



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

**Pronouncement of Judgment on the Referral of Revised Rules of the
Rules of Procedure and Evidence (KSC-CC-PR-2017-03)**

28 June 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 the Referral of the Revised Rules of the Rules of Procedure and Evidence pursuant to Article 19(5) 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 for a review as to their compliance with Chapter II, including Article 55, of the Constitution of the Republic of Kosovo (the 'Constitution').

By a Judgment of 26 April 2017, the Court found that nine out of 208 rules were inconsistent with Chapter II of the Constitution and that it was unable to declare one rule to be consistent with Chapter II of the Constitution.

The Referral

On 29 May 2017, the Plenary, with the exception of the Constitutional Judges, adopted revised rules of the Rules of Procedure and Evidence (the 'Revised Rules').

On 31 May 2017, the Revised Rules were referred to the Court pursuant to Article 19(5) of the Law (the 'Referral').

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.

From the date of the Referral, the Court had 30 days to review the Revised Rules to ensure their compliance with Chapter II of the Constitution.

On 8, 9, 23 and 24 June 2017, the Specialist Chamber of the Constitutional Court held deliberations, in private, on the Revised Rules.

I shall now provide a brief summary of the Judgment which the Court adopted today, 28 June 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 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 Revised Rules are consistent with Chapter II 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 reviewing the Revised Rules, the Court was guided by Article 19(2) of the Law which requires that the Rules reflect the highest standards of international human rights law with a view to ensuring a fair and expeditious trial.

Preliminary Observation

The Court has discerned that in response to its Judgment of 26 April 2017, the Plenary has amended a number of provisions in such a manner as to delimit, at times quite considerably, the powers of the Specialist Prosecutor in relation to the investigation of crimes. It has, for example, curtailed significantly the categories of persons in respect of whom special investigative measures may be imposed and from whom certain evidentiary materials may be obtained.

The Court finds it necessary to underscore that the object of its Judgment of 26 April 2017 was not to place restrictions, generally, upon the Specialist Prosecutor's investigative capacities. To do so could risk frustrating the Specialist Prosecutor in the exercise of his or her statutory obligations. Rather, the Court's findings were aimed at ensuring that where the exercise of prosecutorial investigative powers encroaches upon constitutionally guaranteed fundamental

human rights and freedoms, such exercise must be subject to adequate safeguards and, where necessary, judicial oversight and control. In this way, an appropriate balance is to be achieved between the competing public and private interests in issue.

Findings

Rule 19(3) – Absence of a Judge

It is now clear that any hearing before the Kosovo Specialist Chambers will be a hearing before a tribunal established by law, as is required under Article 31.2 of the Constitution.

The Court therefore finds that Rule 19(3) is not inconsistent with Chapter II of the Constitution.

Rule 30 and Rule 31 – General Provisions and General Minimum Safeguards

The Court observes that the Plenary has introduced, in Rule 30, a ‘*Chapeau-type*’ regulation containing a number of ‘General Provisions’ applicable to all investigations and which, *inter alia*, oblige the Specialist Prosecutor to act at all times in a manner consistent with fundamental human rights.

It also notes that the Plenary has adopted a new provision, Rule 31, providing for certain ‘General Minimum Safeguards’ that are to apply to all investigative measures that may infringe upon fundamental rights. Such measures may be authorised and conducted only when ‘necessary for the investigation’, when the resulting interference is ‘proportionate to the legitimate aim of the investigation’ and when it ‘does not negate the essence of the guaranteed right’.

The Court welcomes these additional provisions designed to secure the enhanced protection of fundamental human rights and it is satisfied that they give effect to the necessary constitutional requirements. It, therefore, finds that Rules 30 and 31 are not inconsistent with Chapter II of the Constitution.

Rule 32 and Rule 33 – Retention, Storage, Protection, Return and Destruction of Material Collected or Seized

The Plenary has responded to the Court’s findings about the insufficiency of safeguards in the diverse areas identified in the Judgment of 26 April 2017 by adopting certain ‘catch-all’ provisions. Rules 32 and 33 are now applicable to materials obtained by the Specialist Prosecutor by way of special investigative measures, searches and seizures and the taking of bodily samples.

However, the Court finds that whilst the Plenary has directed that all such materials be ‘appropriately’ retained, stored and protected, it has not set out the procedures that would allow for such appropriate retention, storage and protection. The Court notes that the Plenary has chosen to delegate these functions to a Panel.

The Court acknowledges that significant time and expertise would be required in order to develop detailed procedures as to how, for example, cellular data, records of private communication or other sensitive materials are to be ‘appropriately retained’.

It considers that the approach adopted in the revised Rules may present certain challenges, in practice, and that, consequently, specific regulatory guidelines will be necessary in order to supplement the existing provisions, particularly, in relation to such technical issues as the storage and retention of certain types of data.

However, the Court finds that, on their face, the provisions of Rules 32 and 33 are not inconsistent with Chapter II of the Constitution.

Rule 34 – Conditions for Undertaking Special Investigative Measures

Rule 34 specifies the nature of the offences which may legitimately give rise to special investigative measures, including interception orders. It also defines the categories of persons in respect of whom special investigative measures may be ordered.

Bearing in mind the procedural obligation of the Specialist Prosecutor to carry out effective investigations into certain crimes, a question could arise about the narrow category of persons who may be subject to special investigative measures.

However, it finds that, on its face, Rule 34 is not inconsistent with Chapter II of the Constitution.

Rule 35 and Rule 36 – Special Investigative Measures Authorised by a Panel or Ordered by the Specialist Prosecutor

Rule 35 provides for special investigative measures that are authorised by a Panel. It sets out clear limits on the duration of such measures, which may include, covert surveillance and interception of communications, and it obliges the Panel to indicate the period for which an authorisation may be granted. It also provides for effective safeguards, such as, a limitation on the initial periods for which a special investigative measure may be authorised, the conditions under which that period may be extended, the circumstances in which the measures authorised must be terminated and the necessary judicial control and supervision of the execution of the measure.

Rule 36 provides for special investigative measures that may be undertaken by the Specialist Prosecutor in defined circumstances and which are subjected, *ex post facto*, to judicial control.

The Court is satisfied that Rules 35 and 36, on their face, are not inconsistent with Chapter II of the Constitution.

Rule 37 and Rule 38 – Search and Seizure Authorised by a Panel or Ordered by the Specialist Prosecutor

These Rules provide for searches and seizures whether authorised by a Panel or undertaken by the Specialist Prosecutor.

The Court finds that Rule 37 provides a heightened necessity test with regard to conditions under which the Specialist Prosecutor shall request authorisation from a Panel for search and seizure.

The Court underscores that when interpreting and applying Rule 37, in practice, the Panel, while ensuring that any interference is ‘in accordance with the law’, should bear in mind the fair balance that is to be struck between the rights to personal integrity and privacy, on the one hand, and the necessity for the Specialist Prosecutor to conduct an effective investigation.

Rule 38 requires the Specialist Prosecutor to consider the necessity of a search and seizure operation and the proportionality of the resulting interference. Furthermore, it provides for an *ex post facto* judicial review, dealing with issues relating to both the legality and proportionality of the measure. The Court is satisfied that the Plenary has addressed the findings made in the Judgment of 26 April 2017.

The Court finds that, on its face, Rules 37 and 38 are not inconsistent with Chapter II of the Constitution.

Rule 39 – Execution of Search and Seizure

Rule 39 governs both search and seizure with prior judicial authorisation and search and seizure with *ex post facto* judicial approval. It provides the degree of precision required in the procedures to be followed in the execution of search and seizure.

In the context of the carrying out of searches, the Court observes that the Rules do not provide, specifically, for remote searches of computerised devices with the aim of searching them for the purpose of obtaining relevant evidence or copying data. Investigating authorities, increasingly, deem such remote searches of suspects’ devices to be an important and necessary investigative tool in combating serious and complex crimes. Such remote searches are to be distinguished from a routine search of a suspect’s hard drive and the interception of communications passing by way of computer.

Whilst several rules contain minimum safeguards in the area of technical infiltration, the Court regards remote searches as a highly intrusive method of investigation which will call for stricter conditions in order to ensure that the resulting interference remains within the confines of what is constitutionally permissible. The Court considers that the Plenary may wish to give consideration to such matters at a future date. However, it finds that, on their face, the existing provisions of Rule 39 are not inconsistent with Chapter II of the Constitution.

Rule 41 – Collection of Bodily Material for Expert Examinations

Whilst the Court observes that the Plenary has narrowed, considerably, the category of persons from whom bodily samples may be obtained on foot of a court order where consent is not forthcoming, it nevertheless finds that Rule 41 is not inconsistent with Chapter II of the Constitution.

Rule 57(4) – Review and Reconsideration of Detention on Remand

The Court concludes that Rule 57(4), which provides for the release of a person within a Third State, is not inconsistent with Chapter II of the Constitution.

Rule 137 – General Provisions

The Plenary has deleted a provision in respect of which the Court in its Judgment of 26 April 2017 was unable to make a finding as to its compliance with the Constitution.

The Court finds that Rule 137 is not inconsistent with Chapter II of the Constitution.

Rule 161 – Status of the Acquitted Person

Rule 161 provides that, where a detained person is acquitted, he or she shall immediately be released, unless he or she is either lawfully detained or serving a sentence in relation to other crimes.

The Court finds that Rule 161 is not inconsistent with Chapter II of the Constitution.

The Operative Provisions

FOR THESE REASONS, THE COURT, UNANIMOUSLY

1. *Declares* that the Referral is admissible;
2. *Holds* that Rules 19, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 57, 137 and 161 are not inconsistent with Chapter II of the Constitution;
3. *Holds* that the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers comply with Chapter II of the Constitution.

Effective Date

This Judgment is effective immediately.

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



Judge Ann Power-Forde

Presiding