

In: KSC-SC-2024-02
Specialist Prosecutor v. Salih Mustafa

Before: The President of the Specialist Chambers
Judge Ekaterina Trendafilova

Registrar: Dr. Fidelma Donlon

Filing Participant: Defence Counsel for Salih Mustafa

Date: 15 January 2024

Language: English

Classification: Public

Mustafa Urgent Motion

for an Extension of Time to File a Request for Protection of Legality

Specialist Prosecutor's Office

Kimberly P. West

Counsel for Salih Mustafa

Venkateswari Alagenda

I. INTRODUCTION

1. The Defence for Salih Mustafa (“Defence”) hereby respectfully requests, as a matter of urgency, an extension of the time limit to file any request for protection of legality under Article 48(6) of the Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”).

2. As explained more fully below, it is submitted that the recent appointment of a new Specialist Counsel and the ongoing appointment of an entirely new defence team, mean that good cause exists for the requested extension, as required by Rule 9(5)(a) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).

II. BACKGROUND

3. On 24 September 2020, Mr. Mustafa was arrested and transferred to the Detention Facilities of the Kosovo Specialist Chambers (the “KSC”), in The Hague. On the same day, Mr. Arpad Bela Gyula (Julius) von Bóné was assigned as Duty Counsel to the Accused.¹

4. On 12 May 2021, Mr. von Bóné requested that his status as “conditionally assigned” Counsel be changed retroactively to “appointed” Counsel, as of the date of his original assignment, which was confirmed in a decision of 23 July 2021.²

¹ KSC-BC-2020-05, F00014, Pre-Trial Panel, *Pre-Trial Panel Notification of Reception in the Detention Facilities of the Specialist Chambers*, 24 September 2020, public.

² KSC/REG/IOR/4328, *Decision of the Registrar*, 23 July 2021.

5. On 15 September 2021, Mr. Mustafa's trial commenced.³ On 16 December 2022, Trial Panel I delivered its judgement ("Trial Judgment").⁴ Of note, is that this judgment was not available in Albanian, the language which Mr. Mustafa fully understands and speaks, until 19 June 2023, some 6 months after issuance of the original.

6. On 3 January 2023, the Defence for Mr. Mustafa, filed an urgent motion to extend the time limit to file its notice of appeal.⁵ On 9 January 2023, the Panel of the Court of Appeals Chambers, granted the Defence motion in part and authorized the Defence and the SPO to file their notices of appeal, if any, by 3 February 2023.⁶

7. On 14 December 2023, the Panel of the Appeals Chamber delivered its judgment ("Appeal Judgement").⁷

8. On 21 December 2023, Mr. Mustafa informed the Detention Management Unit ("DMU") by letter that he was withdrawing his Power of Attorney for Mr. von Bóné and wished to appoint new Specialist Counsel.⁸

9. On 22 December 2023, Mr. Mustafa informed the DMU by letter that he wished to appoint Ms. Venkateswari Alagenda to represent him. On the same day, the Defence Office informed Mr. von Bóné that, due to the fact that the proceedings in the

³ KSC-BC-2020-05, F00138, Trial Panel I, *Decision Setting the Date for the Commencement of the Trial and Related Matters*, 18 June 2021, public.

⁴ KSC-BC-2020-05, F00491, Trial Panel I, *Scheduling Order for the Pronouncement of the Judgment*, 6 December 2022, public.

⁵ KSC-CA-2023-02, F00001, Mustafa Defence, *Defence Urgent Motion to Extend Time Limit to File Notice of Appeal*, 3 January 2023, public.

⁶ KSC-CA-2023-02, F00004, Panel of the Court of Appeals Chamber, *Decision on Defence Motion for Variation of Time Limit to File Notice of Appeal* ("Decision on Variation of Time Limit"), 9 January 2023, public.

⁷ KSC-CA-2023-02, F00038, Panel of the Court of Appeals Chamber, *Public Redacted Version of Appeal Judgment*, 14 December 2023, public.

⁸ KSC/REG/IOR/6649, Decision of the Registrar, 3 January 2024.

present case were at an end, the Registry was terminating his appointment and that of his team members with effect from 28 January 2024.⁹

10. On 26 December 2023, Ms. Alagendra emailed the Defence Office to advise that she had been approached to represent Mr. Mustafa.

11. On 29 December 2023, the Defence Office received a signed and dated Power of Attorney and Assignment/Appointment request from Mr. Mustafa confirming that he wished to appoint Ms. Alagendra as his Specialist Counsel.

12. On 2 January 2024, the Defence Office received from Ms. Alagendra both the consent of her current client in the case KSC-BC-2020-06, Mr. Krasniqi, dated 30 December 2023 as well as that of Mr. Mustafa, dated 29 December 2023.

13. On 3 January 2024, the Registrar granted Mr. Mustafa's request for the appointment of new Counsel, terminated the appointment of Counsel Mr. von Bóné and appointed Ms. Alagendra as Mr. Mustafa's Counsel.¹⁰

14. On 3 January 2024, at 16:07, Ms. Alagendra was notified of the decision of the Registrar and her appointment as Mr. Mustafa's Counsel.

III. SUBMISSIONS

15. Article 48 (6) of the Law and Rule 193(3) of the Rules provide that any request for protection of legality must be filed with the President within ninety (90) days of the final decision or judgment against which protection of legality is sought.

⁹ KSC/REG/IOR/6649, Decision of the Registrar, 3 January 2024.

¹⁰ *Ibid.*

16. As noted above, the Appeal Judgment was issued on 14 December 2023. Therefore, the current deadline for Mr. Mustafa to file any request for protection of legality is 14 March 2024.

17. The Defence submits that, for the following reasons, there is good cause for granting an extension to this deadline of: (i) 180 days; or, in the alternative, (ii) 90 days following the issuance of the Albanian translation of the Appeal Judgment.

18. *First*, since the Appeal Judgement was pronounced on 14 December 2023 (which was one working day prior to the commencement of the Court winter recess),¹¹ there has been a material change in Mr. Mustafa's legal representation before the KSC, specifically the appointment of new Specialist Counsel. As stated above, Ms. Alagendra was formally appointed on 3 January 2024, some 19 days after the issuance of the Appeal Judgment.

19. *Second*, following Ms. Alagendra's appointment, the process of appointing an entirely new defence team began. This process is on-going and, as at the time of filing, is not yet complete. At present, it is not anticipated that any member of the new defence team will have been involved in either the trial or appeal stages of Mr. Mustafa's case and, thus, have any knowledge of the case which was brought against Mr. Mustafa.

20. Given the foregoing, it is apparent that, as of the date of this filing, nearly a third of the period in which Mr. Mustafa has to file any request for protection of legality will have been taken up with the appointment of a new Specialist Counsel and defence team members. Further, as already explained, this process is not yet complete.

¹¹ KSCPR-2023, F00002, The President of the Specialist Chambers, *Judicial Recess Periods for 2024*, 25 September 2023, public.

21. *Third*, the process of providing the new defence team with full access to the former defence team's confidential case file and all the KSC materials in Case KSC-BC-2020-05 and KSC-CA-2023-02 is also ongoing and not yet complete. Of particular relevance, given the stage of the present proceedings, is that confidential English versions of the Trial and Appeal Judgments were only made available to new Specialist Counsel on 9 January 2024, at 16:12 hours. Clearly, while both Judgments are important, they only form a limited part of the case materials. Further, as of the date of filing, only lead Specialist Counsel has been given access to LWF and the KSC case materials in both cases. It is not yet known when all the members of the new team will be given access to all the case materials, including the defence case file.

22. In order to properly advise Mr. Mustafa on what, if any, further legal remedies are available to him, the new defence team will require, in accordance with Article 21 (4)(C) of the Law, adequate time and facilities to thoroughly review and analyse the case materials, including the defence case file, the Trial Judgment and the Appeal Judgment.

23. The new defence team will also require adequate time to consult with Mr. Mustafa and to take his instructions. However, Mr. Mustafa has not yet received the Appeal Judgment in a language he understands, namely Albanian. This difficulty gives rise to the *fourth* reason why good cause exists for an extension of time. Given that the Albanian version of the Trial Judgment was only made available some six (6) months after the English version, it is reasonably anticipated that the translation of the Appeal Judgment will take no longer than six (6) months.¹² Therefore, if the first requested extension period of an additional 180 days is granted, much of that period will require Mr. Mustafa to be providing instructions based on the English version of

¹² The Trial Judgment is 335 pages long and the Appeal Judgment is slightly shorter at 235 pages long.

the Appeal Judgment. Obviously, the Defence will be labouring under this language difficulty for a lesser period if the alternative request of 90 days from issuance of the Appeal Judgment in Albanian is granted.

24. *Fifth*, granting the Defence an extension of time will assist in the efficient conduct of proceedings going forward since it will reduce the likelihood of the new defence team having to make a further request for an extension.

25. *Sixth*, given that there are currently no live proceedings in the present case, the requested extension of time will not extend their length, nor will it negatively impact on the work of either the SPO or the participating victims. In fact, at this stage, it is respectfully submitted that the interests of the SPO and participating victims are not directly engaged. Rather, at this stage, fundamental to the fairness of the present proceedings is for the new defence team to be given sufficient time to properly consider all the case materials and to consult with Mr. Mustafa in a meaningful manner in order to file any request for protection of legality.¹³

26. In considering the present request, the Defence recalls that the Appeals Panel of the KSC has held that “international criminal tribunals have been inclined to accept the new appointment of Counsel or Co-Counsel as circumstances justifying the extension of time and less so when the new appointments concerned other members of a legal team. Nevertheless, the pending assignment of staff members to an accused’s defence team has been taken into consideration for moderate extensions of time”.¹⁴ In the present case, and in line with this case law, the requested extension of time is

¹³ Article 21 (4)(c) of the Law.

¹⁴ Decision on Variation of Time Limit, para 5. See also ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Appeals Chamber, Decision on “Appellant Jean-Bosco Barayagwiza’s Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice”, 17 May 2005, p. 2, where a 4-month extension “starting from the moment the Appellant’s Legal Team is complete” was considered sufficient time for the appellant’s newly appointed legal team to allow the preparation of an amended Notice of Appeal and of a new Appellant’s Brief.

justified because an entirely new defence team is in the process of being appointed with no prior knowledge of the case.

27. The Defence also recalls that the fact that a judgment is not available in a language which a convicted person “fully understands and speaks”, was held by the ICC Appeals Chamber in the *Bemba* case, along with other factors, to constitute good cause for the granting of an extension of time.¹⁵ Indeed, in that case, the Defence were granted an extension of time such that the appellant’s appeal brief required to be filed no later than 180 days from notification of the trial judgment.

28. Pursuant to Rule 9(6) of the Rules, a motion for a variation of the time limits may be disposed of without giving the opposing Party or Victims’ Counsel the opportunity to be heard. In order to provide the Defence with adequate time to prepare, and given that no prejudice will be caused to either the SPO or the participating victims, the Defence submits that it is in the interests of justice to dispose of the present motion immediately.

¹⁵ ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-3370, Appeals Chamber, *Decision on Mr Bemba’s Request for an Extension of Time for the Filing of His Document in Support of the Appeal*, 15 April 2016, para. 6.

IV. CONCLUSION

29. Accordingly, on an urgent basis, the Defence respectfully requests the President to:

- a) find that good cause exists pursuant to Rule 9(5)(a) of the Rules for a variation of the time limit to file any request for protection of legality; and
- b) grant an extension of time to file any request for protection of legality of:
 - a. 180 days from 14 March 2024, which would mean that the filing deadline would be amended to Tuesday, 10 September 2024; or, in the alternative,
 - b. 90 days from the issuance of the Albanian translation of the Trial Judgment.

Word count: 2104



Venkateswari Alagenda

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The Hague, the Netherlands.