

1 Wednesday, 28 June 2017

2 The Hague, Netherlands

3 Kosovo Specialist Chambers - Constitutional Court

4 [Judgment]

5 [Open Session]

6 --- Upon commencing at 12.00 p.m.

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

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

10 THE COURT OFFICER: The Specialist Chamber of the Constitutional  
11 Court of the Kosovo Specialist Chambers, Judge Ann Power-Forde  
12 presiding; Dr. Fidelma Donlon, Registrar; and myself, Riaz Haider,  
13 Court Officer; in the matter of file number KSC-CC-PR-2017-03,  
14 Referral of the Revised Rules of Procedure and Evidence, pursuant to  
15 Article 19(5) of the Law.

16 JUDGE POWER-FORDE: Good afternoon. Mirëdita. Dobar dan.  
17 Introduction.

18 I declare open this Hearing for the delivery of the Judgment of  
19 the Specialist Chamber of the Constitutional Court in the case of the  
20 Referral of the Revised Rules of the Rules of Procedure and Evidence  
21 pursuant to Article 19(5) of the Law No. 05/L-053 on Specialist  
22 Chambers and Specialist Prosecutor's Office (the 'Law').

23 The President of the Kosovo Specialist Chambers, the Judges of  
24 the Plenary and the public, generally, have been duly informed of the  
25 date and the time of this hearing.

1           The Presiding Judge of the Plenary from which this Referral was  
2           made is the President of the Kosovo Specialist Chambers and I welcome  
3           her in the name of the Constitutional Court Panel.

4           Procedure.

5           The Rules of Procedure and Evidence which govern the functioning  
6           of the Kosovo Specialist Chambers were adopted by the Plenary of the  
7           Judges of the Kosovo Specialist Chambers (the 'Plenary') on 17 March  
8           2017 (the 'Rules').

9           On 27 March 2017, the Rules were referred to the Specialist  
10          Chamber of the Constitutional Court (the 'Court') pursuant to Article  
11          19(5) of the Law for a review as to their compliance with Chapter II,  
12          including Article 55, of the Constitution of the Republic of Kosovo  
13          (the 'Constitution').

14          By a Judgment of 26 April 2017, the Court found that nine out of  
15          208 rules were inconsistent with Chapter II of the Constitution and  
16          that it was unable to declare one rule to be consistent with Chapter  
17          II of the Constitution.

18          The Referral.

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

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

24          Background.

25          The Specialist Chamber of the Constitutional Court was

1 established within the existing Constitutional Court of the Republic  
2 of Kosovo and exercises, through its constitutional review of the  
3 Rules of Procedure and Evidence, a supervisory jurisdiction over the  
4 Specialist Chambers and the Specialist Prosecutor's Office and is,  
5 thus, an additional guarantor of the Constitution.

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

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

12 I shall now provide a brief summary of the Judgment which the  
13 Court adopted today, 28 June 2017, and I shall, thereafter, read out  
14 its operative provisions.

15 This summary is not part of the Judgment and shall not bind the  
16 Specialist Chamber of the Constitutional Court. A copy of this  
17 synopsis will be available at the end of this hearing.

18 The full text of the Judgment will also be available on the  
19 Specialist Chambers' Internet site.

20 The Case.

21 The case referred to the Specialist Chamber of the  
22 Constitutional Court raises the question as to whether the Revised  
23 Rules are consistent with Chapter II of the Constitution of the  
24 Republic of Kosovo. Chapter II of the Constitution deals with  
25 'Fundamental Rights and Freedoms'.

1           At the outset, the Court determined that the application was  
2           admissible, it having been made in accordance with the Law.

3           In reviewing the Revised Rules, the Court was guided by Article  
4           19(2) of the Law which requires that the Rules reflect the highest  
5           standards of international human rights law with a view to ensuring a  
6           fair and expeditious trial.

7           Preliminary Observations.

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

15          The Court finds it necessary to underscore that the object of  
16          its Judgment of 26 April 2017 was not to place restrictions,  
17          generally, upon the Specialist Prosecutor's investigative capacities.  
18          To do so could risk frustrating the Specialist Prosecutor in the  
19          exercise of his or her statutory obligations. Rather, the Court's  
20          findings were aimed at ensuring that where the exercise of  
21          prosecutorial investigative powers encroaches upon constitutionally  
22          guaranteed fundamental human rights and freedoms, such exercise must  
23          be subject to adequate safeguards and, where necessary, judicial  
24          oversight and control. In this way, an appropriate balance is to be  
25          achieved between the competing private and public interests in issue.

1 Findings.

2 Rule 19(3) - Absence of a Judge.

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

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

8 Rule 30 and Rule 31 - General Provisions and General Minimum  
9 Safeguards.

10 The Court observes that the Plenary has introduced, into Rule  
11 30, a '*Chapeau-type*' regulation containing a number of 'General  
12 Provisions' applicable to all investigations and which, *inter alia*,  
13 oblige the Specialist Prosecutor to act at all times in a manner  
14 consistent with fundamental human rights.

15 It also notes that the Plenary has adopted a new provision, Rule  
16 31, providing for certain 'General Minimum Safeguards' that are to  
17 apply to all investigative measures that may infringe upon human  
18 rights. Such measures may be authorised and conducted only when  
19 'necessary for the investigation,' when the resulting interference is  
20 'proportionate to the legitimate aim of the investigation' and when  
21 it 'does not negate the essence of the guaranteed right'.

22 The Court welcomes these additional provisions designed to  
23 secure the enhanced protection of fundamental human rights and it is  
24 satisfied that they give effect to the necessary constitutional  
25 requirements. It, therefore, finds that Rule 30 and Rule 31 are not

1 inconsistent with Chapter II of the Constitution.

2 Rule 32 and Rule 33 - Retention, Storage, Protection, Return and  
3 Destruction of Material Collected or Seized.

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

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

15 The Court acknowledges that significant time and expertise would  
16 be required in order to develop detailed procedures as to how, for  
17 example, cellular data, recordings of private communications or other  
18 sensitive materials are to be 'appropriately retained'.

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

25 However, the Court finds that, on their face, the provisions of

1 Rules 32 and 33 are not inconsistent with Chapter II of the  
2 Constitution.

3 Rule 34 - Conditions for Undertaking Special Investigative  
4 Measures.

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

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

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

15 Rule 35 and Rule 36 - Special Investigative Measures Authorised  
16 by a Panel or Ordered by the Specialist Prosecutor.

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

1 and the necessary judicial control and supervision of the execution  
2 of the measure.

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

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

8 Rule 37 and Rule 38 - Search and Seizure Authorised by a Panel  
9 or Ordered by the Specialist Prosecutor.

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

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

15 The Court underscores that when interpreting and applying Rule  
16 37, in practice, the Panel, while ensuring that any interference is  
17 'in accordance with the law', should bear in mind the fair balance  
18 that is to be struck between the rights to personal integrity and  
19 privacy, on the one hand, and the necessity for the Specialist  
20 Prosecutor to conduct an effective investigation, on the other.

21 Rule 38 requires the Specialist Prosecutor to consider the  
22 necessity of a search and seizure operation and the proportionality  
23 of the resulting interference. Furthermore, it provides for an *ex*  
24 *post facto* judicial review dealing with issues relating to both the  
25 legality and proportionality of the measure. The Court is satisfied



1 that the Plenary has addressed the findings made in its Judgment of  
2 26 April 2017.

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

5 Rule 39 - Execution of Search and Seizure.

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

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

20 While several rules contain minimum safeguards in the area of  
21 technical infiltration, the Court regards remote searches as a highly  
22 intrusive method of investigation which will call for stricter  
23 conditions in order to ensure that the resulting interference remains  
24 within the confines of what is constitutionally permissible. The  
25 Court considers that the Plenary may wish to give consideration to

1 such matters at a future date. However, it finds that, on their  
2 face, the existing provisions of Rule 39 are not inconsistent with  
3 Chapter II of the Constitution.

4 Rule 41 - Collection of Bodily Material for Expert Examination.

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

10 Rule 57(4) - Review and Reconsideration of Detention on Remand.

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

14 Rule 137 - General Provisions.

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

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

20 Rule 161 - Status of the Acquitted Person.

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

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

1 Operative Provisions.

2 For these reasons, the Court, unanimously:

3 1. *Declares* that the Referral is admissible;

4 2. *Holds* that Rules 19, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39,  
5 41, 57, 137 and 161 are not inconsistent with Chapter II of the  
6 Constitution;

7 3. *Holds* that the Rules of Procedure and Evidence before the  
8 Kosovo Specialist Chambers comply with Chapter II of the  
9 Constitution.

10 Effective Date.

11 This Judgment is effective immediately.

12 This concludes this afternoon's hearing and, accordingly, I  
13 declare it closed.

14 THE COURT USHER: All rise.

15 --- Whereupon the hearing adjourned at 12.41 p.m.

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