



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2018-01
Before: Single Judge
Judge Nicolas Guillou
Registrar: Dr Fidelma Donlon
Date: 17 September 2020
Language: English
Classification: Strictly Confidential and *Ex Parte*

Decision Authorising a Seizure

Specialist Prosecutor
Jack Smith

THE SINGLE JUDGE¹ is seized of the Specialist Prosecutor’s strictly confidential and *ex parte* “Prosecution request for order authorising seizure of documents” (“Request”), filed on Wednesday, 16 September 2020, and hereby renders his decision.

I. PROCEDURAL BACKGROUND

1. On 16 September 2020, the Specialist Prosecutor’s Office (“SPO”) submitted a strictly confidential and *ex parte* request for the seizure of documents currently believed to be in possession of the Kosovo Liberation Army War Veterans Association (“KLA WVA”).²

II. SUBMISSIONS

2. The SPO submits that the KLA WVA, on 16 September 2020, claims to have received a package containing documents allegedly relating to the Special Investigative Task Force (“SITF”) and/or the SPO, including documents relating to SITF/SPO cooperation with the Serbian authorities and witness statements (“Documents”).³ The SPO further submits that unauthorised access to and distribution of the Documents poses an immediate potential risk to investigations and witnesses.⁴

3. Accordingly, the SPO requests the Single Judge to:

- (a) grant the Request, order Hysni Gucati (“Mr Gucati”) and/or the KLA WVA to immediately produce and hand over the Documents to the SPO, and authorise the seizure of the Documents;⁵

¹ KSCPR-2018, F00004, President, *Decision Assigning a Single Judge Pursuant to Article 33(2) of the Law*, 29 May 2018, strictly confidential and *ex parte*.

² KSC-BC-2018-01, F00122, Specialist Prosecutor, *Urgent Prosecution request for order authorising seizure of documents*, 16 September 2020, strictly confidential and *ex parte*.

³ Request, para. 1.

⁴ Request, para. 1.

⁵ Request, para. 5(a)-(c).

- (b) authorise the SPO, as a competent authority, for service and execution of the order;⁶
- (c) order Mr Gucati, the KLA WVA, and any other individual in possession of the Documents and/or their content to refrain from recording or copying, in whatever form, and further disseminating, by whatever means of communication, the Documents or their content;⁷ and
- (d) caution Mr Gucati or any other individual who is in possession of the Documents and/or their content that, should they obstruct the execution of the decision authorising the requested seizure or violate its conditions, this may constitute an offence under the 2019 Criminal Code of Kosovo, No. 06/L-074, by virtue of Article 15(2) of the Law.⁸

III. APPLICABLE LAW

- 4. Pursuant to Article 39(3) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), at the request of the Specialist Prosecutor, the Single Judge may issue any orders as may be required for the conduct of the investigation and for the preparation of a fair and expeditious trial.
- 5. Pursuant to Rules 31 and 37 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), the search of a person, his or her property, or other locations or objects as well as the seizure of any evidence therefrom may be authorised if:

- (a) There is a reasonable expectation of privacy with respect to the places to be searched and items to be seized;⁹

⁶ Request, para. 5(d).

⁷ Request, paras 4, 5(e).

⁸ Request, para. 5(f).

⁹ Rule 37(2) of the Rules. *See also*, KSC-CC-PR-2017-03, F00006, Constitutional Court Chamber, *Judgment on the Referral of Revised Rules of Procedure and Evidence Adopted by Plenary on 29 May 2017 to the Specialist*

- (b) In relation to the seizure of objects, it is necessary to preserve evidence of a crime within the jurisdiction of the Specialist Chambers and there is grounded suspicion that such evidence is on the location or premises or object;¹⁰
- (c) The seizure is necessary,¹¹
- (d) The seizure is unavoidable, i.e. in the specific circumstances the evidence may not be otherwise obtained and the requested seizure appears to be the only effective means for the purposes of the investigation;¹² and
- (e) The resulting interference with the person's rights to the personal integrity, privacy or property is proportionate to the legitimate aim of the investigation.¹³

6. According to Rule 37(4) of the Rules, any decision authorising seizure shall include: (a) the time, duration and scope of its execution, including an indication of the person or property, location, premises or object in relation to which the measure is authorised; and (b) the procedure for reporting on its implementation and the seized material in accordance with Rule 31(2) of the Rules.

7. Pursuant to Rule 39(1) and (2) of the Rules, the seizure must be executed in the presence of the person concerned, unless he or she cannot be found or refuses to attend the seizure, and if the delay in execution would jeopardise the investigation or the safety or property of a witness, victim or other person at risk. The Specialist Prosecutor must also: (a) provide the person concerned with the decision authorising the seizure;

Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Constitutional Court Chamber 28 June 2017 Judgment"), 28 June 2017, para. 69.

¹⁰ Rule 37(2)(c) of the Rules.

¹¹ Rule 31(1)(b) of the Rules.

¹² Rule 37(1) of the Rules. *See also*, KSC Constitutional Court Chamber 28 June 2017 Judgment, paras 62, 67.

¹³ Rule 31(1)(c) of the Rules.

(b) inform the person of his or her rights; (c) ensure the presence of counsel, unless the person waives this right or counsel's presence cannot reasonably be awaited; and (d) ensure the presence of an independent observer to the seizure.

8. Pursuant to Rule 32(1) of the Rules, any material seized shall be appropriately retained, stored and protected. The Panel authorising such seizure shall indicate: (a) the procedure and precautions for the storage, protection, and transfer of the seized material; (b) the duration of the retention of the seized material; and (c) instructions and a timeline for the return or destruction of the seized material.

9. Article 35(3) of the Law provides that the police within the SPO has the authority and responsibility to exercise powers given to Kosovo Police under Kosovo law. Pursuant to Article 53(1) of the Law, all entities and persons in Kosovo shall comply without undue delay with any request for assistance, order or decision issued by the Specialist Chambers. Pursuant to Rule 202(2) of the Rules, the Single Judge may impose any conditions deemed necessary, including relating to confidentiality and protective measures. Any such order shall be complied with without undue delay, pursuant to Article 53(1) of the Law and Rule 202(3) of the Rules.

IV. DISCUSSION

A. REQUIREMENTS OF SEARCH AND SEIZURE

10. The Request involves the seizure of the Documents, which are believed to be in possession of Mr Gucati and/or the KLA WVA, according to information publicly released by the KLA WVA itself.¹⁴ As the Documents were received in a package left at the premises of the KLA WVA, the Single Judge considers that such premises, located in Rruga Uçk 77, Pristina, Kosovo,¹⁵ may entail a reasonable expectation of privacy. Accordingly, the protections set out in the Law and Rules shall apply.

¹⁴ Request, para. 1.

¹⁵ Request, para. 2.

11. According to the Request, by KLA WVA's own admission during a press conference on 16 September 2020, the Documents appear to contain information related to current investigations of the SPO, including documents relating to SITF/SPO cooperation with Serbian authorities and witness statements.¹⁶ Therefore, there is a grounded suspicion that the execution of the requested measure will result in the seizure of evidence and material that is part and parcel of the SPO investigations, including for offences under Article 15(2) of the Law. Accordingly, by their very nature, the seizure of the Documents is necessary to such investigations, in particular to preserve evidence of crimes under the jurisdiction of the Specialist Chambers and to protect the integrity of the investigation and ensure the safety, security, and well-being of witnesses.

12. As concerns the requirement of unavoidability, the Single Judge notes that, according to the information publicly released by the KLA WVA, the Documents include sensitive information, which are typically non-public. That said, their receipt was publicised by the KLA WVA in a press conference.¹⁷ The combination of these circumstances renders the execution of the seizure particularly urgent, as the Documents may not otherwise be obtained and, thus, their seizure is the only effective means of obtaining them.

13. Finally, regarding the proportionality of the resulting interference with Mr Gucati's rights or any other person present at the KLA WVA *vis-à-vis* the legitimate aim of the investigation, the Single Judge has considered, *inter alia*, the anonymous and unsolicited provision of the Documents, the sensitive nature of the information in possession of Mr Gucati and/or the KLA WVA, the duration and scope of the requested measures, and any safeguards to be implemented.¹⁸ Considering the content of the Documents, the legitimate aim of the investigation is the overall prosecution of

¹⁶ Request, para. 1.

¹⁷ Request, para. 1.

¹⁸ KSC Constitutional Court Chamber 28 June 2017 Judgment, para. 64.

persons responsible for crimes within the jurisdiction of the Specialist Chambers, including under Article 15(2) of the Law. With regard to the safeguards to be implemented, the Single Judge recalls that, as enshrined in Rules 31-33 and 39 of the Rules, the SPO is duty-bound to take appropriate measures with respect to the rights to personal integrity, privacy or property. Accordingly, to the extent that its execution abides by the conditions set forth in the Rules and this decision, the Single Judge finds that the requested seizure is proportionate to the legitimate aim of the investigation.

14. Having found that the aforementioned conditions have been met, the Single Judge authorises the requested seizure as it complies with the requirements of Rules 31 and 37 of the Rules.

B. TIME, DURATION, AND SCOPE OF THE SEIZURE

15. With regard to the timeframe for the execution of the requested seizure, the Single Judge considers, on the one hand, the urgency of the requested measure caused by the public announcement of the KLA WVA, the sensitive nature of the information in possession of the KLA WVA, and the time necessary for the SPO to organise the requested seizure, and on the other hand, Mr Gucati's reasonable expectation of privacy as well as the need for judicial oversight of the execution of these measures. Accordingly, the Single Judge finds that five days from the issuance of the present decision are sufficient for the execution of the requested seizure.

16. The scope of requested seizure must be limited to: (i) material received by Mr Gucati and/or the KLA WVA in the afternoon of Wednesday, 16 September 2020; and (ii) any related material of similar nature that may be received between the issuance of the present decision and the execution of the requested seizure.

C. REPORTING ON THE SEARCH AND SEIZURE

17. In accordance with Rules 31(2) and 37(4)(b) of the Rules, the SPO is required to report on the execution of the requested measures. Taking in consideration the time needed to prepare a report following the execution of the requested measure, the SPO must submit a report within 14 days of the completion of the requested seizure or within 14 days of the lapse of the five-day timeframe provided for the execution of the requested seizure, whichever is earlier. The report shall indicate: (i) the date, time, duration, location, scope, and circumstances of the seizure; and (ii) the fulfilment of the requirements under Rule 39 of the Rules.

D. RETENTION, STORAGE, AND PROTECTION OF SEIZED MATERIAL

18. The Single Judge considers it necessary for the SPO to store, protect, and transfer the seized material, in accordance with the standard chain of custody procedures. In so doing, the SPO must take appropriate measures to protect the seized material against loss, accidental or unauthorized access, alteration, dissemination or destruction. The SPO shall inform the Single Judge on the appropriate procedure and precautions for the storage and protection of the material seized in a report.

19. The Single Judge finds that a four-month timeframe from the execution of the requested seizure is sufficient for the review of the relevance of the seized material. If such material is deemed relevant to the investigation or future proceedings, the SPO may, in accordance with Rule 33(1)(b) of the Rules, retain the material until it is no longer relevant for the purpose for which it was obtained. The seized material will then have to be returned or destroyed pursuant to Rule 33(2)-(3) of the Rules. If the seized material falls outside the scope of the investigation for which it was obtained, and is not relevant for the investigation of any other crime under the jurisdiction of the Specialist Chambers, then the seized material must be returned or destroyed immediately, in accordance with Rule 33(1)(a)(i) and (2)-(3) of the Rules.

E. EXECUTION AND SERVICE OF THE REQUESTED ORDER

20. As the requested seizure is to take place in Kosovo, the Single Judge recalls that, pursuant to Article 35(3) of the Law, the police within the SPO has the authority and responsibility to exercise powers given to Kosovo Police under Kosovo law. Therefore, the SPO may also be considered a “competent authority” under Rule 49(1) of the Rules capable of executing and serving orders of the Specialist Chambers, including the requested seizure. Accordingly, the Single Judge authorises the SPO to serve and to execute the present decision.¹⁹ Where necessary, the SPO may do so in cooperation with the competent authorities in Kosovo.

F. NON DISSEMINATION OF THE DOCUMENTS

21. Considering the sensitive nature of the Documents and the concrete risk that their further dissemination by Mr Gucati and/or the KLA WVA may entail to the safety, security and well-being of the witnesses as well as to the integrity of the SPO investigations, the Single Judge considers it appropriate, pursuant to Article 39(3) of the Law, to order Mr Gucati, the KLA WVA, and any other individual who is in possession of the Documents and/or their content, to refrain from recording or copying, in whatever form, and further disseminating, by whatever means of communication, the Documents or their content.

¹⁹ Notifying the present order to the Specialist Prosecutor, the transmission is deemed fulfilled, in accordance with Rule 49(1) of the Rules.

V. DISPOSITION

22. For the above reasons, the Single Judge hereby:

- a. **AUTHORISES** the requested seizure of the Documents in possession of Hysni Gucati and/or the KLA WVA, located in Rruga Uçk 77, Pristina, Kosovo, as specified in paragraph 16 above;
- b. **AUTHORISES** the SPO to disclose this decision as appropriate and necessary for its execution; and
- c. **ORDERS** Hysni Gucati, the KLA WVA, and any other individual who is in possession of the Documents and/or their content, to refrain from recording or copying, in whatever form, and further disseminating, by whatever means of communication, the Documents or their content.

23. As the requested seizure is to take place in Kosovo, the Single Judge **AUTHORISES** the SPO to serve and to execute this decision pursuant to paragraphs 15-16 and 20 mentioned above and in accordance with Rule 39 of the Rules.

24. Irrespective of where the requested seizure takes place, the Single Judge:

- a. **ORDERS** the SPO to report on the execution of the seizure within 14 days of its completion or within 14 days of the lapse of the five-day timeframe provided for its execution, whichever is earlier, in accordance with paragraph 17 of this decision;
- b. **ORDERS** the SPO to store, retain, and protect the seized material and to report on the procedure and precautions for the storage and protection, in accordance with paragraph 18 of this decision; and
- c. **ORDERS** the SPO to review the relevance of the seized material within four-months from the execution of the requested seizure and to retain, return or destroy the seized material as prescribed by Rule 33 of the Rules, in accordance with paragraph 19 of this decision.

25. The Single Judge cautions Hysni Gucati or any other individual who is in possession of the Documents and/or their content that, should they obstruct the execution of the present decision or violate its conditions, this may constitute an offence under the 2019 Criminal Code of Kosovo, No. 06/L-074, by virtue of Article 15(2) of the Law.



Judge Nicolas Guillou
Single Judge

Dated this Thursday, 17 September 2020

At The Hague, the Netherlands.