COURT OF APPEALS

Case number: PAKR 413/2013

(P 346/2012 BC Pejë/Peć)

6 June 2014

Judgment of the Court of Appeals of Kosovo, with a Panel composed of EULEX Judge Manuel Soares, presiding and reporting, and EULEX Judge Tore Thomassen and Judge Tonka Berishaj, members of the panel, with the assistance of the EULEX Legal Officer Anna Malmström, acting as recording officer.

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DEFENDANTS

N.M, born on XX 19XX in village, , father's name N, mother's name F (I), residing at ;

R.Z, born on XX 19XX in , father's name Q, mother's name I (R), residing at ;

X.Z, born on XX 19XX in , father's name Q, mother's name I (R), residing at ;

M.N born on XX 19XX in , father's name L, mother's name L (L), residing at .

JUDGMENT OF THE COURT OF APPEALS

Pursuant to Articles 407 and the following of the CPC[1], regarding the appeals filed against the judgment of the Basic Court of Pejë/Peć announced on 23 May 2013, in the case nr. 346/2013, the Panel of the Court of Appeals decides as follows:

1. The indictment charging the defendant **N.M** with the criminal offense of Article 374 (1) of the CCRK is rejected *ex officio* due to exemption from criminal prosecution pursuant to Articles 2.1 and 3.1.1.10 of the Law on Amnesty;

2. The appeals filed by the Defence Counsel Bajram Tmava on behalf of the defendant **N.M**, the Defence Counsel Rezarta Metaj on behalf of the defendant **N.M**, the defendant **N.M**, the Defence Counsel Zekir Berdyna on behalf of the defendant **R.Z**, the defendant **R.Z**, the Defence Counsel Kastriot Spahiu on behalf of the defendant **X.Z**, the defendant **X.Z** and the Defence Counsel Haxhi Millaku on behalf of the defendant **M.N** are partially granted and consequently the judgment is modified as follows:

a) The defendant **N.M** is sentenced to three (3) years of imprisonment for the criminal offense of Abusing Official Position or Authority, under Article 422 (1) of the CCRK (applicable pursuant

[1] The following abbreviations referring to the pertinent codes will be used hereinafter: previous Criminal Code: CCK, current Criminal Code: CCRK, previous Criminal Procedure Code: CPC, current Criminal Procedure Code: CPCK.

Article 3 (2) of the CCRK as the most favourable law) and eight (8) months of imprisonment for the criminal offense of Abusing Official Position or Authority, under Article 339 (1) of the CCK. As aggregated punishment the defendant is sentenced to three (3) years and six (6) months of imprisonment. The defendant is also sentenced to the accessory punishment of prohibition from exercising any public administration or public service functions for a period of three (3) years after the term of imprisonment;

b) The defendant **R.Z** is sentenced to one (1) year of imprisonment for the criminal offense of Trading in Influence, under Article 345 (1) in conjunction with Article 23 of the CCK and to three (3) years of imprisonment for the criminal offense of Incitement to Abusing Official Position or Authority, under Article 422 (1) in conjunction with Articles 31 and 32 of the CCRK (applicable pursuant Article 3 (2) of the CCRK as the most favourable law). As aggregated punishment the defendant is sentenced to three (3) years and six (6) months of imprisonment;

c) The defendant **X.Z** is sentenced to one (1) year of imprisonment for the criminal offense of Trading in Influence, under Article 345 (1) in conjunction with Article 23 of the CCK and to three (3) years of imprisonment for the criminal offense of Incitement to Abusing Official Position or Authority, under Article 422 (1) in conjunction with Articles 31 and 32 of the CCRK (applicable pursuant Article 3 (2) of the CCRK as the most favourable law). As aggregated punishment the defendant is sentenced to three (3) years and six (6) months of imprisonment;

d) The confiscation of items 1 to 14 and 24 seized during the house search of the defendants **R.Z** and **X.Z** is lifted;

e) The defendant **M.N** is sentenced to six (6) months of imprisonment for the criminal offense of Assistance to Abusing Official Position or Authority, under Article 339 (1) in conjunction with Article 25 of the CCK, suspended for a period of verification of two (2) years;

3. Pursuant to Article 102 of the CPC the defendants are hereby ordered to pay in 15 days the amount of 250 Euros each separately to support the cost of the proceedings, without prejudice to the possibility of the first instance court issuing a separate ruling on this matter.

4. In all the other non-mentioned aspects the appeals are rejected and the judgment affirmed.

STATEMENT OF GROUNDS

1. Summary of the relevant proceedings

Proceedings in first instance

On 31 July 2012, the EULEX Prosecutor filed with the District Court of Pejë/Peć the indictment PP no. 114/12 against the defendants **N.M**, **R.Z**, **X.Z** and **M.N** and charged them with the following criminal offences:

- Abusing Official Position or Authority under Article 339 (1) and (3) CCK (against **N.M**);

- Abusing Official Position or Authority under Article 339 (1) CCK (against **N.M**);

- Unauthorized Possession of Weapons under Article 328 (2) CCK (against **N.M**);

- Trading in Influence under Article 345 (1) CCK in conjunction with Article 23 CCK (against **R.Z** and **X.Z**);

- Incitement to Abuse Official Position or Authority under Article 339 (1) and (3) CCK in conjunction with Articles 23 and 24 CCK (against **R.Z** and **X.Z**);

- Assistance to Abusing Official Position or Authority under Article 339 paragraph 1 CCK in conjunction with Article 25 CCK (against **M.N**).

The indictment was confirmed with the Ruling KA. No 228/12 on 17 September 2012.

On 4 December 2012 the indictment was amended. The criminal offences of Taking Official Documents and Defrauding Buyers, which the defendants **R.Z** and **X.Z** were also charged with, were severed from this criminal case.

The main trial commenced on 3 December 2012 before a panel of the then District Court of Pejë/Peć. Further 19 trails sessions were held before the judgment P 346/12 was announced on 23 May 2013, whereby all the defendants were found guilty of the criminal offences they were charged with.

On 5 August 2013 appeals were filed by defendants **N.M**, **R.Z** and **X.Z** and Defence Counsel Bajram Tmava on behalf of the defendant **N.M**. On 6 August 2013 an appeal was filed by Defence Counsel Zeqir Berdyna on behalf of the defendant **R.Z** and on 7 August 2013 by Defence Counsel Rezarta Metaj on behalf of the defendant **N.M** and Defence Counsel Kastriot Spahiu on behalf of the defendant **X.Z**. Finally, on 10 August 2013 an appeal was filed by Defence Counsel Haxhi Millaku on behalf of the defendant **M.N**.

The EULEX Prosecutor filed a response to the appeals on 22 August 2013.

Proceedings in the Court of Appeals

The opinion of the Appellate Prosecutor was filed with the Court of Appeals on 26 August 2013.

The Public Session was held on 7 May 2014.

The Panel of the Court of Appeals deliberated and voted on 7 May 2014.

The Judgment was concluded on 6 June 2014.

2. The appealed judgment

The first instance court found that the following facts were proven (summary description):

- Between June 2010 and 27 April 2011, the defendant **N.M**, acting as prosecutor in a criminal investigation against **P.M**, with intent to obtain the sum of 50.000 Euros for himself and for the co-defendants **R.Z** and **X.Z**, offered to terminate the investigation, secured the termination of house detention and revealed to those co-defendants confidential information that enabled them to extort from **P.M** the sum of 30.250 Euros. He also allowed **P.M** to leave his residence in contrary to the limitations imposed by the measure of house detention.
- The defendants **R.Z** and **X.Z**, acting in co-perpetration, intentionally incited the co-defendant **N.M** to act as described and extorted from **P.M** the referred sum of 30.250 Euros.
- Before 11 September 2011, the defendant **N.M**, acting as prosecutor in two criminal investigations, with intent to obtain material benefit for himself, revealed official

information to the co-defendant **M.N**, with intention that she would contact the suspects on those investigations offering them to terminate the investigations in return of payment of an unspecified sum of money, which she did upon his instructions.

- The defendant **M.N** intentionally assisted the co-defendant **N.M** to act as described above.

The defendants were sentenced as follows:

- **N.M**, to 4 years of imprisonment for the criminal offense of Abusing Official Position or Authority, under Article 422 (1) of the CCRK (applicable pursuant Article 3 (2) of the CCRK as the most favourable law), 1 year of imprisonment and 10.000 Euros fine for the criminal offense of Abusing Official Position or Authority, under Article 339 (1) of the CCK, 3 months of imprisonment for the criminal offense of Unauthorized Ownership, Control, Possession or Use of Weapons, under Article 374 (1) of the CCRK (applicable pursuant Article 3 (2) of the CCRK as the most favourable law), to 5 years of imprisonment and 10.000 Euros fine as aggregate punishment and to the accessory punishment of prohibition from exercising any public administration or public service functions for a period of 3 years after the term of imprisonment; confiscation of the seized pistol, magazine and bullets was also imposed;
- **R.Z**, to 1 year and 6 months of imprisonment and 10.000 Euros fine for the criminal offense of Trading in Influence, under Article 345 (1) in conjunction with Article 23 of the CCK, 3 years of imprisonment for the criminal offense of Incitement to Abusing Official Position or Authority, under Article 422 (1) in conjunction with Articles 31 and 32 of the CCRK (applicable pursuant Article 3 (2) of the CCRK as the most favourable law) and to 4 years imprisonment and 10.000 Euros fine as aggregate punishment; realization of items 1 to 14 and 24 seized during the house search of the defendant was also imposed;
- **X.Z**, to 1 year and 6 months of imprisonment and 10.000 Euros fine for the criminal offense of Trading in Influence, under Article 345 (1) in conjunction with Article 23 of the CCK, 3 years of imprisonment for the criminal offense of Incitement to Abusing Official Position or Authority, under Article 422 (1) in conjunction with Articles 31 and 32 of the CCRK (applicable pursuant Article 3 (2) of the CCRK as the most favourable law) and to 4 years imprisonment and 10.000 Euros fine as aggregate punishment; realization of items 1 to 14 and 24 seized during the house search of the defendant was also imposed;
- **M.N**, to 6 months of imprisonment and 10.000 Euros fine for the criminal offense of Assistance to Abusing Official Position or Authority, under Article 339 (1) in conjunction with Article 25 of the CCK.

3. Admissibility of the appeals

The first instance judgment is a decision subject to appeal. The parties announced timely the will to appeal. The appeals were filed within the legal prescribed period of time by the defendants and their Defence Counsels, who are amongst the persons entitled to do so. However, due to the fact that two Defence Counsels of the defendant **N.M** filed appeals cumulatively the question of their admissibility has to be addressed.

The first instance court, by not acting pursuant to Article 407 (2) of the CPC, admitted both appeals filed by two Defense Counsels of the defendant **N.M**. The Court of Appeals is aware of this practice of admitting appeals filed by more than one Defence Counsel of the same defendant, based on the literal interpretation of Articles 71 (1) of the CPC: "*A defendant may have up to three defence*

counsel" and 399 (1) of the CPC: "*An appeal may be filed by the (...) defence counsel (...)*". However, admitting different and potentially conflicting appeals from the representatives of the same party is not required in relation to the principle of "fair trial". Besides, Article 71 (2) of the CPC reads: "*it shall be considered* [when the defendant has more than one Defence Counsel] *that the right to defence shall be satisfied if one of the defence counsel is participating in the proceedings*". Based on this provision the first instance court could have dismissed one of the appeals, as the right to challenge the judgment – i.e. the "right to defence" at that specific stage – expired once one of the defence counsels performed the procedural action.

The Court of Appeals considers however that is not appropriate at this stage to dismiss any appeal. The rules of the proceedings and the defence rights must be equitable balanced and the principles of stability and confidence in the proceedings must be ensured. As the first instance court admitted both appeals it would be inadequate to decide differently confronting the appellants with an unexpected dismissal.

The Court of Appeals accepts all appeals as admissible.

4. Merits of the appeals

In general the appeals are not entirely clear and in many relevant aspects not even sufficiently reasoned. During the session of the panel the parties were warned of those deficiencies and given the opportunity to provide supplementary explanations on allegations in respect of which the panel was not satisfied. In some aspects, however, the allegations of the appellants remained obscure and incomprehensible. It must be noted that to challenge a judgment on matters that cannot be examined *ex officio* is not sufficient to argue conclusively that the judgment of first instance is wrong. It is mostly necessary to state why it is wrong and to be as accurate as possible on the qualification of the legal grounds to challenge it. This is an obligation of the parties derived from the duty to provide "*an explanation of the appeal*" (Article 401 (1) 3) of the CPC). The court reviewing the judgment is not expected to "dig" on the wording of the submissions trying to "guess" the parties' will.

The Court of Appeals will next address one by one all questions challenged by the appellants. To do so in the most logical and understandable way possible, the questions raised in all appeals will be decided according to the sequence established in the law.

4.1. Substantial violations of the provisions of criminal procedure

Improper constitution of the court: Article 403 (1) 1) CPC

The Defence Counsel Haxhi Millaku (defendant **M.N**) argued that the proceedings should have been conducted in the summary form of Articles 461 to 465 of the CPC, because the crime charged to the defendant was punishable with imprisonment up to 1 year. The Prosecutor replied stating that the summary proceedings are not applicable in a joint investigation regarding assistance for committing a crime punishable with imprisonment equal or superior to 3 years, pursuant to Article 33 (4) of the CPC. The Appellate Prosecutor added that as the defendant is an accomplice she had to be processed together with the other defendants.

The issue was raised by the Defence Counsel in the confirmation hearing, the same way as in the appeal. The Pre-Trial Judge dealt with the issue in the ruling confirming the indictment and rejected the objection with reference to Article 33 (4) of the CPC. The issue was raised again by the Defence Counsel during the main trial on 14 February 2013 but, from what comes out in the minutes, the panel did not address it then and did not address it in the judgment.

In the Court of Appeals' opinion the decision of the Pre-Trial Judge to reject this objection cannot be appealed. Article 33 (4) and (5) of the CPC is clear stating that the court which has competence over the perpetrator of the criminal offense shall, as a rule, also have competence over the accomplices in joint proceedings. The referred concept of "accomplices" is related to all forms of collaboration in criminal offenses established in Articles 23 to 26 of the CCK, including therefore "assistance". So, as the defendant **M.N** was charged in the indictment with the criminal offense of assistance to the criminal offense of Abusing Official Position or Authority imputed to the co-defendant **N.M**, the confirmation of the indictment of both criminal offenses is equivalent to a decision of joinder of proceedings upon the motion of the Prosecutor. And for that reason Article 33 (8) of the CPC does not permit an appeal against that decision. The first instance panel did not have to address this objection again since it had been decided previously by the Pre-Trial Judge in an unappealable decision.

Participation of a judge who should be excluded (Article 403 (1) 2) CPC)

The matter of disqualification of the judges was raised in the appeals of the defendants **N.M**, **R.Z** and **X.Z** and of the Defence Counsels Bajram Tmava (**N.M**), Rezarta Metaj (**N.M**) and Kastriot Spahiu (**X.Z**). They all argued that the three judges should have been excluded according to Article 40 (2) of the CPC. The Prosecutor replied stating that the decisions on detention on remand on which the judges were previously involved do not fall under the legal concept of "pre-trial proceedings" of Article 40. The Appellate Prosecutor agreed and added that the Supreme Court decided this matter in an identical case considering that it does not lead to disqualification (Judgment PKL-kzz 71/09 on 10 November 2009).

According to the records, Judge Malcolm Simmons presided in the panel that ruled on the extension of detention on remand in KP Nr. 57/12, of 2/5/12, panel member Judge Dariusz Sielicki presided in the panel in KP Nr. 50/12, of 24/4/12 and panel member Judge Elmaze Syka was a member of the panel that decided the appeal against detention on remand in KA Nr. 228/12, PPS Nr. 114/12. It is correct that all three judges have dealt with detention in a three judge panel as claimed by the defence. Judge Malcom Simmons has even been in a panel that extended the detention on its own, not deciding on an appeal. Judge Dariusz Sielicki has been in a panel that dealt with an appeal by the prosecutor on expert analysis and Judge Judge Elmaze Syka has been in a panel dismissing an appeal by the prosecutor as inadmissible – the request of the prosecutor was to order that the defendants would not be allowed any visitors in the future.

When the main trial started the presiding judge brought this issue to the parties' attention. There were no objections to the composition of the panel from anybody. On 18 March 2013 the defendant **R.Z** on his own brought a number of disqualification issues against the international panel members and the Prosecutor. But the fact that they had decided in the case before was not one of the grounds. The issues raised were dealt with in the next session by oral rulings.

Article 416 of the CPC states that this alleged violation may only be referred in the appeal if the appellant "*was unable to present that violation during the main trial, or if his or her presentation was disregarded by the court of first instance*". As pointed above, all the appellants had the chance to raise this issue during the main trial and failed to do so. The court *ex officio* even asked them if they had any objection on this regard and they did not. They cannot, for this reason, refer now on the appeal to an alleged breach of the procedure with which they previously complied. But even if they could, the appellants are not right because the pointed violation of procedure simply did not occur.

The Supreme Court (SC) has in two cases, one acting as second instance and one as third instance on Protection of legality, ruled on issues relevant to this. The first one is Ap-Kz no 371/2008, 10 April 2009, and is very similar to this one. The defendant claimed that two judges were disqualified to sit in the first instance trial panel because they had been respectively the presiding judge and a member of the three judge panel which during the pre-trial phase decided on the extension of detention on remand against the defendant. One of the judges also approved the request of the public prosecutor for extending the period to submit an indictment. The SC, applying Article 40 of CCP, found that the judges did not exercise the functions of the investigating judge (referring to the former Yugoslav law) and that "*their activity cannot be considered as "participating in the pre-trial proceedings" lacking for this the exercise of the specific functions of the pre-trial judge. The decision of the three judge panel on extension (or termination) of detention on remand was under the previous code and it is still under KCCP a particular activity on security matter which falls outside a specific phase of the proceedings*". The second one is Pkl-Kzz 71/09, 10 November 2009. In this case the judge sat in a three judge panel deciding on detention on remand. He later sat in appeals panel of the SC acting as second instance. The SC discussed the mentioned reasons for disqualification of Article 40 and their relation to the jurisprudence of the European Court of Human Rights (ECHR). One the basis of the ECHR jurisprudence the SC assessed the disqualification of the judge both under subjective aspects and objective aspects and found again that the judge when acting in the three judge panel "*did not exercise the functions of the pre-trial judge as required by Article 40 par 2 sub-par 1 KCCP*". Also the material quality of the met pre-trial decision "*did not provide a sufficient argument for the disqualification of the judge in the later stages of the proceedings. The said panel has taken case of security matters, thus evaluating on the conditions for detention on remand.*" "*The concerned judge did not go into the merit of the case at all but evaluated only the conditions for detention on remand.*"

The trial panel in this case also made reference to an ECHR case, "Hauschildt vs Denmark", which the Supreme Court in the previously mentioned case also referred to. In it the ECHR concluded that in a system like the Danish (which is a little different because the investigation is conducted and led by the Police and Prosecutor and not by a judge) it cannot be made that the fact that a judge has taken part in a pre-trial decision on detention on remand in itself justify fears of impartiality.

The issue raised by the appellants is related to Article 40 (2) 1) of the CPC as all the Judges that were members of the trial panel participated in pre-trial proceedings. As it was stressed by the Supreme Court and the ECHR, the disqualification of a judge from the main trial aims to ensure the impartiality of the court and to prevent that by having previously decided a matter related to the same accused he or she may act biased due to a prejudice about the guilt of the accused. This will occur in cases where the previous intervention of the judge was such that he or she could have

formed an opinion on the merits of the case. Decisions related to detention on remand, to admittance of evidence and to allowance of visitors to the detainee, like those taken by the judges of the trial panel, do not relate directly to the merits of the object of the main trial. Deciding if there is a strong suspicion of a crime and if the precautionary requisites for detention on remand are met or deciding on an expertise or if a detainee can have visits are a different matter as to deciding if beyond a reasonable doubt facts are proven and if they constitute a crime.

Thus, the Court of Appeals concludes that no violation of procedures related to the participation on the trial of a judge that should have been excluded occurred.

Unlawful absence of persons whose presence at the main trial is required by law (Article 403 (1) 3) CPC)

The defendant **X.Z** argued that the main trial was conducted in the absence of persons whose presence is required by law in violation of defence rights. No more details or allegations were presented.

This is not a matter that the Court of Appeals may address *ex officio* according to Art. 415 (1) of the CPC. Therefore, in order to challenge such a procedural violation, the appellant is obliged to provide an "explanation of the appeal" (as mentioned in Art. 401 (1) of the CPC). This means that a precise indication of who should be present and failed to be and in which moment this may have happened has to be alleged by the appellant. The appellant was given the chance to clarify this issue (as recorded in the minutes of the panel session) but failed to do so. The Court of Appeals finds that in this regards the appeal is not reasoned enough to be examine.

Denial of use of own language (Article 403 (1) 3) CPC)

The defendant **N.M** alleged that when he gave his statement on 19 April 2012 he was denied the use of his own language, Bosnian, and that he had to sign the minutes without reading and understanding them.

According to the records, when the defendant gave his statement on the referred occasion he did not raise the issue of needing or requesting a Bosnian speaking translator. After he had given his statement he was informed of his right to have the minutes read back to him and translated into Albanian but he voluntarily waived his right to have them read. He has signed them at the end as well as put his initial on each page. There is nothing noted in the minutes about him objecting to signing, as prescribed in Article 89 (7) of the CPC. It is evident that the defendant speaks and understands perfectly Albanian, which is one of the official languages of his nationality and the one he used throughout all the remaining proceedings without a single complain. Moreover, he was a Prosecutor in Kosovo and used that language professionally. According to Article 15 (1) and (2) of the CPC, Albanian is one of the official languages of criminal proceedings and only a person who does not speak one of them shall be granted the right to use a different one. This right is granted to ensure the principle of "fair trial", since it is obvious that understanding the proceedings is an essential tool to allow the defence. The purpose of the law is not to give the defendant the possibility of choosing the language he likes best and even less to allow him to use artificial pretexts to invoke groundless objections. Even the defence rights have to be exercised in a fair and loyal manner and not abusively.

In respect to the signature of the minutes, the records do not support the defendant's allegation. In addition he was assisted by a lawyer and due to his profession he is well aware of his rights. He could have easily used the right granted in Article 89 (1) of the CPC and asked that the record was translated and read to him before signing it. But the records show exactly the opposite: he was informed of that right and waived it. The allegation that he was pressured to sign the minutes is vague, subjective and not supported with any evidence that the Court of Appeals could assess.

Omission of fully adjudication the substance of the charge (Article 403 (1) 7) CPC)

The Defence Counsel Haxhi Millaku (**M.N**) challenged the judgment on this basis arguing that the court failed to eliminate fundamental violations related to the lack of legal ground of the indictment and failed to establish decisive facts in favour of the defendant and to give credit to the evidence submitted by the defendant. It was not stated which facts were submitted but not established, which objections against the indictment or evidence were presented and not assessed or admitted.

The procedural substantial violation foreseen in Article 403 (1) 7) of the CPC is related to an omission of adjudication of the facts proposed by the Prosecutor in the indictment (establishing them as proven or not proven), as opposed to an excess of adjudication of the scope of the indictment (in subparagraph 10 of the same Article). The defendant's objection is not related to facts charged in the indictment but instead to lack of adjudication of facts or objections of the defence, which is a different procedural matter. The omission of fully adjudication of the substance of the defence as a violation of the procedure is foreseen in Article 403 (2) 2) of the CPC. However, although wrongly qualified, the Court of Appeals will address this question now.

The submission of facts by the defence to be discussed and established during the trial or of objections against the indictment is regulated in Articles 308, 309 (4) and 311 of the CPC. After receiving the indictment or no later than the confirmation hearing, the defence is bounded to the duty to propose the facts and evidence it wishes to have discussed and examined in the main trial. Also by a separate written submission the defence can file objections to the indictment or to the admissibility of evidence proposed by the prosecutor. Even in the course of the main trial the defence can expand its object and propose new facts and new evidence or file motions, based on Article 360 (4) of the CPC. All these matters, i.e. the facts, evidence and motions proposed by the defence, will have to be assessed and decided by the court in the final judgment, according to Article 396 (7) of the CPC. The failure to establish as proven or not proven the facts or to decide on motions submitted by the defence will be procedural violation pursuant Article 403 (2) 1) of the CPC if the omission influenced the rendering of a lawful and proper judgment.

The Court of Appeals notes that the first instance court did not fail to address any fact, to examine any evidence or to decide on any motion filed by the appellant. The appellant objected to the indictment and argued in the confirmation hearing that there was no well-grounded suspicion. He presented only general and conclusive arguments stating that she did not commit the crimes and that there is no evidence that she did. The Pre-Trial Judge confirmed the indictment and did not grant the defendant's objections. No concrete factual allegations or evidence to contradict the indictment were proposed that the judge failed to assess. Also in the main trial no evidence or facts were presented. The defendant chose not to give evidence and her Defence Counsel gave a very short closing argument. No submission has been filed in writing at any stage.

For the aforementioned motives the Court of Appeals is of the opinion that the invoked procedural violation did not occur.

Use of inadmissible evidence (Article 403 (1) 8) CPC

Before addressing each of the evidence that the appellants consider inadmissible, the Court of Appeals finds useful to point out two relevant general aspects related to the validity of evidence. The first one is that, according to Article 153 (1) of the CPC, not all violation of procedural provisions makes the evidence imperatively inadmissible. The law is clear stating that only when inadmissibility of evidence is expressly prescribed in the law the court cannot base a decision on it. All other breaches of procedural rules on collecting evidence will only constitute essential violation if they had influence on the rendering of a lawful and proper judgment, as stated in Article 403 (2) of the CPC. The second one is that, according to Article 154 of the CPC, without prejudice to the *ex officio* duties of the court, the party has the duty to raise issues related to the admissibility of evidence at the time the evidence is submitted in the proceedings, on the confirmation of the indictment or, exceptionally, later, if the party wasn't aware of the issue or other justifiable circumstance occurs. If the party fails to do so and accepts the submitted evidence without objection, it will not be allowed to challenge the inadmissibility of that evidence in the appeal, unless justifiable circumstances occur.

Having these principles in mind, the Court of Appeals will now address each one of the alleged invalidity of evidence.

1. The legality of attributing to **P.M** the status of cooperative witness and to accept his testimony as admissible evidence was challenged in the appeals of the defendants **N.M**, **R.Z** and **X.Z** and of the Defence Counsels Bajram Tmava (**N.M**), Rezarta Metaj (**N.M**) and Kastriot Spahiu (**X.Z**). Essentially they all argued that a cooperative witness is someone who is a suspect or a defendant with respect to whom the indictment has not yet been read at the main trial and that when **P.M** was attributed that quality he was in none of those situations. The Prosecutor replied supporting the legality of the cooperative witness's statute because **P.M** was suspect of the criminal offense of giving bribes. He also added that even if this would not be the case, the evidence would be admissible because the quality of cooperative witness is only to provide the witness with rights and protection. The Appellate Prosecutor stressed the point that the testimony of **P.M** was corroborated by other testimonies.

P.M was first heard on 1 February 2012. It was not clear if he was heard as a witness, a defendant or a suspect. He was given the statute of cooperative witness on 22 May 2012, while his situation was not yet defined.

Article 298 of the CPC states that the cooperative witness status can be given to a suspect or to a defendant with respect to whom the indictment has not yet been read at the main trial. The law provides specific definitions as to the concept of '"suspect" in Article 151 (1) of the CPC: "*a person whom the police or the authorities of the criminal prosecution have a reasonable suspicion of having committed a criminal offense, but against whom criminal proceedings have not been initiated*". The law does not prescribe the need of any formal procedure – ruling, communication or other – in order to invest someone in this quality of "suspect". When **P.M** was first questioned he was already suspect of being involved in the criminal actions under investigation, since he could be accused of paying a prosecutor to terminate the investigation. Hence, in the Court of Appeals'

opinion, the requirements of the mentioned Article 298 were fulfilled, regardless the fact that no formal investigation had been started against the witness.

Moreover, even if the status of cooperative witness had been wrongly attributed to **P.M**, his testimony could not be challenged as inadmissible because there is no provision on the law prescribing expressly that consequence. The status of cooperative witness has mainly two objectives: (1) facilitate criminal investigation related to facts that otherwise would be difficult or impossible to prove and (2) provide the witness that places him or herself on that difficult situation with some rights and protection. It is an option given to the prosecutor to establish an adequate strategy for the investigation and criminal liability and choosing to stop pursuing an investigation against someone in exchange of acquiring cooperative testimony against other suspects or defendants. But precisely because this means that the evidence is more fragile, contrary to other witnesses, the law does not consider it sufficient to find any person guilty if not corroborated by other pieces of evidence, as mentioned in Article 157 (4) of the CPC. This means that the testimony of a cooperative witness has not a privileged value and, therefore, even if there would have been any breach on procedure formalities, no negative influence would have occurred to the rendering of a lawful and proper judgment.

2. The Defence Counsel Rezarta Metaj (**N.M**) also challenged the validity of the testimony given by **P.M** on 1 February 2012 due to the fact that legal provisions on questioning the witness were not followed. The witness was not given any instructions by the Prosecutor regarding the statement and a lawyer was instructing the witness on how to answer questions.

The way that the minutes have been referred to is correct. **P.M** was heard as a witness by the Prosecutor on 1 February 2012 and no instructions were given to him. He did have a Defence Counsel present which he consulted seven times before giving answers after being warned that he could do so. The same occurred during the hearing on assigning the status of co-operative witness on 22 May 2012.

The situations on which the statements of witnesses are inadmissible are those mentioned in Articles 156 (2), *a contrario sensu*, and 161 of the CPC. The lack of the proper instructions of Articles 160 (3), 162 and 164 (2) of the CPC is not included as a cause of inadmissibility. So, as it was pointed out before, this violation of the procedural law will only be considered as substantial if it influenced the rendering of a lawful and proper judgment. The first mentioned testimony given by the witness without the legal instructions does not differ substantially from the one given in the main trial when the witness was properly instructed. This means that the lack of instructions did not influence the testimony. Therefore, in the Court of Appeals' view, no damage was caused to the rendering of a lawful and proper judgment and no violation of procedural law occurred due to the procedural fault.

As to the second mentioned statement in the hearing for the determination of the status of cooperative witness, it is true that the law forbids that it may be assessed as evidence related to the criminal offenses. Article 300 (1) of the CPC states that the statements given during that hearing cannot be used as evidence to support a finding of guilt. Reading carefully the judgment, the Court of Appeals finds that the first instance court did not assess this statement as evidence to support the guilt of any of the defendants. The statement was mentioned in the Annex and also in page 34 of the

judgement but only to justify the procedural action of attributing the status of cooperative witness, not as an evidence to find the guilt.

On the other regard, the witness can be assisted by a lawyer in case the answer to be given may expose him or her to criminal prosecution according to Article 162 of the CPC. By the time **P.M** was questioned as a witness he was a suspect and by giving evidence he could place himself at risk. Having a Defence Counsel present when giving a statement on that condition is a general right of the witness not forbidden by law. According to the minutes, the witness consulted the Defence Counsel seven times before giving some answers. Obviously, it is not – and should not be – recorded on the minutes the content of the consultation. But as there is no reason to assume that the Defence Counsel interfered in the substance of the testimony, rather than advising the witness on his rights, it cannot be concluded by the Court of Appeals that interference in detriment of the defendants occurred; moreover, because the disputed testimony is essentially identical to the one given during the main trial, where he had no lawyer assisting him

3. The defendant **N.M** argued that other illegal evidence was assessed in the judgment. The Court of Appeals will now address all invalidities challenged by the appellant.

It was alleged that the witness **T.G** could not give statement because he had acted as Defence Counsel of the witness **P.M** in the case in which he was being investigated because he received payment to produce evidence against the defendant.

The exemption contained in Articles 160 (1) 5) of the CPC is established in the interest of the persons that are protected by the secrecy of the professional relation and not in the interest of the defendant on the case the lawyer might give evidence. It is up to the lawyer to refuse to give a statement on matters he or she came to know in the exercise of the profession. The law does not forbid a lawyer to give evidence on a criminal case where his or her client is not defendant but instead witness. The minutes show no objection of the lawyer or any request to be exempt of the duty to testify.

Also there is absolutely no information that the lawyer received any payment to give evidence. This is an entirely groundless allegation to which the Court of Appeals may not give any attention.

The appellant also alleged that he was drugged and incapacitated when he gave his statement to the Prosecutor on 19/4/2012. This would be, according to him, a case of prohibited evidence that would fall under the provisions of Article 155 of the CPC.

Again this is an allegation without any support or even consistency. If it was true that the defendant gave false statement during the investigation because of forced administration of drugs, he had the chance to correct his statement in the main trial instead of choosing to remain silent.

The appellant argued that the statements of witness **P.M** on 11/3/2011 and 1/2/2012 were given without the presence of the defendant or his Defence Counsel. The allegation seems to be correct, as on 11/3/2011 it is not written in the minutes who were present during the statement done in front of the police. It must be noted that inviting the defendant or his Defence Counsel to be present during the examination of a witness in the investigative stage is a discretionary faculty of the prosecutor, according to Article 237 (4) of the CPC. Thus, the testimony is not inadmissible as evidence since the defendant had the opportunity to question the witness during the main trial and does not fall under the inadmissibility of Article 156 (2) of the CPC.

It was challenged the validity of the telephone interceptions because they were done before the starting of the investigation by the respective ruling.

The ruling on initiation on investigation was issued on 10/02/2012. The order to disclose the content of SMS messages was issued on 13/02/2012 for the period 01/06/2010 to 20/04/2011. Contrary to the allegation of the appellant, the interception was ordered and conducted after the initiation of the investigation, although referring to records of a previous period. The appellant should note that Article 256 of the CPC allows interception of telecommunications including the live monitoring and recording of conversations and the access to records of metering of past telephone calls. The law does not exclude the access to the records of past text messages, as long as the authorization is duly issued during the investigative stage.

The Court of appeals does not find that any of the evidence assessed by the court is either inadmissible or invalid.

Judgment exceeded the scope of the charge (Article 403 (1) 10) of the CPC)

1. The Defence Counsel Bajram Tmava (**N.M**) alleged that by imposing the accessory measure of prohibition of exercising public functions that was not proposed in the indictment, the judgment exceeded the scope of the charge. The Prosecutor replied arguing that the imposition of accessory punishments is a matter of legal qualification and that the indictment must include only the factual charge and not the request for a specific punishment.

The indictment filed against the defendant did not propose the court to impose on the defendant an accessory punishment. During the main trial this proposal was not mentioned either and the court did not inform the defendant of this possibility. In the judgment the defendant was sentenced to prohibition from exercising any public administration or public service function for a period of three years after the term of imposed imprisonment. No other specific reason than the reference to Article 56 (2) of the CCK was given. The matter raised in the appeal relates to the protection given to the right to defence as one of the aspects of the right to a fair trial.

Article 305 of the CPC does not foresee the indication of possible punishments and respective legal provisions as a mandatory content of the indictment. The charge will be satisfied with the reference to the facts, the legal name of the criminal offense and the citation of the respective legal provisions. The reply of the Prosecutor referring to Article 379 of the CPC is not a relevant argument against the reason of the appellant. The fact that the prosecution may not propose a specific amount of punishment in the closing statement does not necessary mean that this proposal for an accessory punishment could not be included in the indictment. And, moreover, even if the indictment is silent on this matter, the court may advise the defendant of that possibility. The disputed question, however, is whether this information is required to ensure the right to an effective defence as part of the right to a fair trial.

The right to a fair trial as one of the fundamental rights is protected in Article 31 of the Constitution of the Republic of Kosovo. The constitutional protection given to this right has to be interpreted to the same extent as in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as defined by the jurisprudence of the ECHR (Articles 22 (2) and 53 of the Constitution). Thus, it is important now to see how far the ECHR jurisprudence goes on Article

6.3(a) of the Convention, regarding the right to be informed promptly and in detail of the nature and cause of the accusation.

In the case *Salvador Torres v. Spain* it was alleged that the fact that the defendant had been convicted of an offence with an aggravating circumstance with which he had never be expressly charged constituted a violation of Article 6.3(a). The investigating judge in the case found that the facts established by him disclosed the offence of "embezzlement of public funds". The first instance court found that the paragraph of embezzlement of public funds was not applicable because he was not a civil servant as required and the embezzled money was not public funds and found him guilty of simple embezzlement and sentenced him to 18 months imprisonment. The prosecution appealed and the accused did not. The Supreme Court also found that "embezzlement of public funds" was not applicable. They however found him guilty of an aggravated form of simple embezzlement because he had taken advantage of the public nature of his position in performing duties entrusted to him and sentenced him to five years imprisonment. The court found that the public nature of the applicant's position was an element intrinsic to the original accusation of embezzlement of public funds and hence known to the applicant from the very outset of the proceedings. He must accordingly be considered to have been aware of the possibility that the courts would find that this underlying factual element could, in the less severe context of simple embezzlement, constitute an aggravating circumstance for the purpose of determining the sentence. No infringement of the applicant's rights under Article 6 was found.

In light of this decision it can be argued that also an accessory punishment is an intrinsic element of the sentencing of a criminal offence. If the accused is aware of the facts and of the criminal offense he or she should be aware of the law related to the offence, including the principal and accessory punishments applicable.

In the case *T. v. Austria* the applicant in an ongoing case filed a request for legal aid. He submitted a declaration of means, according to which he had no income, property or other assets. The standard form for this declaration contained a warning that, in case the legal aid was obtained improperly by making false or incomplete statements a fine for abuse of process could be imposed. The court, without a hearing, dismissed the applicant's request and imposed a fine for abuse of process. The appeals court found that the applicant's submission that he had savings which allowed him to pay rent constituted new facts which were inadmissible in the appeals proceedings. The court had rightly found that he had made incomplete or false statements and the fine had been properly imposed. The ECHR noted that the applicant only learned about the accusations levelled against him when the court's decision was served on him. Even though he had a right to appeal the appeal was not capable of remedying the shortcomings of the first instance proceedings because the appeals court confirmed the first instance court without a hearing and the submissions made by the applicant in his defence were inadmissible on appeal. In this case the court found a violation of Article 6.3(a).

However, this case disputes a significantly different situation because it relates to the previous knowledge of the factual situation that the court assessed to decide and not only to the admissible punishment. It is clear a case of modification of the facts and not of the legal qualification.

In the case *Dallos v. Hungary*, the applicant was prosecuted for and in the first instance convicted of embezzlement. The Court of Appeals reclassified the offence as fraud; something that the court

never made him aware was a possibility. The ECHR recalled that the fairness of proceedings must be assessed with regard to the proceedings as a whole. The provisions of Article 6.3 (a) point to a need for special attention to be paid to the notification of the accusation to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him. This provision of the Convention affords the defendant the right to be informed not only of the "cause" of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. That information should be detailed. The ECHR found that the applicant was indeed not aware that the he might face a reclassification of his offence as fraud. This circumstance certainly impaired his chances to defend himself in respect of the charges he was eventually convicted of. However, in this respect, the ECHR attributed decisive importance to the subsequent proceedings before the Supreme Court. It noted that the Supreme Court entirely reviewed the applicant's case, both from a procedural and a substantive-law point of view. In addition to having studied the lower courts' case file and submissions by the applicant and the prosecution, the review bench heard, at a public session, oral addresses from the applicant's defence counsel and the Attorney-General's office. Moreover the Supreme Court itself could have replaced the applicant's conviction with a decision of acquittal. Thereby the ECHR found that the applicant had the opportunity to advance before the Supreme Court his defence in respect of the reformulated charge. Assessing the fairness of the procedure as a whole – and in view of the nature of examination of the case before the Supreme Court – the ECHR was satisfied that any defects on the proceedings before the Regional Court were cured before the Supreme Court.

In the case *Sipavičius v. Latvia*, the applicant was in the indictment charged with obtaining property by deception and abuse of office. He was acquitted of these charges. However the Regional Court found that he had performed his duties as a police officer improperly because of negligence. This failure amounted to a breach of a certain provision of the Police act and the judge found him guilty of the offence official negligence. He was not made aware that a reclassification was a possibility. The ECHR recalled and reiterated what was found in *Dallos v. Hungary*. It found that it was undisputed that until the conviction the applicant indeed was not aware that the Regional Court might reclassify the offence as official negligence. This circumstance certainly impaired his ability to defend himself of the charge. However the ECHR reiterated that compliance with Article 6 must be determined in light of the proceedings as a whole, including the appeal procedures. In the case the applicant was entitled to contest his conviction in respect of all relevant legal and factual aspects before the Court of Appeals, which heard the parties at an oral appeal hearing and the reviewed the applicant's complaints about the reclassification of the charge from both the procedural and substantive point of view. It had not been alleged that the appeal court lacked power to quash the conviction and acquit the applicant or that at the appeal level the applicant was unable to defend himself against the reformulated charges. The fact that the applicant's pleadings against the reclassification were unsuccessful does not indicate that the review of the procedures were not capable of remedying the shortcomings of the first instance proceedings. The Court further stated that this case must be distinguished from *T. v. Austria* because in that case the applicant's complaints against the reclassification were rejected as constituting new facts which were inadmissible on appeal and without an appeal hearing being held.

In the light of the aforementioned decisions, the ECHR has been very clear stating that while evaluating the effectiveness of the right to defence the proceedings as a whole must be considered. If the defendant has the right to an appeal in which he or she can argue against what was previously unknown to him and the appeals court has the possibility to review the case and change it if it finds that the first instance was wrong in its decision, Article 6 has not been infringed.

In light of this jurisprudence, the Court of Appeals cannot consider that the defendant's rights were violated. No decision of the ECHR was found that would support the appellant's challenge against the judgment. He has had the right to appeal and the Court of Appeals, after holding a session where his arguments could be presented, can review the case on both procedural and on substantive-law; all the possibilities in the law to amend or even quash the judgment are granted. Therefore there has been no violation of Article 6 of the Convention and there is no ground for revoking the accessory punishment. The fact that the defendant has not argued on the merits on this is entirely his fault. He had the possibility to put forward any argument he wanted against the imposed punishment but chose not to.

2. The Defence Counsel Rezarta Metaj (**N.M**) alleged that the enacting clause of the Judgment contains different and more severe expressions as to the ones mentioned in the indictment, exceeding its scope. Also the defendant **N.M** alleged that the content of the enacting clause changed the qualification of the criminal offences of the indictment. The Prosecutor replied stating that the differences are only formal and due to irrelevant different wording.

The relevant facts to fulfilling the requirements of the criminal offense must be included in the indictment (Article 305 (1) (2) of the CPC). Once confirmed by the Pre-Trial Judge, the factual situation charged in the indictment will limit the object of the main trial and the facts that may be considered to prove guilt in the judgment. The indictment may be modified by the Prosecutor during the main trial but in that situation the defence will be granted the right to give its opinion and to present evidence (Article 376 of the CPC). The enacting clause is the part of the judgment that contains the executable decision and the relevant facts found proven (Articles 391 (1) 1) and 396 (3), (4) of the CPC). The statement of grounds will indicate the facts that were proven and not proven and the evidence assessed to reason the decision (Article 396 (7) of the CPC). The judgment may only relate to facts contained in the charge (Article 386 (1) of the CPC). If it exceeds the factual situation in relation to the charged offenses, i.e. if the enacting clause contains different facts from those of the indictment, it will incur in substantial violation of the procedures (Article 403 (1) 10) of the CPC).

But not all modification of the factual situation will result in a procedural violation. It has to be substantial and able to affect effectively defence rights. The concept of "fact" relates to a specific natural event or human action located in time and space and not the words that are used to describe it. What is important is to provide the defendant with the necessary information to know in advance what material facts he or she is accused of and to allow him or her to contradict those facts and to present the respective support evidence. Reading the judgment, the Court of Appeals is of the opinion that no relevant modification of the facts in detriment of the defendant is included in the enacting clause.

"Official information" and "confidential information" are not substantially different concepts. The fact charged on the defendant is that he revealed information related to a criminal investigation.

That information is both official and confidential. So, the two expressions qualify the same reality with different words. The same goes for "Information" and "official information". All information from an investigation case is official – this is also a qualification matter. "In order to enable" or "with the intention that" are equivalent expressions to describe the intentional act of someone that aims to produce a certain result. "Unlawful possession of a weapon" is a legal qualification not a new fact. "As required by law" is also a conclusive legal concept not a fact. The Court of Appeals finds that there is no substantial modification of the factual charges in the enacting clause.

3. The defence Counsel Haxhi Millaku (**M.N**) alleged that the enacting clause of the Judgment exceeded the charge. No more arguments were presented to support this allegation.

The above mentioned changes were already considered irrelevant. There are no others to address.

Incomprehensibility or inconsistently of the enacting clause / lack of ground in the Judgment / lack of statement of grounds relating to material facts / unclearness or inconsistency of the statement of grounds / discrepancy between the statement of grounds related to content of documents or testimonies regarding material facts (Article 403 (1) 12) of the CPC)

1. Defence Counsel Bajram Tmava (**N.M**) alleged that the judgment is inconsistent and ambiguous because of repetitions of references to evidences and due to contradictions between the enacting clause and the reasoning related to the defendant's intent to obtain an unlawful material benefit and to the request of any amount of money. It was not stated exactly which parts of the judgment are not understandable.

The legal requisites of the written judgment are those foreseen in Article 396 of the CPC. In the Court of Appeals' opinion, even if the formal structure followed by the first instance court is questionable, the judgment meets the legal requisites. All elements of the introductory part and of the enacting clause are included. It is true that in the statement of grounds (reasoning) there is no clear, exhaustive and separate indication of the proven facts and not proven facts and of the reasons for that assessment. Reading the document as a whole it is possible, however, to know which facts the court established as proven because they are indicated in the enacting clause. The reasoning for the establishment of the factual situation is also present in the judgment, as the court analysed all the examined evidence and justified the reasons why some is found credible and other is not.

The Court of Appeals agrees that the judgment is difficult to read and to understand. It is repetitive in some points and its formal structure does not comply with the one foreseen in the law. It lacks the logical sequence or technique of the criminal legal syllogism: fact, legal provision, consequence, i.e. which facts occurred, how the court found them, why they apply to each criminal offense definition and why a certain sanction was chosen. But this does not make the judgment incomprehensible; only more difficult to read. There is no legal template or mandatory form to write a judgment. Judicial practices related to the respective legal system may be followed. And it would be, perhaps, advisable to follow those practices because using a common code of language and concepts helps jurists in that system to better understand the decision. But the formal structure foreseen in the law is not mandatory up to the point of considering that there is a relevant procedural violation if it does not. It would be different if by using a different formal structure in the judgment the court would be making it impossible or unreasonably difficult – under the criteria of the average recipient of the decision – to understand its meaning and by doing so jeopardizing the rendering of a lawful and proper judgment (Article 403 (2) of the CPC). But this is not the case. The appellants understood

the judgment in a manner that allowed them to state their disagreement and to challenge it by appealing.

2. The defendant **N.M** alleged that (i) there are contradictions between the reasons and the enacting clause because the legal naming of the criminal offenses is not completed and right, that (ii) the time and place of commission are not determined clearly and that (iii) the facts established are contradictory.

The Court of Appeals cannot agree with the appellant's allegation that the legal naming of the criminal offenses is incomplete and wrong. The appellant failed to provide sufficient motives to understand this allegation.

The enacting clause includes the place where the facts occurred: "*in Pristina*", "*in Prizren in his premises at* ", "*in Pristina and Gjakova*" and "*in Hotel 'Nartel' in Pristina*". It also includes the time when the crimes were committed: "*In the period between June 2010 and 27 April 2011*", "*In the period before 11 September 2011*", "*On 2 April 2012*" and '*On 11 September 2011*". The determination of the time and place of the criminal offenses is mandatory in the indictment and in the judgment (Article 305 (1) and (4) and 391 (1) 1) of the CPC). These elements are essential to allow the exercise of defence rights and also to allow the court to verify if the territorial jurisdiction and statutory limitation requisites are met. The Court of Appeals finds that the referred indication suffices for the exercise of defence rights.

In the enacting clause it is stated that the defendant acted with intent to obtain benefit to him or others and in the reasoning it is stated that it was not proven that he received any payment or material benefit or that the co-defendant **M.N** has asked for any payment on his behalf. The Court of Appeals considers that there is no contradiction in stating that someone acted with a certain intention but that it was not demonstrated that the intended result in fact occurred.

As to the factual contradictions the appellant did not fulfil the duty to give sufficient allegations to allow an assessment of his reasons.

3. The defendant **X.Z** alleged that the reasoning for the factual situation was omitted and is insufficient.

This allegation is not sustained in concrete reasons. As it was affirmed above, the Court of Appeals finds that the first instance judgment based the facts which were considered proven on the examined evidence and presented enough motivation to reason that decision.

4. The Defence Counsel Haxhi Millaku (**M.N**) alleged that the established factual situation does not support the judgment in the enacting clause.

Reading the appeal it is clear that the appellant is challenging the factual situation established by the court and not the sufficiency of the facts to fulfil the elements of the criminal offenses.

<u>Failure or incorrect application of procedural provisions influencing the rendering of a lawful Judgment/violation of rights of the defence influencing the rendering of a lawful Judgment (Article 403 (2) 1) and 2) of the CPC)</u>

1. Defence Counsel Bajram Tmava (**N.M**) alleged several violations of procedural provisions. The Court of Appeals will address them now.

It was alleged that the judgment failed to observe provisions of Articles 391 1.6 and 2 of the CPC.

The decision regarding the costs of the procedure is in page 212. The decision regarding the period of time to pay the fines was set to 30 days. Only lack of attention of the appellant allows the Court of Appeals to understand this challenge.

Regarding the substitution of the fine if not paid, according to Articles 39 and 40 of the CCK and 46 of the CCRK, the law foresees several alternatives to be decided in a later moment by the judge, according to the reasons given to justify the lack of payment and other specific circumstances. It is obvious that as a general rule the first instance court may not anticipate a decision that will depend on future factors. Therefore, it has to be understood that the obligation to mention immediately in the judgment the form to substitute the non-paid fine is only applicable if the court has already elements to take that decision, instead of referring the issue to a later stage, as it is more appropriate. So, no relevant procedural violation was committed.

It was alleged that the judgment failed to assess all evidence.

The appellant did not state which evidence the court did not assess and should have. Reading the case file the Court of Appeals notes that all evidence submitted in the proper manner were examined and are mentioned in the judgment. It is not necessary for the court to assess each and every evidence to the most absolute detail but instead all evidence in a conjugated manner, especially those that the court considers more relevant and the conflicting one (Article 397 (6) of the CPC). The reference to absolutely irrelevant evidence completely lack of probative value can be omitted by the court.

It was alleged that the judgment did not assess all arguments of the defence.

The first instance court is not obliged to reply to all arguments presented in the closing statements of the parties. It only has to indicate the grounds for not approving motions and the reasons for deciding points of law (Article 396 (6). If the court failed to assess any relevant argument, this does not make the decision null. The defendant will always be provided with the right to bring that argument to consideration trough an appeal.

It was alleged that the court failed to engage professional experts to assess if the defendant's actions could be considered administrative mistakes instead of criminal offenses.

This allegation, with due respect, is almost absurd. According to Article 175 of the CPC, an expert is to be engaged in cases when an important fact calls for the finding and opinion of a specialist with particular professional knowledge. According to the appellant, the decision weather his actions have criminal or administrative relevance should be assessed by an expert. But the Court of Appeals cannot by any means agree with this conclusion. This is exactly the task of the panel of judges in the main trial, to find out if a crime was committed. This is clearly a matter of legal interpretation in which the judge is "the expert of experts".

It was alleged that the ruling on initiation of investigation rendered on 27/3/2012 was not served to the defence. The Prosecutor replied that if by any mistake that document was not delivered, it was listed in the annex of the indictment and therefore the defendant had the chance to claim for it during the trial.

No delivery slips were found in the case file. The allegation seems to be correct. However, the law does not foresee that notification as mandatory. The initiation of the investigation has to be communicated only to the judge (Articles 221 (1) and 222 (2) of the CPC). Only in case the

investigation did not terminate in six months and the judge does not grant the prosecutor's request to keep it secret, the ruling will be served to the defence (Article 225 (3) and (4) of the CPC).

It was alleged that the investigative work that the police performed before the initiation of the investigation by a ruling was not carried out under the supervision of the prosecutor. The Prosecutor replied stating that the law admits investigative steps by the police prior to the starting of the investigation and that the fact that these actions took place before the ruling on initiation of investigation does not mean that the prosecutor was not supervising.

The supervision of police work by the prosecutor is foreseen in Article 200 (2) and (3) of the CPC. It is evident that the law admits some actions before the ruling on initiation of investigation and that the supervision may occur informally and verbally. No circumstance was raised that could lead to the conclusion that the lawful and proper judgment was affected.

It was alleged that the court failed to examine important witnesses.

The defendant could have requested the examination of witnesses in all procedural stages if he considered important to get their statements (Articles 239, during the investigation, 308, for the main trial, and 360 (4), during the main trial). He did not.

2. Defence Counsel Rezarta Metaj (**N.M**) alleged that in violation of procedural provisions the court wrongly applied the previous procedural code instead of the one currently in force. The Prosecutor replied that according to Article 545 (1) of the CPC the revoked code is the applicable one.

In the Court of Appeals view Article 545 of the CPCK *a contrario* is clear stating that the revoked code is the applicable one.

3. The same Defence Counsel Rezarta Metaj (**N.M**) also challenged the fact that he was not served with the decision to attribute to **P.M** the status of cooperative witness.

The ruling when it was first issued was only served on the prosecution, not the defence. This was brought up during the main trial and all the parties were given a copy on 4 December 2012. The notification before the main trial is mandatory (Article 302 of the CPC). However, the omission was corrected and no reason was given to believe that the judgement was not proper or lawful due to the lack of timely notification.

4. The defendant **N.M** alleged several violations of procedural provisions that the Court of Appeals will address now.

It was alleged that the defendant was not represented by a lawyer during the examination of the co-defendant **X.Z** on 18/4/2012.

According to the minutes, the Defence Counsel Beke Lajqi of **R.Z** was summoned but failed to appear. The presence of the Defence Counsel of one defendant in the examination of the co-defendants is not foreseen in the law, namely in Articles 73 and 231 of the CPC, as mandatory, but rather as a discretionary prerogative of the prosecutor (Article 237 (4) *a fortiori* as derogation of the rule of Article 77 (3) of the CPC). Articles 156 (1) and 235 of the CPC do not make this evidence inadmissible.

It was alleged that the Prosecutor acted biased.

This is a groundless allegation. And, to be exact, the Court of Appeals also recalls that the defendant was convicted by the court and not by the prosecutor.

It was alleged that the court refused the proposal to examine relevant witnesses: **I.A**, **E.G** and **Z.I**.

The defendant may propose witnesses but has to justify the reasons and indicate the matter (Article 322 (1) and (2) of the CPC). As to the witness **Z.I**, the defendant proposed in the hearing on 13 February 2013 that his statement given in the investigative stage was considered as read and accepted and the first instance court granted this request. If the statement is not mentioned in the judgment it is because the court did not find it relevant evidence and not because it was not examined. As to the other two witnesses the minutes show that no request was filed but only a suggestion was presented and was later withdrawn. If the defendant wanted firmly to exam these witnesses he would not have withdrawn the suggestion nor would he have said that he had no other evidence to propose when the trial was about to move to the final statements.

It was alleged that the presentation of the defendant's final statement was illegally limited.

The Court of Appeals examined the minutes of the sessions and finds that the statement was rightfully limited with a warning to focus on the relevant allegations for the case. This is a power given to the presiding judge (Article 382 (2), of the CPC) which was used wisely and adequately.

It was alleged that the court did not establish the facts in favour of the defendant.

The defendant could have submitted facts to the main trial under the provisions of Articles 308, 309 (4) and (5) and 311 of the CPC). If he had done so, the court would be obliged to address those facts and to include them in the judgment as proven or not proven. But he did not and now it is not possible to know which facts he is referring to. Article 7 of the CPC cannot be called to support the defendant's allegations since it only foresees an *ex officio* possibility if the court finds it adequate and necessary.

5. The defendant **R.Z** alleged that in violation of procedural provisions the indictment does not meet the legal requirements of Article 305 of the CPC.

The defendant failed to state which requisites were not fulfilled. The Court of Appeals is of the opinion that the indictment meets the legal criteria.

6. The Defence Counsel Kastrioti Spahiu (**X.Z**) alleged that in violation of procedural provisions the judgment does not include the time spent in detention on remand or the manner of substituting the imposed fine. The Prosecutor replied that Article 391 (1) 5) of the CPC refers only to detention and imprisonment imposed under earlier sentences rendered on different proceedings.

The appellant is not right and his allegation must be result of lack of attention as in page 24 of the judgment it is mentioned that the time spent in detention on remand shall be credited against the punishments.

4.2 Violation of criminal law

Whether the act is a criminal offence (Article 404 1) of the CPC)

1. The Defence Counsel Rezarta Metaj (**N.M**) alleged that the intention to obtain material benefit related to the first criminal offense was not proven and that, as to the second criminal offense

concerns, the facts only support a qualification of the crime as an attempt. The Prosecutor replied stating that the criminal offense of Article 339 (1), (3) of the CCK does not require that the perpetrator himself obtains material benefit as it suffices that a third person obtains it in compliance with the perpetrator's intent. Regarding the second criminal offense, the Prosecutor added that the fact that transference of money was proven does not mean that the crime was not consummated because the legal requisite is an action with intent of obtaining material benefit. The Appellate Prosecutor gave the opinion that the constitutive elements of the crimes were established.

The facts related to the criminal intent found proven by the first instance court are described in the enacting clause: "*with the intent to obtain an unlawful material benefit for himself, **X.Z** and **R.Z** amounting 50.000 Euros (...)*". So, the conviction of the defendant was supported on the fact that the court found proven. Differently, the defendant may argue that the evidence were not sufficient to prove that intention. But this is a different matter that has to do with the assessment of evidence that will be analysed ahead.

Regarding the affirmation that the second criminal offense should be qualified as an attempt and not a consummated crime, the Court of Appeals considers it wrong. The action that fulfils the elements of the criminal offense of Article 339 of the CCK is the abuse of official position, excess of authorizations and omission of duties by an official person with the intent to obtain an unlawful material benefit or to cause damage. The defendant was sentenced because it was found proven that with intent to obtain material benefit, acting as prosecutor, he revealed to a co-defendant information related to an investigation in order that she could contact the suspects and ask them to give money in return of the termination of the investigation. It is clear that obtaining material benefit is not a requirement of the crime; the mere intention is sufficient.

On the other hand, according to Article 20 of the CCK, there would be an attempt if the action was not completed or the elements of the intended offense were not fulfilled. This was not the case because by using information related to an investigation with intent to obtain benefit in return of the unlawful termination of that investigation, the defendant's actions completed the elements of the criminal offense, regardless of the fact that it was not proven that the benefit actually was obtained.

2. The defendant **N.M** alleged that the Judgment applied in parallel two laws, the "old" and "new" criminal law, to his detriment.

The court simply applied to the criminal offenses which the defendant was sentenced to the more favourable law, according to the principle of Article 3 of the CCRK. This allegation is difficult to understand, as the defendant did not explain why the application of a more favourable law resulted in his detriment.

3. Also the Defence Counsel Kastrioti Spahiu (**X.Z**) argued that the facts do not support the criminal offenses and that they are only related to a civil dispute.

This allegation might be referring to the facts that according to the opinion of the appellant should have been established and not to those that the court actually established. The challenge seems not to be against the legal qualification of the criminal offenses but rather against the determination of the factual situation.

4. The Defence Counsel Haxhi Millaku (**M.N**) argued that the criminal offenses were wrongly qualified.

This is a conclusive affirmation not supported on specific allegations that the Court of Appeals could assess. All necessary factual elements of the criminal offense that the defendant was found guilty of are described in the enacting clause.

Whether circumstances exist that preclude criminal prosecution, in particular preclusion due to statutory limitation, amnesty, pardon or *res judicata* (Article 404 3 of the CPC)

The Prosecutor and the Appellate Prosecutor moved the Court of Appeals to annul the charge related to criminal offense of unauthorized ownership, control, possession or use of weapons of Article 374 (1) of the CCRK.

Pursuant to Article 415 (1) 4) of the CPC, this is a matter that the Court of Appeals examines *ex officio*. Articles 2.1 and 3.1.1.10 of the Law on Amnesty exempt from criminal prosecution the criminal offense foreseen in Article 374 (1) of the CCRK. None of the exceptions in Article 4 of the Law on Amnesty are applicable. So, the indictment of count 3 against the defendant **N.M** has to be rejected.

Whether in rending a decision on punishment the court exceeded its authority under the law (Article 404 5 of the CPC)

Violation of criminal law in this regard was not challenged in the appeals. Nevertheless, the Court of Appeals may examine it *ex officio* pursuant to Article 415 (1) 4) of the CPC and in this case the judgment incurred in a violation of law in detriment of the defendants that has to be corrected.

All defendants were sentenced to a fine of 10.000 Euros. **N.M** and **M.N** for the criminal offense of Article 339 (1) of the CCK and **R.Z** and **X.Z** for the criminal offense of Article 345 (1) of the CCK. However, those legal provisions do not authorize imposition of a fine to the defendants. Under Article 339 (1) the punishment for the crime is imprisonment of up to one year. No fine is permitted. Under Article 345 (1) the punishment the punishment is fine or imprisonment of up to two years. The fine is an alternative to imprisonment. This means that the defendants were sentenced to sanctions that the law does not foresee. Absolutely no reasoning was given in the judgment that might allow the Court of Appeals to understand this option. It is possible that the first instance court was intending to impose the accessory punishment of fine pursuant to Article 54 (2) 1) of the CCK. But if that would be the case the decision should be clear and motivated to allow the defendants to exercise their right to appeal[2]. Due to the fact that the Court of Appeals cannot presume that the fines were imposed as accessory punishments and considering that the criminal offenses by which the defendants were sentenced do not admit imposition of fines, this punishment has to be revoked for all the defendants.

4.3 Erroneous or incomplete determination of the factual situation (Article 405 (2) of the CPC)

All the appellants challenged the decision of the first instance court as to the determination of the facts. In brief, they argued the following reasons for the alleged erroneous determination of facts:

[2] The Court of Appeals read the minutes of the deliberation of the first instance panel where there might be some explanation to this matter. But as the minutes cannot be revealed to the parties, they are not the adequate place to reason the decisions that the panel wrote in the judgment.

Defence Counsel Bajram Tmava (**N.M**): the testimony of **P.M** is not reliable due to contradictions and inconsistences; the testimony of **S.M** is not reliable due to contradictions and inconsistences and to the fact that he is the brother of **P.M** without any direct knowledge of the facts; the testimonies of **L.N**, **G.H**, **S.K**, **S.H**, **L.Z**, **V.L**, **A.L**, **L.K**, **A.G**, **T.G**, **P.P**, **B.B** and **Z.I.G** are not reliable due to contradictions and inconsistences; the material evidences were wrongly assessed; the defence of the accused was wrongly ignored; there is lack of evidence in the case related to **M.N**;

Defence Counsel Rezarta Metaj (**N.M**): there is no proof of the intention of the defendant to obtain benefit, that he was involved in the arrangements of the co-defendants Reshad Zherka and **X.Z** or that the authorization given to **P.M** to go to a wedding while in house detention was connected to other activities involving money; the testimony of **T.G** corroborates that the defendant acted only with negligence; the co-defendant **M.N** confirmed that the defendant did not reveal to her any information; the testimonies of **S.M** and **Z.I** confirm the denial of the defendant;

Defendant **N.M**: **P.M** gave false testimony; testimony of **L.N** is not credible; testimonies of **S.K**, **L.Z**, **S.H**, **S.M**, **A.L** and **A.G** were wrongly assessed; telephone communications were wrongly assessed;

Defence Counsel Zequir Berdyana (**R.Z**): the testimony of **P.M** was wrongly assessed because the facts are only related to a civil dispute;

Defendant **R.Z**: the testimonies of **L.N**, **G.H**, **S.M** and **T.G** are not reliable;

Defence Counsel Kastrioti Spahiu (**X.Z**): the telephone of the defendant was used by other persons; the testimony of **P.M** is not reliable; evidences was wrongly assessed;

Defendant **X.Z**: **P.M** is not a reliable witness and that all evidenced was wrongly assessed;

Defence Counsel Haxhi Millaku (**M.N**): the evidence was wrongly assessed.

The Prosecutor replied stating that sufficient evidence was presented and that circumstantial evidence is sufficient to support a conviction. The Appellate Prosecutor gave the opinion that the Court assessed the evidence correctly.

Reading the appeals one might be lead to think that no single witness spoke the truth in court and that the only reliable evidence is the denial of the defendants. Deep down, the allegations of the appellants are nothing but manifestations of unacceptance and disagreement with the judgment, presented in a conclusive manner and not substantiated in concrete motives.

The review of the first instance court's decision regarding the determination of the facts is bounded by the allegations of the appellants, as this is not a matter that the Court of Appeals can examine *ex officio* (Article 415 (1) of the CPC *a contrario sensu*). The appellants have to, in the words of the law, provide "*an explanation of the appeal*" (Article 401 (10 3) of the CPC). The motivation of the appeal to challenge the established facts must be precise and explain clearly which evidence would show that a certain fact should have been considered proven or not proven and why. The law does not grant the parties the right to a second judgment but only the possibility to a review of the judgment, which is different. The Court of Appeals is not to be expected to repeat the examination of all evidence as if no previous judgment existed.

As it was affirmed previously by the Court of Appeals[3], when Article 405 of the CPC defines the terms "erroneous determination of the factual situation" and "incomplete determination of the factual situation", is referring to errors or omissions related to "material facts" that are critical to the verdict reached[4]. Only if the first instance court committed a fundamental mistake while assessing the evidence and determining the facts will the Court of Appeals overturn the judgment[5].

As a general principle the evaluation of evidence should rely in a direct and immediate examination of oral testimonies and statements by a panel of judges. The reading of the record of the evidence examined in the trial, however faithful and accurate it may be, is always a less reliable instrument for evaluation of evidence. Even the examine of documents and other material evidence is in general more accurate in the trial because often those piece of evidence have to be conjugated with other elements and subject to oral explanations by witnesses or parties. Therefore, as affirmed by this court in other occasions[6], "*It is a general principle of appellate proceedings that the Court of Appeals must give a margin of deference to the finding of fact reached by the Trial Panel because it is the latter which was best placed to assess the evidence*". The Supreme Court of Kosovo has held that it must "*defer to the assessment by the trial panel of the credibility of the trial witnesses who appeared in person before them and who testified in person before them. It is not appropriate for the Supreme Court of Kosovo to override the trial panel assessment of credibility of those witnesses unless there is a sound basis for doing so.*" The standard which the Supreme Court applied was "*to not disturb the trial court's findings unless the evidence relied upon by the trial court could have not been accepted by any reasonable tribunal of fact, or where its evaluation has been wholly erroneous*".[7]

The Court of Appeals reviewed carefully all the evidence examined by the first instance court and the assessment made by the panel in the judgment. It is obvious that there are contradictions and inconsistences between the statements. The witnesses did not always use the same exact words to produce statements in different occasions. Not all statements match 100%. This is absolutely normal in every case, as justice is not an exact science like mathematics. Especially when the facts are related to events that occurred in secret and the court must rely in circumstantial or indirect evidence.

The appealed judgment, in the opinion of the Court of Appeals, did not incur any critical mistake on evaluation of evidence and establishment of facts. The appellants failed to show that the first instance court erred or was not complete in determining the factual situation. All they did was enlightening certain piece of evidence out of the general context, ignoring other conflicting evidence and even the rules of interpretation based in common sense and logic, to extract conclusions that are not acceptable. Nobody witnessed directly the disputed facts and the defendants, except for one, chose not to give statement in the main trial. Consequently, the crucial facts were established based in evaluation of indirect evidence. But this is a valid and lawful instrument to lead to a certainty beyond any reasonable doubt if certain requirements are met. The

[3] PAKR 1121/12, judgment dated 25/09/2013.
[4] The mentioned judgment refers to B. Petric, in: Commentaries of the Articles of the Yugoslav Law on Criminal Procedure, 2nd Edition 1986, Article 366, para. 3.
[5] PaKr 1122/12, Judgment dated 25.04.2013.
[6] PAKR 1121/12, judgment dated 25/09/2013.
[7] Supreme Court of Kosovo, AP-KZi 84/2009, 3 December 2009, paragraph 35; Supreme Court of Kosovo, AP-KZi 2/2012, 24 September 2012, paragraph 30.

number of indirect evidence must be significant, all circumstantial elements must consistent and internally compatible, all indirect evidence must point in the same direction and lead to the same conclusion, indirect evidence cannot be decisively contradicted by a direct evidence pointing to the opposite direction, all indirect evidence, assessed together under the criteria of logic and common sense, must lead to the conclusion that the fact occurred as the only plausible and reasonable explanation for the evidence.

The defendants' and witnesses' statements, both given in the investigative stage and in the main trial, were examined profoundly by the first instance court. The same happened with the telephonic communications metering and transcription of SMS. Documental and forensic evidence was also assessed carefully. The judgment explains in detail the meaning of that evidence and of the contradictions between them in such a convincing manner that moves the Court of Appeals to accept that the facts established in the judgment as proven are the only reasonable, logic and possible explanation for the evidence. In conclusion, it is not found that the judgment incurred in erroneous or incomplete determination of the factual situation.

4.4 Erroneous determination of the punishment (Article 406 of the CPC)

The Court of Appeals notes that the judgment incurred in two material errors in page 207 (X. SENTENCING). It is referred that in relation to count 2 against **N.M** the new criminal code was applied as the more favourable. But this is an obvious mistake since it refers to count 3 and not 2. The same goes to referring that the new code was applied in the single count against **M.N** because she was sentenced for the criminal offense of Article 339 (1) of the old criminal code. The clerical errors are irrelevant and caused no detriment to the defendants.

The punishments imposed in the judgment were challenged on behalf of all defendants, based on lack of proportionality and fairness and on failure to consider mitigating circumstances. The Prosecutor replied that mitigating circumstances were considered. The Appellate Prosecutor gave the opinion that the punishments are correct and based on all the evaluated circumstances.

The Court of Appeals already stated that the punishments with fines are to be revoked. So, now it will only be necessary to assess the correctness of the sanctions of imprisonment, the accessory sanction of prohibition from exercising any public administration or public service functions and the confiscation of objects.

The first instance judgment failed to give a detailed motivation for the punishments and even to refer to the applicable legal provisions as it was obliged by article 396 (8) of the CPC. Some circumstances relevant to the determination of the punishment were mentioned in relation to each defendant[8] but without any indication of its value or meaning – it was not even clarified if they were assessed as mitigating or aggravating. The law does not suffice with a mere descriptive and neutral indication of the mitigating and aggravating circumstances, as this is not an explanation of the grounds that guided the decision. However, since the judgment is not completely silent on this respect and there is the possibility to assess the circumstances and modify the decision if necessary in the appellate stage, the Court of Appeals did not consider adequate to annul the judgment just for this reason.

[8] Chapter X. SENTENCING, pages 207 up to 210.

Under the provisions of the CCRK the applicable principles to calculate the punishment are the following:

- The criminal sanction is the last resort to protect social values and cannot intervene beyond what it is found as strictly necessary. A sanction must not be higher that the necessity of justice enforcement and disproportionate to the fact that endangered the social protected values. Therefore, according to this principle of minimum intervention of the criminal sanction, it must be assumed that the lower punishment foreseen in the law will be sufficient, adequate and normal for standard situations that may be subsumed in the legal incriminating provision (Article 1).

- The punishment is bounded by the purposes of ensuring individual prevention and rehabilitation, ensuring general prevention, expressing social disapproval to the violation of the protected social values and strengthening social respect for the law (Article 41).

- While determining the punishment, the maximum penalty applicable in concrete will be given by the degree of guilt of the perpetrator and the minimum by the intensity of the demands of social reprobation. Inside this new limit, the sanction must not be in contrary to the referred principles of prevention and rehabilitation and shall consider in a proportionate manner all specific mitigating and aggravating circumstanced related to the criminal fact and the conduct and personal and social circumstances of the offender.

Under the provisions of the CCK the applicable principles do not differ significantly. There is no provision equivalent to Article 1 of the CCRK but the same conditions are inherent to the constitutional principle of proportionality. As to the purposes of the punishment, Article 34 is silent regarding the expression of social disapproval to the crime but this is also a principle that is intrinsically linked to the social purpose of criminal law. The rules to calculate the punishment in Articles 64 and 65 are expressed more succinctly but their meaning is essentially the same.

The Court of Appeals will now assess the relevant available elements to determine the adequate sentences to each defendant and each criminal offense, according to the applicable rules of the CCK and CCRK.

N.M

He was a Prosecutor with official duties but this circumstance cannot be assessed as aggravating because it was already considered to subsume his actions in the elements of the criminal offense. The same goes to his purpose of obtaining material benefit, as this is also an element of the crime he committed. However, it must count as an aggravating circumstance the fact that he was working in the justice system and was bound by special professional duties in the administration of justice, which confidence was seriously undermined by his actions.

The facts that he committed two criminal offenses, that he was involved with three co-defendants and that his actions occurred in quite a long period of time, is demonstrative of a considerable amount of guilt and intense danger. This also counts as aggravating circumstances.

The first criminal offense resulted in a considerable monetary loss of the victim. Regardless of who profited with that money this counts objectively as an aggravating factor.

The defendant actions was somehow motivated, or at least facilitated, by the situation of personal fragility that he faced because of the serious illness of his son. It is clear from the evidence that the

purpose of obtaining material benefit was linked to that situation. This is not a justification of the action but counts as a mitigating factor related to the degree of guilt.

At the same time the illness of his son is to be assessed in favour of the defendant. As it is the fact that he has a family of a wife and three children. Not because this reflects directly in the qualification of his criminal actions but because this is a strong preventive factor as the defendant now experienced imprisonment and is aware of the fact that any future repetition of criminal behaviours could put his son and all his family again in an unprotected situation.

It was not proven that in the end the defendant obtained any material benefit from his action in the first criminal offense. In the second criminal offense no material loss even occurred. This may have happened due to circumstances outside his will, but objectively the situation is less unlawful.

The defendant has no previous convictions and being a first time offender counts as mitigating factor.

Finally, his good behaviour during the trial is relevant. Not because that is not what was expected from him but because by doing so the defendant showed that somehow he was settled with the need to accept the consequences of his actions while facing trial, which is the moment he was publically placed in face of social reprobation.

Having these factors in consideration, the Court of Appeals considers that neither the defendants' guilt nor the needs of prevention and social reprobation justify a sanction of 4 years for the first criminal offense of Abusing Official Position or Authority. The limits go from 6 months to 5 years and 4 years is too close to the maximum and over the level of guilt. Weighing the aggravating circumstances at a standard level and the important mitigating circumstances, the adequate and proportionate sanction is set in 3 years of imprisonment.

For the stronger reasons, 1 year of imprisonment imposed for the second criminal offense of Abusing Official Position or Authority is not acceptable. The first instance court by imposing the most severe sentence possible did not consider the mitigating circumstances that itself pointed out in the judgment. The Court of Appeals, considering mainly that in this criminal offense no effective loss of money occurred, finds sufficient the sanction of 8 months of imprisonment.

As aggregate punishment, having in mind the minimum of 3 years and the maximum of 3 years and 8 months, it is adequate to impose 3 years and 6 months of imprisonment.

The defendant was sentenced to the accessory punishment of prohibition from exercising any public administration or public service functions for a period of three 3 years after the term of imprisonment. This sanction was imposed pursuant Article 56 (2) of the CPCK. The imposition of this sanction is not mandatory but in the present case the Court of Appeals finds it adequate. The violation of public duties was very intense and the need to ensure public trust in institutions such as the legal system is considerable. The period of 3 years is not questionable, given the actions on which the defendant incurred.

R.Z and **X.Z**

The Court of Appeals finds that the circumstances applicable to both these defendants are essentially equivalent.

They were the ones that received an unlawful benefit of 30.250 Euros resulting in a considerable monetary loss of the victim. It was not established exactly who triggered the criminal offenses: if the first defendant used the second and third to his advantage or if they used him to theirs. But the fact that they were the ones that kept the benefit is an important aggravating circumstance.

Although they were not official persons it is counted as aggravating circumstance their involvement with someone with high responsibilities in the justice. Not as seriously as in the first defendant's case, but the breach pf the public confidence towards justice is a relevant factor in detriment of the defendants that played a role in that breach.

The fact that they committed two criminal offenses is assessed equally as aggravating.

The defendant **R.Z** is a business person who for sure suffered detrimental affect upon his activity. He is married and has two children. The defendant **X.Z** is married with three children. These personal circumstances have also mitigating value, for the same reasons mentioned before in regard to the first defendant.

The defendants have no previous convictions. Their condition of first time offenders counts in their favour.

Finally, they behaved wrongly during trial in a repetitive and serious manner. By doing so and not adopting a conduct showing their will to accept the consequences of their actions the defendants proved that the prevention necessities in their case are stronger.

Overall the Court of Appeals notes that there are reasons to impose to the three first defendants an equivalent imprisonment sentence. For different reasons the weight of the mitigating and aggravating factors does not differ. Having lowered the sentences imposed to the defendant **N.M**, it is adequate to lower the sentence for the first count against these two defendants. Considering the aforementioned factors, the Court of Appeals considers that the individual sanctions of 1 year of imprisonment for the criminal offense of Trading in Influence (Article 345.1 of the CCRK) and 3 years of imprisonment for the criminal offense of Incitement to Abusing Official Position or Authority (Article 422.1of the CCRK) imposed on the defendants are adequate and proportional to their guilt and to the needs of prevention and social reprobation.

The aggregate punishment must be reduced. There is no justification to differentiate these defendants from the first one, as weighing all factors their responsibility is equivalent. So, between a minimum of 3 years and the maximum of 4 years, it is adequate to impose 3 years and 6 months of imprisonment.

Finally the Court of Appeals finds that the confiscation of items 1 to 14 and 24 seized during the house search of the defendants **R.Z** and **X.Z** cannot be maintained. This matter was previously brought to the attention of this court. By decision of the Court of Appeals dated 24 January 2013 the ruling of the first instance court ordering the return of the confiscated items was quashed due to the need to secure a possible order upon the defendants to pay an amount of money corresponding to the material benefit, pursuant to Article. The Court of Appeals also found that the confiscated objects were not related to the criminal offenses. The appealed judgement ordered the "realization" of those objects but did not order the confiscation of material benefits for the defendants. So, as there is no payment order to secure and as it is not known if a claim will ever be filed, the objects must be returned to the defendants.

M.N

The defendant was clearly the weakest link of the situation subject to trial. She acted under the instructions of the first defendant, meaning that she must have had some kind of deference or dependence towards him. This lowers her guilt considerably.

As other mitigating factors the Court of Appeals finds the lack of evidence that she gained any material benefit, her personal situation, being o mother of three children, having no previous convictions and her impeccable behaviour during trial.

Also the fact that the conviction will have a detrimental effect on her professional situation has to be assessed because from the rehabilitation perspective it is important that she is not to severely deprived of her chance to be professionally integrated.

Noting the mentioned circumstances, the Court of Appeals considers that the sentence of 6 months imposed by the firs instance court is adequate. However, having in mind the said lower degree of guilt and the rehabilitation purposes, it is proportionate to suspend the sentence for the period of 2 years, pursuant to Articles 41 (1) 1), 42 and 44 of the CCK.

For the given reasons the Court of Appeals decided as in the enacting clause.

Presiding Judge

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Manuel Soares, EULEX Judge

Panel Member

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Tore Thomassen, EULEX Judge

Panel Member

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Tonka Berishaj, CoA Judge

Recording Officer

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Anna Malmstrom, EULEX Legal Officer