



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:** 10 September 2021

**Language:** English

**Classification:** Public

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**Public redacted version of**

**Decision on the Defence request for termination of imposed segregation and  
modification of other measures on Salih Mustafa**

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**To be notified to:**

**Specialist Prosecutor**

Jack Smith

**Counsel for the Accused**

Julius von Bóné

**Registry**

Fidelma Donlon

Chief Detention Officer

**Victims' Counsel**

Anni Pues

TRIAL PANEL I (Panel), hereby renders this decision on the Defence request for termination of imposed segregation and modification of other measures on Salih Mustafa.

## I. PROCEDURAL BACKGROUND

1. On 2 August 2021, the Panel issued, upon request of the Specialist Prosecutor's Office (SPO),<sup>1</sup> the "Decision on Specialist Prosecutor's request for segregation and other measures" (Segregation Decision) in which it set out the principles governing segregation and other measures applicable to the detention of Salih Mustafa (Mr Mustafa or Accused).<sup>2</sup>
2. On 27 August 2021, the Defence submitted the "Defence request for termination of imposed segregation and modification of other measures on Salih Mustafa" (Request).<sup>3</sup>
3. On 1 September 2021, as ordered by the Panel,<sup>4</sup> the Registrar filed the "Registry Submissions on the Feasibility of Measures Sought by the Defence Pursuant to Trial Panel I's Order (F00173)".<sup>5</sup>

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<sup>1</sup> KSC-BC-2020-05, F00133, Specialist Prosecutor, *Prosecution's request for segregation and other measures*, 11 June 2021, confidential and *ex parte*. A confidential redacted version was submitted on 14 June 2021, F00133/CONF/RED.

<sup>2</sup> KSC-BC-2020-05, F00162, Trial Panel I, *Decision on Specialist Prosecutor's request for segregation and other measures*, 2 August 2021, confidential and *ex parte*. A confidential redacted version thereof was submitted on 18 August 2021, F00162/CONF/RED.

<sup>3</sup> KSC-BC-2020-05, F00172, Defence, *Defence request for termination of imposed segregation and modification of other measures on Salih Mustafa*, 27 August 2021, confidential.

<sup>4</sup> KSC-BC-2020-05, F00173, Trial Panel I, *Order for submissions by the Registrar on the "Defence request for termination of imposed segregation and modification of other measures on Salih Mustafa" and varying the time limits for responses and replies* (Order Shortening Time Limits), 30 August 2021, confidential, para. 7(b).

<sup>5</sup> KSC-BC-2020-05, F00179, Registrar, *Registry Submissions on the Feasibility of Measures Sought by the Defence Pursuant to Trial Panel I's Order (F00173)* (Registry Submissions), 1 September 2021, confidential.

4. On 1 September 2021, as ordered by the Panel,<sup>6</sup> the SPO and Victims' Counsel filed their submissions on the Request.<sup>7</sup>

5. On 3 September 2021, the Defence filed the "Defence response to submissions made by other participants regarding the Defence's request for termination of imposed segregation and modification of other measures on Salih Mustafa".<sup>8</sup>

## II. SUBMISSIONS

6. Regarding the segregation regime in place, the Defence submits that Mr Mustafa currently has no meaningful human contact with anyone, as the persons with whom he can interact are staff members of the Specialist Chambers (SC) Detention Facilities, who are performing their job as opposed to interacting with the Accused, and who do not have anything in common with him.<sup>9</sup> The Defence further submits that if segregation is to be maintained, Mr Mustafa must have human contact with persons to whom he can relate.<sup>10</sup> The Defence also contends that [REDACTED] which in turn makes preparation for the upcoming trial difficult, as the imposed measures are overwhelmingly present in every conversation with the Defence Counsel.<sup>11</sup> It therefore requests that the segregation be terminated.<sup>12</sup>

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<sup>6</sup> Order Shortening Time Limits, para. 7(a).

<sup>7</sup> KSC-BC-2020-05, F00180, Specialist Prosecutor, *SPO response to the Defence request for termination of segregation and modification of other measures* (SPO Response), 1 September 2021, confidential; F00183, Victims' Counsel, *Corrected Version of Victims' Counsel Submission on the Order for submissions by the Registrar on the "Defence request for termination of imposed segregation and modification of other measures on Salih Mustafa" and varying the time limits for responses and replies* (Victims' Response), 1 September 2021, confidential.

<sup>8</sup> KSC-BC-2020-05, F00186, Defence, *Defence response to submissions made by other participants regarding the Defence's request for termination of imposed segregation and modification of other measures on Salih Mustafa* (Defence Reply), 3 September 2021, confidential.

<sup>9</sup> Request, paras 2-4.

<sup>10</sup> Request, para. 7.

<sup>11</sup> Request, para. 8.

<sup>12</sup> Request, para. 28.

7. If the segregation is not terminated, the Defence requests that the measures regarding telephone calls and visits be modified.<sup>13</sup> Regarding telephone calls, the Defence submits that the current arrangement of one (1) phone call a day with his close relatives, currently three, during weekdays only, and for a maximum duration of 30 minutes for each call, is not enough, as [REDACTED] as well as on the ability to prepare the case for trial.<sup>14</sup> Accordingly, the Defence requests that telephone calls be allowed with the same frequency as they were before the current measures were imposed, namely multiple times during the day, whenever it fits Mr Mustafa, and that they be allowed also during weekends.<sup>15</sup>

8. Regarding visits (whether in person or via video), the Defence submits, for the same reasons set out above, that the current arrangement of 10 visits per month is not enough, and that these should be extended to at least 20 visits per month.<sup>16</sup>

9. Lastly, the Defence requests more sport or other activities to be organised for Mr Mustafa, involving more than two persons, in order to provide Mr Mustafa with human interaction with others.<sup>17</sup>

10. The SPO submits that the definition of meaningful human contact provided by the Defence does not reflect the standards set by the European Court of Human Rights (ECtHR).<sup>18</sup> The SPO further observes that the Accused is currently allowed to have meetings with three family members; he has access to a television, sport and recreational facilities, a library, a spiritual room, and teacher-led classes; he is visited by the staff of the Detention Facilities and he has regular meetings with his Defence team, which includes two Albanian speaking persons.<sup>19</sup> Accordingly, the SPO submits

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<sup>13</sup> Request, para. 28.

<sup>14</sup> Request, paras 10-18.

<sup>15</sup> Request, paras 15, 19.

<sup>16</sup> Request, paras, 22, 24.

<sup>17</sup> Request, para. 26.

<sup>18</sup> SPO Response, para. 6.

<sup>19</sup> Request, para. 7.

that Mr Mustafa has meaningful human contact and the segregation regime should thus be maintained.<sup>20</sup>

11. Regarding the requested modifications to the communication regime, the SPO submits that, while the current arrangement complies with the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or Convention), it defers to the Panel and Registry regarding the assessment of the feasibility of the sought modifications, provided that the contacts do not compromise the framework set forth in the Segregation Decision, especially with regard to the monitoring of communications.<sup>21</sup>

12. The Victims' Counsel reiterates the need to ensure the protection of participating victims and submits that the termination of the segregation would jeopardise the protection granted due to the ongoing disclosure of material.<sup>22</sup> Accordingly, the Victims' Counsel requests that the segregation be maintained.<sup>23</sup>

13. Regarding the other modifications sought by the Defence, and noting that in the view of the Registrar the sought modifications are feasible, the Victims' Counsel does not oppose them.<sup>24</sup>

14. The Defence replies by reiterating the arguments set out in the Request, and submits that the current arrangement regarding telephone calls and video visits does not work, in practice, for Mr Mustafa and his family.<sup>25</sup> In particular, the Defence contends that with the start of the trial hearings, it will be difficult to have video visits or telephone calls on hearing days, during working hours. For this reason they should

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<sup>20</sup> SPO Response, paras 2, 10

<sup>21</sup> SPO Response, paras 2, 9.

<sup>22</sup> Victims' Response, para. 5.

<sup>23</sup> Victims' Response, para. 9.

<sup>24</sup> Victims' Response, para. 8.

<sup>25</sup> Defence Reply, paras 3-21.

be allowed during weekends or after working hours and until late in the evening (20:00 hours).<sup>26</sup>

15. The Registrar submits that it is feasible to: (i) [REDACTED]; and (ii) implement active monitoring of [REDACTED] visits per month (whether in person, via video, or a combination thereof).<sup>27</sup>

### III. APPLICABLE LAW

16. The Panel notes Article 22(2) of the Constitution of the Republic of Kosovo, Articles 3 and 8 of the ECHR, Articles 3(2), 23(1), 40(2) and (6) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Law), and Rules 56(6) and 116(4)(d) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules).

### IV. DISCUSSION

17. At the outset, the Panel notes that the Defence does not appear to rely upon the available legal remedies provided for in the Law and the Rules, notably certification to appeal, pursuant to Article 45(2) of the Law and Rule 77 of the Rules (the time limit of which has already expired); or reconsideration, pursuant to Rule 79 of the Rules.

18. The Panel understands that the Defence requests, pursuant to paragraphs 30 and 41 of the Segregation Decision, the termination or modification of the measures adopted, on account of the impact that these measures purportedly have on the Accused, although such basis for its Request is not indicated. The Defence is directed to always indicate its legal basis in future submissions, as it is not for the Panel to identify the legal basis for a Party or participant.

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<sup>26</sup> Defence Reply, para. 20.

<sup>27</sup> Registry Submissions, paras 7-8, 11, 15.

19. Regarding the request to terminate the segregation regime, the Panel considers that the Defence failed to demonstrate that the grounds, on which the Panel relied upon when adopting the current measures, ceased to exist or have changed to such an extent that warrant the termination of such regime. In this regard, the Panel recalls that, at the time of the SPO's request for segregation and other measures, the Defence did not make any submissions opposing the relief sought by the SPO. The Defence similarly did not request certification to appeal the Segregation Decision. The Panel further notes that, in its Request, the Defence did not challenge the existence of a risk of unlawful dissemination of confidential information related to the SPO protected witnesses, which had prompted the Panel to order Mr Mustafa's segregation in the first place.<sup>28</sup>

20. Furthermore, the Panel takes note of the Defence assertion that [REDACTED], which appears to be based on Counsel-client conversation. However, the Panel also notes that this assertion is unsupported by [REDACTED]. In this respect, the Panel underlines that both the Segregation Decision<sup>29</sup> and the Rules of Detention<sup>30</sup> stipulate that the Accused, whether or not he requests it, shall be regularly seen by the Medical Officer of the Detention Facilities and that appropriate measures shall be taken if his physical or mental health is affected by the conditions of detention. [REDACTED]. Rather, the Accused is discontent about the recent imposition of more stringent conditions of detention, a consequence that is inherent in any decision imposing segregation/communications' restrictions upon detainees. Lastly, the Panel recalls that the physical and mental condition of the detainee is but one consideration that the Panel has to take into account when deciding on Mr Mustafa's conditions of detention.<sup>31</sup>

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<sup>28</sup> Segregation Decision, para. 23.

<sup>29</sup> Segregation Decision, para. 28.

<sup>30</sup> See Rule 31, KSC-BD-08-Rev1, Registrar, Registry Practice Direction Rules of Detention, 23 September 2020, public.

<sup>31</sup> See Segregation Decision, paras 15, 19, 20-29.

21. The Panel further considers that the definition of meaningful human contact given by the Defence, on which its Request is predicated, is flawed. Ensuring human contact does not require contacts with persons who speak the same language or have the same background as the detainee. Rather, the concept must be understood broadly, allowing for interactions between a detainee and other persons. In this respect, the Panel is of the view that Mr Mustafa currently has a sufficiently wide and varied range of human interactions. These interactions include contacts with authorised family members, his Defence team (which includes two Albanian speakers), and the coaches during the recreational activities organised in the Detention Facilities. With regard to the daily interactions with the staff members of the Detention Facilities (security and medical personnel), while exercising their professional functions, they still provide an opportunity for meaningful human contact, within the framework of a detention regime. When taking these different types of interaction altogether, the Panel considers that they conform to the standards identified by the ECtHR when assessing similar situations,<sup>32</sup> and accordingly do not render the segregation regime incompatible with Article 3 of the Convention. At this juncture, the Panel recalls that whether segregation violates Article 3 of the ECHR depends on a number of factors, and not simply on the level of human contact provided to the detainee and its impact on him. As elaborated in the Segregation Decision, these factors include the conditions of detention, the extent of the social and sensory isolation, the duration of the separation, the objective pursued, its effects on the person concerned, and the procedural safeguards afforded to the detainee to guarantee his or her welfare and the proportionality of the measure, including measures taken to ensure his or her physical and mental condition.<sup>33</sup>

22. Regarding the request to modify the arrangements for telephone calls and visits, for the same reasons provided in paragraphs 19-20 above, the Panel is not convinced

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<sup>32</sup> See ECtHR, *Rohde v. Denmark*, no. 69332/01, [Judgment](#), 21 July 2005, para. 97.

<sup>33</sup> See Segregation Decision, para. 15 and references therein.



that the impact of the current restrictions on Mr Mustafa, which have been ongoing for less than a month, is such that it justifies any modification thereof. Notably, and as noted above, other considerations, as set out in the Segregation Decision, remain valid and militate in favour of maintaining the regime as established.<sup>34</sup> However, the Panel acknowledges that, in light of the imminent commencement of the trial hearings, it will be logistically difficult for the Accused to make telephone calls on hearing days, taking into account that telephone calls are currently authorised from Mondays to Fridays during working hours only.<sup>35</sup>

23. Therefore, the Panel considers it appropriate to authorise telephone calls during hearing days to be made until 20:00 hours and extends its authorisation for telephone calls to Saturdays and Sundays as well, between 10:00 and 17:00 hours. The maximum duration (30 minutes) and frequency (one per day) of those telephone calls remain unchanged. Telephone calls made on non-hearing days shall be authorised during working hours only. In addition, the Panel recalls that the Segregation Decision does not prohibit the 10 authorised visits per month to take place during weekends.<sup>36</sup> Accordingly, the allocated number of visits may also take place during weekend days, in order to accommodate Mr Mustafa's needs and those of his family. For the same reasons applicable to telephone calls, visits during hearing days shall be authorised until 20:00 hours.

24. Lastly, regarding the request to provide Mr Mustafa with more sport or other activities, the Panel notes that the Registry is already committed<sup>37</sup> to identifying creative ways of engaging additional person(s) in the activities offered to Mr Mustafa,

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<sup>34</sup> See Segregation Decision, paras 20-29.

<sup>35</sup> Segregation Decision, para. 37.

<sup>36</sup> Segregation Decision, para. 34.

<sup>37</sup> Registry Submissions, para. 14.

in line with the Segregation Decision,<sup>38</sup> and the Rules of Detention.<sup>39</sup> Accordingly, no action on the part of the Panel is required on this matter.

#### V. [REDACTED]

25. With regard to the observations made by the Defence that [REDACTED],<sup>40</sup> the Panel recalls that a monitoring system of [REDACTED] is in place pursuant to the Rules of Detention and the Segregation Decision.<sup>41</sup>

#### VI. DISPOSITION

26. For the above-mentioned reasons, the Panel hereby **PARTLY GRANTS** the Request, to the extent specified in paragraph 23 of the present decision.

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<sup>38</sup> Segregation Decision, para. 28


<sup>39</sup> Rule 42(1) of the Rules of Detention.

<sup>40</sup> Request, para. 18.

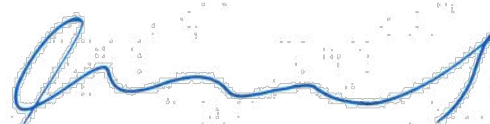
<sup>41</sup> *See supra* para. 20.



**Judge Mappie Veldt-Foglia**  
**Presiding Judge**



**Judge Gilbert Bitti**



**Judge Roland Dekkers**

Dated this Friday, 10 September 2021  
At The Hague, the Netherlands.