



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

**In:** KSC-BC-2020-05  
**Before:** Pre-Trial Judge  
Judge Nicolas Guillou  
**Registrar:** Dr Fidelma Donlon  
**Date:** 12 June 2020  
**Language:** English  
**Classification:** Public

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**Public Redacted Version of  
Decision Authorising Search and Seizure**

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**Specialist Prosecutor**  
Jack Smith

**Counsel for the Accused**  
Julius von Bóné

**THE PRE-TRIAL JUDGE**,<sup>1</sup> pursuant to Articles 39(3), 53, 54 and 55 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 31, 32, 33, 37, 39 and 208(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chamber ("Rules"), hereby renders the following decision.

## I. PROCEDURAL BACKGROUND

1. On 14 February 2020, the Specialist Prosecutor's Office ("SPO") submitted for confirmation a strictly confidential and *ex parte* indictment together with evidentiary material in support of the factual allegations and a detailed outline linking each item of evidentiary material to each allegation.<sup>2</sup>
2. On 28 February 2020, the Pre-Trial Judge ordered the SPO to file, *inter alia*, a revised indictment by 18 March 2020.<sup>3</sup>
3. On 18 March 2020, the SPO submitted a revised indictment for confirmation.<sup>4</sup> A further revised indictment was submitted on 20 March 2020 ("Further Revised Indictment").<sup>5</sup>
4. On 26 May 2020, the Pre-Trial Judge issued an order setting the target date for the issuance of the decision reviewing the Further Revised Indictment.<sup>6</sup>

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

<sup>2</sup> KSC-BC-2020-05, F00002, Specialist Prosecutor, *Submission of Indictment for Confirmation and Related Requests* ("Initial Submission"), 14 February 2020, strictly confidential and *ex parte*, with Annexes 1-3, strictly confidential and *ex parte*.

<sup>3</sup> KSC-BC-2020-05, F00003, Pre-Trial Judge, *Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules*, 28 February 2020, strictly confidential and *ex parte*.

<sup>4</sup> KSC-BC-2020-05, F00004, Specialist Prosecutor, *Submission of Revised Indictment for Confirmation and Related Requests* ("Second Submission"), 18 March 2020, strictly confidential and *ex parte* with Annexes 1-2, strictly confidential and *ex parte*.

<sup>5</sup> KSC-BC-2020-05, F00005, Specialist Prosecutor, *Submission of Further Revised Indictment for Confirmation* ("Third Submission"), 20 March 2020, strictly confidential and *ex parte*, with Annex 1, strictly confidential and *ex parte*.

<sup>6</sup> KSC-BC-2020-05, F00006, Pre-Trial Judge, *Order Setting Target Date for a Decision Pursuant to Article 39(2)*, 26 May 2020, strictly confidential and *ex parte*.

5. On 12 June 2020, the Pre-Trial Judge issued a decision confirming the Further Revised Indictment (“Confirmation Decision”)<sup>7</sup> and issued an arrest warrant for Salih Mustafa (“Mr Mustafa”).<sup>8</sup>

## II. SUBMISSIONS

6. Along with confirmation of the Further Revised Indictment, the SPO, requests, *inter alia*, that the Pre-Trial Judge authorise its request for search and seizure.<sup>9</sup> The SPO requests that the Pre-Trial Judge authorise the SPO and/or the authorities executing the arrest warrant, in cooperation with the SPO, to (i) search the person of Mr Mustafa, location of arrest, and Mr Mustafa’s residence; and (ii) seize any evidence that is believed to have been used in, connected with or may be evidence relevant to the charged crimes (“Requested Search and Seizure”).<sup>10</sup> In particular, the SPO seeks [REDACTED].<sup>11</sup> The SPO indicates that the objects to be seized may include the following: [REDACTED].<sup>12</sup>

7. The SPO submits that there is a grounded suspicion that Mr Mustafa has committed crimes within the Specialist Chambers’ jurisdiction as well as a grounded suspicion that he may have relevant evidence on his person, at the location of arrest, or at his residence.<sup>13</sup>

8. The SPO further submits that, in light of the risks of interference and obstruction,<sup>14</sup> any evidence in Mr Mustafa’s possession may not otherwise be obtained and the

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<sup>7</sup> KSC-BC-2020-05, F00008, Pre-Trial Judge, *Decision on the Confirmation of the Indictment Against Salih Mustafa*, 12 June 2020, strictly confidential and *ex parte*.

<sup>8</sup> KSC-BC-2020-05, F00009, Pre-Trial Judge, *Decision on Request for Arrest Warrant and Transfer Order*, 12 June 2020, strictly confidential and *ex parte*.

<sup>9</sup> The SPO incorporates by reference its argumentation in its Initial Submission, Section B(4)-(6); see Second Submission, paras 7, 24(b). See also Third Submission, para. 3.

<sup>10</sup> Initial Submission, para. 13.

<sup>11</sup> Initial Submission, para. 13.

<sup>12</sup> Initial Submission, para. 13.

<sup>13</sup> Initial Submission, para. 14.

<sup>14</sup> Initial Submission, paras 8-12.

requested search and seizure may be the only means of obtaining the evidence for the purposes of the investigation.<sup>15</sup>

9. The SPO submits that the resulting interference with Mr Mustafa's privacy and property rights is proportionate to the legitimate aim of the investigation and does not negate the essence of those rights.<sup>16</sup>

10. Finally, the SPO requests that retention of any evidence seized be authorised for the time necessary to review the evidence, and if the evidence is deemed relevant, authorisation be given for such further period as necessary for investigations and proceedings.<sup>17</sup>

### III. APPLICABLE LAW

11. Pursuant to Rules 31 and 37 of the Rules, the search of a person, their property, or other locations or objects as well as the seizure of any evidence therefrom may be authorised if:

- (a) There is a reasonable expectation of privacy with respect to the places to be searched and items to be seized;<sup>18</sup>
- (b) In relation to searches of places and objects, there is grounded suspicion that (i) a person has committed, is committing or is about to commit a crime within the jurisdiction of the Specialist Chambers;<sup>19</sup> and (ii) the search will result, *inter alia*, in the discovery and seizure of evidence necessary for the investigation. In relation to the search of a

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<sup>15</sup> Initial Submission, para. 14.

<sup>16</sup> Initial Submission, para. 15.

<sup>17</sup> Initial Submission, para. 16.

<sup>18</sup> Rule 37(2) of the Rules. *See also*, KSC-CC-PR-2017-03, F00006, Constitutional Court Chamber, *Judgment on the Referral of Revised Rules of Procedure and Evidence Adopted by Plenary on 29 May 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office* ("KSC Constitutional Court Chamber 28 June 2017 Judgment"), 28 June 2017, para. 69.

<sup>19</sup> Rule 37(2)(a) of the Rules.

person, there is grounded suspicion that the search will result in the discovery of evidence of a crime within the jurisdiction of the Specialist Chambers and seizure thereof;<sup>20</sup>

(c) The search is necessary for the investigation;<sup>21</sup>

(d) The investigative measure is unavoidable, i.e. in the specific circumstances the evidence may not be otherwise obtained and the requested search and seizure appears to be the only effective means for the purposes of the investigation;<sup>22</sup> and

(e) The resulting interference with the person's right to personal integrity, privacy or property is proportionate to the legitimate aim of the investigation and does not negate the essence of the guaranteed right.<sup>23</sup>

12. According to Rule 37(4) of the Rules, any decision authorising search and seizure shall include: (a) the time, duration and scope of its execution, including an indication of the person or property, location, premises or object in relation to which the measure is authorised, and (b) the procedure for reporting on its implementation and the seized material in accordance with Rule 31(2) of the Rules.

13. Pursuant to Rule 39(1) and (2) of the Rules, the search and seizure must be executed in the presence of the person concerned, unless he or she cannot be found or refuses to attend the search, and if the delay in execution would jeopardise the investigation or the safety or property of a witness, victim or other person at risk. The Specialist Prosecutor must also: (a) provide the person concerned with the decision authorising the search and seizure; (b) inform the person of his or her rights; (c) ensure the presence of counsel, unless the person waives this right or

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<sup>20</sup> Rule 37(3) of the Rules.

<sup>21</sup> Rule 31(1)(b) of the Rules.

<sup>22</sup> Rule 37(1) of the Rules. *See also*, KSC Constitutional Court Chamber 28 June 2017 Judgment, paras 62-67.

<sup>23</sup> Rule 31(1)(c) of the Rules.

counsel's presence cannot reasonably be awaited; and (d) ensure the presence of an independent observer to the search and seizure.

14. Pursuant to Rule 32(1) of the Rules, any material seized shall be appropriately retained, stored and protected. The Panel authorising such seizure shall indicate: (a) the procedure and precautions for the storage, protection, and transfer of the seized material; (b) the duration of the retention of the seized material; and (c) instructions and a timeline for the return or destruction of the seized material.

15. Article 35(3) of the Law provides that the police within the SPO has the authority and responsibility to exercise powers given to Kosovo Police under Kosovo law. Pursuant to Article 53(1) of the Law, all entities and persons in Kosovo shall comply without undue delay with any request for assistance, order or decision issued by the Specialist Chambers. Pursuant to Rule 202(2) of the Rules, the Pre-Trial Judge may impose any conditions deemed necessary, including relating to confidentiality and protective measures. Any such order shall be complied with without undue delay, pursuant to Article 53(1) of the Law and Rule 202(3) of the Rules.

16. In accordance with Article 55 of the Law and Rule 208(1) of the Rules, the Pre-Trial Judge may request the cooperation and assistance of a Third State as is necessary for the investigation and prosecution of persons accused of having committed crimes within the jurisdiction of the Specialist Chambers.

#### IV. DISCUSSION

##### A. REQUIREMENTS OF SEARCH AND SEIZURE

17. The Requested Search and Seizure involves a search of Mr Mustafa's person, location of arrest, and residence. As search of one's residence or property is the traditional ambit of privacy concerns, the Pre-Trial Judge therefore finds that such places, and the items potentially seized therein, give rise to a reasonable expectation of privacy. By the same token, while the location of arrest is not known at this point

in time, the place of arrest may entail a reasonable expectation of privacy.<sup>24</sup> Accordingly, the protections set out in the Law and Rules shall apply.

18. For the purposes of the search of Mr Mustafa's property, residence or the location of arrest, and related seizure of items, the Pre-Trial Judge recalls his findings in the Confirmation Decision that there is a well-grounded suspicion that Mr Mustafa committed crimes within the jurisdiction of the Specialist Chambers.<sup>25</sup> Furthermore, the Pre-Trial Judge finds that, in light of the above, there is a grounded suspicion that the Requested Search and Seizure regarding the aforementioned places and items may result in evidence necessary for the investigation. In addition, the Pre-Trial Judge finds that there is grounded suspicion that such evidence may be found on Mr Mustafa's location of arrest or residence. For the purposes of the search of Mr Mustafa, since he is alleged to have committed crimes within the jurisdiction of the Specialist Chambers, the Pre-Trial Judge finds grounded suspicion that the search may result in the discovery and seizure of evidence related to such crimes. In light of the foregoing, the Pre-Trial Judge finds that there is grounded suspicion warranting the Requested Search and Seizure.

19. Moreover, given that Mr Mustafa's residence or location of arrest may contain relevant information that relates to the confirmed charges, the Pre-Trial Judge finds that the Requested Search and Seizure is necessary for the SPO investigations. Likewise, the search of Mr Mustafa is necessary because, in the context of his arrest or search of his premises, he may attempt to hide on his person evidence related to confirmed charges. In light of the foregoing, the Pre-Trial Judge finds that the Requested Search and Seizure is necessary for the purposes of the investigation into the crimes allegedly committed by Mr Mustafa and any future proceedings.

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<sup>24</sup> See, KSC Constitutional Court Chamber 28 June 2017 Judgment, para. 69.

<sup>25</sup> Confirmation Decision, paras 123, 129, 133, 138, 141, 145, 151.



20. As concerns the requirement of unavailability, the Pre-Trial Judge notes that [REDACTED].<sup>26</sup> [REDACTED] demonstrative of a willingness to obstruct proceedings and a concomitant risk of interference with evidence. Accordingly, the Pre-Trial Judge finds that any evidence in Mr Mustafa's possession may not otherwise be obtained and the Requested Search and Seizure in the context of his arrest may be the only effective means of obtaining the evidence.

21. Finally, regarding the proportionality of the resulting interference with Mr Mustafa's rights *vis-à-vis* the legitimate aim of the investigation, the Pre-Trial Judge may consider, *inter alia*, the gravity of the confirmed charges,<sup>27</sup> the duration and scope of the requested measures, and any safeguards to be implemented.<sup>28</sup> The legitimate aim of the investigation is the prosecution of Mr Mustafa for the crimes charged. With regard to the safeguards to be implemented, the Pre-Trial Judge takes note of the fact that, as enshrined in Rules 31-33 and 39 of the Rules, the SPO is duty-bound to take appropriate measures with respect to the rights to personal integrity, privacy or property. Equally important is the SPO assurance that it will tailor the execution of the Requested Search and Seizure and/or provide the necessary information and instructions to any other authorities executing the Requested Search and Seizure, to ensure that it is conducted in a manner that excludes information of no foreseeable relevance.<sup>29</sup> Accordingly, to the extent that its execution abides by the conditions set forth in the Rules and this decision, the Pre-Trial Judge finds that the Requested Search and Seizure is proportionate to the legitimate aim of the investigation.

22. Having found that the aforementioned conditions have been met, the Pre-Trial Judge authorises the Requested Search and Seizure as it complies with the requirements of Rules 31 and 37 of the Rules.

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<sup>26</sup> Initial Submission, para. 11; [REDACTED].

<sup>27</sup> The charges involve the war crimes of arbitrary detention, cruel treatment, torture and murder in violation of Article 14(1)(c) of the Law.

<sup>28</sup> KSC Constitutional Court Chamber 28 June 2017 Judgment, para. 64.

<sup>29</sup> Initial Submission, para. 15.



## B. TIME, DURATION, AND SCOPE OF THE SEARCH AND SEIZURE

23. The SPO does not indicate the timeframe for the execution of the search of Mr Mustafa, his residence or location of arrest and the related seizure of items. Nonetheless, it is clear from the Initial Submission that the Requested Search and Seizure is to take place in the context of Mr Mustafa's arrest. Balancing, on the one hand, the time-sensitive nature of the investigative acts and time necessary for the SPO, or any other relevant authorities, to organise the Requested Search and Seizure and, on the other hand, Mr Mustafa's reasonable expectation of privacy as well as the need for judicial oversight of the execution of these measures, the Pre-Trial Judge finds that 14 days from Mr Mustafa's arrest are sufficient for the execution of the Requested Search and Seizure.

24. The scope of Requested Search and Seizure must be limited to any evidence that is believed to have been used in, be connected with or be relevant to the confirmed charges. In particular, the Pre-Trial Judge finds that the scope of the Requested Search and Seizure must be limited to [REDACTED]. Items to be seized may include: [REDACTED].

## C. REPORTING ON THE SEARCH AND SEIZURE

25. In accordance with Rules 31(2) and 37(4)(b) of the Rules, the SPO is required to report on the execution of the requested measures. Taking in consideration the time needed to prepare a report following the execution of the requested measure, the SPO must submit a report within 14 days of the completion of the Requested Search and Seizure or within 14 days of the lapse of the 14-day timeframe provided for the execution of the Requested Search and Seizure, whichever is earlier. The report shall indicate (i) the date, time, duration, location, scope, and circumstances of the search and seizure and (ii) the fulfilment of the requirements under Rule 39 of the Rules.

#### D. RETENTION, STORAGE, AND PROTECTION OF THE SEIZED MATERIAL

26. The Pre-Trial Judge considers it necessary for the SPO to store, protect, and transfer the seized material in accordance with the standard chain of custody procedures. In so doing, the SPO must take appropriate measures to protect the seized material against loss, accidental or unauthorized access, alteration, dissemination or destruction. The SPO shall inform the Pre-Trial Judge on the appropriate procedure and precautions for the storage and protection of the material seized in a report.

27. The Pre-Trial Judge finds that a four-month timeframe from the execution of the Requested Search and Seizure is sufficient for the review of the relevance of the seized material. If such material is deemed relevant to the investigation or future proceedings related to the confirmed charges, the SPO may, in accordance with Rule 33(1)(b) of the Rules, retain the material until it is no longer relevant for the purpose for which it was obtained. The seized material will then have to be returned or destroyed pursuant to Rule 33(2)-(3) of the Rules. If the seized material falls outside the scope of the investigation for which it was obtained, and is not relevant for the investigation of any other crime under SC jurisdiction, then the seized material must be returned or destroyed immediately, in accordance with Rule 33(1)(a)(i) and (2)-(3) of the Rules.

#### E. EXECUTION AND SERVICE OF THE REQUESTED ORDER

28. If the execution of the Requested Search and Seizure or any part thereof is to take place in Kosovo, the Pre-Trial Judge recalls that, pursuant to Article 35(3) of the Law, the police within the SPO has the authority and responsibility to exercise powers given to Kosovo Police under Kosovo law. Therefore, the SPO may also be considered a “competent authority” under Rule 49(1) of the Rules capable of executing and serving orders of the Specialist Chambers, including the Requested Search and Seizure. Accordingly, the Pre-Trial Judge authorises the SPO, to serve

and to execute the present decision. Where necessary, the SPO may do so in cooperation with the competent authorities in Kosovo.

29. If the execution of the Requested Search and Seizure or any part thereof is to take place in a Third State, the Pre-Trial Judge requests, pursuant to Article 55 of the Law and Rule 208(1) of the Rules, the competent authorities to serve and execute the present decision in the presence of representatives of the SPO.

## V. DISPOSITION

30. For the above reasons, as concerns **Mr Salih Mustafa**, born 1 January 1972, of Kosovan nationality (personal number [REDACTED]), with last known residence at [REDACTED], Prishtinë/Priština, Kosovo, the Pre-Trial Judge hereby:

- a. **AUTHORISES** the Requested Search and Seizure relating to the search of Mr Mustafa, the location of his arrest and his residence as well as the seizure of any evidence that is believed to have been used in, is connected with or may be relevant to the investigation or future proceedings related to the confirmed charges, as further specified in paragraph 24 of this decision; and
- b. **AUTHORISES** the SPO to disclose, as appropriate and necessary, including to the authorities executing the Requested Search and Seizure, this decision.

31. If the Requested Search and Seizure or any part thereof is to take place in Kosovo, the Pre-Trial Judge **AUTHORISES** the SPO to serve and to execute this decision pursuant to paragraphs 23-24 and 28 mentioned above and in accordance with Rule 39 of the Rules.

32. If the Requested Search and Seizure or any part thereof is to take place in a Third State, the Pre-Trial Judge:

- a. **DIRECTS** the Registrar to transmit this decision to the competent authorities for service and execution;
- b. **DIRECTS** the SPO to consult with the Registrar on the necessary arrangements to be made for the execution and service of this decision;
- c. **REQUESTS** the competent authorities to carry out the Requested Search and Seizure, in the presence of an SPO representative and under the following conditions, where such conditions do not interfere with applicable domestic law:
  - i. The Requested Search and Seizure to be completed, within 14 days from the arrest of Mr Mustafa;
  - ii. To permit Mr Mustafa, his counsel and an independent observer to be present during the execution of the Requested Search and Seizure, unless their delay jeopardises the execution of the measure;
  - iii. To permit the SPO representative present to record the time, duration, scope and all other relevant details of the execution of this decision as well as to prepare an inventory with a detailed description of and information regarding each item seized; and
  - iv. The seized material, which may include [REDACTED], to be transferred to and be retained, stored and protected by the SPO;
- d. **REQUESTS** the competent authorities to raise any technical or logistical difficulties or impediments in the execution of this decision with the SPO representative present during the execution of the Requested Search and Seizure; and
- e. **REQUESTS** the competent authorities to treat the Requested Search and Seizure as confidential and only to disclose the existence of this decision and its contents to those entities and persons whose

involvement is strictly necessary for executing the Requested Search and Seizure.

33. Irrespective of where the Requested Search and Seizure or any part thereof takes place, the Pre-Trial Judge:

- a. **ORDERS** the SPO to report on the execution of the Requested Search and Seizure within 14 days of its completion or within 14 days of the lapse of the 14 day timeframe provided for its execution, whichever is earlier, in accordance with paragraph 25 of this decision;
- b. **ORDERS** the SPO to store, retain and protect the seized material and to report on the procedure and precautions for the storage and protection, in accordance with paragraph 26 of this decision;
- c. **ORDERS** the SPO to review the relevance of the seized material within four-months from the execution of the Requested Search and Seizure and to retain, return or destroy the seized material as prescribed by Rule 33 of the Rules, in accordance with paragraph 27 of this decision.



**Judge Nicolas Guillou**  
**Pre-Trial Judge**

Dated this Friday, 12 June 2020

At The Hague, the Netherlands.