

COURT OF APPEALS

Case number: PN 554/14
PP 376/12 Basic Court of Prizren

Date: 10 February 2015

The Court of Appeals, in a Panel composed of EULEX Judge Timo Vuojolahti, Presiding and Reporting, EULEX Judge Hajnalka Veronika Karpati and Kosovo Court of Appeals Judge Abdullah Ahmeti as Panel members, assisted by EULEX Legal Officer Kerry Kirsten Moyes as Recording Officer in the criminal case PP 376/12, ongoing before the Basic Court of Prizren against;

FH, NU, SM, MHB, KH, KHU, HM, NHM, IHC

Indicted with

(Count 1) Issuing Unlawful Judicial Decisions, in violation of Article 346 of the former Criminal Code of Kosovo (CCK), currently penalized under Article 432 of the Criminal Code of the Republic of Kosovo (CCRK); as to **SM**;

(Count 2) Abuse of Official Position or Authority, in violation of Article 339, paragraphs 1, 2 and 3, in conjunction with Article 23 of the former CCK, currently penalized under Article 422, paragraphs 1 and 5, in conjunction with Article 31 of the CCRK; as to **NU, SM and FH**;

(Count 3) Legalization of False Content, in co-perpetration, in violation of Article 334, paragraph 1, in conjunction with Article 23 of the former CCK, currently penalized under Article 403, paragraph 1, in conjunction with Article 31 of the CCRK; as to **KH and KHU**;

(Count 4) Legalization of False Content, in co-perpetration, in violation of Article 334, paragraph 1, in conjunction with Article 23 of the former CCK, currently penalized under Article 403, paragraph 1, in conjunction with Article 31 of the CCRK; as to **KH, KHU, MHB, NHM, HM and IHC**;

(Count 5) Fraud, in co-perpetration, in violation of Article 261, paragraph 2, in connection with paragraph 1, and in conjunction with Article 23 of the former CCK, currently penalized under Article 335, paragraph 2, in connection with paragraph 1, and in conjunction with Article 31 of the CCRK; as to **NU, FH and SM**;

(Count 6) Fraud, in co-perpetration, in violation of Article 261, paragraph 2, in connection with paragraph 1, and in conjunction with Article 23 of the former CCK, currently penalized under Article 335, paragraph 2, in connection with paragraph 1, and in conjunction with Article 31 of the CCRK; as to **KH** and **KHU**;

(Count 7) Fraud, in co-perpetration, in violation of Article 261, paragraph 2, in connection with paragraph 1, and in conjunction with Article 23 of the former CCK, currently penalized under Article 335, paragraph 2, in connection with paragraph 1, and in conjunction with Article 31 of the CCRK; as to **KH, KHU, MHB, NHM, HM** and **IHC**;

(Count 8) Unlawful Occupation of Real Property, in co-perpetration, in violation of Article 259 paragraph 1, and in conjunction with Article 23 of the former CCK, currently penalized under Article 332, paragraph 1, in conjunction with Article 31 of the CCRK; as to **KH** and **KHU**;

(Count 9) Unlawful Occupation of Real Property, in co-perpetration, in violation of Article 259 paragraph 1, and in conjunction with Article 23 of the former CCK, currently penalized under Article 332, paragraph 1, in conjunction with Article 31 of the CCRK; as to **KH, KHU, MHB, NHM, HM** and **IHC**;

(Count 10) Unlawful Occupation of Real Property, in co-perpetration, in violation of Article 332, paragraph 1, in conjunction with Article 31 of the CCRK; as to **KH, KHU, MHB, NHM, HM** and **IHC**;

(Count 11) Organized Crime, in violation of Article 274, paragraphs 1 and 2 of the former CCK, currently penalized under Article 283, paragraph 1 of the CCRK; as to **NU, SM, FH, KH, KHU, MHB, NHM, HM** and **IHC**;

(Count 12) Organized Crime, in violation of Article 274, paragraph 3 of the former CCK, currently penalized under Article 283, paragraph 2 of the CCRK; as to **NU**;

Object of the Court of Appeals' Ruling

The following appeals were filed against the Ruling of the Presiding Trial Judge PN 554/14 dated 21 August 2014 on Objections to Evidence and Requests to Dismiss the Indictment;

- appeal filed on 25 September 2014 by defence counsel Visar Vehapi on behalf of the defendant **SM**;

- appeals filed on 15 September 2014 and 8 October 2014 by defence counsel Selatin Ahmeti on behalf of the defendant **FH**;
- appeal filed on 12 September 2014 by defence counsel Tahir Rrecaj on behalf of the defendant **NU** against the Ruling dated 21 August 2014. A ‘supplement’ to the appeal was filed on 24 October 2014;
- appeal filed on 12 September 2014 by defence counsel Zivojin Jokanovic on behalf of the defendant **MHB**;
- a joint appeal filed on 12 September 2014 by defence counsels Xhevat Bici, Haxhi Kelmendi, Bajram Tmava, Qerim Metaj, Qazim Qerimi and Selman Bogiqi on behalf of the defendants **MHB, KH, KHU, HM, NHM** and **IHC** (‘the sisters’).
- A request by the sisters dated 24 November 2014 entitled ‘Request for lifting the ban on withdrawal of money from bank accounts’ was addressed to the Court of Appeals.

Having considered the response of the SPRK Prosecutor filed on 24 October 2014, and the response of the Appellate Prosecutor filed on 6 November 2014;

Acting pursuant to Article 413 and Article 416 (1), (2) and (4) of the Criminal Procedure Code (CPC);

Having deliberated and voted on 10 February 2015;

The Panel of the Court of Appeals issues the following:

RULING ON APPEAL

1. The appeals of defence counsel Visar Vehapi filed on 25 September 2014 on behalf of the defendant SM, defence counsel Selatin Ahmeti filed on 15 September 2014 on behalf of the defendant FH, defence counsel Tahir Rrecaj filed on 12 September 2014 on behalf of the defendant NU, defence counsel Zivojin Jokanovic filed on 12 September 2014 on behalf of the defendant MHB, and the joint appeal filed on 12 September 2014 by defence counsels Xhevat Bici, Haxhi Kelmendi, Bajram Tmava, Qerim Metaj, Qazim Qerimi and Selman Bogiqi on behalf of the defendants MHB, KH, KHU, HM, NHM and IBC are rejected as unfounded.

2. The second appeal by defence counsel Selatin Ahmeti on behalf of the defendant FH filed on 8 October 2014 and the ‘supplement to the appeal’ filed on 24 October 2014 by defence counsel Tahir Rrecaj on behalf of the defendant NU are dismissed as belated.

3. The request by the sisters for the lifting of the ban on withdrawal of money from bank accounts is dismissed as impermissible.

4. The impugned Ruling of the Presiding Trial Judge PN 554/14 dated 21 August 2014 is hereby affirmed.

REASONING

I Relevant procedural background

1. On 16 April 2010 an investigation into this matter commenced with a Letter of Entrustment. On 29 October 2010 a second Letter of Entrustment was issued. On 10 October 2012 the Prosecution issued a Ruling on Initiation of Investigation against **FH**. The investigation was expanded on 29 November 2012 against **SM** and **NU** (and **NK**). It was further expanded on 30 May 2013 against **MHB, KH, KHU, HM, NHM** and **IHC**.

2. On 15 January 2014 an Indictment PP 376/12 was filed against all of the above defendants. An amended Indictment was filed on 29 April 2014, which rectified clerical errors and inserted two new chapters dealing with post-indictment investigations and with the assets subject to forfeiture. The Initial Hearing was held on 20 May 2014 and the defendants pleaded not guilty to all counts on the Indictment.

3. By 19 June 2014 defence counsels for **NU, FH, SM** and the sisters filed Objections to Evidence and requested Dismissal of the Indictment. The Prosecutor filed written responses.

4. The Presiding Trial Judge issued the impugned Ruling dated 21 August 2014, which rejected all Objections to Evidence as unfounded and declared all evidence submitted by the Prosecutor together with the case-file as admissible. The Ruling also rejected all requests to Dismiss the Indictment.

II Submissions of the parties

a) The sisters

5. A joint appeal was filed on behalf of the sisters, proposing the dismissal of the Indictment and the termination of the criminal proceedings. They submit:

The Objections to evidence

- The Ruling violates Article 370 (6) and (7) of the CPC as it does not give the grounds for each individual point on the objection of the Indictment.
- It is erroneous for the Presiding Trial Judge to state that it is not appropriate to determine which procedural Code is more favourable to the defendants at this phase of the proceedings, as this determines whether statutory limitation excludes criminal liability.
- Some testimonies and evidences are inadmissible as per Article 159 of the CPC because they were obtained after the filing of the Indictment. The defence counsels disagree with the interpretation of Articles 228, 329 (3) and 244 (3) of the CPC by the Presiding Trial Judge on this point. After the filing of an Indictment all competencies are passed to the Court, and the Prosecutor must file a request to the Presiding Judge to collect further evidence.
- The investigation was not completed within 2 years as per Article 159 of the CPC.
- Regarding the offence of Organized Crime, the Prosecutor did not expand the existing investigation or initiate a new investigation to include this offence, in violation of Article 274 (3) and 103 (4) of the CPC. There was also a violation of Articles 123, 125, 131 and 132 of the CPC as the defendants were not given the opportunity to defend themselves regarding this offence as they were not questioned about it.

The Dismissal of the Indictment

- The defence counsels disagree with the Presiding Trial Judge on his interpretation of the minimum imprisonment requirement for the underlying offence for the offence of Organized Crime. As there is no decision from the second instance court on this matter, the definition of the offence should be interpreted in the defendants' favour.
- There is no evidence that the defendants committed the offences of Unlawful Occupation of Real Property, Legalization of False Content or Fraud. Therefore they cannot be charged with Organized Crime.
- The defence counsels disagree with the interpretation of the period of statutory limitation by the Presiding Trial Judge. Counts 8 and 9 of the Indictment are not interrupted by count 10. Further, the defendants are in factual legal possession of the property since 1986.
- The defence counsels disagree that cumulative charging for the defendants is supported on legal grounds. The counts in the Indictment are not very clear and quite confusing.
- The defence counsels claim again that an element of the criminal offence of Legalization of

False Content is forged document/s. Further, there is no evidence to support these offences, and the Court has erroneously determined the factual situation to conclude that there is a well-grounded suspicion.

- The Court also erred in finding a well-grounded suspicion for the offences as there is no evidence. Further, none of the defendants or witnesses has stated that a criminal group exists. The joint appeal goes into some detail in disputing the evidence.

- There is no evidence to justify the Prosecutor's proposal for the confiscation of the parcel of land and the bank accounts. The old house was bought from the Municipality of Pristina in 1993, and the new house was built between 2003 and 2005 by the financial means of their parents.

b) MHB

6. Defence counsel Zivojin Jokanovic submits that the impugned Ruling is in essential violation of criminal proceedings, the erroneous and incomplete determination of the factual situation, and erroneous application and violation of the criminal code. He proposes that the Indictment is dismissed. He submits:

- There is no evidence that the defendant committed any criminal offence.

- The property was acquired by the defendant in a legal manner. Defence counsel goes into some detail as to why the acquisition and occupation of the property is legal.

- The statutory limitation for Unauthorized Occupation expired long ago.

- A 'serious' crime is a criminal offence punishable with a sentence of at least 4 years of imprisonment, as per Article 274 (7) of the CCK.

c) NU

7. Defence counsel Tahir Rrecaj submits that the impugned Ruling is in violation of Article 415 (1) items 1 and 2 and Article 253 of the CPC and proposes that the Indictment is dismissed against this defendant and the criminal proceedings against him cease. He submits:

- The Presiding Trial Judge did not answer each of the defense allegations and failed to give reasons for rejecting the defence application for Dismissal of the Indictment.

- The Presiding Trial Judge should have determined which Code is applicable, as this determines whether statutory limitation excludes criminal liability.

- The Presiding Trial Judge erroneously interpreted Article 244 and Article 159 of the CPC regarding post Indictment investigation. The Prosecutor does not have the right to undertake investigative actions after the filing of the Indictment. Further, the investigation must be completed within 2 years.
- The Prosecutor violated Article 132 (6) of the CPC as he did not notify the defendant and the defence regarding the date, time and place where statements from witnesses shall be collected.
- For counts 2 and 5 the statutory limitation has been reached, and was reached before the initiation of the investigations. It is incorrect that the statutory limitation was 'interrupted', and therefore the criminal offence has reached the statutory limitation.
- The legal qualifications of the offences are unclear and confusing. It is unclear what actions were undertaken by each of the accused.
- The Prosecutor has ignored exculpatory evidence, and has no evidence to support the charges in the Indictment. Defence counsel goes into some detail to explain the defendant's actions as lawful.
- For the offence of Fraud there must be concrete material damage, which there is not in this case,
- The Prosecutor did not provide any evidence of the existence of an organized criminal group. Defence counsel gives examples of what he considers to be the characteristics of an organized criminal group, and states that the Prosecutor has not established these characteristics. Further, a family can never be classified as a criminal organization, and if they do commit offences in complicity then they are liable only as co-perpetrators.

As noted below, defense counsel also filed a 'supplement' which is belated, and therefore its content is not summarized.

d) FH

8. Defence counsel Selatin Ahmeti filed an appeal in a timely fashion. He claims substantial violation of the provisions of criminal procedure, violation of the criminal law and erroneous or incomplete determination of the factual situation. He proposes that the Indictment is dismissed or that the impugned Ruling is annulled and the case is returned for reconsideration. However, the appeal contains no submissions, only that the reasoning will follow. As noted below, a second appeal was filed, which is dismissed as belated. Therefore its content is not summarized.

e) SM

9. Defence counsel Visar Vehapi submits that the impugned Ruling is in violation of the provisions of the CPC and motions the Court of Appeals to dismiss the Indictment and terminate the criminal procedure against this defendant. He submits:

- The investigation was expanded on 29 November 2012 to include this defendant. The reasoning in the impugned Ruling is incorrect as it cannot be presumed that there was the commission of another criminal offence without a final Judgment of a competent Court. Therefore the offence of Issuing Unlawful Judicial Decisions cannot 'interrupt' the statute of limitations as this offence has not been proved. Even if this is not the case, as the decisions of the defendant are dated in February and June 2007, the investigation was initiated over 5 years later in November 2012. Therefore the limitation period for counts 1, 2, and 5 has expired.
- For the offence of Organized Crime, the underlying offence must be punishable with at least 4 years imprisonment, and he disagrees with the interpretation given by the Presiding Trial Judge on this point. Further, as the limitation has expired for the underlying offences, then count 11 cannot stand as Organized Crime is not an independent offence.
- The Prosecutor has charged the defendant with 4 criminal offences for the same actions. This is cumulative legal qualification and therefore erroneous.
- The defendant is immune from prosecution by Article 107 of the Constitution.
- Regarding counts 1, 2 and 5, the Prosecutor has not proved the intention of the defendant to obtain material benefits for herself or another, or to cause damage to another.
- Judges sometimes render wrong decisions. An erroneous decision does not represent a criminal offence.

f) The Special Prosecutor

10. The Special Prosecutor states that the appeals are largely a repetition of all the arguments already made to the Presiding Trial Judge, and moves the Court of Appeals to reject the appeals as unfounded.

11. The Special Prosecutor disagrees with the Ruling of the Court of Appeals in a different case (PN 474/14 dated 26 September 2014) on the issue of post Indictment investigations. In the impugned Ruling the Presiding Trial Judge states that the time limits for investigation exist in order to ensure that defendants are not subject to lengthy investigations which they are not aware

of, and are therefore not aware of the case against them. However, where the Indictment has been filed there is a complete discovery of the evidentiary material and a full knowledge of the charges. Both parties retain their power to gather evidentiary materials and to carry on the investigation in order to present evidence to the Court. However, the Court of Appeals' decision interprets the stage of the proceedings after the filing of the Indictment as preventing the Prosecution (and presumably also the defence) from continuing to investigate until the beginning of the main trial when applications for Rulings may be made pursuant to Article 288 of the CPC. According to this decision, this means that there is a gap between these two events, during which no investigative action is possible by either of the parties or the Judge. The Special Prosecutor is of the view that this interpretation is unreasonable and would cause harm to the coherence of the criminal justice system. It must be possible at any stage of the criminal proceedings to gather new evidence to present to the Court, or to request that the Court does so.

12. The Special Prosecutor agrees with the Presiding Trial Judge that there is no provision which prohibits the Prosecutor from conducting investigatory actions once the Indictment is filed, and that Article 244 (3) of the CPC, which foresees the disclosure of 'new material', is clear guidance of this position. The Prosecutor also notes Article 82.2 of Law 4/L-213 on International Legal Cooperation, which foresees that requests for legal assistance shall be submitted by the Court after the filing of the Indictment (and before it is filed, submitted by the State Prosecutor). According to the Court of Appeals decision, in between the filing of the Indictment and the main trial it is possible to gather evidence outside Kosovo but forbidden to do so within the country – a paradoxical situation.

13. The issue rather should be who is permitted to gather the evidence; the Judge or the parties. It is usually the Judge in inquisitorial systems common in Europe, but in adversarial systems most of the powers is upon the parties. In the new CPC the main responsibility for gathering evidence rests with the parties, to reflect its essentially adversarial character. The Special Prosecutor also noted that the defence counsels attached documents to their Objections to Evidence/Requests to Dismiss the Indictment which were submitted to the Presiding Trial Judge, which will potentially be included as documentary evidence in the main trial.

14. Finally, the Prosecutor agrees with the view of the Presiding Trial Judge that the Prosecutor is entitled to collect post Indictment evidence because he is not prohibited from doing so, rather than the view of the Court of Appeals in the previous Ruling that he is only permitted to do so if there is specific provision allowing for such actions.

g) The Appellate Prosecutor

15. The Appellate Prosecutor moves the Court of Appeals to reject the appeals and affirm the impugned Ruling.

16. The Appellate Prosecutor notes that the claims in the appeals were already raised during the Initial Hearing and rejected with the impugned Ruling. He refers to the reasoning part of the Ruling, and to the arguments put forward by the Prosecution in response to the defence requests to Dismiss the Indictment and Objections to Evidence, and to the response of the Special Prosecutor to the appeals.

17. Article 250 of the CPC permits the defendants to file a request to Dismiss the Indictment on a specific set of grounds. The procedure is not intended to anticipate the assessment of the evidence, and is rather a screening procedure so that cases with grave and irreparable deficiencies do not proceed further.

18. The Appellate Prosecutor observes that the acts the defendants are charged with are criminal offences at the time of their alleged commission and the criminal law currently in force. The counts clearly state the criminal offences alleged. There are no circumstances that would exclude the criminal liability of the defendants. There is sufficient evidence to support a well-grounded suspicion as alleged in the Indictment.

19. The claims relating to the expiration of the statutory limitations have been already addressed, although the Appellate Prosecutor disagrees with the Presiding Trial Judge that a Letter of Entrustment does not interrupt the period of statutory limitation.

20. There are no other circumstances that would bar prosecution, and Judges do not enjoy immunity if they have committed an intentional violation of the law.

21. The arguments surrounding legal qualification (*lex specialis*, consumption or concurrence) are not a ground for dismissal of the Indictment as per Article 250 of the CPC.

22. Regarding Article 249 of the CPC, the Appellate Prosecutor shares the Presiding Judge's view that the CPC does not prohibit the Prosecutor from conducting investigations after the filing of the Indictment, and that the 2 year limit for the investigations had not expired when the evidence was collected.

23. The interviews of the three witnesses were conducted as per Article 131 of the CPC where the State prosecutor *may* permit defence counsel to participate.

24. Finally, according to the consistent jurisprudence on the issue of the underlying offences to the charge of Organized Crime, the expression 'at least' in Article 274 of the CCK is to be interpreted as meaning that 'it must be possible to apply the mentioned punishment according to the law'.

III Findings of the Panel

Competence of the Panel

25. Since the appeals were filed, the Supreme Court of Kosovo issued a Circular dated 9 January 2015 (number 12/2015) following a General Session of the Supreme Court of Kosovo on issues related to the evidence gathered by using covert measures. One question addressed in the Circular is the appeals procedure against Ruling deciding upon the admissibility of evidence obtained by using these measures. The Circular gives the following opinion:

It clearly turns out that when a single judge or a presiding trial judge declares evidence as inadmissible, it is Surveillance and Investigation Review Panel to decide on the appeal and not the Court of Appeals as is the case and practice in the courts so far.

26. The Panel considers this opinion to be incorrect, and based on a misinterpretation of Articles 97 and 98 of the CPC. The Panel is convinced that the main function of these Articles is to fulfill the positive obligations for a State that are imposed by Article 8 of the European Convention on Human Rights (ECHR). When a national law has instituted a system of surveillance, under which all persons in the country concerned can potentially be affected by the implementation of these measures, it is possible that an individual's right to private life may be violated. The ECHR requires that there must be an effective guarantee against possible abuse of these measures.

27. The general provisions regarding the admissibility of evidence are in Article 249 of the CPC, and Article 97 paragraph 3 of the CPC repeats the same rules in regards to evidence obtained through covert measures: the objections ('challenge') shall be made before the second hearing and it is for the single Trial Judge or Presiding Trial Judge to decide on the motion. Both Articles state that the decision may be appealed.

28. There is nothing in Articles 97 or 98 of the CPC which would give reason to believe that the appeals procedure against the Ruling of the single Trial Judge or Presiding Trial Judge should differ from the general procedure when the challenged evidence has been obtained by using covert measures. Both Articles are implementing the obligations imposed by the ECHR and from the practice of the European Court of Human Rights (ECtHR); with regard to covert measures there has to be effective control mechanisms to ensure that the law is complied with, and there has to be an oversight mechanism independent from the one which carries out the measure. First, the Presiding or single Trial Judge may at any time prior to the final Judgment *ex officio* review the admissibility of the evidence collected under Article 88 of the CPC. Second, the oversight procedure described in Article 98 of the CPC is an 'additional' safeguard against unlawful covert measures, which can be initiated by whoever considers that their rights have been violated by the order or its implementation.

29. That Article 98 of the CPC does not deal with the appeals procedure against Rulings on the admissibility of evidence can also be found in Article 98 paragraph 4 of the CPC. It states that when an order for covert measure (or its implementation) has been established as unlawful with a final Ruling, this Ruling is binding on the Surveillance and Investigation Review Panel. This

demonstrates that these are two separate procedures. There is nothing to indicate that the lawmaker of the CPC intended to create impractical and dysfunctional procedures by the separation of the overview on the admissibility of the evidence into two different procedures at the appellate level and, moreover, to two different tribunals.

30. The Panel concludes that an appeal against the admissibility of evidence collected by using covert and technical measures shall be adjudicated, pursuant to Articles 249 paragraph 6 and 408 of the CPC, by the Court of Appeals, and therefore that the Panel has competence to deal with the appeals in all parts.

Admissibility issues

31. The appeal filed on 25 September 2014 by defence counsel Visar Vehapi on behalf of the defendant **SM** is timely filed and admissible.

32. Defence counsel Selatin Ahmeti on behalf of the defendant **FH** filed appeals on 15 September 2014 and 8 October 2014. The CPC does not envisage second appeals which are filed beyond the time limits permitted. Allowing the parties to do so would entirely defeat the purpose of the strict deadlines in the appeals procedure. The second appeal is therefore dismissed as belated. The appeal filed on 15 September 2014 is timely filed and admissible.

33. Defence counsel Tahir Rrecaj filed an appeal on behalf of the defendant **NU** on 12 September 2014. A 'supplement' to the appeal was filed on 24 October 2014. The CPC does not envisage supplements to an appeal which are filed beyond the time limits permitted. Allowing the parties to do so would entirely defeat the purpose of the strict deadlines in the appeals procedure. The 'supplement' is therefore dismissed as belated. The appeal filed on 12 September 2014 is timely filed and admissible.

34. Defence counsel Zivojin Jokavovic timely filed an appeal on behalf of **MHB** on 12 September 2014. This appeal is supported by a Power of Attorney signed on 11 September 2014. On the same day the defendant **MHB** also had an appeal filed on her behalf in the joint appeal filed by defence counsels Xhevat Bici, Haxhi Kelmendi, Bajram Tmava, Qerim Metaj, Qazim Qerimi and Selman Bogiqi. This joint appeal is also timely filed and admissible.

Findings on the merits

35. The Panel of the Court of Appeals first notes that the possibility to file objections to the evidence and request to dismiss the indictment seems to have been misunderstood among the defence counsels as some kind of a preliminary trial based on documents. This stage of the criminal proceedings is meant to establish only a grave filter against wrongful and wholly unfounded charges. Going into fine details with the admissibility of evidence and legal

qualification of the charges is for the Main Trial panel, not for the Indictment Stage of the proceedings.

36. The Panel notes that many of the arguments are concerned with the evaluation of the evidence. The purpose of an appeal pursuant to Articles 249 and 250 of the CPC is not to invite the Court of Appeals to make a full assessment of the evidence. The task for the Panel is to be satisfied as to the establishment of a well-grounded suspicion, as required by law, and whether the case should proceed to trial or not. Should the case proceed to trial, the complete evaluation of the evidence and determination of the factual situation is the task of the trial Panel. The Panel concludes, therefore, that it is not necessary to conduct such an assessment in order to establish that there is a well-grounded suspicion.

The law is clear in that the defence may file Objections to Evidence only on the grounds listed in Article 249 paragraph 1 of the CPC. None of the defence counsel has specifically claimed any of these grounds. This is a different issue from witness credibility and the determination of the value of all of the evidence in relation to the outcome of the case.

37. The Panel also notes that there is very little raised in the appeals which were not raised in the Objections to Evidence and Request to Dismiss the Indictment that were submitted to the Presiding Trial Judge. The Panel finds that the impugned Ruling is well reasoned and answers all of the submissions. That said, defence counsels for the defendants **NU** and the sisters submit in their appeals that the Presiding Trial Judge did not answer each of the defense allegations and failed to give reasons for rejecting the defences' Objections to the Evidence and Requests for Dismissal of the Indictment. However, no specific examples are given of any of their points which they raised which went unanswered, and the view of the Panel is that the Presiding Trial Judge addressed all relevant arguments and gave very clear reasons for rejecting as unfounded the applications made by all defence counsels.

38. The Prosecutor's choice of the legal qualification of the offences in the Indictment has been variously raised by the defence counsels. Defence counsel Tahir Rrecaj on behalf of the defendant **NU** claims that they are confusing. The Panel notes that the Prosecutor is obliged to detail the legal qualification of the offences in the Indictment. While it is agreed that these are not particularly clear in all parts, they are acceptable at this stage of the proceedings and the acts are sufficiently described and detailed so that the defendants can properly and fully prepare their defences for the main trial phase. Otherwise, the defence counsels can motion the Trial Panel for any issue to be clarified at the beginning of the main trial. Moreover, it is also a duty for the Trial Panel to raise under discussion any question they find relevant for the legal qualification of the charges in order to guarantee a fair trial. The role of the Court of Appeals is not to decide the final legal qualifications, but to ensure that the Indictment is not defective in such a manner it should not proceed to the Main Trial. Finally, in the event of any convictions, it is for the trial Panel, in accordance with Article 241 paragraph 1 item 4 of the CPC to determine the final legal

qualification/s and how the criminal behavior is classified. This obviously includes the determination of how, if at all, the same criminal offences are to be divided into separate counts.

39. Defence counsels for the defendants **NU** and the sisters both submit that the Presiding Trial Judge erroneously decided not to determine which Criminal Code is applicable in this case at this stage of the proceedings, and that this is relevant to the statute of limitation time periods. Otherwise, all appeals submit that the statute of limitations bars Prosecution. The Panel agrees with the Presiding Trial Judge that there is no time-bar on prosecution for any of the offences contained in the Indictment. The Presiding Trial Judge went into considerable detail as to why he reached this conclusion, and the Panel can find no fault with his analysis of the issue or his reasoning.

40. The issue of post-Indictment investigation has been variously raised. The Panel has considered the reasoning and conclusions in the Court of Appeals Ruling PN 474/14 dated 26 September 2014, but finds that it is not in agreement. The Panel is, rather, persuaded by the arguments made by the Special Prosecutor in his response to the appeals which addressed the interpretation of the law on this point. In doing so, the Panel also concurs with the reasoning of the Presiding Trial Judge. There is no legal bar on post-Indictment investigations, and the Panel considers that there is no violation of the defendant's rights or the fairness of the proceedings as long as the Prosecution fulfils the obligations laid down in the CPC regarding disclosure to the defence. In conclusion, the Panel does not find post-Indictment investigation to be inconsistent with human rights as guaranteed in the CPC, the Constitution of the Republic of Kosovo, or international conventions.

41. Defence counsel for the defendant **NU** submits that Articles 131 and 132 of the CPC have been violated. The Panel notes the reasoning of the Presiding Trial Judge on this point at paragraphs 38 to 44 of the impugned Ruling, and is in complete agreement with his analysis of the law on this issue, which is very clearly stated. Defence counsel also submits that for the offence of Fraud there must be concrete material damage, which there is not in this case. This point was clearly addressed by the Presiding Trial Judge, who detailed how and where the damage lies. Defence counsel also gives examples of what he considers to be the characteristics of an organized criminal group, and then claims that these are not present in this case. The Panel notes that this interpretation seems to be the personal view of the defence counsel, which is not supported by the definition in the Criminal Code, nor has defence counsel cited any jurisprudence to support his claim.

42. Defence counsels for the sisters claim that the criminal offence of Legalization of False Content must be based on a forged document/s. The Panel agrees with the Presiding Trial Judge that this is not a requirement in accordance with Article 334 of the former CCK.

43. Defence counsel for the defendant **SM** states that the defendant is immune from prosecution by virtue of Article 107 of the Constitution. However, it is clear that this Article only protects

Judges while carrying out their proper judicial function, and is not intended to provide a shield from prosecution for Judges engaged in criminal activity. He also submits that regarding counts 1, 2 and 5, the Prosecutor has not proved the intention of the defendant to obtain material benefits for herself or another, or to cause damage to another. However, it is clear that the Indictment details the Prosecution case, which is that the benefit is to the **H** and **U** family.

44. In summary, the Panel finds that the Indictment does meet the legal requirements in order to proceed to the Main Trial, and satisfies the necessary requirements in order for the defendants to be able to prepare their defence for the Main Trial.

45. The Court of Appeals finds that the Presiding Trial Judge has made a correct assessment and given sufficient reasons for finding that the evidence amounts to a well-grounded suspicion. As already noted, a detailed assessment is not necessary or possible at this stage of the proceedings, and is for the Trial Panel of the main trial to conduct.

46. Regarding the request by the sisters for lifting the ban on withdrawal of money from bank accounts, the Panel considers this to be a request for the termination of the long term attachment order made by the Pre Trial Judge on 18 April 2013. This decision was affirmed on appeal by a Ruling of the Court of Appeals PN 356/13 dated 17 May 2013, and therefore it is a final decision. As such, it cannot be the subject of a further appeal and the request is dismissed as impermissible. Any issues or requests regarding the long term attachment order should be addressed to the Basic Court.

47. The Panel took this decision pursuant to Article 413 of the CPC solely on the basis of the appeals and motions filed. The issues under appeal are clear, making a session of the Panel unnecessary in accordance with Article 413 Paragraph (2) of the CPC.

Done in English, an authorized language.

Recording Officer

Presiding Judge

Kerry Kirsten Moyes
EULEX Legal Officer

Timo Vuojolahti
EULEX Judge

