



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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

Before: A Panel of the Supreme Court Chamber
Judge Ekaterina Trendafilova
Judge Christine van den Wyngaert
Judge Daniel Fransen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

Date: 23 January 2024

Language: English

Classification: Public

Prosecution challenge to appointment of Counsel

Specialist Prosecutor's Office

Kimberly P. West

Counsel for Victims

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Registry

Head of Defence Office

Counsel for Salih Mustafa

Venkateswari Alagenda

I. INTRODUCTION

1. A conflict of interest arises from the assignment of Ms Venkateswari Alagendra ('Case 6 Counsel') to represent Mr Salih MUSTAFA ('MUSTAFA'),¹ by virtue of her representation of Jakup KRASNIQI ('KRASNIQI') in a substantially related matter. If left unresolved, the conflict of interest could seriously and irreversibly prejudice the administration of justice.² Accordingly, pursuant to Articles 28(3)(b) and 28(4)(b)(1) of the Code of Conduct,³ Section 16(2)(a) of the Directive,⁴ and the Panel's inherent authority to safeguard the fairness and integrity of the proceedings,⁵ the Supreme Court Panel should order the Registrar to terminate Case 6 Counsel's representation of MUSTAFA.

II. SUBMISSIONS

2. MUSTAFA is convicted of war crimes committed in April 1999 at a compound in Zllash/Zlaš, which was the base of the BIA Guerrilla Unit commanded by MUSTAFA.⁶ Case 6 Counsel's other client, KRASNIQI, and his co-Accused are

¹ Notification of Approval of Counsel for Salih Mustafa with one confidential Annex, KSC-CA-2023-02/F00041, 11 January 2024; Information Additional to Notification of Approval of Counsel for Salih Mustafa with two confidential and *ex parte* Annexes, KSC-SC-2024-02/F00004, 18 January 2024; *see also Prosecutor v. Thaçi et al.*, Notification of Appointment of Venkateswari Alagendra as Counsel to Salih Mustafa with two confidential and *ex parte* Annexes, KSC-BC-2020-06/F02066, 18 January 2024.

² ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-AR73.2, Decision on Ivan Čermak's interlocutory appeal against Trial Chamber's decision on conflict of interest of attorneys Čedo Prodanović and Jadranka Sloković, 29 June 2007 ('Gotovina Decision'), para.55; ICTY, *Prosecutor v. Jadranko Prlić et al.*, IT-04-74-AR73.1, Decision on appeal by Bruno Stojić against Trial Chamber's Decision on Request for Appointment of Counsel, 24 November 2004 ('Prlić Decision'), paras 19-22, 24-27; ICC, *Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, ICC-01/14-01/22-124-Red, Judgment on the appeal of Maxime Jeoffroy Eli Mokom Gawaka against the decision of Pre-Trial Chamber II of 19 August 2022 entitled "Decision on legal representation further to the Appeals Chamber's judgment of 19 July 2022", 19 December 2022 ('Mokom Decision'), para.43.

³ Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers, KSC-BC-07/Rev1, 28 April 2021 ('Code of Conduct').

⁴ Registry Practice Direction: Directive on Counsel, KSC-BD-04/Rev1, 28 April 2021 ('Directive').

⁵ ICTY, *Prosecutor v. Mejakić et al.*, IT-02-65-AR73.1, Decision on appeal by the Prosecution to resolve conflict of interest regarding attorney Jovan Simić, 6 October 2004 ('Mejakić Decision'), para.7; Mokom Decision, paras 45, 54; ICC, *Prosecutor v. Nourain and Jamus*, ICC-02/05-03/09, Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence, 30 June 2011, para.12.

⁶ Further redacted version of Corrected version of Public redacted version of Trial Judgment, 8 June 2023, KSC-BC-2020-05/F00494/RED3/COR, 16 December 2022 ('Trial Judgment'), paras 495, 584-588,

charged with, *inter alia*, the same crimes committed by Salih MUSTAFA and certain other BIA members at the Zllash/Zlaš detention compound in April 1999.⁷ Accordingly, the two cases are substantially related within the meaning of Article 28(3)(b) of the Code of Conduct. This provision triggers Counsel's obligation, in addition to obtaining informed consent of each potentially affected client, to notify the relevant Panels,⁸ which shall then determine whether a conflict of interest exists.⁹

3. Case 6 Counsel's simultaneous representation of both KRASNIQI and MUSTAFA creates an irreconcilable conflict of interest.¹⁰ Given that KRASNIQI is charged with, *inter alia*, the same crimes that are the subject of the MUSTAFA case, the resultant conflict of interest cannot be remedied by informed consent.¹¹ For instance, Case 6 Counsel's duty of confidentiality towards one client may conflict with her duty of loyalty towards the other,¹² particularly in situations where she receives privileged information from one client that she would otherwise be obligated to use in

638-639, 695, 758-760, 831. *See also* Appeal Judgment, KSC-CA-2023-02/F00038, 14 December 2023, paras 2-3, 484.

⁷ *Specialist Prosecutor v. Thaçi et al.*, Public Lesser Redacted Version of Amended Indictment, KSC-BC-2020-06/F01323/A01, 27 February 2023 ('Case 6 Indictment'), paras 75, 109, 160; *Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of 'Corrected Version of Prosecution Pre-Trial Brief', KSC-BC-2020-06/F01415/A01, 3 April 2023 ('Case 6 Pre-Trial Brief'), paras 444-457; *see also* paras 203, 438-443. KRASNIQI and his co-Accused are charged with committing through their participation in a joint criminal enterprise ('JCE'), aiding and abetting, and superior responsibility the crimes at, *inter alia*, Zllash/Zlaš. *See* Case 6 Indictment, KSC-BC-2020-06/F01323/A01, paras 32-57. Rrustem MUSTAFA, a JCE member named in the Case 6 Indictment (KSC-BC-2020-06/F01323/A01, para.35), allegedly appointed Salih MUSTAFA as the BIA unit commander. *See* Case 6 Pre-Trial Brief, KSC-BC-2020-06/F01415/A01, para.203. *See also* Trial Judgment, KSC-BC-2020-05/F00494/RED3/COR, para.338.

⁸ At present, the SPO has no information as to whether Case 6 Counsel has notified this or other relevant Panels.

⁹ Code of Conduct, Article 28(4)(b)(1).

¹⁰ A conflict of interest between counsel and client arises in a situation where representation by counsel prejudices or could prejudice the interests of the client and the wider interests of justice. *See* Mokom Decision, para.43.

¹¹ Gotovina Decision, para.24 (stating that a conflict of interest is 'more obvious in cases where counsel represents two accused who are, at least partly, charged with the same criminal acts, committed during the same period of time and in the same area'), para.35 (holding that the conflict of interest could not be cured by informed consent); Prlić Decision, paras 24, 27-30 (holding that the conflict of interest resulting from counsel acting for two accused charged with the same crimes could not be cured by informed consent); *see also* IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Request for Review of Registrar's Decision, 25 January 2019 ('Turinabo Decision'), para.39.

¹² *See e.g.* Code of Conduct, Articles 24-27.

representing the other.¹³ This risk is especially acute since witnesses are anticipated to testify and evidence tendered in the *Thaçi et. al.* trial about the crimes committed at, and MUSTAFA's involvement in, the Zllash/Zlaš detention compound. When deciding if and how to examine such witnesses and challenge such evidence, Case 6 Counsel would face an irreconcilable choice between, on the one hand, respecting the confidentiality of information and, on the other, effectively informing and representing each of her clients.¹⁴

4. Likewise, Case 6 Counsel may not adopt a certain strategy or make a particular submission on behalf of one client, so as not to prejudice the interests of the other.¹⁵ For example, in defending KRASNIQI against the allegations relating to the Zllash/Zlaš detention compound, Case 6 Counsel may be discouraged from shifting blame to alleged subordinates,¹⁶ which would include MUSTAFA.¹⁷ MUSTAFA could also be called as a witness in *Thaçi et al*¹⁸ and Case 6 Counsel, *inter alia*: (i) may not be able to pursue certain lines of examination on behalf of KRASNIQI, without

¹³ See similarly ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11, Public Redacted Version of Reasons for the Decision on the Replacement of Duty Counsel for a Witness, 10 December 2014 ('Ruto Decision'), paras 49-61.

¹⁴ See, similarly, Ruto Decision, paras 49-61.

¹⁵ See, similarly, Gotovina Decision, para.23.

¹⁶ Prlić Decision, para.24.

¹⁷ See Case 6 Indictment, KSC-BC-2020-06/F01323/A01, paras 55-57; see also para.35 (defining the 'JCE Members and Tools', who are also alleged subordinates of KRASNIQI and his co-Accused). Likewise, MUSTAFA – at trial and on appeal – attempted to shift blame from his BIA unit to other KLA units, including Brigade 153 and/or the Karadak Zone, see e.g. Submission of the of the Pre-Trial-Brief, Witness List, and Exhibits List with annexes 1-3, KSC-BC-2020-05/F00106/A01, 30 April 2021, paras 65, 72, 94-96; Defense Appeal Brief pursuant to Rule 179(1) of Rules of Procedure and Evidence ("Rules") with confidential Annex 1 and 2, KSC-CA-2023-02/F00021, 22 April 2023, Grounds 2A-C; Defence Brief in Reply to The Prosecutions' Brief in Response to Defence Appeal and Victims' Counsel Response to Defence Appeal Brief F00021 with one Public Annex pursuant to Rule 179 (3) of Rules of Procedure and Evidence ("Rules"), KSC-CA-2023-02/F00028, 16 June 2023, paras 83-85.

¹⁸ MUSTAFA is a potential witness, regardless of whether he currently features on any Party's witness list, considering the substantial likelihood that he has information about charged crimes, alleged perpetrators, and circumstances relevant to the *Thaçi et al.* proceedings. See, *inter alia*, Article 42 of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' are to the Law, unless otherwise specified.

prejudicing MUSTAFA's interests; and/or (ii) would be incapable of independently advising MUSTAFA about his options.¹⁹

5. In addition, although the issuance of the second instance judgement has finalised the criminal proceedings in this matter,²⁰ leaving only limited scope for review,²¹ procedural avenues remain open to MUSTAFA that may place Case 6 Counsel in a position of conflict.²² Moreover, through her representation of or confidential communications with KRASNIQI or MUSTAFA, Case 6 Counsel may discover new facts or new evidence which were not known during the trial or appeals proceedings in this case. In such circumstances and for many of the same reasons enumerated above, (i) Case 6 Counsel's ability to adopt related strategies or make related submissions may be impaired, and (ii) her duty of confidentiality may bar any use of such information as a basis for an application to re-open criminal proceedings pursuant to Article 48(2)(c).

6. The Supreme Court Panel should proactively step in to prevent any conflict from arising and thus guarantee the fairness and integrity of the proceedings.²³ Such a

¹⁹ See, similarly, Mejačić Decision, paras 13-15. Compare, for example: 069404-TR-ET Part 1, pp 18-23 (MUSTAFA's statement to the SPO claiming, *inter alia*, that from 1997 or 1998, the KLA General Staff issued orders to the subzone staff, which passed these orders down the chain of command) with Transcript of Hearing, KSC-BC-2020-06, 5 April 2023, public, pp 2408 and 2413 (Jakup KRASNIQI's Opening Statement claiming, *inter alia*, that in June 1998 there was no General Staff 'in any meaningful sense of that word' and that the KLA did not have a hierarchical structure with a chain of command).

²⁰ Article 46(7).

²¹ Article 48.

²² For example, the Supreme Court Chamber recently considered an alleged disclosure violation in the context of a request for protection of legality. See *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Requests for Protection of Legality, KSC-SC-2023-01/F000021, 18 September 2023 ('Gucati Legality Decision'), Section IV(G). In substantially related cases, which concern the same crimes and overlapping evidentiary records, such procedural matters could reasonably be expected to affect Case 6 Counsel's ability to full represent both KRASNIQI and MUSTAFA.

²³ Article 39(1), (3), and (11). See also Mokom Appeal Decision, paras 41, 43, 45, 54, 59, 61-62, 64, 93-95; Ruto Decision, paras 33 (finding that a lawyer is seldom justified in asserting that 'it is up to him or her alone to decide to act, as a participant in the judicial process, when the interests of a particular client collide with the interests of other persons or clients or indeed the broader interests of justice'), 47 (the primary obligation on the counsel to address potential conflicts does not negate the role of a court to take appropriate steps to avoid the potential for such conflict where timeous information has come to the attention of the court), 48 (steps should be taken to avoid conflicts when such potential becomes apparent, as damage may not always be easily remedied when a potential conflict materialises later); Gotovina Decision, paras 23, 28 (safeguarding the interests of justice requires not only the existence of

course would be consistent with the Kosovo Ethics Code,²⁴ as well as practice and jurisprudence in both international and domestic systems.²⁵

7. Finally, no undue prejudice would be caused by terminating Case 6 Counsel's representation of MUSTAFA. Since this matter is being conducted in parallel to trial proceedings in Case 6, Case 6 Counsel's dual role poses the risk of delay due to conflicting time and resource constraints, as has already been demonstrated by MUSTAFA's pending request for an extension of time to file a request for protection of legality by 180 days,²⁶ which is twice the duration of the existing time limit.²⁷ Indeed, while some delay may result from a further change of counsel, it need not be substantial, considering that Case 6 Counsel has only been assigned to MUSTAFA since 11 January 2024,²⁸ and the pending extension request. Moreover, it would mitigate the real risk that Case 6 Counsel might withdraw in the course of these proceedings due to circumstances arising from the apparent conflict of interest.²⁹ Thus, any limited prejudice caused by overriding MUSTAFA's choice of counsel at this stage is far outweighed by the interests of justice.³⁰

a mechanism for removing conflicts of interests after they have arisen, but also the prevention of conflicts before they arise).

²⁴ Kosovo Bar Association, Lawyers Code of Professional Ethics, 2012 ('Kosovo Ethics Code'), Article 25 (providing that a lawyer should refuse offering legal assistance, *inter alia*, if s/he has represented clients in the same case or a case related to it).

²⁵ See e.g. Gotovina Decision, paras 44-47 (reviewing the practice in various jurisdictions); Mokom Decision, paras 43-45.

²⁶ Mustafa Urgent Motion for an Extension of Time to File a Request for Protection of Legality, KSC-SC-2024-02/F00001, 15 January 2024. While Case 6 Counsel's obligations in *Thaçi et al.* is not used to justify the request, the trial phase is ongoing and can reasonably be expected to impact on Case 6 Counsel's time and resources in this matter.

²⁷ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020, Rule 193(1).

²⁸ See fn.1 above.

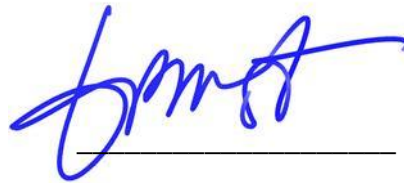
²⁹ Mokom Decision, para.61 (considering that, where judicial intervention is warranted, deferring such action may affect the right of the accused to be tried in an expeditious manner).

³⁰ See, *similarly*, Gotovina Decision, paras 54-55.

III. RELIEF SOUGHT

8. For the foregoing reasons, the Supreme Court Panel should: (i) find that a conflict of interest exists; and (ii) order the Registrar to terminate Case 6 Counsel's representation of MUSTAFA.

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Kimberly P. West

Specialist Prosecutor

Tuesday, 23 January 2024

At The Hague, the Netherlands.