



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

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

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

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 17 March 2021

**Language:** English

**Classification:** Public

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**Prosecution Response on the Review of Detention**

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**Specialist Prosecutor's Office**

Jack Smith

**Counsel for the Accused**

Julius von Bóné

## A. INTRODUCTION

1. Pursuant to Article 41(6) and (10) of the Law<sup>1</sup> and Rule 57(2) of the Rules,<sup>2</sup> and in compliance with the order of the Pre-Trial Judge,<sup>3</sup> the Specialist Prosecutor's Office ('SPO') hereby responds to the Defence's submissions on the review of detention of Salih MUSTAFA ('Accused').<sup>4</sup>
2. The continued detention of the Accused remains necessary.<sup>5</sup> There has been no relevant change in circumstances detracting from the established reasons for detention. Rather, the Article 41(6)(b) risks have only increased given the fact that the SPO has filed its Pre-Trial Brief and other Rule 95(4) materials in February 2021, and that the transmission of the case file to the Trial Panel is now scheduled to take place on or about the beginning of May 2021.
3. In the first two decisions on the review of the Accused's detention on remand,<sup>6</sup> the Pre-Trial Judge confirmed the existence of a well-grounded suspicion of criminal liability and found that there were still articulable grounds to believe that the three risks envisaged by Rule 41(6)(b) existed.<sup>7</sup> The Pre-Trial Judge also found that none of the forms of conditional release listed in Article 41(12) were sufficient to mitigate these risks.<sup>8</sup> The circumstances found to exist by the Pre-Trial Judge have not changed. Accordingly, the Accused's continued detention remains necessary.

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<sup>1</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

<sup>2</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). Unless otherwise indicated, all references to 'Rule(s)' are to the Rules.

<sup>3</sup> Oral Order regarding next review of detention, Pre-Trial Judge, Transcript of Status Conference, KSC-BC-2020-05, 5 March 2021, Open Session, p.203, lines 12-13.

<sup>4</sup> Defence submission for the review on the detention of the Accused, KSC-BC-2020-05/F00095, Public, 11 March 2021 ('Defence Submission').

<sup>5</sup> *Contra* Defence Submission, KSC-BC-2020-05/F00095, paras.9, 17, 22-25, 26-27, 34, 48, 52.

<sup>6</sup> Decision on Review of Detention, KSC-BC-2020-05/F00052, Public, 23 November 2020 ('First Detention Review'); Second Decision on Review of Detention, KSC-BC-2020-05/F00068, Public, 25 January 2021 ('Second Detention Review').

<sup>7</sup> *See* First Detention Review, KSC-BC-2020-05/F00052, para.32; Second Detention Review, KSC-BC-2020-05/F00068, paras.20-21, 26, 31, 32.

<sup>8</sup> First Detention Review, KSC-BC-2020-05/F00052, para.37; Second Detention Review, KSC-BC-2020-05/F00068, para.37.

4. In the sections below, the SPO addresses the issues raised in the Defence Submission with regard to the Article 41(6)(b) risks. These issues do not constitute a relevant change in circumstances, do not impact the Pre-Trial Judge's previous findings, and do not detract from the need for the continued detention of the Accused.

B. CIRCUMSTANCES REQUIRING THAT THE ACCUSED BE KEPT IN DETENTION

i. A well-grounded suspicion that the Accused committed crimes within the jurisdiction of the KSC remains

5. The Defence submits that, at this stage of the proceedings, there must be an evaluation of the extent to which the suspicion against the Accused is well-grounded.<sup>9</sup> This evaluation has in fact already been carried out. In the First and Second Detention Review, the Pre-Trial Judge found that the requirement of Article 41(6)(a) continued to be met.<sup>10</sup> The Defence raised no specific or additional issues regarding the existence of a grounded suspicion. This suspicion thus remains, as there have been no developments in the case warranting reconsideration of that finding.

ii. The Accused remains a flight risk

6. The Defence puts forward arguments that have already been discussed and rejected by the Pre-Trial Judge when assessing the Defence's prior submissions on the review of detention.<sup>11</sup>

7. Contrary to the Defence's claim that the risk of flight is 'merely theoretical',<sup>12</sup> and based on assumptions,<sup>13</sup> the Pre-Trial Judge found that the Accused had both an

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<sup>9</sup> Defence Submission, KSC-BC-2020-05/F00095, para.7.

<sup>10</sup> First Detention Review, KSC-BC-2020-05/F00052, paras.15, 18; Second Detention Review, KSC-BC-2020-05/F00068, paras.14-15.

<sup>11</sup> Cf. Defence Submission, KSC-BC-2020-05/F00095, paras.18-22, and Second Detention Review, KSC-BC-2020-05/F00068, paras.18-21.

<sup>12</sup> Defence Submission, KSC-BC-2020-05/F00095, para.18.

<sup>13</sup> Defence Submission, KSC-BC-2020-05/F00095, para.21.

incentive and the means to flee.<sup>14</sup> The Pre-Trial Judge also held *inter alia* that the disclosure of the materials supporting the indictment had increased that incentive.<sup>15</sup>

8. Further, contrary to the Defence's submissions that the Pre-Trial Judge's review should be based on whether the Accused 'would seriously flee',<sup>16</sup> the Court of Appeals confirmed that the relevant assessment by the Pre-Trial Judge concerns 'articulable grounds to believe' that there is a *risk*, not the *inevitability* or *certainty* of such events.<sup>17</sup>

9. The circumstances considered by the Pre-Trial Judge have not changed since the First and Second Detention Review. The Defence did not submit any new information or development undermining the prior determinations by the Pre-Trial Judge. The risk of flight by the Accused remains, and may have only increased with the filing of the SPO's Pre-Trial Brief and related material in February 2021.<sup>18</sup>

iii. The risk of interference with witnesses and victims remains unchanged

10. With regard to the risk of interference and obstructing proceedings, the Defence submits that the Accused has not done anything to hamper SPO's investigations in the past year and that there is 'no factual ground' to believe that he will do so if released.<sup>19</sup> Additionally, it suggests certain alternative measures to mitigate this risk.<sup>20</sup>

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<sup>14</sup> First Detention Review, KSC-BC-2020-05/F00052, para.22; Second Detention Review, KSC-BC-2020-05/F00068, paras.19-20.

<sup>15</sup> First Detention Review, KSC-BC-2020-05/F00052, para.23.

<sup>16</sup> Defence Submission, para.22.

<sup>17</sup> See Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, Court of Appeals Chamber, 9 December 2020, para.67 (emphasis added).

<sup>18</sup> Submission of the Confidential Redacted Versions of the Pre-Trial Brief, Witness List, and Exhibit List, with confidential annexes 1-3, KSC-BC-2020-05/F00085, 17 February 2021.

<sup>19</sup> Defence Submission, KSC-BC-2020-05/F00095, para.32.

<sup>20</sup> Defence Submission, KSC-BC-2020-05/F00095, paras.26, 34-37.

11. However, the Defence does not put forward any new information or development.<sup>21</sup> There has been no change in the circumstances considered by the Pre-Trial Judge.<sup>22</sup> The risk of interference still exists.

12. Contrary to the Defence's arguments,<sup>23</sup> no measures alternative to detention could eliminate or sufficiently mitigate the risks of interference with witnesses or obstructing proceedings.<sup>24</sup>

iv. The risk of committing further crimes remains

13. The Defence again puts forward arguments that have already been discussed and rejected by the Pre-Trial Judge when assessing the Defence's prior submissions on the review of detention.<sup>25</sup>

14. Contrary to the Defence's claim that the risk that the Accused could commit crimes is 'merely theoretical' and does not qualify as a real risk,<sup>26</sup> the Pre-Trial Judge made specific findings supporting the existence of that risk.<sup>27</sup>

15. The Defence did not submit any new information or development undermining the prior determinations by the Pre-Trial Judge. The circumstances considered by the Pre-Trial Judge remain unchanged, and, if anything, as noted above,<sup>28</sup> have only further increased. There is still a risk that, if released, the Accused will commit further crimes.

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<sup>21</sup> Defence Submission, KSC-BC-2020-05/F00095, paras.27, 31-33.

<sup>22</sup> First Detention Review, KSC-BC-2020-05/F00052, paras.27-28; Second Detention Review, KSC-BC-2020-05/F00068, paras.24-26.

<sup>23</sup> Defence Submission, KSC-BC-2020-05/F00095, paras.27, 31.

<sup>24</sup> See below, Section B.v.

<sup>25</sup> Cf. Defence Submission, KSC-BC-2020-05/F00095, paras.11-17, and Second Detention Review, KSC-BC-2020-05/F00068, paras.28-31.

<sup>26</sup> Defence Submission, KSC-BC-2020-05/F00095, para.17.

<sup>27</sup> First Detention Review, KSC-BC-2020-05/F00052, para.31; Second Detention Review, KSC-BC-2020-05/F00068, paras.29-31.

<sup>28</sup> See para.9 above.

v. Continued detention is the only way to manage the Article 41(6)(b) risks

16. The Defence's proposed measures for conditional release<sup>29</sup> are the same as those already put forward and rejected by the Pre-Trial Judge,<sup>30</sup> with the addition of measures to control visits at the Accused's home, his telephone conversations and social media activities.<sup>31</sup>

17. The SPO reiterates that no condition would suffice to mitigate the identified Article 41(6)(b) risks. These risks, considered alone or together, can only be effectively managed in the Detention Centre. Detention is the most effective means to limit the Accused's ability to flee or otherwise thwart the KSC's jurisdictional reach, obstruct the investigation or court proceedings, and/or commit further crimes. Accordingly, release, with or without conditions, should not be granted.<sup>32</sup>

vi. The personal and professional circumstances of the Accused are not factors that sufficiently mitigate the risks

18. Further, the personal and professional circumstances of the Accused that the Defence puts forward<sup>33</sup> cannot be considered as factors mitigating the Article 41(6)(b) risks, and should thus be rejected.

19. In fact, personal fears such as losing one's job or incurring economic damage are necessarily associated with a criminal case of this nature. Such circumstances *per se* do not mitigate or bear upon the array of risks the Accused poses if released. To the contrary, the Accused's return to work and to his workplace would trigger a number of circumstances (communications, movements, contacts, and so on) that could not be adequately monitored and that would only enhance the very same risks that only the continued detention of the Accused can effectively manage.

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<sup>29</sup> Defence Submission, KSC-BC-2020-05/F00095, paras.26, 34-37.

<sup>30</sup> See Second Detention Review, KSC-BC-2020-05/F00068, paras.34-37.

<sup>31</sup> Defence Submission, KSC-BC-2020-05/F00095, para.36.

<sup>32</sup> See, *similarly*, ICC, Appeals Chamber, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-278-Red, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on [...]", 26 October 2012, para.80.

<sup>33</sup> Defence Submission, KSC-BC-2020-05/F00095, paras.38-49.

20. Since the Defence does not explain how the identified and established Article 41(6)(b) risks would be sufficiently mitigated – rather than heightened - by the circumstance of the Accused returning to work,<sup>34</sup> the Defence's arguments should be dismissed.

C. RELIEF REQUESTED

21. For the foregoing reasons, the SPO requests that the Pre-Trial Judge reject the Defence Submission and order that the Accused remain in detention.

**Word count: 1,542**



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**Jack Smith**

**Specialist Prosecutor**

Wednesday, 17 March 2021

At The Hague, the Netherlands.

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<sup>34</sup> Cf. Defence Submission, KSC-BC-2020-05/F00095, paras.38-49; *see also* para.35.