



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: 25 April 2022

Language: English

Classification: Public

**Public redacted version of
Third decision on the review of the segregation regime
imposed on Salih Mustafa**

To be notified to:

Specialist Prosecutor

Jack Smith

Registry

Registrar

Chief Detention Officer

Head of Witness Protection and Support

Office

TRIAL PANEL I (Panel), hereby renders this third decision on the review of the segregation regime imposed on Salih Mustafa (Mr Mustafa or 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 restrictions to communications applicable to the detention of the Accused.²
2. On 10 September 2021, 19 November 2021 and 18 February 2022, the Panel reviewed the segregation of Mr Mustafa and/or, as the case may be, modified the measures imposed on the Accused's communications with the outside world.³
3. On 13 April 2022, pursuant to the timeframe set out in the Segregation Decision,⁴ the Registrar filed the "Eighth Monthly Registry Report on Segregation of the Accused" (Eighth Registry Report).⁵
4. On 19 April 2022, upon request of the Panel,⁶ the Registry [REDACTED].⁷

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, 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; F00262, Trial Panel I, *Decision on the review of the segregation regime and other measures imposed on Salih Mustafa*, 19 November 2021, confidential; F00323, Trial Panel I, *Second decision on the review of the segregation regime and other measures imposed on Salih Mustafa*, 18 February 2022, confidential.

⁴ Segregation Decision, para. 30.

⁵ KSC-BC-2020-05, F00384, Registrar, *Eighth Monthly Registry Report on Segregation of the Accused*, 13 April 2022, confidential, with Annexes 1-2, confidential and *ex parte*.

⁶ [REDACTED].

⁷ [REDACTED].

5. On the same day, upon request of the Panel,⁸ the SPO and the Defence filed their submissions on the Eighth Registry Report.⁹

6. On 20 April 2022, the Victims' Counsel filed her submissions on the Eighth Registry Report.¹⁰

7. [REDACTED].¹¹

II. SUBMISSIONS

A. SPO

8. The SPO contends that the continued segregation of the Accused is warranted for the purpose of protecting victims and witnesses and/or their family members and that no circumstances known to the SPO have intervened since the previous Panel's decisions, which are capable of changing this assessment.¹² The SPO submits, however, that it does not oppose changes to the segregation regime that may be necessary on [REDACTED], and defers to the Panel and the Registry for the appropriate measures in light of the specific circumstances.¹³ [REDACTED].¹⁴

⁸ KSC-BC-2020-05, CRSPD80, Trial Panel, *Email from Trial Panel I to CMU re request for submissions on segregation from SPO and defence*, 14 April 2022, confidential.

⁹ KSC-BC-2020-05, F00389, Specialist Prosecutor, *Prosecution submissions on the Eighth Monthly Registry Report on Segregation of the Accused (SPO Submissions)*, 19 April 2022, confidential; F00390, Defence, *Defence submission for the possibility to lift the segregation* [REDACTED], 19 April 2022, confidential.

¹⁰ KSC-BC-2020-05, F00391, Victims' Counsel, *Victims' Counsel Submission on the Defence Request to lift Segregation Measures*, 20 April 2022, confidential.

¹¹ [REDACTED].

¹² SPO Submissions, para. 4. *See also* [REDACTED]. [REDACTED].

¹³ SPO Submissions, paras 2, 6-7.

¹⁴ [REDACTED].

B. DEFENCE

9. The Defence submits that over the course of the last eight months of segregation, it has become [REDACTED] as a result of his segregation and [REDACTED].¹⁵ The Defence further submits that in a recent family visit, which took place between 14 and 16 April 2022, Mr Mustafa's family members stated that they [REDACTED].¹⁶ The Defence also submits that contact with [REDACTED] will most probably not increase, improve or simply change his behaviour.¹⁷ Accordingly, the Defence requests that the segregation be terminated and that the Accused undergo a comprehensive medical check-up in hospital, with specific emphasis on [REDACTED].¹⁸

C. VICTIMS' COUNSEL

10. Victims' Counsel submits that the participating victims expressed their ongoing concern for their safety, as for them the situation has not changed, [REDACTED].¹⁹ While Victims' Counsel supports a further variation of the current regime to mitigate the purported negative impact on the Accused, she opposes termination of the segregation.²⁰ Victims' Counsel further support the Defence's request to conduct a medical examination of the Accused to ensure that any medical issues do not go undetected and can be addressed as necessary.²¹

D. THE EIGHTH REGISTRY REPORT AND [REDACTED]

¹⁵ Defence Submissions, paras 3, 6.

¹⁶ Defence Submissions, para. 4.

¹⁷ Defence Submissions, para. 9.

¹⁸ Defence Submissions, paras 8, 12-13.

¹⁹ Victims' Counsel's Submissions, para. 2.

²⁰ Victims' Counsel's Submissions, para. 6.

²¹ Victims' Counsel's Submissions, para. 7.

11. [REDACTED],²² [REDACTED]²³ and [REDACTED].²⁴

III. APPLICABLE LAW

12. The Panel notes Articles 3 and 8 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Article 22(2) of the Constitution of the Republic of Kosovo, Articles 3(2), 21(2), (4), 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. ANALYSIS

13. At the outset, the Panel stresses that limited information originating from *ex parte* filings is revealed only to the extent strictly necessary to reason the decision and to inform the Parties and Victims' Counsel of such reasoning, without disclosing [REDACTED].

14. The Panel recalls that the measure of segregation was imposed on the Accused on account of the "serious risk that Mr Mustafa [REDACTED]".²⁵ The Panel finds that such risk remains unchanged to date, in the absence of compelling circumstances indicating the opposite. However, the Panel also considers that the measure of segregation rests upon a careful balance between two interests: the need for the Accused to be able to meaningfully exercise his fundamental rights, on the one hand,

²² Annex 2 to the Eighth Registry Report, para. 5.

²³ Annex 2 to the Eighth Registry Report, para. 1.

²⁴ [REDACTED].

²⁵ Segregation Decision, para. 23. Such risk was confirmed in subsequent decisions: KSC-BC-2020-05, F00262, Trial Panel I, *Decision on the review of the segregation regime and other measures imposed on Salih Mustafa* (First Review of Segregation), 19 November 2021, confidential, para. 15; F00323, Trial Panel I, *Second Decision on the review of the segregation regime and other measures imposed on Salih Mustafa* (Second Review of Segregation), 18 February 2022, confidential, para. 22. *See also* [REDACTED].

and the protection of witnesses and victims, on the other hand. These interests have their legal foundation in Articles 21 and 23 of the Law, respectively. Accordingly, when the balance between these two instances is compromised to a such a degree that it may potentially prejudice either of them irreparably, the Panel shall intervene.

15. In this respect, the Panel, having reverted on several occasions to the Registry and the Parties for further information,²⁶ takes note of the latest [REDACTED],²⁷ [REDACTED],²⁸ [REDACTED].²⁹ The Panel also recalls that in previous instances it had rejected the Defence requests to discontinue the Accused's segregation in the absence of concrete and tangible [REDACTED].³⁰

16. In the specific circumstances of this case, and according to the information available to the Panel, [REDACTED] the meaningful enjoyment of his fundamental rights under Article 21(4)(c) and (f) of the Law, particularly his right to properly follow the proceedings, read court-related material, and ultimately instruct the Defence Counsel. This, in turn, may prejudice the overall fairness of the proceedings.

17. On the other hand, the Panel recalls that (i) the Defence presentation of evidence is soon to be concluded; (ii) a robust system of witness protection is still in place, comprising the protective measures adopted by the Pre-Trial Judge *vis-à-vis* the public;³¹ (iii) a monitoring and rapid response system run by the WPSO and the SPO

²⁶ KSC-BC-2020-05, F00351, Registrar, *Seventh Monthly Registry Report on Segregation of the Accused*, 18 March 2022, confidential, with Annexes 1-2, confidential and *ex parte*; F00354, Specialist Prosecutor, *Prosecution submissions on the Seventh Monthly Registry Report on Segregation of the Accused*, 21 March 2022, confidential; F00360, Registrar, *Transmission of Clarifications pursuant to Trial Panel I's Request (CRSPD69)*, 23 March 2022, confidential and *ex parte*, with Annex 1, confidential and *ex parte*; F00366, Specialist Prosecutor, *Prosecution submissions on segregation pursuant to Oral Order*, 28 March 2022, confidential; F00367, Registrar, *Submissions of the Registry Pursuant to the Oral Order Regarding the Segregation of the Accused*, 28 March 2022, confidential.

²⁷ Annex 2 to the Eighth Registry Report, para. 5.

²⁸ Annex 2 to the Eighth Registry Report, para. 1.

²⁹ [REDACTED].

³⁰ First Review of Segregation, para. 16; Second Review of Segregation, para. 21.

³¹ KSC-BC-2020-05, F00041/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of First Decision on Specialist Prosecutor's Request for Protective Measures*, 20 October 2020, confidential; F00053/CONF/RED,

in case protection issues arise with witnesses or their family members is in place and will remain available for a “long period of time after the case is completed”;³² and (iv) any act of intimidation against and interference with witnesses and victims may constitute an offence under Article 15(2) of the Law, and may be investigated by the SPO accordingly.

18. In addition, the Panel specifies that the present decision does not concern or modify the restrictions imposed on the Accused to his communications outside of the SC Detention Facilities,³³ which therefore remain in place until otherwise decided by the Panel, and provide a further safeguard for the protection of witnesses and their families. In view of the above as well as the advanced stage of the proceedings, the Panel considers that satisfactory measures remain in place to protect adequately witnesses and victims.

19. In light of the foregoing, and absent any viable alternative conditions of detention,³⁴ the Panel considers it necessary to discontinue, on [REDACTED], the segregation of the Accused with immediate effect, subject to the necessary logistical and organisational arrangements to be made by the Registrar to implement the present decision.

Pre-Trial Judge, *Confidential Redacted Version of Second Decision on Specialist Prosecutor's Request for Protective Measures*, 24 November 2020, confidential; F00090/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Third Decision on Specialist Prosecutor's Request for Protective Measures*, 1 March 2021, confidential.

³² KSC-BC-2020-05, F00131, Registrar, *Registry Submissions for Trial Preparatrimon Conferences*, 2 June 2021, public, paras 29-31; F00367, Registrar, *Submissions of the Registry Pursuant to the Oral Order Regarding the Segregation of the Accused*, 28 March 2022, confidential, paras 18-21; [REDACTED].

³³ Segregation Decision, paras 31-41; KSC-BC-2020-05, F00196, Trial Panel, *Decision on the Defence request for termination of imposed segregation and modification of other measures on Salih Mustafa*, confidential, 10 September 2021; F00262, Trial Panel, *Decision on the review of the segregation regime and other measures imposed on Salih Mustafa*, 19 November 2021, confidential.

³⁴ The Panel takes note that discussions with another institution as to the possibility for Mr Mustafa to spend time with the detainees from such institution are still ongoing. *See also* [REDACTED].

20. With a view to further ensuring that no unlawful divulgence of confidential information takes place, including the identities of protected witnesses in this case, the Panel considers it necessary to order Mr Mustafa to refrain from discussing with his family members, with other detainees in SC custody, or anyone else (except his Defence team), any confidential matter related to the present case, including confidential information relating to witnesses and victims. Should Mr Mustafa violate such order, this may constitute a criminal offence under the SC jurisdiction by virtue of Article 15(2) of the Law³⁵ and the Panel may reinstate the segregation regime with immediate effect. The Defence Counsel is invited to advise Mr Mustafa on this order and the potential consequences in case of breach.

21. Lastly, the Panel stresses that the discontinuation of Mr Mustafa's segregation is solely based on information about [REDACTED] as it stands at the time of issuing the present decision, without prejudice to the Panel's power to reinstate the segregation, *proprio motu* or upon request, should the existing risk of unlawful divulgence of confidential information so warrant, and in light of the future [REDACTED]. In this regard, the Registrar shall continue monitoring [REDACTED] and shall take all the necessary measures accordingly.

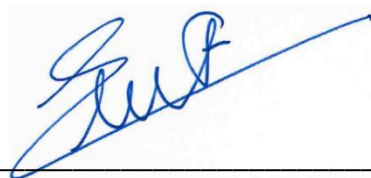
22. As to the Defence request that Mr Mustafa undergo a comprehensive medical check-up in hospital, the Panel invites the Defence to approach the Registrar on this issue, who is responsible for monitoring [REDACTED].

³⁵ See also Segregation Decision, para. 42.

V. DISPOSITION

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

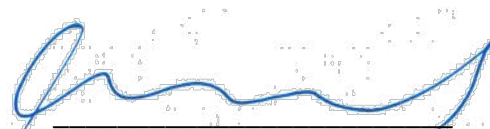
- a. **DECIDES** to discontinue Mr Mustafa's segregation with immediate effect, subject to the necessary logistical and organisational arrangements to be made by the Registrar to implement the present decision;
- b. **DECIDES** that the other restrictions to the Accused's communications outside of the SC Detention Facilities shall remain unchanged and therefore subject to the same conditions and reporting period by the Registrar, as set out in the Segregation Decision and any subsequent amendments thereto;
- c. **ORDERS** Mr Mustafa to refrain from discussing with his family members, with other SC detainees, or anyone else (except his Defence team), any confidential matter related to the present case, including confidential information relating to witnesses and victims;
- d. **WARNS** Mr Mustafa that any violation of the above order may constitute a criminal offence under the SC jurisdiction by virtue of Article 15(2) of the Law;
- e. **ORDERS** the SPO to make submissions on whether Mr Mustafa's remaining restrictions to communications shall be extended further, by **Friday, 1 July 2022**, at 16:00 hours, and the Defence to respond, if it so wishes, by **Friday, 8 July 2022**, at 16:00 hours; and
- f. **ORDERS** the Registrar to continue monitoring [REDACTED] and take any necessary measures accordingly.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Monday, 25 April 2022
At The Hague, the Netherlands.