SUPREME COURT OF KOSOVO
PML.-KZZ. No. 170/2014
19 February 2015
Prishtinë/Priština

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of Supreme Court Judge Nesrin Lushta as Presiding Judge and as members of the panel EULEX Judge Timo Vuojolahti (Reporting Judge) and EULEX Judge Elka Filcheva-Ermenkova, with EULEX Legal Officer Holger Engelmann, acting in the capacity of recording clerk,

In the criminal case against:

1. **K. P.**, father's name Z., mother's maiden name M.M., born on … in XXX, Municipality of Y, residing in Y, Kosovo, Kosovo Albanian, married, father of three children, ___ by profession, of average financial situation,
   In detention on remand since 24 May 2012;

2. **L. P.**, father's name P., mother's name V., born on … in Y, Kosovo, currently residing there, Kosovo Albanian, ___ by profession, of average financial situation;

3. **B.B.**, father's name J., mother's maiden name I.D., born on … in G., currently residing in XXX, Kosovo, Kosovo Albanian, by profession ___, of average financial situation;

All three defendants charged by the Indictment PPS. No. 120/2010, dated 10 August 2011, with having committed the criminal offence of:

1. **Organized Crime** in violation of Article 274 paragraphs 1 and 2 of the Criminal Code of Kosovo[1] (henceforth: CCK), in relation to the defendant **K. P. Organized Crime** in violation of Article 274 paragraph 3 of the CCK in conjunction with the criminal offences of **Abusing Official Position or Authority** in violation of Article 339 paragraph 1 and 3 of the CCK and **Issuing Unlawful Judicial Decisions** in violation of Article 346 of the CCK;

In addition, the defendants **K. P.** and **L. P.** were charged with having committed the criminal offence of:

2. **Falsifying Documents** in co-perpetration in violation of Article 333 paragraph 1 subparagraph 1 in conjunction with Article 23 of the CCK;

The confirmation judge, by decision KA. No. 304/2011, dated 23 September 2011, **dismissed** the charge of **Falsifying Documents** in co-perpetration in violation of Article 333 paragraph 1 subparagraph 1 in conjunction with Article 23 of the CCK against K. P. and L. P..

[1] Issued as 'Provisional Criminal Code of Kosovo', promulgated as UNMIK Regulation 2003/25, dated 6 July 2003, renamed and amended by the Law No. 03/L-002, in force until 31 December 2012

By the first instance **Judgment P. No. 477/2011 of the District Court of Pejë/Peć, dated 24 May 2012,**

a) The defendant **K. P.** was found:
- Not guilty of the criminal offence of **Organized Crime** pursuant to Article 274 paragraphs 1 and 3 of the CCK,
- Guilty of the criminal offence of **Abusing Official Position or Authority** in violation of Article 339 paragraph 1 and 3 of the CCK,
- While the charges against him for having committed the criminal offence of **Issuing of Unlawful Judicial Decisions** pursuant to Article 346 of the CCK were **rejected**.
He was sentenced to a term of **imprisonment of five (5) years** and an **accessory punishment of Prohibition on Exercising Public Administration or Public Service Functions for a period of three (3) years** after the principle punishment has been served.

b) The defendant **L. P.** was found:
- Guilty of the criminal offence of **Fraud** in violation of Article 261 paragraph 1 and 2 of the CCK.
He was sentenced to a term of imprisonment of three (3) years and an **accessory punishment of Prohibition on Exercising a Profession, Activity or Duty for a period of three (3) years**, starting from the day this Judgment becomes final, provided that the period of time served in prison is not included in the duration of this accessory punishment.

c) The defendant **B.B.** was found:
- Guilty of the criminal offence of **Fraud** in violation of Article 261 paragraph 1 and 2 of the CCK.
He was sentenced to a **term of imprisonment of six (6) months, which shall not be executed if the defendant does not commit another criminal offence for a period of two (2) years**. An **accessory punishment of Prohibition on Exercising a Profession, Activity or Duty for a period of three (3) years** starting from the day this Judgment becomes final was imposed.

A fourth defendant was acquitted from all charges.

Upon appeals filed by the Special Prosecutor and on behalf of all three convicted defendants, the **Court of Appeals** as court of second instance by **Judgment PAKR. No. 1122/2012, dated 25 April 2013**, rejected the appeals filed by on behalf of the defendants K. P., L. P. and B.B. against the Judgment of the court of first instance as unfounded. The court *ex officio* **modified** the first instance Judgment as follows:

The defendant K. P. was, instead of the criminal offence of Abusing Official Position or Authority, found guilty of the criminal offence of **Issuing Unlawful Judicial Decisions** pursuant to Article 346 of the CCK and **sentenced to five (5) years of imprisonment**. Pursuant to Article 391 paragraph 5 of the Kosovo Code of Criminal Procedure[2] (henceforth: KCCP), the time spent in pre-trial custody was included in the sentence.

[2] Issued as 'Provisional Criminal Procedure Code of Kosovo', promulgated as UNMIK Regulation 2003/26, dated 6 July 2003, renamed and amended by the Law No. 03/L-003, in force until 31 December 2012

The Appeal of the Special Prosecutor was granted and the Judgment of the court of first instance was annulled in relation to the acquittal of the fourth defendant. The case against him was returned to the Basic Court for retrial.

Deciding upon the Request for Protection of Legality filed on 26 December 2013 by Defence Counsel Rame Gashi on behalf of the defendant L. P., the Request for Protection of Legality filed on 6 January 2014 by the defendant L. P., the Request for Protection of Legality filed on 15 January 2014 by the Defence Counsel Destan Rukiqi on behalf of the defendant B.B. and the Request for Protection of Legality filed on 4 February 2014 by the defendant K. P. against the final Judgment PAKR. No. 1122/2012 of the Court of Appeals, dated 25 April 2013, and the Judgment P. No. 477/2011 of the District Court of Pejë/Peć, dated 24 May 2012, while also taking into account the Response of the Office of the Chief State Prosecutor of Kosovo (henceforth: OSPK), filed on 19 August 2014,

Issues the following:

JUDGMENT

1. **The Requests for Protection of Legality filed on behalf of and by the defendant L. P. against the Judgment P. No. 477/2011 of the District Court of Pejë/Peć, dated 24 May 2012, and the Judgment PAKR. No. 1122/2012 of the Court of Appeals, dated 25 April 2013, are hereby REJECTED AS UNFOUNDED.**

2. **The Request for Protection of Legality filed by the Defence Counsel on behalf of the defendant B.B. is determined as WELL-FOUNDED. The Judgment P.-K. No. 477/2011 of the District Court of Pejë/Peć, dated 24 May 2012, and the Judgment PAKR. No. 1122/2012 of the Court of Appeals, dated 25 April 2013, are hereby MODIFIED as follows:**
   - ***The defendant B.B. is ACQUITTED FROM ALL CRIMINAL CHARGES*.**

3. **The Request for Protection of Legality filed by the defendant K. P. is determined as PARTIALLY WELL-FOUNDED. The aforementioned Judgments are MODIFIED with respect to the criminal sanction as follows:**
   - ***The accused K. P. is sentenced to a term of imprisonment of four (4) years and six (6) months*.**

   For the REMAINING PART the Request is REJECTED AS UNFOUNDED.

REASONING

I. Procedural Background

1) On 22 September 2010 the SPRK issued a ruling on initiation of investigation against the aforementioned defendants and one additional co-defendant.

2) In August 2011 the SPRK filed with the District Court of Pejë/Peć the Indictment PPS. No. 120/2010, dated 10 August 2011, charging the three defendants and one additional co-defendant with the aforementioned criminal offences.

3) By the rulings KA. No. 034/2011, dated 23 September and 27 December 2011 the Indictment was confirmed related to the charges for Organized Crime in conjunction with the criminal offences of Abusing Official Position or Authority in violation of Article 339 paragraph 1 and 3 of the CCK and Issuing Unlawful Judicial Decisions in violation of Article 346 of the CCK while dismissing the charge for the criminal offence of Falsifying Documents in co-perpetration in violation of Article 333 paragraph 1 subparagraph 1 in conjunction with Article 23 of the CCK against K. P. and L. P..

4) The main trial was held between 12 March and 24 May 2012 before the District Court of Pejë/Peć.

5) On 24 May 2012 the District Court of Pejë/Peć issued the Judgment P. No. 477/2011, acquitting the defendant K. P. of the criminal offence of Organized Crime pursuant to Article 274 paragraphs 1 and 3 of the CCK, finding him guilty of having committed the criminal offence of Abusing Official Position or Authority in violation of Article 339 paragraph 1 and 3 of the CCK, while the charges against him for having committed the criminal offence of Issuing Unlawful Judicial Decisions pursuant to Article 346 of the CCK were rejected. He was sentenced to a term of imprisonment of five (5) years and an accessory punishment of Prohibition on Exercising Public Administration or Public Service Functions for a period of three (3) years after the principle punishment has been served.

6) The defendant L. P. was found guilty of the criminal offence of Fraud in violation of Article 261 paragraph 1 and 2 of the CCK, the Court thus re-qualifying the original charge of Organized Crime. He was sentenced to a term of imprisonment of three (3) years and an accessory punishment of Prohibition on Exercising a Profession, Activity or Duty for a period of three (3) years, starting from the day this Judgment becomes final, provided that the period of time served in prison is not included in the duration of this accessory punishment.

7) The defendant B.B. was found guilty of the criminal offence of Fraud in violation of Article 261 paragraph 1 and 2 of the CCK, the Court thus re-qualifying the original charge of Organized Crime. He was sentenced to a term of imprisonment of six (6) months, which shall not be executed if the defendant does not commit another criminal offence for a period of two (2) years. An accessory punishment of Prohibition on Exercising a Profession, Activity or Duty for a period of three (3) years starting from the day this Judgment becomes final was imposed. A fourth defendant was acquitted from all charges.

8) The Judgment was appealed by the SPRK and the defendants K. P., L. P. and B.B..

9) On 25 April 2013 a public session was held before the Court of Appeals. The Court by Judgment PAKR. No. 1122/2012, dated 25 April 2013, rejected the appeals filed by on behalf of the defendants K. P., L. P. and B.B. against the Judgment of the court of first instance as unfounded. The court *ex officio* modified the first instance Judgment as follows:

   - The defendant K. P. was found guilty of the criminal offence of Issuing Unlawful Judicial Decisions pursuant to Article 346 of the CCK and sentenced to five (5) years of imprisonment. Pursuant to Article 391 paragraph 5 of the KCCP, the time spent in pre-trial custody was included in the sentence.

   The Appeal of the Special Prosecutor was granted and the Judgment of the court of first instance was annulled in relation to the acquittal of the fourth defendant. The case against him was returned to the Basic Court for retrial.

10) Requests for Protection of Legality were filed on 26 December 2013 by Defence Counsel Rame Gashi on behalf of the defendant L. P., on 6 January 2014 by the defendant L. P. himself, on 15 January 2014 by the Defence Counsel Destan Rukiqi on behalf of the defendant B.B. and on 4 February 2014 by the defendant K. P. against the final Judgment PAKR. No. 1122/2012 of the Court of Appeals, dated 25 April 2013, and the Judgment P. No. 477/2011 of the District Court of Pejë/Peć, dated 24 May 2012.

11) In addition the defendant L. P. filed supplementary requests to his Request for Protection of Legality, dated 25 February 2014, 28 April 2014, 18 June 2014 and 10 July 2014.

12) The defendant B.B. on 2 October 2014 filed a supplementary Submission to his Request for Protection of Legality.

13) On 19 August 2014 the Response of the Office of the Chief State Prosecutor of Kosovo (OSPK) was filed.

II. Submissions of the Parties

1. Request filed by the defendant K. P. on 1 February 2014

14) The Request proposes to amend both challenged Judgments, or, alternatively, partially or entirely annul the Judgments and return the case for re-trial to the Basic Court of Pejë/Peć. The defendant K. P. bases the Request against both Judgments on the reason of substantial violations of the Criminal Procedure Code and violations of the criminal law.

15) In particular the Request claims that the challenged Judgments contain substantial violations of the criminal procedure, violations of the criminal law and violations of the rights of the defence because four distinct criminal proceedings against the defendant were conducted instead of concentrating all related criminal offences in one case and applying the provision of Article 81 of the Criminal Code of the Republic of Kosovo (new criminal code, CCRK) on criminal offences in continuation. The Court of first instance and the Court of Appeals by accepting that the case against the defendant was separated into four distinct cases (see Request page 3, no. I. to IV.) substantially violated the criminal procedure, the criminal law and the rights of the defendant, in particular Article

81 of the CCRK. The cases should have been concentrated into one case since all elements of a criminal offence in continuation are met.

16) The challenged decisions contain wrongful decisions on the criminal sanctions in violation of Article 451 paragraph 1 in conjunction with Articles 402 para. 1 item 4 and 406 of the KCCP. When calculating the punishment, both courts failed to correctly evaluate all aggravating and mitigating circumstances. The courts gave too much weight to the aggravating circumstances while not considering all mitigating circumstances. In particular, the court was not authorized to impose a maximum punishment based on the relative modest amount of damage (16,000 Euro) caused to the Guarantee Fund of Kosovo. As for the mitigating circumstances not taken into consideration, the defendant mentions the fact that he was a civil servant and a judge, that he had a position of trust, his age, and his obligations towards his family and children, three of whom are students. The defendant considers that it would be sufficient to impose either suspended sentence or a minimum sentence foreseen by that criminal offence.

2. Requests filed on behalf of and by the defendant L. P.

A. Request filed by Defence Counsel Rame Gashi on behalf of the defendant L. P. on 26 December 2013

17) The Defence Counsel proposes to approve the Request as well-founded and to modify the impugned Judgments by acquitting the defendant from all charges or, alternatively, to annul the mentioned Judgments and return the case for re-trial to the Basic Court of Pejë/Peć.

18) The Defence Counsel bases his Request on the grounds of Article 432 subparagraphs 1.1. (violation of the criminal law), 1.2. (substantial violations of the provisions of criminal procedure) and 1.3. (other violation of the provisions of criminal procedure affecting the lawfulness of the challenged decisions) of the CPC. He also refers to the provisions of Article 432 in conjunction with 393 and 394 paragraph 1 subparagraph 1.4 and Article 35 of the CPC as well as violations of all the grounds pursuant to Article 403 paragraph 1 items 10 and 12 and Article 404 of the KCCP.

In particular he claims:

19) The enacting clause of the Court of Appeals Judgment related to the defendant K. P. for the criminal offence of Issuing Unlawful Judicial Decisions, pursuant to Article 346 of the CCK, is incomprehensible and in contradiction with reasoning as well as the records and the evidence of the case. It mentions incriminating acts for the defendant L. P., for which he was neither accused nor found guilty. Also, the enacting clause mentions L. P.'s intention to obtain a material benefit for himself while in the reasoning it is concluded that he had given the money deemed as compensation to the defendant K. P.. The enacting clause describes that L. P. on 25 April (2008) gave 16,000 Euro to K. P. while during the main trial it had been proven that L. P. only took his compensation for procedural costs, to which he was entitled.

20) The challenged Judgments exceed the scope of the charges since the Indictment does not contain any proposal for accessory punishment. Both judgments pronounce the prohibition

on exercising a profession as accessory punishment while the Indictment did not request such a punishment.

21) The contested Court of Appeals Judgment violates the rights of the defence in two points: The Court failed to evaluate or take into account the relevant evidence timely offered by the defence (details on page 3 para. 5 of the Request) although it was obliged to do so. Also, the Judgment does not examine and consider the Appeal filed by the defendant L. P. himself while it fails to answer any of the arguments submitted in the separate Appeal of the Defence Counsel of L. P..

22) The act for which the defendant L.P. was prosecuted is not a criminal offence: The defendant could not have committed the criminal offence of Fraud, since he himself did not know F.G. while the mentioned person was friend of the defendant K. P.. He acted only believing the assurances of K. P.. He had no knowledge about any documents K. P. had forged earlier. K. P. had the idea of having the compensation sum paid to the account of L. P.. He was manipulated by judge K.P., which is proven by the fact that he did not receive more than his compensation for representing a client, as he was entitled to. Consequently he acted without the *mens rea* required for the criminal offence. He never misled the insurance company since he was only acting before the court.

23) The division of the charges into "more than two or three" cases and the allocation of these to courts with different jurisdictions violate the rights of the defendants (principle of concentration).

24) The enacting clauses of both contested Judgments are in contradiction to the statements given by the witnesses F.G. and P.J.. According to the statements of witness F.G., the witness had been asked by the defendant L. P. if he had received the compensation money and the witness had told that it was the defendant K. P. as judge in the case who had received the money. The Court of Appeals substantially violated the criminal procedure when denying that the mentioned contradictions justified an annulment of the first instance Judgment. Witness P.J. confirmed that the defendant L. P. had told F.G. the history of the whole case after finding out that he had not received the indemnity payment.

25) In addition, the request includes several additional allegations in relation to the factual findings of the first instance court and the Court of Appeals.

B. Request filed by the defendant L. P. on 6 January 2014

26) The defendant proposes finding his Request for Protection of Legality well-founded, to modify the contested Judgments and to acquit the defendant of the charges or alternatively, annul the challenged Judgments and return the case for re-trial. Pursuant to Article 435 paragraph 4 of the CPC, he requests to suspend or terminate the execution of the final Judgment until the decision of the Supreme Court on the current Request.

27) The defendant bases his Request on the grounds of Article 432 subparagraphs 1.1. (violation of the criminal law), 1.2. (substantial violations of the provisions of criminal procedure) and 1.3. (another violation of the provisions of criminal procedure affecting the lawfulness of the challenged decisions) of the CPC. He also mentions the provisions of Article 432 in conjunction with 393 and 394 paragraph 1 subparagraph 1.4 and Article 35 of the CPC as well as violations of all the grounds of the old law pursuant to Article 403

paragraph 1 items 10 and 12 and Article 404 of the KCCP. The enacting clause of the final Judgment against the defendant L. P. is in deep contradiction with its reasoning as well as with witness statements and every piece of material evidence.

In particular he claims:

28) The enacting clause of the final Judgment against the defendant L. P. is in deep contradiction with its reasoning as well as with the witness statements and every piece of material evidence. The enacting clause is in contradiction with the reasoning regarding who had proposed the offer to settle the claim for the sum of 16,000 Euros paid as compensation. The trial panel had established that the representative of the Guarantee Fund of Kosovo proposed the settlement. This contradiction may not be considered as of minor relevance as done by the Court of Appeals.

29) The Request claims a violation of the principle of *ne bis in idem* enshrined in Article 4 of the CPC. The defendant allegedly was acquitted by the District Court of Prishtinë/Priština in the case P. No. 13/2012 for the same criminal offence subject to the current proceedings. The defendant submits that the Court of Appeals did not review the new evidence related to that, which he had delivered together with his Appeal against the first instance Judgment.

30) The first instance court did not establish all elements of the criminal offence of Fraud. It did not assess the subjective elements of the criminal offence of Fraud in an explicit and detailed way in the Judgment. The defendant L.P. acted without intent; he himself was deceived by K.P.. The defendant did not have the intent to gain material benefit for himself. He gained only 800 Euro, of which 450 Euro were his legitimate lawyer's fee and the remaining 350 Euro were expenses paid for the experts. The panel considered the same 200 Euro as material benefit for the defendants L. P. as well as B.B. without noticing that they were part of the 800 Euro of compensation for procedural costs. No unlawful benefit for himself was intended nor obtained. The Court of Appeals has wrongly established the existence of required *mens rea*. *Dolus specialis* was only established by the Court of Appeals in regards of the defendant K.P..

    There was no fraudulent act committed by defendant L.P.. He had no role in the appointment of B.B. as medical expert witness, nor was it him who told this person that there was no need to examine F.G., but K. P..

    The criminal liability is excluded because defendant L.P. represented the injured party in the compensation claims case (F.G.) based on the judge's decision, although there was no authorization in the case file from the client. The Appeal Panel did not consider exculpatory circumstances and the principle '*in dubio pro reo*' at all.

31) The District Court did not examine the witness Z.G, as requested by the defence, although Article 163 paragraph 3 of the KCCP provides that a witness can be examined out of court.

32) The police and prosecutor delayed the investigation for more than a year and afterwards split the case into several indictments, although it should have been concentrated into one case instead. The defendant claims that his rights were affected by these procedural circumstances.

33) The punishment pronounced against the defendant L. P. is not based on law and violates the rights of the defendant:
    - The punishment is not in proportion to the criminal offence and the level of criminal liability, in particular when compared to the punishment pronounced against the defendant B.B..
    - The Judgment does not state the mitigating and aggravating circumstances it took into consideration.
    - The purpose "to send a strong signal not only to the perpetrators but also to Kosovo society", mentioned in the reasoning of the appeal Judgment is not a legitimate one for calculating criminal sanctions.
    - The Judgment failed to credit that the defendant had spent 1 month in house detention.
    - The removal of the accessory punishment against the defendant K.P. violates the principle that everyone should be equal before the law.
    - In calculating the accessory punishment the Court should credit the fact that, upon the prosecution's request, the defendant's license to practice law has been suspended by the Kosovo Chamber of Advocates since 2011.

34) The factual findings of the first instance court and Court of Appeals are in many parts in contradiction with the evidence. The Judgment of the Court of Appeals does not explain the details of the plan that K. P. concocted together with L. P.. L. P. did not know that F.G. was only lightly injured.

35) In addition the defendant has filed four requests for considering additional evidence, dated 25 February, 28 April, 18 June and 10 July 2014, supplementing his Request for Protection of Legality. He also filed a request to speed up the adjudication of his Request, dated 15 July 2014.

3. Request filed by Defence Counsel Destan Rukiqi on behalf of the defendant B.B. on 14 January 2014

36) The defendant proposes to grant his Request for Protection of Legality as well-founded and to modify the contested Judgments and acquit the defendant of the charges or, alternatively, annul the challenged Judgments and return the case for re-trial. The Defence bases the Request against both Judgments on the reason of substantial violations of the Criminal Procedure Code and violations of the criminal law.

In particular the defendant submits:

37) The defendant B.B. was only charged with the criminal offence of Organized Crime pursuant to Article 274 paragraph 2 of the CCK. The definition of this offence does describe only the active participation in the organized criminal group and not the actual committing of any criminal offence. The court was not authorized to reclassify the criminal offence to Fraud since only the charge pursuant to Article 274 paragraph 2 of the CCK was allowed in the confirmation ruling of the District Court of Pejë/Peć KA. No. 304/2011, dated 23 September 2011.

38) The same applies to the imposed accessory punishment of prohibiting the defendant from exercising his profession, activity or duty, pursuant to Article 54 paragraph 1 and 2 item 4 and Article 57 paragraphs 1 and 2 of the CCK. The accessory punishment was not

indicated in the indictment. These violations were affirmed and continued by the Judgment of the CoA.

39) The Judgment of the first instance is incomprehensible and the enacting clause is in contradiction with the grounds and the reasoning. The defendant did not commit the criminal offence of Fraud.

The first instance Judgment does not sufficiently describe the elements of the criminal offence of Fraud, as allegedly committed by the defendant, neither the objective nor the subjective elements. In particular, the element of (direct) intent – as required by the law - is missing. The Court of Appeals by itself had doubt about the existence of the subjective element of the criminal offence of Fraud with regard to the defendant B.B..

The enacting clause, when describing the way in which the defendant B.B. had committed the criminal offence of Fraud, mentions that he exaggerated the injuries he "believed" F.G. had sustained. The defendant trusted the authenticity of the discharge paper from the hospital. As confirmed by the witness Dr. M.J. during the main trial, it was reasonable for him to do so, based on the quality of the report (See Judgment page 49, 2nd para. under headline 'B.B.'). He did not know F.G. at all nor has he ever personally had contact with him. Since the Judgment concludes that he could trust the mentioned discharge report, he could not have acted with intent in order to acquire a material benefit for Mr. Gashi. He believed that F.G. had actually suffered the described injuries.

Both instances found that the law had not been violated by the defendant B.B. by providing his expert opinion. Both courts determined that the defendant did not know about the plan devised by the defendants K.P. and L.P. to damage the Guarantee Fund of Kosovo and that he did not receive more than the 200 Euro for compensation drafting the expert opinion (see page 7, para. 1.12 of the Request; not further substantiated). These objective elements of the offence are missing too.

40) The Court of Appeals, when finding a violation of Article 403 paragraph 1 item 12 of the KCCP, pursuant to Article 424 para. 1 of the KCCP was obliged to annul the first instance Ruling and send it for re-trial. The stance of the Court of Appeals that "minor flaws in the enacting clause do not justify the annulment of the judgment…" is in contradiction with the wording of the provisions of the criminal procedure. It is clearly indicated in Article 403 paragraph 1 item 12 of the KCCP that any such contradiction, inconsistency or incomprehensible part is considered a *substantial* violation and an absolute reason for annulling the respective decision.

41) In an additional Submission, filed on 2 October 2014 with the Supreme Court, the Defence Counsel Destan Rukiqi on behalf of the defendant B.B. proposes to consider the testimony of K. P. as witness in the main trial before the Basic Court of Pejë/Peć in the case against I.S., PKR. No. 386/2013, dated 28 February 2014, when Mr. K.P. stated that he lied about people who did not deserve it and because of that an innocent man, Mr. B.B., was punished.

4. The Reply of the Office of the Chief State Prosecutor

42) The OSPK in the Reply to the Requests moves the Supreme Court to reject the defendant K. P.'s Request as unfounded, while not making an explicit motion in regard to the other

three Requests for Protection of Legality filed by the defendant L. P., his Defence Counsel and the Defence Counsel of the defendant B.B..

43) In regard to the re-qualification of the criminal offence committed by K. P., she concurs with the reasoning of the Court of Appeals. All elements of the criminal offence were evaluated and found present.

44) The Court had no obligation to concentrate the three distinct criminal proceedings into one case.

45) In respect to the Request of L. P. and his Defence Counsel, the Court had the right, according to its own assessment, to admit or reject evidence according to its relevance and probative value.

46) Both courts have sufficiently substantiated on the *mens rea* of the defendant B.B.. The element of intent to exaggerate F.G.'s injuries was found present by the fact that he had not examined the mentioned person while still confirming his severe bodily injuries.

III. Supreme Court Findings

1. Admissibility of the Requests for Protection of Legality

47) The Supreme Court of Kosovo finds that the Requests for Protection of Legality filed on behalf and by the defendants were timely filed and are admissible.

48) In regard to the supplemental requests filed by the defendant L. P. on the 25 February, 28 April, 18 June and on 10 July 2014 the Supreme Court has considered the contents of these additional submissions to the extent that they are explaining or supplementing the factual and legal arguments presented in the initial requests. New additional arguments and facts that were presented in addition to the initial Requests were not considered because being presented belatedly.

49) The additional Submission filed on 2 October 2014 by the Defence Counsel Destan Rukiqi on behalf of the defendant B.B. is dismissed as belated. Even if the Court would accept the Submission as timely filed and only supplementary to the arguments submitted with the initial Request for Protection of Legality, the Submission is inadmissible since it is based exclusively on the ground of an erroneous or incomplete determination of the factual situation (Article 432 paragraph 2 of the CPC).

2. The composition of the Panel

50) The Supreme Court of Kosovo with majority decision decides that the appointment of the Presiding Judge[3] and the composition of the Panel[4] is based on the competencies provided

[3] See Dissenting Opinion of Judge Vuojolahti on that question attached to the Judgment.
[4] See Dissenting Opinion of Judge Lushta on that question attached to the Judgment.

to EULEX Judges by the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors[5] (henceforth: LoJ).

51) Law No. 04/L-273 on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo (hereinafter '*Omnibus Law'*), approved on 23 April 2014, entered into force on 30 May 2014 and *inter alia* modified the LoJ. The *Omnibus Law* raises the matters of jurisdiction of EULEX Judges and composition of the panels that are related to the competence of the Court. The Supreme Court Panel unanimously decided, that the Requests for Protection of Legality filed in the current case are to be considered as an 'ongoing case' within the meaning of the new Article 1.A of the LoJ, and thus EULEX judges have jurisdiction on the case. The Panel had to determine if it was correctly composed and on the presiding judge.

52) Article 3 of the *Omnibus Law* added Article 1.A and amended Article 3 of the *LoJ* as follows:

Article 1.A.
Ongoing cases

For purpose of this law an ongoing case means:

1. Cases for which the decision to initiate investigations has been filed before 15 April 2014 by EULEX prosecutors in accordance with the law.

2. Cases that are assigned to EULEX judges before 15 April 2014.

Article 3.
Jurisdiction and competences of EULEX judges for criminal proceedings

3.1. EULEX judges assigned to criminal proceedings will have jurisdiction and competence over ongoing cases as stipulated in Article 1.A sub-paragraph 1.2 of this law.

3.2. …

3.3. Panels in which EULEX judges exercise their jurisdiction in criminal proceedings will be composed of a majority of local judges and presided by a local judge. Upon the reasoned request of the EULEX competent authority Kosovo Judicial Council will decide that the panel to be composed of majority of EULEX judges.

3.4. …

53) The amended Article 2.3 of the *LoJ* provides that where required, the relevant aspects of the activity and cooperation of EULEX Judges with the Kosovo Judges:

"… will be further outlined, to a necessary extent, in a separate Arrangement between the Head of the EULEX Kosovo and the Kosovo Judicial Council."

[5] Law No. 03/L-053, 13 March 2008, as amended by the Law No. 04/L-273 Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo, Official Gazette No. 32, dated 15 May 2014.

54) An agreement between the Head of the EULEX Kosovo and the Kosovo Judicial Council on relevant aspects of the activity and cooperation of EULEX Judges with the Kosovo Judges working in the local courts was reached on 18 June 2014 (hereinafter '*The Agreement*').

55) Relevant to the question of panel composition is the issue regarding whether or not the case is to be considered as an 'ongoing' case.

A request for protection of legality is an extraordinary legal remedy to be used against final decisions. A request for protection of legality becomes a pending case when it is filed with the court. This supports an interpretation that this case of extraordinary legal remedy was not an ongoing case on 15 April 2014, and thus would be outside of the jurisdiction of EULEX Judges.

On the other hand, the core question is how the phrase 'cases that are assigned to EULEX Judges before 15 April 2014' shall be interpreted in a situation when the 'case' refers to requests for extraordinary legal remedies.

The Panel notes that the LoJ was amended by the competent authorities of Kosovo following an international agreement reached by the exchange of letters between the Republic of Kosovo and the European Union (on the European Union Rule of Law Mission in Kosovo, hereinafter International Treaty), ratified by Law No. 04/L-274. The International Treaty, with direct nexus to the LoJ, describes that the transitioning of EULEX Kosovo mandate is based on a "normally no new case" policy. This gives reasons to conclude that the International Treaty is based on the idea that the cases which EULEX prosecutors and Judges have been dealing with (before 15 April 2014) should also be concluded under the jurisdiction of EULEX Judges.

The new Art 1.A in the LoJ speaks about 'cases'. The law doesn't give any further explanation what is meant with this concept of 'case'. However, it is very obvious that the 'case' refers to criminal proceedings dealing with one or more criminal offences. Article 68 of the CPC explains the stages of a criminal proceeding as follows:

> *"A criminal proceeding under this Criminal Procedure Code shall have four distinct stages: the investigation stage, the indictment and plea stage, the main trial stage and the legal remedy stage."*

A criminal investigation is initiated when there is a reasonable suspicion that a criminal offence has been committed (or is to be committed). The decision to initiate the investigation specifies inter alia the suspect, a description of the act which specifies the elements of the criminal offence, and the legal name of the criminal offence. Later on, it is possible to expand the investigation. However, when the investigation has been completed and pursuant to the requirements provided by law, the 'case' moves to the next stage (indictments and plea stage), then to main trial and at last to legal remedy stage. But throughout all the stages listed above, the 'case' is the same: dealing with the same relevant facts which constitute the elements of the criminal offence of which the defendant has been suspected, or for which they have been indicted, or for which they have been convicted and sentenced.

The headline of Chapter XXI in the CPC is "Legal Remedies". The chapter includes both ordinary legal remedies and extraordinary legal remedies.

The Panel considers that the concept of 'case' in Art 1.A of the LoJ must be interpreted in such a way that it covers all of the stages of criminal proceedings, including the extraordinary legal remedies. The 'case' features the same defendant/s, the same criminal offence/s and the same facts, i.e. the same merits. It does not become a new case because it enters a new stage or phase of the criminal proceedings.

The Omnibus Law has its basis in the International Treaty; the Omnibus Law is implementing what was agreed with the International Treaty. When interpreting the new provisions of the LoJ special attention must be paid on the provisions in Section 3 of the Vienna Convention on the Law of Treaties (hereinafter *Vienna Convention*). This convention is applicable law also in Kosovo. Article 31 of the *Vienna Convention* sets the rules for interpretation of treaties. Article 31 reads:

> *"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
>
> *2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
>
> *a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
>
> *…*
>
> *3. There shall be taken into account, together with the context:*
>
> *a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;"*

The wording in Article 3 of the LoJ supports an interpretation that the majority of the Panel should consist of local Judges. However, Count 2 of *The Agreement* states, that *in all ongoing cases the trial panels consisting of a majority of EULEX judges and will continue with a majority of EULEX judges on the panel for the continuation of all phases of the trial and the remainder of the proceedings.*

Based on the Article 31.3 of the Vienna Convention, *The Agreement* reached between the same parties shall be taken into account when interpreting the new provisions of the *LoJ*.

The wording in Count 2 of *The Agreement* is vague and unclear. On one hand, it speaks about *trial panels*, which can be considered to refer to the first instance trial only. On the other hand it speaks about '*all phases* of the trial and *the remainder of the proceedings'*, which clearly points to all phases of the trial and *proceedings* .When *The Agreement* was meant to give guidance ('further outline') for the interpretation of the Omnibus Law, it would have been fair to assume that it would clearly express, by using exact legal concepts, the purpose and scope of this provision.

The Panel considers that by repeating twice the same matter, using different expressions ('*for the continuation of all phases of the trial*' and '*the remainder of the proceedings'*), the parties of *The Agreement* emphasized that the provision deals with all stages of a criminal proceeding. This means the provision covers also the stage of legal remedies. Moreover, the wording of Count 2 of *The Agreement* clearly refers to '*continuation*' with

the panel composition when it states that '… *in all ongoing cases the trial panels consisting of a majority of EULEX Judges and will continue with a majority of EULEX Judges'*. This wording indicates that the purpose was to maintain the previous situation also when it comes to the questions concerning the composition of the Panel.

Thus, the Panel concludes that the Article 3 of the LoJ, despite of its wording, has to be interpreted in the light of the purpose of the International Treaty, as explained in *The Agreement*. Reading together the Article 3 of the LoJ and the count 2 of *The Agreement* leads to the interpretation that *when there has been a Panel consisting of a majority of EULEX Judges, all the following stages of the proceedings may also be conducted with a majority of EULEX Judges.* This interpretation is also consistent with the policy of 'normally no new case' as described in the International Treaty (paragraph 8, above). Therefore the procedure regarding the adjudication of an ongoing case by a majority of EULEX judges is not affected by the amendments in force since 30 May 2014.

56) Both, the main trial panel as well as the panel of the Court of Appeals were composed of a majority of EULEX judges. In application of the provisions discussed before, it is concluded that the Panel is correctly composed with a majority of EULEX Judges.

57) The presiding judge in the current panel was appointed in application of the Article 3.3. of the LoJ.

3. <u>The defendant K. P.</u>

58) The Supreme Court finds the defendant's Request partially well-founded and rejects the Request for the remaining part as unfounded.

59) The defendant's Request alleges that the Court of first instance and the Court of Appeals by accepting that the case against the defendant was separated into four distinct cases substantially violated the criminal procedure, the criminal law and the rights of the defendant, in particular Article 81 of the CCRK. The cases should have been concentrated into one case since all elements of a criminal offence in continuation are met.

60) The Panel rejects that argument as unfounded.

As to the defendant's claim that the facts established by the court of first instance during the main trial determining the nature and the legal qualification of the criminal offence are erroneous or incomplete, the Supreme Court refers to Article 432 paragraph 2 of the CPC, which provides that a Request for Protection of Legality may not be based on these grounds.

As far as the defendant alleges that final judgment fails to correctly evaluate the facts established by the trial court in respect to the legal qualification, he has not substantiated that the elements of a criminal offence in continuation are present. No factual details on the other criminal offences subject to the criminal proceedings mentioned under the numbers II. to IV. on page 3 of his Request were provided.

In addition, the Court refers to Article 81 paragraph 4 of the CCRK. Pursuant to that provision, the qualification as criminal offence in continuation might even be in

disadvantage of the defendant. In application of Article 3 paragraph 2 of the CCRK the court is under the obligation to apply the most favourable law to the perpetrator.

61) There is no violation of the rights of the defendant either. The generally accepted principle of concentration, which guides the courts to concentrate related criminal offences into one criminal procedure aims exclusively at ensuring procedural economy and efficiency and does not serve to protect the defendant's rights. If there are other considerations conflicting with the aim to organize proceedings in the utmost efficient way, as for example procedural obstacles related to the person of one out of several defendants, the courts are free to sever cases and proceed separately. The defendant therefore cannot claim a deviation from the principle as a violation of his procedural rights. His right to receive a fair and proportionate punishment is protected through the provision of Article 82 paragraph 1 of the CCRK (previous CCK Article 72), which obliges the courts in case of conviction of a person that has been convicted before to impose an aggregate punishment, taking into consideration the earlier imposed punishment(s).

62) The defendant also claims that the challenged Judgments contain wrongful decisions on the criminal sanctions. When calculating the punishment, both courts failed to correctly evaluate all aggravating and mitigating circumstances. By imposing the maximum sentence of imprisonment of five years for committing the criminal offence of Issuing Unlawful Judicial Decisions the Court of Appeals violated the criminal law.

63) The Supreme Court Panel finds this argument well-founded. The Court of Appeals did not take into consideration that the Court established the existence of mitigating circumstances, but regardless of that imposed the maximum penalty applicable to the criminal offence committed, thus violating the general rules on determining punishments under Article 64 of the CCK.

64) First, the majority[6] of the Supreme Court Panel considers, Pursuant to Article 432 subparagraph 1.1. of the CPC in conjunction with Article 64 of the CCK, the defendant was entitled to base his Request on that ground. A violation of the mentioned provision of the CCK constitutes a violation of the criminal law.

Article 432 paragraph 1 of the CPC enumerates the grounds based upon which a request for protection of legality may be filed:

"1.1. on the ground of a violation of the criminal law;

1.2.on the ground of a substantial violation of the provisions of criminal procedure provided for in Article 384, paragraph 1, of the present Code, or

1.3. …"

The fact that while subparagraph 1.2. refers only to the procedural violations explicitly provided for in Article 384 paragraph 1 of the CPC, subparagraph 1.1. has no such limitations, clearly indicates that a request for protection of legality against a final judicial decision can be based on any violation of the criminal law. Although Article 385 of the CPC enumerates violations of the criminal law for the purpose of appeals against judgments, Article 432 paragraph 1.1. of the CPC does not refer to that provision.

[6] See Dissenting Opinion of Judge Lushta attached to this Judgment.

Therefore the violations of the criminal law that can be claimed by a request for protection of legality are not limited to the ones provided in Article 385 of the CPC.

65) Second, what comes to the violation of the criminal law, the majority of the Supreme Court Panel states the following:

66) The Judgment of the court of first instance convicted the defendant for having committed the criminal offence of Abusing Official Position or Authority in violation of Article 339 paragraphs 1 and 3 of the CCK and imposed a punishment of imprisonment of five (5) years and an accessory punishment of Prohibition on Exercising Public Administration or Public Service Functions for a period of three (3) years after the principle punishment has been served. On page 55 under the headline 'Mitigation/Aggravation of Punishment' the District Court enumerates the circumstances taken into consideration for calculating the punishment against K. P. as follows:

> *"He showed no remorse. His actions served to undermine confidence in the administration of justice. His actions resulted in a financial loss of 16,800 Euros to the Guarantee Fund of Kosovo. No evidence of previous convictions was put before the Court."*

67) The final Judgment of the Court of Appeals re-qualified the committed offence as Issuing Unlawful Judicial Decisions in violation of Article 346 of the CCK and maintained the pronounced principle punishment of five (5) years of imprisonment. Also the accessory punishment was upheld. As mitigating circumstances the Court of Appeals took into consideration the fact that the accused had no previous convictions (paragraph 62. on page 20). As aggravating the Court considered the following circumstances (ibid.):

> *"…high material damage of 16,800 Euros…; the specific set-up of the crime, particularly the involvement of other persons and the elaborated scheme used to defraud the Guarantee Fund of Kosovo; the accused's position of influence over co-defendant L. P., a former trainee-lawyer under his supervision, which defendant K.P. used to his advantage."*

The Court (in paragraph 63 on page 20) also considered as purpose of the punishment the general and individual prevention and the fact that Kosovo is severely damaged by ongoing corruptive practices among state entities, including the judiciary. Strong signals have to be sent to the perpetrators and to the Kosovo society demonstrating that these crimes will be prosecuted and the offenders will face justice in strongest terms.

68) The Supreme Court finds that the court of first instance was mistaken when considering the lack of remorse and the result of undermining the public confidence in the administration of justice as aggravating circumstances. Remorse shown by a defendant can be considered as a mitigating factor (see Article 64 paragraph 1 of the CCK) but the lack of such cannot be regarded as aggravating. Likewise, the fact that the confidence in the public administration is being undermined is inherent to the criminal offence of Abusing Official Position or Authority (Article 339 paragraphs 1 and 3 of the CCK) and cannot therefore be considered as an additional aggravating circumstance.

The Court of Appeals seems to have remedied the shortcomings in the determination of punishment by pointing out correctly all relevant circumstances. However, (in paragraph

63 on page 20) the Court of Appeals concludes as result of the considerations on the severity of the punishment the "…need to impose the maximum punishment…".

In application of the rules for the calculation of punishments determined by Article 64 paragraph 1 of the CCK (corresponding to Article 73 paragraphs 1, 2 and 3 of the CCRK) the Court of Appeals erred when imposing the maximum punishment allowed for the offence described by Article 346 of the CCK. Since the Judgment pointed out that at least one mitigating circumstance was considered the Court of Appeals should logically not have imposed the maximum punishment. Starting from the limits determined by the law in Article 346 of the CCK (imprisonment of six months to five years) considering all relevant circumstances, as prescribed by Article 64 paragraph 1 of the CCK, the Court should have imposed a punishment somewhere below the upper limit of Article 346 of the CCK. While the law provides the possibility to pronounce punishments below the limits provided by the relevant legal provision (Article 66 of the CCK, Article 75 of the CCRK) the upper limit is an absolute one. Consequently, whenever at least one mitigating circumstance is identified a deduction in the punishment from the maximum limit must be made.

Therefore, the Supreme Court considers that the Court of Appeals violated the criminal law when imposing the maximum penalty applicable to the criminal offence of Issuing Unlawful Judicial Decisions. Pursuant to Article 438 paragraph 1 sub-paragraph 1.1. the Supreme Court, concurring with all aggravating and mitigating circumstances enumerated in the Judgment of the Court of Appeals, modifies the judgment and determines that a punishment of four (4) years and six (6) months is proportionate.

4. The defendant L. P.

69) The Supreme Court Panel rejects the Request filed by the defendant L. P. and the Request filed on his behalf by his Defence Counsel as unfounded.

70) The defendant's request alleges that the enacting clauses of both challenged Judgments contain substantial violations of the provisions of criminal procedure and violations of criminal law since the elements of the criminal offence of Fraud were not established by the District Court and are not described in the enacting clause. The argument is unfounded. The Supreme Court is satisfied that both, the objective and the subjective elements of the criminal offence of Fraud were established by the first instance Judgment and described in detail in the enacting clause. The enacting clause is clear and comprehensible.

In mentioning the intent to obtain an unlawful material benefit for himself and the co-defendant K. P. the District Court describes the qualified *mens rea* required by Article 261 paragraph 1 of the CCK. The details of the plan that was jointly concocted by the defendants are described in the enacting clause. The plan consisted of filing the described compensation claim against the Guarantee Fund of Kosovo before the court in the name of F.G. without that person's knowledge, exaggerating the injuries sustained by F.G. and as a result obtaining a material benefit. The objective elements consist of the realization of the described plan with the defendant 'representing' the alleged injured party F.G. without his authorization or knowledge in the court proceedings, receiving the compensation sum, including the costs for the court proceedings and his compensation as lawyer for

'representing' the claimant, paid by the Guarantee Fund of Kosovo and giving the amount of 16,000 Euros to K. P..

71) There are no internal contradictions within the enacting clauses of either the Judgment of the first instance, nor the one of the Court of Appeals.

The first instance Judgment consistently describes the hand-over of the 16,000 Euros in cash from the defendant L. P. to K. P. in the enacting clause and in the reasoning. This finding of the District Court is based on defendant L.P.'s own statement during the main trial (page 25, paragraph 5).

The objection that this hand-over resulted in a situation where the defendant does not have any material benefit anymore from his actions does not hold. The criminal offence of Fraud does not even require an actually obtained material benefit but only the intent to obtain it. The intend even to obtain the compensation for his unauthorized and illegitimate 'legal representation' of F.G. before the court is sufficient to satisfy the requirements of Article 261 paragraph 1 of the CCK.

The defendant's argument that he was actually legally entitled to his lawyer's fee for representing the client F.G. does not stand. Since the defendant had never been authorized to represent this client, nor did the client even know about this alleged 'representation' it was not a genuine legal representation. Above all, the defendant did not ever have the intention to, nor did he actually act in the interest of the client when 'representing' him before the court.

72) The defendant has raised the claim that there is an inconsistency between the enacting clause and the reasoning of the first instance Judgment regarding who proposed the settlement of the court proceedings in the amount of 16,000 Euros. The Court of Appeals has discussed this issue in paragraphs 18 and 19 on page 9 of its Judgement. The Supreme Court concurs that the matter is not related to decisive facts of the Judgment and represents a minor error.

Any existing *de minimus* error in the first instance Judgment had been rectified by the Court of Appeals Judgment. Both challenged Judgments have in the reasoning in detail described the defendant L. P.'s actions in relation to the negotiation of the settlement for the compensation. There is no doubt that he actively contributed to the deception of actually representing the claimant F.G.. The defendant – allegedly on behalf of his client F.G. – had rejected the first settlement offer proposed by the representative of the Guarantee Fund of Kosovo. The first instance court established that the defendant after the final settlement offer left the court room, allegedly in order to consult with his client. Both challenged Judgments are clear in describing the defendant's actions in negotiating the settlement sum. It is irrelevant who actually proposed the final settlement since it was made in mutual agreement between the defendant and the representative of the Guarantee Fund of Kosovo and the amount of money was determined to a significant degree by the defendant's previous negotiations and his rejection of the first offer. The Supreme Court Panel concludes that the reasoning presented by the courts does not contradict the findings established in the enacting clauses.

73) The defendant claims that the enacting clause of the final Judgment related to the defendant K. P. for the criminal offence of Issuing Unlawful Judicial Decisions, pursuant to Article 346 of the CCK, is incomprehensible and in contradiction with reasoning as

well as the records and the evidence of the case because it mentions incriminating acts for the defendant L. P., for which he was neither accused nor found guilty. The Panel finds this claim without base and refers to the arguments in relation to the hand-over of the 16,000 Euros above. The hand-over does not eliminate the defendant's intent to obtain a material benefit. The enacting clause very clearly elaborates that K. P.'s intent was to obtain a benefit for "*themselves*", referring to both defendants, K. P. and L. P.. There are no contradictions between the enacting clause and the reasoning either. It corresponds with all the findings of the courts of both instances in relation to the criminal offence L. P. was found guilty for.

74) The Supreme Court rejects the allegation that the defendant's criminal liability is excluded because defendant L.P. represented the injured party in the compensation claims case (F.G.) based on the judge's decision, although there was no authorization in the case file from the client. The judge cannot order a lawyer to represent a client in civil court proceedings without the client's knowledge and authorization.

75) The defendant has also raised the claim that he by himself had been deceived and used by the co-defendant K. P.. Both previous instances have recognized the influence of Judge K.P. over his former trainee and considered it in the evaluation of the criminal liability. It can only justify a mitigation of that liability but not serve as exculpation. L. P., although still relatively young, had a legal degree, some experience in working as a lawyer and was aware of his obligations towards a potential client, the requirements of the law in relation to truthfulness before a court and the possible consequences of actions contrary to law.

76) The defendant claims that his rights were impaired by the failure of the District Court to hear the witness Z.G.. The first instance Judgment in reference to the mentioned witness on page 20 only states that the Court called the proposed witness Zeq Din Gashi to give evidence but was informed by his family that he was 80 years of age and of poor health. The Panel acknowledges that the trial court did not sufficiently explain the reasons why it had not examined the witness proposed by the Defence out of court, if the witness was unable to attend the session in court, as provided for by Article 163 paragraph 3 of the KCCP.

However, the defendant in his Request for Protection of Legality fails to substantiate how the testimony of the witness would have affected the outcome of the criminal proceedings. The witness P.J. has been heard about the conversation the defendant had in 2010 with F.G. and his testimony had been found credible and was corroborated by the testimony of F.G. and partially by the own statements of the defendant. Therefore the Panel concludes that the defendant's rights were not affected by the addressed shortcoming.

77) The Panel finds the defendant's objection that the Court of Appeals had failed to consider the appeal filed by the defendant himself without merits. The Court refers to page 2, paragraphs 18, 19 and several other paragraphs where explicit reference is made to the defendant's appeal and the arguments submitted by this appeal.

78) The claim that the Appeal Panel did not consider exculpatory circumstances and the principle '*in dubio pro reo*' is without substance. The defendant fails to elaborate on his claim in more detail. The court of second instance has taken into consideration all relevant circumstances required for determining the defendant's criminal liability.

79) The defendant has alleged a violation of the principle of *ne bis in idem* enshrined in Article 4 of the CPC. He allegedly was acquitted by the District Court of Prishtinë/Priština in another criminal case P. No. 13/2012 for the same criminal offence subject to the current proceedings. The defendant submits that the Court of Appeals did not review the new evidence related to this argument, the evidence which he had delivered together with his Appeal against the first instance Judgment.

The Supreme Court after careful review of the defendant's documents submitted together with his appeal against the first instance judgment and the minutes of the public session before the Court of Appeals of 25 April 2013 finds this allegation as unfounded.

Article 4 paragraph 1 of the CPC states that no one can be prosecuted or punished for a criminal offence, if he or she has been acquitted or convicted of it by a final decision of a court. While this principle has to be observed by the Court *ex officio* the Panel has found no indication that a final decision for the same criminal offence exists.

The defendant's claim that he had submitted evidence in respect to a violation of the principle of *ne bis in idem* to the Court of Appeals is without substance. The case file contains no such documents; the defendant's appeal was apparently filed without any such evidence attached. The minutes of the public session contain no record that the defendant or his Defence Counsel had proposed or submitted additional evidence or documents.

80) The Request alleges that the investigation had been delayed for more than a year and afterwards the case had been split into several indictments, although it should have been instead concentrated into one trial; this has impaired the defendant's rights.

The Court finds this argument without merits and refers to paragraph 62 above (page 16) in relation to the procedural practice of concentration. The defendant cannot claim a deviation from the principle of concentration as violation of his procedural rights. The courts are free to sever or merge cases based on procedural necessity, as dictated by the goal of organizing the proceedings in a most efficient way.

The alleged undue delay in the investigation has not been substantiated by the defendant. He has not elaborated that the length of the investigation violated the provisions of the criminal procedure.

81) The Request claims that the final Judgment failed to credit that the defendant had spent 1 month in house detention. The Court did not find any records in the case file supporting the claim that house detention had been ordered against him in the current criminal proceedings. The claim therefore must be rejected.

In case the defendant indeed has spent time in house detention that was ordered in the current criminal proceedings, he has the opportunity to still claim the crediting of that time in the execution procedure, based on Article 489 paragraph 1 of the CPC.

82) The punishment imposed on the defendant is proportionate to his criminal liability, the gravity of the offence and the conduct and circumstances of the offender, pursuant to Article 64 paragraph 1 of the CCK.

The allegation that the final Judgment does not state the mitigating and aggravating circumstances is without substance. The Court refers to paragraph 54 (page 19) of the

Court of Appeals Judgment and the chapter named "L. P." on page 55 of the Judgment of the District Court.

In respect to the purpose of the punishment the Panel refers to Article 64 paragraph 1 in conjunction with Article 34 of the CCK (corresponding to Article 73 paragraph 1 in conjunction with Article 41 of the CCRK). General prevention is one of the purposes of punishment for any offender, as encoded by the Law.

The defendant's claim that in comparison to other convictions his punishment is unfair and violates the principle of equality before the law fails to convince. Punishments are meted out against each offender individually and in consideration of all the specific circumstances related to the specific offence and the specific person. Therefore a direct comparison with other punishments imposed for similar offences in other cases is not possible. The principle of equality before the law dictates that similar or equal facts and circumstances shall be treated similarly and equally. In regard to the conditions relevant to the calculation of punishments conditions and circumstances are hardly ever the same for two different offenders or for two different offences.

The Court cannot follow the proposal to credit the time during which his license to practice law was suspended by the Kosovo Chamber of Advocates. This measure was not related to the punishment for a criminal offence but an administrative measure to protect the public.

83) The defendant has presented several arguments which could not be qualified as violations of the criminal procedural law or of the criminal law. The Panel here refers to all allegations related to the courts' evaluation of evidence. These arguments are dismissed as not admissible claims of an erroneous or incomplete determination of the factual situation pursuant to Article 432 paragraph 2 of the CPC. Article 439 of the CPC is not applicable here since no such "considerable doubt on the factual determination" of the challenged decisions could be found.

84) In his supplemental request filed on 10 July 2014 the defendant has alleged that the statute of limitation had expired when the Indictment was filed. Although the arguments submitted in this request are belated (see paragraph 48 on page 11 above), the court had *ex officio* to examine if the prosecution is barred due to an expiry of the statutory limitation. Article 90 paragraph 1 item 4 of the CCK regulate the statutory limitation for the criminal offence of Fraud, pursuant to Article 261 paragraphs 1 and 2 of the CCK, which the defendant was found guilty of. In accordance with Article 261 paragraph 2 of the CCK, an upper limit of the punishment frame of five (5) years is applicable. Consequently, in application of Article 90 paragraph 1 item 4 of the CCK, the statutory limitation expires after five (5) years from the commission of the criminal offence. The offence was committed between 12 September 2007 and 8 April 2008. Statutory limitation would consequently expire after five (5) years counting from the 8 April 2008. Hence, on 10 August 2010 when the Indictment against the defendant was filed the statute of limitation had not expired.

85) Also, the arguments submitted in the four supplemental requests for considering additional evidence, dated 25 February, 28 April, 18 June and 10 July 2014, are dismissed as not admissible claims of an erroneous or incomplete determination of the factual situation pursuant to Article 432 paragraph 2 of the CPC, as far as they are claiming an erroneous or incomplete determination of the factual situation.

86) The Panel, after considering the defendant's request to order the postponement or termination of the enforcement of the final Judgment against him, pursuant to Article 435 paragraph 4 of the CPC, rejects the request as unfounded.

Such a measure may be ordered if the concerned final judicial decision contains apparent and grave violations of the law that will severely and irreparably inhibit the convicted person's elementary rights and liberties if executed. The Court has to take into consideration the fact that the decision in question has been reviewed by the previous instances and that in the interest of judicial fairness and efficiency any postponement or termination of the execution of a final judicial decision can only be an extra-ordinary exception.

The defendant has not substantiated the risk of such an irreparable damage to his rights; neither has the Court found any apparent or grave violations in the final decision challenged by the defendant's Request that could have justified such a postponement or termination of the execution. Reference is made to the reasoning provided above in relation to the defendant L. P..

5. The defendant B.B.

87) The Request for Protection of Legality claims that defendant B.B. was only charged with the criminal offence of Organized Crime pursuant to Article 274 paragraph 2 of the CCK. The definition of this offence describes only the participation in the organized criminal group and not the actual committing of any criminal offence. The court was not authorized to reclassify the criminal offence to Fraud.

88) The Panel finds this argument well-founded and considers that the challenged final Judgment contains a substantial violation of the provisions of criminal procedure pursuant to Article 432 subparagraph 1.2. in conjunction with Article 384 subparagraph 1.10 of the CPC, corresponding to Article 403 paragraph 1 subparagraph 10 of the KCCP, when it finds the defendant guilty of the criminal offence of Fraud in violation of Article 261 paragraph 1 and 2 of the CCK. The Judgment in that respect exceeds the scope of the charge.

89) The Indictment PPS. No. 120/2010, dated 10 August 2010, charged the defendant B.B. with the criminal offence of Organized Crime in violation of Article 274 paragraphs 1 and 2 of the CCK. This was confirmed by the Ruling of the confirmation judge KA. No. 304/2011, dated 23 September 2011.

The Indictment describes the defendant's contribution to the offence as follows:

> *"From 12th September 2007 until 08th April 2008…B.B., orthopaedic specialist – traumatology, in retirement, with the purpose to unlawfully obtain with material benefit for himself and others in detriment to others – to the Kosovo Guarantee Fund, in Pristina, acted within the organized criminal group, … B.B. as member(s) of the organized criminal group assisted to K. P. … in abusing with official position… K. P. has further appointed the medical expert, the defendant B.B., to whom he provided with the case file in his flat in Pristina, and the latter in agreement with K. P. has unlawfully provided his professional opinion, in violation of normative and positive*

acts. By acting so that based on the falsified discharge sheet provided the respective opinion, that allegedly F.G. has incurred serious bodily injuries with consequences for his health: incurred fear, deformation, permanent reduction (of) vital activity, reduction of work capability, requires the assistance of a third person, enforced nourishment and future medication. …"

Article 305 of the KCCP, the law in force at the time the Indictment PPS. No. 120/2010 was filed, enumerates the essential elements the indictment shall contain. Paragraph 1 item 4 of the provision states that the indictment shall contain:

"The time and place of commission of the criminal offence, the object upon which and the instrument by which the criminal offence was committed, and other circumstances necessary to determine the criminal offence with precision;"

The Indictment charges B.B. only with acting within the organized criminal group, assisting K. P. in abusing his official position. The Indictment in relation to the defendant B.B. does not describe the essential objective elements of the criminal offence of Fraud, such as the act of deceiving another person or keeping the person in deception, the means of false representation or concealing of facts and the inducing of the victim to do or abstain from doing an act to the detriment of his or her property or another person's property, nor does it mention any of the corresponding subjective elements - the intent to commit these actions – required by Article 261 paragraph 1 of the CCK. The District Court, pursuant to Article 386 paragraph 2 of the KCCP, was not bound by the legal qualification of the act in the indictment. However, the requalification the trial Court was allowed to do, had to correspond to the act, as provided in Article 305 paragraph 1 subparagraph 4 of the KCCP, which is in fact subject of the charge. In the case at hand, by qualifying the criminal offence as Fraud, pursuant to Article 261 paragraph 1 of the CCK, the Court exceeded the scope of the charge, contained in the indictment. The Court of Appeals affirmed the first instance Judgment in that respect and did not remedy the violation.

90) It is the opinion of this Panel of the Supreme Court that at this stage of the proceeding (which is an extraordinary legal remedy) the Supreme Court is not authorized to change the legal qualifications of the defendant's acts without notifying him and providing the opportunity for an effective defence. Hence, the Panel had to acquit the defendant from the criminal charges as they were formulated in the indictment.

91) Consequently, in application of Article 438 subparagraph 1.1. of the CPC, the Supreme Court of Kosovo modifies the final Judgment of the Court of Appeals, acquitting the defendant B.B. from all criminal charges.

For the aforementioned reasons, the Supreme Court of Kosovo decides on the Requests for Protection of Legality as in the enacting clause.

Presiding Judge:

Nesrin Lushta
Supreme Court Judge

Members of the panel:

Timo Vuojolahti
EULEX Judge

Elka Filcheva-Ermenkova
EULEX Judge

Recording Clerk:

Holger Engelmann
Legal Officer

SUPREME COURT OF KOSOVO
PML.-KZZ. No. 170/2014
Prishtinë/Priština