

BASIC COURT OF PRIZREN

P. No.: 123/13

Date: 6th September 2013

IN THE NAME OF THE PEOPLE

The Basic Court of PRIZREN through the trial panel composed of EULEX Presiding Judge Vitor Hugo Pardal, EULEX Judge Anna Adamska Gallant and local Kosovo Judge Skender Çoçaj as panel members, assisted by EULEX Assistant Eduard Nimani and Court Recorder Christine Sengl, in the criminal case against:

OK.A, son of and, born on the in,,,,, residing in,,,, owner of,,,, and, citizenship, passport No. and Kosovo ID no.;

BU.F, son of and, born on the in,,,, residing in, ..,,,, ID no.;

FL.A, son of and, born on the in, .., .., .., residing, ..,, ..,, .., .., .., .., ID no. and passport no.;

As per the indictment amended on the 11th February 2013, all of defendants are charged with **Organized crime** contrary to Article 274, paragraphs 1 to 3 CCK, **Smuggling of migrants** contrary to Article 138, paragraphs 1 to 6 CCK and **Money Laundering**, contrary to article 32 of Law 03/L-196 dated 03 September 2010 and section 10.2 of UNMIK regulation No. 2004/2, dated 5 February 2004.

The two first identified defendants have also each been charged with one count of **Smuggling of migrants** respectively contrary to article 138, paragraphs 1 to 6 and 138, paragraphs 1, 3, 5 and 6 CCK.

After having seven public trial sessions on 27 March 2013 (initial hearing), 29 and 30 April 2013; 2 May 2013; 12 June 2013, 10 July 2013 and 20 August 2013, with the judgment being announced orally on the **22 August 2013** in the presence of the defendants and their respective Defense Counsels Mr. Ethem Rogova, Mr. Hajrip Krasniqi and Mr. Brahim Sopa, together with the SPRK Prosecutor Mr. Alister Cumming and after the trial panel's deliberation and voting held on 21st August 2013, pursuant to articles 362.1, 364 and 365 of the KPCP issues the following

JUDGMENT

On Count 1 – **Organized Crime**, contrary to article 274, paragraphs 1 and 3 and 23 of the CCK pursuant to articles 362.1 and 364.1.3 of the KPCP, the accused OK.A, BU.F and FL.A are all

ACQUITTED

of the aforementioned charge, because in concrete case it has not been proven that any of the accused have committed the act with which they have been charged, as follows:

“Between 11 May 2010 and 14 December 2011, Ok.A; between 30 November 2010 and 5 January 2012 Bu.F; and between 6 December 2010 and 12 March 2012 Fl.A on the territory of Kosovo committed the offense of organized crime by a) organizing, supervising, managing or directing the activities of an organized criminal group consisting of more than themselves“; b) committing smuggling of migrants as part of an organized criminal group consisting in more than themselves; c) actively participating in the criminal or other activities of any organized criminal group knowing that their participation would contribute to the commission of serious crime by any group; in order to obtain, directly or indirectly, a financial or any other material benefit”.

On Count 2 – **Smuggling of migrants**, contrary to article 138, paragraphs 1 and 5 of the CCK, pursuant to articles 362.1 and 365 of the KPCP, the defendant FL.A is

ACQUITTED

of the above referred charge, because in concrete case it has not been proven that this accused has committed the act with which he has been charged, as follows:

“Between 25 June 2011 and 14 December 2011, Fl.A in the territory of Kosovo, Serbia, Montenegro, Croatia, Slovenia, Italy, Austria, Germany and other States, committed the offence of Smuggling of Migrants by engaging in the smuggling; procuring and providing fraudulent travel or identity documents to enable the smuggling to obtain a financial or other material benefit; and enabling persons who are not residents of Kosovo to enter or remain in Kosovo, or persons who are not nationals or permanent residents to cross a border without complying with the requirements for legal entry, and remain in the State concerned without complying with the necessary legal requirements to remain by the previously-stated means or by other illegal means; and most importantly, by organizing and directing other persons to commit the same, for the following migrants:

Between 25 June 2011 and 6 July 2011 smuggling Ha.D, Turkish citizen, Fe.Y, Turkish citizen and Ab.S.Z, Turkish citizen from Turkey through Montenegro, Serbia, Bosnia and Herzegovina, Croatia and Slovenia to Italy.

Between 19 October 2011 and 23 October 2011 smuggling Se.A and Ta.T, Turkish citizens, from Turkey through Croatia and Slovenia to Italy;

Between 1 October 2011 and 7 October 2011 smuggling Me.S, Ra.S and Ah. (last name indicated as S), Turkish citizens, from Turkey through Serbia, Bosnia and Herzegovina and Croatia to Slovenia and France;

Between 1 October 2011 and 17 November 2011, smuggling Za.A and Om.Y, Turkish citizens, from Turkey to Kosovo then Turkey through Croatia and Slovenia to Italy;

Between 17 November 2011 and 20 November 2011, attempting smuggling of 4 unidentified Turkish illegal migrants from Turkey through Montenegro and Serbia to Germany;

Between 20 November 2011 and 28 November 2011, attempting smuggling 4 migrants to Belgrade - Ya.D, Bi.H.O, Ha.D, Me.S, from Serbia through Hungary to Austria;

Between 28 November 2011 and 6 December 2011, smuggling a family consisting of a mother and 5 children, a Turkish migrant named Il. and another Turkish boy, Ug., from Croatia through Slovenia to Italy;

Between 18 August 2011 and 03 December 2011, smuggling and/or enabling persons who are not nationals or permanent residents, or not otherwise legally permitted, to enter or remain in other States, namely, 19 persons in the forest, Mu.B, Az.K, Ba.B, Se. or Ser., Fa.T, Me., Se., Em.U, Me.E, Family of 3, Me.A, Ta.A, Er.A, Me.Y, Ay.U, Ra.T, Sa.D, and other unidentified persons of Turkish origin from Turkey through Serbia, Kosovo, Montenegro, Croatia and or Bosnia and Herzegovina to Slovenia, Italy, Germany and/or Austria, in co-perpetration pursuant to Article 23 of the CCK. ”

regarding the accused OK.A and BU.F with personal data listed above, the Court pronounces both

GUILTY

OK.A because *“Between 1 October 2011 and 7 October 2011 smuggled Me.S,*

Ra.S and Ah. (last name indicated as S), Turkish citizens, from Turkey through Serbia, Bosnia and Herzegovina and Croatia to Slovenia and France; Between 20 November 2011 and 28 November 2011, attempted the smuggling of 4 migrants to Belgrade - Ya.D, Bi.H.O, Ha.D, Me.S, from Serbia through Hungary to Austria;

Between 28 November 2011 and 6 December 2011, smuggled a family consisting of a mother and 5 children, a Turkish migrant named Il. and another Turkish boy, Ug., from Croatia through Slovenia to Italy; all these in co-perpetration pursuant to Article 23 of the CCK;

Between 25 June 2011 and 6 July 2011 smuggled Ha.D, Turkish citizen, Fe.Y, Turkish citizen and Ab.S.Z, Turkish citizen from Turkey through Montenegro, Serbia, Bosnia and Herzegovina, Croatia and Slovenia to Italy;

Between 1 October 2011 and 17 November 2011, smuggled Za.A and Om.Y, Turkish citizens, from Turkey to Kosovo then Turkey through Croatia and Slovenia to Italy”.

and

BU.F because “Between 1 October 2011 and 7 October 2011 smuggled Me.S, Ra.S and Ah. (last name indicated as S), Turkish citizens, from Turkey through Serbia, Bosnia and Herzegovina and Croatia to Slovenia and France;

Between 20 November 2011 and 28 November 2011, attempted the smuggling of 4 migrants to Belgrade - Ya.D, Bi.H.O, Ha.D, Me.S, from Serbia through Hungary to Austria;

Between 28 November 2011 and 6 December 2011, smuggled a family consisting of a mother and 5 children, a Turkish migrant named Il. and another Turkish boy, Ug., from Croatia through Slovenia to Italy; all these in co-perpetration pursuant to Article 23 of the CCK.”

Both in violation of article 138, paragraph 1 of the former CCK (2003), acquitting both of them of all the remaining sub-counts.

On Count 3 – **Smuggling of migrants**, contrary to article 138, paragraphs 1 and 5 of the CCK pursuant to articles 362.1 and 365 of the KPCP, the defendant OK.A is

ACQUITTED

of the aforementioned charge, because in concrete case it has not been proven that this accused has committed the act with which he has been charged, as follows:

”Between 5 October 2011 and 9 October 2011, Ok.A on the territory of Kosovo, committed the offence of attempted Smuggling of Migrants by engaging in the smuggling; procuring and providing fraudulent travel or identity documents to enable the smuggling to obtain a financial or other material benefit; and enabling persons who are not residents of Kosovo to enter Kosovo, or persons who are not nationals or permanent residents to cross a border without complying with the requirements for legal entry and

remain in the State concerned without complying with the necessary legal requirements to remain by the previously stated means or by other illegal means; and most importantly, by organizing and directing other persons to commit the same, for the following migrants: Ah.E, Mu.E and Ab.E from Turkey through Kosovo and Albania to Italy, in co-perpetration pursuant to Article 23 of the CCK”.

On Count 4 – Smuggling of migrants, contrary to article 138, paragraphs 1 and 5 of the CCK pursuant to articles 362.1 and 365 of the KPCP, the defendant BU.F is

ACQUITTED

of the aforementioned charge, because in concrete case it has not been proven that this accused has committed the act with which he has been charged, as follows:

*“Between 26 November 2011 and 2 December 2011, Bu.F, on the territory of Kosovo, Slovenia and Austria, committed the offence of Smuggling of Migrants by engaging in the smuggling; procuring and providing fraudulent travel or identity documents to enable the smuggling to obtain a financial or other material benefit; and enabling persons who are not residents of Kosovo to enter Kosovo, or persons who are not nationals or permanent residents to cross a border without complying with the requirements for legal entry and remain in the State concerned without complying with the necessary legal requirements to remain by the previously stated means or by other illegal means; and most importantly, by organizing and directing other persons to commit the same, for the following migrants:
Family of 5 - Husband, wife and 3 children - from Croatia through Slovenia to Graz, Austria In co-perpetration pursuant article 23 of the CCK”.*

On Count 5 – Money Laundering, contrary to article 32 of Law 03/L-196, promulgated on 18 October 2010 and section 10.2 of UNMIK Regulation No. 2004/2, dated 5 February 2004, pursuant to articles 362.1 and 365 of the KPCP, the accused OK.A, BU.F and FL.A are all

ACQUITTED

of the aforementioned charge, because in concrete case it has not been proven that any of the accused has committed the act with which they have been charged, as follows:

“Between 11 May 2010 and 14 December 2011, Ok.A; between 30 November 2010 and 8 December 2011, Bu.F; and between 6 December 2010 and 8 December 2011, Fl.A; on the territory of Kosovo and other States committed the offence of Money Laundering by knowingly or having cause to know that certain property, namely cash or other monetary means, is the proceeds of criminal activity, and which property is in fact proceeds of crime (smuggling of migrants by members of the criminal group):

- a) converting or transferring, or attempting to convert or transfer, the property for the purpose of concealing the nature, source, location, disposition, movement or ownership of the property;*
- b) converting or transferring, or attempting to convert or transfer, the property for the purpose of assisting any person - namely, Ok.A, Bu.F, Fl.A, Ah.C, Nu.N, 'Na.', Shk.M, Muh.M, Ar.V, Ke.V, Ni.M, Hu.M, Ka.H, Ar.B, Sa.A, Ri.V, Ga.B, Af.A, Ag.B, Ba.E, Da.M, Ta.H, Ma.B, Da.S, An.S, Ed.S, Mi.M, Ra.A, Ok.S, Ib.B, Mu.T, Mu.G, Hu.G, Me.I, Ha.H, Hac.H, Ja.Z("the Ir."), Nu.K, Is. (last name unknown), Es.(last name unknown), Av. (last name known), Be. (last name unknown), person nicknamed "Kl.", and other unidentified members of the criminal group - who are involved in the commission of the criminal offence that produced the property (smuggling of migrants) to evade the legal consequences;*
- c) converting or transferring, or attempting to convert or transfer, the property for the purpose of promoting the underlying criminal activity (smuggling of migrants); and/or*
- d) Acquiring, possessing or using the property (cash or other monetary means)".*

SENTENCING

Pursuant to article 365.1.3 of the KCPC, and article 71 of the CCK, the hereby convicted defendants are sentenced as follows:

The defendant **Ok.A, for Count 2 – Smuggling of migrants**, in violation of article 138, paragraph 1 of the CCK, pursuant to articles 362.1 and 365 of the KCPC: 7 (seven) years imprisonment;

The defendant **Bu.F, for Count 2 - Smuggling of migrants**, in violation of article 138, paragraph 1 of the CCK, pursuant to articles 362.1 and 365 of the KCPC: 3 (three) years imprisonment;

For each of the defendants Ok.A and Bu.F time already spent in detention on remand, respectively, from 14 December 2011 and 17 April 2012, will be discounted.

CONFISCATION

Having taken into consideration the evidence produced during the course of the main trial that the cellular phones which were temporarily sequestered of the convicted defendants that were

used in the commission of the criminal offenses for which the same have been convicted, the respective forfeit of such objects is hereby determined, as per article 283. 1 to 4 KCPC.

COSTS

Ok.A and Bu.F have been found guilty of criminal offenses, and therefore are obligated to reimburse the costs of the criminal proceedings pursuant to article 451.1 and 2 and 453.1 of the KCPC, as listed by article 450.2 of the same Code except the cost of interpretation and translation throughout the criminal proceedings. Having taken into consideration the total amount of witnesses, number of sessions held and IIA requests, the amount of costs is hereby determined as 2000 (two thousand) Euros, for which both these defendants are jointly and severally liable.

RESTRITIVE MEASURES

House detention regarding the defendant FL.A is hereby declared as expired as per articles 183.7 and 367.4.1 KCPC.

Detention on remand regarding the defendant OK.A is hereby extended until this judgment becomes final, as per article 367.2 and 7 KCPC.

Possible extension of detention on remand regarding the defendant BU.F will be decided by the trial panel in a separate ruling immediately after the announcement of this judgment, and after hearing from the relevant parties as per article 380.1 KCPC.

REASONING

Procedural background

On the 11th December 2012, the SPRK Prosecutor Mr. Alister Cumming filed an indictment against 2 individuals, Ok.A and Bu.F, containing documentary evidence (pages 84 and 85 of the indictment), and 3 witnesses (page 84) in order to support the charges of Organized crime,

contrary to article 274, paragraphs 1 to 3 CCK (count 1), Smuggling of migrants, contrary to article 138, paragraphs 1 to 6 CCK (count 2) and Money laundering, contrary to article 32 of Law 03/L-196 dated 03 September 2010 and section 10.2 of UNMIK regulation No. 2004/2, dated 5 February 2004 (count 5), with which the first two defendants have been indicted for, in co-perpetration as per article 23 CCK.

On the 11th February the indictment was amended to include FLA as a defendant with the aforementioned Counts 1, 2 and 5, in co-perpetration.

The same evidence for this defendant has been produced in order to support the charges of Smuggling of migrants, contrary to article 138, paragraphs 1 to 6 and 138, paragraphs 1, 3, 5 and 6 CCK (respectively Counts 3 and 4) for which the first and the second defendants have been individually indicted.

Eight public sessions on the 27 March 2013 (initial hearing), 29 and 30 April 2013; 2 May 2013; 12 June 2013, 10 July 2013, 20 and 22 August 2013 were held, with the judgment being orally announced during the last session on the 22 August 2013.

Several preliminary issues were raised by the defense at the first hearing and those afterwards which were considered and decided upon in the ruling dated 25 April 2013, rendered by the Presiding Judge. Thereafter the following three objections were raised by the parties which were ruled upon: a) the objection as presented by Ethem Rugova representing the defendant Ok.A regarding the opening of criminal proceedings in Kosovo, dated 29 April 2013, was herein ruled as a previous issue to the present judgment as below; b) objection to new evidence to be presented by the prosecution and related adjournment of the main trial, as rejected by a ruling dated 2 May 2013; c) the inadmissibility of all statements regarding victims interviewed by foreign authorities due to the impossibility of cross-examination as attested by the SPRK Prosecutor, dated 10 July 2013.

All the defendants produced a statement whilst being examined at the trial, in line with articles 346 and 347 of the KCPC, having all been made aware of each other's statement immediately after the last one was examined in the absence of the others, in line with article 345.3 KCPC.

The SPRK Prosecutor gave his closing speech and all defendants provided closing statements by themselves or/and by their respective defense counsels.

All the defendants have been present during the oral announcement of the final judgment.

Jurisdiction of this Court

The judges composing this panel are competent to adjudicate this case, having the court the material and territorial jurisdiction, as per articles 25 and 29 KCPC; Following a decision of the President of EULEX Judges issued on the 11th March 2013, to assign the undersigning EULEX Judges for adjudicating this case, and the local judge was appointed following the applicable roster in force at the Prizren Basic Court. Seven main trial sessions have been held and no objections have been raised by the parties. Thus, the panel is the competent, according to article 3.1 LoJAF (Law 03/L-53).

Previous issue: “*Litispence*” of criminal proceedings in Kosovo

During his final speech, Mr. Ethem Rugova, raised the following objection:

“this proceeding is in contradiction with the Law no. 04/L-31 dated 16/09/2011 which is related to the transfer of criminal proceedings from the foreign countries to Kosovo, because the

conditions have not been met as foreseen with the provisions of this law. It is very important to mention that the above proceedings has started in contradiction with article 117 of the Criminal Code of Kosovo which provision foresees special conditions for prosecution of criminal offenses committed outside the territory of Republic of Kosovo. This provision beside others foresees in paragraph 1 “ in foreseen cases with article 114 of this code if the criminal proceedings is started but is not finished in another jurisdiction, criminal proceedings in the Republic of Kosovo will be commenced only with the approval of the Chief State Prosecutor of Republic of Kosovo. In the concrete case in the case files but even neither during the main hearing was not presented such a document”.

The Court considered this argument as ungrounded. The indictment was filed with the Court initially on 11th December 2012, which is before the entering into force of the new CCK. Therefore, any procedural provisions regarding the initiation of the criminal proceedings must refer to that date and, therefore to the CCK in force at that time.

Considering so, as per article 103.1 of the CCK (2003), the approval is to be obtained from the *Office of the Public Prosecutor of Kosovo*. As per the new CCK it would be upon authorization of *the Chief State Prosecutor of Republic of Kosovo* instead.

The Public Prosecutor of Kosovo is not defined as such in the new Law on State Prosecutor (Law No.03/L –225) entered into force on the 1st January 2013 but article 32.2 is clear and reads: *“Upon the entry into force of this law any reference in any law, regulation, directive, rule or other legal act to “Prosecution Services” or “Public Prosecutor” shall be construed to mean the “State Prosecutor”.*

State Prosecutor is defined as per article 2.1.1 of the same law as, *“the independent institution with authority and responsibility for the prosecution of persons charged with committing criminal acts and other acts specified by law and includes the following: the Basic Prosecution Offices; the Appellate Prosecution Office; the Special Prosecution Office; and the Office of the Chief State Prosecutor; ...”*

Hence, before the 1st January 2013, the only authorization needed was from the Office of the Public (State) prosecutor, rather than from a higher authority of the same institution, as it is now (Chief State Prosecutor of Republic of Kosovo).

It would make no sense to demand a formal documented authorization from someone who was (and is) part of the Office of the Public Prosecutor, namely the SPRK Prosecutor who filed the indictment at stake. Therefore, this objection is to be considered as procedurally ungrounded and there is no material or procedural objections preventing the trial panel to enter the merits of this issue into the case.

Administered Evidence

The following set of evidence was considered relevant to the final deliberation and subsequent judgment.

Written exhibits: The following list of documentary evidence was considered as analyzed at the main trial, as provided by article 344.1 KCPC:

- 15 day reports on phone number 0038XX, dated 29 Aug 2011, 13 Sep 2011, 29 Sep 2011 and 14 Oct 2011;
- MIA – Civil registration agency report, dated 05 Dec 2011;
- 15 day reports on phone number 0038XX, dated 06 Dec 2011, 21 Dec 2011, 18 Feb 2012, 04 Mar 2012, 19 Mar 2012 and 02 Apr 2012;
- 15 day reports on phone number 0038XX, dated 12 Dec 2011, 29 Dec 2011, 13 Jan 2012, 04 Mar 2012 and 19 Mar 2012;
- Legal interception transcription reports - periods 8 Nov 2011 to 21 Nov 2011, 22 Nov 2011 to 06 Dec 2011, dated 14 Dec 2011;
- Search reports of flat of Ok.A, dated 15 Dec 2011 and FLA, dated 19 Dec 2012;

- Legal interception reports - periods 22 Nov 2011 to 07 Dec 2011, dated 15 Dec 2011;
- Metering of phone numbers police reports, dated 15 Dec 2011 and 03 May 2012;
- EULEX police Surveillances report, dated 17 Jan 2012;
- EULEX police reports, dated 02 Feb 2012, 22 Feb 2012, 10 May 2012, 03 Jul 2012 and 04 Oct 2012
- Evidence report + CD, dated 10 May 2012;
- 15 day reports on phone number 0038XX and IMEI n35828703425194, dated 12 Dec 2011, 26 Feb 2012 and 11 Mar 2012;
- 15 day reports on phone number 0038XX, dated 18 Feb 2012, 05 Mar 2012, 19 Mar 2012 and 02 Apr 2012;
- EULEX police reports dated 29 Feb 2012, 01 Mar 2012, 02 Mar 2012, 07 Mar 2013, 12 Mar 2012, 06 Apr 2012, 12 Apr 2012, 19 Mar 2012 and 17 Jul 2012;
- 15 days reports on phone number 0038XX, dated 08 Mar 2012 and 23 Mar 2012;
- Analysis report on seized evidence, dated 21 Mar 2012;
- 15 day reports on phone number 0038XX, dated 30 Mar 2012 and 18 Apr 2012;
- Summary report on financial investigations, dated 09 Sep 2011 and 17 Sep 2012;
- Financial disclosed data from Raiffeisen Bank, dated 31 Aug 2011 and 06 Aug 2012, Procredit bank, dated 05 Sep 2011 and 04 Aug 2012 + CD, Banka Ekonomike, dated 02 Sep 2011 and 01 Aug 2012, NLB, dated 22 Aug 2011 and 27 Jul 2012 + CD, BpB, dated 01 Sep 2011 and 06 Aug 2012, BKT, dated 22 Aug 2011 and 30 Jul 2012, TEB, dated 22 Aug 2011 and 27 Jul 2012, UFP,

dated 24 Aug 2011 and 30 Jul 2012 + CD; DMTH, dated 31 Aug 2011 and 02 Aug 2012;

- Kosovo Cadastral Agency report, dated 26 Aug 2011, 27 Aug 2012 and 06 Aug 2012;
- Tax Administration of Kosovo report, dated 01 Sep 2011;
- Kosovo Business registration agency report, dated 01 Sep 2011 and 06 Sep 2012;
- Kosovo Customs report, dated 24 Aug 2011 and 31 Jul 2012;
- Civil registration agency report, dated 31 Aug 2011 and 24 Aug 2012;
- Criminal charge against Ok.A, received by ILA from Slovenia, dated 21 Jun 2011;
- Ok. operation report, received by ILA from Italian State police, from Feb 2011 to Aug 2012;
- Evidence received from Italy by ILA as follows:
 - Police report from the border police in Trieste dated 23 September 2011 relating to two Turkish migrants arrested in Trieste;
 - Copy of an agreement between the Governments of Italy and Slovenia in relation to the return of these two migrants to Slovenia;
 - A Train ticket for two adults from Trieste to Milan;
 - Italian border police report to the Slovenian authorities describing the arrest of two migrants in it, also referring to the fact that the phone was found in possession of Ta. K contains the number of 0038XX, owned by Ok.A.
 - Analysis report of phone devices of Ta. K and Se. A;
 - Arrest reports of Ar. V, Er. Z, Fe.Y, dated 5 July 2011;
 - Seizure of documents from Fe.Y;
 - minutes of search in person and car of Ar.V;
 - Transcript of phone calls, dated 5 and 8 July 2011 and summary of transcripts of intercepted phone calls, dated 12 July 2011;
 - Analysis of phone records, dated 7 July 2011; and report of phone analysis of two phones of Fe.Y dated 7 July 2011

Witnesses: statements produced at the main trial by Mi.J and Ka.G.

Defendants' statements: as produced before the Court at the main trial.

Statement of Grounds

Factual Grounds:

a. *The following relevant facts have been considered as PROVED:*

1. *Between 25 June 2011 and 6 July 2011 Ok.A smuggled Ha.D, Fe.Y and Av.S.Z, all Turkish citizens from Turkey through Montenegro, Serbia, Bosnia and Herzegovina, Croatia and Slovenia to Italy enabling them, being non-nationals and permanent residents of Italy, to cross the border without complying with the necessary legal requirements (sub-count 1)*
2. *Specifically that: a) the aforementioned 3 individuals crossed the border of Italy and on 5 Jun 2011 were later arrested in Trieste for illegal entrance in Italy, together with Ar.V and Ba.E; b) The 3 individuals are referred in phone conversations involving Ok.A and other 2 individuals - Ar.V and Ba.E; c) Ok.A is mentioned in phone book of one of the sequestered phone devices; d) In his phone conversations, Ok.A makes explicit references to trip details, money and payments directly regarding the smuggling of these 3 individuals; e) On the 4 July 2011, Bu.F sent 1917,50 Eur to Ar.V; f) On 13 May 2011 FLA received 4.328,00 Eur, on the 31 May 2011 received 500,00 Eur and on the 3 June 2011 received 3.150,00 Eur always from Turkish individuals;*
3. *On 23 October, migrants Se.A and Ta.T, who are Turkish citizens were stopped by Slovenian police in Koper for illegally crossing the border between Slovenia and Italy (Sub-count 2)*
4. *Specifically that: a) The aforementioned migrants made text messages and phone calls to Ok.A; b) On 19 October 2011, Bu.F sent 2,777.00 Eur to Ka.H, Slovenia; on 20 October 2011, received 300 Eur from Ra.C, Turkey; on 21 October 2011 received 1,345.00 Eur from Ar.C, Albania and sent 952.00 Eur to Ar.V, Slovenia;*

5. *Between 1 October 2011 and 7 October 2011 Ok.A and Bu.F, in co-perpetration, smuggled Me.S, Ra.S and Ah. (last name indicated as S), Turkish citizens, from Turkey through Serbia, Bosnia and Herzegovina and Croatia to Slovenia and France enabling them, being non-nationals and permanent residents of Slovenia, to cross the border without complying with the necessary legal requirements (sub-count 3);*
6. *Specifically that: a) Ok.A was provided with the details of these migrants, agreed the price, instructed the migrants with the planned route, advised them regarding the police presence in Croatia (“lots of police in Zagreb”); b) Ok.A arranged a room for them by phone in Porec; c) Bu.F reported to Ok.A the trip on the following day and was instructed by this last; d) Bu.F instructed the migrants to throw away their passports, like Ok.A did, and coordinated the drivers; e) on 19 October 2011, Bu.F transferred 2,777.00 Eur to Ka.H in Slovenia and on 21 October 2011 Bu.F transferred 952,00 Eur to Ar.V in Slovenia.*
7. *Between 1 October 2011 and 17 November 2011, Ok.A smuggled Za.A and Om.Y, Turkish citizens, from Turkey to Kosovo then Turkey through Croatia and Slovenia to Italy enabling them, being non- nationals and permanent residents of Italy, to cross the border without complying with the necessary legal requirements (sub-count 4);*
8. *Specifically that: a) Ok.A was provided with the details of these migrants; b) on 15 November 2011 spoke with one of these migrants and payments had been discussed as well as with an individual named “H” and a payment had been received by Ok.A; c) The migrants crossed the border to Italy around 16:41 on the 16 November 2011; d) on 15 November 2011 Bu.F sent 1.958,50 Eur to Hajdin Asllani; e) on 20 October 2011, Bu.F received 300 Eur from Ra.C, Turkey and on 21 October 2011 received 1.345,00 Eur from Ar.C, Albania;*
9. *Between 20 November 2011 and 28 November 2011, Ok.A and Bu.F, in co-perpetration, attempted the smuggling of 4 migrants to Belgrade - Ya.D, Bi.H.O, Ha.D, Me.S- from Serbia through Hungary to Austria intending to enable them, being non- nationals and permanent residents of Austria, to cross the border without complying with the necessary legal requirements (sub-count 6);*

10. Specifically that: a) Ok.A was provided with the details of these migrants, agreed the price, arranged with the drivers; c) Bu.F was informed by Ok.A about the four migrants and was informed of the identity of one of them by SMS sent to him by Ok.A; e) Fl.A was forwarded of the details of 3 of the migrants by SMS;
11. Between 28 November 2011 and 6 December 2011, Ok.A and Bu.F, in co-perpetration smuggled a family consisting of a mother and 5 children, a Turkish migrant named Il. and another Turkish boy, Ug., from Croatia through Slovenia to Italy, enabling them, being non-nationals and permanent residents of Italy, to cross the border without complying with the necessary legal requirements (sub-count 7);
12. Specifically that: a) Ok.A was provided with the details of these migrants, agreed the price, instructed the migrants with the planned route to take a bus from Zagreb to Porec; c) Bu.F organized the drivers from Porec to Udine; c) Payment of Il. amounted to 1,700.00 Eur and drivers service was arranged by Bu.F with Sh.M; d) Bu.F instructed the migrants to throw away their passports, e) Migrants were caught in Venice on the 5 December 2011 by the Italian police and returned to Turkey on the 13 December 2011.
13. The following money transfers were proved:
- a. To Ok.A:
 - i. 20 Sep 2010, 300 Eur from Hu.G, Turkey;
 - ii. 06 Oct 2010, 100 Eur from Ha.K, Turkey;
 - iii. 23 Oct 2010, 1900 Eur from Si.S, Turkey;
 - iv. 23 Oct 2010, 1300 Eur from Al.U, Turkey;
 - v. 15 Nov 2010, 180 Eur from Me.I, Turkey;
 - vi. 14 Jan 2011, 1100 Eur from Er.S, Turkey;
 - vii. 14 Mar 2011, 2500 Eur from Er.D, Turkey;
 - viii. 25 May 2011, 2900 Eur from Ab.K, Turkey;
 - ix. 03 Jun 2011, 1525 Eur from Me.I, Turkey;
 - x. 24 Apr 2011, 4000 Eur from Me.I, Turkey;
 - xi. 01 Aug 2011, 2000 Eur from Ib.B, Turkey;
 - xii. 02 Aug 2011, 1000 Eur from Ib.B, Turkey;
 - xiii. 22 Aug 2011, 3500 Eur from Ib.B, Turkey;
 - xiv. 11 May 2010, 100 Eur from Ha.H, Germany;

- xv. 20 Oct 2010, 630 Eur from Okk.S, Italy;
- xvi. 20 Oct 2010, 1900 Eur from Mu.T, Italy;
- xvii. 06 Dez 2010, 3300 Eur from Ya.D, France;
- xviii. 23 Sep 2011, 3000 Eur from Me.K, Turkey;
- xix. 14 Nov 2011, 300 Eur from Mu.Y, Turkey;
- xx. 16 Nov 2011, 1850 Eur from At.V, Turkey;

b. To Bu.F:

- i. 26 Feb 2011, 1895,50 Eur from Al.E, Turkey;
- ii. 31 Mar 2011, 3900 Eur from Oz. K, Turkey;
- iii. 04 Apr 2011, 4000 Eur from Me. I, Turkey;
- iv. 22 Aug 2011, 1800 Eur from Ce. B, Turkey;
- v. 25 Aug 2011, 1800 Eur from Ib.B, Turkey;
- vi. 20 Out 2011, 300 Eur from Ra.C, Turkey;
- vii. 04 Nov 2011, 450 Eur from Me. K, Turkey;
- viii. 18 Mar 2011, 956 Eur from Ar.V, Slovenia;
- ix. 04 Oct 2011, 80 Eur from Su. P, BiH;
- x. 21 Oct 2011, 1345 Eur from Ar.C, Albania;
- xi. 17 Nov 2011, 80 Eur from Ha. K, BiH

c. From Bu.F to Ar.V, Slovenia:

- i. 24 Nov 2011, 700 Eur;
- ii. 25 Mar 2011, 2875 Eur;
- iii. 13 May 2011, 2298 Eur;
- iv. 26 May 2011, 1000 Eur;
- v. 02 Jun 2011, 1918 Eur;
- vi. 04 Jul 2011, 1917,50 Eur;
- vii. 21 Out 2011, 952 Eur;

d. Others from Bu.F to Slovenia:

- i. 14 Jul 2011, 1727,50 Eur to Shk.M;
- ii. 24 Sep 2011, 2050 Eur to Ru. B;
- iii. 19 Oct 2011, 2777 Eur to Ka.H;
- iv. 15 Nov 2011, 1968,50 Eur to Ha. A;

- v. 08 Dec 2011, 200 Eur to Ga.B;
- vi. 30 Nov 2010, 500 Eur to La. V;
- vii. 28 Dec 2010, 700 Eur to La. V;
- viii. 24 Jan 2011, 300 Eur to La. V;
- ix. 14 Mar 2011, 800 Eur to La. V;

e. *To FLA:*

- i. 23 Dec 2010, 3450 Eur from Me.I, Turkey;
- ii. 29 Dec 2010, 600 Eur from Ta. Y, Turkey;
- iii. 15 Mar 2011, 1900 Eur from Ki. S, Turkey;
- iv. 25 Mar 2011, 3000 Eur from Ki. S, Turkey;
- v. 06 Apr 2011, 2000 Eur from Os. E, Turkey;
- vi. 07 Apr 2011, 1896 Eur from Ib.B, Turkey;
- vii. 13 May 2011, 4328 Eur from Ys. T, Turkey;
- viii. 31 May 2011, 500 Eur from Ib.B, Turkey;
- ix. 3 Jun 2011, 3150 Eur from Ib.B, Turkey;
- x. 6 Dec 2010, 3300 Eur from Ay. C, France;
- xi. 30 Nov 2011, 200 Eur from Qe. K, Switzerland;

f. *From FLA:*

- i. 23 Dec 2010, 500 Eur to Ab. M, Slovenia;
- ii. 14 Jan 2011, 500 Eur to Muh.M, Slovenia;
- iii. 04 Feb 2011, 500 Eur to Ky M, Turkey;
- iv. 08 Dec 2011, 179 Eur to Sa. G, Turkey;

b. *The following relevant facts were considered as NOT BEEN PROVED:*

14. *Between 25 June 2011 and 6 July 2011 Bu.F and/or FLA have cooperated, in co-perpetration with Ok.A, on smuggling Ha.D, Fe.Y and Av.S.Z, all Turkish citizens from Turkey through Montenegro, Serbia, Bosnia and Herzegovina, Croatia and Slovenia to Italy enabling them, being non-nationals and permanent residents of Italy, to cross the border without complying with the necessary legal requirements (sub-count 1).*

15. *Between 19 October 2011 and 23 October 2011 Bu.F and/or Fl.A and/or Ok.A smuggled Se.A and Ta.T, Turkish citizens, from Turkey through Croatia and Slovenia to Italy (sub-count 2);*
16. *Between 1 October 2011 and 7 October 2011 Fl.A had cooperated, in co-perpetration with Ok.A and Bu.F, on smuggling Me.S, Ra.S and Ah. (last name indicated as S), Turkish citizens, from Turkey through Serbia, Bosnia and Herzegovina and Croatia to Slovenia and France enabling them, being non-nationals and permanent residents of Slovenia, to cross the border without complying with the necessary legal requirements (sub-count 3);*
17. *Between 1 October 2011 and 17 November 2011, Bu.F and/or Fl.A cooperated, in co-perpetration with Ok.A on smuggling Za.A and Om.Y, Turkish citizens, from Turkey to Kosovo then Turkey through Croatia and Slovenia to Italy, enabling them, being non-nationals and permanent residents of Italy, to cross the border without complying with the necessary legal requirements (sub-count 4);*
18. *Specifically, it was not proved that: a) Bu.F arranged the transportation of the aforementioned migrants to Europe; b) Bu.F coordinated the drivers and arranged for the migrants to be picked-up in Slovenia and dropped off in Udine, Italy. No facts related with Fl.A have been proven.*
19. *Between 17 November 2011 and 20 November 2011, Bu.F and/or Fl.A and/or Ok.A attempted the smuggling of 4 unidentified Turkish illegal migrants from Turkey through Montenegro and Serbia to Germany intending to enable them, being non-nationals and permanent residents of Germany, to cross the border without complying with the necessary legal requirements (sub-count 5);*
20. *Specifically, it was not proved that any of the defendants have performed any concrete act of smuggling that could be confirmed by anything but the phone interceptions;*
21. *Between 20 November 2011 and 28 November 2011, Fl.A had cooperated with Ok.A and Bu.F in attempting to smuggle 4 migrants to Belgrade - Ya.D, Bi.H.O, Ha.D, Me.S - from Serbia through Hungary to Austria, intending to enable them, being non-nationals and permanent residents of Austria, to cross the border without complying with the necessary legal requirements (sub-count 6);*

22. *Specifically, it was not proved that Fl.A was aware of anything but the details of 3 migrants sent to him by SMS;*
23. *Between 28 November 2011 and 6 December 2011, Fl.A had cooperated with Ok.A and Bu.F on smuggling a family consisting of a mother and 5 children, a Turkish migrant named Il. and another Turkish boy, Ug., from Croatia through Slovenia to Italy, enabling them, being non- nationals and permanent residents of Italy, to cross the border without complying with the necessary legal requirements (sub-count 7);*
24. *Specifically, it was not proved that Fl.A was involved in the facts described under sub-count 7;*
25. *Between 18 August 2011 and 03 December 2011, Bu.F and/or Fl.A and/or Ok.A smuggled and/or enabled persons who are non- nationals or permanent residents, or not otherwise legally permitted, to enter or remain in other States, namely, 19 persons in the forest, Mu.B, Az.K, Ba.B, Serhat or Serkan, Fa.T, Me., Se., Em.U, Me.E, Family of 3, Me.A, Ta.A, Er.A, Me.Y, Ay.U, Ra.T, Sa.D, and other unidentified persons of Turkish origin from Turkey through Serbia, Kosovo, Montenegro, Croatia and or Bosnia and Herzegovina to Slovenia, Italy, Germany and/or Austria (sub-count 8);*
26. *Between 5 October 2011 and 9 October 2011, Ok.A on the territory of Kosovo, committed the offence of attempted Smuggling of Migrants by engaging in the smuggling; procuring and providing fraudulent travel or identity documents to enable the smuggling to obtain a financial or other material benefit; and enabling persons who are not residents of Kosovo to enter Kosovo, or persons who are non- nationals or permanent residents to cross a border without complying with the requirements for legal entry and remain in the State concerned without complying with the necessary legal requirements to remain by the previously stated means or by other illegal means; and most importantly, by organizing and directing other persons to commit the same, for the following migrants: Ah.E, Mu.E and Ab.E from Turkey through Kosovo and Albania to Italy, in co-perpetration (count 3);*
27. *Between 26 November 2011 and 2 December 2011, Bu.F, on the territory of Kosovo, Slovenia and Austria, committed the offence of Smuggling of Migrants by engaging in the smuggling; procuring and providing fraudulent travel or identity documents to enable the smuggling to obtain a financial or*

other material benefit; and enabling persons who are not residents of Kosovo to enter Kosovo, or persons who are non- nationals or permanent residents to cross a border without complying with the requirements for legal entry and remain in the State concerned without complying with the necessary legal requirements to remain by the previously stated means or by other illegal means; and most importantly, by organizing and directing other persons to commit the same, for the following migrants: Family of 5 - Husband, wife and 3 children - from Croatia through Slovenia to Graz, Austria In co-perpetration (count 4);

28. *Between 11 May 2010 and 14 December 2011, Ok.A; between 30 November 2010 and 5 January 2012 Bu.F; and between 6 December 2010 and 12 March 2012 Fl.A on the territory of Kosovo committed the offense of organized crime by a) organizing, supervising, managing or directing the activities of an organized criminal group consisting of more than themselves; b) committing smuggling of migrants as part of an organized criminal group consisting in more than themselves; c) actively participating in the criminal or other activities of any organized criminal group knowing that their participation would contribute to the commission of serious crime by any group; in order to obtain, directly or indirectly, a financial or any other material benefit (count 1).*

29. *Specifically it was not proved that any of the defendants are themselves an organized criminal group or acted as proved being part of any other organized criminal group.*

30. *Between 11 May 2010 and 14 December 2011, Ok.A; between 30 November 2010 and 8 December 2011, Bu.F; and between 6 December 2010 and 8 December 2011, Fl.A; on the territory of Kosovo and other States committed the offence of Money Laundering by knowingly or having cause to know that certain property, namely cash or other monetary means, are the proceeds of criminal activity, and which property is in fact proceeds of crime (smuggling of migrants by members of a criminal group): a) converting or transferring, or attempting to convert or transfer, the property for the purpose of concealing the nature, source, location, disposition, movement or ownership of the property; b) converting or transferring, or attempting to convert or transfer, the property for the purpose of assisting any person - namely, Ok.A, Bu.F,*

Fl.A, Ah.C, Nu.N, 'Na', Shk.M, Muh.M, Ar.V, Ke.V, Ni.M, Hu.M, Ka.H, Ar.B, Sa.A, Ri.V, Ga.B, Af.A, Ag.B, Ba.E, Da.M, Ta.H, Ma.B, Da.S, An.S, Ed.S, Mi.M, Ra.A, Ok.S, Ib.B, Mu.T, Mu.G, Hu.G, Me.I, Ha.H, Hac.H, Ja.Z("the Ir."), Nu.K, Is. (last name unknown), Es.(last name unknown), Av. (last name known), Be. (last name unknown), person nicknamed "Kl.", and other unidentified members of the criminal group - who are involved in the commission of the criminal offence that produced the property (smuggling of migrants) to evade the legal consequences; c) converting or transferring, or attempting to convert or transfer, the property for the purpose of promoting the underlying criminal activity (smuggling of migrants); and/or d) Acquiring, possessing or using the property (cash or other monetary means) – (count 5).

31. Specifically it was not proved that any of the defendants converted or transferred, or attempted to convert or transfer, the property of money received or sent from/to other individuals.

1. Reasoning and findings:

Throughout an in-depth evaluation of all the produced evidence, the main trial panel considered the aforementioned evidence as follows and for facilitating purposes the facts are referred to as each count and sub-count of this judgment as identified above.

Two introductory considerations must be exposed as the global criteria used by the trial panel in order to determine if the facts are established or not.

Firstly, and as a basic principle, the panel considered that there is no evidence by similarity. Once a criminal offense is proved, the same can be considered as nothing more than an indication or suspicion that a similar offense may have been committed in similar circumstances.

Secondly, covert measures were considered by the panel as a required means to collect evidence. Nevertheless, transcriptions of phone interceptions must be credible in their content with regards to the materiality of the referred to facts. Therefore, those transcriptions can be used as evidence if – and only if – they are accompanied by other evidence that confirms or supports the

materiality of the conversation held. Any conversation regarding criminal activity that is not accompanied by any other supporting evidence, can prove nothing except that the conversation itself took place. Conversing about criminal activity is not a criminal offense in itself.

Having those criteria in mind, the Court decided as follows:

Regarding the facts referred to above for **sub-count 1**, the content of the transcriptions of phone interceptions in respect of the phone numbers involved are considered as sufficient to prove that Ok.A was involved in the conversation, as well as being part of the analyzed phone book and metered phone calls. The Italian police reports prove that border crossings were undertaken by the identified individuals since they are reported to be arrested in Trieste by Italian police in a period of time compatible with the phone conversation. Finally, the detailed conversation regarding money identifies the purpose of Ok.A' activities in these conversations. Considering the content of the phone conversation and the events which immediately flowed from the conversation, the facts are considered to be credible and therefore, able to support the charges. It is considered that no other reasonable explanation can exist to justify the activities of the defendant and as such, no reasonable doubts result from them.

On the other hand, the money transfers that were proven to come from Fl.A or from Bu.F have no established connection with the smuggling of these 3 individuals. They could relate to any other operation, legal or illegal, previous or posterior, or even to different subjects. No connection may be inferred from these transfers to the smuggled 3 individuals since no reference is made to these transfers in the intercepted calls as well as to Fl.A or/and Bu.F, and no correspondence of values can be determined.

Regarding **sub-count 2**, there is evidence provided by the Slovenian police reports that the two aforementioned individuals attempted to cross the border to Italy, as well as some inconclusive phone communications with Ok.A. However no evidence has been produced that a material benefit has been agreed with Ok.A and no evidence has been presented that connects Ok.A with Bu.F and with the money transfers facilitated by this defendant. An explanation provided can be nothing

but a speculation based on the timing of those transfers and there was not a single phone call with Ok.A that could factually ground that explanation. Regarding Fl.A there are no facts related to him that could lead to charge him with this sub-count.

Regarding **sub-count 3**, the content of the phone interceptions are detailed and show the number of phone calls exchanged between the defendant Ok.A and the migrants, as well as between Ok.A and Bu.F. The Slovenian police report also forms a credible aspect of the evidence. The content of the phone interceptions expose the prices agreed which confirms the defendants' intent to obtain material benefit as well as the payments made by Bu.F, despite the fact that the smuggling operation was unsuccessful. Fl.A is again absent from all evidence produced.

Regarding **sub-count 4**, there is sufficient evidence to connect Ok.A with these specific migrants, connecting the explicit content of the intercepted phone calls and the SMS sent to him corresponding to the money sent through Western Union from the same sender. The conversation was intercepted when the migrants were already successfully in Italy which can only explain that the smuggling operation on this occasion was successful. All other previous and concomitant money transfers involving Bu.F could not be sufficiently connected with the activity of smuggling herein detailed. Regarding Fl.A there is no evidentiary connection with these facts.

Regarding **sub-count 5**, apart from the interceptions, no other evidence has been produced in order to confirm the materiality of the facts subject of that conversation.

Regarding **sub-count 6**, the content of the conversations between Ok.A and Ah.C and between Ok.A and Bu.F demonstrates a plan of smuggling migrants for purposes of material benefit (prices were discussed) and Bu.F was directly instructed by phone regarding these migrants. Such conversations did not exist with Fl.A, although the veracity of such plan was confirmed through SMS messages sent from Ok.A to both Fl.A and Bu.F. However, regarding Fl.A, the facts are insufficient to consider Fl.A as involved in the plan beyond any reasonable doubt.

Regarding the **sub-count 7**, all of the content of the interceptions was confirmed by the fact that the migrants had successfully crossed the border to Italy and were caught in Italy and returned to

Croatia and then to Turkey on the 13 December 2011. Further phone conversations would make no sense if the border crossing did not occur. As such, the materiality of the facts is confirmed.

Regarding **sub-count 8** there is no other evidence related with these facts other than the telephone interception itself. No other evidence was produced to confirm the materiality of the alleged facts.

The basis and reasoning for **Count 3** is identical to sub-count 8 above: there is no further confirming evidence to conclude differently regarding the sole phone interceptions.

Regarding **Count 4** there is a detailed but not confirmed means of evidence: the intercepted phone calls. Again, the Court considers this as insufficient to prove the alleged facts, irrespective of how detailed they may be.

Regarding **Count 1** the evidence produced in court concerned specifically an alleged commission of a set of serious crimes in a homogenous manner – smuggling of migrants – by a set of defendants interacting with each other. However the evidence presented led to a set of interactions between Ok.A and Bu.F but not in a decisive manner with Fl.A for whom no substantial evidence has been presented to link him to the charges.. Several other relevant connections have been proved between Ok.A and Bu.F, between Ok.A and other individuals as well as between Bu.F and other individuals. However these relationships are far from falling into the definition of a homogenous group. The conversations reveal a relationship of pure business, defining conditions, modus operandi and prices between individuals, rather than instructions provided within a group, or amongst cells of the same group. It might be plausible that some of these individuals have relations with each other but none of them are deemed to belong to the same group as Ok.A and Bu.F. Therefore, evidence has been presented in order to show that several groups interacted as such but it is considered that out of the defendants only Ok.A and

Bu.F were acting as part of the same group by holding contacts with Turkey, or with individuals in Bosnia, Croatia and Serbia.

Regarding **Count 5**, the Court has analyzed all the evidence presented and has come to the conclusion that all actions undertaken amongst the individuals – or even groups – involved only reveal a disguised manner of hiding real payments for illegal activities, rather than involving an activity of transferring the property for the purpose of concealing or disguising the nature, source, location, disposition, movement or ownership of the property. In the case at stake, the Court considers that every transfer could not have any purpose other than transferring the property, allegedly as a mere payment.

Therefore, any act of sending or receiving money from Ok.A and Bu.F – once directly connected with the criminal acts - could be not considered with any purpose other than the regular outcome from their respective criminal activity which is part of the business and, in legal terms, from the material benefit envisaged by the legal provision. Moreover not all the proved transfers may refer to the period of time in which the acts of smuggling are alleged (from 25 Jun 2011). All other transfers are related to acts not detailed in the indictment regarding the individuals.

However, regarding Bu.F and specifically regarding FLA, two remarks on evidence must be made: on the one hand regarding Bu.F, no direct connection has been considered as proved between the amounts transferred and the activity of smuggling; on the other hand, regarding FLA, in spite of the huge amounts of money involved as a whole, regarding the specific period of smuggling as it has been proven in this case, only 3 transfers are at stake (3,150.00 Eur on the 3 Jun 2011, 200.00 Eur on the 30 Nov 2011 and 179.00 Eur on the 8 Dec 2011), albeit not connected with respective smuggling acts, the Court considered them as almost insignificant, and therefore insufficient in matters of probative value.

Legal grounds:

For operative reasons that will be explained below, this judgment will consider the legal grounds of Count 1 after considering all the others. Therefore, regarding,

a) Counts 2, 3 e 4

Article 138 of CCK (2003) reads,

(1) Whoever engages in the smuggling of migrants shall be punished by imprisonment of two to twelve years.

(2) Whoever produces, procures, provides or possesses a fraudulent travel or identity document in order to enable the smuggling of migrants and to obtain, directly or indirectly, a financial or other material benefit shall be punished by imprisonment of up to five years.

(3) Whoever enables... a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary legal requirements... shall be punished by a fine or by imprisonment of up to one year.

(4) An attempt to commit the offence provided for in paragraph 3 of the present article shall be punishable.

(5) Whoever organizes or directs other persons to commit the offence provided for in paragraph 1, 2 or 3 shall be punished by a fine of up to 500.000 EUR and by imprisonment of seven to twenty years.

(6) When the offence provided for in paragraph 1, 2 or 3 of the present article is committed by a perpetrator acting as a member of a group or in a manner that endangers, or is likely to endanger, the lives or safety of the migrants concerned or that entails inhuman or degrading treatment, including exploitation, of such migrants, the perpetrator shall be punished by imprisonment of two to ten years.

(7) For the purposes of the present article,

1) The term "smuggling of migrants" means the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into... a State of which such person is not a national or a permanent resident.

2) The term "illegal entry" means... crossing the borders of a State without complying with the necessary requirements for legal entry into such State.

3) The term "fraudulent travel or identity document" shall mean any travel or identity document:

(i) That has been falsely made or altered in some material way by any person other than a person or agency lawfully authorized to make or issue the travel or identity document;

(ii) That has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or

(iii) That is being used by a person other than the rightful holder.

(...)

Regarding the accused Ok.A and having taken into consideration the facts that have been considered as proved, the panel concludes that he entered into smuggling of migrants on sub-accounts 1, 3, 4, 6 (attempted) and 7 because:

(1) Between 25 June 2011 and 6 July 2011 he smuggled Ha.D, Fe.Y and Av.S.Z, all Turkish citizens enabling them, being non- nationals and permanent residents of Italy, to cross the border without complying with the necessary legal requirements where they were later arrested. Ok.A made explicit references to trip details, money and payments directly regarding the smuggling of these 3 individuals which fulfills the requirement of proving the existent intent to achieve a material benefit coming from that activity.

(3) Between 1 October 2011 and 7 October 2011 Ok.A smuggled Me.S, Ra.S and Ah. (last name indicated as S), Turkish citizens, enabling them, being non- nationals and permanent residents of Slovenia, to cross the border without complying with the necessary legal requirements. He was provided with the details of these migrants, agreed the price, instructed the migrants with the planned route, advised them about the police presence (“lots of police in Zagreb”), arranged a room for them by phone in Porec; instructed the migrants through Bu.F to throw away their passports. By agreeing the price for the described activity he entered in procurement activities directly connected with the purpose of obtaining a material benefit from it. (4) Between 1 October 2011 and 17 November 2011, Ok.A smuggled Za.A and Om.Y, Turkish citizens, enabling them, being non-nationals and permanent residents of Italy, to cross the border without complying with the necessary legal requirements. He was provided with the details of these migrants; on 15

November 2011 spoke with one of these migrants and payments were discussed as well as with an individual named “H” and a payment was received by Ok.A; The migrants crossed the border to Italy around 16:41 on the 16 November 2011; All these facts compose the legal requirements of entering into procurement activities directly connected with the purpose of obtaining a material benefit from it.

(6) Between 20 November 2011 and 28 November 2011, Ok.A attempted to smuggle 4 migrants to Belgrade - Ya.D, Bi.H.O, Ha.D, Me.S, from Serbia through Hungary to Austria intending to enable them, being non-nationals and permanent residents of Austria, to cross the border without complying with the necessary legal requirements. He was provided with the details of these migrants, agreed the price, and arranged the transportation with the drivers. There is no evidence presented which shows that the border cross actually occurred and such no proof of a material benefit being gained therefore this activity can only be considered as a mere attempt, as defined by article 20.1 CCK.

(7) Between 28 November 2011 and 6 December 2011, Ok.A smuggled a family consisting of a mother and 5 children, a Turkish migrant named Il. and another Turkish boy, Ug., enabling them, being non-nationals and permanent residents of Italy, to cross the border without complying with the necessary legal requirements; he was provided with the details of these migrants, agreed the price, instructed the migrants with the planned route to take a bus from Zagreb to Porec; and the migrants were later caught in Venice on the 5 December 2011 by the Italian police and then returned to Turkey on the 13 December 2011. All legal elements are present, namely the illegal entrance and the procurement in order to obtain material benefit from it.

Regarding the accused Bu.F, and having taken into consideration the facts that have been considered as proved, the panel concludes that he engaged in the criminal act of smuggling of migrants on sub-counts 3, 6 (attempt) and 7 because:

(3) Between 1 October 2011 and 7 October 2011, in co-perpetration with the previously mentioned accused, Bu.F smuggled Me.S, Ra.S and Ah. (last name indicated as S), Turkish citizens, enabling

them, being non-nationals and permanent residents of Slovenia, to cross the border without complying with the necessary legal requirements, when he reported to Ok.A the trip from Porec and was instructed by him as well as instructing the migrants to throw away their passports and coordinated the drivers. He was directly involved in the same action as above described regarding Ok.A which means that he acted in co-perpetration with him, and therefore the same legal requirements are entirely fulfilled.

(6) Between 20 November 2011 and 28 November 2011, Bu.F, attempted the smuggling of 4 migrants to Belgrade - Ya.D, Bi.H.O, Ha.D, Me.S, intending to enable them, being non-nationals and permanent residents of Austria, to cross the border without complying with the necessary legal requirements; Bu.F was informed by Ok.A about the four migrants and was informed of the identity of one of them by SMS sent to him by Ok.A; The panel considers that he participated in the same attempted action as described above.

(7) Between 28 November 2011 and 6 December 2011, Bu.F, in co-perpetration with Ok.A, smuggled a family consisting of a mother and 5 children, a Turkish migrant named Il. and another Turkish boy, Ug., enabling them, being non-nationals and permanent residents of Italy, to cross the border without complying with the necessary legal requirements; Bu.F organized the drivers from Porec to Udine; Payment of Il. amounted to 1,700.00 Eur and drivers service was arranged by Bu.F with Sh.M; He instructed the migrants to throw away their passports and therefore he actively participated in the same action as Ok.A as described above, sharing identical purposes and intents from it.

The trial panel also considers the facts as proved and found no reasons to consider that passing instructions to a co-perpetrator is to organize or to direct other person to commit the offense as a factually verified aggravated circumstance, as demanded by law (article 138. 5 CCK).

Having taken into consideration the facts as considered proved and not proved, the trial panel also concludes that there are not sufficient facts to integrate the criminal offense of smuggling of migrants as described in Counts 3 and 4. The same conclusion is extended to the other sub-counts (2, 5 and 8).

b) Count 5

In accordance with the period of time alleged in the indictment, the activity of money laundering would be covered by two successive laws, namely the section 10.2 UNMIK Reg. 2004/2, dated 5 Feb 2004 and the article 32 of Law 03/L-196 dated 3 Sep 2010, promulgated on 18 Oct 2010.

The Court considers that, having taken into consideration the evidence presented and the period of time concerning the criminal offenses effectively proved, only the last Law could be concretely at stake. Nevertheless, it is worthy to note that the content of the two legislative devices are not substantially different from each other.

Article 32.2 and 3 of Law on Money Laundering (Law 03/L-196) reads,

2. Whoever, knowing or having cause to know that certain property is proceeds of some form of criminal activity, and which property is in fact proceeds of crime, or whoever, believing that certain property is proceeds of crime based on representations made as part of a covert measure conducted pursuant to Chapter XXIX of the Criminal Procedure Code of Kosovo:

2.1. converts or transfers, or attempts to convert or transfer, the property for the purpose of concealing or disguising the nature, source, location, disposition, movement or ownership of the property;

2.2. converts or transfers, or attempts to convert or transfer, the property for the purpose of assisting any person who is involved in, or purportedly involved in, the commission of the criminal offence that produced the property to evade the legal consequences, or apparent legal consequences, of his or her actions;

2.3. converts or transfers, or attempts to convert or transfer, the property for the purpose of avoiding a reporting obligation under this Law;

2.4. converts or transfers, or attempts to convert or transfer, the property for the purpose of promoting the underlying criminal activity; or

2.5. acquires, possesses or uses, or attempts to acquire, possess or use, the property;

2.6. conceals or disguises the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, or from an act of participation in such activity;

2.7. participates in, associates to commit and aids, abets, facilitates and counsels the commission of any of the actions mentioned in sub-paragraphs 2.1 to 2.6 of this paragraph,

2.8. commits a criminal offence punishable by a term of imprisonment of up to ten (10) years and a fine of up to three (3) times the value of the property which is the subject of the criminal offence.

3. For purposes of paragraph 2 of this Article, representations may be a basis for the belief that certain property constitutes the proceeds of crime, even if those representations only indirectly support the belief that the property constitutes the proceeds of crime.

(...)

The panel considers that regarding the few payments that could be considered as directly associated to the activity of smuggling of migrants, that no transfer of property would have been performed, but a different way to proceed to a payment for an illegal business instead. Indeed, the transfer of property inherent to illicit activities is part of the business (smuggling of migrants) as it would have been featured rather than a manner of concealing or disguising the nature, source, location, disposition, movement or ownership of the property. Therefore, considering the payment as *conditio sine qua non* the same activity would not take place, the panel considered that no transfer of property has been verified in the proper sense as legally demanded, and therefore as an independent criminal offense.

c) Count 1

As it results from a combined interpretation of article 274.7.1 to 3 CCK, an Organized crime group has 6 legal requisites:

- a) a group of three or more persons;
- b) that is not randomly formed for the immediate commission of an offense and does not need to have formally defined roles for its members, continuity of its membership or a developed structure;
- c) existing for a period of time;
- d) acting in concert;
- e) with the aim of committing one or more criminal offenses punishable with imprisonment of at least 4 years;

f) in order to obtain, directly or indirectly, a financial or other material benefit.

Therefore, article 274.1,2 and 3 CCK, the defendants have been charged with – count 1 - criminalizes the following conduct although establishing different punishments for them:

1. *Whoever commits a serious crime as part of an organized criminal group...*
2. *Whoever actively participates in the criminal or other activities of an organized group, knowing that his participation will contribute for the commission of serious crimes by the organized criminal group...*
3. *Whoever organizes, supervises, manages or directs the activities of an organized criminal group...*

These 3 alternative conducts include respectively: a) to be part of the organized crime group (OCG) AND a criminal offense punishable with imprisonment of at least 4 years to be committed; b) to participate in the activities of the OCG AND the essentiality of this participation aimed to contribute for a criminal offense punishable with imprisonment of at least 4 years (not necessarily already committed); c) organizing, supervising, managing or directing an OCG (not necessarily having already committed any other criminal offense).

The same criminal offense as foreseen by article 283 of the new CCK, entered into force on the last 1st January 2013, is slightly simpler

The former conducts as foreseen by article 274.1 and 2 lost autonomy and are now both included in article 283.1 CCK. The third aforementioned conduct keeps its autonomy but its punishment has been substantially modified.

However the substantial legal meanings have been kept (article 120.13 and 14 CCK) in their entirety which leads to identical legal requisites, exactly as detailed before.

Having taken into consideration the facts as they have been considered as proved and non-proved, one single fact is sufficient to consider this criminal offense as inexistent. In spite of considering

the existence of a group with some instructions given by the first defendant to the second in several occasions as well as a coordination of activities amongst the existing groups involved in smuggling of migrants, being it at upstream or downstream, there is no evidence of instructions or directions having been given to other elements other than to Bu.F in a manner that could be considered as an evidenced hieratic relationship with Ok.A. All other instructions have been provided directly to migrants or to partners in business belonging to other groups and not depending of the same structure which has not been proved to constitute cells of the very same criminal group. Therefore, the essential element of 3 or more people is not verified in the case at stake. Therefore since there is not an existing organized crime group, every instruction detected is irrelevant for this particular criminal offense for which the defendants have been charged.

Sentencing:

As per article 3.2 of the new CCK, the most favourable law shall be applied, which includes the calculation of punishments and its specific regime.

According to article 34.1 and 2 of the former CCK, punishments have three different and cumulative purposes: to prevent the perpetrator from committing criminal offenses in the future, to rehabilitate him and to deter other persons from committing criminal offenses. Article 41 of the new CCK introduces two new purposes to be considered in general, together with the herein mentioned ones.

Regarding the calculation of punishments, article 64.1 of the former CCK established the criteria to be considered and the limits as well as aggravating and mitigating circumstances. Article 73 of the new CCK does not establish a different system and also mitigation and aggravating circumstances must be taken into consideration the same manner.

Article 71 of the former CCK and article 80 of the new CCK establish the same criteria on sentencing.

It must be said that any of the defined regimes cannot be considered summarily and abstractly as more favourable or unfavourable to the sentenced person. This operation shall be performed upon the concrete circumstances involved.

As per article 138, paragraph 1 CCK (2003) who enters into smuggling of migrants shall be *punished with imprisonment from 2 to 12 years*. However an issue arises from paragraph 6 of the same article: *“when the offense provided for in paragraph 1... is committed by a perpetrator acting as a member of a group or in a manner that endangers or is likely to endanger the lives or safety of the migrants concerned or that entails human degrading treatment... the perpetrator shall be punished by imprisonment of 2 to 10 years”*. Simply put, aggravated circumstances as those would be “awarded” with a more lenient maximum punishment, which necessarily would be reflected in the concrete punishment rendered.

Following the principle of the most favorable interpretation to the defendant as well as the principle of legality (*nulla poena sine lege*) the panel cannot consider in the former criminal code a maximum limit higher than 10 years of imprisonment. Consequently, the panel is obliged to find the old code as necessarily more favorable than the new one. The only difference of punishment is reflected in the existence of a concomitant fine, foreseen together with exactly the same frame of minimum/maximum of imprisonment.

The defendant Ok.A has actively participated in 5 acts which can be considered as entering into smuggling of migrants, one being attempted. Having taken into consideration the relevance of his position as a relevant contact between Turkish sources and several other final destination countries as well as in-between countries, the relevance of these acts to a subsequent personal benefit cannot be overlooked and the Court considers as substantially high both the degree of his criminal liability and the injury to the protected value. On the other hand, the circumstances and the motives in which the acts have been committed are evaluated as in a medium level as a continued crime, in spite of the proved facts having been committed along the time with short

intervals in-between. No previous convictions for criminal offenses of this or other kinds have been proved. Having taken all those circumstances into consideration the Court considers 7 (seven) years of imprisonment as the adequate punishment.

The defendant Bu.F has been in contact with several other individuals, although not of the same group, but in direct connection with Ok.A and on at least 3 occasions.

Having taken into consideration the relevance of his position as direct executer and liaison agent both with migrants and guides and taxi drivers, his role is considered as essential for the success of the illegal activity. The benefit as proved is not high but the Court considers as substantially high both the degree of his criminal liability and the injury to the protected value. On the other hand, the circumstances and the motives in which the acts have been committed are evaluated as at a medium level. A previous conviction has been alleged but not proved. Having taken all those circumstances into consideration the Court considers 3 (three) years of imprisonment as the adequate punishment.

Confiscation:

The SPRK Prosecutor alleged that the material benefit of the defendants is the one as listed and therefore these amounts are to be considered as assets directly obtained due to the acts constituting the criminal offense.

Regardless of the fact that the huge majority of these amounts have not been directly connected with the facts through valid evidence, the panel considered these amounts as not corresponding to assets once they have not been ever temporarily sequestered before and they only exist now as a mere value of reference. The panel decides to ignore whether these amounts of money still exist presently and a list of alleged benefits is not a material object that might be confiscated. The panel cannot decide to confiscate an object when its current existence is unestablished.

Nevertheless, in accordance with article 276 KCPC, both telephone devices used by the convicted defendants are hereby declared as permanently confiscated.

Considering all aforementioned grounds it is as decided as in the enacting clause.

Legal remedy: This Judgment may be appealed by the Prosecution or by the convicted defendants before the Court of Appeals through the Basic Court of Prizren within 15 (fifteen) days of the day the full written judgment has been served to the parties, according to Article 398, paragraph 1 of KCCP, if duly announced within the next 8 (eight) days from the current date.

Prizren, 6th September 2013

Vitor Hugo Pardal

Presiding Judge

Christine Sengl

Court Recorder