



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 March 2021

**Language:** English

**Classification:** **Public**

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**Third Decision on Review of Detention**

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**Specialist Prosecutor**  
Jack Smith

**Counsel for the Accused**  
Julius von Bóné

**THE PRE-TRIAL JUDGE**,<sup>1</sup> 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 decision<sup>2</sup> and an arrest warrant issued by the Pre-Trial Judge ("Arrest Warrant"),<sup>3</sup> further to the confirmation of an indictment against him.<sup>4</sup>
2. On 23 November 2020 and 25 January 2021, respectively, the Pre-Trial Judge issued the first and second decision reviewing the detention of Mr Mustafa, ordering his continued detention ("First Review of Detention" and "Second Review of Detention").<sup>5</sup>
3. On 5 March 2021, the Pre-Trial Judge requested the Parties to file written submissions on whether reasons for the continued detention of Mr Mustafa still exist.<sup>6</sup>
4. On 11 March 2021, the Defence filed its submissions.<sup>7</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, 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*.

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> KSC-BC-2020-05, F00052, Pre-Trial Judge, *Decision on Review of Detention* ("First Review of Detention"), 23 November 2020, public; F00068, Pre-Trial Judge, *Second Decision on Review of Detention* ("Second Review of Detention"), 25 January 2021, public.

<sup>6</sup> KSC-BC-2020-05, Transcript, 5 March 2021, public, p. 203, lines 12-13.

<sup>7</sup> KSC-BC-2020-05, F00095, Defence, *Defence Submissions for the Review on the Detention of the Accused* ("Defence Submissions"), 11 March 2021, public.

5. On 17 March 2021, the Specialist Prosecutor's Office ("SPO") filed its submissions.<sup>8</sup>

## II. SUBMISSIONS

6. The Defence submits that Mr Mustafa should be released, with or without conditions.<sup>9</sup> In particular, the Defence submits that: (i) after six months of detention a review of the well-grounded suspicion is warranted;<sup>10</sup> (ii) the risks found in respect of the Accused are merely theoretical;<sup>11</sup> and (iii) the personal circumstances of the Accused, including the possibility to lose his job and hence the income for his family, should be taken into account.<sup>12</sup> Should he be released with conditions, Mr Mustafa accepts to adhere to any condition deemed appropriate by the Pre-Trial Judge, including: submitting his passport to competent authorities; seeking permission to undertake any work-related trip; house arrest, duty to report before an SPO officer, undertaking to appear before the Specialist Chambers ("SC") as ordered, having monitoring devices installed at home or on his person, and being subject to travel or work ban, if necessary ("Proposed Conditions").<sup>13</sup>

7. The SPO submits that the circumstances previously found by the Pre-Trial Judge have not changed and, accordingly, Mr Mustafa's continued detention remains necessary.<sup>14</sup> Specifically, the SPO submits that the Defence did not provide any reason as to why the well-grounded suspicion that Mr Mustafa is criminally responsible for the crimes charged no longer exists.<sup>15</sup> The SPO further submits that the Defence advanced no new arguments as to why the risks under Article 41(6)(b) of the Law no

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<sup>8</sup> KSC-BC-2020-05, F00096, Specialist Prosecutor, *Prosecution Response on the Review of Detention* ("SPO Submissions"), 17 March 2021, public.

<sup>9</sup> Defence Submissions, para. 52.

<sup>10</sup> Defence Submissions, para. 7.

<sup>11</sup> Defence Submissions, paras 13-14, 18, 21.

<sup>12</sup> Defence Submissions, paras 40-49.

<sup>13</sup> Defence Submissions, paras 23-24, 35-36.

<sup>14</sup> SPO Submissions, paras 2-3.

<sup>15</sup> SPO Submissions, para. 5.

longer exist.<sup>16</sup> As to the conditions proposed by the Defence, the SPO submits that no condition would sufficiently mitigate the risks already found, and that detention is the only effective means in this regard.<sup>17</sup> Lastly, the SPO submits that the personal and professional circumstances of the Accused should not be considered as mitigating factors of the risks, and that a return of the Accused to his job could in fact heighten the risks under Article 41(6)(b) of the Law.<sup>18</sup>

### III. APPLICABLE LAW

8. Article 41(6) of the Law provides that the 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 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

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<sup>16</sup> SPO Submissions, paras 11, 13, 15.

<sup>17</sup> SPO Submissions, para. 17.

<sup>18</sup> SPO Submissions, para. 19.

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. As regards the threshold for continued detention, Article 41(6)(a) of the Law requires grounded suspicion that a crime within the jurisdiction of the SC has been committed.<sup>19</sup> In this regard, the Pre-Trial Judge recalls his finding that by virtue of

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<sup>19</sup> 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”. Second Review of Detention, para. 14. 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.

having confirmed an indictment against Mr Mustafa,<sup>20</sup> the requirement of Article 41(6)(a) of the Law has been met.<sup>21</sup> The Pre-Trial Judge reiterates that the evaluation of the evidence in support of the charges will occur at trial, when Mr Mustafa's guilt or innocence will be determined.<sup>22</sup> The Pre-Trial Judge considers that the Defence does not raise any specific argument in support of its claim that the grounded suspicion against the Accused no longer exists. Therefore, the Pre-Trial Judge finds that no intervening information or development in the current proceedings warrants reconsideration of the above findings.

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

#### B. NECESSITY OF DETENTION

14. 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.<sup>23</sup> 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.<sup>24</sup> The Pre-Trial Judge further recalls that, on the basis of the available evidence, the specific articulable grounds must support the “belief”<sup>25</sup> 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

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<sup>20</sup> Confirmation Decision, para. 163(a).

<sup>21</sup> Arrest Warrant, para. 1; Decision on Arrest and Transfer, para. 18.

<sup>22</sup> Second Review of Detention, para. 14.

<sup>23</sup> 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”.

<sup>24</sup> 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.

<sup>25</sup> See chapeau of Article 41(6)(b) of the Law.

the inevitability, of a future occurrence.<sup>26</sup> In simple terms, while suspicion simpliciter is not enough, certainty is not required.<sup>27</sup>

## 1. Risk of Flight

15. Contrary to the Defence submissions, the Pre-Trial Judge shall not evaluate whether or not the Accused “would seriously flee”, if released, but shall determine, on the basis of the Parties’ submissions, whether the possibility of such future occurrence (still) exists.<sup>28</sup>

16. In this respect, the Pre-Trial Judge recalls his finding<sup>29</sup> that Mr Mustafa has both an incentive and the means to flee, on account of the following factors: (i) knowledge of the charges against him and potential penalties; (ii) awareness of publicly reported convictions of senior Llap Operational Zone commanders; (iii) links to the Kosovo intelligence apparatus with resultant access to information and resources; and (iv) ability to travel freely to countries not requiring a visa.<sup>30</sup>

17. In addition, the Pre-Trial Judge notes that the SPO has completed the disclosure of incriminating evidence and has filed its Pre-Trial Brief, list of witnesses (including witnesses whose identity has been revealed to the Defence), and list of exhibits,<sup>31</sup> thus outlining in full the case it intends to present at trial. The Pre-Trial Judge considers that this elucidates the seriousness of the charges and

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<sup>26</sup> Second Review of Detention, para. 16. See also 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.

<sup>27</sup> KSC-BC-2020-06, F00178, Pre-Trial Judge, *Decision on Kadri Veseli’s Application for Interim Release*, 22 January 2021, public, para. 21.

<sup>28</sup> See para. 14 above.

<sup>29</sup> Second Review of Detention, para. 19.

<sup>30</sup> Decision on Arrest and Transfer, para. 20; Arrest Warrant, para. 5.

<sup>31</sup> KSC-BC-2020-05, F00085, Specialist Prosecutor, *Submission of the Confidential Redacted Versions of the Pre-Trial Brief, Witness List, and Exhibits List*, 17 February 2021, public, with Annexes 1-3, confidential; F00088, Specialist Prosecutor, *Submission of Corrected Pre-Trial Brief*, public, with Annex 1, strictly confidential and ex parte, and Annex 2, confidential.

makes progressively more concrete the possibility of conviction and of the imposition of a lengthy sentence.

18. The Defence does not provide any information indicating new or changed circumstances capable of affecting the risk of flight, but merely repeats previous submissions regarding Mr Mustafa's cooperation with the SPO and his lack of interest to flee Kosovo,<sup>32</sup> which have already been weighed in the Second Review of Detention.<sup>33</sup> The Pre-Trial Judge considers that no intervening information or development in the current proceedings undermines the above determinations; rather, the upcoming date for finalisation of the pre-trial stage and for transmission of the case file to the Trial Panel pursuant to Rule 98(1) of the Rules continue to demonstrate the risk of flight.

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

## **2. Risk of Obstructing the Progress of SC Proceedings**

20. With regard to the risk of obstructing SC proceedings, the Pre-Trial Judge recalls his finding<sup>34</sup> that the limited temporal and geographical scope of the case would facilitate the process of identifying and interfering with the victims and witnesses, especially for an experienced intelligence officer such as Mr Mustafa.<sup>35</sup> The Pre-Trial Judge further confirms that the concrete risk of conviction and the consequent imposition of penalties demonstrates Mr Mustafa's incentives to interfere with victims and witnesses,<sup>36</sup> particularly as he is now informed, through the Pre-Trial Brief and related material, of the full extent of the case that the SPO intends to present at trial, including the identity of some witnesses.<sup>37</sup>

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<sup>32</sup> Defence Submissions, paras 18-20.

<sup>33</sup> Second Review of Detention, para. 20.

<sup>34</sup> Second Review of Detention, para. 24.

<sup>35</sup> Decision on Arrest and Transfer, para. 21; Arrest Warrant, para. 5.

<sup>36</sup> Second Review of Detention, para. 24.

<sup>37</sup> *See supra* para. 17.



21. Regarding this risk, the Defence does not provide any information indicating new or changed circumstances, but merely repeats previous submissions, namely that Mr Mustafa cooperated with the SPO and that no specific incident of obstruction to criminal proceedings may be attributed to the Accused.<sup>38</sup> These submissions, which were already rejected in the Second Review of Detention,<sup>39</sup> do not negate the findings that Mr Mustafa has the incentive and means to obstruct SC proceedings, in light of the Accused's knowledge of the case and evidence against him. This holds particularly true at this stage of the proceedings, when the Accused has been informed, through the Pre-Trial Brief, of the SPO case to be presented at trial, and has been provided with the summary of the evidence to be elicited from the SPO witnesses, including witnesses whose identity is now known to the Defence.<sup>40</sup> The Pre-Trial Judge considers that no intervening information or development in the current proceedings undermines the above determinations.

22. 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**

23. As regards the risk of committing further crimes, the Pre-Trial Judge recalls his finding<sup>41</sup> 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.<sup>42</sup> The Pre-Trial Judge also recalls his above finding that there is a risk that Mr Mustafa will

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<sup>38</sup> Defence Submissions, paras 32-33.

<sup>39</sup> Second Review of Detention, para. 25.

<sup>40</sup> KSC-BC-2020-05, F00085/A02, Specialist Prosecutor, Annex 2 to *Submission of the Confidential Redacted Versions of the Pre-Trial Brief, Witness List, and Exhibits List*, 17 February 2021, confidential, pp. 20-24.

<sup>41</sup> Second Review of Detention, para. 29.

<sup>42</sup> Decision on Arrest and Transfer, para. 22; Arrest Warrant, para. 5.

obstruct SC proceedings.<sup>43</sup> 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 former are of relevance to the assessment of the latter,<sup>44</sup> particularly in light of the limited scope of the charges. In light of the above, the Pre-Trial Judge considers that 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.

24. Regarding this risk, the Defence does not provide any information indicating new or changed circumstances, but merely repeats previous submissions, namely that Mr Mustafa cooperated with the SPO and that he has a clean criminal record, adding that the latter provided him with the required clearance to continue his public office.<sup>45</sup> These circumstances do not negate the assessment that, as he is now informed of the incriminating evidence against him and, crucially, of the full extent of the SPO case for trial, Mr Mustafa has the incentive to commit further crimes against SC victims or witnesses testifying as to his alleged conduct.

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

#### **4. Conclusion**

26. The Pre-Trial Judge finds that no intervening information or development in the current proceedings undermines the determination that there are articulable

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<sup>43</sup> See *supra* paras 20-22.

<sup>44</sup> Similarly KSC-BC-2020-06, F00177/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Hashim Thaçi's Application for Interim Release*, 22 January 2021, public, para. 48.

<sup>45</sup> Defence Submissions, paras 11-15.

grounds to believe that all three risks envisaged under Article 41(6)(b)(i)-(iii) of the Law continue to exist.

### C. CONDITIONAL RELEASE

27. As regards the risk of flight, the Pre-Trial Judge considers that some of the Proposed Conditions, notably Mr Mustafa's undertaking to remain under house arrest or any other form of alternative detention, to have monitoring devices installed to ensure that he does not leave his home, to submit his passport to the competent authorities, to seek permission for any work-related travel, to report before an SPO officer, and to appear before the SC when so ordered, may appropriately mitigate this risk. Accordingly, the Pre-Trial Judge confirms his previous findings that the risk of flight could be managed, should Mr Mustafa be released with appropriate conditions.<sup>46</sup>

28. 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 irrespective of whether Mr Mustafa continues his current employment or not. In this respect, the Pre-Trial Judge considers that, contrary to what the Defence alleges, the fear of losing one's job may not be regarded as a persuasive factor in the present assessment, as it is the direct (potential) consequence of criminal proceedings involving detention of the Accused ordered under the Law.

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<sup>46</sup> Second Review of Detention, para. 35.

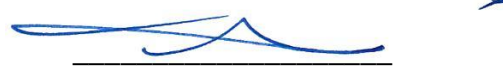
29. The Pre-Trial Judge further considers that none of the Proposed Conditions could restrict or monitor Mr Mustafa's private communications, through which he could inconspicuously request or receive information and resources facilitating interference with SC victims or witnesses or commission of further 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.

30. 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

31. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **ORDERS** Mr Mustafa's continued detention;
- b. **ORDERS** the Defence to file submissions on the next review of detention by Tuesday, 11 May 2021; and
- c. **ORDERS** the SPO to respond to the Defence submissions, if any, by Monday, 17 May 2021.



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

Dated this Thursday, 25 March 2021  
At The Hague, the Netherlands