

**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:** 11 March 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. In the past decisions regarding the prolongation of the detention of the accused, the defence submits that the personal circumstances of the Accused have not been properly evaluated, at least the particular circumstances of the Accused haven't been given the proper weight and serious consideration as to his (conditional) release has not been given.

6. Instead, to date, apparently the prima facie evaluation of materials presented by the SPO, has been enough to maintain the detention of the Accused.

7. At this stage of the proceedings, 6 months after the transfer of the Accused to The Hague, the defence submits that at least some kind of evaluation of the well-grounded suspicion has to be made. In addition, the prolonged detention has to be reviewed in light of the consequences that such (prolongation of) detention might have for the Accused.

8. Apart from these matters, it is necessary to address how realistic the SPO's arguments are as to a number of issues that have been put forward by the SPO in order to justify the prolonged detention of the Accused. And even if any kind of risk might in theory exist, whether such risks can be contained or eliminated, other than subjecting the Accused into prolonged detention.

9. The personal circumstances of a person being detained can become such that a judicial institution needs to weigh and balance these in order to see whether the prima facie well-grounded suspicion and the -in earlier decisions- enumerated risks are substantial enough to keep the Accused detained. The defence submits that in light of the personal circumstances of the Accused are such, that his detention is no longer justified, and that the alleged risks are of a mere theoretical kind.

10. The defence will first address, once more, the alleged risks, the personal circumstances of the Accused and other relevant issues.

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

11. 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.

12. The Accused mr. Mustafa denies the charges and has no fear whatsoever to face the current indictment as he is convinced about his innocence to the charges.

13. 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, baseless and unsubstantiated claim. Such claim is fundamentally ill-founded.

14. The alleged risk that he would or could commit crimes is a mere theoretical proposition, that bears in the light of the past 20 years hardly any real substance. Essentially, mr. Mustafa is a Patriot in the true sense of the word. He has been serving his home country in the past, and he still does so within the public service in which he has continued to serve his homeland.

15. The office that he holds in public service is such, that regularly his personality, his stature and his capacity to serve within that office, is evaluated. Each time mr. Mustafa has received "clearance" in order to continue within his position.

16. It is therefore simply untrue but moreover unjust to claim that he would commit a crime or could commit one. There is absolutely no intrinsic substance to that claim.

17. The defence submits that this merely theoretical ground can neither qualify as a real risk, nor justify any decision to prolong his detention.

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

18. The claim that for some reason the Accused would pose any risk of flight is also merely theoretical. During the period that he was in his home country, before being arrested, he never even contemplated to leave his home country.

19. In contrast, he has put his life in service of his country and has absolutely no reason to leave the country whose liberation he contributed to. The claim by the SPO that he could -or would- flee is equally unfounded and baseless. He would have had so many opportunities to do so if he would fear anything from the SPO. But he has nothing to fear for, as he maintains his innocence.

20. Instead of going elsewhere, he came to the Netherlands to be interviewed by the SPO, and had afterwards no reason to take any action in whatever direction. He simply maintained his job-position and had no reason to leave the country permanently for any particular reason. Mr. Mustafa has never even contemplated to leave his country out of fear for anything. His release from detention would not in any manner change his position. He will simply pick up his work if that would be allowed under the terms and conditions of a (conditional) release.

21. The defence submits that after 6 months in detention, the Pre-Trial Judge should make a finding regarding mr. Mustafa, rather than accept the SPO's presumption that mr. Mustafa would indeed pose a risk of flight. The assumption is without any factual ground. The risk has never even been assessed and is based on purely rather far-fetched claims.

22. The defence submits that the Pre -Trial Judge has to review the detention on the basis that it needs to be determined in findings, rather than SPO assumptions, that the Accused would seriously flee his home country, where he has his home, family and economic life.

23. 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.

24. Alternatively, a compulsory regular or daily visit at the SPO's liaison office or to any other authority could be implemented as a condition for a conditional release of the Accused. Such condition would simply assure that he would go nowhere else. And it is easy to control.

25. 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 made 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.**

26. The defence submits once again that the accused can be released under conditions to be determined by the Court (be it the Pre-Trial Judge or the Panel).

27. It is the design of those measures that can avoid or eliminate the (theoretical and alleged) risk(s) that the accused would interfere either with any kind of the proceedings or with witnesses or victims.

28. 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.

29. 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.

30. 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.

31. 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.

32. 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 factual ground that the Accused would do so when he would be released.

33. 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.

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

35. 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.

36. In addition to this, conditions can be set as to control the people that might visit him at his home, or control his telephone conversations, social media activities, controlled activities within or around his home, or any other measures that can be put in place.

37. 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.

**V. Personal and professional circumstances impacted by prolonged detention of the Accused.**

38. An Accused in detention has in general a lot to lose once he is held in detention and when is detention is regularly being continued.

39. Very much counts the same for the Accused in this case.

40. The Accused has been employed up to the moment that he has been arrested and transferred to The Hague. His employment was full time and he has maintained a family life, which has been greatly harmed by his detention.

41. The Accused has fear to lose his job and his employment which would of course damage the income that he was able to generate for himself and his family.

42. In deciding about the detention and the prolongation of it, the defence submits that the Court needs to address this personal issue. It is common knowledge that when someone will not show up for work for a long time, that he will simply lose his job.

43. The economic impact for the Accused and his family of the prolongation of detention is therefore a factor that needs to be considered and addressed by the Court. The defence submits that the economic impact of the prolongation of the detention is to be weighed as a factor in order to justify such prolongation.

44. The detention of the Accused has to be proportional as to the effects that the detention has on the Accused himself, his economic well-being, and that of his family.

45. The Accused fears the loss of his job, and with it, his income. It is as simple as that.

46. Therefore, the defence submits that in order to limit the damage to his economic life and that of his family, the Accused is to be released, at the minimum on a conditional basis, so that he will be able to secure for him and his family his economic life.



47. The conditions can be defined by the Pre-Trial Judge and can be tailored to the extent that the Pre -Trial Judge deems it necessary. Propositions put forward by the defence to this end, can serve as examples that can be reinforced in whatever manner.

48. Simply keeping the Accused detained, without any possibility of release, would most certainly have a profound impact of that of the Accused, his employment his economic life and that of his family. And it is therefore a serious matter to contemplate, in the light of the possibilities that are proposed in order to limit any kind of theoretical and alleged risk that might have been put forward by the SPO in previous or current arguments.

49. The defence submits and requests the Court to give serious consideration to the justified fears that the Accused has as for his personal and professional circumstances.

50. Once again, the defence reiterates that the Accused will be present during Court sessions, will abide by any condition that is to be imposed by the Court, and will in no manner undertake anything that would harm the proceedings in any manner.

51. Therefore, any kind of condition to effectuate the above, will be accepted by the Accused.

## **VI. Conclusion**

52. The defence submits that the Accused will be released, or released under conditions to be set by the Pre Trial Judge .

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

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Done at The Hague, the Netherlands