



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: **KSC-BC-2020-05**

The 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: Fidelma Donlon

Date: 25 May 2021

Language: English

Classification: **Public**

Fourth decision on review of detention

Specialist Prosecutor

Jack Smith

Counsel for the Accused

Julius von Bóné

Victims' Counsel

Anni Pues

TRIAL PANEL I (Panel),¹ hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 23 November 2020², 25 January 2021,³ and 25 March 2021,⁴ respectively, the Pre-Trial Judge issued the “Decision on Review of Detention”, “Second Decision on Review of Detention”, and “Third Decision on Review of Detention” (Third Review of Detention), ordering the continued detention of Salih Mustafa (Mr Mustafa or Accused). In the Third Review of Detention, the Pre-Trial Judge ordered the Defence and the Specialist Prosecutor’s Office (SPO) to file written submission on whether reasons for continued detention of the Accused still exist by Tuesday, 11 May 2021, and Monday, 17 May 2021, respectively.⁵
2. On 11 May 2021, the Defence filed its submissions.⁶
3. On 17 May 2021, the SPO filed its submissions.⁷

II. SUBMISSIONS

4. The Defence submits that Mr Mustafa should be released from detention and that the Panel, if that is determined necessary, can set any conditions of release as it might deem necessary and appropriate. To this end, the Defence submits the following. Mr Mustafa does not present any risk of flight, considering that he: (i) has his social,

¹ KSC-BC-2020-05, F00114, President, *Decision Assigning Trial Panel I*, 5 May 2021, public.

² KSC-BC-2020-05, F00052, Pre-Trial Judge, *Decision on Review of Detention*, 23 November 2020, public.

³ KSC-BC-2020-05, F00068, Pre-Trial Judge, *Second Decision on Review of Detention* (Second Review of Detention), 25 January 2021, public.

⁴ KSC-BC-2020-05, F00097, Pre-Trial Judge, *Third Decision on Review of Detention* (Third Review of Detention), 25 March 2021, public.

⁵ Third Review of Detention, para. 31(b)-(c).

⁶ KSC-BC-2020-05, F00120, Defence, *Defence Submission for Review of the Detention of the Accused* (Defence Submissions), 11 May 2021, public.

⁷ KSC-BC-2020-05, F00122, Specialist Prosecutor, *Prosecution Response on the Fourth Review of Detention* (SPO Submissions), 17 May 2021, public.

economic, and family life in Kosovo, (ii) has a clean criminal record; (iii) has hardly left Kosovo in the last 20 years; (iv) has never constituted a risk for anybody; (v) has cooperated with the SPO when requested to do so; and (vi) is eager to defend himself in court and, accordingly, does not intend to flee anywhere.⁸ The assumption that Mr Mustafa would pose a risk of flight is without factual ground.⁹ In this regard, previously found risk factors do not support any risk of flight for Mr Mustafa.¹⁰ More specifically, Mr Mustafa's awareness of the charges and the evidence, as the case progresses, cannot be held as a risk factor against him, as any accused must be made aware of the charges. Furthermore, the development of the case does not depend upon the Accused but is determined by the court.¹¹ Previous convictions of Senior Llap Operational Zone commanders cannot serve as an incentive for Mr Mustafa to flee, as he was never a senior commander himself.¹² Likewise, the purported links to the Kosovo intelligence apparatus and his ability to travel to certain countries without a visa, even assuming that they can be considered as risk factors, can be eliminated through the imposition of conditions.¹³ The Defence also submits that the Panel should evaluate whether or not the risks under Article 41(6)(b)(i)-(ii) of the Law on Specialist Chambers and Specialist Prosecutor's Office (Law) are real or just presumed and that in relation to the risk under Article 41(6)(b)(iii) of the Law, the evidence put forward by the SPO has not been subject to a single evaluation.¹⁴ Lastly, the Defence reiterates, from its previous submissions, that conditions could be set, by which the Accused would abide, in order to prevent any risks that the Panel may find.¹⁵

⁸ Defence Submissions, paras 5-13.

⁹ Defence Submissions, para. 21.

¹⁰ Defence Submissions, para. 14.

¹¹ Defence Submissions, paras 15, 19.

¹² Defence Submissions, para. 16.

¹³ Defence Submissions, paras 17-18.

¹⁴ Defence Submissions, paras 26-27.

¹⁵ Defence Submissions, para. 28.

5. The SPO submits that the circumstances previously found as warranting detention have not changed and, accordingly, Mr Mustafa's continued detention remains necessary.¹⁶ Specifically, the SPO submits that the findings that there is a well-grounded suspicion that the Accused committed the crimes charged were based on a thorough review of the supporting material provided by the SPO pursuant to Rule 86(3) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules).¹⁷ Regarding the risk of flight, the SPO submits that the previously found risk factors have been objectively assessed, contrary to the Defence's claim, and have increased in light of the imminent start of the trial, which serves as an incentive to flee, if released.¹⁸

6. Regarding the risk of interference with witnesses and victims, the SPO submits that not only it remains, but that it increased on account of the upcoming disclosure of the witnesses' identities to the Accused, namely 30 days before their respective testimony.¹⁹ With regard to the risk of committing further crimes, the SPO submits that the previous risk factors have not disappeared and that the risk of obstruction of proceedings under Article 41(6)(b)(ii) of the Law is relevant when assessing this risk as well.²⁰ The SPO also submits that the risks posed by the Accused can be effectively managed only in the detention facilities of the Specialist Chambers (SC), particularly at this stage of the proceedings when the identities of key SPO witnesses will shortly be disclosed to Mr Mustafa.²¹ Lastly, considering that the trial is about to start and that the Parties intend to call a limited number of witnesses, the SPO submits that there is no perspective of unreasonable duration of detention on remand, in full respect of Article 41(5) of the Law.²²

¹⁶ SPO Submissions, paras 3-4.

¹⁷ SPO Submissions, para. 5.

¹⁸ SPO Submissions, paras 6-8.

¹⁹ SPO Submissions, paras 9-10.

²⁰ SPO Submissions, paras 11-12.

²¹ SPO Submissions, para. 13.

²² SPO Submissions, para. 14.

III. APPLICABLE LAW

7. Pursuant to Article 3(2) of the Law, the SC shall adjudicate and function in accordance with: (a) the Constitution of the Republic of Kosovo (Constitution); (b) the Law, as *lex specialis*; (c) other provisions of Kosovo law as expressly incorporated and applied by this Law; (d) customary international law; and (e) international human rights law which sets criminal justice standards, including the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights, as given superiority over domestic laws by Article 22 of the Constitution.

8. According to Article 29 of the Constitution, everyone is guaranteed the right to liberty and security and shall only be deprived of liberty in the cases foreseen by law and after a decision of a competent court. Any deprivation of liberty should be in keeping with the key purpose of protecting the individual from arbitrariness.²³

9. Pursuant to Article 53 of the Constitution, human rights and fundamental freedoms guaranteed by the Constitution shall be interpreted consistent with the decisions of the European Court of Human Rights (ECtHR).²⁴

10. Article 41(10) of the Law and Rule 57(2) of the Rules provide that, until a judgement is final or until release, upon the expiry of two (2) months from the last ruling on detention on remand, the Panel shall examine whether reasons for detention on remand still exist, namely whether: (i) there is grounded suspicion under Article 41(6)(a) of the Law that the person committed the crime(s) charged; and (ii) there are articulable grounds to believe that any of the requirements set out in

²³ KSC-CC-PR-2017-01, F00004, Specialist Chamber of the Constitutional Court, *Judgement on the Referral of the Rules of Procedure and Evidence Adopted by the Plenary on 17 March 2017 to the Specialist Chambers of the Constitutional Court Pursuant to Article (19)5 of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office* (SCCC 26 April 2017 Judgment), 26 April 2017, public, para. 111.

²⁴ See KSC-CC-2020-09, F00006, Specialist Chamber of the Constitutional Court, *Judgement on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020* (SCCC 22 May 2020 Judgment), 22 May 2020, public, para. 16 and references contained therein.

Article 41(6)(b) of the Law has been fulfilled. On the basis of such examination, the Panel shall render a ruling by which detention on remand is extended or terminated.

11. 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.

12. The Trial Panel notes that the Kosovo Criminal Procedure Code (Law No. 04/L-123) (KCPC) contains detailed provisions, *inter alia*, in this regard, which could be of assistance to the Panel for the interpretation of the Rules, in accordance with Rule 4(1) of the Rules.

IV. ANALYSIS

13. At the outset, the Panel notes that the presumption of innocence, as provided for in Article 31(5) of the Constitution, Article 21(3) of the Law, and Article 6(2) ECHR, is the starting point for the assessment of the continued detention on remand.²⁵ Accordingly, continued detention cannot be maintained lightly and the Accused should be released once his continued detention ceases to be reasonable.²⁶

A. GROUNDED SUSPICION

14. As regards the threshold for continued detention, Article 41(6)(a) of the Law requires, as a pre-condition,²⁷ grounded suspicion that a crime within the jurisdiction

²⁵ KSC-BC-2020-06, IA004/F00005/RED, *Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release* (Thaçi Interim Release Appeal Decision), 30 April 2021, para. 17.

²⁶ ECtHR, *Buzadji v. The Republic of Moldavia*, no. 23755/07, [Judgment](#) (*Buzadji v. The Republic of Moldavia*), 5 July 2016, para. 90.

²⁷ [Buzadji v. The Republic of Moldavia](#), para. 87.

of the SC has been committed.²⁸ In this regard, the Panel notes that by virtue of the decision taken by the Pre-Trial Judge on the confirmation of the indictment against Mr Mustafa,²⁹ the requirement of Article 41(6)(a) of the Law has been met and confirmed by an independent judicial authority after analysis of the evidence presented by the SPO.³⁰ The Panel finds 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 on the basis of the evidence before the Panel.³¹ The Panel 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, other than alleging generally that the "[c]ourt has not seriously considered the intrinsic value of the evidence".³² Likewise, the Panel does not identify any ground to conclude that the confirmation of the indictment against Mr Mustafa was improper or flawed, to the extent that the grounded suspicion threshold is no longer fulfilled. Therefore, the Panel finds that Article 41(6)(a) of the Law continues to be met.

²⁸ Under the KCPC, 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) ECHR, 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.

²⁹ KSC-BC-2020-05, F00008/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on the Confirmation of the Indictment Against Salih Mustafa*, 5 October 2020, public, para. 163(a).

³⁰ KSC-BC-2020-05, F00009/A01/RED, Pre-Trial Judge, *Public Redacted Version of Arrest Warrant for Mr Salih Mustafa*, 12 June 2020, public, para. 1; F00009/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Request for Arrest Warrant and Transfer Order*, 12 June 2020, public, para. 18.

³¹ Third Review of Detention, para. 12.

³² Defence Submissions, para. 20.

B. NECESSITY OF DETENTION

15. Provided that the threshold of grounded suspicion in paragraph (6)(a) is met, Article 41(6)(b) of the Law sets out three alternative grounds (or risks) that, if found, allow the Panel to determine that the continued detention of the Accused is necessary. The SPO must prove either of these risks against the threshold of articulable grounds to believe. The Panel is guided by Article 19.1.30 of the KCPC, according to which “articulable” implies that “the party offering the information or evidence must specify in detail the information or evidence being relied upon”. The term “articulable” refers directly to the specificity of the information or evidence required, as also indicated by reference to “articulable evidence” in Article 19.1.9 and 19.1.10 KCPC. That being said, the SPO is duty-bound to provide at each review of detention detailed and concrete information or evidence that will satisfy the requirement of articulable grounds.

16. The Specialist Chamber of the Constitutional Court ruled that pursuant to Article 41(6)(b)(i)-(iii) of the Law, a Panel must rely on specific and concrete grounds to believe that the Accused poses public interest risks that can only be mitigated through continued detention.³³ The Court of Appeals Panel underlined the importance of (case) specific reasoning and concrete grounds which are required to be relied upon by the Panel.³⁴ This is also in line with the established jurisprudence of the ECtHR, according to which the arguments put forward must not be general and abstract, but should contain references to specific facts and to the personal circumstances justifying the continued detention.³⁵ Only duly reasoned decisions can effectively demonstrate

³³ SCCC 26 April 2017 Judgment, paras 113, 115.

³⁴ Thaçi Interim Release Appeal Decision, para. 22.

³⁵ See ECtHR, *Hasselbaink v. the Netherlands*, no. 73329/16, [Judgment](#) (*Hasselbaink v. the Netherlands*), 9 February 2021, para. 72; *Zohlandt v. The Netherlands*, no. 69491/16, [Judgment](#) (*Zohlandt v. the Netherlands*), 9 February 2021, para. 53; *Maassen v. the Netherlands*, no. 10982/15, [Judgment](#) (*Maassen v. the Netherlands*), 9 February 2021, para. 65.

to the Parties that they have been heard, thus making appeals and public scrutiny of the administration of justice possible.³⁶

17. The exercise that the Panel has to conduct is a risk assessment. Accordingly, reviewing detention revolves around the possibility of a future occurrence, not its inevitability.³⁷ The standard to be applied is, on the one hand, less than certainty, but on the other hand, more than a mere possibility of a risk materialising.³⁸ In simple terms, while simple suspicion is not enough, certainty is not required when assessing the possibility as opposed to the unavailability of the risks under Article 41(6)(b)(i)-(iii) of the Law.³⁹ The Panel must therefore assess whether the SPO presented specific reasoning based on evidence supporting the belief of a sufficiently real possibility that one or more of the risks under Article 41(6)(b)(i)-(iii) of the Law (still) exist.⁴⁰

1. Risk of Flight

18. Regarding the risk of flight under Article 41(6)(b)(i) of the Law, the Panel considers that the factors relied upon by the SPO, which were previously found to be sufficient, do not indicate that Mr Mustafa is at flight risk. In particular, the Panel does not find that the Accused's knowledge of the charges, the potential lengthy sentence if convicted, the awareness of previous convictions of Kosovo Liberation Army (KLA) members from the same operational zone, and his ties to

³⁶ See ECtHR, [Hasselbaink v. the Netherlands](#), para. 77; [Zohlandt v. the Netherlands](#), para. 58; [Maassen v. the Netherlands](#), para. 65.

³⁷ KSC-BC-2020-07, IA001/F00005, Court of Appeals Panel, *Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention*, 9 December 2020, public, para. 67; *Thaçi Interim Release Appeal Decision*, para. 21; *Third Review of Detention*, para. 14.

³⁸ See, for example, KSC-BC-2020-06, IA001/F00005, Court of Appeals Panel, *Decision on Kadri Veseli's Appeal Against Decision on Interim Release*, 30 April 2021, public, para. 17.

³⁹ *Third Review of Detention*, para. 14.

⁴⁰ *Thaçi Interim Release Appeal Decision*, para. 24. See also ECtHR, *Jarzyński v. Poland*, no. 15479/02, Judgment, [Judgment](#), 4 January 2006, para. 46; *Merabishvili v. Georgia*, no. 72508/13, [Judgment](#), 28 November 2017, para. 229.

the Kosovo intelligence apparatus may result in Mr Mustafa having an incentive to flee. As to his possibility to travel visa-free to certain countries, the Panel does not find this factor strong enough to establish a risk of flight. When assessing the risk of flight, the Panel first notes the cooperation shown by Mr Mustafa towards the SPO before the confirmation of the indictment. The Panel further notes that Mr Mustafa has a permanent place of residence in Kosovo and a stable family relationship and economic and social links with his home country. Therefore, the Panel finds that Mr Mustafa is not at flight risk and that such risk, even if existent, could be adequately mitigated by conditions to be imposed upon the Accused pursuant to Article 41(12) of the Law and Rule 56(5) of the Rules.

2. Risk of Obstructing the Progress of SC Proceedings

19. With regard to the risk of obstructing SC proceedings under Article 41(6)(b)(ii) of the Law, the Panel considers that most of the risk factors highlighted above with regard to the risk of flight are, instead, relevant in this context. Specifically, the Panel is of the view that the Accused's knowledge of the charges and the potential lengthy sentence, if convicted, may serve as incentives for Mr Mustafa, if released, to interfere with victims and witnesses, and/or their families. In light of Mr Mustafa's ties to the Kosovo intelligence apparatus and his experience in this respect, such interference could take place by, *inter alia*: (i) exerting pressure, including by violence or threats, or trying to influence victims and witnesses, and/or their families; (ii) intimidating victims and witnesses, and/or their families, directly or through others; and/or (iii) colluding with other potential perpetrators referred to in the indictment, as confirmed, or anyone involved in this or other related cases. This is all the more so at this stage of the proceedings, when the upcoming disclosure of the identities of SPO protected witnesses would make it easier for the Accused, who is an experienced intelligence officer with the required technical knowledge and network, to potentially interfere with victims and

witnesses, and/or their families, and more generally, to obstruct the progress of the proceedings. Furthermore, the limited scope of the case and the limited number of witnesses may increase the risk of interference with those victims and witnesses and/or their families. The Panel therefore considers that no intervening information or development has arisen, since the Third Review of Detention, which undermine the above determinations.

20. The Panel accordingly finds that there is a sufficiently real possibility that Mr Mustafa may obstruct the progress of SC proceedings by interfering with victims and witnesses, and/or their families, remains.

3. Risk of Committing Further Crimes

21. The Panel recalls that, as the conditions set out in Article 41(6)(b) of the Law are alternative to one another, if one of those conditions is fulfilled, the other conditions do not have to be addressed in order for detention to be maintained.⁴¹

22. Having found that there is a sufficiently real possibility that Mr Mustafa will obstruct SC proceedings, including by interfering with victims and witnesses, and/or their families,⁴² the Panel finds that it need not address the risk under Article 41(6)(b)(iii) of the Law.

4. Conclusion

23. In light of the foregoing considerations, the Panel finds that there are articulable grounds to believe that the risk of obstructing the progress of SC proceedings, as envisaged under Article 41(6)(b)(ii) of the Law, continues to exist.

⁴¹ Thaçi Interim Release Appeal Decision, para. 78.

⁴² See *supra* paras 19-20.

C. CONDITIONAL RELEASE

24. The Panel recalls that detention on remand should only be continued if there are no more lenient measures that could sufficiently mitigate the risks set out in Article 41(6)(b)(i)-(iii) of the Law.⁴³ In this regard, the Panel has the obligation to inquire and evaluate, *proprio motu*, all reasonable conditions that could be imposed on an accused, and not only those raised by the Defence.⁴⁴

25. As regards the risk of obstructing the progress of SC proceedings, in light of the risk factors identified above⁴⁵ the Panel considers that no conditions could adequately 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, and/or their families. Likewise, no conditions could adequately restrict or monitor Mr Mustafa's private communications or movements, which could be used to request or receive information and resources facilitating interference with victims and witnesses, and/or their families; nor could any such conditions be properly enforced and sufficiently monitored. The Panel considers that it is only through the communication monitoring framework applicable at the SC detention facilities that Mr Mustafa's communications and activities can be effectively restricted and monitored, thereby mitigating the risk of obstructing the progress of SC proceedings.

26. The Panel accordingly finds that no condition, including those previously proposed by the Defence⁴⁶ or any additional limitations to be imposed by the Panel, would sufficiently mitigate the risk of obstructing the progress of SC proceedings. Therefore, Mr Mustafa must remain in detention.

⁴³ SCCC 22 May 2020 Judgment, para. 70.

⁴⁴ KSC-BC-2020-06, IA003/F00005/RED, Court of Appeals Panel, *Public Redacted Version of Decision on Rexhep Selimi's Appeal Against Decision on Interim Release*, 30 April 2021, public, para. 86.

⁴⁵ See *supra* paras 19-20.

⁴⁶ Defence Submissions, para. 28.

D. REASONABLENESS OF DETENTION

27. The Panel notes that Mr Mustafa has been in detention for eight months since he was arrested and transferred to the detention facilities of the SC in The Hague, the Netherlands, on 24 September 2020. The Panel considers that Mr Mustafa is charged with serious war crimes under Article 14 of the Law, including murder and torture, allegedly committed under multiple modes of criminal responsibility under Article 16 of the Law. The Panel does not identify any period of inactivity in the proceedings against the Accused before the SC, such that could lead to a finding that the duration of the detention has become unreasonable. The Panel also notes that the case is already at trial, that several trial preparation conferences will take place at the beginning of June, that it has requested observations from the Parties and Victims' Counsel in order to start the trial as soon as possible, and that the Parties intend to call a limited number of witnesses.

28. Accordingly, the Panel does not find that Mr Mustafa's detention has become unreasonable under Rule 56(2) of the Rules.

V. DISPOSITION

29. For the above-mentioned reasons, the Panel hereby:

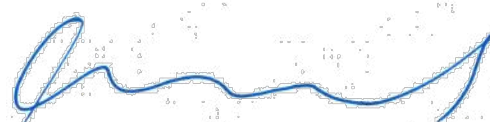
- a. **ORDERS** Mr Mustafa's continued detention;
- b. **ORDERS** the SPO and Victims' Counsel, if she so wishes, to file submissions on the next review of detention by **Monday, 5 July 2021**; and
- c. **ORDERS** the Defence to file submissions on the next review of detention, if it so wishes, by **Monday, 12 July 2021**.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Tuesday, 25 May 2021
At The Hague, the Netherlands.