



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: 25 January 2021

Language: English

Classification: **Public**

Second Decision on Review of Detention

Specialist Prosecutor
Jack Smith

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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 24 September 2020, Salih Mustafa ("Mr Mustafa") was arrested pursuant to a decision² and an arrest warrant issued by the Pre-Trial Judge ("Arrest Warrant"),³ further to the confirmation of an indictment against him.⁴
2. On 23 November 2020, the Pre-Trial Judge, after receiving submissions from the Parties,⁵ issued the first decision reviewing the detention of Mr Mustafa, ordering his continued detention ("First Review of Detention").⁶
3. On 5 January 2021, the Pre-Trial Judge requested the Parties to file written submissions on whether reasons for the continued detention of Mr Mustafa still exist.⁷

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

² 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*.

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, 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, para. 37.

⁵ KSC-BC-2020-05, F00048, Pre-Trial Judge, *Order for Submissions on the Review of Detention*, 16 November 2020, public; F00050, Defence for Mr Mustafa, *Defence Submission for the Review on the Detention of the Accused*, 20 November 2020, public; F00051, Specialist Prosecutor, *Prosecution Submission on the Review of Detention*, 20 November 2020, public.

⁶ KSC-BC-2020-05, F00052, Pre-Trial Judge, *Decision on Review of Detention* ("First Review of Detention"), 23 November 2020, public.

⁷ KSC-BC-2020-05, F00064, Pre-Trial Judge, *Order for Submissions on the Review of Detention*, 5 January 2021, public.

4. On 13 January 2021, the Specialist Prosecutor's Office ("SPO") filed its submissions.⁸

5. On 18 January 2021, the Defence for Mr Mustafa ("Defence") filed its submissions.⁹

II. SUBMISSIONS

6. The SPO submits that the circumstances found to exist by the Pre-Trial Judge in the First Review of Detention have not changed and the Mr Mustafa's continued detention remains necessary.¹⁰

7. The Defence submits that Mr Mustafa should be released or conditionally released.¹¹

III. APPLICABLE LAW

8. Article 41(6) of the Law provides that the Specialist Chambers ("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: (i) the person is a flight risk; (ii) the person will destroy, hide, change or forge evidence or specific circumstances indicate that he or she will obstruct the progress of criminal proceedings; or (iii) the seriousness of the crime, or the manner or circumstances in which it was committed and his or her personal characteristics, past conduct, the environment and conditions in which he or she lives or other personal circumstances indicate a risk that the person will repeat the

⁸ KSC-BC-2020-05, F00065, Specialist Prosecutor, *Prosecution Submissions on the Review of Detention* ("SPO Submission"), 13 January 2021, public.

⁹ KSC-BC-2020-05, F00067, Defence for Mr Mustafa, *Defence Submission for the Review on the Detention of the Accused* ("Defence Submission"), 18 January 2021, public.

¹⁰ SPO Submission, para. 6.

¹¹ Defence Submission, para. 21.

criminal offence, complete an attempted crime, or commit a crime which the person has attempted to commit.

9. 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. 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.

10. 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.

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. The SPO submits that well-grounded suspicion that Mr Mustafa committed crimes within the jurisdiction of the KSC remains, as there has been no development in the case warranting reconsideration of that finding.¹²

13. The Defence submits that Mr Mustafa vehemently denies the charges against him and that the Pre-Trial Judge must review the extent to which the suspicion against Mr Mustafa is well-grounded, in light of the material disclosed by the SPO.¹³ The Defence raises no further challenge as regards the existence of a grounded suspicion.

14. As regards the threshold for continued detention, Article 41(6)(a) of the Law simply requires grounded suspicion that a crime within the jurisdiction of the SC has been committed.¹⁴ In this regard, the Pre-Trial Judge recalls his finding in the Arrest Warrant that by virtue of having confirmed an indictment against Mr Mustafa,¹⁵ the requirement of Article 41(6)(a) of the Law has been met.¹⁶ The Pre-Trial Judge also noted in the First Review of Detention that the process of evaluating the evidence in support of the charges will occur during the trial phase of the proceedings when Mr Mustafa's guilt or innocence will be determined.¹⁷ The Pre-Trial Judge finds that no intervening information or development in the current proceedings warrants reconsideration of the above findings.

¹² SPO Submission, para. 7.

¹³ Defence Submission, paras 5, 7.

¹⁴ 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". First Review of Detention, para. 12. *See also* 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, *Fox, Campbell and Hartley v. United Kingdom*, no. 12244/86; 12245/86; 12383/86, [Judgment](#), 30 August 1990, para. 32; *K.-F. v. Germany*, no. 144/1996/765/962, [Judgment](#), 27 November 1997, 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.

¹⁵ Confirmation Decision, para. 163(a).

¹⁶ Arrest Warrant, para. 1; Decision on Arrest and Transfer, para. 18.

¹⁷ First Review of Detention, para. 17.

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

B. NECESSITY OF DETENTION

16. 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.¹⁸ In this regard, the Defence submits that the Pre-Trial Judge should review such risks based on factual grounds and not mere assumptions or statements.¹⁹ The Pre-Trial Judge notes that pursuant to Article 41(6)(b) of the Law, a Panel must rely on articulable – *i.e.* specific and concrete – grounds to believe that the Accused poses public interest risks that can only be mitigated through continued detention.²⁰ The Pre-Trial Judge further recalls that, on the basis of the available evidence, the specific articulable grounds must support the “belief”²¹ that the risks under any of the three limbs of Article 41(6)(b) of the Law exist, denoting an acceptance of the possibility, not the

¹⁸ Article 19.1.30 of the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123 defines “articulable” as: “the party offering the information or evidence must specify in detail the information or evidence being relied upon”.

¹⁹ Defence Submission, paras 10-12.

²⁰ 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, para. 113, 115.

²¹ See chapeau of Article 41(6)(b) of the Law.

inevitability, of a future occurrence.²² In simple terms, while suspicion simpliciter is not enough, certainty is not required.²³

1. Risk of Flight

17. The SPO submits that the circumstances considered by the Pre-Trial Judge in the First Review of Detention have not changed and the risk of flight by Mr Mustafa remains, and may have only increased with the disclosure of further evidence in December 2020.²⁴

18. The Defence submits that the claim that Mr Mustafa would flee is unfounded and baseless, because: (i) in the twenty years he has been at liberty, he hardly left Kosovo;²⁵ (ii) he travelled voluntarily to The Hague to be interviewed by the SPO;²⁶ and (iii) he never contemplated fleeing his country, although he would have had the opportunity to do so.²⁷

19. As regards the risk of flight, the Pre-Trial Judge recalls his finding, as confirmed in the First Review of Detention,²⁸ that Mr Mustafa's knowledge of the

²² KSC-BC-2020-07, IA001/F00005, Court of Appeals Chamber, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, 9 December 2020, public, paras 63, 67. See also Haradinaj First Decision on Detention, para. 18. Similarly, ICC, *Prosecutor v. Bemba 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"*](#) ("Bemba et al. Appeal Judgment"), 11 July 2014, paras 107, 117; *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-572, Appeals Chamber, [*Judgment in the Appeal by Mathieu Ngudjolo of 27 March 2008 Against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release*](#) ("Katanga Appeal Judgment"), 9 June 2008, para. 21; *Prosecutor v. Lubanga*, ICC-01/04-01/06-824, Appeals Chamber, [*Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"*](#) ("Lubanga Appeal Judgment"), 13 February 2007, para. 137.

²³ KSC-BC-2020-06, F00178, Pre-Trial Judge, *Decision on Kadri Veseli's Application for Interim Release*, 22 January 2021, public, para. 21.

²⁴ SPO Submission, para. 9.

²⁵ Defence Submission, para. 6.

²⁶ Defence Submission, para. 20.

²⁷ Defence Submission, para. 9.

²⁸ First Review of Detention, para. 22.

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 and the means to flee.²⁹ The Pre-Trial Judge further considers that the completion by the SPO of the disclosure of incriminating evidence 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.³⁰ The Pre-Trial Judge considers that no intervening information or development in the current proceedings undermines the above determinations.

20. The fact that Mr Mustafa has hardly left the country in the past twenty years or that he never contemplated to flee, despite having the means to do so, does not negate the assessment that he has the incentive and means to flee, as these considerations predate the subsequent knowledge of the scope of the case and the evidence against Mr Mustafa.

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

2. Risk of Obstructing the Progress of SC Proceedings

22. The SPO submits that the circumstances considered by the Pre-Trial Judge in the First Review of Detention have not changed and the risk of interference by Mr Mustafa still exists, and may have only increased with the disclosure of further evidence in December 2020.³¹

²⁹ Decision on Arrest and Transfer, para. 20; Arrest Warrant, para. 5.

³⁰ To date, the SPO has completed disclosure under Rule 102(1)(a)-(b) and 102(3). KSC-BC-2020-05, Transcript, 28 October 2020, public, p. 76, lines 16-24; Transcript, 14 December 2020, public, pp. 90-91.

³¹ SPO Submission, paras 10-11.

23. The Defence submits that there is no ground to believe that Mr Mustafa would obstruct SC proceedings if he was released,³² because (i) he has cooperated with the SPO and has done nothing to impair SPO investigations;³³ and (ii) not a single incident has been ever reported in this regard.³⁴

24. With regard to the risk of obstructing SC proceedings, the Pre-Trial Judge recalls his finding, as confirmed in the First Review of Detention,³⁵ that the limited temporal and geographical scope of the case would facilitate the process of identifying and interfering with the victims and witnesses,³⁶ especially for an experienced intelligence officer such as Mr Mustafa.³⁷ The Pre-Trial Judge further confirms that the concrete risk of conviction and the consequent imposition of penalties increases Mr Mustafa's incentives to interfere with victims and witnesses,³⁸ especially as he is now informed of the incriminating evidence as disclosed.³⁹ The Pre-Trial Judge considers that no intervening information or development in the current proceedings undermines the above determinations.

25. The fact that Mr Mustafa has voluntarily submitted to being interviewed by the SPO and that no incident has so far been recorded regarding his interference with SC victims or witnesses does not negate the assessment that he has the incentive and means to obstruct SC proceedings, as the above considerations predate Mr Mustafa's subsequent knowledge of the evidence and identity of witnesses.

³² Defence Submission, para. 19.

³³ Defence Submission, paras 19-20.

³⁴ Defence Submission, para. 19.

³⁵ First Review of Detention, para. 27.

³⁶ Decision on Arrest and Transfer, para. 21; Arrest Warrant, para. 5.

³⁷ First Review of Detention, para. 27.

³⁸ First Review of Detention, para. 27.

³⁹ *See supra* fn. 30.

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

3. Risk of Committing Further Crimes

27. The SPO submits that the circumstances considered by the Pre-Trial Judge in the First Review of Detention have not changed and the risk of committing further crimes by Mr Mustafa still exists, and may have only increased with the disclosure of further evidence in December 2020.⁴⁰

28. The Defence submits that the claim that Mr Mustafa is a threat to anyone is unfounded and baseless, because (i) in the twenty years he has been at liberty, he was never convicted of any crime;⁴¹ (ii) he vehemently denies the charges against him and has no fear in facing the indictment;⁴² and (iii) he committed no crimes in the period since he had been interviewed by the SPO as a suspect.⁴³

29. As regards the risk of committing further crimes, the Pre-Trial Judge recalls his finding, as confirmed in the First Review of Detention,⁴⁴ 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 further crimes against victims and witnesses.⁴⁵ The Pre-Trial Judge also recalls his above finding that there is a risk that Mr Mustafa will obstruct SC proceedings.⁴⁶ While the existence of a risk of obstruction does not automatically translate into a risk of committing further crimes, in the present case the factors underpinning the

⁴⁰ SPO Submission, para. 12-13.

⁴¹ Defence Submission, para. 6.

⁴² Defence Submission, para. 7.

⁴³ Defence Submission, para. 8.

⁴⁴ First Review of Detention, para. 31.

⁴⁵ Decision on Arrest and Transfer, para. 22; Arrest Warrant, para. 5.

⁴⁶ See *supra* paras 24-26 .

former are of relevance to the assessment of the latter. The Pre-Trial Judge accordingly considers that, although more than twenty years have passed since Mr Mustafa's statement about the alleged execution of Serbs, no intervening information or development in the current proceedings undermines the determination that, faced with the prospect of conviction and the consequent imposition of penalties, Mr Mustafa could commit crimes against SC victims or witnesses testifying as to his alleged conduct.

30. The fact that Mr Mustafa has not been convicted of any crime in the past twenty years, that he has apparently not committed any crimes since he was interviewed as a suspect by the SPO and that he has no fear in facing the indictment does not negate the assessment that, as he is now informed of the incriminating evidence against him, he has the incentive to commit further crimes against SC victims or witnesses testifying as to his alleged conduct.

31. The Pre-Trial Judge accordingly finds that the risk that Mr Mustafa may commit further crimes remains.

4. Conclusion

32. The Pre-Trial Judge finds that no intervening information or development in the current proceedings undermines the determination that there are articulable grounds to believe that all three risks envisaged under Article 41(6)(b)(i)-(iii) of the Law continue to exist.

C. CONDITIONAL RELEASE

33. The SPO submits that the risks identified, considered alone or together, can only be effectively managed in the SC detention facilities. The SPO further avers that detention is the most effective means to limit Mr Mustafa's ability to flee,

obstruct the investigation or court proceedings, and/or commit further crimes. Any assurances that Mr Mustafa may give would be insufficient to guarantee compliance with any conditions or overcome the concrete risks of release. In such circumstances, release, with or without conditions, should not be granted.⁴⁷

34. The Defence submits that Mr Mustafa should be released or, in the alternative, be conditionally released.⁴⁸ As regards conditional release, the Defence submits that Mr Mustafa undertakes to: (i) remain in house arrest or any other form of alternative detention;⁴⁹ (ii) agree to the installation of any technical devices in his home or on him personally to ensure that he does not leave his home;⁵⁰ (iii) submit his passport to the competent authorities;⁵¹ (iv) seek permission for any work-related travel;⁵² (v) stay at home and pick up employment unless prohibited by the Pre-Trial Judge;⁵³ (vi) appear before the SC pursuant to any summons to appear or scheduling order;⁵⁴ and (vii) abide by any other conditions imposed by the Pre-Trial Judge (“Proposed Conditions”).⁵⁵ The Defence further avers that measures under Article 41(12)(a)-(d) of the Law can only be applied if the Pre-Trial Judge makes specific findings concerning the risks under Article 41(6)(b) of the Law.⁵⁶

35. As regards the risk of flight, the Pre-Trial Judge finds that the Proposed Conditions could mitigate such a risk in relation to Mr Mustafa. In this regard, the Pre-Trial Judge notes favourably Mr Mustafa’s various undertakings to remain in house arrest or any other form of alternative detention, to agree to the installation of any technical devices to ensure that he does not leave his home, to submit his

⁴⁷ SPO Submission, para. 14.

⁴⁸ Defence Submission, para. 21.

⁴⁹ Defence Submission, para. 11.

⁵⁰ Defence Submission, para. 11.

⁵¹ Defence Submission, para. 22.

⁵² Defence Submission, para. 22.

⁵³ Defence Submission, para. 22.

⁵⁴ Defence Submission, para. 22.

⁵⁵ Defence Submission, paras 13, 23.

⁵⁶ Defence Submission, para. 16.

passport to the competent authorities, to seek permission for any work-related travel, and to appear before the SC when so ordered.

36. As regards the risk of obstructing the progress of SC proceedings or committing further crimes, the Pre-Trial Judge considers that, given Mr Mustafa's position within the Kosovo security and intelligence apparatus, none of the Proposed Conditions, including any additional limitations imposed by the Pre-Trial Judge, could restrict Mr Mustafa's ability to access information and resources that would facilitate any attempts to obstruct SC proceedings, through interference with victims and witnesses, or commit further crimes. This holds true even if Mr Mustafa does not continue his current employment. In particular, none of the Proposed Conditions could restrict or monitor Mr Mustafa's private communications, through which he could inconspicuously request or receive information and resources facilitating interference with SC victims or witnesses or commission of further crimes in this regard. Restricting Mr Mustafa's movements would equally not mitigate such a risk. Additionally, prohibiting Mr Mustafa from contacting witnesses, persons connected to the case or, for that matter, any person in Kosovo can neither be enforced nor monitored, whether such bar refers to in-person contacts or communication through electronic devices. It is only through the communication monitoring framework applicable at the SC detention facilities that Mr Mustafa's communications can be effectively restricted and monitored, thereby mitigating the risks of him obstructing SC proceedings or committing further crimes.

37. The Pre-Trial Judge accordingly finds that the Proposed Conditions, including any additional limitations imposed by the Pre-Trial Judge, would insufficiently mitigate the risks of obstructing SC proceedings or committing further crimes and, for that reason, Mr Mustafa must remain in detention.

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, 25 January 2021

At The Hague, the Netherlands