



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

**Pronouncement of Judgment on the Referral of the Rules of Procedure and Evidence
(KSC-CC-PR-2017-01)**

26 April 2017

Introduction

I declare open this Hearing for the delivery of the Judgment of the Specialist Chamber of the Constitutional Court in the case of a Referral of the Rules of Procedure and Evidence pursuant to Article 19(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (the 'Law').

The President of the Kosovo Specialist Chambers, the Judges of the Plenary and the public, generally, have been duly informed of the date and the time of this hearing.

The Presiding Judge of the Plenary from which this Referral was made is the President of the Kosovo Specialist Chambers and I welcome her in the name of the Constitutional Court Panel.

Procedure

The Rules of Procedure and Evidence which govern the functioning of the Kosovo Specialist Chambers were adopted by the Plenary of the Judges of the Kosovo Specialist Chambers (the 'Plenary') on 17 March 2017 (the 'Rules').

On 27 March 2017, the Rules were referred to the Specialist Chamber of the Constitutional Court (the 'Court') pursuant to Article 19(5) of the Law (the 'Referral').

Pursuant to Article 33(3) of the Law the three (3) judges of the Specialist Chamber of the Constitutional Court were assigned as a Panel to conduct a review of the Rules. The Reserve Judge was also assigned.

Background

The Specialist Chamber of the Constitutional Court was established within the existing Constitutional Court of the Republic of Kosovo and exercises, through its constitutional review of the Rules of Procedure and Evidence, a supervisory jurisdiction over the Specialist Chambers and the Specialist Prosecutor's Office and is, thus, an additional guarantor of the Constitution.

The Referral was lodged with the Specialist Chamber of the Constitutional Court on 27 March 2017 and from that date the Court had 30 days to review the Rules to ensure their compliance with Chapter II of the Constitution.

On 29 and 30 March 2017 and on 10, 11, 22, and 23 April 2017, the Specialist Chamber of the Constitutional Court held deliberations, in private, on the Rules as adopted by the Plenary.

I shall now provide a brief summary of the Judgment which the Court adopted today, 26 April 2017, and I shall, thereafter, read out its operative provisions.

This summary is not part of the Judgment and shall not bind the Specialist Chamber of the Constitutional Court. A copy of this synopsis will be available at the end of this hearing.

The full text of the Judgment will also be available and may be consulted on the Specialist Chambers' internet site.

The Case

The case referred to the Specialist Chamber of the Constitutional Court raises the question as to whether the Rules of Procedure and Evidence as adopted by the Plenary are consistent with Chapter II, including Article 55, of the Constitution of the Republic of Kosovo. Chapter II of the Constitution deals with 'Fundamental Rights and Freedoms'.

At the outset, the Court determined that the Referral was admissible, it having been made in accordance with the Law.

In conducting its review of the Rules, the Court was guided by Article 19(2) of the Law which requires that the Rules reflect the highest standards of human rights law with a view to ensuring a fair and expeditious trial. The Court interpreted each rule on the basis of the actual language of the text, as adopted by the Plenary.

To the extent possible, the Court incorporated the doctrine of 'harmonious interpretation' into its review of the Rules. Where the plain meaning of a text permitted, the Court proceeded upon the assumption that the provision of an individual rule should not be construed in isolation from other parts of the Rules but rather should be construed so as to harmonise therewith.

Where a rule engaged a question of fundamental human rights as guaranteed under the Constitution it was subjected to heightened scrutiny in order to determine its overall compliance with Chapter II of the Constitution. In interpreting the human rights provisions of the Constitution, the Court had regard to Article 53 which provides that such provisions are to be interpreted in a manner consistent with the court decisions of the European Court of Human Rights.

Findings

Having carried out its review of the 208 rules adopted by the Plenary, the Court determined that nine rules were inconsistent with Chapter II of the Constitution. It was unable to make a determination in respect of one further rule. Thus, 198 Rules were found not to be inconsistent with the Constitution.

The rules which the Specialist Chamber of the Constitutional Court found to be inconsistent with the Constitution of the Republic of Kosovo were as follows:

Rule 19(3)

In so far as this rule permitted a hearing to continue before two members of a Panel in the absence of its third member, the Court found that such a hearing was not a hearing before a tribunal established by law, as is required under Article 31.2 of the Constitution. The reasons for this finding are set forth in the Judgment but focus, essentially, upon what the Law requires in relation to the composition of Panels of the Kosovo Specialist Chambers.

Rules 31, 32 and 33

Rules 31, 32 and 33 have been found by the Specialist Chamber of the Constitutional Court to be inconsistent with the fundamental right to privacy under Article 36 of the Constitution, as qualified by Article 55 thereof. These rules provide for the authorisation of special investigative measures, including, the interception of private communications. In the Court's view, they failed to contain the requisite minimum safeguards necessitated by the highest standards of human rights law. The Rules did not specify the categories of persons to whom the measures may be applied; they lacked sufficient precision in terms of the duration of intercepted communications and contained inadequate safeguards relating to the retention and destruction of data obtained on foot of such measures. The Court found that these rules, as adopted, did not meet the 'quality of law' requirement under Article 55 of the Constitution and that they were incapable of demonstrating that the permitted 'interference' was kept to what was 'necessary' in a democratic society.

Rule 35(1) and Rule 35(3)

Rule 35 provides for search and seizure operations to be conducted by the Specialist Prosecutor in the absence of prior judicial authorisation. The Court confirmed that a clear legal framework and strict limits on such powers are required if persons are to be protected from arbitrary interference by the authorities with the constitutionally protected right to respect for privacy. The Court found that the powers accorded to the Specialist Prosecutor pursuant to Rules 35(1)(b) and 35(1)(c) were excessively extensive and did not meet the 'necessity' requirements laid down in Article 36.2 of the Constitution.

It further found that the *ex post facto* judicial review provided for in Rule 35(3) did not provide for the inclusion of an assessment as to the proportionality of the measure and, thus, did not confine the impact of the aforementioned searches and seizures to what was 'necessary' in a democratic society.

Rule 36(1) and Rule 36(2)

Rule 36 is concerned with the execution of search and seizure operations. The Court found that Rule 36(1) and Rule 36(2) were not formulated with the requisite degree of precision as to their applicability and operation. They, therefore, did not comply with the quality of law requirement inherent in the term 'by law' as provided by Article 55.1 of the Constitution.

Rule 38(1) and Rule 38(5)

Rule 38 provided for expert examinations for the purpose of the collection of bodily matter, such as, hair, saliva, blood samples, DNA and other similar material. Thus, the rights to personal integrity and to privacy under Articles 26 and 36 of the Constitution are engaged.

Rule 38(1) provided for the power of the Specialist Prosecutor to order an expert examination for the collection of hair, saliva or other swab samples which can be undertaken without bodily intrusion. The Court considered that insofar as this provision permitted the collection of hair, saliva or other swab samples from a person (as distinct from an object with which the person had been in contact) such collection could not be undertaken without bodily intrusion, however minor such intrusion may be. In the absence of sufficient safeguards governing circumstances where a person withheld his or her consent to the collection of saliva or hair or other swab samples, the Court found that Rule 38(1) was inconsistent with the requirement of ‘necessity’ under Article 55.2 of the Constitution.

The Court also found that Rule 38(5) was inconsistent with the Constitution insofar as it provided for the retention, for some considerable time, of all materials, including cellular samples, collected from a person, without any particular assessment of the necessity therefor arising from the specific circumstances in each case. The Court found that the retention of such bodily materials failed to strike a fair balance between the competing public and private interests at stake in contravention of Article 55.4 of the Constitution.

Rule 54

Rule 54 contains provisions governing the review and reconsideration of detention on remand. The Court found that Rule 54(4) called for scrutiny and further clarity. On a plain reading, the provision would make the release of a detained person entirely dependent upon the consent of a third State even in circumstances where a Panel has found sufficient grounds requiring the release of a detainee. The Court concluded that, on its face, this specific provision of Rule 54(4) was inconsistent with Article 29 of the Constitution.

Rule 158(2)

Rule 158(2) provided for the detention of a person who had been acquitted following a trial. The Court found that the continued detention of an acquitted person is not foreseen by law and does not come within one of the permissible grounds for the deprivation of liberty. Consequently, the Court concluded that this provision was inconsistent with Article 29 of the Constitution.

Rule 134(3)

For the reasons set out in its Judgment, the Court was unable to find that Rule 134(3) was consistent with Chapter II of the Constitution.

Effective Date

This Judgment is effective immediately.

Operative Provisions

Having provided a brief summary of the Court's review, I will now read the operative provisions of the Judgment wherein the Court

1. *Declares*, unanimously, that the Referral is admissible;
2. *Holds* unanimously, that Rule 31, Rule 32, Rule 33, Rule 35(1)(b) and (c) and 35(3), Rule 36(1) and (2), Rule 38(1) and (5), and Rule 54(4) are inconsistent with Chapter II of the Constitution;
3. *Holds*, by majority, that Rule 19(3) and Rule 158(2) are inconsistent with Chapter II of the Constitution;
4. *Holds*, unanimously, that it is unable to declare Rule 134(3) to be consistent with Chapter II of the Constitution; and
5. *Holds*, unanimously, that the remaining provisions of the Rules are not inconsistent with Chapter II of the Constitution.

This concludes this afternoon's hearing and, accordingly, I declare it closed.



Judge Ann Power-Forde

Presiding