

SUPREME COURT OF KOSOVO

A.K.I. [REDACTED] (.)

PML 64/2014

Date: 3 April 2014

THE SUPREME COURT OF KOSOVO, in the panel composed by EULEX Judge Timo Vuojolahti as Presiding, EULEX Judge Gerrit-Marc Sprenger and Supreme Court Judge Sali Toplica as members of the panel, in the presence of Natalie Dawson EULEX Legal Officer, acting in capacity of a recording clerk, in the case against the defendant:

A.K.I. [REDACTED] father's name [REDACTED] mother's name [REDACTED] born [REDACTED] in [REDACTED] now residing in Pristina, ID number [REDACTED] arrested on 28 October 2013

Suspected of the following criminal offences:

- **Organised crime** in violation of article 283, paragraph 2 of CCRK, in conjunction with the criminal offence of **Extortion**, in violation of article 340, paragraph 2 of CCRK;
- **Unauthorised ownership, control or possession of weapons**, in violation of article 374, paragraph 1 of CCRK

Deciding upon the Request for Protection of Legality filed by Dr I. R. [REDACTED] Lawyer, on behalf of the defendant [REDACTED] dated 17 March 2014.

A.K.I.

After reading the response of the Special Prosecutor, dated 2 April 2014, and the Opinion of the State Prosecutor, filed on 1 April 2014, following the deliberation and voting, in a session held on 4 April 2014, pursuant to Articles 451 and 454 and 455 of the Criminal Procedure Code of Kosovo (hereafter "CPC") issues as below.

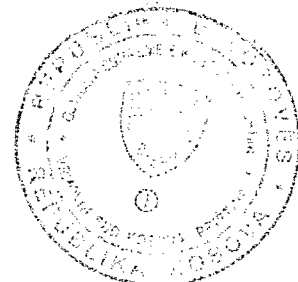
Following the deliberation and voting, in accordance with Article 435 of the Criminal Procedure Code (CPC), the Supreme Court issues the following:

JUDGMENT

The Request for Protection of Legality of the defendant [REDACTED] dated 17 March 2014 and filed on his behalf by defence lawyer Dr I. R. [REDACTED] is REJECTED AS UNFOUNDED.

REASONING

A. Procedural History

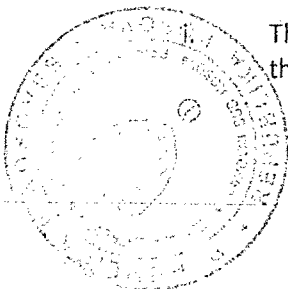


1. On 8 March 2013 the Special Prosecutor issued a Ruling on Initiation of Investigation against the defendant [REDACTED] and his co-defendants [REDACTED] and [REDACTED]. A.N. A.K.1. A.K.2
2. All defendants were arrested on 28 October 2013 and the same day the Special Prosecutor filed an application for detention on remand against all three.
3. On 29 October 2013 the Pre-Trial Judge of the Basic Court of Pristina ordered detention on remand for one month. The order was confirmed by the Court of Appeals on 2 November 2013. Subsequently detention on remand has been extended by a Ruling of the Pre-Trial Judge issued on 27 November 2013, which was approved by the Court of Appeals on 6 December 2013, and then by the Pre-Trial Judge's Ruling of 11 February 2014 until 26 April 2014.
4. The Pre-Trial Judge's Ruling of 11 February 2014 states that there has been no change in circumstances since the initial imposition of detention on remand and the previous extensions thereof. The Ruling found that:
 - a. There is grounded suspicion that the Defendants committed the offences suspected.
 - b. There is sufficient ground to believe that the Defendants would intimidate witnesses and make known the identities of the witnesses if released.
 - c. The Defendants may contact the other members of the criminal group involved and other witnesses not yet identified. A.K.1. A.K.2
 - d. There is a risk of flight because the Defendants [REDACTED] and [REDACTED] have ties in Austria.
 - e. There is a risk of repetition of criminal offences due to the continuous pattern of offences alleged.
 - f. Alternative measures would not alleviate those risks.
5. This Ruling was upheld by the Court of Appeals in its Ruling of 1 March 2014.
6. The Defence Counsel acting on behalf of the defendant [REDACTED] filed this request for Protection of Legality against the Ruling of the Court of Appeals on 1 March 2014. A.K.1.

B. The Positions of the Parties:

- a. The Defence Counsel:
 - i. The Court of Appeals was not properly constituted. Presiding Judge Bertil Ahnborg was disqualified from taking part in this deliberation due to his previous involvement in a Request for Protection of Legality, decided on 11 February 2014.
 - ii. Neither the Ruling of the Court of Appeals, nor the Ruling of the Pre-Trial Judge, describes any criminal actions perpetrated by [REDACTED]. The allegations against him are fabricated. A.K.1.
 - iii. Lesser measures would suffice in this case pending trial.
- b. The State Prosecutor:

The Supreme Court should annul the Ruling of the Court of Appeals and return the case for a new decision.



- ii. Judge Bertil Ahnborg was disqualified due to his previous involvement, and therefore there has been a violation of the procedure. This violation is not essential as the defence counsel simply repeats the issues which had already been dealt with.
 - iii. The other grounds are without merit since there has been no change in the circumstances and no new grounds are put forward.
- c. SPRK Prosecutor's Response
- i. Judge Ahnborg was not disqualified. His first involvement was as a third instance Judge, requiring him only to consider procedural matters. His second involvement was as a second instance judge. These are separate proceedings.
 - ii. Should the court not find favour with this argument, the Prosecutor would submit that the decision should be annulled and returned to the Court of Appeals.

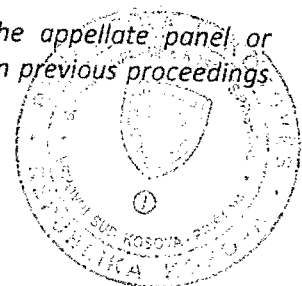
3. Findings of the Court:

The request for Protection of Legality is timely filed by a person authorised to do so.

1. The Position of Judge Bertil Ahnborg - the question of disqualification

- A.K.I.
- a. The Defendant [REDACTED] is suspected of committing the criminal offence of Organized Crime in conjunction with the criminal offence of Extortion and Unauthorised Ownership, Control or Possession of Weapons. The criminal proceedings against [REDACTED] are pending at the investigation stage; the indictment has not been filed yet. All relevant previous rulings in this case only deal with ordering or extending detention on remand. Thus, it must be noted, the assessment of the question of disqualification is now related only to decisions on detention on remand during the investigative stage of the criminal proceedings and to the appellate level.
 - b. Judge Ahnborg's first involvement in this case was as a third instance (Supreme Court) judge on 11 February 2014, presiding on a request for Protection of Legality. This was in relation to the Basic Court Ruling of 27 November 2013, when the Pre-Trial Judge extended the measure of detention on remand. Judge Ahnborg's second involvement in this case was as a second instance judge on 1 March 2014, presiding in the Court of Appeals panel on an appeal against the Basic Court Ruling of 26 February 2014, when the Pre-Trial judge extended for the second time the measure of detention on remand.
 - c. Article 39(2) of the CPC reads as follows:

'a judge shall be excluded as... a member of the appellate panel or Supreme Court panel if he or she has participated in previous proceedings in the same criminal case...'

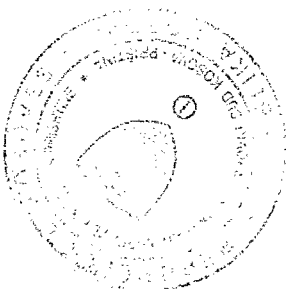


- l. The Defence Counsel alleges Judge Bertil Ahnborg was disqualified from taking part in the adjudication of the appeal in the Court of Appeals on 1 March 2014.' In applying this provision to this case the Panel concludes that the wording of article 39(2) CPC is so general that it requires interpretation. The Panel concludes that crucially it must determine the intention of the law-maker.
- e. The equivalent provision in the previous law (article 40(1)(5) of the Criminal Procedure Code of Kosovo, effective until 1 January 2013) read as follows:

'A judge ... shall be excluded from the exercise of the judicial functions in a particular case:

(5) If in the same case he or she has taken part in rendering a decision of a lower court or if in the same court he or she has taken part in rendering a decision, which is being challenged by an appeal.'

- f. The Panel considers that the old provision clearly stated that an appellate level judge was only disqualified from taking part in adjudicating a case if he/she had taken part in rendering the challenged decision. The general nature of the wording of the equivalent article under the new code (article 39(2)) gives the Panel reason to believe that the lawmaker did not intend to change this rule.
- g. Taking this into consideration, the Panel concludes that the clear purpose of article 39(2) of a CPC is to avoid a judge who has already formed a view about the merits of the case - that being considering, and reaching a conclusion on, the information available to the court at the relevant time, about the defendant's circumstances and the evidence regarding the suspected or charged offences, which are relevant to the defendant's remand status – from taking part in adjudication on the case at a higher level. If such a judge was allowed to adjudicate upon the case at a higher level, the defendant would be deprived of his opportunity for a different decision to be taken and his rights would therefore be violated. This is also the view taken by the European Court of Human Rights in its own jurisprudence.
- h. It therefore follows that an appellate judge is not disqualified from adjudicating on an appeal against a Pre-Trial Judge's decision in a detention case, even if he/she has previously taken part in rendering a Court of Appeals decision dealing with a previous detention ruling of the Pre-Trial Judge in the same criminal case pending at the investigating stage against the same defendant. The Panel emphasises that such circumstances involve separate appeals against separate decisions.
- i. Dealing with a request for Protection of Legality requires a judge only to consider the procedural formalities and the alleged violation of the criminal law within the challenged Ruling. It does not require a judge to form his own opinion about the merits and evidence in the case.



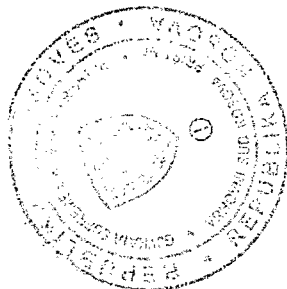
- j. Taking these points into consideration, the Panel finds that a Supreme Court Judge in a request for Protection of Legality is disqualified if he/she has taken part in rendering the challenged Ruling. However, a judge who has acted as a Supreme Court Judge on a request for Protection of Legality in relation to a previous detention decision is not disqualified from adjudicating on a subsequent appeal (as a Court of Appeals Judge) during the same investigation stage. In such circumstances the defendant is not deprived of his rights to a fair and impartial trial.
- k. The Panel concludes that Judge Ahnborg was not disqualified in the circumstances referred to in the current request for Protection of Legality.
- l. Firstly, the Panel finds that the two decisions referred to in this request for Protection of Legality are, first, a request of Protection of Legality and, second, an appeal. These are two different decisions, and thus two separate cases at the appellate level.
- m. Secondly, since Judge Ahnborg's first involvement in the criminal proceedings against the defendant [REDACTED] was in relation to a request for Protection of Legality, the Panel finds that there is nothing which indicates that he considered and formed a view about the merits of this case. The Panel therefore concludes that when Judge Ahnborg took part in adjudication of the appeal on 1 March 2014, he was free and able to consider, and reach his own conclusion about the merits of the appeal. On 1 March 2014 Judge Ahnborg was not disqualified and the defendant's rights were not violated.
- A.K.I.

2. The Merits of the Request

- a. The Ruling of the Court of Appeals on 1 March 2014 is clear that the appeal contained no new information such as to persuade the Panel that the Pre-Trial Judge had erred in extending detention on remand in relation to the defendant [REDACTED] A.K.I.
- b. Having reviewed the Rulings of the Basic Court and the Court of Appeals, the Supreme Court finds that the Ruling of the Court of Appeals contains sufficient description of the allegations faced by the defendants. The Panel therefore concludes that no legal violation has taken place.

The Panel therefore rejects the request for Protection of Legality as unfounded on both grounds.

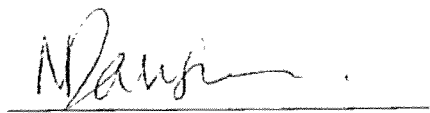
Presiding judge:



Recording officer:



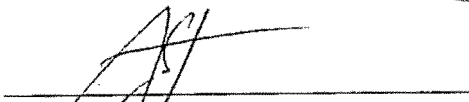
Timo Vuojolahti
EULEX Judge



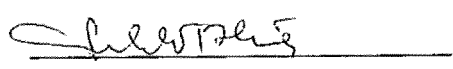
Natalie Dawson
Legal Officer



Members of the panel:



Gerrit-Marc Sprenger
EULEX Judge



Sali Toplica
Supreme Court Judge

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