



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2018-01
Before: **Single Judge**
Judge Nicolas Guillou
Registrar: Dr Fidelma Donlon
Date: 24 September 2020
Language: English
Classification: **Public**

**Public Redacted Version of
Decision Authorising Search and Seizure**

Specialist Prosecutor
Jack Smith

Counsel for Hysni Gucati
Jonathan Elystan Rees
Huw Bowden

Counsel for Nasim Haradinaj
Toby Cadman
Carl Buckley

THE SINGLE JUDGE,¹ pursuant to Articles 39(3), 53, 54, and 55 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 31, 32, 33, 37, 39, and 208(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders the following decision.

I. PROCEDURAL BACKGROUND

1. On 22 September 2020, the Specialist Prosecutor's Office ("SPO") submitted a request for the issuance of an arrest warrant and corresponding transfer order against Hysni Gucati ("Mr Gucati"), head of the Kosovo Liberation Army War Veterans Association ("KLA WVA").² The SPO also requested, *inter alia*, that the Single Judge authorise search and seizure with respect to the person of Mr Gucati, the location of his arrest, and the KLA WVA offices.³

2. On 23 September 2020, the SPO supplemented the aforementioned request with information concerning Mr Gucati's personal details and the location of the KLA WVA offices.⁴

3. On 24 September 2020, the Single Judge issued an arrest warrant for Mr Gucati ("Arrest Warrant").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, F00125, Specialist Prosecutor, *Request for Arrest Warrants and Related Orders*, 22 September 2020 ("Request"), strictly confidential and *ex parte*, with Annexes 1-2, strictly confidential and *ex parte*.

³ Request, paras 3, 27-30, 35(b).

⁴ KSC-BC-2018-01, F00127, Specialist Prosecutor, *Urgent Supplemental Submission Related to Filing KSC-BC-2018-01/F00125*, 23 September 2020 ("Supplemental Submission"), strictly confidential and *ex parte*, with Annex 1, strictly confidential and *ex parte*.

⁵ KSC-BC-2018-01, F00128/A01, Single Judge Panel, *Arrest Warrant for Hysni Gucati*, 24 September 2020, strictly confidential and *ex parte*.

II. SUBMISSIONS

4. Along with the issuance of an arrest warrant against Mr Gucati, the SPO requests that the Single Judge authorise the SPO and/or the authorities executing the arrest warrant, in cooperation with the SPO, to: (a) search the person of Mr Gucati, his location of arrest, and the KLA WVA offices; and (b) seize any evidence that is believed to be connected with or may be evidence relevant to offences under Article 15(2) of the Law and Articles 387, 388, and 392 of the 2019 Criminal Code of Kosovo, No. 06/L-074 (“Criminal Code”), including alleged material of the Special Investigative Task Force (“SITF”) and/or the SPO and any evidence of recent efforts to interfere with the administration of justice (“Requested Search and Seizure”).⁶ The SPO indicates that the items to be seized may include the following: copies of documents, photographs, video and audio recordings, as well as computers, telephones, copying machine hard drives, and other devices that reasonably could be expected to contain relevant evidence.⁷

5. The SPO submits that there is a grounded suspicion that Mr Gucati has committed crimes within the Specialist Chambers’ jurisdiction as well as a grounded suspicion that he may have evidence necessary to the investigation on his person or in his office or at the location of arrest.⁸

6. The SPO further submits that, in light of the risks of interference and obstruction,⁹ any evidence in Mr Gucati’s possession will not otherwise be obtained and search and seizure in connection with arrest is the only effective means of obtaining the evidence for the purposes of the investigation.¹⁰

⁶ Request, paras 2, 27.

⁷ Request, para. 27(b).

⁸ Request, para. 28.

⁹ Request, paras 21-23.

¹⁰ Request, para. 28.

7. The SPO submits that the resulting interference with Mr Gucati's privacy and property rights is proportionate to the legitimate aim of the investigation and does not negate the essence of those rights.¹¹

8. Lastly, the SPO requests that retention of any evidence seized be authorised for the time necessary to review it, and, if the evidence is deemed relevant, authorisation be given for such further period as may be necessary for investigations and proceedings.¹²

III. APPLICABLE LAW

9. Pursuant to Rules 31 and 37 of the Rules, the search of a person, their 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;¹³
- (b) In relation to searches of places and objects, there is grounded suspicion that (i) a person has committed, is committing or is about to commit a crime within the jurisdiction of the Specialist Chambers;¹⁴ and (ii) the search will result, *inter alia*, in the discovery and seizure of evidence necessary for the investigation. In relation to the search of a person, there is grounded suspicion that the search will result in the discovery

¹¹ Request, para. 29.

¹² Request, para. 30.

¹³ 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 Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office*, 28 June 2017 ("KSC Constitutional Court Chamber 28 June 2017 Judgment"), para. 69.

¹⁴ Rule 37(2)(a) of the Rules.

of evidence of a crime within the jurisdiction of the Specialist Chambers and seizure thereof;¹⁵

- (c) The search is necessary for the investigation;¹⁶
- (d) The investigative measure is unavoidable, i.e. in the specific circumstances the evidence may not be otherwise obtained and the requested search and seizure appears to be the only effective means for the purposes of the investigation;¹⁷ and
- (e) The resulting interference with the person's right to personal integrity, privacy or property is proportionate to the legitimate aim of the investigation and does not negate the essence of the guaranteed right.¹⁸

10. According to Rule 37(4) of the Rules, any decision authorising search and 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.

11. Pursuant to Rule 39(1) and (2) of the Rules, the search and seizure must be executed in the presence of the person concerned, unless he or she cannot be found or refuses to attend the search, 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 search and seizure; (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

¹⁵ Rule 37(3) of the Rules.

¹⁶ Rule 31(1)(b) of the Rules.

¹⁷ Rule 37(1) of the Rules. *See also*, KSC Constitutional Court Chamber 28 June 2017 Judgment, paras 62-67.

¹⁸ Rule 31(1)(c) of the Rules.

cannot reasonably be awaited; and (d) ensure the presence of an independent observer to the search and seizure.

12. 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.

13. 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.

14. In accordance with Article 55 of the Law and Rule 208(1) of the Rules, the Single Judge may request the cooperation and assistance of a Third State as is necessary for the investigation and prosecution of persons accused of having committed crimes within the jurisdiction of the Specialist Chambers.

IV. DISCUSSION

A. REQUIREMENTS OF SEARCH AND SEIZURE

15. The Requested Search and Seizure involves a search of Mr Gucati's person, location of arrest, and the offices of the KLA WVA, an organisation headed by Mr Gucati. The Single Judge considers that, while Mr Gucati's location of arrest is not known at this point in time, the place of arrest may entail a reasonable expectation of

privacy.¹⁹ Also, as previously noted, the offices of the KLA WVA, located on all floors except the ground floor of the building located on Rruga Uçk 77, Pristina, Kosovo,²⁰ may entail a reasonable expectation of privacy.²¹ Accordingly, the protections set out in the Law and Rules shall apply.

16. For the purposes of the search of Mr Gucati's location of arrest and of the KLA WVA's offices and related seizure of items, the Single Judge recalls that there is a grounded suspicion that Mr Gucati committed offences under the jurisdiction of the Specialist Chambers.²² Furthermore, the Single Judge finds that, in light of the above, there is a grounded suspicion that the Requested Search and Seizure regarding Mr Gucati's location of arrest and the KLA WVA offices may result in evidence that is necessary for the SPO investigation into the aforementioned offences. In addition, the Single Judge finds that there is grounded suspicion that such evidence may be found at Mr Gucati's location of arrest and in the KLA WVA offices. For the purposes of the search of Mr Gucati, since he is alleged to have committed offences within the jurisdiction of the Specialist Chambers, the Single Judge finds grounded suspicion that the search may result in the discovery and seizure of evidence related to such crimes. In light of the foregoing, the Single Judge finds that there is grounded suspicion warranting the Requested Search and Seizure.

17. Moreover, given that Mr Gucati's location of arrest and the KLA WVA offices may contain relevant information that relates to the offences contained in the Arrest Warrant, the Single Judge finds that the Requested Search and Seizure is necessary for the SPO investigation. Likewise, the search of Mr Gucati is necessary because, in the context of his arrest, he may attempt to hide on his person such evidence. In light of the foregoing, the Single Judge finds that the Requested Search and Seizure is

¹⁹ See, KSC Constitutional Court Chamber 28 June 2017 Judgment, para. 69.

²⁰ Supplemental Submission, para. 2.

²¹ See also, KSC-BC-2018-01, F00121, Single Judge, *Urgent Decision Authorising a Seizure*, 7 September 2020, strictly confidential and *ex parte*, para. 10; F00123, Single Judge, *Decision Authorising a Seizure*, 17 September 2020, strictly confidential and *ex parte*, para. 10.

²² Arrest Warrant, pp. 1-2.

necessary for the SPO investigation of the offences contained in the Arrest Warrant and any future proceedings.

18. As concerns the requirement of unavailability, the Single Judge notes that Mr Gucati has publicly expressed his opposition to and non-recognition of the Specialist Chambers²³ and recalls that there is a grounded suspicion that he is criminally responsible for the offences of intimidation during criminal proceedings, retaliation, and violating the secrecy of proceedings pursuant to Articles 387, 388, and 392 of the Criminal Code.²⁴ It is reasonable to believe that his publicly expressed opposition to and non-recognition of the Specialist Chambers and his willingness to obstruct proceedings through the aforementioned offences is demonstrative of a willingness to interfere with evidence. Accordingly, the Single Judge finds that any evidence in Mr Gucati's possession may not otherwise be obtained and the Requested Search and Seizure in the context of his arrest may be the only effective means of obtaining the evidence.

19. Finally, regarding the proportionality of the resulting interference with Mr Gucati's rights *vis-à-vis* the legitimate aim of the investigation, the Single Judge may consider, *inter alia*, the gravity of the offences contained in the Arrest Warrant, the duration and scope of the requested measures, and any safeguards to be implemented.²⁵ The legitimate aim of the investigation is the prosecution of Mr Gucati for the offences contained in the Arrest Warrant and related investigation. With regard to the safeguards to be implemented, the Single Judge takes note of the fact 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. Equally important is the SPO assurance that it will tailor the execution of the Requested Search and Seizure and/or provide the necessary information and

²³ Request, para. 10; KSC-BC-2018-01, F00125/A01, Annex 1 to Request, pp. 13, 17-18.

²⁴ Arrest Warrant, pp. 1-2.

²⁵ KSC Constitutional Court Chamber 28 June 2017 Judgment, para. 64.

instructions to any other authorities assisting in executing it to ensure that it is conducted in a manner that excludes information of no foreseeable relevance and in accordance with the safeguards outlined in Rule 39 of the Rules.²⁶ 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 Search and Seizure is proportionate to the legitimate aim of the investigation.

20. Having found that the aforementioned conditions have been met, the Single Judge authorises the Requested Search and Seizure as it complies with the requirements of Rules 31 and 37 of the Rules.

B. TIME, DURATION, AND SCOPE OF THE SEARCH AND SEIZURE

21. The SPO does not indicate the timeframe for the execution of the search of Mr Gucati, the location of his arrest, and the KLA WVA offices, and the related seizure of items. Nonetheless, it is clear from the Request that the Requested Search and Seizure is to take place in the context of Mr Gucati's arrest. Balancing, on the one hand, the time-sensitive nature of the investigative acts and the time necessary for the SPO, or any other relevant authorities, to organise the Requested Search and 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, the Single Judge finds that 14 days from Mr Gucati's arrest are sufficient for the execution of the Requested Search and Seizure.

22. The scope of the Requested Search and Seizure must be limited to any evidence that is believed to be connected with or may be evidence relevant to the offences contained in the Arrest Warrant, including alleged material of the SITF, the SPO, and/or the Specialist Chambers and any evidence of recent efforts to interfere with the administration of justice. Items to be seized may include: copies of documents,

²⁶ Request, para. 29.

photographs, video and audio recordings, as well as computers, telephones, copying machine hard drives, and other devices that reasonably could be expected to contain relevant evidence.

C. REPORTING ON THE SEARCH AND SEIZURE

23. 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 into 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 Search and Seizure or within 14 days of the lapse of the 14-day timeframe provided for the execution of the Requested Search and Seizure, whichever is earlier. The report shall indicate: (a) the date, time, duration, location, scope, and circumstances of the search and seizure; and (b) the fulfilment of the requirements under Rule 39 of the Rules.

D. RETENTION, STORAGE, AND PROTECTION OF SEIZED MATERIAL

24. 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.

25. The Single Judge finds that a four-month timeframe from the execution of the Requested Search and 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 related to the offences contained in the Arrest Warrant, 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

26. If the execution of the Requested Search and Seizure or any part thereof 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 Search and Seizure. Accordingly, the Single Judge authorises the SPO to serve and to execute the present decision.²⁷ Where necessary, the SPO may do so in cooperation with the competent authorities in Kosovo.

27. If the execution of the Requested Search and Seizure or any part thereof is to take place in a Third State, the Single Judge requests, pursuant to Article 55 of the Law and Rule 208(1) of the Rules, the competent authorities to serve and execute the present decision in the presence of representatives of the SPO.

28. The SPO submits that it may impose on Mr Gucati a temporary prohibition on the use of non-essential electronic communications at the site of any search and seizure.²⁸ Since this condition affects the rights of Mr Gucati during the Requested Search and

²⁷ Notifying the present decision to the Specialist Prosecutor, the transmission is deemed fulfilled, in accordance with Rule 49(1) of the Rules.

²⁸ Request, footnote 28.

Seizure, the Single Judge considers it necessary to assess and, if necessary, include this condition in the present decision.

29. The Single Judge considers that, in order to ensure the integrity of the investigation and related proceedings, as well as the safety of those present during the execution of the Requested Search and Seizure, the SPO or the authorities assisting in the execution may impose on Mr Gucati a temporary prohibition on the use of non-essential means of electronic communication throughout the execution of the Requested Search and Seizure or any part thereof.

V. DISPOSITION

30. For the above reasons, as concerns **Hysni Gucati**, head of the Kosovo Liberation Army War Veterans Association, born 30 March 1967, of Kosovan nationality (personal number [REDACTED]), with last known residence at [REDACTED], Kosovo, the Single Judge hereby:

- a. **AUTHORISES** the Requested Search and Seizure relating to the search of Mr Gucati, the location of his arrest, and the Kosovo Liberation Army War Veterans Association offices located on all floors except the ground floor of the building located on Rruga Uçk 77, Pristina, Kosovo, as well as the seizure of any evidence that is believed to be connected with or may be evidence relevant to the offences contained in the Arrest Warrant, including alleged material of the SITF, the SPO, and/or the Specialist Chambers and any evidence of recent efforts to interfere with the administration of justice, as further specified in paragraph 22 of this decision;
- b. **AUTHORISES** the SPO or the authorities assisting in the execution of the Requested Search and Seizure to impose on Mr Gucati a temporary prohibition on the use of non-essential means of electronic

communication throughout the execution of the Requested Search and Seizure or any part thereof; and

- c. **AUTHORISES** the SPO or the Registrar, as the case may be, to disclose, as appropriate and necessary, including to the authorities executing the Requested Search and Seizure, this decision.

31. If the Requested Search and Seizure or any part thereof is to take place in Kosovo, the Single Judge **AUTHORISES** the SPO to serve and to execute this decision pursuant to paragraphs 21-22 and 26 mentioned above and in accordance with Rule 39 of the Rules.

32. If the Requested Search and Seizure or any part thereof is to take place in a Third State, the Single Judge:

- a. **DIRECTS** the Registrar to transmit this decision to the competent authorities for service and execution;
- b. **DIRECTS** the SPO to consult with the Registrar on the necessary arrangements to be made for the execution and service of this decision;
- c. **REQUESTS** the competent authorities to carry out the Requested Search and Seizure, in the presence of an SPO representative and under the following conditions, where such conditions do not interfere with applicable domestic law:
 - i. The Requested Search and Seizure to be completed, within 14 days from the arrest of Mr Gucati;
 - ii. To permit Mr Gucati, his counsel, and an independent observer to be present during the execution of the Requested Search and Seizure, unless their delay jeopardises the execution of the measure;

- iii. To impose on Mr Gucati a temporary prohibition on the use of non-essential means of electronic communication throughout the duration of the execution of the Requested Search and Seizure;
 - iv. To permit the SPO representative present to record the time, duration, scope, and all other relevant details of the execution of this decision as well as to prepare an inventory with a detailed description of and information regarding each item seized; and
 - v. The seized material, which may include copies of documents, photographs, video and audio recordings, as well as computers, telephones, copying machine hard drives, and other devices that reasonably could be expected to contain relevant evidence, to be transferred to and be retained, stored and protected by the SPO;
- d. **REQUESTS** the competent authorities to raise any technical or logistical difficulties or impediments in the execution of this decision with the SPO representative present during the execution of the Requested Search and Seizure; and
- e. **REQUESTS** the competent authorities to treat the Requested Search and Seizure as confidential and only to disclose the existence of this decision and its contents to those entities and persons whose involvement is strictly necessary for executing the Requested Search and Seizure.

33. Irrespective of where the Requested Search and Seizure or any part thereof takes place, the Single Judge:

- a. **ORDERS** the SPO to report on the execution of the Requested Search and Seizure within 14 days of its completion or within 14 days of the lapse of the 14-day timeframe provided for its execution, whichever is earlier, in accordance with paragraph 23 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 24 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 Search and Seizure and to retain, return or destroy the seized material as prescribed by Rule 33 of the Rules, in accordance with paragraph 25 of this decision.



Judge Nicolas Guillou
Single Judge

Dated this Thursday, 24 September 2020

At The Hague, the Netherlands.