



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 November 2021

Language: English

Classification: **Public**

**Public redacted version of
Seventh 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 2020,¹ 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 (Accused).
2. On 25 May 2021, 23 July 2021, and 23 September 2021, respectively, the Panel issued the “Fourth decision on review of detention” (Fourth Review)⁴, “Fifth decision on review of detention” (Fifth Review),⁵ and “Sixth decision on review of detention” (Sixth Review).⁶ In the Sixth Review, 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, 8 November 2021, and the Defence to do the same, if it so wishes, by Monday, 15 November 2021.⁷
3. On 8 November 2021, the SPO filed its submissions.⁸
4. Victims’ Counsel and the Defence did not file any submissions.

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), 25 March 2021, public.

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

⁵ KSC-BC-2020-05, F00158, Trial Panel I, Fifth decision on review of detention, 23 July 2021, public.

⁶ KSC-BC-2020-05, F00215, Trial Panel I, Sixth decision on review of detention, 23 September 2021, confidential. A public redacted version thereof was filed on the same day.

⁷ Sixth Review, para. 33 (b)-(c).

⁸ KSC-BC-2020-05, F00245, SPO, Prosecution submissions for the seventh review of detention (SPO Submissions), 8 November 2021, confidential.

II. SUBMISSIONS

5. The SPO submits that: (i) the Accused's continued detention remains lawful and necessary, as grounded suspicion continues to exist and there is still a real possibility that, if released, the Accused may interfere with victims, witnesses, and/or their families and, more generally, may obstruct the progress of the proceedings; and (ii) no condition would sufficiently mitigate such risk.⁹ Moreover, the SPO avers that the risks of flight and of commission of further crimes 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) have increased due to the recent disclosures revealing information identifying all remaining Prosecution witnesses, the progression of trial, and the evidence that the Prosecution witnesses have provided during their testimonies.¹⁰

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 Sixth Review.¹¹ The SPO further submits that this well-grounded suspicion has been reinforced after hearing the evidence provided by the initial Prosecution witnesses.¹² Regarding the risk of flight, the SPO submits that: (i) such risk does exist and remains high, for reasons set out in its Response on the Fourth Review;¹³ (ii) following the recent witnesses' testimonies and disclosure of information identifying key Prosecution witnesses, the Accused now has even stronger motivation to mobilise his support network to help him flee and go into hiding, if released;¹⁴ and (iii) conditional release would be insufficient to prevent a

⁹ SPO Submissions, para. 2.

¹⁰ SPO Submissions, para. 2.

¹¹ SPO Submissions, para. 3.

¹² SPO Submissions, para. 3.

¹³ SPO Submissions, para. 4, referring to KSC-BC-2020-05, F00122, Specialist Prosecutor, *Prosecution Response on the Fourth Review of Detention* (SPO Response on the Fourth Review), 17 May 2021, public.

¹⁴ SPO Submissions, para. 4.

person with the background, experience, and network of the Accused from fleeing, if he decided to do so.¹⁵ Regarding the risk of interference with witnesses and victims, the SPO submits that not only it remains, but it has increased due to the recent disclosure of witnesses' identities to the Defence.¹⁶ The SPO further avers that knowing the identities of all SPO witnesses markedly increases the risk of obstruction by the Accused or his network and the testimonies of the witnesses heard to date confirm the influence of the Accused in Kosovo and his ability to affect the witnesses, and therefore the proceedings.¹⁷ The SPO therefore submits that the Accused's continued detention remains essential to mitigate such risk.¹⁸

7. Regarding the risk of committing further crimes, the SPO incorporates by reference its previous submissions and argues that the risk of committing further crimes has only increased with the recent testimonies and release of witnesses' identifying information to the Defence and the Accused.¹⁹

8. The SPO further submits that the risks posed by the Accused can only be effectively managed in the SC detention facilities, particularly at this advanced stage of the proceedings.²⁰ Any assurances that the Accused may give would be insufficient to eliminate or mitigate the existing risks.²¹ Lastly, the SPO notes that the Panel's prior findings regarding the reasonable duration of the detention in this case still stand.²²

¹⁵ SPO Submissions, footnote 8.

¹⁶ SPO Submissions, paras 5-6.

¹⁷ SPO Submissions, para. 7.

¹⁸ SPO Submissions, para. 6.

¹⁹ SPO Submissions, para. 10, also referring to SPO Submissions on Fourth Review, paras 11-12 and KSC-BC-2020-05, F00147, SPO, Prosecution submissions for the fifth review of detention, 5 July 2021, public, para. 8.

²⁰ SPO Submissions, paras 11-12.

²¹ SPO Submissions, para. 12.

²² SPO Submissions, paras 13-14, referring to Sixth Review, paras 30 – 32.

III. APPLICABLE LAW

9. 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

10. 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 (Convention), is the starting point for the assessment of the continued detention on remand.²³ Accordingly, continued detention cannot be maintained lightly and the Accused should be released once his continued detention ceases to be reasonable.²⁴

A. GROUNDED SUSPICION

11. As regards the threshold for continued detention, Article 41(6)(a) of the Law requires, as a pre-condition,²⁵ grounded suspicion that a crime within the jurisdiction of the SC has been committed.²⁶

12. In this regard, the Panel recalls its previous findings that, by virtue of the decision taken by the Pre-Trial Judge on the confirmation of the indictment against

²³ Sixth Review, para. 13; Fifth Review, para. 14; Fourth Review, 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, public, para. 17.

²⁴ Sixth Review, para. 13; Fifth Review, para. 14; Fourth Review, para. 13; European Court of Human Rights (ECtHR), *Buzadji v. The Republic of Moldavia*, no. 23755/07, [Judgment](#) [GC] (*Buzadji v. The Republic of Moldavia* [GC]), 5 July 2016, para. 90.

²⁵ Sixth Review, para. 14; Fifth Review, para. 15; Fourth Review, para. 14; ECtHR, [Buzadji v. The Republic of Moldavia](#) [GC], para. 87.

²⁶ Sixth Review, para. 14; Fifth Review, para. 15; Fourth Review, para. 14 and footnote 28.

the Accused,²⁷ 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.²⁸ Moreover, the Panel recalls that the evaluation of the evidence in support of the charges will occur at trial, when the Accused's guilt or innocence will be determined on the basis of the totality of the evidence before the Panel.²⁹ Furthermore, the Panel does not identify any ground to conclude that the confirmation of the indictment against the Accused was improper or flawed, to the extent that the grounded suspicion threshold is no longer fulfilled.³⁰ Accordingly, and further to the witnesses' testimonies heard to date and other supporting material, the Panel finds that the requirement under Article 41(6)(a) of the Law has not ceased to exist and therefore continues to be met.

B. NECESSITY OF DETENTION

13. 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, 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.³¹

14. 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.³² In this respect, the assessment of whether there is a risk

²⁷ 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).

²⁸ Sixth Review, para. 15; Fifth Review, para. 15, Fourth Review, para. 14, referring to 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 and Pre-Trial Judge, *Public Redacted Version of Decision on Request for Arrest Warrant and Transfer Order*, 12 June 2020, public, para. 18.

²⁹ Sixth Review, para. 15; Fifth Review, para. 15; Fourth Review, para. 14; Third Review, para. 12.

³⁰ *Similarly*, Sixth Review, para. 15; Fifth Review, para. 15; Fourth Review, para. 14.

³¹ Sixth Review, para. 16; Fifth Review, para. 16; Fourth Review, paras 15-17, also referring to *Thaçi Interim Release Appeal Decision*, para. 22.

³² Sixth Review, para. 17; Fifth Review, para. 17; Fourth Review, para. 17.

of obstruction occurring in the future does not require proof that obstruction has actually occurred in the past.³³

1. Risk of Flight

15. Regarding the risk of flight under Article 41(6)(b)(i) of the Law, the Panel recalls its previous findings that the Accused is not at flight risk and that such risk, even if existent, could be adequately mitigated by conditions to be imposed upon him.³⁴

16. The Panel further notes the SPO's submission that the Accused has a stronger motivation to mobilise his support network to help him flee and go into hiding after hearing the recent witnesses' testimonies and disclosure of information. The Panel however does not consider this factor sufficient to establish a risk of flight. In assessing the risk of flight, the Panel notes other previously evaluated factors, such as the cooperation of the Accused towards the SPO before the confirmation of the indictment and his links with his home country,³⁵ and considers that no intervening information or development has arisen which undermines the Panel's aforementioned findings.

17. Accordingly, the Panel finds that the Accused is not at flight risk and that such risk, even if existent, could be adequately mitigated by conditions to be imposed upon him pursuant to Article 41(12) of the Law and Rule 56(5) of the Rules.

³³ Sixth Review; para. 17 Fifth Review, para. 17. Fourth Review, para. 17. 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.

³⁴ Sixth Review, para. 18; Fifth Review, para 19; Fourth Review, para. 18.

³⁵ Fifth Review, para. 18, Fourth Review, para 18.

2. Risk of Obstructing the Progress of SC Proceedings

18. 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 the Accused, if released, to interfere with victims and witnesses, and/or their families. In light of the Accused's ties to the Kosovo intelligence apparatus and his experience in this respect, and further to [REDACTED],³⁶ and [REDACTED],³⁷ 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, in light of the recent and ongoing disclosure of further information to the Accused, in particular the identities of all SPO protected witnesses, including former KLA members operating in the same area as the Accused. In the view of the Panel, this 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 number of witnesses, as well as the fact that the evidence of one witness is often inseparably

³⁶ KSC-BC-2020-05, Transcript of hearing, 14 October 2021, confidential, p. 1232, line 25 to p. 1233, line 2; p. 1239, lines 9 – 16 and p. 1240 lines 4 – 8.

³⁷ KSC-BC-2020-05, Transcript hearing, 18 November 2021, confidential, p. 1686, line 23 to p. 1688, line 21.

connected to the evidence of other witnesses may further increase the risk of interference with victims, witnesses, and/or their family members.

19. The Panel further notes that during his testimony, witness [REDACTED].³⁸ In addition, the Panel notes that, during his testimony, witness [REDACTED],³⁹ [REDACTED].⁴⁰ The Panel considers that such circumstances are an indication of the influence of the Accused in Kosovo and his ability to affect the witnesses, and therefore the proceedings.

20. The Panel further notes that during their testimonies, witnesses [REDACTED].⁴¹ Even though this factor is in and of itself, not determinative in relation to the risk of obstructing the progress of the proceedings, it provides the context against which the aforementioned findings, pertaining specifically to the Accused, must be considered.

21. Lastly, the Panel recalls its reiterated finding that [REDACTED],⁴² which led the Panel to order [REDACTED].⁴³ This further militates against the release of the Accused.

22. In light of the above, the Panel finds that the risk that the Accused will obstruct the progress of SC proceedings by interfering with victims and witnesses, and/or their families continues to exist.

³⁸ KSC-BC-2020-05, Transcript of Hearing, 5 October 2021, confidential, p. 994, lines 11-22.

³⁹ KSC-BC-2020-05, Transcript of Hearing, 24 September 2021, confidential, p. 771, lines 2-4.

⁴⁰ KSC-BC-2020-05, Transcript of Hearing, 24 September 2021, confidential, p. 771, lines 5-7.

⁴¹ KSC-BC-2020-05, Transcript of Hearing, 10 November 2021, confidential, p. 1487, line 16 to p. 1489, line 1; p. 1490, line 18 to p. 1492 line 8; p. 1494, lines 11 – 21 and p. 1495, line 11 to p. 1496, line 11; KSC-BC-2020-05, Transcript of Hearing, 18 November 2021, confidential, p. 1712, line 1 to p. 1714, line 9.

⁴² [REDACTED].

⁴³ [REDACTED].

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.⁴⁴

24. Having found that there is a sufficiently real possibility that the Accused will obstruct SC proceedings, including by interfering with victims and witnesses, and/or their families,⁴⁵ the Panel finds that it need not address the risk under Article 41(6)(b)(iii) of the Law.⁴⁶

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.

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.⁴⁷ In this regard, the Panel has the obligation to inquire and evaluate, *proprio motu*, all reasonable conditions that could be imposed on an accused.⁴⁸

⁴⁴ *Thaçi Interim Release Appeal Decision*, para. 78.

⁴⁵ *See supra* paras 18-22.

⁴⁶ *Similarly*, Sixth Review, para. 24; Fifth Review, para. 24; Fourth Review, para. 22.

⁴⁷ Sixth Review, para 26; Fifth Review, para. 26; Fourth Review, 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.

⁴⁸ Sixth Review, para. 26, Fifth Review, para. 26; Fourth Review, 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.

27. As regards the risk of obstructing the progress of SC proceedings, the Panel recalls the risk factors identified above.⁴⁹ The Panel further recalls its finding concerning [REDACTED],⁵⁰ which led the Panel to order: (i) [REDACTED],⁵¹ and (ii) [REDACTED].⁵² Should the Accused be released, the Panel considers that no conditions could adequately restrict or monitor his private communications, including with members of his family and any approved visitors, 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. Recalling, specifically, that the Accused has particular skills due to his intelligence background, a real possibility exists that he could ask others to pass on a message orally or use a device belonging to a third person to do so. In addition, aside from the question whether any such conditions could be effectively implemented in practice, any further conditions, such as monitored visits, would insufficiently mitigate this risk due to the possibility of using coded language which cannot be easily recognised or prevented by persons not familiar with SC proceedings. It follows that the Accused's communications can only be restricted and monitored in a way to sufficiently mitigate the risks of him obstructing SC proceedings through the communication monitoring framework at the SC detention facilities and [REDACTED].

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

⁴⁹ See *supra* paras 18-22.

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

D. REASONABLENESS OF DURATION OF DETENTION

29. The Panel recalls its obligations, pursuant to Rule 56(2) of the Rules, to ensure that a person is not detained for an unreasonable period prior to the opening of the case, and to adjudicate in accordance with the Constitution and international human rights law, as stipulated in Article 3(2)(a) and (e) of the Law.⁵³ Therefore, the Panel considers that it shall continue to assess the reasonableness of the duration of the Accused's detention after the opening of the case, which took place on 15 September 2021,⁵⁴ until a decision on the charges against him is taken, or until proceedings are otherwise terminated, in line with Article 53 of the Constitution and the jurisprudence of the European Court of Human Rights (ECtHR).⁵⁵

30. In the circumstances of the present case, the Panel notes that the Accused has been in detention for 14 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 further notes that the Accused 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 commenced, as scheduled, on 15 September 2021, with the

⁵³ Sixth Review, para. 30.

⁵⁴ Transcript of Hearing, 15 September 2021, public, pp. 301-382.

⁵⁵ See, e.g., ECtHR, *Solmaz v. Turkey*, no. 27561/02, [Judgment](#), 16 January 2007, paras 23-24; [Kalashnikov v. Russia](#), no. 47095/99, 15 July 2002, para. 110; [Wemhoff v. Germany](#), no. 2122/64, 27 June 1968, para. 9, noting that, in determining the length of detention pending trial under Article 5(3) of the Convention, the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance.

procedures prescribed under Rules 124 and 125 of the Rules, followed by the opening statements of the SPO and Victims' Counsel; and (ii) to date, the Panel completed the testimony of seven (7) SPO witnesses, two (2) in September 2021;⁵⁶ two (2) in October 2021;⁵⁷ and three (3) in November 2021.⁵⁸ Moreover, the Panel notes that the Parties intend to call a limited number of witnesses.

31. Accordingly, the Panel does not find that the Accused has been detained for an unreasonable period.

⁵⁶ KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, public; KSC-BC-2020-05, Transcript of Hearing, 23 September 2021, public.

⁵⁷ KSC-BC-2020-05, Transcript of Hearing, 4 October 2021, public; KSC-BC-2020-05, Transcript of Hearing, 12 October 2021, public.

⁵⁸ KSC-BC-2020-05, Transcript of Hearing, 2 November 2021, public; KSC-BC-2020-05, Transcript of Hearing, 10 November 2021, public; KSC-BC-2020-05, Transcript of Hearing, 17 November 2021, public.

V. DISPOSITION

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

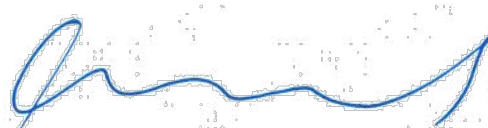
- a. **ORDERS the Accused's** continued detention;
- b. **ORDERS** the SPO and Victims' Counsel, if she so wishes, to file submissions on the next review of detention by **Wednesday, 12 January 2022**; and
- c. **ORDERS** the Defence to file submissions on the next review of detention, if it so wishes, by **Monday, 17 January 2022**.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Tuesday 23 November 2021
At The Hague, the Netherlands.