

IN THE BASIC COURT OF PRIZREN

Case Number: P.169/14

29 August 2014

IN THE NAME OF THE PEOPLE

THE BASIC COURT OF PRIZREN before the Presiding Judge, Judge Malcolm Simmons and Valentina Gashi as Recording Officer, in the criminal case against:

E.Y.,, born on in,,, fathers name, mothers name (.....), citizen of and with, residing in,,, economic status '....',

CHARGED in the Indictment of the EULEX Special Prosecutor PPS no. 50/2011 dated 7 July 2014 and filed with the Registry of the Basic Court of Prizren on 11 July 2014 with the criminal offence of Assisting Another Person in the Smuggling of Migrants in violation of Articles 25 paragraph 1 and 138 paragraphs 1, 2 and 6 of the Criminal Code of Kosovo¹,

Because

Between 2 October 2012 and 30 November 2012, E.Y, on the territory of Kosovo, assisted A.C, acting as a member of a group including M.B, T.Y, S.S and A.M, to commit the offence of Smuggling of Migrants by engaging in the smuggling of persons who are not nationals or permanent residents of the state to cross a border without complying with the requirements for legal entry, for the following migrants:

(1) Between 2 October 2012 and 5 October 2012, assisting A.C in the smuggling of N.S, Turkish citizen, from Turkey through Kosovo to Montenegro and onwards to a European country, by

¹ Corresponding to Articles 33 and 170 of the Criminal Code of Kosovo, Law 04/L-082 of 2012 (new code), sentencing to be in accordance with Article 3 thereof

-serving as a guarantor in order to enable his entry into and passage through Kosovo on 4-5 October 2012;

(2) Between 8 November 2012 and 30 November 2012, assisting A.C in the smuggling of migrants R.B, citizen of the Republic of Turkey, born 01 January 1968, E.B, citizen of Republic of Turkey, born 01 January 1966 and others, by helping with the provision of a guarantee letter by T.Y to enable the entry of R.B into Kosovo on 11 November 2012 and passage through Kosovo 11-13 November 2012, and of E.B into Kosovo on 19 November 2012 and passage through Kosovo 19-22 November 2012, to the Former Yugoslav Republic of Macedonia (FYROM) and onwards to a European country.

AFTER having held the Initial Hearing on 29 August 2014 in the presence of the defendant E.YI, his Counsel Rasim Hoti and in the presence of EULEX Prosecutor Salma Yousef,

AFTER consideration of the Plea Agreement dated 14 May 2014 and filed with the Registry of the Basic Court of Prizren on 14 July 2014, the Presiding Judge finds that the defendant understands the nature and the consequences of the guilty plea; the guilty plea is made voluntarily by the defendant after sufficient consultation with his counsel; the guilty plea is supported by the facts and material proofs of the case that are contained in the indictment; that none of the circumstances under Article 253, paragraphs 1 and 2 of this Code exist and after hearing submissions from the defendant, his counsel and the Prosecutor,

HAVING accepted the written Plea Agreement SPRK PPS No: 50/2011 dated 14 May 2014 filed with the Registry of the Basic Court of Prizren on 14 July 2014 pursuant to Article 233 paragraph 21 of the Criminal Procedure Code of Kosovo,

PURSUANT to Article 362 paragraph 1, Article 365 and Article 366 of the Kosovo Criminal Procedure Code on this 29 day of August 2014, in open court and in the presence of the defendant, his Defence Counsel and the EULEX Special Prosecutor, renders the following:

JUDGMENT

E.Y., with personal details above is hereby found

GUILTY

BECAUSE E.Y assisted A.C and others in the smuggling of migrants across borders into states of which they were not nationals or permanent residents without complying with the requirements for legal entry. Specifically,

Between 2 October 2012 and 5 October 2012, E.Y assisted A.C in the smuggling N.S, Turkish citizen, from Turkey through Kosovo to Montenegro and onwards to a European country, by serving as a guarantor in order to enable his entry into and passage through Kosovo on 4-5 October 2012.

From interception of A.C's email communications, it is revealed that A.C organized a false travel document for N.S, born 10 January 1971, citizen of Republic of Turkey, after receiving a copy of his Turkish identity document from his associate H.S on 2 October 2012. Further, it is revealed that A.C made hotel reservations for migrant N.S at NIRVANA ROOMS, Split, Croatia for 8 October 2012. The Kosovo Police Border Monitoring System reveals that N.S entered Kosovo by flight into Pristina airport on 4 October 2012 at 19:56 before leaving Kosovo for Montenegro by car through the Kulla Pejes border crossing on 5 October 2012 at 16:52.

E.Y supplied a false letter of guarantee to the migrant to enable him to enter Kosovo in transit, knowing that the migrant did not intend to remain in Kosovo but would illegally enter other countries with the support of A.C. He also collected the migrant from the airport, together with driver S.S, giving the false perception to the authorities that he knew the migrant and was a legitimate guarantor for his stay in Kosovo.

On 4 October 2012 at 13:36:31 A.C called E.Y and Y. asked him for his whereabouts to which A.C replied that he was at home and would soon go out. E.Y asked A.C if the notary located at Qafa was still working. A.C confirmed that they were and to go there for arrangements. A.C also warned about the division of money. E.Y stated that one of them was born in 1971. A.C explained that the notary would deal with this and would ask for the first name and surname. He stated that the notary would also ask for the justification of the person staying and that there was no need for court. A.C explained that the notary would receive money for the job done and that the details to the notary would be sent by email. A.C advised E.Y to visit the notary and to make arrangements for a passenger who would depart that night. He further stated that when the arrangements were made they would be sent to the passenger who could book the flight for that night. E.Y asked if he should visit the notary located near the municipality building but A.C advised him to go to the notary located opposite the "Sultan" shop since the other notary did not make such arrangements. E.Y in fact carried out this assistance, as instructed.

On 4 October 2012 at 19:56hrs, N.S was collected at Pristina airport by driver S.S, together with E.Y in the capacity of his guarantor to secure his entry into Kosovo. This was confirmed by E.Y in his pre-trial testimony to the Police on 6 February 2013.

Further, between 8 November 2012 and 30 November 2012, E.Y assisted A.C in the smuggling of migrants R.B, citizen of the Republic of Turkey, born 01 January 1968, E.B, citizen of Republic of Turkey, born 01 January 1966 and others, by helping with the provision of a guarantee letter by T.Y to enable the entry of R.B into Kosovo on 11 November 2012 and passage through Kosovo 11-13 November 2012, and of E.B into Kosovo on 19 November 2012 and passage through Kosovo 19-22 November 2012 , to the Former Yugoslav Republic of Macedonia (FYROM) and onwards to a European country.

A.C organized a false travel document for R.B after receiving a copy of his Turkish passport from his associate B.E on 27 October 2012. The Kosovo Police Border Monitoring System revealed that R.B entered Kosovo by flight into Pristina airport on 11 November 2012 at 11:44AM and thereafter left Kosovo by bus through the Hani Elizit border crossing with FYR Macedonia on 13 November 2012 at 4:43:00PM.

A.C organized a false travel document for E.B. The Kosovo Police Border Monitoring System revealed that E.B entered Kosovo by flight into Pristina airport on 19 November 2012 at 4:43:21PM and thereafter left Kosovo by bus through the Hani Elizit border crossing with FYR Macedonia on 22 November 2012 at 4:43:21PM.

The guarantee letter and transportation from Pristina airport for these migrants was provided by T.Y, on the instruction of A.C. E.Y assisted T.Y in this task, also on the instruction of A.C. On 8 November 2012 at 16:06:43 A.C called T.Y. On 8 November 2012 at 16:09:42 A.C called E.Y. A.C told E.Y that T. would pay a visit to him. E.Y replied that he was next to the 2nd floor café. A.C said that T. would come there. T. had only 10 Euros for the notary. A.C asked E.Y if he could give him some money. On 12 November 2012 at 17:54:36, A.C was called by E.Y in relation to the matter.

THEREBY the Defendant committed the criminal offence of **ASSISTING ANOTHER PERSON IN THE SMUGGLING OF MIGRANTS**, in violation of Articles 25 paragraph 1 and 138 paragraph 6 of the Criminal Code of Kosovo, Law No.03/L-002 dated 6 November 2008.

HAVING been found guilty of the offence of Assisting Another Person in the Smuggling of Migrants under Article 25 paragraph 1 and Article 138 paragraph 6 of the Criminal Code of Kosovo, **PURSUANT** to Articles 41 paragraph 1, subparagraph 1, 42, 43, 44, 45, 46 and 48 of the Criminal Code of Kosovo, this Court announces a

SUSPENDED SENTENCE

imposing a term of imprisonment of 2 (two) years, whose execution shall not be executed if the defendant does not commit another criminal offence in the time period of 2 (two) years.

PURSUANT to Articles 450, 451 and 453 of the Criminal Procedure Code of Kosovo the Accused shall reimburse the costs of the criminal proceedings, assessed in the sum of 100 (one hundred) Euros.

Any property claim may be pursued through the civil courts.

The parties withdrew from the rights to appeal the said judgment.

Reasoning

A. INTRODUCTION

I. Procedural History

On 11 December 2012, the Prosecutor filed an Indictment against O.A and B.F. On 13 February 2012, the Prosecutor filed an Amended Indictment to include an additional defendant, F.A, in the same proceedings.

The trial of O.A, B.F and F.A has been completed, concluding at first instance with the Judgment of the Basic Court of Prizren dated 6 September 2013.

Separately, on 16 April 2013 the Prosecutor filed an Indictment against A.B. The trial of A.B has been completed, concluding at first instance with the Judgment of the Basic Court of Prizren pronounced on 29 October 2013 by plea agreement.

On 11 December 2013, the Prosecutor filed an Indictment against A.C, M.B, A.M, I.P, A. B, M.A, T.Y, S.S and A. G.

The indictment SPRK PPS No:50/2011 against E.Y is filed in the context of the same criminal investigation.

This case was investigated by a Joint Investigation Team consisting of investigators from both EULEX Police Organised Crime Investigation Unit (OCIU) and Kosovo Police Department of Organised Crime (DOC).

On 10th May 2011, the SPRK received an International Legal Assistance (ILA) Request from the District Public Prosecutor in Ljubljana, Republic of Slovenia with reference TPP-S-1 27/2010 – DŠ dated 21st April 2011, regarding a suspect to be identified as O.A.

On 11th July 2011, the Prosecutor issued a Ruling of Initiation against O.A. On 11 January 2012 and 11 July 2012, the Pre-Trial Judge granted the extension of the investigation for another six months. The investigation against him was to expire 11 January 2013.

On 14 December 2011, the Prosecutor issued a Ruling on Expansion of the Investigation to B.F. On 15 June 2012, the Pre-Trial Judge granted the extension of the investigation for another six months. The investigation against him expired on 14 December 2012.

On 20 January 2012, the Prosecutor issued a third Ruling on Expansion of the Investigation to F.A. Following an extension, the investigation against him was to expire on 20 January 2013.

On 20 January 2012, the Prosecutor issued a Ruling on Expansion of the Investigation to A.M who was later re-identified as A.B.

On 21 March 2012, the Prosecutor issued a Ruling on Expansion of the Investigation to A.B. On 20 September 2012, the Pre-Trial Judge granted the extension of the investigation for another six months. The investigation against him was previous set to expire on 21 March 2013 but pursuant to Article 159 (1) of the KCCP, Law 04/L-123 of 2012, was to expire on 21 March 2014.

On 17 August 2012, the Prosecutor issued a Ruling on Expansion of the Investigation to A.C.

On 5 September 2012, the Prosecutor issued a Ruling on Expansion of the Investigation to N.A. On 2 November 2012, the Prosecutor issued an amended Ruling on Expansion to N. N, following re-identification of this defendant.

On 3 December 2012, the Prosecutor issued a Ruling on Expansion of the Investigation to M.B.

On 5 December 2012, the Prosecutor issued a Ruling on Expansion of the Investigation to M.A, A.M, A.G, I.P, T.Y, S.S, B.B, M.B and E.Y.

On 14 December 2012, the Prosecutor issued a Ruling on Expansion of the Investigation to A.B.

Other suspects were part of the same case and the investigation against them is ongoing.

The Indictment SPRK PPS No: 50/2013, dated 7 July 2014 of the EULEX Prosecutor was filed with the Registry of the Basic Court of Prizren on 11 July 2014.

II. Jurisdiction

Article 11 of the Law on Courts² provides that Basic Courts are competent to adjudicate at first instance in all cases, except otherwise foreseen by Law.

Article 15 of the said Law provides that the Serious Crimes Department of the Basic Court has jurisdiction to adjudicate at first-instance in cases involving criminal offenses Smuggling of Migrants.

The defendant was charged with the criminal offence of Assisting another Person in the Smuggling of Migrants under Article 25 paragraph 1 and Article 138 paragraphs 1, 2 and 6 of the Criminal Code of Kosovo.

The undersigned judge is competent to adjudicate this case as per Articles 20, 21, 22, 25, 26 and 29 of the CPC and Law on Courts, Law no.03/L-199.

The CPC that entered into force on 1 January 2013 re-classified District Courts as Basic Courts.

The Basic Court of Prizren has territorial jurisdiction over the case under Article 29 of the CPC.

B. LAW

I. Applicable Criminal Law

² Law No. 03/L-199

Having been convicted of the criminal offence of Assisting another Person in the Smuggling of Migrants under Article 25 paragraph 1 and Article 138 paragraph 6 of the CPC, the Court found Article 138 paragraph 6 of the CPC of the 'old' code more favourable to the defendant.

i. Procedure Code

The Indictment was filed after the coming into force of the new Criminal Procedure Code. There was no dispute that the new Criminal Procedure Code was applicable in this case.

C. CONSIDERATIONS REGARDING THE EVALUATION OF EVIDENCE

I. Burden and standard of proof

Under Article 6 (2) of the European Convention on Human Rights (hereinafter the "ECHR"), the Constitution of Kosovo and Article 3 (1) of the CPC enshrine the presumption of innocence to which Accused is entitled. This presumption places on the Prosecution the burden of establishing the guilt of the Accused, a burden which remains on the Prosecution throughout the trial.

Article 370 (7) of the CPC stipulates that *'the court shall state clearly and exhaustively which facts it considers proven or not proven, as well as grounds for this'*. Accordingly, the Trial Panel must determine whether it is satisfied on the basis of the whole of the evidence so that it is sure that every element of that crime has been established. Any doubt must be resolved in favour of the accused.

The Trial Panel pursuant to Article 7 (1), (2) CPC *'... must truthfully and completely establish the facts which are important to rendering a lawful decision'* and *'... has a duty to examine carefully*

and with maximum professional devotion and to establish with equal attention the facts against the defendant as well as those in ... favour ...'.

D. ASSESSMENT OF THE EVIDENCE

The Defendant was charged in the Indictment with Assisting Another Person in the Smuggling of Migrants under Articles 25 paragraph 1 and 138 paragraphs 1, 2 and 6 of the Criminal Code of Kosovo.

The Defendant entered into a Plea Agreement with the Prosecutor on 14 May 2014. The Plea Agreement was accepted by the Court during the Initial Hearing held on 29 August 2014. The factual findings to which reference is made herein were the written basis of the Plea Agreement. Having reviewed the evidence upon which the Prosecution relied, the Presiding Judge found that the Defendant assisted A.C and others in the smuggling of migrants of Turkish origin. Specifically, the Presiding Judge finds that

(1) Between 2 October 2012 and 5 October 2012, E.Y assisted A.C in the smuggling of N.S, Turkish citizen, from Turkey through Kosovo to Montenegro and onwards to a European country, by serving as a guarantor in order to enable his entry into and passage through Kosovo on 4-5 October 2012.

From interception of A.C's email communications, it is revealed that A.C organized a false travel document for N.S, born 10.01.1971, citizen of Republic of Turkey, after receiving a copy of his Turkish identity document from his associate H.S on 2 October 2012.³ Further, it is revealed that A.C made hotel reservations for migrant N.S at NIRVANA ROOMS, Split, Croatia for 8

³ EULEX Police, OCIU 4855, Police 15-day report on interception of a computer network (A.C) covering the period 21/06/2012 – 11/10/2012, dated 17/10/2012, (SPRK/in/1212/OC of 19/10/2012), Police file PINK 2, vol. 3, Tab 1, pp. 1-17

October 2012 (sent email dated 6.10.2012).⁴ The Kosovo Police Border Monitoring System reveals that N.S entered Kosovo by flight into Pristina airport on 4 October 2012 at 19:56 before leaving Kosovo for Montenegro by car through the Kulla Pejes border crossing on 5 October 2012 at 16:52.⁵

E.Y supplied a false letter of guarantee to the migrant to enable him to enter Kosovo in transit, knowing that the migrant did not intend to remain in Kosovo but would illegally enter other countries with the support of A.C. He also collected the migrant from the airport, together with driver S.S, giving the false perception to the authorities that he knew the migrant and was a legitimate guarantor for his stay in Kosovo.

The evidence against Y. is contained in the lawful interceptions of A.C, telephone metering and the I.T. forensic examination of the phones of E.Y and A.C as well as the guarantee letter itself.

On 04.10.2012 at 13:36:31 A.C called E.Y and E.Y asks him for his whereabouts to which A. replies that he is home and will soon go out. Y. asks A. if the notary located at Qafa is still working and A. confirmed that they were and to go there for arrangements. A. also warned about the division of money. Y. stated that one of them was born in 1971. A. explained that the notary will deal with this and will ask for the first name and surname. He stated that the notary will also ask for the justification of the person staying and that there is no need for court. A. explains that the notary will receive money for the job done and that the details to the notary will be sent by email. A. advised Y. to visit the notary and make arrangements for a passenger who will depart that night. He further states that when the arrangements are made they are sent to the passenger who may book the flight for tonight. Y. asks if he has to visit the notary

⁴ EULEX Police, OCIU 4855, Police 15-day report on interception of a computer network (A.C) covering the period 21/06/2012 – 11/10/2012, dated 17/10/2012, (SPRK/in/1212/OC of 19/10/2012), Police file PINK 2, vol. 3, Tab 1, pp. 1-17.

⁵ EULEX Police, Report OCIU 5246 on border crossing of migrants, dated 15/01/2013 (SPRK/in/52/OC of 17/01/2013), Police file PINK 2, vol. 6, Tab 5, pp. 135-143

located near the municipality building but A. advised him to go to the notary located opposite to the "Sultan" shop since the other notary does not make such arrangements. E.Y in fact carried out this assistance, as instructed.

On 4 October 2012 at 19:56hrs, N.S was collected at Pristina airport by driver S.S, together with E.Y in the capacity of his guarantor to secure his entry into Kosovo. This was confirmed by E.Y in his pre-trial testimony to the Police on 6 February 2013.

(2) Between 8 November 2012 and 30 November 2012, E.Y assisted A.C in the smuggling of migrants R.B, citizen of the Republic of Turkey, born 01 January 1968, E.B, citizen of Republic of Turkey, born 01 January 1966 and others, by helping with the provision of a guarantee letter by T.Y to enable the entry of R.B into Kosovo on 11 November 2012 and passage through Kosovo 11-13 November 2012, and of E.B into Kosovo on 19 November 2012 and passage through Kosovo 19-22 November 2012 , to the Former Yugoslav Republic of Macedonia (FYROM) and onwards to a European country.

From interception of A.C's email communications, it is revealed that A.C organized a false travel document for R.B after receiving a copy of his Turkish passport from his associate B.E on 27 October 2012.⁶ The Kosovo Police Border Monitoring System reveals that R.B entered Kosovo by flight into Pristina airport on 11 November 2012 at 11:44AM and thereafter left Kosovo by bus through the Hani Elizit border crossing with FRY Macedonia on 13 November 2012 at 4:43:00PM.⁷

⁶ EULEX Police, OCIU 4928, Police 15-day report on interception of a computer network (A.C), covering period 12/10/2012 – 28/10/2012, dated 30/10/2012 (SPRK/in/1251/OC of 01/11/2012), Police file PINK 2, vol. 1, Tab 18, pp. 234-237.

⁷ EULEX Police, Report OCIU 5246 on border crossing of migrants, dated 15/01/2013 (SPRK/in/52/OC of 17/01/2013), Police file PINK 2, vol. 6, Tab 5, pp. 135-143

From interception of A.C's email communications, it is revealed that A.C organized a false travel document for E.B. The Kosovo Police Border Monitoring System reveals that E.B entered Kosovo by flight into Pristina airport on 19 November 2012 at 4:43:21PM and thereafter left Kosovo by bus through the Hani Elizit border crossing with FRY Macedonia on 22 November 2012 at 4:43:21PM.⁸

The defendant is not alleged to have been a member of the organised criminal group. The defendant is also not alleged to have assisted A.C or others in the commission of the offence of Organised Crime.

The role of E.Y is limited to that of providing assistance in the commission of the offence of Smuggling of Migrants by the above-mentioned minor actions.

A. SENTENCING

The defendant is 52 years of age. He is married with two children.

The Court considered the suspended sentence of 2 (two) years with verification period of 2 (two) years was reasonable and proportionate.

The Court finds that the provisions of Article 233 of the Criminal Procedure Code have been complied with and that the plea agreement was entered into voluntarily by the accused and that he understood its import and implications regarding his future conduct at the time that it was signed by him. The Court notes that copies of the plea agreement have been retained by the parties and a copy has been retained on the Court's file.

⁸ EULEX Police, Report OCIU 5246 on border crossing of migrants, dated 15/01/2013 (SPRK/in/52/OC of 17/01/2013), Police file PINK 2, vol. 6, Tab 5, pp. 135-143

The parties withdrew from the rights to appeal the said judgment.

For the reasons stated herein, the Presiding Judge finds as in the enacting clause of this Judgment.

Judge Malcolm Simmons
Presiding Judge

Valentina Gashi
Recording Officer