BASIC COURT OF MITROVICË/MITROVICA
P. No 170/15

IN THE NAME OF THE PEOPLE

THE BASIC COURT OF MITROVICË/MITROVICA, in the Trial Panel composed of EULEX Judge Roxana Marilena Comsa as Presiding Judge and EULEX Judge Franciska Fiser and local Judge Rifat Bllata as Panel Members, with the participation of EULEX Legal Officer Chiara Tagliani as the Recording Officer, in the criminal case against:

B.G., nickname T., father's name M., mother's name and maiden name Az. B., Kosovo Albanian, born on .. in L. village, Municipality of Skenderaj/Srbica, residing in .., Municipality of Skenderaj/Srbica, in detention on remand from 23 October 2012 to 13 August 2015;

And

H.A., father's name Hy.A., mother's name and maiden name El.D., Kosovo Albanian, born on … in R., Municipality of Skenderaj/Srbica, residing in ..-Skenderaj/Srbica Municipality, in house detention from 06 December 2012 to 06 March 2013;

Both accused through the Indictment of the Special Prosecution Office of the Republic of Kosovo dated 27 December 2012, amended on 16 January 2013 and a second time on 22 March 2013 with the criminal offences of:

"Organized Crime" contrary to Article 274 Paragraph (2) in conjunction with Article 23 of the former Criminal Code of Kosovo, (CCK) and "Smuggling of

migrants" contrary to Article 138 Paragraph (6) as read with Paragraph (1) in conjunction with Article 23 of CCK;

After having held the Main Trial hearings, all open to the public, on 28 February 2017, 01, 08 and 14 March 2017, 14 June 2017, 30 August 2017, 06 November 2017, 18 January 2018 and 12 March 2018, in the presence of the Accused B.G. and his Defence Counsel K.O., of the Accused H.A. and his Defence Counsel F.K., the Injured Parties B.B.(on 14 March 2017, 14 June 2017, 30 August 2017 and 06 November 2017) and F.H.(on 28 February 2017 and 01 March 2017) and the State Prosecutor;

Following the Trial Panel's deliberation and voting held on 12 March 2018;

Pursuant to Article 366 Paragraph (1) of the Criminal Procedure Code of Kosovo (CPC) on 14 March 2018 in a public hearing and in the presence of both Accused, their Defence Counsel and the State Prosecutor;

Renders the following:

JUDGMENT

I. The Accused B.G. and H.A. are

FOUND GUILTY

Because it was proven beyond reasonable doubt that during 2011, the Defendants B.G. and H.A., with the aim of obtaining financial profit in complicity with support of Albanian citizens, acted intentionally with a common and shared

purpose to facilitate the transfer of Kosovo citizens to other European countries in exchange of money, both with knowledge that those persons did not possess valid documents which allowed them to lawfully cross those countries' borders, specifically:

- Around the second half of the year 2011 the Defendants B.G. reached an agreement with F.B. in terms that the Defendant B.G. would receive 2.500 euros to get F.B. to Italy. Following this agreement, the Defendants B.G. and H.A. transported F.B. to Durres, Albania, together with his relative B.B., by the means of H.A.'s vehicle, driven by him. In Durres, the Defendant B.G. put B.B. and F.B. in contact with two Albanian citizens with the purpose of facilitating F.B.'s travel to Italy without proper documents. When it was realized that F.B. was underage, the Defendant B.G. decided he would not send him to Italy through the port of Durres. The Defendants B.G. and H.A. then took B.B. and F.B.to Tirana. In Tirana B.G. had another meeting with the two Albanian citizens, where the possibility to send F.B. to Italy through Greece for € 2.500 was discussed but was never implemented. B.B. and F.B. were then brought back to Kosovo by both B.G. and H.A. in the same vehicle driven by the latter;
- During the second half of 2011, the Defendants B.G. and H.A. transported to Tirana, Albania D.M. and F.H., Kosovo citizens with a vehicle driven by H.A.. In Tirana the Defendant B.G. arranged for D.M. and F.H.to meet an Albanian citizen who provided them with forged biometric passports of the Republic of Albania. D.M. and F.H. gave € 3500 to Defendant B.G. and D.M. gave also his vehicle Volkswagen Golf. Defendant H.A. transported D.M. and F.H. and dropped them near the border with Greece, which they then crossed by foot. D.M. and F.H. then took a ferry from Greece to Italy. Upon their arrival at the Port of Bari, Italy, they were caught by the Italian police with forged passports and returned to Greece where they were arrested, spent five weeks in prison and then through FYROM they returned to Kosovo.
- Both times, Defendant H.A. was rewarded for his driving services.

Therefore,

The Accused **B.G.** is **CONVICTED** of committing the criminal charge of "***Smuggling of migrants***" contrary to Article 138 Paragraph (6), as read with paragraph 1, in conjunction with Article 23 of the former Criminal Code of Kosovo (CCK), in accordance with Article 2 (1) of the new Criminal Code of the Republic of Kosovo – Law 04/L-082 (CCRK); *thereby requalifying the original criminal offences* of "*Organized Crime*", in violation of Article 274 Paragraph (1) as read in conjunction with Article 23 of the former Criminal Code of Kosovo, and "*Smuggling of migrants*", contrary to Article 138 Paragraph (6), as read with paragraph (1), and as read in conjunction with Article 23 of the former Criminal Code of Kosovo.

AND

The Accused **H.A.** is **CONVICTED** of committing the criminal charge of ***"Smuggling of migrants"*** contrary to Article 138 Paragraph (6), as read with paragraph 1, in conjunction with article 23 of the former Criminal Code of Kosovo (CCK), in accordance with Article 2 (1) of the new Criminal Code of the Republic of Kosovo (CCRK); *thereby requalifying the original criminal offences* of "*Organized Crime*", in violation of Article 274 Paragraph (1) as read in conjunction with Article 23 of the former Criminal Code of Kosovo, and "*Smuggling of migrants*", contrary to Article 138 Paragraph (6), as read with paragraph (1), and as read in conjunction with Article 23 of the former Criminal Code of Kosovo.

III. The Accused B.G. is hereby

SENTENCED

to 4 (four) years of imprisonment in accordance with Articles 38 (1) and 138 (6) of the CCK.

The time served in detention on remand since 23 October 2012 until 13 August 2015 is to be included in the punishment of imprisonment pursuant to Article 73 Paragraphs (1) and (4) CCK.

IV. The Accused H.A. is hereby

SENTENCED

to 2 (two) years and 3 (three) months of imprisonment in accordance with Articles 38 (1) and 138 (6) of the CCK.

The time served in house detention from 6 December 2012 until 6 March 2013 is to be included in the punishment of imprisonment pursuant to Article 73 Paragraphs (1) and (4) CCK.

V. COSTS

The Accused shall pay each 200 (two hundred) Euros as part of the costs of criminal proceeding, but are relieved of the duty to reimburse the remaining costs in accordance with Article 453 paragraphs (1) and (4) CPC. The Accused must reimburse the ordered sum no later than 30 days from the day this Judgment is final.

REASONING

A. PROCEDURAL BACKGROUND

1. On 27 December 2012, the Special Prosecutor of the Republic of Kosovo (the Prosecutor) filed the Indictment PPS 07/12 against the Defendants B.G. and H.A., thereby charging the Defendants B.G. and H.A. with the criminal offences of 'Smuggling of Migrants, in violation of Article 138 paragraph (6) as read with Paragraph (1) in conjunction with Article 23 of the CCK and with the criminal offence of 'Organized Crime' in violation of Article of 274 Paragraph (2) read in conjunction with Article 23 of the CCK. The indictment was later amended on 16 January 2013 and on 22 March 2013. Following the amendment of 22 March 2013, the criminal offence of Organized Crime was re-qualified as article 274 Paragraph (1).

2. On 22 March 2013 the Initial Hearing on Indictment was held as per Article 245 of the CPC. Objections to the evidence presented in the Indictment and a Request for dismissal of the Indictment were filed by both Defendants. On 19 June 2013, the Presiding Trial Judge issued a Ruling, thereby rejecting the Defence Requests to dismiss the Indictment and sending the case for Main Trial.

3. The enacting clause of the Judgment was announced in the first main trial on 26 September 2013.

4. On 13 August 2015, the Court of Appeals rendered a Ruling in case PAKR No. 193/2014 by which they annulled the first instance verdict and sent the case for re-trial.

5. The current Main Trial sessions were held on 28 February, 1, 8 and 14 March, 14 June, 30 August, 6 November 2017, 18 January and 12 March 2018.

6. Pursuant to Article 541 of the new Criminal Procedure Code (CPC) which entered into force on 01 January 2013[1], the Trial was carried out according to provisions of the new Criminal Procedure Code of Kosovo (CPC).

B. COMPETENCE OF THE COURT

7. The Law of Courts, Law no. 03/L-199 (LC) also entered fully into force on 1 January 2013 (Article 43). This regulates the territorial and substantive jurisdiction of the Court.

8. Under Article 11 Paragraph (1) of the Law on Courts, Basic Courts are competent to adjudicate in the first instance all cases, except otherwise foreseen by Law.

9. Article 9 Paragraph (2) Subparagraph (2.7) of the same Law states that the Basic Court of Mitrovicë/a is established for the territory of the Municipalities of Mitrovicë/a South and Mitrovicë/a North, Leposaviq/Leposavić, Zubin Potok, Zvečan/Zveçan, Skenderaj/Srbica and Vushtrri/Vučitrn. Based on the filed Indictment, the alleged criminal offences have partly taken place in Skenderaj/Srbica and, therefore, within the territorial jurisdiction of the Basic Court of Mitrovicë/a, as per Article 29 Paragraph (1) of the CPC. Furthermore, considering that the petition for initiation of proceedings was firstly filed with, at that time, the District Court of Mitrovicë/a[2], pursuant to Article 29 Paragraph (2) of the CPC, the Basic Court of Mitrovicë/a has jurisdiction over the case.

10. According to Article 15 Paragraph (1) Subparagraphs (1.15) and (1.18) of the above mentioned Law on Courts, the criminal offences of 'Smuggling of

[1] CRIMINAL No. 04/L-123 PROCEDURE CODE;
[2] Ruling on Initiation of Investigation filed with the Registry of the District Court of Mitrovicë/a on 23 February 2012;

migrants' and 'Organized Crime' fall within the jurisdiction of the Serious Crimes Department of the Basic Court.

11. In accordance with Paragraph (2) of the same Article and pursuant to the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo[3], and in accordance with the Ruling of the Acting President of the Basic Court of Mitrovica[4], the case was heard by a Trial Panel composed by EULEX Judge Roxana Marilena Comsa as Presiding Judge and EULEX Judge Franciska Fiser and local Judge Rifat Bllata as Panel Members. None of the parties objected to the competence of the Court or to the composition of the Trial Panel.

C. THE MAIN TRIAL

12. The Main Trial sessions were open to the public and they were held on 28 February 2017, 1 March 2017, 8 March 2017, 14 March 2017, 14 June 2017, 30 August 2017, 6 November 2017, 18 January 2018 and 12 March 2018.

13. During the Main Trial session of 28 February 2017, both Accused pleaded not guilty to both charges.

14. The Injured Party B.B. was present during the sessions on 14 March 2017, 14 June 2017, 30 August 2017 and 6 November 2017 and Injured Party F.H. attended the session of 28 February 207 and 1 March 2017.

[3] Law No. 03/L-053;
[4] Ruling GJA 127/16 of 12 April 2016;

D. EVIDENTIAL PROCEDURE

i) Evidence presented during the course of the Main Trial

15. During the course of the Main Trial the following Witnesses were heard:
    - B.B.(called as Injured Party and as Witness by the Prosecution) was heard on 14 June 2017 and 30 August 2017;
    - F.H.(called as Injured Party and as Witness by the Prosecution) was heard on 1 March 2017;
    - Sa.H.(Witness initially proposed by the Prosecutor) was not called anymore as the parties agreed to consider her previous statement as read in the session on 1 March 2017;

16. During the Trial Session of 6 November 2017 the parties agreed to consider read the record of 23 September 2013, when the prosecutor adduced as evidence the following documents as listed below[5]:
    - The record on the examination of the Defendant B.G. (tab 5);
    - The record of the suspect hearing of H.A. (tab 6);
    - The interception reports in relation to the phone of the Defendant B.G. (tab 7);
    - The interception reports in relation to N.B. (tab 8);
    - A CD with reference to the items seized during the search (tab 9);
    - The summary report on incoming/outgoing SMSs for B.G.'s numbers (tab 10) ;
    - The report on the disclosure of financial data, which refers to the bank accounts of B.G. and H.A. (tab 12);

[5] See Prosecution Binder #1;

- Another summary report on disclosure of financial data, highlighting the vehicles attributed to the Defendants (tab 13, pages 226 -233 English version, pages 237- 246 Albanian version);
- The searches reports and confiscation certificates (tabs 14 and 15).

17. With regard to items seized and listed in the CD, they were exhibited as follows:
    - Three (3) passports, exhibit 1;
    - Two Greek ID cards, driving license and ID, exhibit 2;
    - Document with information on how to apply for a visa, exhibit 3;
    - Procredit Bank receipt on received money, exhibit 4;
    - Vala Card box and Besniku card, exhibit 5;
    - Piece of paper with information on documents required for employment in Germany, exhibit 6;
    - Piece of paper with an address in Poland, exhibit 7;
    - Application Form for Schengen Visa, exhibit 8;
    - Address book, exhibit 9;
    - Piece of paper reporting date of '14 November 2011' and the name of the 'Q.Restorant D.';
    - Other pieces of papers with numbers on it.

18. During the same Trial session of 23 September 2013, the Defence Counsel of the defendant B.G., lawyer K.O. submitted the following piece of evidence:
    - Hospitalization report of the Defendant B.G.'s uncle (Ha.G.), exhibit 12.

    By agreeing to read into the current record the minutes of the session of 23 September 2013, the said document also becomes part of the evidentiary material.

19. In the session of 6 November 2017, the Defendants B.G. and H.A. declared that they stood behind their statements given previously during the first main Trial session of 23 September 2013.

ii) Motions

- *Request to summon the suspects Re.D. and C.D. from Albania*

20. During the Trial session of 1 March 2017, the Defence Counsel K.O. submitted a motion for examination of the two mentioned suspects whom the indictment says acted in co-perpetration with both accused in the commission of the criminal offences they are charged with. The Defence Counsel filed this motion in order to clarify the amount of money allegedly paid to defendant B.G..

21. The motion was rejected under Article 128 (1) (1.1) as inadmissible - since it came into contradiction with Art. 126 (1.3) CPC; additionally, under Article 258 (2)(2.3) of the CPC the motion was assessed to be wholly unobtainable[6].

- *Request for Mutual Legal Assistance (MLA) for D.M.*

22. During the Trial session of 28 February 2017, the Prosecutor filed a request to hear in person witness D.M., who currently is believed to live in Germany since the mentioned Witness could not be found in Kosovo.

23. By the way of a Mutual Legal Assistance request the Panel asked the German authorities to provide any helpful information for the identification of the

[6] See Record of the Main Trial 8 March 2017;

whereabouts of this witness. The German authorities could not provide any such information[7]. The motion to summon the witness was rejected under Article 258 (2) (2.3) CPC as wholly unobtainable[8].

- *Admissibility and use of statement given by D.M.*

24. It was also decided that based on article 123 of CPC the statement given by D.M.in the investigation stage cannot constitute direct evidence in this case[9].

E. FACTUAL FINDINGS

E.1. Summary of the proven facts

25. The Court had to establish what the proven facts are on the basis of the administered evidence submitted against the Accused B.G. and H.A. for the criminal offences of 'Smuggling of Migrants' and 'Organized Crime'.

26. Upon the admissible evidence presented and administered during the course of the Main Trial, the Court considered the following relevant facts as proven beyond reasonable doubt:

I. Defendant B.G. was known as a person who could facilitate the movement of individuals into various European countries. Consequently, persons interested in such services would seek his help in order to do so.

II. Around the second half of the year 2011, in Skenderaj/Srbica, D.M., F.H. and B.B. contacted Defendant B.G. with that same purpose.

[7] See Reply of German Authorities dated 28 September 2017;
[8] See Record of the Main Trial 6 November 2017;
[9] See Record of the Main Trial 6 November 2017;

III. Following the agreement reached, B.G. would receive € 2.500 to get F.B.to Italy.

IV. In November 2011 F.B. was transported to Durres, Albania, together with his relative B.B. and Defendant B.G., in Defendant's H.A. vehicle driven by himself.

V. Once in Durres, Defendant B.G. put B.B. and F.B.in contact with two Albanian citizens with the purpose of facilitating F.B.'s travel to Italy without proper documents.

VI. It was then realized that F.B. was underage and it was decided they would not send him to Italy through the port of Durres.

VII. B.B. and F.B. were then taken to Tirana by B.G. and H.A.. In Tirana they had another meeting with the two Albanian citizens, where the possibility to send F.B. to Italy through Greece for € 2.500 was discussed but never implemented. B.B. and F.B. were then brought back to Kosovo by the Defendants.

VIII. Also during the second half of 2011, D.M. and F.H., who were interested in going abroad, contacted Defendant B.G..

IX. From Kosovo they were transported to Tirana, Albania, in Defendant H.A.'s vehicle, traveling also with Defendant B.G..

X. In Tirana Defendant B.G. arranged for them to meet an Albanian citizen who provided them with faked biometric passports of the Republic of Albania.

XI. They gave € 3500 to Defendant B.G. and D.M. gave also his vehicle Volkswagen Golf.

XII. Both times, Defendant H.A. was rewarded for his driving services.

XIII. Defendant H.A. transported D.M. and F.H. and dropped them near the border with Greece, which they then crossed by foot.

XIV. D.M. and F.H. then took a ferry from Greece to Italy. Upon their arrival at the Port of Bari, Italy, they were caught by the Italian police with forged passports and returned to Greece where they were arrested and spent five weeks in prison.

XV. Through FYROM they returned to Kosovo.

XVI. Defendants B.G. and H.A. acted intentionally with a common and shared purpose to facilitate the transfer of Kosovo citizens to other European countries in exchange for money.

XVII. On both occasions, the Defendants B.G. and H.A. acted with the support of Albanian citizens.

XVIII. Both shared the knowledge that those persons did not possess valid documents which did not allow them to lawfully cross those countries' borders.

XIX. Both were fully mentally competent.

E.2. Summary of the unproven facts

27. It could not be proven:

I. For how long the Albanian citizens had been working together with the Accused.

II. Whether the identity of these Albanian citizens was the same on both occasions.

III. That there was a connection between the Defendants and these Albanian citizens acting on both occasions.

E.3. Analysis

28. The Trial Panel basis their decision in this case on the above listed evidence (D. Evidence at trial).

    The Trial Panel has also considered the testimony of witnesses to determine the alleged facts. After the examination of the two witnesses and the statements of the Defendants, the Trial Panel puts forward the following considerations:

29. The Witness B.B. changed the account that he initially put forward in the first main trial.

30. In the first main trial, the main aspects recounted by this witness were as follows:

31. The Witness B.B.[10] stated to have known the Defendant B.G. just by sight before contacting him in order to arrange the trip to Albania. He got in contact with him since his cousin, F.B., wanted to go abroad and he had heard that B.G. was helping people going abroad, be it legally or illegally.

32. He then recalled their first meeting at the café bar 'A.' in Skenderaj, where they agreed that F.B. would have been taken to Italy for 2500 euros through Albania, Durres. No money was paid at that time, since the agreement was to pay money once F.B. had reached Italy. The Witness justified to have given B.G. only 100 euros, which were in fact paid by F.B.'s brother for the expenses incurred during the trip.

33. The meeting was in the winter of 2011, approximately three months before F.B.'s birthday, which is on .., as affirmed by the Witness. Therefore, around November 2011.

34. The day after having discussed the arrangements of the trip, the Witness stated to have met both defendants together with his cousin F.B. at a motel in Klina and to have started their trip on a red Opel Vectra driven by the defendant H.A.. They then reached Durres in Albania where they stayed overnight. The morning after, the Witness asserted having met the Defendants again accompanied by two more persons, Albanian nationals, one of them working for the police, as the Witness stated to have heard from that person himself.

35. When the Albanian nationals realized that F.B. was underage they did not accept to take him abroad. At that point, the Witness detailed the involvement of the Defendant B.G., who discussed with these two persons an alternative to sending abroad F.B., while H.A., the Witness and F.B. himself were sitting somewhere else.

[10] See hearing minutes of 19 September 2013, pages 10 to page 25, tab 11, Court Binder P 2/13, VOLUME III, Main Trial P 02/13;

36. They then headed to Tirana. There, the Witness, F.B. and the Defendant B.G. discussed with the two Albanian nationals the possibility of sending F.B. through Greece, but the plan was not accomplished due to the fact that the Witness and the same F.B. did not have the 2.500 euros requested for it.

37. The Witness stated that the Defendant H.A. was not present during the discussion concerning the possibility of F.B. traveling through Greece. However, the entire trip occurred in his car, with H.A. driving.

38. The Witness admitted to have never intended to travel himself to Italy, but he only wanted to accompany the cousin until Durres.

39. In the present main trial, the Witness B.B. seems to try to convince the Court of a different scenario, modifying his statement in the following main aspects: his reason to approach B.G. and the amount of money paid/due and to whom.

40. He now maintains that he and Defendant B.G. lived in the same neighbourhood. The witness alleges that he found out by chance that B.G. wanted to go abroad. Since F.B. Berisha, the witness' relative wanted the same thing and he was underage, the witness thought that B.G. and Berisha could travel together[11].

41. This hypothesis is not convincing. The witness gave several statements in this case but this is the first time when he puts forward this account. This theory is in fact not corroborated by any other piece of evidence. Even the Defendants themselves have never mentioned in their statements of B.G.'s intention to leave the country.

[11] See Record of the Main Trial 14 June 2017;

42. Moreover, this would be inconsistent with the concrete actions undertook by B.G. during the trips to Albania, when he followed closely the rest of the group – H.A., F.B. and B.B. instead of pursuing his intention to go abroad.

43. For example, in their first trip to Albania, when F.B. encountered problems because he was underage, B.G. travelled together with the group over a period of 3-4 days to Durres, Fushe Kruje and Tirana and finally came back to Kosovo together with them. The witness did not offer any specific reason or credible explanation as to why B.G., if he wanted to go abroad in the first place, did not follow through with his plan and instead chose to accompany F.B..

44. B.G.'s overall conduct strongly supports the fact that the reason he accompanied F.B. was in fact to facilitate his border crossing.

45. In his current statement, B.B. maintains that in exchange for F.B.'s visa and move abroad he was supposed to pay 1.500 Euro; the money was supposed to be paid to "a person from Albania", possibly from Durres; he did not know personally that respective person, but found out about him from some other persons in a cafeteria, who had turned to the witness and pointed to him "the person from Albania". According to the witness, "a person in a cafeteria turned to us and informed us that there was a guy who could send people abroad"[12]. Initially, the witness said that he gave this person 1.500 Euro. Later on during his statement, the witness mentions the higher amount of 2.500 and he specifies that he was supposed to hand over the money only after F.B. would cross the border[13]. Besides his shifting and contradictory accounts, there is one main reason why the Panel deems his current statement not credible, namely that it is

[12] See Record of the Main Trial 14 June 2017;
[13] See Record of the Main Trial 30 August 2017;

illogical and highly unlikely that the witness would enter any monetary transactions with completely unknown individuals.

46. By means of logical inference the Panel establishes that the money was intended for B.G. who was in fact – as established above – the person who was supposed to arrange for F.B. to travel abroad.

47. It is of note that the witness tries to justify this deviation from his previous statement on the fact that the police record did not accurately reflect what he recounted. However, he provides no valid explanation for altering the statement he initially gave before the Court during the first main trial.

48. On the other hand, in his current testimony, the witness repeatedly reiterates that he maintains his previous statements, as his memory was fresher when he gave it. This leaves the Panel with the option to conclude that it is B.B.'s previous statement that reflects accurately reflects the events. The previous statement does not contain conflicting accounts or elements that defy logic, such as the ones contained in the statements given during the present trial and pointed out above.

49. When it comes to Witness F.H.[14], he maintained in general lines the aspects presented before the Court in the first main trial.

50. Witness F.H.[15] stated to have known the Defendant B.G. for 4-5 years.

[14] See Record of the Main Trial 1 March 2017;
[15] See hearing minutes of 19 September 2013, pages 25 to page 37, tab 11, Court Binder P 2/13, VOLUME III, Main Trial, P 02/13;

51. He recalled the moment they met with B.G. and H.A. and all left to Albania. He then stated that in Tirana they met Re.D. and another person, both Albanian nationals, and waited two or three days to get forged Albanian documents arranged for them.

52. After receiving the documents, they were then transported by the two Albanian nationals to Saranda where they stayed for two days, before crossing the border. In Saranda the Witness asserted having met again with B.G. and H.A. and having been all together; shortly after, himself and D.M. illegally crossed the border into Greece. He further added to have actually discussed with B.G. the modalities of how to cross the mentioned border.

53. The Witness further added that he, D.M., Re.D. and Re.D.'s friend were in fact driven to the border by the Defendant H.A., following which Re.D. and H.A. drove back, while the others crossed illegally on foot the border.

54. The Witness stated to have given the Defendant B.G. 3500 euro when in Tirana, inside the car, and that D.M. gave his car, a Golf 3. According to the witness estimation, the value of the car was 3.500 Euro[16].

    The Trial Panel has found F.H.'s statement credible and trustworthy and fully relies on it when establishing the facts relevant to the case.

55. When it comes to H.A., both witnesses declared they did not know him, but they could recognize him exactly because of the trips of 2011. As a matter of fact, F.H. stated to have never discussed anything with H.A. and also B.B. stated that H.A. was not involved in the discussion concerning an alternate route for transporting F.B. to Italy.

[16] See Record of the Main Trial 1 March 2017;

56. The Trial Panel counter balanced such coherent and corroborating statements with the statements of the Defendants – as given in the first main trial and maintained by the Defendants in the current main trial, with H.A. underlining his exclusive role of a driver[17] - and it found several inconsistencies in the latters' statements.

57. The Defendant B.G.[18] stated to have gone several times to Albania between 2008 and 2010 because of medical reasons relating to his wife and in 2011 relating to his uncle.

58. The Defendant admitted the fact that F.H. went with him, H.A. and D.M.to Albania, but the reason being because he needed a lift there and he used the opportunity to get it with the Defendant. Once they reached Albania, the Defendant said to have gone back the next day. He stated to have paid H.A. only for the fuel expenses, namely around 50 or 70 Euro. He also confirmed knowing the person called Re.D. and that he had helped him during the time his uncle had been at the Tirana Military Hospital, since Re.D.'s maternal uncle was working at the hospital as deputy director. The defendant also argued that in fact the Witness owns him money following the purchase of a stock of cloth for the Witness's wedding and worthy 2700 euro.

59. The Defendant also admitted having had the trip to Durres with B.B. and his cousin, F.B., with H.A. driving them in his car. He stated having stayed in Durres for two nights and to have paid H.A.'s hotel fees (although he initially said that he could not remember whether H.A. remained overnight in Durres) and to have given him again around 50 Euro for fuel expenses. The Defendant further asserted that the Golf 3 he used did not belong to D.M. but to a person called

[17] See Record of the Main Trial 6 November 2017;
[18] See hearing minutes of 23 September 2013, pages 26 to page 44, tab 9, Court Binder P 2/13, VOLUME III, Main Trial P 02/13;

Eg.R.. The Defendant added that he used H.A. to drive him around for his business and that he would pay him when he had money for it.

60. The Defendant H.A.[19] stated to have known B.G. since they were kids and to have driven him and his wife to Albania sometimes in 2011 in order for B.G. to visit his paternal uncle who was hospitalized there.

61. He then admitted to have transported F.H. to Albania in his car during the same trip when he brought B.G. to the hospital. In his statement, he actually corroborated what mentioned by F.H., namely that they met in Komoran and they drove in two separate cars until ETC in Prizren, where then they proceeded to Albania all in H.A.'s car, whereas D.M.'s car was left in the parking of ETC. However, the Defendant argued not to have been aware of the reasons why F.H. and D.M. travelled in his car and that the only topic of discussion during the trip concerned girls.

62. Only after questioning by the Prosecutor, the Defendant recalled having driven also B.B. to Durres, in Albania.

63. He stated having gone back to Kosovo the same day on both occasions and that also the Defendant B.G. went back with him.

64. The Defendant then added to have been driving the defendant B.G. around, because the latter had been involved in an accident and his psychological state was not good. In exchange, B.G. would then reimburse his fuel expenses. He, therefore, corroborated what stated by B.G., namely that on the occasion of the two trips he was paid around 50 Euro as reimbursement for the fuel expenses.

[19] Ibid, pages 7 to 25;

65. The Trial Panel found several contradictions in the accounts of the Defendants, unlike for the Witnesses.

66. The Defendants claimed to be very good friends, but the Defendant H.A. argued to have never discussed with the Defendant B.G. the kind of business he was into.

67. It was also very unrealistic the fact that on two occasions, strangers got into the vehicle of the Defendant H.A. and were driven to Albania, but the reason of their trip was never discussed or questioned by the same H.A.. Furthermore, apparently the Defendants never discussed the reason why B.G. was driving D.M.'s car. It is to be recalled that both trips lasted for several days and were not just a one day's trip, according to the witnesses.

68. Defendant H.A. initially stated to have been only to Tirana, to then add only later that he also went to Durres. In relation to this trip to Durres, H.A. at first said that B.B. was with someone else, whereas he later stated that in fact B.B. was alone.

69. Contradictions also arose concerning the time spent in Albania by the Defendants. H.A. stated to have returned to Kosovo the same day of the trip on both occasions and that B.G. went back with him. Concerning the trip to Tirana, B.G. initially said to have stayed overnight in Tirana, but he then retracted it and stated having gone back the same day. With regard to the trip to Durres, B.G. asserted to have stayed there a couple of nights. He initially said that he could not remember for how long H.A. stayed, but later he contradicted himself when he asserted having paid the hotel expenses for H.A..

70. The Trial Panel also found contradictions in the reasons adduced by the Defendant B.G. for traveling to Tirana in the critical period. The Defendant asserted that he was visiting his uncle who was hospitalized at the Tirana

Hospital. However, in the medical report for his uncle Ha.G., submitted during the hearing session of 24 September 2013[20], the dates of hospitalization results to be from 29 August 2011 until 19 September 2011. The Witness B.B. recalled that the trip took place around November 2011. The same Defendant B.G. stated having had the trip to Tirana with the Witness F.H. in November 2011[21]. Therefore, the dates of B.G.'s uncle hospitalisation do not match with the critical period in which the trips with the Witnesses took place, namely November 2011.

71. With regard to the money received by the Defendant H.A., the same admitted to having been acting as a taxi driver for his friend B.G.. However when he also drove other strangers in his case, he stated to have been paid also in that occasions only the money for the fuel expenses.

72. The defence presented by H.A., namely that he was completely oblivious to the nature of the operations he was part of, cannot be accepted. This hypothesis is contradicted by the fact that H.A. was accompanying the groups for periods lasting a few days and staying over in different hotels together with them. He drove people to the border and dropped them there.

73. Furthermore, B.G. could not give a plausible explanation to the reason why two Greek IDs were found at his place during the search of 22 October 2013. The Court did not find credible what stated by the Defendant, namely that he found the IDs in the street in Tirana and he simply retained them instead of handing them over to the authorities. This indicates that Defendant B.G. had the possibility to acquire foreign-Schengen area documents. This is considered as circumstantial evidence.

[20] Exhibit 12;
[21] See hearing minutes of 23 September 2013, pages 38, tab 9, Court Binder P 2/13, VOLUME III, Main Trial P 02/13;

74. To conclude, the established facts concern two separate events, with the same modus operandi, with B.B. having the lead and entering into contacts with the Albanian citizens to facilitate the transport of persons abroad and with H.A. having a more minor role, mainly ensuring the transportation of the groups in his red Opel Vectra.

75. Therefore, considering all the above, based on the parts of the witnesses' statements considered credible and reliable, and other circumstantial evidence, it established the factual situation elaborated above under Chapter E.1.

76. It is, therefore, proven beyond reasonable doubt that the Defendant B.G. found the immigrants interested to travel abroad and found a way of bringing them to Albania where he put them in contact with other persons who then facilitated or attempted to facilitate their travel. He did so in exchange of money or material benefit, i.e. the Golf 3 vehicle.

77. It is also proven beyond reasonable doubt that the Defendant H.A. acted as the driver of the group, therefore providing the mean for the trip from Kosovo to Albania, driving them to the place where they then got in contact with the Albanian citizens. He knew what the purpose of the trip was and he received money for this.

78. The fact that H.A. was authorized as a taxi driver has no bearing on his criminal liability for the charges at trial. He is not on trial for driving persons without taxi license. Him being an authorised taxi driver does not exonerate him of criminal responsibility for the behaviour charged in the Indictment.

79. It could not be ascertained whether the two Albanian nationals met by B.B. and F.B. were the same ones met by F.H. and Dardan D.M.. If fact, no detailed evidence was produced in this regard.

80. The Court further concluded that the offence was not very complex in nature, although involving some transnational elements. No intricate organization emerged from the evidence. Instead, an ad hoc smuggling was revealed, where the migrants sought the assistance of smugglers for parts of their journey. This consolidated the Court's conviction that the Defendants were not part of a hard network of criminals but instead relied on some acquaintances with whom they collaborate on an eventual basis.

F. LEGAL FINDINGS

I. Applicable law

81. The above established events occurred sometimes in the second half of 2011, when the applicable law was the Criminal Code of Kosovo, which entered into force on 06 April 2004 under the name of Provisional Criminal Code of Kosovo. That was amended on 06 November 2008 merely by changing its name to Criminal Code of Kosovo. However, the new Criminal Code of the Republic of Kosovo (CCRK, Code No. 04/L-082) entered into force on 01 January 2013.

82. The Trial Panel points out that both the old law (CCK) and the new law (CCRK) express the common principle in criminal law: "The law in effect at the time a criminal offence was committed shall be applied to the perpetrator"22. However, both laws also express the universally accepted exception: "In the

[22] Article 2(1) of the CCK and Article 3(1) of the CCRK;

event of a change in the law applicable to a given case prior to a final decision, the law more/most favourable to the perpetrator shall apply"23.

83. The Panel interpreted this as primarily looking at the substantive elements of the offence but also the level and calculation of any associated punishment.

II. Criminal liability

84. Article 11(1) of the CCK or Article 17(1) of the CCRK clearly set out a person is only criminally liable when mentally competent and commits a criminal offence "intentionally or negligently."

III. The criminal offences

i) Smuggling of migrants

85. Article 138 of the CCK reads:

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

[23] Article 2(2) of the CCK (using the word 'more') and Article 3(2) of the CCRK (using the word 'most');

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.

(…).

86. Article 138 of the CCK is based on the Protocol against the Smuggling of Migrants by Land, Sea and Air to the United Nations Convention against Transnational Organized Crime (UNTOC), adopted by General Assembly resolution 55/25 of 15 November 2000[24].

87. An offence of migrant smuggling will exist where a smuggler has procured or facilitated a migrant to enter or stay in a country of which the migrant was not a national or permanent resident, and did not have the documents required by that country's domestic law. The smuggler will have procured the entry or provided this assistance for a financial or material benefit.

88. The criminal action comprises three elements that must be proven: the procurement, an illegal entry and a financial or other material benefit.

89. Procurement refers to the act of bringing about or facilitating an event. To procure can be defined as the act to "obtain something or to cause a result by effort"[25]. In the case of migrant smuggling, procuring could include the actions of the smuggler organizing, recruiting, and arranging the illegal entry of the

[24] See also the UNODC Model Law against the Smuggling of Migrants, 2010; this Model Law was developed to assist States in implementing the provisions contained in the Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organized Crime (UNTOC);

[25] See page 5 of the UNODC In-depth training manual on investigating and prosecuting the smuggling of migrants, Module 1;

migrant. In this manner, the smuggler has “caused the result” which was the illegal entry of the migrant, “by effort” which was the organizing and arranging.

90. The procurement of the illegal entry of a person into a foreign country covers the arrangement of all aspects of the smuggling operation, such as the recruitment of persons willing to move abroad, the negotiations to undertake such an endeavour, liaising with other possible actors, arranging and providing for the adequate logistics (documentation, shelter, etc.) and the transport across the border.

91. The term "illegal entry" means, as quoted, crossing the borders of a State without complying with the necessary requirements for legal entry into such State, pursuant to Article 138, § 7, 2) of the CCK.

92. The element of financial or material benefit must also be present. It separates those who are motivated by profit from persons who may have assisted migrants for no reward or for altruistic purposes.

93. Considering that the different elements that compose the criminal offence of smuggling of migrants and the fact that it involves an element of trans-nationality, it is accepted that the accomplishment or attempted accomplishment of such offence engages a chain of individuals that through different roles, different steps and through different countries allow the completion of the offence or the attempt of its completion.

94. Once it is determined that the migrant has crossed the border as defined by the relevant legislation, there must be an assessment to determine who was involved to assist, facilitate or procure the crossing of the border. For example, one smuggler may provide fraudulent documents to the migrant, and another may transport him or her. The offence of Smuggling of Migrants will capture the conduct of both smugglers because both assisted or procured the illegal entry of

the migrant although only one smuggler physically drove the migrant over the border.

95. The evidence elaborated above established that at least for approximately six months, that is, during the second half of 2011, the Defendants B.G. and H.A. acted in concert in order to obtain a financial benefit by organizing the procurement of some persons interested in moving abroad and their transport to Albania in order for them to then cross to another European country through the assistance of other individuals in Albania.

96. These persons had different roles, with B.G. acting as the coordinating and negotiating link, H.A. providing the means to transport the migrants to Albania and some Albanian citizens providing fake passports and the means and the assistance to cross the Albanian border.

97. Defendant B.G. was a reference point for people wanting to go abroad. At least three migrants saw their journey organized by him after negotiations had taken place and a price had been established. The migrants were then transported by Defendant H.A. with his vehicle to a transit country. Defendant B.G. rode with them and in Albania liaised with other persons who facilitated or attempted to facilitate their passage either to Greece or Italy. Defendant B.G. coordinated the operation and entered into contacts with the Albanian citizens to facilitate the transport of persons abroad. H.A. had a more minor role, namely ensuring the transportation of the groups by driving them in his red Opel Vectra.

98. On one occasion two of the migrants – D.M. and F.H.- were successful in crossing the Greek and Italian borders, after which they were arrested by the police.

99. On another occasion the other migrant, F.B. Berisha, did not manage to leave Albania despite several plans being discussed.

100. All of the elements of the offence are present in the Defendants' first action: the procurement, the material benefit and the illegal entry into a state of which the migrants were not nationals. Regarding the second action there is a lack of full completion of the offence: F.B. never illegally entered any state.

101. The Defendants then violated more than once the statute foreseeing the punishment of smuggling of migrants with more than one action. Nevertheless, they did so under the same criminal intention, which consequently unifies their actions. In fact, the initial purpose of facilitating the transfer of Kosovo citizens to other countries persisted throughout the whole period of time during which they dedicated themselves to such activity.

102. Consequently, albeit being two, both actions only amount to one criminal offence.

103. Therefore, the Trial Panel found that the actions of the Defendants amounted to and the Defendants committed the criminal offence of 'Smuggling of Migrants' punished under Article 138(1) of the CCK by imprisonment of two to twelve years.

104. The Defendants were additionally charged under Article 138(6) of the CCK for "acting as a member of a group".

105. The Court considers that the notion of "group" foreseen in Article 138(6) of the CCK is different and broader than the definition of "organized criminal group" present in Article 274 of the CCK. According to the code, being part of a smuggling group carries an aggravated punishment while belonging to an organized criminal group is an offence in itself, if a serious crime - that is, an offence punishable by imprisonment of at least four years - is committed. The punishment foreseen under Article 138 (6) meets this latter criterion, as

mentioned *infra*[26]. The Court assumes that it was not the law maker's purpose to punish exactly the same criminal act under two different offences with two different punishments; in others words, to replicate the same offence elements in two different provisions to end up punishing them differently. Being an organized criminal group already criminalized under Article 274 there seems no purpose or logic in including it in any other provision.

106. The UNODC Model Law proposes as an optional aggravating factor if "The offence was committed as part of the activity of an organized criminal group".[27] The wording of the model law is different from the wording in Article 138 (6) of the CCK. The Trial Panel deems that the legislator by using the term "member of a group" meant something less than "part of the activity of an organized criminal group". This is also a natural understanding of the wording.

107. The notion of group present in Article 138(6) must then mean something else not strictly covered already by the general statute that prohibits organized criminal groups. Article 138 of the CCK covers all forms of smuggling of migrants. Therefore, a smuggling group does not refer to an organized group in the way envisaged by Article 274 and it may be a 'loosely connected network'. Specifically, the group does not need to exist for a prolonged period of time.

108. If an organized criminal group would smuggle migrants, the criminal offence of 'Organized Crime' would absorb the criminal offence of Smuggling of Migrants. As stated by the Supreme Court in its Judgement Ap-Kz no 61/12, "The formulation used throughout Article 274 of the CCK clearly stipulates that the commission of a basic offence is a constitutive element to this offence. Otherwise, an individual could be found guilty for the same act, forming part of both criminal offences, of Organized crime and of the underlying offence. This situation might amount a breach of the prohibition to impose a double

[26] See paragraph 134;
[27] UNODC: Model Law against the Smuggling of Migrants, page 46;

punishment for one single offence. In the case at hand, the offence of Organized crime to some extent subsumes the one of Smuggling of migrants".

109. The evidence shows that the Defendants were supported by several Albanian citizens in their task to illegally send abroad the migrants. This activity appears to be an *ad hoc* smuggling where the need for assistance by the smugglers is not very high: the migrants only needed the assistance of smugglers for parts of their journey, to obtain travel documents and to be transported across the border undetected.

110. The Court concludes the smuggling of the mentioned migrants clearly engages Article 138(6) of the CCK as an aggravating factor[28]. Both Accused acted as members of a group composed on each occasion of four persons, an association that facilitated the illicit business through task division.

111. After establishing the committed criminal offence (*actus reus*), the Trial Panel then turned to evaluate whether the subjective elements (so called *mens rea*) of the Defendants can be established.

112. Pursuant to Article 11 Paragraph (1) of the CCK, a person is criminally liable if he or she is mentally competent and has been found guilty of the commission of a criminal offence. Pursuant to the same provision, a person is guilty of the commission of a criminal offence when he or she commits a criminal offence intentionally or negligently.

[28] The Court will not discuss here the reasons why it considers Article 138(6) of the CCK an aggravated circumstance of the core criminal offence established under Article 138(1), considering that the basic offence is punishable with imprisonment of two to twelve years and an added and strongest blameworthiness is punished by imprisonment of two to ten years, somehow inviting criminals to organize themselves in groups to better carry out their activities or to inhumanly treat the migrants.

113. Two are, therefore, the elements to be considered: the mental capability of the person and the intent to commit or the negligence in committing a criminal offence.

114. First, there is no doubt as to the fact that the Defendants B.G. and H.A. were all fully mentally competent during the critical time. As a matter of fact, this issue was never the subject of argumentation during the proceedings.

115. Second, the Trial Panel had to evaluate whether, when committing the above established criminal offence, the Defendants acted with intent. The law requires intent as the form of *mens rea* before criminal liability can be established, as negligence is the exception (article 11 (3) of the CCK).

116. Article 15 of the CCK, when describing the notion of intent, states that: "(1) A criminal offence may be committed with direct or eventual intent. (2) A person acts with direct intent when he or she is aware of his or her act and desires its commission. (3) A person acts with eventual intent when he or she is aware that a prohibited consequence can occur as a result of his or her act or omission and he or she accedes to its occurrence".

117. The Panel finds the definition of direct intent is clear: a person must know he or she is doing something and wants to do so. In other words, the actor must know the elements of the offence (cognitive element) and have the will to bring about its completion (volitional element).

118. As stated above, it is proven beyond reasonable doubt that the Defendants acted in concert when they got involved with the smuggling activity. They, therefore, met and acted fully aware of their actions and with a direct intent to facilitate the moving abroad of the injured parties/Witnesses.

ii) Organized Crime

119. Article 274, § 1, of the CCK provides that:

"§ 1. Whoever commits a serious crime as part of an organized criminal group shall be punished by a fine of up to 250.000 EUR and by imprisonment of at least seven years."

120. Article 274, § 7, of the CCK, provides some crucial definitions:

"§ 7. For the purposes of the present article,

1) The term "organized crime" means a serious crime committed by a structured group in order to obtain, directly or indirectly, a financial or other material benefit.

2) The term "organized criminal group" means a structured group existing for a period of time and acting in concert with the aim of committing one or more serious crimes in order to obtain, directly or indirectly, a financial or other material benefit.

3) The term "serious crime" means an offence punishable by imprisonment of at least four years.

4) The term "structured group" means a group of three or more persons that is not randomly formed for the immediate commission of an offence and does not need to have formally defined roles for its members, continuity of its membership or a developed structure."

121. The activities of the Defendants taken together must engage the threshold of the definition of an organised crime: that the group was structured, it existed for a period of time and was set up to commit one or more serious crimes in order to obtain financial or material benefit for the defendants.

122. Article 274, § 7, Item (3) of the CCK defines a "serious crime" as an offence punishable by imprisonment of at least four years. As noted above, the criminal

offence of Smuggling of Migrants is punishable by two to twelve years of imprisonment. Therefore, imprisonment of at least four years is possible and the offence qualifies as a serious crime.

123. The Trial Panel refers to the jurisprudence of the Supreme Court of Kosovo which further clarifies and supports the above referred interpretation. In its Judgment Ap-Kz.No. 349/2007 dated 2 July 2009, the Supreme Court had to assess what could constitute a serious crime for the purposes of establishing Organized Crime. The criminal offences in question involved drug trafficking and the Supreme Court stated that such offences could be considered a serious crime because the imprisonment of 4 years was in the range of the imprisonment foreseen by those criminal offences.

124. As already mentioned, it was considered proven that this group of persons facilitating the transfer of Kosovo citizens to other European countries comprised other persons aside from B.G. and H.A., which assisted them with their illegal activities. However, it could not be established that the identity of these Albanian citizens was the same on both occasions and that there was a connection between these Albanian citizens acting on both occasions. It could neither be established for how long these Albanian citizens had been working together with the Accused.

125. So, the Court could only conclude that on two occasions two different groups acted, both groups comprising four elements, namely the two Accused and two more Albanian citizens, assisting F.B. as well as D.M. and F.H.'s smuggling. As said, no connection between two groups of two Albanian citizens was proven. More relevantly, it was not proven that these Albanian nationals worked with the Defendants on more than one occasion or that their collaboration was something more than a one time job.

126. Therefore, the Trial Panel could not find established the qualifying elements of the criminal offence of 'Organized Crime'. Namely, the group stability element foreseen on item (2) of § 7 was not found.

127. Since the elements qualifying this criminal offence in the law in force at the time the criminal acts were committed were not found, it is superfluous to analyse what the constitutive elements of such offence are in the new CCRK, since as stated above in paragraph 75 above "The law in effect at the time a criminal offence was committed shall be applied to the perpetrator".

ii) <u>Requalification</u>

128. As the elements of organized crime cannot be established, the Panel requalifies the original criminal offences of Organized Crime in conjunction with Smuggling of migrants into the criminal offense of Smuggling of migrants.

129. Thus, the Trial Panel finds the Defendants B.G. and H.A. guilty and criminally liable for the criminal offence of 'Smuggling of Migrants'.

130. The new criminal code also punishes the smuggling of migrants under its Article 170. The only relevant change introduced, apart from new punishing ranges, is the definition of the offence that, under its Article 170(8), item 8.1, reads: "Smuggling of migrants - any action with the intent to obtain, directly or indirectly, a financial or other material benefit, from the illegal entry of a person into the Republic of Kosovo, where such person is not a Republic of Kosovo National, or a person who is a Republic of Kosovo National or a foreign national into a State in which such person is not a permanent resident or a citizen of such State".

131. Essentially, the relevant elements of the offence remain the same under the CCRK as under the CCK. The only difference is the replacement of a stricter act –

the procurement – by the more comprehensive and less specific term "any action".

G. SENTENCE

132. When imposing the criminal sanction, the Court has to consider both the general purpose of punishment, namely to suppress socially dangerous activities by deterring others from committing similar criminal acts, and the specific purpose, that is to prevent the offender from re-offending. According to Article 34 of the CCK: "The purposes of punishment are: 1) to prevent the perpetrator from committing criminal offences in the future and to rehabilitate the perpetrator; and 2) to deter other persons from committing criminal offences". Bearing this in mind, the Trial Panel decides as follows.

133. Based on what is stated above in chapter FI concerning the entry into force of the new Criminal Code of the Republic of Kosovo as of 01 January 2013, and considering the principle of peremptory applicability of *lex mitior*[29], the Trial Panel has to *in concreto* consider what law would be more favourable for the Defendants when calculating the sentence. As stated by the European Court of Human Rights (ECtHR), *lex mitior* is the one which is more favourable to the Defendant, taking into account his or her characteristic, the nature of the offence and the circumstances in which the offence was committed[30]. Therefore, the *lex mitior* has to be found *in concreto*[31].

[29] See *case of Scoppola v Italy no.2*, no. 10249/03, ECHR*;*
[30] See case of *Scoppola v Italy (no. 2)*, no. 10249/03, para. 109, 17 September 2009*; Maktouf and Damjanovic v Bosnia and Herzegovina*, separate opinions, page 43;
[31] See above, *Maktouf and Damjanovic v Bosnia and Herzegovina*, page 44;

I. Calculation of punishment under the old CCK

134. With regard to the criminal offence of 'Smuggling of migrants', Article 138 Paragraph (6) of the CCK foresees a punishment of imprisonment of **two to ten years.**

135. According to Article 64 of the CCK: "The Court shall determine the punishment of a criminal offence within the limits provided for by law for such criminal offence, taking into consideration the purpose of the punishment, all the circumstances that are relevant to the mitigation or aggravation of the punishment (mitigating and aggravating circumstances) and, in particular, the degree of criminal liability, the motives for committing the act, the intensity of danger or injury to the protected value, the circumstances in which the act was committed, the past conduct of the perpetrator, the entering of a guilty plea, the personal circumstances of the perpetrator and his or her behaviour after committing a criminal offence. The punishment shall be proportionate to the gravity of the offence and the conduct and circumstances of the offender".

136. As mitigating circumstance for the Defendant B.G., the Trial Panel considered his family situation.

137. As mitigating circumstance for the Defendant H.A., the Trial Panel considered the fact that he just had a minor role in the established smuggling network and he only had a material participation, namely the one of driver.

138. As mitigating circumstance for both Defendants, the Panel considers that a considerable period of time has elapsed since the commission of the offences, which diminished their social impact. To the same effect, the Panel considers the length of the proceedings as mitigating circumstance.

139. As aggravating circumstance for both Defendants, the Panel factors in the fact that F.B. was underage at the date of the commission of the criminal offence involving him.

140. Therefore, taking into consideration all of the above mentioned circumstances, the Trial Panel would impose against the Defendant B.G. a sentence of four (4) years of imprisonment.

141. Whereas, the Trial Panel would impose against the Defendant H.A. a sentence of two (2) years and three (3) months of imprisonment.

II. Calculation of punishment under the new CCRK

142. With regard to the criminal offence of 'Smuggling of Migrants', Article 170 Paragraph (1) of the new CCRK foresees a punishment of two (2) to ten (10) years of imprisonment and a fine. Paragraph (6) of the same article foresees a punishment of not less than five (5) years of imprisonment.

143. The applicable sentencing range is, therefore, from five (5) to ten (10) years of imprisonment and a fine.

144. On the basis of the same mitigating and aggravating circumstances, the Trial Panel would have imposed against the Defendant B.G. a sentence of six (6) years of imprisonment and a fine of one hundred (100) Euro, and against the Defendant H.A. a sentence of five (5) years and two (2) months of imprisonment and a fine of one hundred (100) Euro.

III. *Lex mitior* and final calculation

145. The Trial Panel considers that by applying the old CCK the most favourable outcome for the Defendants would be *in concreto* reached.

146. Therefore, in relation to the Defendant B.G., the Trial Panel imposed a sentence of Four (4) years of imprisonment for the criminal offence of 'Smuggling of Migrants', pursuant to Articles 38 (1) and 138 (6) of the CCK.

147. The time spent in detention on remand from 23 October 2012 is to be credited pursuant to Article 73 Paragraph (1) of the CCK.

148. In relation to the Defendant H.A., the Trial Panel imposes the calculated sentence of two (2) years and three (3) months of imprisonment for the criminal offence of 'Smuggling of Migrants', in accordance with Articles 38 (1) and 138 (6) of the CCK.

149. The time spent in house detention from 06 December 2012 until 6 March 2012 is to be credited pursuant to Article 73 Paragraph (1) of the CCK.

H. COSTS OF PROCEEDINGS

150. The Trial Panel finds the Defendants B.G. and H.A. guilty and, pursuant to Article 453 Paragraph (1) of the CPCK, they shall each reimburse the costs of criminal proceedings. Considering the number of hearings held and the economic conditions of the Accused, the Trial Panel decides that each Accused shall reimburse two hundred (200) Euros as part of the costs of criminal proceedings but they are relieved of the duty to reimburse the remaining costs in accordance with Article 453 Paragraph (4) of the CPCK.

151. The accused shall reimburse the ordered sum no later than thirty (30) days from the day the Judgment becomes final.

I. PROPERTY CLAIM

152. The Trial Panel takes note that the Injured Parties did not submit any claim for compensation during the Trial period.

Basic Court of Mitrovicë/a

Roxana Comsa	**Rifat Bllata**	**Franciska Fiser**
Presiding Judge	**Panel Member**	**Panel Member**

Chiara Tagliani

Recording Officer

Drafted in English, original version

LEGAL REMEDY: *A Defendant, their legal counsel, the Prosecutor, an Injured Party or their Authorised Representative have 15 days from service of this judgment to appeal in accordance with Articles 380(1) and 381(1) of the CPC. Any appeal must be filed with the Court of first instance under Article 388(1) of the CPC.*