defence is of the view that the conditions as set forth in Article 41 (12) (a until d) of the Law can only be applied if the Pre-Trial Judge or Panel makes specific findings concerning the accused whether: he or she will not be present during the proceedings, whether there is any justified risk that the accused would reoffend, or whether there is anything that justifies that a successful conduct of the criminal proceedings would be jeopardized.

17. Article 41 (12) prescribes that the measures may be ordered, which implies that this article does not dictate in any manner that the measures prescribed in the article are compulsory. The Pre-Trial Judge or Panel can also decide not to apply any of these measures.

18. If however any risk would be assumed or established, than still such risk can be eliminated as the Court can set the conditions to which the accused needs to adhere. Consequently, risks of any kind can easily be eliminated.

19. Not in any manner has the accused been unwilling or has he done anything to impair the investigations of the SPO as they were conducted during the period in the past years. Not a single incident has been ever reported to that end or has been put in the current case material. Therefore, there is no ground that the accused would do so when he would be released.

20. In the case of the accused it is a fact that he is a citizen of Kosovo, and resides in Kosovo. He has cooperated with the SPO in the sense that he has made a statement to the SPO and came voluntarily to The Netherlands to be interviewed by the SPO.

21. The defence submits that the accused should be released or conditionally released.

22. The defence submits that if any summons to appear would become placed upon him, or a schedule to appear will be in place, that the accused will appear at any of the Court's sessions, be it via VTC or in vivo. The accused will voluntarily submit his passport in order to ensure that he will not leave the country, or will seek permission if any work-related trip would necessitate this. Basically, the accused will stay at his home with his family and will pick up his current employment in order to provide for his family. But if a condition is designed that he should not work at all than the accused will adhere to that.

23. If the Pre-Trial Judge would, based on any specific findings, order any measures that it finds appropriate for this specific accused, the defence submits that the accused will comply with them.

24. The defence is ready to exemplify any of the submissions in a court session if that would be required or if it would further clarify the position of the defence and the accused regarding this matter.

25. The defence has at this point no further submissions.

**Word count: 1377**



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**Julius von Bóné**  
**Defence Counsel**

18 January 2021

At The Hague, the Netherlands