



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: 21 March 2022

Language: English

Classification: Public

**Public redacted version of
Ninth 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 ninth decision on review of detention.

I. PROCEDURAL BACKGROUND

1. On 21 January 2022, the Panel issued the “Eighth decision on review of detention” of Salih Mustafa (Accused).¹
2. On 7 March 2022, the Specialist Prosecutor’s Office (SPO) filed its submissions on the ninth review of detention, requesting for the Accused to remain in detention.²
3. On 10 March 2022, the Defence for Salih Mustafa (Defence) filed its submissions, requesting for: (i) the Accused to be released, with or without conditions to be set by the Panel; and, in case of continued detention of the Accused, (ii) [REDACTED].³
4. Victims’ Counsel did not file any submissions.

II. SUBMISSIONS

5. The SPO submits that the Accused’s continued detention remains necessary and proportionate.⁴ More specifically, the SPO advances that: (i) a grounded suspicion that the Accused has committed crimes within the jurisdiction of the Specialist Chambers (SC) continues to exist and this suspicion has solidified with the conclusion of the SPO’s case and the Panel’s rejection of the Defence’s motion to dismiss any or all of

¹ KSC-BC-2020-05, F00295, Trial Panel I, *Eighth decision on review of detention* (Eighth Review), 21 January 2022, confidential. A public redacted version was issued the same day, F00295/RED.

² KSC-BC-2020-05, F00339, Specialist Prosecutor, *Prosecution submissions for the ninth review of detention* (SPO Submissions), 7 March 2022, confidential, para. 14.

³ KSC-BC-2020-05, F00342, Defence, *Defence submission for the review on the detention of the Accused* (Defence Submissions), 10 March 2021, confidential, with Annex 1, confidential and *ex parte*, paras 27, 29, 31-32.

⁴ SPO Submissions, para. 2.

the charges (Rule 130 Decision);⁵ and (ii) 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) continue to exist.⁶

6. Regarding the risk of flight, the SPO submits that such a risk is real and remains high, and has further increased with the completion of the SPO's case.⁷ Regarding the risk of obstruction of the proceedings through interference with witnesses and victims, the SPO highlights that the Panel has repeatedly acknowledged that this risk exists and that it remains high, as shown by the testimony of witnesses, the Accused's intent and ability to interfere with criminal proceedings and [REDACTED].⁸ The SPO adds that there is a further real risk that, if released, the Accused will commit further crimes, including crimes against the administration of justice.⁹ The SPO therefore argues that: (i) at this advanced stage of the proceedings, detention is the only means to effectively mitigate the existing risks;¹⁰ and (ii) the duration of the detention remains reasonable.¹¹

7. The Defence submits that there are no grounds justifying the Accused's detention, as there is nothing to suggest that he would interfere with victims and witnesses, or their families, if released.¹² More specifically, the Defence argues that: (i) [REDACTED] the Accused [REDACTED] has not disclosed any unauthorised information and has not in any manner obstructed the proceedings;¹³ (ii) no link has been established between the Accused and [REDACTED], relied upon by the Panel in

⁵ SPO Submissions, para. 3, referring to KSC-BC-2020-05, F00326, Trial Panel I, *Decision on the Defence Rule 130(1) motion to dismiss any or all charges of the Indictment* (Rule 130 Decision), 23 February 2022. A public redacted version was issued the same day, F00326/RED.

⁶ SPO Submissions, para. 2.

⁷ SPO Submissions, para. 4.

⁸ SPO Submissions, paras 5-8.

⁹ SPO Submissions, para. 9.

¹⁰ SPO Submissions, paras 10-11.

¹¹ SPO Submissions, paras 12-13.

¹² Defence Submissions, paras 14-15.

¹³ Defence Submissions, para. 8.

its previous detention review;¹⁴ (iii) it is unfair, unfounded and unjust to assume, as the Panel did, that [REDACTED];¹⁵ and (iv) the Accused no longer has any position in the Kosovo Intelligence apparatus, nor any ties, and his past experience has become obsolete.¹⁶ The Defence adds that, should any risk be established, the Accused could be released under conditions, to be determined by the Panel. He could be kept in the Netherlands and have his phone calls monitored. Alternatively, he could be [REDACTED].¹⁷

III. APPLICABLE LAW

8. The Panel notes Article 6(2) of the European Convention on Human Rights (ECHR), Articles 29, 31(5) and 53 of the Constitution of the Republic of Kosovo (Constitution), Articles 3(2), 21(3), and 41(6) and (10)-(12) of the Law, and Rule 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules).

IV. ANALYSIS

9. 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 ECHR, is the starting point for the Panel's assessment of the continued detention on remand. Accordingly, continued detention cannot be maintained lightly and the Accused should be released once his continued detention ceases to be reasonable.¹⁸

¹⁴ Defence Submissions, paras 9-10.

¹⁵ Defence Submissions, paras 11-12.

¹⁶ Defence Submissions, para. 13.

¹⁷ Defence Submissions, para. 16.

¹⁸ Eighth Review, para. 12; 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; European Court of Human Rights (ECtHR), *Buzadji v. The Republic of Moldova*, no. 23755/07, [Judgment](#) [GC] (*Buzadji v. The Republic of Moldova* [GC]), 5 July 2016, para. 89.

10. Further, the Panel would like to clarify that the present decision concerns only the review of the Accused's detention. The Defence's request to [REDACTED].¹⁹

A. GROUNDED SUSPICION

11. As regards the threshold for continued detention, Article 41(6)(a) of the Law requires, as a pre-condition,²⁰ a grounded suspicion that a crime within the jurisdiction of the SC has been committed.²¹

12. In this regard, the Panel recalls its previous finding that, by virtue of the decision taken by the Pre-Trial Judge on the confirmation of the indictment against the Accused,²² 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.²³ Further, the Panel has more recently found, in its Rule 130 Decision, that the evidence presented during the SPO's case, if accepted, is capable of supporting a conviction under Counts 1-4 of the Indictment, under one or more of the modes of individual criminal responsibility with which the Accused is charged.²⁴ Accordingly, the Panel finds that the requirement under Article 41(6)(a) of the Law has not ceased to exist and continues to be met.

¹⁹ [REDACTED].

²⁰ ECtHR, [Buzadji v. The Republic of Moldavia](#) [GC], para. 87.

²¹ Eighth Review, para. 13.

²² 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). The Pre-Trial Judge's findings were made on the basis of a well-grounded suspicion, a standard which exceeds the grounded suspicion threshold required for the purposes of Article 41(6)(a) of the Law; *see also* F00215/RED, Trial Panel I, *Public redacted version of Sixth decision on review of detention*, 23 September 2021, public, para. 15.

²³ Eighth Review, para. 14.

²⁴ Rule 130 Decision, paras 33, 39.

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 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.²⁵

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.²⁶ In this respect, the assessment as to whether there is a risk of obstruction occurring in the future does not require proof that obstruction has actually occurred in the past.²⁷

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 a risk, even if it existed, could be adequately mitigated by conditions to be imposed upon him.²⁸

16. The Panel notes the SPO's submission that the risk of flight has increased with the completion of the SPO's case, as the Accused is now fully aware of the inculpatory evidence against him.²⁹ The Panel does not, however, find this factor to be sufficient to establish a risk of flight. The Panel has previously considered

²⁵ KSC-BC-2020-05, F00127, Trial Panel I, *Fourth decision on review of detention* (Fourth Review), 25 May 2021, public, paras 15-17; *Thaçi Interim Release Appeal Decision*, para. 22.

²⁶ Fourth Review, para. 17.

²⁷ Eighth Review, para. 16. *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.

²⁸ Eighth Review, paras 17-19.

²⁹ SPO Submissions, para. 4 and footnote 11.

similar arguments made by the SPO³⁰ and the SPO does not bring any new arguments that would lead the Panel to a different conclusion.

17. Accordingly, the Panel finds that the Accused is not at flight risk and that such a risk, even if it existed, 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.

2. Risk of Obstructing the Progress of SC Proceedings

18. The Panel recalls that it has previously found that there is a risk, under Article 41(6)(b)(ii) of the Law, that the Accused will obstruct the progress of SC proceedings by interfering with victims and witnesses, and/or their families.³¹ The Panel has noted in this regard that: (i) the Accused's knowledge of the charges and potential lengthy sentence, if convicted, may serve as incentives for him, if released, to interfere with victims and witnesses, and/or their families; (ii) the Accused's knowledge of the identity of all SPO witnesses, his ties to the Kosovo intelligence apparatus, his experience as an intelligence officer [REDACTED] and the limited scope of the case make it easier for him to potentially interfere with victims and witnesses, and/or their families, and more generally, to obstruct the progress of the proceedings; (iii) several witnesses have testified [REDACTED]; (iv) witnesses have further referred to [REDACTED]; and (v) [REDACTED].³²

19. The Panel is not persuaded by the submissions of the Defence that no risk of obstruction of SC proceedings exists.³³ First, the fact that all SPO witnesses have testified and that the SPO closed its case does not mean that the risk of obstruction

³⁰ See Eighth Review, paras 7, 18; F00267/RED, Trial Panel I, *Public redacted version of Seventh decision on review of detention*, 23 November 2021, public, paras 6, 16.

³¹ Eighth Review, para. 24.

³² Eighth Review, paras 20-23.

³³ See Defence Submissions, paras 7-15.

has ceased to exist, as the Defence seems to imply.³⁴ The proceedings are still ongoing, witnesses will continue to be heard, evidence tendered and witnesses who have testified could be recalled.

20. Second, the Panel recalls, as highlighted above, that the assessment as to whether there is a risk of obstruction in the future does not require proof that obstruction has occurred in the past.³⁵ Thus, the fact that the Accused has not breached [REDACTED] is not determinative, as argued by the Defence.³⁶

21. Third, turning to [REDACTED],³⁷ [REDACTED]. [REDACTED].³⁸ The fact that [REDACTED] is not determinative, since the exercise to be undertaken by the Panel is that of a risk assessment.³⁹

22. Fourth, regarding the Panel's reliance [REDACTED], which the Defence contests,⁴⁰ the Panel observes that [REDACTED].⁴¹

23. Fifth, the Panel finds no merit in the Defence's submission that the Accused's ties to the Kosovo intelligence apparatus have become inexistent and his experience obsolete.⁴² The Accused's intelligence background has a solid basis, given that, prior to his arrest, he was a senior officer with the Intelligence Department of the Ministry of Defence of Kosovo.⁴³ Thus, the contacts and ties previously established remain relevant to date.

³⁴ See Defence Submissions, paras 8, 16.

³⁵ See *supra* para. 14.

³⁶ See Defence Submissions, para. 8.

³⁷ See Defence Submissions, paras 9-10.

³⁸ See Eighth Review, paras 20-22.

³⁹ See *supra* para. 14.

⁴⁰ See Defence Submissions, paras 11-12.

⁴¹ Eighth Review, para. 20.

⁴² See Defence Submissions, para. 13.

⁴³ 069404-TR-ET, Part 1, p. 5; KSC-BC-2020-05, F00009/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Decision on Request for Arrest Warrant and Transfer Order*, 26 January 2021, para. 20.

24. Lastly, the Panel notes that [REDACTED], which further militates against his release.⁴⁴

25. 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.

3. Risk of Committing Further Crimes

26. 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.⁴⁵

27. Having found that there is a sufficiently real possibility that the Accused will obstruct the progress of SC proceedings, including by interfering with victims and witnesses, and/or their families,⁴⁶ the Panel finds that it need not address the risk under Article 41(6)(b)(iii) of the Law.⁴⁷

4. Conclusion

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

⁴⁴ [REDACTED].

⁴⁵ Eighth Review, para. 25.

⁴⁶ See *supra* paras 18-25.

⁴⁷ Similarly, Eighth Review, para. 26.

C. CONDITIONAL RELEASE

29. 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.⁴⁸ In this regard, the Panel has the obligation to inquire and evaluate, *proprio motu*, all reasonable conditions that could be imposed on an accused.⁴⁹

30. The Panel recalls the risk factors identified above with regard to the risk of obstructing the progress of SC proceedings.⁵⁰ The Panel further recalls its findings concerning the existence of a serious risk that [REDACTED], which has led the Panel to order [REDACTED].⁵¹

31. The Panel considers that, should the Accused be released, no conditions could adequately restrict or monitor his contacts and communications to sufficiently mitigate the risk of obstruction of SC proceedings. The Panel recalls that [REDACTED].⁵² The Panel considers that case-related conversations and the use of coded language cannot be properly monitored and prevented by persons not familiar with the SC proceedings and privy to non-public information in the case record. It follows that the Accused's communications can only be restricted and monitored in a way that sufficiently mitigates the risks of him obstructing SC proceedings through the communication monitoring framework at the SC detention facilities [REDACTED].

⁴⁸ Eighth Review, para. 28; KSC-CC-PR-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.

⁴⁹ Eighth Review, para. 28. 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.

⁵⁰ See *supra* paras 18-25.

⁵¹ [REDACTED].

⁵² [REDACTED].

32. Regarding the Defence's request to release the Accused in the Netherlands,⁵³ the Panel notes that, pursuant to Article 41(11) of the Law, persons detained by the SC shall not be released in the Host State.

33. As to the Defence's alternative request to transfer the Accused [REDACTED],⁵⁴ the Panel observes that this request concerns in fact the Accused's conditions of detention, rather than a matter of (conditional) release. Be that as it may, as already noted by the Panel, [REDACTED].⁵⁵

34. The Panel accordingly finds that no conditions, including those 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.

D. REASONABLENESS OF DURATION OF DETENTION

35. The Panel notes, first, that the Accused is entitled to trial within a reasonable time or to release pending trial and, relatedly, recalls its continued obligation to assess the reasonableness of the Accused's detention after the opening of the case until a decision on the charges against him is taken, or until proceedings are otherwise terminated.⁵⁶

36. In the circumstances of the present case, the Panel notes that the Accused has been in detention for 18 months since he was arrested and transferred to the detention facilities of the SC, 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

⁵³ See Defence Submissions, para. 16.

⁵⁴ See Defence Submissions, para. 16.

⁵⁵ [REDACTED].

⁵⁶ Eighth Review, para. 31.

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 notes, in particular, that: (i) the trial commenced, as scheduled, on 15 September 2021 and the SPO closed its case on 4 February 2022;⁵⁷ (ii) on 23 February 2022, the Panel issued its Rule 130 Decision; (iii) on 8 and 9 March 2022, the Panel held the Defence Preparation Conference and Victims' Status Conference and issued several orders aimed at ensuring the efficiency of the proceedings;⁵⁸ and (iv) on 22 March 2022 the Defence will present its opening statements, which will be immediately followed by the testimony of the first Defence witnesses, scheduled to commence on 23 March 2022.⁵⁹ The Panel further notes that, pursuant to the Panel's order,⁶⁰ the Defence intends to call a limited number of witnesses, with an estimated time for direct examination of 36 hours.⁶¹

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

⁵⁷ KSC-BC-2020-05, F00308, Specialist Prosecutor, *Prosecution Notice of the Closing of its Case pursuant to Rule 129*, 4 February 2022, public.

⁵⁸ KSC-BC-2020-05, Transcript of Hearing, 8 March 2022, public; Transcript of Hearing, 9 March 2022, public.

⁵⁹ KSC-BC-2020-05, Transcript of Hearing, 9 March 2022, public, p. 2521, line 25 to p. 2522, line 5, and p. 2524, line 23 to p. 2525, line 1.

⁶⁰ KSC-BC-2020-05, Transcript of Hearing, 9 March 2022, public, p. 2522, line 13 to p. 2524, line 22.

⁶¹ KSC-BC-2020-05, F00343, Defence, *Defence Rule 119 (2) (a) filing regarding updated Order of Testimony of Defence Witnesses*, 14 March 2022, public, with Annex 1, confidential.

V. DISPOSITION

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

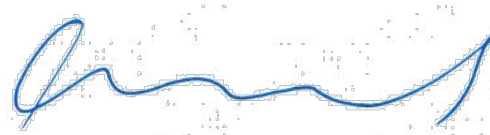
- a. **ORDERS** the Accused's continued detention;
- b. **ORDERS** the SPO and Victims' Counsel, if she so wishes, to file submissions on the next review of detention by **Friday, 29 April 2022**;
- c. **ORDERS** the Defence to file submissions on the next review of detention, if it so wishes, by **Friday, 6 May 2022**; and
- d. **ORDERS** the SPO and the Defence to file public redacted versions of their respective submissions (F00339 and F00342, without its annex) by **Monday, 28 March 2022**.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Monday, 21 March 2022

At The Hague, the Netherlands.