

SUPREME COURT

Case number: PML-KZZ 106/2017

**(P. no. 98/14 Basic Court of Mitrovica)
(PAKR no. 299/16 Court of Appeals)**

Date: 24 May 2017 _____

The Supreme Court of Kosovo, in a Panel composed of EULEX Judge Jorge Martins Ribeiro (presiding and reporting), EULEX Judge Elka Filcheva-Ermenkova and Kosovo Supreme Court Judge Nesrine Lushta, as Panel members, assisted by EULEX Legal Adviser Vjollca Kroci-Gerxhaliu, in the criminal case against:

O.I., subject to the restrictive measures set in Articles 177 of the Criminal Procedure Code, hereinafter CPC, (prohibition of approaching specific persons or places) and 178 CPC (attendance at the police station) with his travel documents apprehended by the court, and

charged under the Indictment of the Special Prosecution office of the Republic of Kosovo PPS 04/2013, dated 8 August 2014, and filed with the Basic Court on 11 August 2014, and as far this request for protection of legality is concerned, he was accused of

(Count one)

- 1) War Crimes Against Civilian Population** in serious violation of Article 3 § 1(a) Common to the four Geneva Conventions of 12 August 1949, relating to the Protection of Civilian Persons in Time of War, and Article 4 § 2(a) of the Additional Protocol II relating to the protection of Victims of Non-International Armed Conflicts of 8 June 1977, pursuant to Article 152 § 1 and 2.1 in conjunction with Articles 16 and 32 of the Criminal Code of Kosovo

(hereinafter, CCK) and criminalized also at the time of the commission of the offence under Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia dated 28th September 1976 (CCSFRY);

convicted by **Judgment of the Basic Court of Mitrovica** P. no. 98/14, dated 30 March 2016, as follows:

O.I. was found guilty of **Count 1**, criminal offence of **War crimes against the civilian population** criminalised under Article 142 of the Criminal Code of the Federal Republic of Yugoslavia (CCFRY) and in violation of Article 3 § 1 (a) Common to the four Geneva Conventions of 12 August 1949 relating to the Protection of Civilian Persons in Time of War and Article 4 § 2 (a) of the Additional Protocol II relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977.

The defendant O.I. was sentenced to 9 years of imprisonment. He was also ordered to reimburse the sum of 750 Euros as part of the costs of the criminal proceedings.

By the **Judgment of the Court of Appeals** dated 19 December 2016, adjudicating on the appeals filed by the Prosecution and by the defendant and by his defence counsel, the Court of Appeals (PAKR 299/16), partially granted the appeals of the defence, rejected the appeal of the Prosecution as unfounded and, consequently, the judgment of the Basic Court of Mitrovica was annulled in relation to count one and the case was returned for retrial on this count; the judgment was confirmed in relation to counts two and three.

Acting upon the Request for Protection of Legality KMLP/I no. 17/2017 (hereinafter: Request) concerning the Judgment of the Court of Appeals PAKR 299/16, dated 19 December 2016, in relation to count one, filed by a State Prosecutor on 11 April 2017 and received at the Supreme Court through the Basic Court of Mitrovica on 28 April 2017;

having considered the Reply of the defense counsel dated 27 April 2017 to the Request by a State Prosecutor on count one of the Court of Appeals Judgment PAKR 299/16 dated 19 December 2016;

having deliberated and voted on 24 of May 2017;

pursuant to Articles 418 and Articles 432 to 441 of the Criminal Procedure Code (CPC);

renders the following:

RULING

The Supreme Court dismisses the Request for Protection of Legality Judgment filed against the Court of Appeals Judgment PAKR 299/16, dated 19 December 2016, in relation to count one, as it is not admissible pursuant to Article 435, paragraph 2, CPC in conjunction with Article 432, paragraph 1, CPC read together with article 418, paragraph 3, CPC as the request is, furthermore, premature as the case has got no final decision nor the proceedings have been completed in a final form.

REASONING

Relevant Procedural Background

1 – The above mentioned charge was initially adjudicated in the criminal case P. no. 98/2014 of the Basic Court of Mitrovica. By the Judgment rendered on 21 January 2016 the Defendant was found guilty of the said criminal offense and sentenced to 9 (nine) years of imprisonment.

2 – Following the appeals of both the Prosecution and the defendant and his defence counsel, on 19 December 2016, the Court of Appeals rendered Judgment PAKR 299/16. By this Judgement, the appeal of the defense was partially granted, the appeal of the Prosecution rejected as

ungrounded, and the Judgment of the Basic Court of Mitrovica in P. no. 98/2014 was annulled in relation to count 1 and the case was returned for retrial of this count to the Basic Court of Mitrovica.

3 – On 11 April 2017, a State Prosecutor filed this Request for Protection of Legality KMLP/I no. 17/2017 against the said Judgment of the Court of Appeals in relation to the adjudication on count one with regards, in sum, for having sent the case for retrial rather than amending itself the state of the facts, pursuant Article 403 CPC.

4 – The Basic Court of Mitrovica served the Request to the Defence on 13 April 2017 and the defence filed its reply on 27 April (stamped on 28) 2017.

5 – The request was transferred to the Supreme Court on 28 April 2017.

6 – In this case, following the entry into force of Law 05/L-103, it is not necessary to ask KJC again, based on Article 3, paragraph 5, of the said Law, for permission to have the panel composed of a majority of EULEX Judges with an EULEX Judge Presiding because the previous request (on 22/8/2016 PEJ (0107-0001) for such throughout the entire course of the proceedings was granted on 27 September 2016 (KGJK 1123/2016). With regards the mentioned KJC decision, it is worth noting that no reference is made to the protection of legality. However, it starts by approving the request of EULEX (and it comprised also the requests for protection of legality) and in the reasoning of the decision there is nothing in the sense that the requests for protection of legality are excluded).

Submissions of the Parties

State Prosecutor's submission

Request for Protection of Legality against the Judgment of the Court of Appeals with regards count 1

The State Prosecutor opposes the findings of the Court of Appeals in its Judgment according to which count 1 of the charge against **O.I.** should be sent back for retrial due to the fact that the enacting clause of the

impugned Judgment is in contradiction with itself and with the reasoning part of the Judgment.

He moves the Supreme Court of Kosovo to declare that Judgment of the Court of Appeals PAKR 299/16 violated the provisions of Article 384 (1.12) in conjunction with Article 370 (7) of the CPC, because it failed to state clearly the reasons by which it was guided in setting the abovementioned points of law; violated the provisions of Article 5 (1) and (2) of CPC, Article 402 and 403 of CPC as well as Article 22 (2) of Constitution; violated Article 6 (1) of ECHR because sent the case for retrial instead of modifying the enacting clause of the Judgment of the Basic Court of Mitrovica (where, according to the Prosecution, “the Appeals Panel clearly understood from the reasoning of the Judgment the first instance court’s intention to convict O.I. for co-perpetration”, this because “only if the enacting clause remains incomprehensible or inconsistent after being read in connection with the statement of grounds, it can be declared unlawful and the judgment annulled”), and because the court wrongly assessed and processed the issues related to the factual situation (as “the Appeals Panel should have instead applied Article 403 of the CPC and adjusted the enacting clause of the first instance judgment to correspond with the reasoning of the first instance judgment”, also because “Article 403 of the CPC is designed to avoid retrials if the appeals court is able to correct the mistakes of the first instance judgment”).

Reply of the defense counsel on count one of the Prosecutor’s request

Defence counsel in his reply moves the Supreme Court of Kosovo to dismiss the Request for Protection of Legality filed by the State Prosecutor as inadmissible pursuant to Article 435 (2) of CPC on three grounds:

- a) It was not filed by the authorised person since the Request for protection of Legality can be filed only by the Chief State Prosecutor of the Republic of Kosovo and not Special Prosecutor of Kosovo (pursuant to Article 433, paragraph 1, CPC);

- b) A Request for Protection of Legality can be filed only against the final judicial decision, or due to a violation of judicial proceedings which preceded the rendering of that decision, after the proceedings have been completed in a final form, and
- c) The request, if admitted, is ungrounded, as the Court of Appeals did not violate Articles 402 and 403 CPC.

Competence and the composition of the panel

The Supreme Court of Kosovo is competent court to adjudicate upon the extraordinary legal remedies, as per Articles 418 *et seq.* CPC.

In accordance with the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo - Law no 03/L-053 as amended by the Law no. 04/L-273 and 05/L-103, the case is considered as an ‘on going case’ and consequently falls under the jurisdiction and competence of EULEX judges, in accordance with Articles 1, paragraphs 1 and 2, and 3, paragraph 5, Law 05/L-103 with its current amended wording.

The composition of the panel with a majority of EULEX judges, presided by a EULEX Judge in this case is based on the KJC Decision No. KGJK 1123/2016, dated 27 September 2016, as mentioned above.

Admissibility of the request

The request in this ongoing EULEX case was filed by a Prosecutor of the Office of the State Prosecutor (as written in the blue stamp “Prokurori Shtetit”) and, in sum, the Chief State Prosecutor as mentioned in Article 433 CPC is not the entity competent to file it in this case, pursuant Article 12 of the Law on State Prosecutor 05/L-034, dated 28 May 2015, which added Article 32A to the previous law, 03/L-225 from September 2010; according to paragraph 1 of the said Article 32A, “[f]or the

duration of the EULEX Kosovo mandate, the Chief State Prosecutor may not assume jurisdiction over cases assigned to a EULEX Prosecutor, without the consent of the Chief EULEX Prosecutor” . It was said “in sum” as much could be said, namely, the new criminal procedure code is in force since 1/1/2013...and it changed significantly the *locus standi* related to filing protections of legality, as in the Provisional Procedure Code any public prosecutor could do it (pursuant Article 452, read together with Article 46 *et seq* on the competencies and Article 151 on definitions), but in the new Criminal Procedure Code only the Chief State Prosecutor is mentioned (Article 443, and Article 46 on competence makes reference to the Law on State Prosecutor Chapter IV).

After having addressed whether who filed the request for protection of legality is authorised to do so, pursuant article 433 CPC, it is time to assess whether there is legal ground for filing it. The grounds are set in Article 432 and in Article 433, paragraph 4, CPC.

Pursuant to Article 418, paragraph 3, a party may request protection of legality within three months of the final judgment or final ruling against which protection of legality is sought. The wording is clear, but considering the systematic insertion of the norm in the code, the classification of the legal remedies as extraordinary, and reading it together with Article 432, paragraph 1, CPC (a request for protection of legality against a final judicial decision), it leaves no room to consider that for this purpose it is the same to have a judgment or a ruling that became final because it is not anymore subject to an appeal or to have a final judgment or ruling terminating the case, the proceedings. It is not the same.

The extraordinary legal remedies are to be used only once there is a final judicial decision, where the proceedings have been completed in a final form. Indeed, even in the case where the request for protection of legality is against judicial proceedings which preceded the rendering of that decision (the final judicial decision) only (emphasis added) after the proceedings have been completed in a final form the request can be filed – as set in the final part of paragraph 1 of Article 432 CPC.

The exception to this principle is clearly set in paragraph 4 of the same article: a request for protection of legality can be filed during criminal proceedings which have not been completed in a final form only against final decisions ordering or extending detention on remand.

Were there any doubts about the difference addressed above (between a decision that became final for not being subject to an appeal any longer and between the final decision of the proceedings), this norm set in paragraph 4 would clarify it.

The systematic interpretation in reference to the other two extraordinary legal remedies referred to in Article 418 CPC also leaves no doubt that these legal instruments are addressing proceedings that have been terminated, completed, be it the reopening of criminal proceedings, be it the extraordinary mitigation of punishment.

Also, and now in terms of historic interpretation, we can see that in relation to the preceding legislation of Yugoslavia the doctrinal approach was the same (see, for instance, Branko Petric about previous Article 416 in the Commentary on the Law on Criminal Procedure, 1986, 2nd edition. Finally, we quote here the 8th paragraph of another commentary, “(8) [i]f a decision is in question it has to be effective. Competent public prosecutor cannot circumvent the jurisdiction or the ordinary legal remedy, within the appeal deadline or before it is ruled upon the appeal of the accused, and file the motion for protection of legality. Decision by the second instance court by which the first instance verdict is nullified due to incorrect and incompletely established state of facts, and the case returned for a retrial, cannot be the subject of the motion for protection of legality. This is only a formal effective decision by which, in the concrete case, a manner of acting before the court is established, and from the material side it does not represent an effective decision by the court in the sense of the criminal procedure. The procedure is still in progress, violation of the law could still be rectified only by the court itself, or it would be rectified by the ordinary legal remedy” (emphasis added) – see Momcilo Grubac and Tihomir Vasiljevic, Commentary of the Law on Criminal Procedure, 1982, 2nd edition, Savremena Administracija, Belgrade.

Conclusion

As the request is inadmissible the Court will refrain from making comments on the merits.

For the stated above it has been decided as in the enacting clause.

Presiding Judge

Recording Officer

EULEX Judge Jorge Martins Ribeiro

Vjollca Kroci-Gerxhaliu

Panel members

EULEX Judge

Elka Filcheva-Ermenkova

Supreme Court Judge

Nesrine Lushta