

1 Wednesday, 26 April 2017

2 The Hague, Netherlands

3 Kosovo Specialist Chambers - Constitutional Court

4 [Judgment]

5 [Open Session]

6 --- Upon commencing at 12.07 p.m.

7 THE COURT USHER: All rise. Please be seated.

8 JUDGE POWER-FORDE: Court Officer, could you please call on the
9 case.

10 THE COURT OFFICER: In the matter of the Referral of the Rules
11 of Procedure and Evidence, file number KSC-CC-PR-2017-01.

12 JUDGE POWER-FORDE: Good afternoon. Mirëdita. Dobar dan.

13 I declare open this hearing for the delivery of the Judgment of
14 the Specialist Chamber of the Constitutional Court in the case of a
15 Referral of the Rules of Procedure and Evidence, pursuant to Article
16 19(2) of Law No. 05/L-053, on Specialist Chambers and Specialist
17 Prosecutor's Office, hereinafter "the Law".

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

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

24 Procedure.

25 The Rules of Procedure and Evidence which govern the functioning

1 of the Kosovo Specialist Chambers were adopted by the Plenary of the
2 Judges of the Kosovo Specialist Chambers (the 'Plenary') on 17 March
3 2017 (the "Rules").

4 On 27 March 2017 the Rules were referred to the Specialist
5 Chamber of the Constitutional Court pursuant to Article 19(5) of the
6 Law. Pursuant to Article 33(3) of the Law, the three Judges of the
7 Specialist Chamber of the Constitutional Court were assigned as a
8 Panel to conduct a review of the Rules. The Reserve Judge was also
9 assigned.

10 Background.

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

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

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

24 I shall now provide a brief summary of the Judgment which the
25 Court adopted today, 26 April 2017, and I shall thereafter read out

1 its operative provisions. This summary is not part of the Judgment
2 and shall not bind the Specialist Chamber of the Constitutional
3 Court. For a synopsis of the Court's review of the Rules and its
4 reasoning, I refer you to the press release which will be available
5 at the end of this hearing. The full text of the Judgment will also
6 be available and may be consulted on the Specialist Chambers'
7 internet site.

8 The Case.

9 The case referred to the Specialist Chamber of the
10 Constitutional Court raises the question as to whether the Rules of
11 Procedure and Evidence as adopted by the Plenary are consistent with
12 Chapter II of the Constitution, including Article 55. Chapter II of
13 the Constitution deals with fundamental rights and freedoms.

14 At the outset the Court determined that the referral was
15 admissible, it having been made in accordance with the Law. In
16 conducting its review of the Rules, the Court was guided by Article
17 19(2) of the Law which requires that the Rules reflect the highest
18 standards of human rights law with a view to ensuring a fair and
19 expeditious trial.

20 The Court interpreted each rule on the basis of the actual
21 language of the text as adopted by the Plenary. To the extent
22 possible, the Court incorporated the doctrine of harmonious
23 interpretation into its review of the Rules. Where the plain meaning
24 of the text permitted, the Court proceeded on the assumption that the
25 provision of an individual rule should not be construed in isolation

1 from other parts of the rules but rather should be construed so as to
2 harmonize therewith.

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

10 Findings.

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

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

19 Rule 19(3).

20 Insofar as this rule permitted a hearing to continue before two
21 Members of the Panel in the absence of its third Member, the Court
22 found that such a hearing was not a hearing before a tribunal
23 established by law as is required under Article 31(2) of the
24 Constitution. The reasons for this finding are set forth in the
25 Judgment but focus essentially upon what the Law requires in relation

1 to the composition of Panels of the Kosovo Specialist Chambers.

2 Rules 31, 32, and 33.

3 Rules 31, 32, and 33 have been found by the Specialist Chamber
4 of the Constitutional Court to be inconsistent with the fundamental
5 right to privacy under Article 36 of the Constitution as qualified by
6 Article 55 thereof.

7 These rules provide for the authorization of special
8 investigative measures, including the interception of private
9 communications. In the Court's view, they fail to contain the
10 requisite and minimum safeguards necessitated by the highest
11 standards of human rights law. The Rules do not specify the
12 categories of persons to whom the measures may be applied; they
13 lacked sufficient precision in terms of the duration of the
14 intercepted communications; and they contained inadequate safeguards
15 relating to the retention and destruction of data obtained under such
16 measures. The Court found that these rules as adopted did not meet
17 the quality of law requirement under Article 55 of the Constitution
18 and they were incapable of demonstrating that the permitted
19 interference was kept to what was necessary in a democratic society.

20 Rule 35(1) and Rule 35(3).

21 Rule 35 provides for search and seizure operations to be
22 conducted by the Specialist Prosecutor in the absence of prior
23 judicial authorization. The Court confirms that a clear legal
24 framework and strict limits on such powers are required if persons
25 are to be protected from arbitrary interference by the authorities

1 with the constitutionally protected right to respect for privacy.

2 The Court found that the powers accorded to the Specialist
3 Prosecutor pursuant to Rule 35(1)(b) and 35(1)(c) were excessively
4 extensive and did not meet the necessity requirements laid down in
5 Article 36(2) of the Constitution. It further found that the ex post
6 facto judicial review provided for in Rule 35(3) did not provide for
7 the inclusion of an assessment as to the proportionality of the
8 measure and thus did not confine the impact of the aforementioned
9 searches and seizures to what was necessary in a democratic society.

10 Rule 36(1) and Rule 36(2).

11 Rule 36 is concerned with the execution of search and seizure
12 operations. The Court found that Rule 36(1) and Rule 36(2) were not
13 formulated with the requisite degree of precision as to their
14 applicability and operation. They therefore did not comply with the
15 quality of law requirement inherent in the term "by law" as provided
16 by Article 55(1) of the Constitution.

17 Rule 38(1) and Rule 38(5).

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

23 Rule 38(1) provided the power to the Specialist Prosecutor to
24 order an expert examination for the collection of hair, saliva, or
25 other swab samples which can be undertaken without bodily intrusion.

1 The Court considered that insofar as this provision permitted
2 the collection of hair, saliva, or other swab samples from a person
3 as distinct from an object with which the person had been in contact,
4 such collection could not be undertaken without bodily intrusion,
5 however minor such intrusion may be. In the absence of sufficient
6 safeguards governing circumstances where a person withheld his or her
7 consent to the collection of hair, saliva, or other swab samples, the
8 Court found that Rule 38(1) was inconsistent with the requirement of
9 necessity under Article 55(2) of the Constitution.

10 The Court also found that Rule 38(5) was inconsistent with the
11 Constitution insofar as it provided for the retention, for some
12 considerable time, of all materials, including cellular samples
13 collected from a person, without any particular assessment of the
14 necessity therefor arising from the specific circumstances in each
15 case. The Court found that the retention of such bodily materials
16 failed to strike a fair balance between the competing public and
17 private interests at stake in contravention of Article 55(4) of the
18 Constitution.

19 Rule 54.

20 Rule 54 contains provisions governing the review and
21 reconsideration of detention on remand. The Court found that
22 paragraph (4) of Rule 54 called for scrutiny and further clarity. On
23 a plain reading, the provision would make the release of a detained
24 person entirely dependent upon the consent of the third state even in
25 circumstances where a Panel had found sufficient grounds requiring

1 the release of a detainee. The Court concluded that on its face this
2 specific provision of Rule 54(4) was inconsistent with Article 29 of
3 the Constitution.

4 Rule 158(2).

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

11 Rule 134(3).

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

15 The effective date of this Judgment is today.

16 Operative provisions.

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

19 (1) Declares unanimously that the Referral is admissible;

20 (2) Holds unanimously that Rule 31; Rule 32; Rule 33; Rule
21 35(1)(b) and (c) and (3); Rule 36(1) and (2); Rule 38(1) and (5);
22 Rule 54(4) are inconsistent with Chapter II of the Constitution;

23 (3) Holds by majority that Rule 19(3) and Rule 158(2) are
24 inconsistent with Chapter II of the Constitution;

25 (4) Holds unanimously that it is unable to declare Rule 134(3)

1 to be consistent with Chapter II of the Constitution; and

2 (5) Holds unanimously that the remaining provisions of the Rules
3 are not inconsistent with Chapter II of the Constitution.

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

6 --- Whereupon the hearing adjourned at 12.23 p.m.

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