

KJI NEWSLETTER ***July 2004***

This newsletter is published to fully inform the magistrates of Kosovo on the activities of the KJI. This publication is distributed to judges and prosecutors throughout Kosovo. The Monthly KJI Newsletter features articles from KJI Staff relating to issues of interest to judges and prosecutors working in Kosovo.

One year Regulation on Protection against Domestic Violence – One day seminar with extensive discussion

On 5 May 2004 Kosovo Judicial Institute hosted a one day seminar on Protection against Domestic Violence. It was the second seminar on the Regulation 2003/12 after a first had taken place in November last year. Since then many open questions have been answered and some problems have been solved by the daily court praxis.

While some comparisons with other European and US legislations were drawn by Dr. Horst Proetel, Judicial Trainer KJI, and Annette Williams, resident legal advisor US DoJ, the procedure according to the Regulation was explained by Anton Nokaj, president of Prishtinë/Priština District Court and the question of criminal offences of domestic violence was illuminated by Rushdi Berisha, lawyer from Prizren/Prizren.

After the presentations a lot of time was devoted to discussions. This opportunity was welcomed and extensively used by the participants who presented to their peers different cases from their court

praxis. During the discussions the following issues came up:

I. Section 5.3 – competency of a District Court to review a petition for a protection order.

If a divorce case is pending with the District Court (according to the Law of Marriage and Family Relations - LMFR), is this court competent for reviewing a petition and issuing a protection order according to section 5.3 of the Regulation?

Given that section 5.1 explicitly states that generally the Municipal Court is competent, some participants were of the opinion that section 5.3 leads under no circumstances to the competence of a District Court. It was argued that such competence would consequently lead to the competence of the Supreme Court regarding appeals against a protection order, which could impossibly be the will of the lawmaker.

Furthermore section 5.5 caused some confusion in this regard. Many participants concluded from this provision that the court that issues the protection order is also competent to try the violation of the protection order according to section 15 (see also II). Presumed this is correct, it is feasible that a District Court is competent although according to the Law on regular courts such crime is to be tried at a Municipal Court.

However other participants pointed out that it must be the District Court which is competent in these cases. Section 5.3 explicitly defines that that court “shall” be competent.

As a basic principle the word “shall” stands for “must” – not only in a legal context. Only extraordinary circumstances justify an exception. The court competency is therefore not left to the discretion of neither the judge nor the petitioner.

A possible competence of the District Court was also supported by KJI’s trainer Horst Proetel who stressed that this exception is justified as it only simplifies the procedure: instead of two different courts only one court is competent. He referred to the systematic construction of the provision: while 5.1 and 5.2, dealing with general rules, are stating that the respective Municipal Court is competent, 5.3 explicitly does not contain any provision regarding the question which court it should be but refers to the LMFR. Finally section 5.5 is not a counter-argument as it has to be read differently (see II).

II. Content of Section 5.5 – Does this provision supercede the Law on regular courts?

Many participants understand section 5.5 as a provision which regulates the real and territorial competence of the criminal court thus superceding the general provisions on competencies in the Law on regular courts regarding criminal offences. This interpretation combined with section 5.3 would – as we have just seen - indeed lead to a total mix up of court competencies. It cannot be assumed that this was the will of the lawmaker.

Another understanding of section 5.5 was presented by KJI’s judicial trainer Horst Proetel. This interpretation is strongly supported by a comparison of laws from many European states which contain similar provisions. Decisive is the exact wording of the provision. Section 5.5 says that the court which issues the order shall be competent “to determine any violation of such order pursuant to section 15”. It is clearly a difference if the provision speaks about whether the court shall “decide on” or only “determine” any violation of such order. The provision does not foresee a different competence for the criminal proceedings. It only defines that it is in the hand of the same civil court judge to decide whether or not a violation has occurred. Such decision has constitutive effect and is therefore precondition for any criminal proceedings in this regard. In this way the competence according to the Law on regular courts remains unchanged.

This opinion is again supported by the systematic of the Regulation. Chapter I until III are only dealing with civil law matters while chapter IV (“Criminal Offences and Proceedings”) deals with criminal matters.

III. Legal terminology used in the Regulation.

As in the November-seminar confusion regarding the terminology was addressed. Despite the fact that some of this confusion persists, the meaning of the legal terms is by now quite clear for everyone. While the term “petitioner” is broadly accepted, the Albanian translation for “respondent” still causes some critics. In order to ease the distinction between civil law and criminal law many speakers showed sympathy for the term “responsible party” instead. However the terms are labelled, it was acknowledged by everyone that only civil procedures apply.

IV. Issuing a protection order is not a punishment of the respondent but solely aimed to protect the victim of domestic violence.

Does it contravene the double jeopardy principle to impose (or extend) a protection order against a person because of an act, for which he/she has already been punished by imprisonment?

Section 10.2 clearly states that both proceedings are not related at all. Besides the protection order does in no way constitute a punishment at all but only a protection of the victim. Therefore

a punishment according to criminal law and a protection order issued at the same time with regard to the same act do not contravene the principle of double jeopardy. This problem shows once again the importance of a clear distinction between criminal law and civil law.

V. Can the protected party, who did not file the petition for an emergency protection order, withdraw the petition? Who is party of the proceedings?

According to section 6 the petition for an emergency protection order may also be filed by a third-party, for example a person with whom the protected party has a domestic relationship or a representative from the Center for Social Work. If this is the case, can the protected party withdraw the petition?

It must be admitted that this provision touches upon the private family-sphere which is protected by the constitutional framework and international human rights. If a third party gets involved, a balance has to be found between the comprehensible wish to protect a victim of domestic violence and the constitutional right of each person to have his/her private and family life respected. The question has to be answered against this background.

In a formal sense, the protected party is in such case not petitioner or party of the legal proceedings and can therefore not withdraw the petition. However, according to section 9.2 the court shall hear the protected party in reviewing the petition. If the spouse during that hearing declares that no domestic

violence has taken place, the judge will probably terminate the procedure unless he gets the impression that the statement is forced.

At the end of the day the court cannot act contrary to the explicit will of the person to be protected. The aim of the regulation is to support and protect victims of domestic violence, not to force people to receive such help.

VI. Expiration of interim emergency protection order

As stated in section 13.3 (b) an interim emergency protection order issued by the law enforcement agencies shall not expire at the next opening of the court but at the end of the next day the court is in operation. This guarantees a continuous protection as the court shall decide on an emergency protection order within 24 hours according to section 9.1.

The seminar was also used to address practical problems in relation with the Regulation. To remove the perpetrator from the residence, while being a good solution in many Western countries, can

cause problems in Kosovo as the wife (which is mostly the victim) lives in her husband's family which will probably not stay impartial towards the victim. It is very likely that the family will at least try to influence her while often the victim will even be discriminated against. Besides it seems that the actual situation in Kosovo does often not give enough room for judicial intervention as the welfare system cannot adequately support a family if the only provider is removed or even incarcerated. If under these circumstances the petitioner withdraws the petition, the legal consequence is clearly that the case is to be closed. However, in such case it remains unanswered whether or not a protection for the petitioner would have been necessary.

The KJI is aware of the remaining difficulties but at the same time pleased to learn that many problems were solved by the daily praxis in Kosovo's court rooms. At the appropriate time the KJI will again hold a seminar on this issue.

Michael Frahm, KJI Intern

Project activities July 2004

- Seminar on civil law – expropriation and compensation
- Seminar on the Provisional Criminal Code and the Juvenile Justice Code

Seminar on civil law – expropriation and compensation

The KJI will organize a seminar on 7 July on expropriation and compensation. The topics of this training session will focus on the procedure of compensation for expropriation, the annulment of final decisions on expropriation, the deprivation of property under the European Convention on Human Rights and the case law of the European Court of Human Rights, as well as the preparatory actions related to expropriation. The experts contributing to this seminar will be a Professor of Civil Procedural Law from the Law Faculty of Prishtinë/Priština, a Judge from the Supreme Court of Kosovo, a Human Rights international consultant and a judicial trainer from KJI. This session addresses civil law judges from the Supreme Court, District Courts and Municipal Courts.

Seminar on the Provisional Criminal Code and the Juvenile Justice Code

The KJI and the Probation service will organize on 15 July a joint training session on specific legal aspects of the Provisional Criminal Code and the Juvenile Justice Code. The first topic presented and discussed during this training session will focus on the different types of suspended sentences that can be imposed under both Provisional Criminal Code and Juvenile Justice Code (some draft model forms will be presented and discussed). The revocation of these suspended sentences according to the Provisional Criminal Code will also be addressed. Further topics will deal with the respective roles and responsibilities of probation officers and social workers according to the Juvenile Justice Code, their cooperation with the magistrates, as well as the duties of assistance and supervision undertaken by the Probation Service.

The experts contributing to this seminar are an expert on criminal law (ex KJI judicial trainer), a judge from the Supreme Court of Prishtinë/Priština, a judge from the District Court of Mitrovicë/Mitrovica, and the director of the Probation service of Kosovo. This training session addresses criminal law judges, prosecutors and probation officers.

Local experts needed to identify training needs and design future curricula

The last newsletter featured a presentation of the EU-funded project 'Institution Building of the KJI'. The Project Steering Committee recently extended the project duration from eleven to fifteen months and endorsed a number of recommendations elaborated by the project team. (More on these in a future newsletter).

The project team is now urgently looking for local judges, prosecutors and advocates who would be willing to work with Dr Rainer Deville, Judicial Training Expert, on assessing the training needs of prospective and serving magistrates and lay judges as well as designing the various curricula in substance. Knowledge of English or German would be an additional asset but is not indispensable as the project can organise interpretation.

What the project needs in particular is detailed feedback from local judicial professionals on any deficiencies which you may have experienced in the training currently provided to serving magistrates. We would also appreciate any suggestions on the detailed training (both theoretical and practical) which should be provided to prospective magistrates as well as to serving and future lay judges.

For further information, please contact the project office urgently.

If you do not wish to join the working group, please feel free to address your suggestions in writing to the project office by e-mail or telefax:

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