

SUPREME COURT OF KOSOVO

Case number: Pml. Kzz 98/2016 (HT) Supreme Court
PN 162/16 Court of Appeals
P. No. 58/2014 Basic Court of Mitrovica

Date: 10 May 2016

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a Panel composed of EULEX Judge Jorge Martins Ribeiro (Presiding and Reporting), EULEX Judge Krassimir Mazgalov, and Supreme Court Judge Valdete Daka as Panel members, and EULEX Legal Officer Kerry Moyes as the Recording Officer, in the criminal case number P. No. 58/2014 before the Basic Court of Mitrovica, and now concerning the defendant:

HT,

The defendant was convicted by the Judgment of the Basic Court of Mitrovica P. No. 58/2014, on 27 May 2015, to seven (7) years of imprisonment as aggregated punishment for the criminal offences of War Crimes against the Civilian Population under multiple counts, pursuant to Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), awaiting appellate review by the Court of Appeals.

acting upon the Request for Protection of Legality filed on 31 March 2016 by defence counsel Artan Qerkini (Sejdiu & Qerkini, L.L.C.), on behalf of the defendant **HT**, against the Ruling of the Court of Appeals PN 162/16(9) dated 9 March 2016;

having considered the Reply filed by the State Prosecutor on 12 April 2016;

having deliberated and voted on 10 May 2016;

pursuant to Articles 418 and Articles 432-441 of the Criminal Procedure Code (CPC), by a majority of votes¹

renders the following

¹ The Request is found to be admissible by a majority. The Request is unanimously rejected as unfounded.

JUDGMENT

The Request for Protection of Legality filed on 31 March 2016 by defence counsel Artan Qerkini (Sejdiu & Qerkini, L.L.C.), on behalf of the defendant HT, against the Ruling of the Court of Appeals PN 162/16(9) dated 9 March 2016, is admissible but is rejected as unfounded, as per Article 437 of the CPC.

REASONING

1. Relevant procedural background

1.1 The defendant **HT** has been ordered to detention on remand since 27 May 2015, as on this day he was convicted by the Basic Court of Mitrovica for multiple counts of War Crimes and sentenced to seven (7) years of imprisonment.

1.2 The defendant was ordered to detention on remand in Dubrava Detention Centre until the Judgment becomes final.

1.3 On 23 September 2015 the Basic Court of Mitrovica allowed the defendant's hospitalization at the Clinic of Infectious Diseases of the UCK due to an "acute liver problem" being indicated by a medical report by the Dubrava Detention Centre, later confirmed by the medical report issued by the UCK on 29 September 2015.

1.4 Following an incident on 7 December 2015 (when the defendant was found to have been left without any escort and later returned alone to his room at the Clinic of Infectious Disease²), on 16 December 2015 an international doctor performed a medical examination of the defendant, and wrote a report dated 31 January 2016, stating (among other details) the following: "*the health condition of **IH** should be considered as rather good and stable (...). **IT** can stay in prison. He should be on a diet rich in proteins. Laboratory examination should be done periodically and there should be possibility of doctor's control / GP and infectiologist (...). **HT**'s staying in prison in his current state of health does not put his life in danger*".

1.5 Thus, on 18 February 2016 the Presiding Judge of the Basic Court of Mitrovica ordered his immediate transfer from the UCK to the High Security Prison in Podujevo given the fact that there is "*risk the defendant might continue to abuse conditions of detention on remand*

² "*At approximately 17:00 hrs correctional staff under monitoring of the EULEX Monitor Team proceeded to the Clinic of Infectious Diseases UCK to conduct a search on the prisoner **HT**. Upon arrival in the room they found only the officer **FP** who stated that the prisoner escorted by the officer **FQ** had gone for a check-up at the Clinic of Dermatology. I was informed and suggested them to wait a little until the prisoner and the noted officer return. At approximately 17:35 hrs I was informed again that the other officer returned but not the prisoner. Then, upon consulting with the Acting General Director **SZ** I set off to the spot along with **IK** – Head of the Operation Office. Since the prisoner was not in his room, whereas both officers who had to guard him were in the room, upon consultation with the Acting General Director, I informed the Kosovo Police. I arrived at the Clinic of infectious Diseases along with **IK** at approximately 18:00 hrs, whereas at approximately 18:10 hrs the prisoner as well returned in the room*" – as per e-mail exchanged by RKS Date: December 8, 2015 at 08:58:15 GMT+1

(...) that security standards in the Correctional Centre in Dubrava might have been violated by its staff. Therefore is necessary to place him in High Security Prison in Podujevo (...)”.

1.6 The defendant’s defence counsel filed an appeal against this last Order, which was rejected as unfounded by a Ruling of the Court of Appeals dated 9 March 2016.

1.7 On 31 March 2016 the defence counsel filed the subject Request for Protection of Legality against the Ruling of the Court of Appeals.

1.8 The State Prosecutor filed a reply on 12 April 2016.

2. Submissions by the Parties

2.1. Defence counsel on behalf of the defendant HT:

The defence counsel states that the Ruling by the Court of Appeals is based on several violations of the CPC, namely Article 202, and of the Law on Execution of Criminal Sanctions, namely Article 93 (on transfer of convicted persons) and Article 107 (on the disciplinary procedure). The essential of the argument is that the Presiding Trial Judge who ordered the detention on remand does not have the legal power or authority to transfer a detainee from one detention centre to another, as only the general director of the correctional service is entitled to do so as a consequence of disciplinary proceedings, in accordance with Article 201 of the CPC (on discipline of detainees) read together with the other mentioned provisions.

2.2. The reply of the State Prosecutor:

The State Prosecutor proposes that the Request is dismissed as inadmissible as it does not fall into the situations set in Article 432 of the CPC. In the case of par. 1 because the proceedings are still ongoing in the sense that the appeals on the sentence are yet to be decided, and in the case of par. 4 because the appellant challenges the transfer of the detainee, which is not a situation foreseen in this paragraph, as it comprises only the cases of decisions ordering or extending detention on remand.

3. Findings of the Panel

A) On the admissibility *stricto sensu*

3.1 The Request for Protection of Legality by the defense counsel and the reply by the State Prosecutor are timely filed, pursuant to Article 418 par. 3 of the CPC and Article 435, par. 2 *in fine*.

3.2 Despite the fact there is no statement that the defendant consents to the request under discussion, as per Articles 418 (4) and 376 (1.8) of the CPC, taking into consideration the explicit and precise wording in Article 433 (“A request for protection of legality may be filed

by (...) the defendant or his or her defence counsel”), the Court *ex officio* decided not to dismiss the Request on that specific ground.

3.3 In accordance with Article 436, par. 1 of the CPC, “the Supreme Court of Kosovo shall confine itself to examine those violations of law which the requesting party alleges in his or her request”. This, of course, is not an impediment to an analysis of other provisions related to the alleged violations.

3.4 The Court, by a majority of votes³, does not completely share the State Prosecutor’s view on the inadmissibility of this Protection of Legality (hereinafter PoL). If on one hand it is true that par. 1 of Article 432 of the CPC is not applicable as a ground to reason this PoL, as the defendant has filed an appeal against the judgment by which he was convicted (P. No. 58/2014, on 27 May 2015), on the other hand it is also true that if the literal wording of par. 4 reads “only against final decisions ordering or extending detention on remand” the scope of an order transferring a detainee in detention on remand falls within the same level of required protection of fundamental rights and freedoms of an individual, as actually both kinds of decisions (ordering or extending and transferring) may pose questions equally pertaining to the protection of fundamental rights and freedoms - in addition, Article 3, par. 2 of the CPC states that “(...) doubts regards the implementation of a certain criminal law provision shall be interpreted in favor of the defendant and his or her rights under the present Code and the Constitution of the Republic of Kosovo”.

3.5 The previous conclusion and its reference to fundamental rights is in connection with the provision set in Article 433 par. 4 of the CPC, according to which if a decision of the European Court of Human Rights establishes that a final judicial decision against the defendant violates human rights, then a request for PoL shall be possible against a decision of the Supreme Court of Kosovo. The majority of the Panel is at this point emphasizing two key ideas: on one side, the protection of fundamental rights (as phrased before) or human rights (as worded in Art. 433, par. 4 of the CPC) should not be subject to a restrictive doctrinal interpretation of the law and, on the other side, if the legislator has foreseen such possibility against a decision of the Supreme Court then, *a fortiori*, it must be understood that it is also possible against decisions of the Court of Appeals⁴.

3.6 Therefore, this Panel by a majority decided that the PoL is admissible.

B) On the merits

3.7 As noted above, a decision on the transfer of a detainee in detention on remand can, by its nature, pose several questions or issues of protection of fundamental rights and freedoms of an individual, in other words, several questions or issues of protection of human rights of a detainee; this assertion is, in the light of the Court’s view, apparent, obvious, but let us have

³ As for the Kosovo Panel member only the decisions regarding ordering or extending detention on remand, pursuant Article 432, paragraph 4, CPC can be subject to a request for Protection of legality.

⁴ Though, of course, even if not stemming from a decision of the European Court of Human Rights.

just an example: let us picture the case of a transfer of a detainee in a big country⁵ leading to a *de facto* absence of visits, not as lawful punishment.

3.8 The Court cannot agree that the provisions mentioned by the defence counsel can be interpreted in the way that it would be unlawful for a Judge to order a transfer as only the general director is authorized to do so. In fact, the provision set in Article 93 of the Law on Execution of Penal Sanctions not only refers to convicted persons (not to the case of a detainee in detention on remand – and analogy to the detriment of the defendant is prohibited, as per Article 2, par. 3 of the Criminal Code of the Republic of Kosovo (CCRK), *mutatis mutandis*), but also does not prohibit (and could not...) the direct intervention of a Judge.

3.9 At this point two references must now be made. The first is to Article 5, par. 2 of the CPC, “the court shall be bound to carry out proceedings without delay and to prevent any abuse of the rights of the participants in proceedings”, and the issues arising from the execution of the detention on remand are obviously not excluded from the scope of this norm, this to say that it is ultimately a matter for the Court to prevent any abuse of the defendant’s rights. The second is that from a logical and doctrinal perspective, which is connected with the first reference, and in accordance with the Superior Law of Kosovo, meaning the Constitution of the Republic of Kosovo (the Constitution), pursuant to Articles 22, par. 1, 23, 29, pars. 1 and 4 and Article 102, pars. 1 to 3 of the Constitution, it is clear to assert that the Judge is the ultimate guardian of the fundamental rights and freedoms of a citizen, not the general director of the correctional service.

3.10 Finally, Article 107 of the Law on Execution of Penal Sanctions refers to the disciplinary procedure. However, again two remarks have to be made: not only there was no disciplinary procedure carried out as a consequence of the incident on 7 December 2015, but also, if there had been one, the detainee should not have been the subject of it as he is not the one responsible for implementing the staff’s duties.

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

⁵ We might mention, for example, the case of Australia, Canada and United States, not to mention the Russian Federation, but in smaller countries the same applies as the detainee’s relatives means to travel may be insufficient, which in practice leads to an unlawful and deliberate deprivation of the right to have visits.

Presiding Judge

Jorge Martins Ribeiro

EULEX Judge

Krassimir Mazgalov

EULEX Judge

Recording Officer

Kerry Moyes

EULEX Legal Officer

Panel members

Valdete Daka

Supreme Court Judge