

PARTLY DISSENTING OPINION OF JUDGE TIMO VUOJOLAHTI

I disagree with the majority on the issue of the admissibility of the requests filed by the two Defense Counsel of the defendant, lawyer [REDACTED] and lawyer [REDACTED] MB EJ

The question

The question addressed here in my dissenting opinion is: Does the present procedure code (Criminal Procedure Code – CPC) where the defendant has more than one defense counsel representing him, permit each of the lawyers a separate and individual authority to represent their client at the same time?

Facts

From the case file it can be established that the defendant [REDACTED] EK has been represented by three defense counsel, lawyers [REDACTED] EJ; MB and SS [REDACTED]. All three of them filed separate appeals on behalf of their mutual client against the first instance judgment (Pristina District Court, dated 11.05.2012), and the Court of Appeals (the impugned judgment, dated 25.9.2013) considered all the appeals as admissible.

Now, two of the defense counsel, lawyers [REDACTED] J, B have on 8 May 2014 (timely) filed separate requests for protection of legality on behalf of their client. Moreover, the defendant [REDACTED] has attached his own request to the one filed by lawyer [REDACTED] B K

Law

Article 55 Paragraphs 2 and 3 of the CPC reads:

2. A defendant may have up to three (3) defense counsel, and it shall be considered that the right to defense shall be considered satisfied if one of the defense counsel is participating in the proceedings.

3. If a defendant has more than one defense counsel, one defense counsel shall be nominated the lead counsel by the defendant or, if the

defendant fails to do so, the competent judge shall appoint the lead counsel.

Article 61 of the CPC states that the defense counsel has the same rights that the defendant has under the law, except those explicitly reserved to the defendant personally.

Article 19, Paragraph 1, Sup-paragraph 28 reads:

Lead Counsel – when a party is represented by more than one attorney, one and only one attorney shall represent the party before the court or during criminal proceedings. Service upon the lead counsel of documents, including indictments, requests, replies, appeals, and the documents required to be disclosed to defendants shall constitute service upon all attorneys representing the party

My assessment

Before going to the legal assessment I have to point out, that this case, a request for protection of legality against a final judgment of the Court of Appeals, is not a case of mandatory defense (Art 57.(1.4)). Namely, that kind of a situation may set some other requirements for the use of several defense counsel.

The assessment of the law

I find it very obvious that the core idea behind giving the defendant a possibility to assign more than one lawyer for her/his defense is to secure a sufficient and effective defense. The right to be effectively defended by a lawyer is one of the fundamental elements of the fair trial. The need for having more than one lawyer may arise when the case is very extensive, or it includes exceptionally difficult legal questions, or the defense has to conduct a lot of research work etc; in these situations to carry out a proper defense may need more than one lawyer's contribution. And then, a clear division of work is the factor which enables an effective defense.

The right to be effectively defended is a right guaranteed to the defendant. Although the lawyer representing the defendant has the same rights as the defendant has under the law (Art 61 CPC), these rights cannot be considered as her/his 'personal' or 'individual' rights', separate from the rights of the defendant. This means that the defense counsel represents the defendant only in the

interests of her/his client – all her/his rights are derived from the rights of the defendant.

When the defendant has more than one defense counsel it is clear that all the lawyers have a mutual responsibility to defend the accused in an effective way. However, the provision in Art 55.3 CPC shows that there must be coordination and compatibility with the work of the lawyers, and one of them has to carry the responsibility for this arrangement. Without further reasoning everybody understands that it would be against the defendant's rights if the lawyers present in their written appeals or requests contradictory or totally irrelevant grounds and arguments. Moreover, repeating the same grounds and arguments is a sign of ineffectiveness and only shows that there was no factual need for having more than one defense counsel at that stage of the proceedings.

Article 19.(1.28) CPC states clearly¹, that when a party is represented by more than one attorney, one and only one attorney [my emphasis] shall represent the party before the court or during criminal proceedings². The literal interpretation of this rule shows that in a written procedure, like filing a request for extraordinary legal remedy, only one lawyer should represent the defendant – so, only one request shall be filed on behalf of the defendant. I refer to the underlined wording above, which shows that the lawmaker put emphasis on the word 'one' by repeating it, which also shows to me that the lawmaker's purpose was not to give individual or separate rights to each of the lawyers to file appeals and requests. This interpretation takes also into consideration the effectiveness of the defense and serves for the aims of a clear and coherent procedure.

This doesn't mean that in the case the defendant wants to have several lawyers also for filing a request for protection of legality, she/he could not use them. In that situation, it is for the lawyers to decide, how to comply with the conditions set out in the law. If the size of the case, or the extent of the request, or the difficulty of the case, or other reasons require division of the work and the lawyers decide to work like this, the separate work and it's results have to be summoned and collected together into one request. Finally, the responsibility for this lies with the lead defense counsel.

¹ The provision includes a distinct and clear rule, although this rule is placed in an article of definitions. – However, day after day it becomes more evident that the present law cannot be considered as coherent and systematic; thus a clear rule cannot be ignored just because it is presented in 'a wrong place'.

² It must be noted that the previous law, Criminal Procedure Code of Kosovo (in force up till 31.12.2012), didn't include any provision with the same meaning.

The assessment of this case

The requests of the two lawyers were filed separately, with no indication by the defense counsel that they were intended as a single request. So, the above interpretation of the relevant provisions leads me to conclude that only one of these two requests should be considered when adjudicating on this case.

In the present case there are no other factors than the one of 'lead counsel' to be applied when deciding which one of the requests shall be found admissible. I could not find from the case file any specific data about who's acting as the lead counsel. However, based on the fact that lawyer ³ [REDACTED] has represented the defendant from earlier stage of the trial, I consider him as the lead counsel. Thus, I find that the request filed by lawyer ³ [REDACTED] must be considered as admissible and the one filed by lawyer ³ [REDACTED] as inadmissible.

Before reaching this conclusion I had to assess if the dismissal of the request filed by lawyer ³ [REDACTED] would factually impinge the rights of the defendant. As stated in the reasoning of this decision, the request filed by lawyer ³ [REDACTED] was found ungrounded. If there had been a relevant ground or argument which would have led to approve the request, I would have found myself forced to call the lead counsel's attention to this question and give him an opportunity to supplement his request.

Based on these reasons I find that the request filed by defense counsel ³ [REDACTED] is inadmissible. Regarding the requests filed by the defendant himself and defense counsel ³ [REDACTED] I agree with the majority.


OBITER DICTUM OF JUDGE VUOJOLAHTI:

In addition to my reasoning above there is one more remark I find proper to make in this connection:

In cases where the defendant has more than one defense counsel representing her/him, it is an unfortunate habit with the lawyers in Kosovo that they each file a separate request for protection of legality against the same decision on behalf of their mutual client. My experience in these situations tells me that it is not uncommon that the several requests for protection of legality mainly repeat the same grounds and arguments, and the grounds and arguments presented are too many times manifestly unjustified. The purpose of the lawmaker -- to secure

an effective defense for the defendant by allowing the use of more than one defense counsel – seems to have been forgotten. Instead, we have too often a confused and incoherent request, which also prevents the court from concentrating on relevant issues and questions.

To improve the effectiveness of the defense it is high time to pay attention to these provisions stated above.



Timo Vuojolahti
EULEX Judge