

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

**Before:** **Trial Panel I**  
Judge Roland Dekkers  
Judge Mappie Veldt-Foglia  
Judge Gilbert Bitti

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Defence

**Date:** 11 May 2021

**Language:** English

**Classification:** Public

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**Defence submission for**

review of the detention of the Accused

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**Specialist Prosecutor**

Jack Smith

**Counsel for the Accused**

Mr. Julius von Bóné

## I. Introduction

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 the 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-founded suspicion that mr. Salih Mustafa committed or participated in the commission of the alleged crimes.

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 proven beyond a reasonable doubt before an independent judge.

5. 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.

6. Even so, during all these years, no particular statements regarding his involvement in any crime have surfaced in this case or any other case. Mr. Mustafa has a clean criminal record.

## II. Factual circumstances, not in dispute

7. During his entire stay in Kosovo since the end of the conflict, mr. Mustafa worked and has not in any manner been involved in any criminal activities. The Pre-Trial judge has never seriously considered or contemplated the possibilities to release the Accused under a set of conditions that would eliminate any theoretical "risks" that has been put forward by the SPO.

8. Fact is that mr. Mustafa has never been involved in any potential risk against anybody.
9. Fact is that mr. Mustafa has hardly ever left his home country, and even if he ever did, he returned, as his social life, economic life, his family life and life in society in his homeland. It is therefore a baseless assumption and it is without any ground to suggest or to find that his detention would suddenly change all that.
10. Fact is that mr. Mustafa came to The Hague as he was requested to do so by the SPO to be interviewed. Therefore, it is a suggestion without any foundation that mr. Mustafa would not abide by any decision of the Court to ensure his appearance during trial.
11. Fact is that mr. Mustafa lives in a relatively small country in which he would be easily found when he would not abide by a decision of the Court.
12. Lastly, fact is that mr. Mustafa is eager to defend himself to the charges of the indictment, as he vehemently denies all of these.
13. Mr. Mustafa has in light of these facts no particular incentive to flee.

### **III. Factors considered in earlier decisions do not relate to a risk of flight.**

14. In addition, the factors such as awareness of the charges, knowledge of reported convictions of senior Llap Operational Zone commanders, links to Kosovo intelligence apparatus and ability to travel to countries not requiring a visa, are in the view of the defence no incentive for the accused to flee.
15. Any accused is and must be (made) aware of the charges against him, otherwise there is no ground at all to detain him. To hold such awareness as a factor against him, as a risk for flight, is therefore unjust. It would mean that an(y) accused awaiting his trial could be held for as long as the trial might last and that is, at this point and certainly for mr. Mustafa, undetermined. It is also a factor that cannot be in any manner controlled by the Accused, as the development of a case is simply in the hands of the Court, and not of the accused. Lastly,

there is no direct relation between the awareness of the charges and the risk or incentive to flee. It is a presumption not based on any factual ground, certainly not in the light of the facts as explicated in the above.

16. As Mr. Mustafa is not a Llap Operational Zone commander, let alone a senior one, so there is little value in the factor that such commanders might have been convicted. The Court mis-qualifies the status of the Accused. Besides, these convictions date from the period far before the arrest of the Accused and apparently never formed for him any incentive or reason for him to flee his homeland. It is therefore incorrect to hold this factor against Mr. Mustafa. Additionally, the defence cannot conclude in any manner that any convictions at all relate to the risk to flee for Mr. Mustafa. He even never contemplated to flee, and never would.

17. The links to the Kosovo intelligence apparatus can also not be held against Mr. Mustafa in order to substantiate the risk of flight. If such risk should exist at all, it is rather easy to eliminate such risk. Conditions could be set in order to prevent Mr. Mustafa to such resources, and lastly, the defence does not in any manner see for what reason this factor would impose a risk of flight. There is no relation between the two.

18. The fact that Mr. Mustafa is able to visit countries without a visa requirement is a factor that can also be easily eliminated. If Mr. Mustafa has no passport or ID card, or if the condition is set that he should report daily or weekly to some authority, the entire risk to flee (or leave the country) can be eliminated. Considering the factual elements set out earlier, it is extremely unlikely that he would leave his country, his entire economic and social life as well as he would abandon his family in order to evade his trial. It is a theoretical factor without any ground. Besides, he is very determined to face trial.

#### **IV. Disclosures of the SPO are either redacted or irrelevant**

19. The factor that Mr. Mustafa is aware of the SPO's disclosures of incriminating evidence makes no difference at all. As most of the (witness) material is redacted, and other material is irrelevant to the charges it makes no difference at all as to the period of time where the material was not disclosed. And none of the identified witnesses is in fact incriminating.

20. The Court has on the other hand not seriously considered the intrinsic value of the evidence in the present case. Just referring to the confirmed indictment seems to be the only ground for keeping mr. Mustafa detained.

**V. The risk of flight is to be evaluated objectively and/or a set of conditions for release that make such flight impossible, can be imposed.**

21. The defence submits that after nearly eight months in detention it is time that the Court makes concrete findings if mr. Mustafa would indeed pose a risk of flight or any other risk. The claim of the SPO to that end is baseless. The assumption is without any factual ground. The risk has never even been objectively assessed.

22. The defence submits that at least an evaluation of any concrete and assumed risk should take place, in order to see whether such risk actually exists, rather than that it is assumed or implied in some factor.

23. The Accused is willing to abide by any condition that might be put forward in such evaluation or that might be put forward by the Court itself.

24. The Defence submits that the Accused should not be held solely on the basis of assumed risks or purely theoretic possibilities of risk.

25. The case moves into the next phase and the SPO has completed its investigations and released its evidentiary material. Most of the relevant incriminating material is redacted. Most the other material in the case, the defence submits, is irrelevant to any acts actually performed by the Accused as is described in the charges of the indictment.

26. The Court should therefore evaluate if any risk under Article 41 (6) (i) or (ii) is actually a real risk, or just a presumed risk.

27. The defence submits that, as for Article 41 (6) (iii), as serious as the crimes might appear, not a single evaluation in any manner has taken place as to the intrinsic probative value of

the evidence that has been put forward by the SPO. At this stage of the proceedings, the defence submits that such evaluation of the evidence is to take place in order to make any findings as to the veracity of the evidence in relation to the charges. In that manner the Court can balance the potential risks vis-à-vis the actual factual circumstances of the Accused as described above.

28. The Defense reiterates, as in earlier submissions, that conditions could be set for the accused in order to prevent any kind of risk that might be imagined by the Court, and that the accused is willing to abide by any of those should these be put into place.

## **VI. Conclusion**

29. The defence submits that the accused should be released from detention and that the Court, if that is determined necessary, can set any conditions of release as it might deem necessary and appropriate.

30. The defence has at this point no further submissions.

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

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At The Hague, the Netherlands