

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

No.: **ICC-01/14-01/21**

Date: **5 July 2022**

THE APPEALS CHAMBER

Before:

**Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Marc Perrin de Brichambaut
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze**

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI

Public Document

**Defence Notice of Appeal against the “First review of the detention of
Mr Mahamat Said Abdel Kani” (ICC-01/14-01/21-382) by Trial Chamber VI
Deciding to Continue Mr Said’s Detention**

Source: Defence Team for Mahamat Said Abdel Kani

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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I. Procedural history

1. On 25 January 2022, the Defence filed a “*demande de mise en liberté provisoire de Mahamat Said Abdel Kani*”.¹
2. On 28 January 2022, a hearing was held on Mr Said’s detention, at which the Prosecution stated that it wished to request the continuation of Mr Said’s detention and the restrictions on Mr Said’s communications with the outside world.²
3. That day, at the hearing, the Chamber informed the parties that they could make initial observations orally and subsequently expand on them in written submissions.³ It specified that the Prosecution had until 4 February 2022 to file its written submissions and the Defence and the Legal Representative of Victims until 11 February 2022.⁴
4. On 4 February 2022, the Prosecution filed “additional submissions related to the detention and contact restrictions of Mahamat Said Abdel Kani”.⁵
5. On 11 February 2022, the Defence filed its response “[TRANSLATION] to the oral request for the continuation of Mr Said’s detention and the restrictions on Mr Said’s communications made at the hearing of 28 January 2022 (ICC-01/14-01/21-T-007-CONF-FRA ET) and in the ‘additional submissions related to the detention and contact restrictions of Mahamat Said Abdel Kani’ (ICC-01/14-01/21-236-Conf) filed on 4 February 2022”.⁶
6. On 3 March 2022, the Trial Chamber issued its “Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact

¹ ICC-01/14-01/21-233-Conf. The public redacted version of the application for interim release was filed on 27 January 2022 (ICC-01/14-01/21-233-Red).

² ICC-01/14-01/21-T-007-CONF-FRA, p. 67.

³ ICC-01/14-01/21-T-007-CONF-FRA, p. 67, lines 1-11.

⁴ ICC-01/14-01/21-T-007-CONF-FRA, p. 84, lines 26-28.

⁵ ICC-01/14-01/21-236-Conf. The public redacted version was filed the same day (ICC-01/14-01/21-236-Red).

⁶ ICC-01/14-01/21-239-Conf-Exp. The public redacted version was filed the same day (ICC-01/14-01/21-239-Red2).

Restrictions” (the impugned decision) in which it decided to continue Mr Said’s detention and to maintain the restrictions, albeit relaxing them.

7. On 9 March 2022, the Defence filed a notice of appeal against the “Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions’ (ICC-01/14-01/21-247-Conf) of Trial Chamber VI Deciding to Continue Mr Said’s Detention and Maintain the Restrictions on His Communication”.⁷

8. On 10 March 2022, the Appeals Chamber issued the “Decision on the Presiding Judge of the Appeals Chamber in the appeal of Mr Mahamat Said Abdel Kani against the decision of Trial Chamber VI entitled ‘Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions’ of 3 March 2022”.⁸

9. On 11 March 2022, the Appeals Chamber issued the “Order on the conduct of the appeal proceedings”⁹ in which it ordered the Defence to file its appeal brief by 21 March 2022 and invited the Prosecution and the OPCV to respond to the Defence brief by 31 March 2022.

10. On 21 March 2022, the Defence filed a brief “[of] [a]ppeal [...] against the ‘Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions’ (ICC-01/14-01/21-247-Conf) of Trial Chamber VI Deciding to Continue Mr Said’s Detention and Maintain the Restrictions on His Communications”.¹⁰

11. On 31 March 2022, the OPCV filed a “response to the ‘*Mémoire de la Défense relatif à l’appel interjeté à l’encontre de la* “Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions” (ICC-01/14-01/21-247-Conf) de la Chambre de première instance VI décidant du maintien en détention de

⁷ ICC-01/14-01/21-252-tENG.

⁸ ICC-01/14-01/21-253.

⁹ ICC-01/14-01/21-254.

¹⁰ ICC-01/14-01/21-265-Conf-tENG.

Monsieur Said et du maintien des mesures de restrictions à ses communications’ (ICC-01/14-01/21-265-Conf)”.¹¹

12. The same day, the Prosecution filed a “Response to the ‘*Mémoire de la Défense relatif à l’appel interjeté à l’encontre de la “Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions”*’ (ICC-01/14-01/21-247-Conf) de la Chambre de première instance VI décidant du maintien en détention de Monsieur Said et du maintien des mesures de restrictions à ses communications’ (ICC-02/05-01/20-265-Conf)”.¹²

13. On 16 May 2022, the Appeals Chamber issued the “Scheduling Order for the delivery of Judgment on the appeal of Mr Said against the decision of Trial Chamber VI entitled ‘Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions’”¹³ in which the Chamber announced that judgment would be delivered in open court on 19 May 2022.

14. On 19 May 2022, a hearing was held before the Appeals Chamber.

15. The same day, the Appeals Chamber delivered the “Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Trial Chamber VI entitled ‘Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions’”¹⁴ in which the Chamber confirmed the Trial Chamber’s decision.

16. On 17 May 2022, the Trial Chamber, recalling its duty to assess Mr Said’s detention periodically, ordered the Prosecution and the OPCV to file observations on the matter by 30 May 2022 and invited the Defence to respond to those observations by 10 June 2022.¹⁵

¹¹ ICC-01/14-01/21-267-Conf.

¹² ICC-01/14-01/21-268-Conf.

¹³ ICC-01/14-01/21-311.

¹⁴ ICC-01/14-01/21-318.

¹⁵ Email from TC VI on 17 May 2022 at 13.09.

17. On 30 May 2022, the Prosecution filed “observations on the review of detention of Mr Mahamat Said Abdel Kani”.¹⁶

18. The same day, the OPCV filed “observations on the review of Mr Saïd’s Detention”.¹⁷

19. On 10 June 2022, the Defence filed its response to the “Prosecution’s observations on the review of detention of Mr Mahamat Said Abdel Kani” (ICC-01/14-01/21-335) and to the “Victims’ observations on the review of Mr Saïd’s Detention” (ICC-01/14-01/21-336).¹⁸

20. On 17 June 2022, pursuant to the instructions communicated by the Trial Chamber,¹⁹ the Registry filed the “Brief Report on the Security Situation in the Central African Republic”.²⁰

21. By emails of 21 and 22 June 2022 respectively, the OPCV and the Office of the Prosecutor stated that they would not submit observations on the Registry’s report.²¹

22. On 24 June 2022, the Defence for Mr Said filed the “*Observations de la Défense portant sur le rapport ‘on the Security Situation in the Central African Republic’* (ICC-01/14-01/21-365-Conf) déposé par le Greffe le 17 juin 2022”.²²

23. On 29 June 2022, Trial Chamber VI issued the “First review of the detention of Mr Mahamat Said Abdel Kani”, in which it decided to continue Mr Saïd’s detention.²³

II. The impugned decision

24. By this notice of appeal the Defence appeals against Decision No. ICC-01/14-

¹⁶ ICC-01/14-01/21-335.

¹⁷ ICC-01/14-01/21-336.

¹⁸ ICC-01/14-01/21-353-Conf-Red.

¹⁹ ICC-01/14-01/21-365-Conf, para. 1.

²⁰ ICC-01/14-01/21-365-Conf-AnxA.

²¹ Email OPCV to TC VI on 21 June 2022 at 09.04, email OTP to TC VI on 22 June 2022 at 20.27.

²² ICC-01/14-01/21-366-Conf-Exp.

²³ ICC-01/14-01/21-382.

01/21-382 issued by Trial Chamber VI on 29 June 2022 entitled “First review of the detention of Mr Mahamat Said Abdel Kani” which ordered Mr Said’s continued detention.

III. Legal basis

25. The Defence brings its appeal under article 82(1)(b) of the Statute, which provides that either party may appeal a decision granting or denying release of the person being investigated or prosecuted.

26. Rule 154(1) of the Rules of Procedure and Evidence provides that an appeal may be filed under article 82(1)(b), not later than five days from the date upon which the party filing the appeal is notified of the decision. In the present case the time for filing that notice of appeal runs until 5 July 2022.

27. Regulation 64(5) of the Regulations of the Court specifies that an appeal filed for the purposes of rule 154 shall state:

- (a) the name and number of the case or situation;
- (b) the title and date of the decision being appealed;
- (c) whether the appeal is directed against the whole decision or part thereof;
- (d) the specific provision of the Statute pursuant to which the appeal is filed;
- (e) the grounds of appeal, cumulatively or in the alternative, specifying the alleged errors and how they affect the appealed decision; and
- (f) the relief sought.

28. Regulation 64(6) of the Regulations of the Court provides:

For appeals filed under article 82, paragraph 1 (b) and rule 154, the Appeals Chamber shall, within two days of the filing of the notice of appeal, issue directions for the conduct of the proceedings, which may, at its full discretion, include:

- (a) Scheduling a hearing to be held no later than 10 days from the notification of the notice of appeal. Depending on the circumstances, the Appeals Chamber may decide to adjourn the hearing following all or some of the participants’ submissions and resume the hearing on a later date. The holding of a hearing is without prejudice to the Appeals Chamber also requiring the submission of written arguments or summaries thereof in advance of and/or following the hearing. The date of the hearing may be fixed after the 10 day deadline if necessary; or
- (b) Proceeding by way of written submissions only and setting a timetable therefor.

IV. Grounds of appeal

29. First ground of appeal: in the impugned decision the Chamber states that

as regards the Defence's specific arguments that it has not been established that (i) Mr Said can still count on supporters in the CAR, (ii) that there is no link between him and the FPRC, and (iii) that he has demonstrated a willingness to appear, the Chamber considers that the Defence is relitigating issues that were already decided by the Chamber in the Initial Detention Decision and confirmed on appeal. The Chamber will therefore not consider these arguments further.²⁴

30. First, by so ruling the Chamber erred in law as regards the standard to be used when applying article 60(3). The fact that the Chamber made particular factual findings in an earlier decision cannot bar the Defence from arguing that those factual findings are now no longer valid in a review of the detention of the person charged. Those factual findings are the logical starting point for discussion of whether a change in circumstances has occurred, and the Defence will naturally take them as its basis. For example, the Defence pointed out in its response of 10 June 2022 (1) that it still did not have the Registry's *ex parte* report on which the Chamber had nevertheless relied heavily in issuing its first decision on 3 March 2022, and (2) that the Registry did not appear to have supplied any new information relating to the contents of that report or regarding whether it was standing by the report's conclusions. It stands to reason, the Defence submitted, that the report could no longer be factored into the review because it had not been updated. It also submitted that the Chamber could now no longer endorse past factual findings founded on a now obsolete report, because the basis for those findings no longer exists. It was legitimate for the Defence to raise this issue which is central to the discussion in the event of a review. The aim is not one of "relitigating" but merely one of implementing the normal process established by article 60(3).

31. Secondly and in the same vein, the Chamber's refusal to "consider these arguments further" constitutes an error of law because the Chamber is refusing to perform its task of ascertaining whether those factual findings now still hold true,

²⁴ ICC-01/14-01/21-382, para. 28.

which is nevertheless the essence of the exercise established in article 60(3). To concur with the Chamber would mean that the Defence would have no right to question at a later date the basis for a factual finding and that the Chamber would not be in any way obliged, on each review of detention, to ascertain whether the past factual findings underpinning detention are still well founded. To concur with the Trial Chamber would entail that Chamber would only need to determine once that a circumstance existed for that circumstance to be regarded as holding true forever, which would run counter to the entire rationale of the periodic review established by article 60(3).

32. Thirdly and lastly, by failing to rule on the substance of the Defence's submissions, the Chamber is taking the view in practice, albeit without expressly so stating, that the factual findings in question still hold true, even though there is no evidence to that effect. This constitutes an error of fact which invalidates the impugned decision. The Defence notes in that respect that it was all the more incumbent on the Chamber to revisit those factual findings since the Appeals Chamber found, in relation in particular to the claim that there is a link between Mr Said and the FPRC, that "the Trial Chamber could have referred to more than two items of evidence in support of this determination".²⁵

33. Second ground of appeal: in the impugned decision, the Chamber notes:

The Defence is correct in saying that it is insufficient for the Prosecution to simply make a blanket claim that nothing has changed. Even though this may well be factually true, and the Chamber will make an independent assessment in this regard below, the mere affirmation by the Prosecution is not enough to establish it. The Chamber therefore finds that the Prosecution should have made a greater effort to provide substantiated submissions on the matter.²⁶

Since it finds in the impugned decision that the Prosecution has not provided the necessary evidence to establish the need for continued detention, the Chamber should have found that the Prosecution failed to discharge its burden of proof, and

²⁵ ICC-01/14/01/21-318, para. 35.

²⁶ ICC-01/14-01/21-382, para. 30.

accordingly have ordered Mr Said's release. By failing to act on its own findings the Chamber committed an error of law which invalidates the impugned decision.

34. Third ground of appeal: in the impugned decision the Chamber relies primarily on the report on the situation in the Central African Republic filed by the Registry on 17 June 2022. The Chamber thereby committed several errors.

35. First, the Chamber states: "Moreover, the Chamber observes that, even though the Defence bears no probative burden in this regard, it does not claim that any of the information provided in the Registry Report is false or inaccurate."²⁷ Therein lies an error of law since by questioning the methodology that the Registry used to write the report the Defence is quite clearly taking the view that the factual findings made by the Registry are not substantiated and are therefore not valid grounds for Mr Said's continued detention. To expect the Defence to show positively that an assertion is false is not only to ask it to prove the impossible but also amounts to reversing the burden of proof, which constitutes an error of law that invalidates the impugned decision.

36. Secondly, the Defence notes that the Chamber relies on conclusions by the Registry for which there were not even any sources, as the Defence previously underscored in its response of 24 June 2022 to the Registry's report.²⁸ For example, the Chamber states: "Moreover, according to the Registry Report, there have been reports of high profile detainees being released without trial and even abducted from detention facilities in Bangui."²⁹ However, the Registry makes that assertion in a paragraph of its report which has no reference, no source and therefore no foundation. Reliance on an unsubstantiated assertion of that nature constitutes an error of fact which invalidates the impugned decision.

37. Fourth ground of appeal: the Chamber predicates Mr Said's continued detention on the general security situation in the Central African Republic but never

²⁷ ICC-01/14-01/21-382, para. 32.

²⁸ ICC-01/14-01/21-373-Conf.

²⁹ ICC-01/14-01/21-382, para. 33.

takes the trouble to establish the slightest link with Mr Said, since it relies on theoretical “motives” that a person might have for wanting to prejudice the proceedings but at no point establishes that those are Mr Said’s “motives”.

38. It should be recalled that in the appeal judgment of 19 May 2022 in the case *sub judice* the only factor that led the Appeals Chamber to determine that, in its view, the Chamber had not created a presumption of continued detention was the fact that the Trial Chamber relied on the existence of alleged links between Mr Said and the FPRC:

[T]he Appeals Chamber recalls that the Trial Chamber determined that there was a “significant risk” on the basis of the evidence before it, indicating, *inter alia*, that Mr Said may still enjoy the support of his network in the FPRC. Thus, the Appeals Chamber is not convinced that there was a presumption of continued detention, absent any concrete evidence, as argued by the Defence³⁰

and that the Appeals Chamber stated in relation to that determination that “the Trial Chamber could have referred to more than two items of evidence in support of this determination”.³¹

39. The continued reliance on theoretical risks and the refusal to revisit the only relevant factual findings (see above) now mean that it is even more apparent from the impugned decision that the Chamber relied on the identification of theoretical and abstract risks to continue Mr Said’s detention despite the lack of concrete evidence to lend support to the existence of the alleged risks.

40. The consequence of such an approach is that the burden of proof is reversed, since the onus would then fall on the Defence to prove – which is, by definition, impossible – that no risks exist. The reversal of the burden of proof constitutes an error of law which invalidates the impugned decision.

41. Such an approach also gives rise to a presumption of continued detention for any person detained for the purposes of proceedings before the Court, since it will always be possible to justify by claiming – absent evidence – that there might be someone who might want to interfere with the proceedings or even that the Accused himself – again,

³⁰ ICC-01/14-01/21-318, para. 36.

³¹ ICC-01/14-01/21-318, para. 35.

absent any concrete evidence – might want to. This presumption of continued detention, which violates the principle that “liberty is the rule and detention the exception”, also constitutes an error of law which invalidates the impugned decision.

V. Relief sought

42. The Defence respectfully prays the Appeals Chamber to:

- (1) Reverse in its entirety the decision of Trial Chamber VI for lack of legal basis and the errors of fact and law committed;
- (2) Accordingly, order Trial Chamber VI to rule anew, with reference to the applicable legal rules and the requirements of article 60(3) of the Statute, on whether the conditions at article 58(1)(b) of the Rome Statute are met.

[signed]

Jennifer Naouri

Lead Counsel for Mahamat Said Abdel Kani

Dated this 5 July 2022

At The Hague, Netherlands