KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

File number:	**KSC-CC-PR-2020-09**
Before:	**The Specialist Chamber of the Constitutional Court** Judge Vidar Stensland, Presiding Judge Roland Dekkers Judge Antonio Balsamo
Registrar:	Fidelma Donlon
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Classification:	**Public**

Judgment

on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020

The Specialist Chamber of the Constitutional Court

Composed of

Vidar Stensland, Presiding Judge
Roland Dekkers, Judge
Antonio Balsamo, Judge

Having deliberated remotely delivers the following judgment

I. PROCEDURE

A. ADOPTION AND REVIEW OF THE RULES

1. On 17 March 2017, the plenary of the Judges of the Kosovo Specialist Chambers adopted the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (the "Rules") pursuant to Article 19(1) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (the "Law"). The Constitutional Judges did not participate in their adoption.

2. On 27 March 2017, the President of the Specialist Chambers (the "President") referred the Rules to the Specialist Chamber of the Constitutional Court (the "Chamber") to review their compliance with Chapter II of the Constitution of the Republic of Kosovo (the "Constitution") pursuant to Article 19(5) of the Law.[1]

3. On 26 April 2017, the Chamber found that some rules were inconsistent with Chapter II of the Constitution, and that it was unable to declare one rule to be consistent. The remaining provisions were not inconsistent with Chapter II of the

[1] KSC-CC-PR-2017-01, F00001, Referral of the Rules of Procedure and Evidence to the Specialist Chamber of the Constitutional Court, public, 27 March 2017.

Constitution.[2] The Chamber's findings were sent to the Judges in plenary for action on the affected rules.

4. On 29 May 2017, the Judges sitting in plenary adopted revised rules of the Rules. The President then referred them to the Chamber for review pursuant to Article 19(5) of the Law.[3] On 28 June 2017, the Chamber found that the Rules complied with Chapter II of the Constitution.[4] The Rules thus entered into force on 5 July 2017 pursuant to Rule 1(3) of the Rules.

B. AMENDMENTS TO THE RULES

5. On 29 and 30 April 2020, the Judges of the Kosovo Specialist Chambers sitting in plenary adopted amendments to 30 rules of the Rules.[5] As always, the Constitutional Judges did not participate in their adoption.

C. REFERRAL OF AMENDMENTS

6. On 1 May 2020, the President referred the aforementioned amendments to the Chamber (the "Referral") pursuant to Article 19(5) of the Law.[6] The same day, the President, pursuant to Article 33(3) of the Law, assigned the above constitutional

[2] KSC-CC-PR-2017-01, F00004, Judgment on the Referral of the Rules of Procedure and Evidence adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, public, 26 April 2017 (the "Judgment of 26 April 2017").
[3] KSC-CC-PR-2017-03, F00001, Referral of the Revised Rules of the Rules of Procedure and Evidence to the Specialist Chamber of the Constitutional Court, public, 31 May 2017.
[4] KSC-CC-PR-2017-03, F00006, COR, Judgment on the Referral of Revised Rules of the Rules of Procedure and Evidence adopted by Plenary on 29 May 2017 to the Specialist Chamber of the Constitutional Court pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, public, 28 June 2017 (the "Judgment of 28 June 2017").
[5] KSC-CC-PR-2020-09, F00001, Referral of Amendments to the Rules of Procedure and Evidence to the Specialist Chamber of the Constitutional Court, public with confidential annex, 1 May 2020 (the "Referral"), para. 1.
[6] Ibid.

panel to review the amendments, in order to ensure their compliance with Chapter II of the Constitution, including its Article 55.[7]

7. The Chamber thus turns to the assessment of the Referral.

II. JURISDICTION

8. With regard to its jurisdiction to decide the Referral, the Chamber notes that, under Article 162(6) of the Constitution, the Chamber has competence to review the Rules to ensure their compliance with Chapter II of the Constitution. Further, Article 19(5) of the Law provides that the Chamber shall review adopted amendments to the Rules. This is also provided for in Rules 4(a) and 13(1) of the Rules of Procedure for the Specialist Chamber of the Constitutional Court.

9. It follows that the Chamber has jurisdiction to examine the present Referral of amendments to the Rules.[8]

III. ADMISSIBILITY

10. The Chamber notes that Rule 4(a) of the Rules of Procedure for the Specialist Chamber of the Constitutional Court require that amendments to the Rules be referred to the Chamber by the President. This is also provided for in Rule 7(6) of the Rules. In the present case, the President referred to the Chamber the amendments adopted by the plenary in accordance with Article 19(4) of the Law.

11. It follows that the Referral is admissible. The Chamber can thus proceed to the examination of the amendments.[9]

[7] KSC-CC-PR-2020-09, F00002, Decision assigning a Constitutional Court Panel of the Specialist Chambers, public, 1 May 2020.
[8] See Judgment of 28 June 2017, paras 7, 10, 12.
[9] See ibid., paras 7, 12.

IV. ASSESSMENT

A. SCOPE OF REVIEW

12. At the outset, the Chamber reiterates that, pursuant to Article 162(6) of the Constitution and Article 19(5) of the Law, its review is limited to the question of whether the amendments to the Rules, as phrased, comply with Chapter II of the Constitution.[10]

13. It is not the Chamber's function to prescribe how the Rules could be improved or to anticipate possible scenarios in their application. Indeed, the manner in which a certain provision is applied may be essential to ensure compliance with Chapter II of the Constitution. It is essential that, in interpretation and application of the Rules, regard must be had to Article 162(2) of the Constitution and Article 3(2)(a) and (e) of the Law, which require the Specialist Chambers and the Specialist Prosecutor's Office to function in accordance with the fundamental rights and freedoms enshrined in Chapter II of the Constitution.[11]

B. GUIDING PRINCIPLES

14. The Chamber recalls the principle established in its case law that, in its review of the Rules, the Chamber has as a starting point the requirement under Article 19(2) of the Law that the Rules "reflect the highest standards of international human rights law […]". In that light, the Chamber acknowledges that the intention of the Judges sitting in plenary was to comply with the highest standards of international human rights law.[12]

15. Therefore, a slight implication or vague conjecture are not grounds endorsed by this Chamber for finding a provision to be inconsistent with Chapter II of the Constitution. It is only when such inconsistency is clear from the actual phrasing of

[10] Judgment of 26 April 2017, para. 10.
[11] See ibid., para. 11; Judgment of 28 June 2017, paras 14-15.
[12] Judgment of 26 April 2017, para. 12.

the provision that the Chamber makes a finding to that effect. The Chamber does not arrive at such determination lightly.[13]

16. Further, the Chamber is guided by the principle of harmonious interpretation. It does not construe a rule in isolation but in the context with the other rules and the relevant provisions of the Law so as to harmonise therewith. In its assessment of whether a provision read in that manner complies with the fundamental rights and freedoms guaranteed by Chapter II of the Constitution, the Chamber is guided by the ECtHR case law since Article 53 of the Constitution requires the Chamber to interpret the fundamental rights and freedoms consistent with the ECtHR rulings.[14] In this regard, the Chamber notes that the Constitutional Court of Kosovo has stated that "the Constitutional Court is bound to interpret human rights and fundamental freedoms consistent with the court decisions of the [ECtHR]".[15]

17. Where a provision raises no issue as to its compliance with Chapter II of the Constitution, the Chamber makes no comment on it. Where a provision raises an issue of fundamental rights and freedoms guaranteed by Chapter II of the Constitution, it is subjected to a heightened level of scrutiny in order to determine its overall compliance with Chapter II of the Constitution.[16]

18. With that in mind, the Chamber now turns to its review of the amendments to the Rules. This judgment quotes the text of the amended rules as was submitted to the Chamber for review.[17]

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[13] Ibid., paras 12-13, 17.
[14] See ibid., paras 14, 16 *in fine*; KSC-CC-2019-05, F00012, Decision on the referral of Mahir Hasani concerning Prosecution order of 20 December 2018, public, 20 February 2019 (the "*Decision on the referral of Mahir Hasani*"), para. 25.
[15] Kosovo, Constitutional Court, *Constitutional review of Judgment Pml No. 181/15 of the Supreme Court of the Republic of Kosovo, of 6 November 2015*, KI 43/16, Resolution on inadmissibility, 14 April 2016 (16 May 2016), para. 50. See also Kosovo, Constitutional Court, *Gëzim and Makfire Kastrati against Municipal Court in Prishtina and Kosovo Judicial Council*, KI 41/12, Judgment, 25 January 2013 (26 February 2013), para. 58.
[16] Judgment of 26 April 2017, paras 15-16.
[17] KSC-CC-PR-2020-09, F00001, A01, Annex, confidential, 1 May 2020.

V. AMENDMENTS

19. With due regard to the guiding principles noted above, the Chamber considers that the following amendments require a closer scrutiny.

A. AMENDMENTS TO RULE 31

20. The amendments to Rule 31, as submitted to the Chamber for review, read as follows:

> **Rule 31 General Minimum Safeguards**
>
> (1) – (2) [unchanged]
>
> (3) Information deriving from a professional relationship **between a person and their Specialist Counsel ~~or other confidential relationship~~** as provided for in Rule 111**(1)** shall be privileged and shall not be subject to investigative measures, unless the privilege is abused to perpetrate a crime within the jurisdiction of the Specialist Chambers and the evidence sought was in furtherance of that crime. In this case, Rule 33(1)(a)(ii) shall apply *mutatis mutandis*.
>
> **(4) Information deriving from any other professional or confidential relationship as provided for in Rule 111(2) and (3) shall not be subject to investigative measures, unless a Panel decides otherwise based on the circumstances of the case. In this case, Rule 33(1)(a)(ii) shall apply *mutatis mutandis*.**

1. Preliminary Considerations

21. The Chamber discerns that, by these amendments to paragraphs (3) and (4) of Rule 31, the plenary has addressed the Chamber's observations in its Judgment of 28 June 2017.

22. The Chamber recalls that, in the Judgment of 28 June 2017, it noted that the plenary had extended a near general prohibition on the application of investigative measures to information deriving not only from a lawyer-client relationship but also from other professional or confidential relationships as provided for in Rule 111. The Chamber opined that such a near general prohibition in respect of information deriving from other professional or confidential relationships could unduly restrict the Specialist Prosecutor's Office in the discharge of its functions under the Law. The

question of whether investigative measures could be applied to other professional or confidential relationships was a matter to be assessed by a competent panel on a case-by-case basis.[18]

23. In addressing the Chamber's aforementioned observations, the plenary has now envisaged in Rule 31 a possibility for a panel to assess in each case whether investigative measures provided for in the Rules may be applied to information deriving from other professional or confidential relationships specified in Rule 111(2) and (3). In that manner, the amendments to paragraphs (3) and (4) of Rule 31 are to be read in combination with the other rules on investigative measures, including paragraph (1) of Rule 31 on general minimum safeguards. The Chamber recalls that it has already found that these rules comply with Chapter II of the Constitution.[19] It will thus assess the amendments to Rule 31 in that context.

2. The Chamber's Assessment

(a) Relevant Principles

24. As noted in the Chamber's Judgment of 26 April 2017, the application of investigative measures, which also include special investigative measures and searches and seizures, generally engages the right to personal integrity and the right to privacy guaranteed by Articles 26 and 36 of the Constitution and Article 8 of the European Convention on Human Rights (the "Convention").[20] While the application of investigative measures may engage also other constitutional rights, such as the rights of the accused and the right to fair trial under Articles 30 and 31 of the Constitution and Article 6 of the Convention,[21] in the present case, the Chamber is to

[18] See Judgment of 28 June 2017, paras 21-25.
[19] See ibid., paras 29-89.
[20] Judgment of 26 April 2017, paras 60, 77.
[21] See *Decision on the referral of Mahir Hasani*, paras 27-28; KSC-CC-2019-07, F00013, Decision on the referral of Driton Lajci concerning interview procedure by the Specialist Prosecutor's Office, public, 13 January 2020 (the "*Decision on the referral of Driton Lajci*"), paras 13-15.

assess only the phrasing of the amendments as to their compliance with Chapter II of the Constitution (see paragraphs 12 and 15 above).

25. The Chamber notes that these amendments, as phrased, provide for a possibility to obtain, through investigative measures, information deriving from a professional or confidential relationship that a person may have with his or her doctor, psychologist or counsellor, among others. More often than not, the information a person communicates to such professionals involves intimate and personal matters. Therefore, a possibility to obtain such details under Rule 31, as amended, directly engages the right to privacy under Article 36 of the Constitution and Article 8 of the Convention, even where such details may be obtained by the Specialist Prosecutor's Office only.[22] The Chamber must thus assess whether the amendments to Rule 31 are compatible with the right to respect for privacy.

26. As held in the Chamber's Judgment of 26 April 2017, it follows from Article 55 of the Constitution and Article 8(2) of the Convention that any interference with the right to privacy under Article 36 of the Constitution and Article 8(1) of the Convention can be justified only if it is 'in accordance with the law' and 'necessary' in an open and democratic society for the fulfilment of the purposes set out in the Constitution.[23]

27. As regards the requirement of 'in accordance with the law', it means that a measure must have a basis in law and be compatible with the rule of law. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the person – if need be with appropriate advice – to regulate his or her conduct. The law must indicate the scope of any powers conferred on the

[22] See ECtHR, *Avilkina and Others v. Ru*ssia, no. 1585/09, 6 June 2013, para. 32; *Z v. Finland*, 25 February 1997, Reports of Judgments and Decisions 1997-I, paras 70-71; *Panteleyenko v. Ukraine*, no. 11901/02, 29 June 2006, paras 57-58.
[23] See Judgment of 26 April 2017, paras 54, 61. See ECtHR, *Panteleyenko v. Ukraine*, cited above, paras 48, 59.

competent authorities and the manner of their exercise with sufficient clarity to give the person adequate protection against arbitrary interference.[24]

28. As the lawfulness of the interference is closely related to the question of its 'necessity', the Camber will address jointly these requirements.[25]

(b) Application of the Principles

29. The Chamber first observes that Rule 31, as amended, clearly confirms that certain categories of communication under Rule 111(3) are considered as privileged, namely, between a person and his or her doctor, psychologist, counsellor and a member of religious clergy, and communications made in the context of a sacred confession. The amendments further confirm that communications made in the context of other professional or confidential relationships that fulfil the criteria in Rule 111(2) are also considered as privileged.

30. In this respect, the Chamber observes that Rule 111(3) does not include communication with, for example, a journalist. At the same time, the application of investigative measures to information deriving from contacts with a journalist may raise in addition an issue of the right to freedom of expression and thus call for the most careful scrutiny.[26] Hence, Rule 31(4), as amended, may also be relevant with regard to such other professional relationships that, while not listed in Rule 111(3), may fulfil the criteria in Rule 111(2).

31. The Chamber further observes that Rule 31, as amended, contains an important safeguard to protect the information deriving from the aforementioned professional

[24] Judgment of 26 April 2017, paras 62-63, 90. See Judgment of 28 June 2017, para. 34; ECtHR, *Avilkina and Others v. Russia*, cited above, para. 35; *Y.Y. v. Russia*, no. 40378/06, 23 February 2016, para. 49; *G.S.B. v. Switzerland*, no. 28601/11, 22 December 2015, para. 68; *L.H. v. Latvia*, no. 52019/07, 29 April 2014, para. 47.
[25] See Judgment of 26 April 2017, para. 64; ECtHR, *R.E. v. the United Kingdom*, no. 62498/11, 27 October 2015, para. 157 *in fine*; *Avilkina and Others v. Russia*, cited above, para. 37.
[26] See, for example, ECtHR, *Roemen and Schmit v. Luxembourg*, no. 51772/99, ECHR 2003-IV; *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*, no. 39315/06, 22 November 2012.

or confidential relationships specified in Rule 111(2) and (3). In particular, such information may not, as a matter of principle, be subject to investigative measures. It is only where authorised by a panel that investigative measures may be applied.

32. Furthermore, the wording that a panel's decision is needed for "investigative measures" means that a prior judicial authorisation is required not only for special investigative measures or searches and seizures but also for any other investigative measure in respect of information deriving from other professional or confidential relationships specified in Rule 111(2) and (3). It also means that even in urgent situations, such as those under Rules 36 and 38, the Specialist Prosecutor may not proceed unless a panel has authorised the respective measure.

33. In addition, Rule 31(1)(b) guarantees that the application of any investigative measure in respect of information deriving from the aforementioned professional or confidential relationships may only be considered if and to the extent that the respective information is *necessary* for the investigation. In so far as the other rules set out further conditions for undertaking certain types of investigative measures, the Chamber recalls its earlier findings in the Judgment of 28 June 2017 as to their compliance with Chapter II of the Constitution, including with the requirements of 'in accordance with the law' and 'necessity'.[27]

34. Consequently, in addition to limitations and safeguards already contained in the other provisions on investigative measures, including in Rule 31, the amendments to Rule 31(4) require a panel to assess, in the circumstances of each case, whether a certain investigative measure may be justified given the nature of the relationship at issue.

35. In that regard, the Chamber confirms that investigative measures in respect of information deriving from relationships under Rule 111(2) and (3) that is necessary

[27] See Judgment of 28 June 2017, paras 29-89.

for the investigation of the crimes within the jurisdiction of the Specialist Chambers may in principle serve to achieve the legitimate aims of the prevention of crime and the protection of the rights and freedom of others under Article 36 of the Constitution and Article 8(2) of the Convention.[28]

36. At the same time, the protection of personal information, not least on a person's health, is of fundamental importance to a person's enjoyment of his or her right to respect for privacy. The disclosure of sensitive personal information may dramatically affect a person's life. Respecting the confidentiality of personal information is a vital principle. It is crucial not only to respect the sense of privacy of a person, but also to preserve his or her confidence in the professions that Rule 31(4) concerns, including medical.

37. As regards health services in particular, the Chamber reiterates that, without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in some cases, that of the community. [29]

38. Therefore, it is essential that, a panel, in its assessment on the application of investigative measures under the amended Rule 31(4), scrutinise the requirements of necessity and proportionality so as to prevent any unjustified interference with the right to respect for privacy. Depending on the information sought, the interests in protecting its confidentiality may weigh heavily in the balance in determining whether the interference is proportionate to the legitimate aim pursued. Such interference cannot be compatible with Articles 36 and 55 of the Constitution and

[28] See *Z v. Finland*, cited above, para. 76.
[29] See ECtHR, *Avilkina and Others v. Russia*, cited above, para. 45; *Z v. Finland*, cited above, paras 95-96; *Biriuk v. Lithuania*, no. 23373/03, 25 November 2008, paras 39, 43; *Y.Y. v. Russia*, cited above, para. 38; *Y v. Turkey* (dec.), no. 648/10, 17 February 2015, para. 68.

Article 8 of the Convention unless it is justified by an overriding requirement in the public interest.

39. In this connection, the Chamber also notes that, in view of the specific circumstances of each case, it may be appropriate that a panel seek the views of the person concerned or apply such additional safeguards as may be necessary to ensure the compatibility of the interference with the guarantees in Articles 36 and 55 of the Constitution and Article 8 of the Convention.[30]

40. As regards such additional safeguards as may be necessary, the Chamber observes that the amendments to Rule 31(4), as submitted to the Chamber, do not contain the wording currently in force that "[t]he Panel may impose other safeguards as necessary". It appears that this wording has been deleted. That, however, does not prevent a panel from imposing additional safeguards.

41. In this context, it is relevant that Rule 31(4), as amended, concerns information deriving from a range of other professional or confidential relationships specified in Rule 111(2) and (3). It is thus practically impossible to set out in advance the specific safeguards that may be necessary in every scenario that may come before a panel.[31] This will depend on the specific circumstance of each case, which a panel is to subject to the most careful scrutiny with due regard to the requirements of necessity and proportionality of a measure, as also envisaged in Rule 31(1)(b) and (c) applicable to all investigative measures.[32]

42. Having regard to the foregoing, the Chamber considers that the amendments to Rule 31, as read in combination with the other rules on investigative measures previously found to be compatible with Chapter II of the Constitution, provide for

[30] See ECtHR, *Z v. Finland*, cited above, paras 96-97, 101 *et seq.*; *Avilkina and Others v. Russia*, cited above, paras 47-48. See also *Sidorova v. Russia*, no. 35722/15, 28 May 2019, para. 33.
[31] In this connection, see ECtHR, *Avilkina and Others v. Russia*, cited above, para. 35 *in fine*.
[32] Judgment of 28 June 2017, paras 30, 32-33, 35.

important limitations on application of investigative measures to information deriving from other professional or confidential relationships under Rule 111(2) and (3) and such investigative measures are accompanied by adequate safeguards against abuse.

3. Finding

43. Subject to adherence to the principles enunciated above and mindful of the obligation on the Specialist Chambers to function in accordance with Article 162(2) of the Constitution and Article 3(2) of the Law, the Chamber finds that the amendments to Rule 31 comply with Chapter II of the Constitution.

B. AMENDMENTS TO RULE 38

44. The amendments to Rule 38, as submitted to the Chamber for review, read as follows:

> **Rule 38 Search and Seizure by the Specialist Prosecutor**
>
> In accordance with Articles 35 and 39 of the Law, the Specialist Prosecutor may, without an authorisation of a Panel, search a person or property, location, premises or object and temporarily seize items found during the search under the conditions specified in Rule 37(1) to (3), if:
>
> (a) [unchanged];
>
> (b) [unchanged]; ~~**or**~~
>
> (c) [unchanged]**; or**
>
> **(d) it is necessary to collect evidence which might be in danger of loss**.

45. As with the amendments to Rule 31 considered above, the Chamber discerns that by these amendments to Rule 38(d) the plenary has addressed the Chamber's observations in its Judgment of 28 June 2017.

46. The Chamber recalls that, in the Judgment of 28 June 2017, it noted that this Rule set out the circumstances in which the Specialist Prosecutor could conduct search and seizure without a prior judicial authorisation. However, it did not contain a situation where there was "a risk of evidence being lost unless an immediate search and seizure

operation is conducted", even though it could be necessary for the Specialist Prosecutor to act in such a situation in order to comply with his or her statutory obligations. The legal basis for the Specialist Prosecutor to carry out an operation in such circumstances without a prior judicial authorisation could be found in Article 36(2) of the Constitution. In this connection, the Chamber was also guided by Article 110(3) of the Criminal Procedure Code of Kosovo No. 04/L-123 (the "CPCK"), which provided for that type of prosecution powers.[33]

47. It follows that, in its Judgment of 28 June 2017, the Chamber has already recognised this ground, now set out in the amended Rule 38(d), for conducting the search and seizure without a prior judicial authorisation. Therefore, the Chamber does not need to carry out a detailed assessment of these amendments. At the same time, the Chamber finds it appropriate to outline the following.

48. The amended Rule 38(d) does not specify that the Specialist Prosecutor may proceed without a prior judicial authorisation where there is a risk of loss of evidence *unless* the search and seizure is immediately carried out, as was stated by the Chamber in its Judgment of 28 June 2017 (see paragraph 46 above). Instead, Rule 38(d), as amended, refers to the "evidence which might be in danger of loss". However, even in case of evidence that might be in danger of loss, there could be sufficient time to request a prior judicial authorisation pursuant to Rule 37.

49. In that regard, the Chamber notes that prior judicial authorisation is an important safeguard against unjustified interference with the right to respect for privacy under Articles 36 and 55 of the Constitution and Article 8 of the Convention. Therefore, it must be sought where possible without risking losing the evidence.

50. With due regard to the above observations, the Chamber finds that the amendments to Rule 38 comply with Chapter II of the Constitution.

[33] Judgment of 28 June 2017, paras 73-76.

C. AMENDMENTS TO RULE 42

51. The amendments to Rule 42, as submitted to the Chamber for review, read as follows:

> **Rule 42 General Provision**
>
> **(1)** During an investigation by the Specialist Prosecutor, a person:
>
> (a) **shall not be compelled to confess guilt and shall not be compelled to testify when the testimony might incriminate himself or herself or persons referred to in Rule 152;**
>
> (b) – (d) [unchanged]
>
> **(2) The Specialist Prosecutor shall notify the person of his or her rights as set out in paragraph (1) in a language that he or she understands.**
>
> **(3) Any challenge to a summons, order or investigative undertaking by the Specialist Prosecutor on the basis that it adversely affects the person's rights, shall be brought before a Single Judge to be assigned pursuant to Article 25(1)(f) of the Law, if a Panel has not otherwise been assigned. Any such challenge shall be brought no later than one month from the official notification of such summons, order or investigative undertaking and acknowledgment thereof by the person concerned.**

1. Preliminary Considerations

52. The Chamber notes that Rule 42(1)(a), as amended, provides for, *inter alia*, the privilege against self-incrimination. In this respect, it concerns the constitutional rights of a person subject to a 'criminal charge', within the meaning of Article 30 of the Constitution and Article 6 of the Convention,[34] to silence and the right to not incriminate oneself under Article 30(6) of the Constitution and Article 6(1) of the Convention. As held by the Chamber in the *Decision on the referral of Mahir Hasani*, these rights are generally recognised international standards in criminal proceedings which lie at the heart of the notion of a fair procedure.[35]

[34] *Decision on the referral of Mahir Hasani*, paras 29-30; ECtHR, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, 13 September 2016, para. 249.
[35] *Decision on the referral of Mahir Hasani*, para. 27; ECtHR, *Saunders v. the United King*dom, 17 December 1996, Reports of Judgments and Decisions 1996-V, para. 68.

53. In that regard, the Chamber observes that the language of Rule 42, as currently in force, envisages the aforementioned rights. In particular, it provides that a person "shall not be compelled to incriminate himself or herself or to confess guilt". The amendments to this provision introduce a new detail that a person "*shall not be compelled* to confess guilt and […] testify *when* the testimony might incriminate himself or herself or persons referred to in Rule 152". (emphasis added) While this wording still provides for the right to silence and the right to not incriminate oneself, it states that these rights apply only in case where the testimony 'might be incriminating'. The Chamber will therefore address this specific aspect.

2. The Chamber's Assessment

54. The Chamber reiterates that the right to not incriminate oneself is primarily concerned with respecting the will of a person subject to a 'criminal charge', within the meaning of Article 30 of the Constitution and Article 6 of the Convention,[36] to remain silent. It does not extend to the use in criminal proceedings of materials which may be obtained from such person through the use of compulsory powers but which has an existence independent of the will of the accused, such as documents acquired pursuant to a warrant.[37]

55. At the same time, the right to not incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature – such as exculpatory remarks or mere information on questions of fact – may later be deployed in criminal proceedings in support of the prosecution case, for example, to contradict or cast doubt upon other statements of the accused or evidence given by him or her during the trial or to otherwise undermine

[36] *Decision on the referral of Mahir Hasani*, paras 29-30.
[37] Ibid., paras 33, 48; ECtHR, *Saunders v. the United King*dom, cited above, para. 69.

his or her credibility. It follows that what is of the essence in this context is the use to which evidence obtained under compulsion is put in the course of the criminal trial.[38]

56. In that light, the Chamber underscores with regard to the wording "might incriminate" in the amended paragraph (1)(a) of Rule 42 that this relates not only to directly incriminating remarks but also to other remarks where they are subsequently used in a manner which seeks to incriminate the accused.

3. Finding

57. Subject to adherence to the principles enunciated above and mindful of the obligation on the Specialist Chambers to function in accordance with Article 162(2) of the Constitution and Article 3(2) of the Law, the Chamber finds that the amendments to Rule 42 comply with Chapter II of the Constitution.

D. AMENDMENTS TO RULES 56 AND 57

58. The amendments to Rules 56 and 57, as submitted to the Chamber for review, read as follows:

> **Rule 56 General Provisions on Detention ~~Detention on Remand~~**
>
> (1) [1]A person subject to a detention order shall be detained in accordance with Article 41(7) of the Law. [2]In exceptional circumstances, the person may be held in facilities outside the Host State or Kosovo pending transfer. [3]In such circumstances, the Panel may, on the application of a Party and upon consultation with the Registrar, request modification of the conditions of detention or provide comments thereon. [4]The detained person shall at all times remain under the authority of the Specialist Chambers.
>
> **(2) [1]~~Before the assignment of a Pre-Trial Judge pursuant to Article 33(1)(a) of the Law, the detention of a suspect shall be reviewed by an individual Judge assigned pursuant to Article 33(2) of the Law every two (2) months or at any time earlier, upon request by the suspect or Specialist Prosecutor, or *proprio motu*.~~ [2]~~In addition to the grounds provided for in Article 41(6) of the Law, each request for an extension shall be justified by investigative measures to be taken by the Specialist Prosecutor.~~ [3]~~The total duration of the detention under this provision shall not exceed one (1) year.~~ [4]~~At the end of this period,~~**

[38] *Ibrahim and Others v. the United Kingdom* [GC], cited above, paras 268-269; *Saunders v. the United King*dom, cited above, para. 71.

~~**unless the Pre-Trial Judge has been assigned, the suspect shall be released.**~~ **The Panel shall ensure that a person is not detained for an unreasonable period prior to the opening of the case. In case of an undue delay caused by the Specialist Prosecutor, the Panel, having heard the Parties, may release the person under conditions as deemed appropriate.**

(3) Upon request by a detained person or *proprio motu*, the Panel may order the temporary release of a detained person, where compelling humanitarian grounds justify such release.

(4) A detained person shall not be released in the Third State without the consent of that State. [1]The Panel shall hear the Third State to which the detained person seeks to be released.[2] A decision shall be rendered as soon as possible and no later than three (3) days from the last submission.

(5) The Panel may impose such conditions upon the release as deemed appropriate to ensure the presence of the detained person. ~~**the Accused during proceedings, in accordance with Article 41(12)(c)-(g) of the Law.**~~

(6) Without prejudice to Article 21(4)(c) of the Law, the Panel may, upon request or *proprio motu*, rule on conditions of detention and related matters for the purposes of protecting witnesses or victims, confidential information or the integrity of the proceedings, including on the imposition of necessary and proportionate restrictions on the communications of a detained person.

Rule 57 Review and Reconsideration of Detention on Remand

(1) ***[NOTE - former Rule 56(2)]*** [1]Before the assignment of a Pre-Trial Judge pursuant to Article 33(1)(a) of the Law, the detention of a Suspect shall be reviewed by a Single Judge assigned pursuant to Article 33(2) of the Law every two (2) months or at any time earlier, upon request by the **S**uspect or **the** Specialist Prosecutor, or *proprio motu,* **where a change in circumstances since the last review has occurred**. [2]In addition to the grounds provided for in Article 41(6) of the Law, each request for an extension shall be justified by investigative measures to be taken by the Specialist Prosecutor. [3]The total duration of the detention under this provision shall not exceed one (1) year. [4]At the end of this period, unless the Pre-Trial Judge has been assigned, the Suspect shall be released.

(~~**1**~~ **2**) [1]After the assignment of a Pre-Trial Judge pursuant to Article 33(1)(a) of the Law and until a judgment is final, the Panel seized with a case shall review a decision on detention on remand upon the expiry of two (2) months from the last ruling on detention, in accordance with Article 41(6), (10), (11) and (12) of the Law **or at any time upon request by the Accused or the Specialist Prosecutor, or *proprio motu*, where a change in circumstances since the last review has occurred**. [2] ~~The Panel shall ensure that a person is not detained for an unreasonable period prior to the opening of the case. [3]In case of an undue delay caused by the Specialist Prosecutor, the Panel, having heard the Parties, may release the person under conditions as deemed appropriate.~~

~~**(2) Where new facts are discovered which render his or her continued detention unlawful, a detained person may request reconsideration of a decision on detention on remand before the Panel that rendered that decision.**~~

~~**(3 2) Subject to Article 41(6)(b) of the Law, where sufficient grounds require the release of the detained person, subject to Article 41(6)(b) of the Law, a Panel may, upon request by the detained person or *proprio motu* and having heard the Parties, at any stage of the proceedings, order the release of the detained person.**~~

~~**(4) [1]Upon request under paragraphs (2) or (3), the Panel may impose such conditions upon the release as deemed appropriate to ensure the presence of the Accused during proceedings, in accordance with Article 41(12)(c)-(g) of the Law. [2]The Panel shall hear the Third State to which the detained person seeks to be released. [3]A detained person shall not be released in the Third State without the consent of that State. [4]A decision shall be rendered as soon as possible and no later than three (3) days from the last submission.**~~

1. Preliminary Considerations

59. With regard to the amendments to Rules 56 and 57, the Chamber recalls its findings in the Judgments of 26 April 2017 and 28 June 2017 that these provisions on detention engage the fundamental right to liberty guaranteed by Article 29 of the Constitution and Article 5 of the Convention.[39]

60. The Chamber further observes that these amendments do not significantly change the substance of the provisions currently in force, which the Chamber has already found to be compatible with Chapter II of the Constitution. The Chamber's assessment will thus address certain aspects requiring a closer scrutiny.

2. The Chamber's Assessment

(a) Period of Detention

61. The Chamber notes that the requirement that a panel shall "ensure that a person is not detained for an unreasonable period prior to the opening of the case" has been moved from paragraph (2) of Rule 57 to paragraph (2) of Rule 56, as amended. In this

[39] Judgment of 26 April 2017, paras 109, 112; Judgment of 28 June 2017, para. 94.

connection, the Chamber also observes that Rule 56, as amended, is entitled 'General Provisions on Detention'. While this title suggests that Rule 56 provides for general requirements on detention, under its paragraph (2) the obligation on a panel to ensure that a period of time spent in detention is reasonable is specified with regard to a period "prior to the opening of the case" only.

62. In this respect, the Chamber reiterates that, in determining the length of detention pending trial for the purposes of Article 29(2) of the Constitution and Article 5(3) of the Convention, the period to be taken into consideration begins on the day the accused is taken into custody and ends when he or she is released or the charge is determined, even if only by a panel of first instance.[40] Furthermore, Article 29(2) of the Constitution and Article 5(3) of the Convention cannot be seen as authorising pre-trial detention unconditionally provided that it lasts no longer than a certain minimum period. Justification for any period of detention must be convincingly demonstrated by a panel.[41]

63. In that light, the Chamber underscores that the amended paragraph (2) of Rule 56 on 'General Provisions on Detention' must not be read in isolation from the aforementioned general principles. Consequently, it does not limit in any way the general obligation on a panel to ensure that the time spent in detention is reasonable, including after the opening of a case.

(b) Review of Detention

64. The Chamber notes that paragraphs (1) and (2) of Rule 57, as amended, provide for review of detention before and after the assignment of a pre-trial judge upon the filing of an indictment. No significant changes to the substance of these provisions

[40] ECtHR, *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, 5 July 2016, para. 85; *Velečka and Others v. Lithuania*, nos. 56998/16 and 3 others, 26 March 2019, para. 95; *Štvrtecký v. Slovakia*, no. 55844/12, 5 June 2018, para. 55; *Solmaz v. Turkey*, no. 27561/02, 16 January 2007, paras 23-24.
[41] See Judgment of 26 April 2017, paras 113-115; ECtHR, *Idalov v. Russia* [GC], no. 5826/03, 22 May 2012, para. 140; *Belchev v. Bulgaria*, no. 39270/98, 8 April 2004, para. 82; *Smirnova v. Russia*, nos. 46133/99 and 48183/99, ECHR 2003-IX, para. 62.

emerge. At the same time, the Chamber observes that, at the end of the first sentence of these provisions, the wording has been added that links review of detention to "a change in circumstances since the last review has occurred".

65. In this regard, the Chamber recalls that, in the Judgment of 26 April 2017, it emphasised the importance of both the procedural and substantive lawfulness of detention, for the purposes of Article 29 of the Constitution and Article 5 of the Convention.[42] The Chamber reiterates that, for detention to be lawful under Article 29 of the Constitution and Article 5 of the Convention, it must also be effected in conformity with the applicable substantive and procedural provisions.[43]

66. Given that the new wording on "change in circumstances" concerns review of detention, the relevant provision in the Law is Article 41(10), which must be observed for detention to be lawful. The Chamber notes in particular that Article 41(10) of the Law provides for review of detention at two-month intervals "[u]ntil a judgment is final or until release". It also provides that such review is required in order to "extend" detention. Hence, upon the expiry of two months a person must be released unless a competent panel decides to extend the detention for a further two months.[44]

67. In that light, the new wording in paragraphs (1) and (2) of Rule 57 on "change in circumstances" applies to review of detention in between the two-month intervals "upon request by the Suspect [or the Accused] or the Specialist Prosecutor, or *proprio motu*". Such review ensures that new relevant factors that arise in the intervals between reviews of detention can be assessed, especially where they might affect the lawfulness of or the justification for the accused's continued detention.

[42] Judgment of 26 April 2017, para. 198.
[43] See ECtHR, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, ECHR 2012, para. 230; *Baranowski v. Poland*, no. 28358/95, ECHR 2000-III, para. 51.
[44] In this connection, see ECtHR, *Tase v. Romania*, no. 29761/02, 10 June 2008, paras 40-41; *Smirnova v. Russia*, cited above, paras 58-59.

68. As regards the review of detention every two months, it follows from Article 41(10) of the Law that such review is automatic. Further, it must be carried out with regard to detention before and after the assignment of a pre-trial judge upon filing of an indictment. As noted above, Article 41(10) of the Law provides for review "[u]ntil a judgment is final or until release", which includes the period of detention before the assignment of a pre-trial judge.

(c) Conditions on Release

69. With regard to the amendments to Rules 56 and 57, the Chamber observes that, as with the Rules currently in force, the amendments continue to provide a possibility for a panel to "impose such conditions upon the release as deemed appropriate to ensure the presence of the detained person" under the amended Rule 56(5). The possibility to release a person under conditions as deemed appropriate is also retained in the amended Rule 56(2).

70. Indeed, Article 41(12) of the Law provides for a range of more lenient measures that may be ordered to ensure the presence of the accused during proceedings, to prevent his or her reoffending or to ensure successful conduct of criminal proceedings. These measures include house arrest and promise not to leave the place of residence. In fact, as stated by the Chamber in the Judgment of 26 April 2017, to fully comply with the constitutional standards, a panel must consider more lenient measures when deciding whether a person should be detained.[45]

71. As the Chamber indicated in the Judgment of 26 April 2017, despite the requirement on a panel to consider other more lenient measures, the Rules contained no provisions in respect of how such measures were to be applied.[46] The Chamber observes that the Rules, as amended, still contain no such provisions. In this

[45] Judgment of 26 April 2017, para. 114. See ECtHR, *Buzadji v. the Republic of Moldova* [GC], cited above, para. 87 *in fine*; *Idalov v. Russia*, cited above, para. 140; *Jablonski v. Poland*, no. 33492/96, 21 December 2000, para. 83.
[46] Judgment of 26 April 2017, para. 116.

connection, the Chamber notes that, unlike the Rules, the CPCK contains detailed provisions on how various more lenient measures are to be applied. In particular, Section 3 of Chapter X includes provisions on, for example, bail in Articles 179 to 182, house detention in Article 183, and prohibition on approaching a specific place or person in Article 177.

72. It is relevant that Article 162(6) of the Constitution provides that "[t]he Specialist Chambers may determine its own Rules of Procedure and Evidence […] and be guided by the Kosovo Code of Criminal Procedure".[47] Also Article 19(2) of the Law provides that "[i]n determining its Rules of Procedure and Evidence, the Specialist Chambers shall be guided by the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123". Despite this requirement on the Specialist Chambers to be guided by the CPCK, the Rules, in contrast to the CPCK, lack provisions on how more lenient measures are to be applied.

73. Furthermore, the Chamber points out that the application of more lenient measures may engage certain fundamental rights and freedoms, for example, the right to liberty under Article 29 of the Constitution and Article 5 of the Convention in case of house arrest,[48] or the freedom of movement under Article 35 of the Constitution and Article 2 of Protocol No. 4 to the Convention in case of measures restricting a person's movement.[49]

74. For the interference with the fundamental rights and freedoms to be compatible with the Constitution, it must meet the relevant constitutional standards. These may include certain requirements on the quality of law, including on its accessibility and

[47] See Judgment of 28 June 2017, para. 75.
[48] See ECtHR, *Buzadji v. the Republic of Moldova* [GC], cited above, paras 103-104; *Süveges v. Hungary*, no. 50255/12, 5 January 2016, para. 77; *Lavents v. Latvia*, no. 58442/00, 28 November 2002, para. 63.
[49] See ECtHR, *Buzadji v. the Republic of Moldova* [GC], cited above, para. 103; *De Tommaso v. Italy* [GC], no. 43395/09, 23 February 2017, paras 88-91. See also Kosovo, Constitutional Court, *Valon Bislimi against Ministry of Internal Affairs, Kosovo Judicial Council and Ministry of Justice*, KI 06/10, Judgment, 22 September 2010 (30 October 2010), paras 63-67.

foreseeability.[50] Given that the Rules lack detailed provisions on the application of more lenient measures, it must be ensured that no interference incompatible with the Constitution occurs in case of more lenient measures engaging the constitutional rights. To fully comply with the constitutional standards in such cases, a panel may also need to consider the relevant conditions in Article 41(12) of the Law or, as appropriate, Article 41(6).[51]

3. Finding

75. Subject to adherence to the principles enunciated above and mindful of the obligation on the Specialist Chambers to function in accordance with Article 162(2) of the Constitution and Article 3(2) of the Law, the Chamber finds that the amendments to Rules 56 and 57 comply with Chapter II of the Constitution.

E. AMENDMENTS TO RULE 143

76. The amendments to Rule 143, as submitted to the Chamber for review, read as follows:

> **Rule 143 Examination of Witnesses**
>
> (1) [unchanged]
>
> (2) With leave of the Panel, a Party who called a witness may question that witness about the following matters, where relevant to the witness's credibility:
>
> (a) [unchanged];
>
> (b) [unchanged]; and
>
> (c) whether the witness has, at any time, made a prior inconsistent statement. **Any such prior inconsistent statement may be admissible for the purpose of assessing the credibility of the witness, as well as for the truth of its contents or for other purposes within the discretion of the Panel.**
>
> (3) – (4) [unchanged]

77. The amendments to paragraph 2(c) of Rule 143 concern the admission into evidence of a witness's prior inconsistent statement. It is most likely that such a

[50] See, for example, ECtHR, *De Tommaso v. Italy* [GC], cited above, paras 104-109.
[51] See, for example, ECtHR, *Buzadji v. the Republic of Moldova* [GC], cited above, para. 113.

statement will have been made in the accused's absence. In this regard, the Chamber recalls the right of a person charged with a criminal offence to examine witnesses against him or her under Article 31(4) of the Constitution and Article 6(3)(d) of the Convention. This right is a specific aspect of the right to a fair trial set forth in Article 31(2) of the Constitution and Article 6(1) of the Convention, which must be taken into account in any assessment of the fairness of proceedings.[52]

78. The Chamber further reiterates that all evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use in evidence of statements obtained at other stages of the proceedings, including investigation, is not in itself incompatible with Article 31(2) and (4) of the Constitution and Article 6(1) and (3)(d) of the Convention provided that the rights of the defence have been respected. As a rule, these rights require that the accused be given an adequate and proper opportunity to challenge and question a witness against him or her either when that witness is making a statement or at a later stage of the proceedings.[53]

79. It follows that, in case the accused did not have an adequate and proper opportunity to challenge and question a witness against him or her when that witness was making the statement in the amended Rule 143(2)(c), the accused must as a general rule be given such an opportunity at a later stage of the proceedings. This opportunity, the Chamber observes, is specifically provided for in Rule 143(3).

80. In so far as the amended Rule 143(2)(c) entails a possibility for a panel to use a prior *inconsistent* statement as evidence, the ECtHR has clarified that, in convicting an accused, a court may use statements which a witness made at the stage of

[52] ECtHR, *Schatschaschwili v. Germany* [GC], no. 9154/10, ECHR 2015, para. 100; *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011, para. 118; *Lucà v. Italy*, no. 33354/96, ECHR 2001-II, paras 37-38. See *Decision on the referral of Driton Lajci*, paras 14, 21.
[53] See Judgment of 26 April 2017, para. 189; ECtHR, *Schatschaschwili v. Germany* [GC], cited above, paras 103, 105; *Al-Khawaja and Tahery v. the United Kingdom* [GC], cited above, para. 118; *Lucà v. Italy*, cited above, paras 39-40.

investigation and later retracted in open court, provided that the defence had the opportunity to cross-examine the witness at the trial. Indeed, it cannot be hold in the abstract that evidence given by a witness in open court and on oath should always be relied on in preference to other statements made by the same witness in the course of criminal proceedings, even when the two are in conflict. It is for a panel to assess the credibility of a witness and make a choice between competing versions of the truth, subject to the constitutional requirement that the trial be fair.[54]

81. With due regard to the above observations, the Chamber finds that the amendments to Rule 143 comply with Chapter II of the Constitution.

F. OTHER AMENDMENTS

82. The Chamber has examined the other amendments to the Rules as to their compliance with Chapter II of the Constitution, in particular the amendments to Rules 2, 16, 25, 27, 29, 43, 63, 65, 78, 79, 82, 85, 93, 94, 100, 101, 102, 113, 115, 125, 145, 151, 155, 208. The Chamber finds that these amendments do not raise any issue requiring a closer scrutiny. These amendments, as phrased, comply with Chapter II of the Constitution, including its Article 55.

[54] ECtHR, *Camilleri v. Malta*, no. 51760/99, 16 May 2000. See also ECtHR, *Bosti v. Italy* (dec.), no. 43952/09, 13 November 2014, paras 35-47; *Berardi and Others v. San Marino* (dec.), nos. 24705/16, 24818/16 and 33893/16, 1 June 2017, paras 73-79.

FOR THESE REASONS,

The Specialist Chamber of the Constitutional Court, unanimously,

1. *Declares* the Referral admissible;

2. *Holds* that the amendments to Rules 2, 16, 25, 27, 29, 31, 38, 42, 43, 56, 57, 63, 65, 78, 79, 82, 85, 93, 94, 100, 101, 102, 113, 115, 125, 143, 145, 151, 155, 208 comply with Chapter II of the Constitution.

Vidar Stensland
Presiding Judge

Done in English on Friday, 22 May 2020
At The Hague, the Netherlands