



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

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

Before: **Trial Panel I**
Judge Mappie Veldt-Foglia, Presiding Judge
Judge Roland Dekkers
Judge Gilbert Bitti
Judge Vladimir Mikula, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

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Language: English

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Prosecution Response on the Fourth Review of Detention

Specialist Prosecutor's Office

Jack Smith

Counsel for the Accused

Julius von Bóné

Victims' Counsel

Anni Pues

A. INTRODUCTION

1. Pursuant to Article 41(6) and (10) of the Law¹ and Rule 57(2) of the Rules,² and in compliance with the order of the Pre-Trial Judge,³ the Specialist Prosecutor's Office ('SPO') hereby files its submissions on the review of detention of Salih MUSTAFA ('Accused').
2. On 12 June 2021, the Pre-Trial Judge issued an arrest warrant against the Accused on the basis of a) the existence of a well-grounded suspicion of criminal responsibility for the crimes charged in the Indictment;⁴ and b) the existence of flight risk, risk of obstruction to the proceedings, and the risk that the Accused, if released, could commit further crimes.⁵ In his subsequent bimonthly detention reviews pursuant to Rule 57, the Pre-Trial Judge found that the well-grounded suspicion of the Accused's criminal responsibility remained. He also found that the progress of the pre-trial phase and the disclosure of evidence to the Accused had increased the risks of flight, obstruction, and of commission of other crimes.⁶ The Pre-Trial Judge also consistently held that none of the forms of conditional release listed in Article 41(12) were sufficient to mitigate these risks.⁷
3. To date, the circumstances considered by the Pre-Trial Judge in ordering the continued detention of the Accused have not changed. Rather, after the transmission of the case file to the Trial Panel,⁸ the Accused is now closer than ever to facing a public

¹ 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.

² 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.

³ Third Decision on Review of Detention, KSC-BC-2020-05/F00097, Public, 25 March 2021 ('Third Detention Review'), para.31.

⁴ Public Redacted Version of Arrest Warrant for Mr Salih Mustafa, KSC-BC-2020-05/F00009/A01/RED, Public, 12 June 2020, paras 1-4.

⁵ KSC-BC-2020-05/F00009/A01/RED, para.5. *See* Rule 41(6)(b).

⁶ Decision on Review of Detention, KSC-BC-2020-05/F00052, Public, 23 November 2020; Second Decision on Review of Detention, KSC-BC-2020-05/F00068, Public, 25 January 2021; Third Decision Review.

⁷ Decision on Review of Detention, KSC-BC-2020-05/F00052, Public, 23 November 2020; Second Decision on Review of Detention, KSC-BC-2020-05/F00068, Public, 25 January 2021; Third Decision Review.

⁸ Decision Transmitting the Case File to Trial Panel I, KSC-BC-2020-05/F00119, Public, 7 May 2021.

trial. Moreover, with the trial phase of the proceedings about to start, the identity of key prosecution witnesses for whom the Pre-Trial Judge ordered delayed disclosure will shortly be disclosed to the Accused. Once their identity is known, the risk of interference will dramatically increase, together with the risk for the safety of the witnesses.⁹

4. Accordingly, the Accused's continued detention remains necessary.

B. CIRCUMSTANCES REQUIRING THAT THE ACCUSED REMAIN IN DETENTION

i. Well-grounded suspicion that the Accused committed crimes within the jurisdiction of the KSC – Article 41(6)(a)

5. The well-grounded suspicion that the Accused committed crimes within the jurisdiction of the KSC remains. No circumstances capable of changing this finding have intervened. In this regard, the Defence's contention that '[t]he Court has [...] not seriously considered the intrinsic value of the evidence' in the case, and that the only ground to keep the Accused in detention seems to be the confirmed indictment, is plainly incorrect.¹⁰ The Pre-Trial Judge's findings were in fact based on a thorough analysis of the indictment supporting materials filed by the SPO pursuant to Rule 86(3).¹¹

ii. Risk of flight – Article 41(6)(b)(i)

6. In finding that the Accused is and remains a flight risk, the Pre-Trial Judge correctly considered and weighed several different factors: the Accused's knowledge of the charges against him and potential lengthy sentences to which he may be convicted; his awareness of the convictions of KLA commanders from the Llap Zone, the same Operational Zone as the Accused; the Accused's links with the Kosovo

⁹ *Contra* Defence Submission for Review of the Detention of the Accused, KSC-BC-2020-05/F00120, Public, 11 May 2021 ('Defence Submissions'), para.19.

¹⁰ *See* Defence Submissions, KSC-BC-2020-05/F00120.

¹¹ Public Redacted Version of Decision on the Confirmation of the Indictment against Salih Mustafa, KSC-BC-2020-05/F00008/RED, 5 October 2020, paras 88-151.

intelligence apparatus, with resultant access to resources and information; and his ability to travel freely in countries not requiring a visa.¹²

7. In his decision concerning the second review of detention, the Pre-Trial Judge also considered that the filing of the SPO's Pre-Trial Brief and the completion of disclosure of incriminating evidence further increased the risk of flight, as they made more concrete to the Accused the possibility of a conviction accompanied by a lengthy sentence.¹³ The Defence's claim that the Accused's flight risk 'has never been objectively assessed' is thus patently incorrect.¹⁴

8. There has been no change in circumstances affecting the factors considered by the Pre-Trial Judge regarding the Accused's flight risk. On the contrary, with the trial about to start the Accused's incentive to flee, if released, will only have increased.

iii. Risk of interference with witnesses and victims – Article 41(6)(b)(ii)

9. The limited temporal and geographical scope of the indictment in this case makes the identification of victims and witnesses relatively easy for an experienced intelligence officer like the Accused.¹⁵ Further, the Accused is aware, after completion of disclosure and with the trial about to begin, that there is a concrete risk of a conviction to a lengthy sentence.¹⁶ On this basis, in his Third Detention Review the Pre-Trial Judge found that the risk of interference with victims and witnesses remained.¹⁷ To date, there has been no change in these circumstances, and the risk of interference still exists.

10. In this regard, it bears recalling that the delayed disclosure of the identity of SPO witnesses ordered by the Pre-Trial Judge will expire shortly, with the unredacted statements of these witnesses to be disclosed to the Defence 30 days before their

¹² Third Detention Review, KSC-BC-2020-05/F00097, para.16.

¹³ Third Detention Review, KSC-BC-2020-05/F00097, para.17.

¹⁴ Defence Submissions, KSC-BC-2020-05/F00120, para.21.

¹⁵ Third Detention Review, KSC-BC-2020-05/F00097, para.20.

¹⁶ Third Detention Review, KSC-BC-2020-05/F00097, para.20

¹⁷ Third Detention Review, KSC-BC-2020-05/F00097, para.22

testimony.¹⁸ Under these circumstances, lifting the Accused's detention at this stage would pose a grave risk for SPO witnesses in this case.

iv. Risk that the Accused could commit crimes – Article 41(6)(b)(iii)

11. At a press conference held on or around 14 June 1998 in Prishtinë/Priština, the Accused publicly bragged about the execution of Serbs, demonstrated a risk that he may result to threats or physical violence against victims and witnesses. The Pre-Trial Judge correctly considered this a risk factor that the Accused, if released, could commit crimes.¹⁹ The risk of obstruction of the proceedings, especially by interfering with victims and witnesses, is also a relevant consideration in assessing this limb of Article 41(6)(b).²⁰

12. To date, the circumstances considered by the Pre-Trial Judge remain unchanged. There is still a risk that, if released, the Accused will commit further crimes, including crimes against the administration of justice over which the KSC has jurisdiction pursuant to Article 15 of the Law.

v. Continued detention is the only way to manage the risks posed by the Accused

13. The risks posed by the Accused's release, considered alone or together, can only be effectively managed in the Detention Centre.²¹ 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. This is especially true at a stage of the proceedings where the identity of key prosecution witnesses will shortly be disclosed to the Accused. Any assurances that the Accused may give would be insufficient to guarantee compliance with any

¹⁸ Defence Submissions, KSC-BC-2020-05/F00120, para.19.

¹⁹ Third Detention Review, KSC-BC-2020-05/F00097, para.23.

²⁰ Third Detention Review, KSC-BC-2020-05/F00097, para.23; *see also* paras 20-22.

²¹ *Contra* Defence Submissions, KSC-BC-2020-05/F00120, para.28.

conditions or overcome the concrete risks of release. In such circumstances, release, with or without conditions, should not be granted.²²

14. Finally, the trial is about to start, and both parties have listed a limited number of witnesses in their pre-trial briefs. There is no risk of an unreasonable duration of detention on remand for the Accused, with full respect of Article 41(5) of the Law.

C. RELIEF REQUESTED

15. For the foregoing reasons, the SPO requests that the Trial Panel order that the Accused remain in detention.

Word count: 1,400



Jack Smith

Specialist Prosecutor

Monday, 17 May 2021

At The Hague, the Netherlands.

²² 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.