

**DISSENTING OPINION OF THE JUDGE VALDETE DAKA in the criminal matter
PML.no.Kzz.no.98/2016**

On 10 May 2016, in a panel composed by EULEX judges at the Supreme Court we reviewed the criminal matter PML.no.Kzz.no.98/2016 regarding the request for protection of legality filed by the defense counsel Sejdiu and Qerkini Law firm against the ruling of the Court of Appeals Pn.no.162/2016, dated 9 March 2016. I hereby dissent my opinion from other members of the panel regarding permissibility of filing a request for protection of legality against the ruling of the Court of Appeals by which the judge, President of the Basic Court of Mitrovica ordered the transfer of the convicted **HT** from Clinical University Center of Kosovo (CUCK) in Prishtina to the High Security Prison in Podujevo.

In this criminal matter, by the judgment of the Basic Court of Mitrovica P.no.58/2014 dated 27 May 2015, the convicted **HT** was found guilty of war crimes and was sentenced to an aggregate punishment of seven (7) years of imprisonment, a decision which is at the appeal stage pending decision of the Court of Appeals, regarding the appeal filed against this ruling.

The convicted, during his stay in detention on remand in the Detention Center in Dubrava, on 23 September 2015 upon his request and with the permission of the Basic Court of Mitrovica was hospitalized in the infectious diseases clinic at the CUCK due to the health problems, whereas on 7 December 2015 the same was seen leaving the clinic unaccompanied by the officers, and on 16 December 2015 an international doctor performed a medical examination of the convicted and found that he does not suffer from any disease and that he has no medical reasons to continue to stay in the hospital. On 18 February 2016, the President of the Basic Court of Mitrovica ordered immediate transfer of the convicted from CUCK to the High Security Prison in Podujevo, whereas on 9 March 2016 the Court of Appeals rejected the appeal against this order.

Defense of the convicted, Sejdiu and Qerkini Law firm filed a request for protection of legality alleging that relevant provisions of the Criminal Procedure Code and the Law on execution of the criminal sanctions were violated, without specifying which provisions were violated.

The State Prosecutor of Kosovo, by submission KMLP.II.ZZZK.II.no.68/2016 dated 14.4.2016, proposed to dismiss the request for protection of legality as impermissible, as the provisions of the CPCK prescribed clear rules as to when a judicial decision may be challenged through a request for protection of legality.

I base by opinion in the following facts:

Article 432 of the CPCK in paragraph 1 prescribes: A request for protection of legality against a final judicial decision or against judicial proceedings which preceded the rendering of that decision may, after the proceedings have been completed in a final form, be filed , and paragraph 4 stipulates that Notwithstanding the provisions under paragraph 1 of the present Article, a request for protection of legality may be filed during criminal proceedings which have not been completed in a final form only against final decisions ordering or extending detention on remand.

From this legal provision it results that filing of the request for protection of legality against decisions which have not been completed in a final form or against decisions which are not related to ordering or extending detention on remand, is impossible.

Moreover, request for protection of legality does not specify at all the violations of the Criminal Procedure Code or the Criminal Law, because the provision of the article 432 par. 1 item 1.1, 1.2 and 1.3 of the CPCK itself, prescribes the grounds on which a request for protection of legality may be filed, and in the concrete case the request does not mention the alleged provisions that have been violated.

Interpretation of the judges who had opposing opinion that this matter is related to human rights and fundamental freedoms of an individual does not stand at all, because also by the European Convention on Human Rights and Freedoms it is foreseen that there should be two instances against any judicial decision, and in the concrete case from the case files it is confirmed that the convicted was given the opportunity to appeal the decision of the first instance court, therefore also these provisions have been complied with.

Based on the above, I consider that the request for protection of legality should be dismissed as impermissible pursuant to the provision of the article 434 par. 2 item 2.1 of the CPCK.

Judge
Valdete Daka