

SUPREME COURT OF KOSOVO

Case number:

Pml.Kzz 92/2016

Court of Appeals case no. PAKR 52/14
Basic Court of Pristina case no. P 309/10
and P 340/10

Date:

15 December 2016

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a Panel composed of Supreme Court Judge Valdete Daka (Presiding), EULEX Judge Elka Filcheva–Ermenkova (Reporting/Dissenting) and Supreme Court Judge Emine Mustafa, assisted by EULEX Legal Officer Maja Máhl as the recording officer,

in the criminal case against;

1. **L.D.**, [ID no./Place of Birth/Residence];
2. **A.D.**, [ID no./Place of Birth/Residence];
3. **D.J.**, [ID no./Place of Birth/Residence];
4. **I.R.**, [ID no./Place of Birth/Residence];
5. **S.H.**, [ID no./Place of Birth/Residence];
6. **I.B.**, [ID no./Place of Birth/Residence];
7. **S.D.**, [ID no./Place of Birth/Residence];

acting upon requests for protection of legality filed

- by defence counsel P.D. on behalf of A.D. on 8 March 2016,
- by L.D. through his defence counsels L.S. and B.I. on 5 April 2016, and
- by the Chief State Prosecutor on 14 June 2016 (dated 10 June 2016).

having considered the response of the Chief State Prosecutor and *having seen* the responses filed by the defence counsels of I.B. and L.D.;

having deliberated and voted on 13 and 15 December 2016;

pursuant to Articles 418 and 432—441 of the Criminal Procedure Code (hereafter: the CPC)

renders the following

JUDGMENT

1. The request for protection of legality filed by the Chief State Prosecutor on 14 June 2016 against Judgment of the Court of Appeals dated 6 November 2015 in case no. PAKR 52/14 is hereby dismissed as belated.
2. The requests for protection of legality filed by defence counsel P.D. on behalf of A.D. and by L.D. through his defence counsels L.S. and B.I. are partially granted as described in point 3.
3. Judgment of the Basic Court of Pristina dated 29 April 2013 in case no. P 309/10 and P 340/10, Judgment of the Court of Appeals dated 6 November 2015 in case no. PAKR 52/14, and Judgment of the Supreme Court dated 20 September 2016 in case no. PAII-KZII-2/2016 are hereby *partially* annulled in relation to all parts of the judgments through which defendants were convicted, as follows:
 - a. with regard to defendant L.D.: Judgment of the Basic Court of Pristina dated 29 April 2013 in case no. P 309/10 and P 340/10 and Judgment of the Court of Appeals dated 6 November 2015 in case no. PAKR 52/14 are annulled in the parts where L.D. is found guilty for the commission of the criminal offences of Trafficking in Persons in co-perpetration under Articles 139 and 23 of the Provisional Criminal Code of Kosovo (count 1) and Organised Crime under Article 274 of the same code (count 2), including the imposition of principal and accessory punishments against him and the decision on partial compensation to the injured parties;
 - b. with regard to defendant A.D.: Judgment of the Basic Court of Pristina dated 29 April 2013 in case no. P 309/10 and P 340/10 and Judgment of the Court of Appeals dated 6 November 2015 in case no. PAKR 52/14 are annulled in the parts where A.D. is found guilty for the commission of the criminal offences of Trafficking in Persons in co-perpetration under Articles 139 and 23 of the Provisional Criminal Code of Kosovo (count 1) and Organised Crime under Article 274 of the same code (count 3), including the imposition of punishment against him and the decision on partial compensation to the injured parties;
 - c. with regard to defendant S.H.: Judgment of the Basic Court of Pristina dated 29 April 2013 in case no. P 309/10 and P 340/10, Judgment of the Court of Appeals dated 6 November 2015 in case no. PAKR 52/14 and Judgment of the Supreme Court dated 20 September 2016 in case no. PAII-KZII-2/2016 are annulled in the parts where S.H. is found guilty of the commission of the criminal offence of Grievous Bodily Harm under Article 154 of the Provisional Criminal Code of Kosovo (count 7), including the imposition of principal and accessory punishments against him.

4. Pursuant to Article 435 (4) of the CPC, the Supreme Court orders immediate termination of the enforcement of the final judgments mentioned above.
5. In the parts specified in point 3 of this judgment, the case is returned for re-trial to the Basic Court of Pristina.
6. The remainder of Judgment of the Basic Court of Pristina dated 29 April 2013, Judgment of the Court of Appeals dated 6 November 2015 and Judgment of the Supreme Court dated 20 September 2016, namely the parts not annulled by this judgment, remains unchanged.

REASONING

IRRELEVANT PROCEDURAL HISTORY

Case no. P 309/10 and P 340/10 of the Basic Court of Pristina

Indictment PPS no. 41/09 was filed against the defendants L.D., A.D., D.J., I.R. and S.H. on 15 October 2010. On 20 October 2010, Indictment PPS no. 107/10 was filed against the defendants I.B. and S.D. The two indictments were joined into a single indictment on 29 November 2010 and confirmed on 27 April 2011.

The main trial commenced on 4 October 2011 and was concluded on 24 April 2013. It was held before a Panel composed of two EULEX judges and one local judge. On 18 May 2012, the local judge was replaced.

EULEX Judge Arkadiusz Sedek was the presiding judge of the main trial. During the pre-trial stage, he had on one occasion acted as pre-trial judge by granting the Prosecutor's request to extend of the investigation. With reference to his previous involvement in the case, the defence counsel of L.D. requested on 21 December 2011 that he should be excluded from the panel. This request was rejected as unfounded by a decision of the President of the Assembly of EULEX Judges dated 11 January 2012.

On 22 March 2013 and 17 April 2013, the indictment was amended and expanded. Under the final indictment, the defendants were charged as follows:

- COUNT 1: *L.D., A.D. and S.H.*
 Trafficking in Persons in co-perpetration under Articles 139 and 23 of the Provisional Criminal Code of Kosovo (hereafter: the PCCK)
- COUNT 2: *L.D.*
 Organised Crime under Article 274 (3) of the PCCK

- COUNT 3: *A.D. and S.H.*
Organised Crime under Article 274 (1) of the PCCK
- COUNT 4: *L.D., D.J., I.B., S.D. and S.H.*
Unlawful Exercise of Medical Activity in co-perpetration under Articles 221 (1) and 23 of the PCCK
- COUNT 5: *D.J.*
Abusing Official Position or Authority under Article 339 (1) of the PCCK
- COUNT 6: *I.R.*
Abusing Official Position or Authority under Article 339 (1) of the PCCK
- COUNT 7: *L.D., S.H., I.B., S.D. and A.D.*
Grievous Bodily Harm in co-perpetration under Articles 154 and 23 of the PCCK
- COUNT 8: *L.D. and A.D.*
Fraud under Article 261 of the PCCK
- COUNT 9: *L.D. and A.D.*
Falsifying Documents under Article 332 (1) of the PCCK
- COUNT 10: *I.R.*
Falsifying Official Documents under Article 348 of the PCCK

On 29 April 2013, the Basic Court announced its judgment by which:

- L.D. was convicted of the criminal offences of Trafficking in Persons committed in co-perpetration (count 1) and Organised Crime (count 2). He was sentenced to imprisonment of eight years and fine of 10,000 Euros. The accessory punishment of prohibition from exercising the profession of urologist was imposed against him for a period of two years. The charges of Unlawful Exercise of Medical Activity, Grievous Bodily Harm, Fraud and Falsifying Document (counts 4 and 7—9) were rejected.
- A.D. was convicted of the criminal offences of Trafficking in Persons committed in co-perpetration (count 1) and Organised Crime (count 3). He was sentenced to imprisonment of seven years and three months and fine of 2,500 Euros. He was acquitted of the charge of Grievous Bodily Harm (count 7). The charges of Fraud and Falsifying Documents (counts 8 and 9) were rejected.

- S.H. was acquitted of the charge of Organised Crime (count 3) and convicted of the criminal offence of Grievous Bodily Harm (count 7). He was sentenced to imprisonment of three years. The accessory punishment of prohibition from exercising the profession of anesthesiologist was imposed for a period of one year. The charges of Trafficking in Persons and Unlawful Exercise of Medical Activity (counts 1 and 4) were rejected.
- I.B. was convicted of the criminal offence of Grievous Bodily Harm (count 7) and sentenced to suspended imprisonment of one year. The charge of Unlawful Exercise of Medical Activity (count 4) was rejected.
- S.D. was convicted of the criminal offence of Grievous Bodily Harm (count 7) and sentenced to suspended imprisonment of one year. The charge of Unlawful Exercise of Medical Activity (count 4) was rejected.
- D.J.: The charges of Unlawful Exercise of Medical Activity and Abusing Official Position or Authority (counts 4 and 5) were rejected.
- I.R. was acquitted of the charge of Abusing Official Position or Authority (count 6). The charge of Falsifying Official Documents (count 10) was rejected.

By a separate ruling dated 25 November 2013, the Basic Court ordered the closure and confiscation of the Medicus Clinic.

Case no. PAKR 52/14 of the Court of Appeals

L.D., A.D., S.H., I.B., S.D. (all through their defence counsels) and the Prosecutor appealed the ruling dated 25 November 2013 and the judgment dated 29 April 2013.

After having held public sessions, the Court of Appeals rendered the following judgment on 6 November 2015:

L.D.: The conviction was upheld but with the modification that the number of proven kidney transplants that took place at the Medicus Clinic was established as seven and not twenty-four. The imposed principal punishments were confirmed. The imposition of the accessory punishment was modified insofar that the prohibition was to start after the service of the imposed punishment.

A.D.: The conviction was upheld but with the modification that the number of proven kidney transplants that took place at the Medicus Clinic was established as seven and not twenty-four. The term of imprisonment was modified to eight years. The imposed fine was confirmed.

S.H.: The conviction with regard to the criminal offence of Grievous Bodily Harm was upheld but with the modification that the number of proven kidney transplants that took place at the Medicus Clinic was established as seven and not twenty-four. In addition, S.H. was convicted of the criminal offences of Organised Crime in connection with Trafficking in Persons in co-perpetration (counts 1 and 3). He was sentenced to imprisonment of five years and fine of 2,500 Euros. The imposition of the accessory punishment was modified insofar that the prohibition was to start after the service of the imposed punishment.

I.B.: I.B. was acquitted of the charge of Grievous Bodily Harm (count 7).

S.D.: S.D. was acquitted of the charge of Grievous Bodily Harm (count 7).

Confiscation: The ruling on confiscation was modified insofar that the Prosecutor's application for confiscation of the Medicus Clinic was rejected.

The Supreme Court Proceedings

Service of the judgment of the Court of Appeals:

The judgment of the Court of Appeals was served on all parties between 25 February 2016 and 4 March 2016. The SPRK Prosecutor was served the judgment on 25 February 2016 by signing the acknowledgment of delivery receipt.

Supreme Court case no. Pml.Kzz 92/2016:

The requests for protection of legality registered in this case were filed

- by defence counsel P.D. on behalf of A.D. on 8 March 2016,
- by L.D. through his defence counsels L.S. and B.I. on 5 April 2016, and
- by the Chief State Prosecutor on 14 June 2016 (the request is dated 10 June 2016).

On 5 April 2016, defence counsel L.S. on behalf of L.D. requested the Supreme Court to stay execution of the challenged judgments. The Supreme Court rejected the request by a ruling dated 26 April 2016.

Supreme Court case no. PAII-KZII-2/2016:

Simultaneously with the abovementioned requests, S.H., his defence counsel and L.D. filed appeals against the judgment of the Court of Appeals. By a ruling dated 26 May 2016, the Supreme Court dismissed L.D.'s appeal as not permitted.

On 20 September 2016 the Supreme Court rendered a judgment in relation to the appeals filed by S.H. and his defence counsel. Through this judgment, the charge as described in count 1 was rejected and S.H. was acquitted of the charge of Organised Crime (count 3). The conviction with regard to the criminal offence of Grievous Bodily Harm (count 7) was upheld

and the term of imprisonment was modified to three years. The imposition of the accessory punishment was confirmed.

Supreme Court case no. Pml.Kzz 310/2016:

On 2 November 2016 and 30 November 2016, S.H. (through his defence counsel) and the Chief State Prosecutor have filed requests for protection of legality against the Supreme Court Judgment dated 20 September 2016. This case has not yet been adjudicated.

II. THE REQUESTS

L.D. through his defence counsels

The defence counsels of L.D. move the Supreme Court to modify the challenged judgments and instead either reject the indictment in respect to all charges or acquit the defendant, or alternatively annul both judgments and return the case to the Basic Court for re-trial. The request is based on the grounds of substantial violations of the provisions of criminal procedure and violations of criminal law and fundamental human rights, as follows:

Illegal extension of investigation: In violation of applicable law and a long established practice of the judiciary in Kosovo, the investigation was illegally extended after 12 May 2009. The Prosecutor's request to extend the investigation was not filed until after the investigation had already expired. At that point there was no legal possibility to extend the investigation. By granting the request for extension, the law was interpreted to the detriment of the defendant. Because of these violations the indictment is invalid and the trial proceeded in substantial violation of the provisions of criminal procedure and Article 6 of the European Convention on Human Rights (hereafter: the ECHR).

Inadmissible evidence – legal consequences: In violation of law, Article 6 of the ECHR and an established practice of the courts of Kosovo, the Court of Appeals concluded that the judgment of the Basic Court was based on inadmissible evidence but did not annul the judgment and return the case for re-trial. The Basic Court had to a considerable extent relied on inadmissible evidence. The Court of Appeals was therefore bound to annul the judgment and return the case for re-trial. Instead of doing so, the Court of Appeals erroneously confirmed the factual findings reached by the Basic Court. As a result, both judgments are based on inadmissible evidence.

Disqualified Presiding Judge: In violation of Article 40 (2) of the Provisional Criminal Procedure Code of Kosovo (hereafter: PCPC), the provisions of criminal procedure and Article 6 of the ECHR, the President of the Assembly of EULEX Judges rejected the request to exclude the Presiding Judge from the trial panel despite the fact that he had participated in the pre-trial proceedings. Participation in the pre-trial proceedings is an absolute ground for disqualification from participation in the trial panel. This interpretation is supported by the Legal Opinion no. 176/2014 of the Supreme Court dated 7 May 2014.

Judicial bias of the Presiding Judge: As a result of the fact that the Presiding Judge had been serving as the pre-trial judge, he was biased and consequently denied the defence the right to a fair trial as guaranteed by the ECHR. Briefly put, he conducted the main trial in an inquisitorial manner and not as an unbiased and objective judge. This appeared in practice as follows: On 25 March 2012, he accused the defendant of “cheating on his taxes” without an allegation by the Prosecutor or any evidence to support the allegation. On 25 March 2012 and at the end of the main trial, he instructed the Prosecutor to amend the indictment. He failed to make record of the received evidence and to rule on objections to evidence. He questioned witnesses and expressed opinions that demonstrated extreme bias, for example during the main trial session on 10 April 2013. He repeatedly engaged in private meetings with the Prosecutor. In an obvious attempt to prejudice the donors, he was repeatedly telling them at the outset of their testimony that they were “victims” and assured them that they would be entitled to compensation if the defendants were convicted. The exhibits from the material allegedly taken from the Medicus Clinic were not identified or marked in spite of repeated requests from the defense. He refused to allow the defense to question the Prosecutor’s witnesses about the “Medical Operations Protocol Book” and no inventory of the search was ever produced although this was repeatedly requested by the defense. He confiscated the Medicus Clinic despite the fact that there was no evidence supporting that the building was a product of illegal activity.

Replacement of panel member: During the main trial, the panel member Hamdi Ibrahim was replaced by Vahid Halili. There was no reading in of the prior testimonies. The necessary procedures were not followed. The Supreme Court should *ex officio* decide if this was a substantial violation of criminal procedure.

Decisive facts not established: In substantial violation of the provisions of criminal procedure, the challenged judgments do not meet the requirements set out in Article 403 (1.12) of the PCPC. In violation of the defendant’s right to a fair trial, the insufficient reasoning made the defence impossible. The judgments contain the following deficiencies:

- In order to find someone guilty of the criminal offence of *Trafficking in Persons*, the court has to establish that the removal of organs by the defendants was either committed without the consent of the donor or that the consent was invalidated by illicit means. This fact was not proven by the Prosecutor and was not addressed or established by the courts.
- In order to find someone guilty of *Organised Crime*, the court has to establish that there was a premeditated meeting of minds between the members of the alleged group in the sense that individuals of the group can be held criminally responsible for actions committed by the others. This fact was not proven by the Prosecutor and was not addressed or established by the courts.
- The Court of Appeals did not give any reasoning related to decisive facts such as the dates of the operations, the persons who performed the kidney removals or the connection between the defendant and the alleged fraud or abuse of vulnerability.

Amended indictment: The Prosecutor filed an amended indictment on 22 March 2013 by adding the illicit means fraud and abuse of vulnerability. The amended indictment was filed after the hearing of witnesses, more than three years after the trial started and only one month before the Basic Court rendered its judgment. The defence was thereby deprived the opportunity to question and confront the witnesses about the new elements. In addition, the Prosecutor presented very limited evidence on the new elements; the evidence consisted only of two persons who were not known to the defence before the main trial. In this regard, the defendant's right to a fair trial, and in particular the principle of equality of arms, was violated.

Violations of criminal law: In violation of Articles 139 (1) and 23 of the PCCK, the courts failed to thoroughly address and establish action, means and purpose. These are all basic elements of the criminal offence of Trafficking in Persons. In the enacting clause of the judgment of the Court of Appeals it is stated that the defendant has contributed to invalidate the consent of the donor by illicit means without any factual basis. None of the facts that were established by the Court of Appeals contain the necessary elements of Trafficking in Persons. The established facts do not constitute a criminal offence at all. Even if it was established that the defendant conducted an illegal transplant or sold organs, he should not have been convicted since an illegal transplant is an administrative offence according to Kosovo Health Law 2004/4. Kosovo Health Law is *lex specialis* in relation to the general laws. With regards to the sale of organs, this was not criminalized as a separate criminal offence until 2012.

Defence counsel on behalf of A.D.

The defence counsel of A.D. moves the Supreme Court to annul the challenged judgments and return the case to the Basic Court for re-trial. He requests to be summoned to the Panel's session in order for him to make some important clarifications. The request is based on the grounds of violations of criminal law and substantial violations of the provisions of criminal procedure, as follows:

Factual determination: The following circumstances prove that A.D. is not guilty of the criminal offences of which he is charged with and convicted of: A.D. was engaged in the Medicus Clinic only as an accountant and was authorized only for maintenance of the finances. The invitations and guarantee letters were confirmed by the former Municipal Court in Pristina and later sent to the Customs Police. Upon request sent by A.D., the Ministry of Health approved the Medicus Clinic as a private health institution according to the applicable legislation. This allowed the offering of urologic services. The Ministry of Health also issued an "Authorization for transplantation" according to Article 100 of the Kosovo Health Law 2004/4.

Insufficient reasoning: The findings of the challenged judgments are contradictory and incomprehensible. The Court of Appeals did not provide sufficient reasoning with regards to the question of the partiality of the Presiding Judge. The enacting clauses of the challenged judgments are unclear as they do not specify the actions committed by A.D. or the connection between them. A.D. was never the director of the Medicus Clinic. The indictment is based on

assumptions. The courts have assumed that A.D. co-operated with other defendants but have failed to establish if a causal link of mutual actions existed.

Inadmissibility of evidence: The Court of Appeals declared certain evidence inadmissible but erroneously relied on the Basic Court's conclusions when determining facts. The challenged judgments are therefore based on inadmissible evidence. A.D. is only mentioned by the two witnesses A.K. and D.S. These witness statements are not reliable. A.K. was kept by the SPRK Prosecutor before giving his testimony. There is no record that these two witnesses have been operated at the Medicus Clinic. None of the other witnesses that testified refer to criminal actions committed by A.D.

Chief State Prosecutor

Chief State Prosecutor moves the Supreme Court to declare that the judgment of the Court of Appeals contains violations of law in the parts relating to the evidence declared as inadmissible, the confiscation of the premises that hosted the Medicus Clinic and the determination of punishment for the concurrent criminal offences of Trafficking in Persons and Organised Crime. The request is based on the grounds of substantial violations of the provisions of criminal procedure in relation to Articles 384 (1.7) and (1.12) of the CPC, violations of criminal law according to Article 385 (5) of the CPC, and violations of provisions of criminal procedure that affected the lawfulness of the judicial decision. The alleged violations are summarized in the following sections:

Admissibility of evidence: By declaring the evidence seized during the search as inadmissible, the Court of Appeals did not fully adjudicate the charges, acquitted the defendants I.B. and S.D. and violated the provisions of Articles 257, 11, 370 (5) and (7) of the CPC and 354 (1) of the PCCK. The search was conducted by the inspectors of the Health Inspectorate in cooperation with the forensic experts in accordance with the applicable provisions. The PCPC does not expressly prescribe that evidence legitimately collected by state institutions other than the police should be declared as inadmissible. Even if the evidence collected by the police was to be considered as inadmissible due to violations of applicable provisions this should not affect the activities that were carried out by the Health Inspectorate as these are conducted for a different purpose and are not subject to strict rules of admissibility. It is irrelevant in this regard that the activities were carried out in the context of a criminal investigation.

Confiscation: In the part relating to the confiscation of the premises that hosted the Medicus Clinic, the judgment of the Court of Appeals is in substantial violation of the provisions of criminal procedure in relation to Article 384 (1.12) and Article 370 (7) of the CPC. The provisions of the UNMIK Regulation 2001/4 were not superseded by the entry into force of the PCCK because the UNMIK Regulation is considered as *lex specialis* and therefore has priority. The Court of Appeals failed to take into consideration all of the relevant arguments related to the necessity of the confiscation for the interests of general security as foreseen in the PCCK. Because of that, the judgment lacks of grounds related to all material facts. In addition, the reasoning is contradictory to the content of evidence in the part related to the

interest for the general security. The Court of Appeals did not make an evaluation of the credibility of conflicting evidence and failed to exhaustively state which facts were considered not proven.

Determination of punishment: The Court of Appeals exceeded its authority pursuant to Articles 385 (5) and 370 (5) of the CPC because it convicted the defendants L.D., A.D. and S.H. of one criminal offence instead of two, namely Trafficking in Persons and Organised Crime, and as a consequence only imposed one punishment.

III: THE RESPONSES

Chief State Prosecutor

Proposal: The Chief State Prosecutor moves the Supreme Court to dismiss the requests of the defendants as prohibited; or if considered filed against final judgments, to reject the requests as unfounded.

Response to the Request filed by A.D.:

Chief State Prosecutor stresses that the vast majority of the allegations relate to the factual determination and that these arguments are not permitted in a request for protection of legality. Further, he argues that the allegations related to inadmissible evidence, the form and content of the written judgments and the violations of the rights of the defence are not substantiated by any ground.

Response to the Request filed by L.D.:

Chief State Prosecutor initially states that all of the claims have already been raised and correctly assessed during the proceedings. He also stresses that the arguments related to the factual determination are not permitted in a request for protection of legality. With regards to the alleged procedural violations, he states:

- The allegation related to the extension of the investigation after 12 May 2009 is unfounded. The defendant has not indicated or specified how this decision had an impact of his rights. The arguments related to “unreasonable time” are unfounded as the extension was requested only 10 days after the expiration of the six-month time frame and was justified based on the complexity of the investigation.
- The Court of Appeals has based its findings only on admissible evidence. The allegations related to the Court of Appeals decision to declare certain evidence inadmissible are therefore unfounded. The Court of Appeals provided statement of grounds related to all decisive facts consistent with the evidence.
- The Presiding Judge had only participated in the pre-trial proceedings by granting an extension of the investigation. This decision was not related to the merits of the case and was of technical character. The examples given from the main trial are examples of the legitimate exercise of the judicial functions, non-existent procedural violations

related to the administration of evidence and of the defence counsels' denigrating attitude.

- The allegations related to the amended indictment are ill-founded. The defendants and their defence counsels were granted access to the available evidence throughout the proceedings. The indictments submitted on 15 and 20 October 2010 contain a section where a detailed list of witnesses and exhibits is provided. The amended indictment submitted on 22 March 2013 contains as annexes three binders with corresponding lists of submissions. On 22 March 2013, the Presiding Judge granted the defence one week to analyse the amended indictment and propose new evidence.

Defence counsels of I.B. and L.D.

Defence counsels of I.B. and L.D. move the Supreme Court to reject the request filed by the Chief State Prosecutor as unfounded.

IV. FINDINGS OF THE SUPREME COURT

Competence and Composition of the Panel

1. Pursuant to Articles 21 and 22 of the Law on Courts (Law no. 03/L-199), the Supreme Court is the competent court to adjudicate upon this matter.
2. In accordance with the Law on Courts and the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo¹, the case is considered as an "Ongoing case". Consequently, EULEX judges have jurisdiction and competence in this case and the Panel is composed of a majority of local judges and presided by a local judge.

Applicable Procedural Laws

3. The requests were filed after the (new) CPC entered into force on 1 January 2013. Pursuant to Article 539 of the CPC, the Supreme Court procedure is therefore governed by the CPC.
4. The indictments in the criminal proceedings which preceded the rendering of the challenged judgments were filed, joined and confirmed before the CPC entered into force. Pursuant to Articles 539 and 545 of the CPC, the criminal proceedings of relevance to the merits of the requests were correctly conducted according to the PCPC.

Admissibility

5. The request filed by the Chief State Prosecutor is belated. According to Article 433 (2) of the CPC, the Chief State Prosecutor (and others) may file a request for protection of legality within three months of the service of the final judicial decision. The SPRK Prosecutor was served the judgment of the Court of Appeals on 25 February 2016.

¹ Law 03/L-053 as amended by Laws no. 04/L-273 and 05/L-103.

Pursuant to Article 435 (2) of the CPC, the request filed by the Chief State Prosecutor on 14 June 2016 is therefore dismissed as belated.

6. The Panel decided that the requests filed by the defence counsels of L.D. and A.D. are admissible. In compliance with Article 433 of the CPC, the requests are filed by authorized persons and within the prescribed time limit in relation to the service of the judgment of the Court of Appeals. The Panel notes that the judgment of the Court of Appeals was not final at the time when the requests were filed due to, at the time pending, appeals. It can therefore be argued that the requests should have been dismissed as not permitted and re-filed after the adjudication of those appeals. However, since the Supreme Court has now adjudicated upon the filed appeals, the challenged judgments are now final and a dismissal would therefore not serve a purpose. Because of these circumstances, the Panel concludes that the requests are admissible.

The request to be summoned to the Supreme Court session

7. The Panel decided to reject P.D.'s request to be summoned to the Panel's session. It can initially be noted that he did not give any explanation on why he cannot provide the Panel with the necessary clarifications in writing or why he failed to make these clarifications in the first or second instance. In addition, there is no procedural possibility to grant the request. The Supreme Court procedure when adjudicating requests for protection of legality is governed by Articles 418 and 432—441 of the CPC. According to Article 435 (1) of the CPC, requests for protection of legality shall be considered by the Supreme Court in a session of the Panel. This session, during which the Panel deliberates on the requests, is not open for parties, their legal representatives or the public. None of the abovementioned articles include a procedural possibility for the Supreme Court to hold an open session which the parties and their legal representatives are summoned to or notified of. Because of this, the request is unfounded and the Panel decided that no further proceedings are necessary.

Merits of the Requests

8. Pursuant to Article 436 (1) of the CPC, the Panel has confined itself to thoroughly examine those violations of law which the defendants have put forward in their requests. For the reasons set out in paragraphs 10—21, the Panel – *by a majority of votes* – has concluded that the judicial proceeding which preceded the rendering of the judgment of the Basic Court was in substantial violation of the provisions of criminal procedure, namely Article 384 (1.2) of the CPC read in conjunction with Article 40 (2.1) of the PCPC, and that the Basic Court also violated other provisions of criminal procedure, namely Article 345 of the PCPC. Considering the nature of these violations, the Panel has pursuant to Article 438 (1.2) of the CPC decided that the challenged judgments should be annulled in all parts through which defendants were convicted.

The Presiding Judge:

9. The Panel has concluded that the criminal proceeding which preceded the rendering of the judgment of the Basic Court was in substantial violation of the provisions of criminal

procedure, namely Article 384 (1.2) of the CPC read in conjunction with Article 40 (2.1) of the PCPC, because the Presiding Judge should have been excluded from participation in the main trial but participated therein.

10. Initially, the Panel notes that the procedure set out in Articles 41 and 42 of the PCPC was correctly followed with regard to the proposal to exclude the Presiding Judge from the trial panel. The petition for disqualification was in this case filed after the indictment was brought and during the main trial. The ruling rejecting the petition was contested by the appeal against the judgment of the Basic Court. The decision of the Court of Appeals to reject the appeal as unfounded in this regard is a final judicial decision in the meaning of Article 432 of the CPC.
11. Secondly, the Panel notes that Article 40 (2.1) of the PCPC is applicable in relation to the question of disqualification. This article reads:

Article 40 (2.1) of the PCPC:

A judge shall be excluded from the trial panel if in the same criminal case or in a case against the same defendant, he or she has participated in pre-trial proceedings, including in proceedings to confirm the indictment.

12. The Panel notes that Article 40 (2.1) of the PCPC very clearly prescribes that if a judge has participated in pre-trial proceedings, he/she shall be excluded from the trial panel of the same case. The provision does not in any way imply that the question of disqualification depends on the nature of the participation during the pre-trial proceedings. The Panel also notes that when an applicable legal provision is clear, there is no need to consult other legal sources for the interpretation if not an application of the provision would violate principles of superior nature, for example principles protecting the defendant's right to a fair trial.
13. In this case, it is not contested that the Presiding Judge participated in the pre-trial proceedings. Pursuant to Article 40 (2.1) of the PCPC, he should therefore have been excluded from the trial panel. Because of this, the Panel cannot agree with the conclusions reached by the Vice-President of the Assembly of EULEX Judges in the decision dated 11 January 2012 or the Court of Appeals in its judgment. It is irrelevant to this question if the Presiding Judge de facto was biased. According to Article 40 (2.1) of the PCPC, he should have been excluded only because of his participation during the pre-trial proceeding.
14. Pursuant to Article 384 (1.2) of the CPC, there is a substantial violation of the provisions of criminal procedure if a judge who should be excluded from participation in the main trial participated therein. The Panel finds that this violation is of such severe nature that it is not sufficient to act pursuant to Article 438 (1.1) or (1.3) of the CPC, namely to modify the judgments or to confine itself to establish the violations, but that the challenged judgments pursuant to Article 438 (1.2) of the CPC must be annulled in all parts through

which defendants were convicted and that the case is to be returned to the Basic Court of Pristina for re-trial in these parts. Because of the restriction *Reformatio in Peius* set out in Article 395 of the CPC, the challenged judgments should remain unchanged in the parts through which defendants were acquitted or charges against them were rejected.

Replacement of panel member:

15. Only for the reasons set out in the previous section, the judgments are annulled and the case is returned to the Basic Court for re-trial. Therefore, the Panel does not find it appropriate to address all alleged violations put forward in the requests. However, the Panel has concluded that the replacement of the local panel member was conducted in violation of criminal procedure and that this violation is of such serious nature that the issue must be addressed through this judgment.

16. The following provisions in the PCPC, under *Adjournment and Recess of the Main Trial*, are of relevance to this part:

Article 344

1. In addition to cases specified in the present Code, the main trial may be adjourned under a ruling of the trial panel, if new evidence has to be collected, or if it is established in the course of the main trial that the accused has become afflicted by a temporary mental disorder or disability after committing the criminal offence, or if there are other impediments which prevent the successful completion of the main trial.

2. Whenever possible, the ruling by which the main trial is adjourned shall specify the day and hour at which the main trial shall be resumed. In the same ruling, the trial panel may order the collection of such evidence that is likely to be lost with the passing of time.

3. No appeal shall be permitted against a ruling under paragraph 2 of the present article.

Article 345

1. When the composition of the trial panel has changed, the adjourned main trial shall start from the beginning. However, after hearing the parties, the trial panel may in this case decide not to examine the witnesses and expert witnesses again and not to conduct a new site inspection, but rather to read the testimony of the witnesses and the expert witnesses given at the previous main trial or the record of the site inspection.

2. If the composition of the trial panel has not changed, the adjourned main trial shall be continued and the presiding judge shall give a short account of the course of the previous main trial. However, the trial panel may in this case also decide to recommence the main trial from the beginning.

3. If the main trial has been adjourned for more than three months or if it is held before a new presiding judge, the main trial shall recommence from the beginning and all the evidence shall be examined again.
17. As stated in the judgment of the Basic Court (page 18), the panel member Judge Hamdi Ibrahim was on 18 May 2012 replaced by Judge Vahid Halili. The Panel has thoroughly read the minutes from the main trial session held on 18 May 2012 and notes that the present parties initially were informed of the replacement of one of the panel members, that the meaning of Article 345 of the PCPC was discussed, that it was – indirectly – decided that the main trial should continue, that the new panel member should read the minutes from the previous sessions and that a separate addendum was attached to the minutes which listed all of the minutes that were read to the new panel member. The Panel also notes that the defence counsels of L.D. and A.D. did not object to this procedure.
 18. The Panel notes that Articles 344 and 345 of the PCPC prescribe the following procedure:
 - If there are impediments which prevent the successful completion of the main trial, the trial panel may under a ruling adjourn the main trial.
 - When the composition of the trial panel has changed, the adjourned main trial shall start from the beginning.
 - In cases where the main trial starts from the beginning because of change of composition of the trial panel, the trial panel may decide not to examine the witnesses and expert witnesses again and not to conduct a new site inspection, but rather to read the testimony of the witnesses and the expert witnesses given at the previous main trial or the record of the site inspection.
 19. The Panel concludes that the Basic Court did not follow the procedure set out in Articles 344 and 345 of the PCPC. Initially, the trial panel did not issue a ruling under which the main trial was adjourned due to impediments which prevented the successful completion of the main trial, namely that one of the members of the panel due to other commitments could not participate. In addition, and more importantly, the main trial did not start from the beginning but instead continued. This was in violation of Articles 344 and 345 of the PCPC and also violated the defendant's right to a fair trial since the main trial partially was conducted in the absence of one of the panel members.

Other alleged violations:

20. This Panel has thoroughly assessed all of the alleged violations put forward in the requests and has concluded that no other alleged violations of either criminal procedure or material criminal law would motivate annulment of the challenged judgments. However, the Panel wishes to stress that all alleged violations put forward in the requests should be taken into consideration during the re-trial proceedings.

S.H. and the principle of *Beneficium Cohesionis*

21. The Panel has concluded that the requests filed by the defendants L.D. and A.D. are partially well-founded and that the challenged judgments must be annulled in the parts through which they were convicted. The reasons for deciding in their favour also exist in relation to S.H., who was convicted by the judgment of the Supreme Court dated 20 September 2016 and has now filed a request for protection of legality against that judgment.
22. If the Supreme Court finds that reasons for deciding in favour of the defendant also exist in respect of another co-accused for whom a request for protection of legality has not been filed, it shall proceed *ex officio* as if such request has also been filed by that person (Article 436, par. 2, of the CPC). The Panel notes that this provision allows the Panel to proceed in any way necessary in order to ensure the implementation of the principle of *Beneficium Cohesionis* in situations where this would be to one of the defendants benefit. Because of this, the Panel decided that the conclusions thoroughly explained in the section above also should have effect on S.H. and that the challenged judgments, including the judgment of the Supreme Court dated 20 September 2016, should be annulled in the parts through which he was convicted.

V. CONCLUSION

Having considered the above, the Supreme Court of Kosovo decided as in the enacting clause of this judgment.

**THE SUPREME COURT OF KOSOVO
PRISTINA
PML.KZZ 92/2016, dated 15 December 2016**

Presiding judge:

Recording officer:

Valdete Daka
Supreme Court Judge

Maja Mähl
EULEX Legal Officer

Members of the panel:

Elka Filcheva–Ermenkova
EULEX Judge (Reporting)
Dissenting opinion, see next page.

Emine Mustafa
Supreme Court Judge

DISSENTING OPINION

EULEX Judge Elka Filcheva-Ermenkova disagrees with the majority of the Panel in relation to the requests filed by L.D. and A.D. through their defence counsels and votes that the requests filed by them should be rejected as unfounded. She states:

On the basis of Article 438 (1.2) of the CPC, in relation with Articles 384 (1.2), 436 (1) and (2) of the same code, the majority of the Panel decided that the challenged judgments and the judgment of the Supreme Court dated 20 September 2016, taken in a parallel procedure under Article 407 (7) of the CPC, had to be annulled in part and the case returned to the Basic Court for the conduct of a new trial under the conditions of Article 440 of the same code.

In the opinion of the majority of the Panel, the Basic Court allowed two substantial violations of the provisions of criminal procedure. The majority considered that the Presiding Judge should have been excluded from participation in the main trial because the same judge participated in the pre-trial proceedings (violation of Article 41, par. 2, of the PCPC). Secondly the Basic Court, in the opinion of the majority, violated Article 345 (1) of the PCPC because when a member of the trial panel changed the trial panel did not strictly follow the prescription of the provision.

I disagree on both points:

The Presiding Judge:

The majority of the Panel considers that the text of Article 40 (2.1) PCPC leaves no room for interpretation and that a trial judge should always recuse in case he/she took part in the pre-trial stage, regardless of what form that participation might have had. I consider this approach not in line with the purpose of the law, which is that the parties in the trial enjoy their right to a fair trial conducted by an impartial judge within reasonable time.

The right to a fair trial is a fundamental principle of any modern judicial system. For this fundamental principle to be ensured and in particular related to the impartiality of the judge various mechanisms have been developed. A traditional standard to determine whether a judge should recuse is to verify whether there was real bias or prejudice meaning whether he/she has any interest in the outcome of the case. A newer approach is to avoid any appearance of bias or prejudice (regardless whether there is actual bias).

In the question at hand there is no reason to suggest that there was either an actual bias/prejudice, or appearance of such. What happened on the pre-trial stage was that the Presiding Judge signed a decision for extension of the investigation.

According to Article 9 (3) of the PCPC, a judge makes decisions on actions and measures in pre-trial proceedings, which limit the human rights and basic freedoms of a person. As long as a pending investigation always limits certain basic rights of the person being investigated the extension of the investigation is subject to an authorization of a judge under Article 225

(2) of the PCPC. The purpose of having a judge involved is to guarantee that a fair balance is ensured between the legitimate needs of an investigation and the personal basic rights of the individual. In the case at hand the reason for the extension to be requested was mainly the fact that the investigative authorities were waiting for numerous requests for international legal assistance to be communicated and for that matter additional time was needed. The judge took into account the enormous logistical difficulties related to the investigation and concluded that extension may be granted. The judge neither made assessment of evidence, nor expressed any opinion on any decisive investigative steps. Therefore on this ground (authorizing the extension of investigation) this same judge was neither biased nor prejudiced on the level of the main trial. In that regard I concur completely with the assessment of the Acting President of EULEX judges, expressed in his Ruling numbered JC/EJU/OPEJ/2760/chs/11, dated 11 January 2012. In conclusion the right to a fair trial of all defendants was not infringed in any way.

In relation to the alleged bias, the defence claims that on 25 March 2012, the presiding judge accused the defendant L.D. of “cheating on his taxes”; that the Presiding judge instructed the Prosecutor to amend the indictment; that he failed to make record of the received evidence and to rule on objections to evidence; that on 10 April 2013 he questioned witnesses and expressed opinions that demonstrated extreme bias; that he repeatedly engaged in private meetings with the Prosecutor; that in an obvious attempt to prejudice the donors, he repeatedly told them at the outset of their testimony that they were “victims” and assured them that they would be entitled to compensation if the defendants were convicted, etc.

The way the allegations are made and with referral to only two sessions dated 25 March 2012 and 10 April 2013, it is impossible to investigate whether or not the generic allegations (engagement in private meetings, refusing to let the defence ask certain questions) are true. First, there was no trial session on 25 March 2012, so obviously the allegation that the Presiding Judge accused Dr D. of tax fraud on that day is completely groundless. Second, nowhere else it is found that the Presiding Judge actually made such accusations. In that regard the assertion that the Presiding Judge accused the defendant of “tax evasion” is genuine untrue and for that matter almost amounts to misuse of the procedural right of extraordinary legal remedy.

As long as reference is made to the actions of the Presiding Judge during the session held on 10 April 2013 the only worth making note is that from the reading of the minutes one can tell that the judge was executing strictly his judicial function. In a judicial system such as the one in Kosovo this includes the obligation of the judge to be active and to establish truthfully and accurately the facts which are important to rendering a lawful decision. The latter is called “general duty to establish a full and accurate record” and is explicitly regulated in Article 7 of the PCPC (applicable at the time of the trial, now corresponding again to Article 7 of the CPC).

Therefore I would reiterate that there is no reason to claim that the judge was either biased or prejudiced and that the right to fair trial was violated in any way.

Last but not least: In case when the right to a fair trial is not infringed in any way by the previous involvement of the presiding trial judge, the annulment of the decisions and the return of the case for a new trial may result into a real infringement of the right to a fair trial conducted within reasonable time.

Replacement of panel member:

The majority considers that the Panel violated the provisions of Articles 344 and 345 (1) of the PCPC because “the trial panel did not issue a ruling under which the trial was adjourned due to impediments which prevented the successful completion of the main trial, namely that one of the members of the panel due to other commitments could not participate. In addition, and more importantly, the main trial did not start from the beginning but instead continued”.

The provision of Article 345 (1) of the PCPC states that “When the composition of the trial panel has changed, the adjourned main trial shall start from the beginning. However, after hearing the parties, the trial panel may in this case decide not to examine the witnesses and expert witnesses again and not to conduct a new site inspection, but rather to read the testimony of the witnesses and the expert witnesses given at the previous main trial or the record of the site inspection”.

The first sentence of the provision subsumes the principle of directness of the criminal procedure according to which the presentation of all facts and evidence required for forming a decision must take place in a public debate in front of the court which will reach a decision in an adversarial procedure. This is because the court must learn about the facts directly, as a direct observer and receiver of information, without the mediation of other interlocutors. *E.g.* the judge in the trial where evidence is collected must hear with his/her ears and see with his/her eyes. This is the principle.

However, the lawmakers in their wisdom provided for cases when for some reason a member of the panel has to be replaced (in cases when there was no reserve judge appointed). The law provides that “after hearing the parties, the trial panel may in this case decide not to examine the witnesses and expert witnesses again and not to conduct a new site inspection, but rather to read the testimony of the witnesses and the expert witnesses given at the previous main trial or the record of the site inspection”. Obviously the lawmaker, by carefully balancing the principle of directness with the principle of procedural economy, created a legal fiction, so that even though the new judge was physically not there (in the trial directly), it would be considered as if he/she was there and had direct impressions of what happened in the trial. For this legal fiction to be activated the panel has to read to the new judge the testimonies of witnesses and any other relevant record. This may be done in front of the parties but if it is not the principle of directness would not be violated, because the parties have already learned all the facts directly, by being present in the court room, prior to the appointment of the new judge.

From a factual point of view what happened on 18 May 2012 is that the Presiding Judge announced that a new panel member will be stepping in and requested the parties to express opinion on that. In addition, the Presiding Judge prepared an addendum to the minutes (thus it should be considered imminent part of these same minutes) in which he duly listed all the minutes of all the sessions that were conducted thus far, therefore all witness testimonies and all relevant record was read to the new judge, meaning strictly to the prescription of Article 345 (1) of the PCPC. Just because the addendum is not physically another page of the minutes of that day does not mean that the relevant record was not read to the judge. According to Article 348 (5) of the PCPC, it is up to the presiding trial judge to decide how the main trial should be recorded and in this particular case he decided to have part of the record from 18 May 2012 in an addendum, which certifies the action of the actual reading of the previous minutes to the new judge.

Last but not least the parties expressed their opinions related to the appointment of the new judge and none of them ever questioned that the minutes were actually read to him. In addition, the minutes from the session on 18 May 2012 show that the defence counsels of L.D. and A.D. explicitly expressed that they had no objection to the procedure. Therefore there is no reason to doubt that this reading actually happened.

As to whether the actual reading happened in front of the parties, as already mentioned, this would not make a difference, because the parties were present at the original collection of the evidence and the principle of directness in relation to them had already been duly observed.

For the reasons above I completely disagree with the opinion of the majority of the Panel on the two points assessed.

With regard to the other issues raised in the requests for protection of legality it would be redundant to comment. In passing it may be only mentioned that the Panel found all other allegations ill-founded, to which I agreed.

Elka Filcheva-Ermenkova
EULEX Judge at the Supreme Court of Kosovo