



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA 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: 23 July 2021

Language: English

Classification: **Public**

Fifth decision on review of detention

To be notified to:

Specialist Prosecutor

Jack Smith

Counsel for the Accused

Julius von Bóné

Victims' Counsel

Anni Pues

TRIAL PANEL I (Panel) hereby renders this decision on review of detention.

I. PROCEDURAL BACKGROUND

1. On 23 November 2020¹, 25 January 2021,² and 25 March 2021,³ 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”, ordering the continued detention of Salih Mustafa (Mr Mustafa or Accused).
2. On 25 May 2021, the Panel issued the “Fourth decision on review of detention” (Fourth review of detention).⁴ In the Fourth review of detention, the Panel ordered the Specialist Prosecutor’s Office (SPO) and Victims’ Counsel, if she so wishes, to file submissions on the next review of detention by Monday, 5 July 2021, and the Defence to do the same, if it so wishes, by Monday, 12 July 2021.⁵
3. On 5 July 2021, the SPO filed its submissions.⁶ Victims’ Counsel did not file any submissions.
4. On 11 July 2021, the Defence filed its submissions.⁷

II. SUBMISSIONS

5. The SPO submits that the Accused’s continued detention remains necessary, as there has been no change in circumstances which would alter the Panel’s finding that

¹ KSC-BC-2020-05, F00052, Pre-Trial Judge, *Decision on Review of Detention*, 23 November 2020, public.

² KSC-BC-2020-05, F00068, Pre-Trial Judge, *Second Decision on Review of Detention*, 25 January 2021, public.

³ KSC-BC-2020-05, F00097, Pre-Trial Judge, *Third Decision on Review of Detention* (Third Review of Detention), 25 March 2021, public.

⁴ KSC-BC-2020-05, F00127, Trial Panel I, *Fourth decision on review of detention*, 25 May 2021, public.

⁵ Fourth review of detention, para. 29(b)-(c).

⁶ KSC-BC-2020-05, F00147, Specialist Prosecutor, *Prosecution submissions for the fifth review of detention* (SPO Submissions), 5 July 2021, public.

⁷ KSC-BC-2020-05, F00151, Defence, *Defence submission for review of the detention of the Accused* (Defence Submissions), 11 July 2021, public. The filing was notified on 12 July 2021.

there is a sufficiently real possibility that, if released, the Accused may interfere with victims, witnesses, and/or their families and that no condition would sufficiently mitigate such risk.⁸ Moreover, the risks of flight and of commission of further crimes also remain high and, since the last detention review, each of the risks referred to in Article 41(6)(b) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Law) has increased due to the imminent start of the trial.⁹

6. Regarding the well-grounded suspicion that the Accused has committed crimes within the jurisdiction of the Specialist Chambers (SC), the SPO submits that no circumstances capable of changing this finding, made both by the Pre-Trial Judge and the Panel, have intervened since the Fourth review of detention.¹⁰ Regarding the risk of flight, the SPO submits that such risk remains high, for reasons set out in its submissions on the Fourth review of detention.¹¹ Regarding the risk of interference with witnesses and victims, the SPO submits that not only it remains, but that it will markedly increase in light of the upcoming date set for the commencement of the trial and the related lifting of delayed disclosure redactions.¹² In this respect, the SPO argues that the Accused's continued detention remains essential to mitigate such risk, in order to allow limiting and monitoring his communications, which could not be effectively enforced if he were provisionally or conditionally released.¹³ Regarding the risk of committing further crimes, the SPO incorporates by reference its previous submissions and argues that, similarly, not only does such risk remain, but it has

⁸ SPO Submissions, para. 2.

⁹ SPO Submissions, para. 2.

¹⁰ SPO Submissions, para. 3.

¹¹ SPO Submissions, para. 3, referring to KSC-BC-2020-05, F00122, Specialist Prosecutor, *Prosecution Response on the Fourth Review of Detention* (SPO submissions on Fourth review of detention), 17 May 2021, public.

¹² SPO Submissions, paras 5-6.

¹³ SPO Submissions, para. 7.

increased considering the upcoming date set for the commencement of the trial and the fact that increased information is due to be disclosed to the Accused.¹⁴

7. The SPO further submits that the risks posed by the Accused, considered alone or together, can only be effectively managed in the SC detention facilities, particularly at this stage of the proceedings, when delayed disclosure redactions are about to be lifted and certain identities disclosed to the Accused.¹⁵ Any assurances that the Accused may give would be insufficient to guarantee compliance with any conditions or overcome the concrete risks of release.¹⁶ Finally, the SPO notes that the trial is scheduled to start on 15 September 2021 and that, since the last detention review, the proceedings have advanced quickly and efficiently, and without any period of inactivity.¹⁷

8. 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.¹⁸ To this end, the Defence submits the following. Mr Mustafa does not present any risk of flight, considering that he: (i) has his social, 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.¹⁹ The Defence further argues that previously found risk factors do not support any risk of flight for Mr Mustafa.²⁰ 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

¹⁴ SPO Submissions, para. 8, also referring to SPO submissions on Fourth review of detention, paras 11-12.

¹⁵ SPO Submissions, paras 9-10.

¹⁶ SPO Submissions, para. 10.

¹⁷ SPO Submissions, para. 12.

¹⁸ Defence Submissions, para. 37.

¹⁹ Defence Submissions, paras 5-13.

²⁰ Defence Submissions, para. 14.

accused must be made aware of the charges.²¹ Furthermore, the development of the case does not depend upon the Accused but is determined by the court.²² 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.²³ 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.²⁴

9. The Defence further submits that the Accused does not have either the intention or the means to obstruct the proceedings or to interfere with witnesses and victims. Specifically, the Defence avers that: (i) the Accused has no incentive to obstruct the proceedings as doing so would backfire against him; (ii) the idea that the Accused would have the means to obstruct proceedings greatly exaggerates his means and capabilities; (iii) the proposition that the Accused would interfere or that there is a concrete risk that he would interfere with any witness or victim has not been substantiated; and (iv) any supposed risk is not increased as the trial date has been set.²⁵ The Defence also argues that “[o]bstruct the proceedings” is a vague term to which neither the Panel nor the SPO have given any specification.²⁶

10. As regards the risk that the Accused could commit crimes, the Defence submits that: (i) after nearly one year in detention, it is time for the Panel to make a concrete finding if Mr Mustafa would indeed pose a risk of committing crimes, including specifying which crimes; (ii) the assumption that, after not being detained for any charge in the past 20 years, Mr Mustafa would suddenly start committing crimes is

²¹ Defence Submissions, para. 15.

²² Defence Submissions, para. 15.

²³ Defence Submissions, para. 16.

²⁴ Defence Submissions, paras 17-18.

²⁵ Defence Submissions, paras 19-27.

²⁶ Defence Submissions, para. 19.

without any foundation; and (iii) the fact that there is a clear date for the start of the trial does not change this in any manner.²⁷

11. In these circumstances, the Defence submits that the Panel should evaluate whether the risks under Article 41(6)(b)(i)-(ii) of the 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.²⁸

12. 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.²⁹

III. APPLICABLE LAW

13. The Panel notes Articles 29, 31(5), and 53 of the Constitution of the Republic of Kosovo (Constitution), Articles 3(2), 21(3), and 41(6), (10), and (12) of the Law, and Rule 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules).

IV. ANALYSIS

14. At the outset, the Panel recalls 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) of the European Convention on Human Rights, is the starting point for the assessment of the continued detention on remand.³⁰ Accordingly, continued detention cannot

²⁷ Defence Submissions, paras 29-31.

²⁸ Defence Submissions, paras 34-35.

²⁹ Defence Submissions, paras 32, 36.

³⁰ Fourth review of detention, para. 13. *See also* 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.

be maintained lightly and the Accused should be released once his continued detention ceases to be reasonable.³¹

A. GROUNDED SUSPICION

15. As regards the threshold for continued detention, Article 41(6)(a) of the Law requires, as a pre-condition,³² grounded suspicion that a crime within the jurisdiction of the SC has been committed.³³ 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,³⁴ 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.³⁵ 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.³⁶ 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 should consider the intrinsic value of the evidence in the present case".³⁷ 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

³¹ Fourth review of detention, para. 13; ECtHR, *Buzadji v. The Republic of Moldova*, no. 23755/07, [Judgment \[GC\]](#) (*Buzadji v. The Republic of Moldova* [GC]), 5 July 2016, para. 90.

³² Fourth review of detention, para. 14; ECtHR, [Buzadji v. The Republic of Moldova](#) [GC], para. 87.

³³ Fourth review of detention, para. 14 and footnote 28.

³⁴ 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).

³⁵ 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.

³⁶ Fourth review of detention, para. 14; Third Review of Detention, para. 12.

³⁷ Defence Submissions, para. 28.

extent that the grounded suspicion threshold is no longer fulfilled.³⁸ Therefore, the Panel finds that Article 41(6)(a) of the Law continues to be met.

B. NECESSITY OF DETENTION

16. The Panel recalls the standard to be applied to its assessment as to whether the continued detention of the Accused is necessary, as set out in the Fourth review of detention, as well as the importance of (case) specific reasoning and concrete grounds which are required to be relied upon by the Panel, as underlined by the Court of Appeals Panel.³⁹

17. Specifically, as regards Article 41(6)(b)(ii) of the Law, the Panel recalls that, as with all other risks under Article 41(6)(b) of the Law, the exercise that the Panel has to conduct is a risk assessment.⁴⁰ In this respect, the assessment of whether there is a risk of obstruction occurring in the future does not require proof that obstruction has actually occurred in the past.⁴¹

1. Risk of Flight

18. Regarding the risk of flight under Article 41(6)(b)(i) of the Law, the Panel recalls its considerations in this respect as set out in the Fourth review of detention⁴² and considers that the factors relied upon by the SPO still do not (sufficiently) 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

³⁸ *Similarly*, Fourth review of detention, para. 14.

³⁹ Fourth review of detention, paras 15-17, also referring to *Thaçi Interim Release Appeal Decision*, para. 22.

⁴⁰ Fourth review of detention, para. 17.

⁴¹ *Similarly*, 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. 38.

⁴² Fourth review of detention, para. 18.

Army members from the same operational zone, and his ties to 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. Facts or circumstances that should lead the Panel to a different conclusion have not been demonstrated by the SPO. Therefore, the Panel considers that no intervening information or development has arisen since the Fourth review of retention – where the Panel found that Mr Mustafa was not at flight risk⁴³ – which undermines the above determinations.

19. The Panel accordingly finds that, as already found in the Fourth review of detention, 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

20. With regard to the risk under Article 41(6)(b)(ii) of the Law, the Panel notes at the outset that the risk of obstructing “the progress of the criminal proceedings by influencing witnesses, victims or accomplices” refers first and foremost to the risk of obstructing the proceedings that an accused is subject to, as it is in relation to such proceedings that an accused person would have both the incentive and the means – i.e. the necessary knowledge as to who relevant witnesses, victims or accomplices are – to interfere with.

⁴³ Fourth review of detention, para. 18.

21. As regards the existence of such risk with respect to Mr Mustafa, 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 him, 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 the current stage of the proceedings, when – considering the upcoming dates set for the start of the trial and for the testimony of the first two SPO witnesses⁴⁴ – the imminent disclosure of further information to the Accused, including and in particular 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. As noted above,⁴⁵ the absence of evidence that the Accused has previously attempted to interfere with witnesses or victims or to obstruct the progress of the proceedings more generally is not determinative to the Panel's assessment under Article 41(6)(b)(ii) of the Law as what the Panel has to conduct

⁴⁴ KSC-BC-2020-05, F00138, Trial Panel I, *Decision setting the date for the commencement of the trial and related matters* (Decision on trial commencement), 18 June 2021, public, para. 22(f), (i).

⁴⁵ See *supra* para. 17.

in this respect is a risk assessment. The Panel therefore considers that no intervening information or development has arisen, since the Fourth review of detention, which undermines the above determinations.

22. 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.

3. Risk of Committing Further Crimes

23. 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.⁴⁶

24. 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,⁴⁷ the Panel finds that it need not address the risk under Article 41(6)(b)(iii) of the Law.⁴⁸

4. Conclusion

25. 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.

⁴⁶ *Thaçi* Interim Release Appeal Decision, para. 78.

⁴⁷ *See supra* paras 20-22.

⁴⁸ *Similarly*, Fourth review of detention, para. 22.

C. CONDITIONAL RELEASE

26. 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.⁴⁹ 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.⁵⁰

27. As regards the risk of obstructing the progress of SC proceedings, in light of the risk factors identified above,⁵¹ 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.

28. The Panel accordingly finds that no condition, including those previously proposed by the Defence⁵² or any additional limitations to be imposed by the Panel,

⁴⁹ Fourth review of detention, para. 24; 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*, 22 May 2020, public, para. 70.

⁵⁰ Fourth review of detention, para. 24. *See also* 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.

⁵¹ *See supra* paras 20-22.

⁵² Defence Submissions, para. 36.

would sufficiently mitigate the risk of obstructing the progress of SC proceedings. Therefore, Mr Mustafa must remain in detention.

D. REASONABLENESS OF DURATION OF DETENTION

29. The Panel notes that Mr Mustafa has been in detention for ten 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: (i) the trial will commence on Wednesday, 15 September 2021, with the procedures prescribed under Rules 124 and 125 of the Rules, followed by the opening statements of the SPO and Victims' Counsel; and (ii) the testimony of the first two SPO witnesses will be heard between Monday, 20 September 2021, and Tuesday, 28 September 2021.⁵³ Moreover, the Panel notes that the Parties intend to call a limited number of witnesses.

30. Accordingly, the Panel does not find that Mr Mustafa is detained for an unreasonable period prior to the opening of the case under Rule 56(2) of the Rules.

⁵³ Decision on trial commencement, para. 22(f), (i).


V. DISPOSITION

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

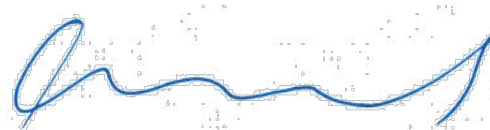
- a. **ORDERS** Mr Mustafa's continued detention;
- b. **ORDERS** the SPO and Victims' Counsel, if she so wishes, to file submissions on the next review of detention by **Monday, 6 September 2021**; and
- c. **ORDERS** the Defence to file submissions on the next review of detention, if it so wishes, by **Monday, 13 September 2021**.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Friday, 23 July 2021
At The Hague, the Netherlands.