



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: 20 July 2022

Language: English

Classification: **Public**

**Public redacted version of
Eleventh 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 eleventh decision on review of detention.

I. PROCEDURAL BACKGROUND

1. On 20 May 2022, the Panel issued the “Tenth decision on review of detention” of Salih Mustafa (Accused).¹
2. On 5 July 2022, the Specialist Prosecutor’s Office (SPO) filed its submissions on the eleventh review of detention.²
3. The Defence Counsel and Victims’ Counsel did not file any submissions.

II. SUBMISSIONS

4. The SPO submits that the Accused’s continued detention remains necessary and proportionate.³
5. The SPO contends that the grounded suspicion that the Accused has committed crimes within the jurisdiction of the Specialist Chambers (SC) continues to exist, as no circumstances justifying the revision of this finding have occurred since the Tenth Review;⁴ such suspicion, after having adduced all the evidence in the case, has not only solidified, but the required threshold has been surpassed.⁵
6. The SPO submits that the risk of flight is real, remains high and is further increased by the conclusion of the evidentiary proceedings.⁶

¹ KSC-BC-2020-05, F00411, Trial Panel I, *Tenth decision on review of detention* (Tenth Review), 20 May 2022, confidential. A public redacted version was issued the same day, F00411/RED.

² KSC-BC-2020-05, F00447, Specialist Prosecutor, *Prosecution submissions for the eleventh review of detention* (SPO Submissions), 5 July 2022, public.

³ SPO Submissions, para. 2.

⁴ SPO Submissions, para. 3.

⁵ SPO Submissions, para. 3.

⁶ SPO Submissions, para. 4.

7. The SPO further submits that the risk of obstruction of the proceedings through interference with witnesses and victims and/or their families continues to exist due to the Accused's close ties to the Kosovo intelligence apparatus, related experience, technical knowledge and network, as well as his knowledge of the charges and the potential length of the sentence, if convicted.⁷ The SPO also contends that the manner in which such interference could take place has been exemplified through the testimony of witnesses at trial.⁸

8. The SPO also avers that there is a real risk that, if released, the Accused will commit further crimes, including crimes against the administration of justice; such risk has only increased with the closure of the evidentiary proceedings and in view of the forthcoming conclusion of the case, and the expected verdict.⁹

9. In light of the above, the SPO submits that detention is the only means to effectively mitigate the existing risks, and the duration of the detention remains reasonable, considering the pace of the procedural steps taken during trial.¹⁰

III. APPLICABLE LAW

10. 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 Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Law), and Rule 57(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules).

⁷ SPO Submissions, para. 5.

⁸ SPO Submissions, para. 6.

⁹ SPO Submissions, para. 7.

¹⁰ SPO Submissions, paras 9-11.

IV. ANALYSIS

11. 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.¹¹

A. GROUNDED SUSPICION

12. As regards the threshold for continued detention, the Panel recalls that Article 41(6)(a) of the Law requires, as a pre-condition,¹² a grounded suspicion that a crime within the jurisdiction of the SC has been committed.¹³

13. In this regard, the Panel also 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,¹⁴ 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.¹⁵ Further, the Panel has more recently found, in the "Decision on the Defence Rule 130(1) motion to dismiss any or all charges of the Indictment", that the evidence presented during the SPO case, if accepted, is capable of supporting a conviction under Counts 1-4 of the Indictment, under one or more of the modes of

¹¹ Tenth Review, para. 11; 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.

¹² ECtHR, [Buzadji v. The Republic of Moldova](#) [GC], para. 87.

¹³ Tenth Review, para. 12.

¹⁴ 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.

¹⁵ Tenth Review, para. 13.

individual criminal responsibility with which the Accused is charged.¹⁶ Accordingly, the Panel finds that the requirement under Article 41(6)(a) of the Law continues to be met.

B. NECESSITY OF DETENTION

14. 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 shall be relied upon by the Panel, as underlined by the Court of Appeals Panel.¹⁷ Specifically, as regards all risks under Article 41(6)(b) of the Law, the exercise that the Panel has to conduct is a risk assessment.¹⁸

1. Risk of Flight

15. Regarding the risk of flight under Article 41(6)(b)(i) of the Law, beside the arguments reiterated by the SPO from previous submissions,¹⁹ the Panel does not find the additional factor of the approaching verdict under Article 43 of the Law strong enough to persuade the Panel to change its previous finding regarding this risk.²⁰ 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

¹⁶ 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*, 23 February 2022, paras 33, 39.

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

¹⁸ Fourth Review, para. 17.

¹⁹ SPO Submissions, para. 4, and footnote 15; KSC-BC-2020-05, F00355, Trial Panel I, *Ninth decision on review of detention* (Ninth Review), confidential, para. 16. A public redacted version was filed on the same day, F00355/RED.

²⁰ Tenth Review, para. 21; Ninth Review, paras 15-17 with reference to KSC-BC-2020-05, F00295/RED, Trial Panel I, *Public redacted version of Eighth decision on review of detention* (Eighth Review), 21 January 2022, public, paras 7 and 18.

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

16. As previously found by the Panel, 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.²¹ To this effect, the Panel has relied on a multiplicity of factors, considered altogether: (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, his relationship to some of the witnesses 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 protected witnesses have testified about instances in which they and/or their families have been subjected to (indirect) threats and intimidation, and expressed fear to testify in the present proceedings; (iv) witnesses have referred to a general climate of interference and intimidation prevailing in Kosovo against persons who criticise former Kosovo Liberation Army members, including the Accused; and (v) there is a serious risk that – even whilst detained – the Accused will reveal the identities of protected SPO witnesses to other accused persons currently in the SC's custody.²²

17. The Panel does not see any reason to abandon the factors above and to depart from the conclusion that they underpin, in the absence of any compelling factors

²¹ Eighth Review, paras 20-23; Tenth Review, para. 19.

²² Ninth Review, para. 18.

indicating the opposite. In particular, the Panel recalls 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.²³ In this vein, the Panel reiterates that the Accused's intelligence background has a solid basis, considering that prior to his arrest he was a senior officer with the Intelligence Department of the Ministry of Defence of Kosovo.²⁴ Thus, the contacts and ties previously established remain relevant to date. This, coupled with the evidence given by SPO witnesses in relation to incidents of intimidation and interference,²⁵ within the context of a general climate of witness intimidation, constitute strong factors militating in favour of a risk of obstruction, within the meaning of Article 41(6)(b)(ii) of the Law. The Panel further observes that some of the witnesses who provided evidence to this effect are neighbours of the Accused or distant relatives, which makes it even easier for him to reach them and directly interfere with them.²⁶

18. [REDACTED].²⁷ [REDACTED].²⁸

19. 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.

²³ Tenth 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.

²⁴ 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.

²⁵ Eighth Review, paras 20-22; Tenth Review, para. 17.

²⁶ Ninth Review, para. 22.

²⁷ [REDACTED].

²⁸ [REDACTED].

3. Risk of Committing Further Crimes

20. 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.²⁹

21. 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,³⁰ the Panel finds that it need not address the risk under Article 41(6)(b)(iii) of the Law.³¹

4. Conclusion

22. 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.

C. CONDITIONAL RELEASE

23. 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.³² In this regard, the Panel has the obligation to inquire and evaluate, *proprio motu*, all reasonable conditions that could be imposed on an accused.³³

²⁹ Tenth Review, para. 20.

³⁰ See *supra* para. 19.

³¹ Tenth Review, para. 21.

³² Tenth Review, para. 23; 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.

³³ Tenth Review, para. 23. 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.

24. The Panel incorporates by reference its findings from the Ninth Review with regard to conditional release which remain equally valid today.³⁴ The Panel also recalls the risk factors identified above with regard to the risk of obstructing the progress of SC proceedings.³⁵ [REDACTED].³⁶

25. With the above in mind, the Panel considers that, should the Accused be released, no conditions could adequately restrict or monitor his contacts and communications in order to sufficiently mitigate the risk of obstruction of SC proceedings.³⁷ No circumstance has occurred since the Tenth Review capable of changing this finding

26. The Panel accordingly finds that no conditions 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

27. 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.³⁸

28. In the circumstances of the present case, the Accused has been in detention for almost 22 months since he was arrested and transferred to the SC Detention Facilities, 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

³⁴ Ninth Review, paras 30-34.

³⁵ *See supra* paras 16-19.

³⁶ *See supra* para. 18.

³⁷ Tenth Review, para. 25.

³⁸ Tenth Review, para. 27.

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 notes, in particular, that: (i) the trial commenced, as scheduled, on 15 September 2021; (ii) the SPO closed its case on 4 February 2022;³⁹ (iii) the Defence closed its case on 26 May 2022;⁴⁰ (iv) the Panel closed the evidentiary proceedings on 20 June 2022;⁴¹ and (v) the hearing on the closing statements is scheduled for 13-15 September 2022, with 16 September 2022 as a reserve day.⁴²

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

³⁹ KSC-BC-2020-05, F00308, Specialist Prosecutor, *Prosecution Notice of the Closing of its Case pursuant to Rule 129*, 4 February 2022, public.

⁴⁰ KSC-BC-2020-05, F00421, Defence, *Defence Rule 131 Notice to close the Defence case*, 26 May 2022, public.

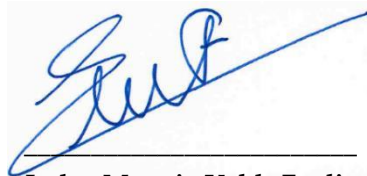
⁴¹ KSC-BC-2020-05, F00439, Trial Panel I, *Decision on the closing of the evidentiary proceedings and related matters* (Decision on the closing of the evidentiary proceedings), 20 June 2022, public.

⁴² Decision on the closing of the evidentiary proceedings, para. 25(e).

V. DISPOSITION

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

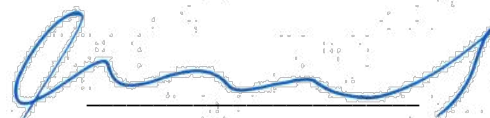
- a. **ORDERS** the Accused's continued detention;
- b. **ORDERS** the SPO and Victims' Counsel, if she so wishes, to file submissions on the next review of detention by **Monday, 5 September 2022**; and
- c. **ORDERS** the Defence to file submissions on the next review of detention, if it so wishes, by **Tuesday, 13 September 2022**.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Wednesday, 20 July 2022

At The Hague, the Netherlands.