



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: 18 February 2022

Language: English

Classification: Public

**Public redacted version of
Second decision on the review of the segregation regime
and other measures imposed on Salih Mustafa**

To be notified to:

Specialist Prosecutor

Jack Smith

Counsel for the Accused

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Registry

Registrar

Chief Detention Officer

Victims' Counsel

Anni Pues

TRIAL PANEL I (Panel), hereby renders this second decision on the review of the segregation regime and other measures imposed on Salih Mustafa (Accused).

I. PROCEDURAL BACKGROUND

1. On 2 August 2021, the Panel issued, upon request of the Specialist Prosecutor's Office (SPO),¹ the "Decision on Specialist Prosecutor's request for segregation and other measures" (Segregation Decision) in which it set out the principles governing the segregation and other measures applicable to the detention of the Accused.²

2. On 10 September 2021, upon request of the Defence,³ the Panel issued the "Decision on the Defence request for termination of imposed segregation and modification of other measures on Salih Mustafa" (Decision on Modification of Measures), in which it modified the measures imposed on the Accused's communication with the outside world in order to adjust to the trial hearings schedule.⁴

3. On 19 November 2021, pursuant to the framework set in the Segregation Decision,⁵ the Panel issued the "Decision on the review of the segregation regime and other measures imposed on Salih Mustafa" (Review Decision of the Segregation Regime), in which it extended the Accused's segregation and other measures imposed on him,

¹ 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.

² 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.

³ 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.

⁴ KSC-BC-2020-05, F00196, Trial Panel I, *Decision on the Defence request for termination of imposed segregation and modification of other measures on Salih Mustafa*, 10 September 2021, confidential.

⁵ Segregation Decision, para. 30.

but increased to a certain extent the number of telephone calls and video visits allocated to the Accused.⁶

4. On 17 December 2021, 20 January 2022 and 18 February 2022 respectively, pursuant to the Segregation Decision,⁷ the Registrar filed the “Fourth Monthly Registry Report on Segregation of the Accused” (Fourth Report on Segregation),⁸ the “Fifth Monthly Registry Report on Segregation of the Accused” (Fifth Report on Segregation)⁹ and the “Sixth Monthly Registry Report on Segregation of the Accused” (Sixth Report on Segregation).¹⁰

5. On 4 February 2022, the SPO filed the “Prosecution Notice of the Closing of its Case pursuant to Rule 129”.¹¹

6. On 7 February 2022, in compliance with the timeframe set by the Panel for the review of the Accused’s segregation and other measures imposed on him,¹² the SPO filed the “Prosecution submissions for the review of segregation and related measures” (SPO Submissions).¹³

7. On 15 February 2022 at 17:09, four days after the deadline set in the Review Decision of the Segregation Regime,¹⁴ the Defence filed the “Defence submission for

⁶ KSC-BC-2020-05, F00262, Trial Panel I, *Decision on the review of the segregation regime and other measures imposed on Salih Mustafa*, 19 November 2021, confidential.

⁷ Segregation Decision, para. 43(d).

⁸ KSC-BC-2020-05, F00284, Registrar, *Fourth Monthly Registry Report on Segregation of the Accused*, 17 December 2021, confidential, with Annex 1, confidential and *ex parte*.

⁹ KSC-BC-2020-05, F00293, Registrar, *Fifth Monthly Registry Report on Segregation of the Accused*, 20 January 2022, confidential, with Annex 1, confidential and *ex parte*.

¹⁰ KSC-BC-2020-05, F00322, Registrar, *Sixth Monthly Registry Report on Segregation of the Accused*, 18 February 2022, confidential, with Annexes 1 and 2, confidential and *ex parte*.

¹¹ KSC-BC-2020-05, F00308, Specialist Prosecutor, *Prosecution Notice of the Closing of its Case pursuant to Rule 129* (SPO Rule 129 Notice), 4 February 2022, public.

¹² Review Decision of the Segregation Regime, para. 22(d).

¹³ KSC-BC-2020-05, F00313, Specialist Prosecutor, *Prosecution submissions for the review of segregation and related measures*, 7 February 2022, confidential.

¹⁴ Review Decision of the Segregation Regime, para. 22(d).

the review of the segregation and related measures of the Accused” (Defence Submissions).¹⁵

II. SUBMISSIONS

8. The SPO submits that the segregation of the Accused remains lawful and necessary since the risk of unlawful disclosure, by the Accused, [REDACTED], persists.¹⁶ Specifically, the SPO submits that, although all SPO witnesses have now testified [REDACTED].¹⁷

9. The SPO further submits that the following factors contribute to the risk of unlawful disclosure: (i) [REDACTED]; (ii) [REDACTED]; (iii) [REDACTED];¹⁸ and (iv) [REDACTED].¹⁹ Moreover, the SPO submits that the current restrictions provide the Accused with meaningful human contact on a daily basis, daily visits by a Detention Officer and visits by a Medical Officer as well as sufficient flexibility in his communication with authorised family members, in full compliance with human rights standards.²⁰

10. Therefore, the SPO requests the Panel to maintain the segregation and other measures imposed on the Accused.²¹

11. The Registrar submits that [REDACTED].²²

¹⁵ KSC-BC-2020-05, F00321, Defence, *Defence submission for the review of the segregation and related measures of the Accused*, 15 February 2022, confidential.

¹⁶ SPO Submissions, paras 2 -4.

¹⁷ SPO Submissions, para. 4.

¹⁸ SPO Submissions, para. 5.

¹⁹ SPO Submissions, para. 6.

²⁰ SPO Submissions, para. 8.

²¹ SPO Submissions, para. 9.

²² Fourth Report on Segregation, para. 25; Fifth Report on Segregation, para. 25; Sixth Report on Segregation, para. 22; Annex 1 to the Sixth Report on Segregation, para. 4.

12. The Defence submits that, since the SPO case has been closed and all the identities of the protected witnesses have been disclosed, the segregation of the Accused should be terminated promptly.²³ The Defence further avers that there is no risk of harming the proceedings in this case as the SPO has finished the presentation of its evidence.²⁴ With regard to the integrity of [REDACTED], the Defence argues that nothing could be disclosed that could harm such proceedings.²⁵ In addition, the Defence submits that it would be disproportionate to maintain the segregation regime for the purpose of safeguarding other proceedings which do not relate to the Accused, and whose length is not possible to predict.²⁶ Lastly, the Defence asserts that the segregation [REDACTED],²⁷ and thus requests the Panel to terminate it promptly.²⁸ Regarding the timeliness of the filing, the Defence states that the submissions were filed late due to an ongoing mission and the priority given to other filings.²⁹

III. APPLICABLE LAW

13. The Panel notes Articles 3 and 8 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 22(2) of the Constitution of the Republic of Kosovo, Articles 3(2), 23(1), 40(2) and (6), and 41(6)(b)(ii) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Law), and Rules 9(5)(b), 56(6), 76 and 116(4)(d) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules).

²³ Defence Submissions, paras 5, 7, 14.

²⁴ Defence Submissions, para. 7.

²⁵ Defence Submissions, para 10.

²⁶ Defence Submissions, paras 7–9, 11.

²⁷ Defence Submissions, para. 13.

²⁸ Defence Submissions, para 14.

²⁹ Defence Submissions, para. 1.

IV. ANALYSIS

A. TIMELINESS OF THE DEFENCE SUBMISSIONS

14. As regards the timeliness of the Defence Submissions, the Panel notes that the filing has been submitted after the time limit indicated by the Panel in the Review Decision of the Segregation Regime.³⁰ The Panel wishes to remind Defence Counsel that, pursuant to Rule 76 of the Rules, applications for extension of time shall be filed sufficiently in advance. Moreover, pursuant to Article 10(b) of the Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers,³¹ Defence Counsel shall act in a timely and efficient manner, including responding without undue delay to any decision or order of a Panel. The Panel expects Defence Counsel to abide by such duties, especially when it is possible to anticipate competing deadlines, such as under the current circumstances, when the timeline for the review of the segregation framework was set by the Panel three months in advance. As a good practice, the Defence has to duly inform the Panel of its intention to submit a late filing outside of the scope of Rule 76 of the Rules, when extraordinary circumstances arise. Notwithstanding the above, and having considered the shortened deadline set by the Panel in the “Third decision on the conduct of the proceedings”,³² the Panel is satisfied that the Defence has shown good cause for its late submission, in accordance with Rule 9(5)(b) of the Rules.

B. REVIEW OF THE SEGREGATION REGIME AND RELATED MEASURES

15. At the outset, the Panel notes that it shall proceed to undertake the review of the segregation regime imposed on the Accused, pursuant to the deadlines set in the

³⁰ Review Decision of the Segregation Regime, para. 22(d).

³¹ Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers, KSC-BD-07, 1 March 2019.

³² KSC-BC-2020-05, F00318, Trial Panel I, *Third decision on the conduct of the proceedings* (Third Decision on the Conduct of the Proceedings), 9 February 2022, public, paras 12, 16(b).

Segregation Decision,³³ notwithstanding the submission by the Defence of a motion under Rule 130 of the Rules,³⁴ and without prejudice to the subsequent determination on such motion.³⁵

16. The Panel has taken the following factors into account when deciding whether to maintain the segregation and related measures imposed on the Accused.

17. Firstly, the Panel considers that, pursuant to the combined reading of Article 23(1), Article 40(2) of the Law and Rule 56(6) of the Rules, the Panel shall provide for the protection of victims and witnesses and/or their families, including their safety, physical and psychological well-being, dignity and privacy throughout the duration of the proceedings.³⁶ As a consequence, the Panel's duty to ensure the protection of witnesses and/or their families does not end at this juncture of the proceedings. Such obligation continues even after the trial has been concluded before the Panel.³⁷

18. In this regard, the Panel pays particular heed to the fact that several witnesses have testified about instances in which they or their families have been subjected to threats and intimidation, and expressed their fears to testify in these proceedings.³⁸

³³ Segregation Decision, para. 30.

³⁴ KSC-BC-2020-05, F00320, Defence, *Defence Rule 130 (1) Motion to dismiss any or all charges of the Indictment*, 15 February 2022, confidential.

³⁵ Third Decision on the Conduct of the Proceedings, para. 12.

³⁶ The Panel also notes that Article 23(1) of the Law refers expressly to Articles 221-226 of the Criminal Procedure of Kosovo (Law No. 04/L-123) and Articles 5-13 of the Law on Witness Protection (Law No. 04/L-015) which provide for protective measures at all stages of the proceedings (see in particular Article 221(1)). Likewise, Article 23(3) of the Law refers to protective measures "before, during and after testimony" before the SC.

³⁷ See Rule 81(1) of the Rules. See also KSC-BC-2020-05, F00310, *Decision on the application of Article 22(9) of the Law, setting further procedural steps in the case, and requesting information*, 4 February 2022, confidential, para. 38. A public redacted version was filed on the same day, F00310/RED.

³⁸ KSC-BC-2020-05, F00295, Trial Panel I, *Eighth decision on review of detention* (Eighth Detention Review), 21 January 2022, confidential, paras 20-22. A public redacted version was filed on the same day, F00295/RED.

Both the fear expressed by those witnesses and the possibilities of threats and intimidations did not cease with their testimony before the Panel.³⁹

19. Furthermore, the Panel recalls that in its recent Eighth Detention Review it has found, pursuant to Article 41(6)(b)(ii) of the Law, that there is a risk that the Accused may obstruct the progress of SC proceedings by interfering with victims and witnesses, and/or their families, and that his continued detention is thus necessary.⁴⁰

20. Moreover, the Panel notes that [REDACTED], has been found to present a similar risk of obstruction [REDACTED] of SC proceedings thus rendering their respective detention necessary.⁴¹ Under these circumstances, the Panel considers that, should the Accused and [REDACTED], there exists a risk that the Accused will disclose [REDACTED]. In this context, the Panel recalls that [REDACTED].⁴² Therefore, the free communication between the Accused and [REDACTED],⁴³ may facilitate the possibility for the latter to potentially interfere with the protected witnesses in Case 05. Contrary to the Defence's assertion, such risk has further increased at the current stage of the proceedings, when the presentation of the SPO evidence has terminated, and the identities of all the protected witnesses in the present case have been disclosed to the Accused.⁴⁴ The Panel further stresses that the need to prevent the unlawful disclosure of the identities of the protected witnesses in Case 05 is directed at protecting them, rather than preserving the integrity of [REDACTED], as the Defence seems to suggest.

³⁹ Eighth Detention Review, para. 21.

⁴⁰ Eighth Detention Review, paras 20-24, 27.

⁴¹ Segregation Decision, para. 21. *See also* [REDACTED].

⁴² Segregation Decision, para. 22; Review Decision of the Segregation Regime, para. 15.

⁴³ Segregation Decision, para. 23.

⁴⁴ Eighth Detention Review, para. 20. *See also* [REDACTED].

21. The Panel lastly notes the Registrar's submission that there have been no formal complaints submitted by the Accused during the reporting period on his segregation and related measures⁴⁵ and [REDACTED].

22. In light of the above, the Panel considers it of paramount importance to ensure the protection of the witnesses in Case 05 also in the upcoming phase of the proceedings by preventing the possible unlawful disclosure by the Accused of the identities of the SPO protected witnesses. Accordingly, the segregation of the Accused [REDACTED] remains necessary.

23. With regard to the restrictions on the Accused's communications and visits, the Panel finds that they continue to remain necessary, as the measure of segregation would become meaningless without a simultaneous set of proportionate restrictions to the Accused's contacts with the outside world.⁴⁶ Furthermore, the Panel considers that, in light of the Registry's Fourth, Fifth and Sixth Reports on Segregation, all measures and conditions, as established in the Review Decision of the Segregation Regime,⁴⁷ shall remain unchanged.

⁴⁵ Fourth Report on Segregation, para. 24; Fifth Report on Segregation, para. 24; Sixth Report on Segregation, para. 21. The Panel notes that a technical issue has occurred on 7 February 2022. The Panel is satisfied that such issue appears to have been resolved, as detailed in Annex 1, para. 11 and Annex 2 to the Sixth Report on Segregation.

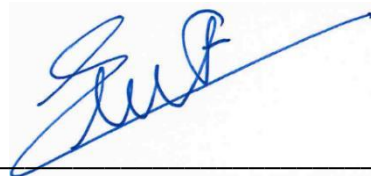
⁴⁶ Segregation Decision, para. 32.

⁴⁷ Review Decision of the Segregation Regime, para. 22 (a)-(b).

V. DISPOSITION

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

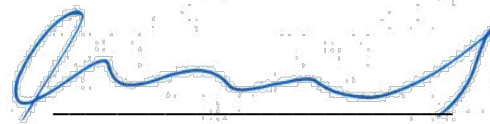
- a. **DECIDES** to extend the Accused's segregation and other measures imposed on him, as established in the Review Decision of the Segregation Regime;
- b. **ORDERS** the SPO to make submissions on whether Mr Mustafa's segregation and other measures shall be extended further, by **Friday, 6 May 2022**, at 16:00 hours, and the Defence to respond, if it so wishes, by **Thursday, 12 May 2022**, at 16:00 hours; and
- c. **ORDERS** the Registrar to submit, by **Friday, 13 May 2022**, at 16:00 hours, or at any time earlier if deemed necessary, the consolidated report in accordance with paragraph 43(d) of the Segregation Decision for the reporting period starting on 18 April 2022,.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Friday, 18 February 2022
At The Hague, the Netherlands.