

# SUPREME COURT of KOSOVO

Supreme Court of Kosovo  
Ap.-Kz. No. 467/2011  
Prishtinë/Priština  
03 April 2012

## IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo held a panel session pursuant to Article 26 paragraph (1) of the Kosovo Code of Criminal Procedure (KCCP), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (LoJ) on 24 November 2009 in the Supreme Court building in a panel composed of EULEX Judge Gerrit-Marc Sprenger as Presiding Judge and Kosovo National Judges Marije Ademi and Salih Toplica as panel members

And with Ms. Mia Mezini as Court Recorder,

In the presence of the

State Prosecutor Ms. Laura Pula, Office of the State Prosecutor of Kosovo (OSPK)

Defense Counsel Av. D. R. for the defendant A. A.  
Defense Counsel Av. R. C. for the defendant V. V.

In the criminal case number AP.-KZ. No. 467/2011 against the defendants:

A. A., born on [REDACTED] in Prishtinë/Priština, Kosovo Albanian, residing in Prishtinë/Priština, [REDACTED] fathers name [REDACTED] mother's maiden name [REDACTED] la, married, father of four children, [REDACTED] medium financial state, no criminal records;

V. FERIZI, born on 10 May 1968 in D. Kosovo Albanian, residing in [REDACTED], fathers name [REDACTED] mother's maiden name [REDACTED], unmarried, accomplished University studies on English language, procurement expert, of average financial state, no other procedure ongoing;

In accordance to the Verdict of the first instance District Court of Prishtinë/Priština in the case no. P. Nr. 44/09 dated 07 July 2011 and registered with the Registry of the District Court of Prishtinë/Priština on the same day, the defendants were found not guilty of the following criminal offenses:

**A [REDACTED]**

Of committing the criminal offence of **Abuse of Official Duty or Authority**, pursuant to Article 339 paragraph 1 of the Criminal Code of Kosovo (CCK) in two cases (according to Counts 2 and 3 of the confirmed Indictment);

**V [REDACTED]**

Of committing the criminal offence of **Abuse of Official Duty or Authority**, pursuant to Article 339 paragraph 2 in conjunction with paragraph 1 of the CCK (according to Counts 2 of the confirmed Indictment).

In the course of the final speech the Public Prosecutor withdrew the Indictment regarding Counts 4 and 5 on **Abuse of Official Duty or Authority**, pursuant to Article 339 paragraph 1 of the CCK against the defendant **A [REDACTED] A [REDACTED]**, which the latter was accepted by the District Court with the result that both Counts were rejected as per Article 389 paragraph 1 of the CCK.

**The District Public Prosecutor of Prishtinë/Priština** filed an appeal dated 29 August 2011 against the Verdict of the District Court, asserting erroneous and incomplete establishment of the factual situation and violations of the Criminal Law. It was proposed to both amend the 1st Instance Judgment and replace the acquittals of both defendants by a guilty find as intended by the Indictment, thus also imposing proper punishments, or to annul the challenged Judgment and send the case back to the 1<sup>st</sup> Instance for re-trial.

**The Defense Counsels of both defendants** responded to the appeal of the District Public Prosecutor of Prishtinë/Priština, the Defense of **A [REDACTED] A [REDACTED]** dated 08 September 2011 and the Defense of **V [REDACTED] F [REDACTED]** dated 12 September 2011. Both Defense Counsels supported that the establishment of facts as carried out by the District Court was correct and proposed to reject the appeal of the Public Prosecutor as ungrounded.

**The OSPK**, with a response dated 16 December 2011 fully supported the appeals filed by the District Public Prosecutor of Prishtinë/Priština and proposed to approve this appeal.

Based on the written Verdict in case P. Nr. 44/09 of the District Court of Prishtinë/Priština dated 16 December 2011 (filed with the Registry of that Court on the same day), the submitted written appeal of the District Public Prosecutor of Prishtinë/Priština, the responses to that appeal as filed by the Defense Counsels of the two defendants, the opinion of the OSPK, the relevant file records and the oral submissions of the parties during the hearing session on 03 April 2012, together with an analysis of the applicable law, the Supreme Court of Kosovo, following the deliberations on 03 April 2012, hereby issues the following:

## JUDGMENT

The appeal of the District Public Prosecutor is **REJECTED AS UNGROUNDED**.  
The Judgment P. No. 44/2009 of the District Court Prishtinë/Priština, dated 7 July 2011 is **AFFIRMED**.

## REASONING

### PROCEDURAL HISTORY

On 23 January 2009 the District Public Prosecutor of Prishtinë/Priština filed an Indictment against the defendants A [redacted] A [redacted] and V [redacted] F [redacted], charging A [redacted] A [redacted] with multiple criminal offenses of alleged **Abuse of Official Duty or Authority**, pursuant to Article 339 paragraph 3 in conjunction with paragraph 1 and paragraph 1 of the CCK during the time period from 2006 until 2008, and charging V [redacted] F [redacted] with multiple criminal offenses of alleged **Abuse of Official Duty or Authority**, pursuant to Article 339 paragraph 2 in conjunction with paragraph 1 and paragraph 1 of the CCK during the time period from 2004 until 2006. The allegations of the Indictment are separate and independent for each defendant and the two are not alleged of having acted as co-perpetrators.

According to the allegations of the Indictment, defendant A [redacted] A [redacted] was an official person employed by the International Airport Prishtinë/Priština, who in this capacity and with the intent to obtain unlawful material benefits for himself or for others has abused his official duty or authority regarding five separate acts.

Count 1 of the Indictment alleged that A [redacted] A [redacted] exceeded his official duty or authority in connection with the paving and maintenance of an airport runway, thereby mismanaging financial resources of the Airport.

According to Counts 2, 3, 4 and 5 of the Indictment, A [redacted] A [redacted] allegedly has abused his official duty or authority in connection with the hiring and promotion of several airport employees, in particular [redacted] (Count 2), [redacted] (Count 3), [redacted] (Count 4) and [redacted] (Count 5). B. 2.

According to the allegations of the Indictment, defendant V [redacted] F [redacted] was an official person employed by the International Airport Prishtinë/Priština, who in this capacity and with the intent to obtain unlawful material benefits for herself or for others has abused her official duty or authority regarding two separate acts.

According to Count 1 V. F. allegedly has exceeded her professional authority in connection with a tender for the construction of an airport fence. In particular the defendant had failed to award the contract to the lowest bidder, thereby damaging the airport in the amount of 31.229,00 €.

According to Count 2 of the Indictment the defendant V. F. has failed to exercise her professional duty in connection with the payment of fuel deliveries to the airport, thereby damaging the airport in the amount of approximately 3.145,00 €.

A Confirmation Hearing was conducted on 13 October 2010, which resulted in the dismissal of Count 1 of the Indictment against the defendant A. A. and in the dismissal of all Counts of the Indictment against the defendant V. F., whilst the Indictment was confirmed in its remaining parts.

Upon timely appeal of the Public Prosecutor of Prishtinë/Priština with respect to the dismissal of the charges against the defendant V. F., a three-judge panel of the District Court of Prishtinë/Priština ruled on 22 December 2010 that Count 2 of the Indictment was to be reinstated, whilst the Prosecutors appeal was rejected as to the dismissal of Count 1 of the Indictment against the defendant V. F.

The Main Trial commenced through three sessions on 08 June, 05 and 06 July 2011, when the latter the challenged Judgment was orally announced.

The District Court heard the defendants A. A. and V. F. as well as the witnesses [redacted] and [redacted].  
F. T., X. P., A. V., J. S. and S. D.

Moreover, the following evidence was admitted and assessed by the trial panel: Report of the Financial Expert F. T., dated 04 November 2008; Employment Contract of M. K., dated 08 May 2007; Employment Contract of [redacted], dated 08 January 2007; Annex Agreement for the employee [redacted], dated 10 January 2007; Regulation on Staff of the Airport, dated 28 June 2007; Staff Policies for the Prishtinë/Priština International Airport J.S.C., dated June 2005; Airport Board of Director's Matrix of Authorizations, dated 06 June 2007; Memorandum from [redacted], dated 11 January 2007; Prishtinë/Priština International Airport Organizational Structure Chart, dated 10 October 2007; Salary Grades and Guidelines for Prishtinë/Priština International Airport J.S.C.; Memorandum for A. A., dated 02 November 2007; Employment Contract for A. A., dated 31 January 2007; Memorandum regarding ECAA Assessment Report, dated 23 January 2008; Summary of Operational Budget of Prishtinë/Priština International Airport J.S.C. for 2008; By-Laws of the Prishtinë/Priština International Airport J.S.C.; various invoices for the delivery of fuel from the Petrol Company to the airport and authorizations for the payment thereof; document protocol number 022, dated 09 April 2008, prepared by [redacted]; salary documents for [redacted] and [redacted]; announcement of vacancies published by the

M. K., N. K., F. S., N. S., B. M. X. P.

newspaper Koha Ditore; minutes of the interview panel for the position of Senior Administrative Officer; Employment Contract for [REDACTED], dated 09 January 2008 and announcement for his position published in Koha Ditore. ✓. G.

On 06 July 2011, after the conclusion of the Main Trial and prior to the final arguments, the Prosecutor amended the Indictment and in particular withdrew Counts 4 and 5 of the Indictment against the defendant A [REDACTED] A [REDACTED] being related to the employment and promotion of [REDACTED] and [REDACTED].

Based on its findings, on 07 July 2011, the District Court announced the verdict and found both defendants not guilty as to the remaining Counts of the Indictment as indicated before. b.2. ✓. S.

**The District Public Prosecutor of Prishtinë/Priština** filed an appeal dated 29 August 2011 against the Verdict of the District Court, asserting and proposing as indicated before.

**The Defense Counsels of both defendants** responded to the appeal of the District Public Prosecutor of Prishtinë/Priština, the Defense of [REDACTED] dated 08 September 2011 and the Defense of [REDACTED] dated 12 September 2011, both proposing to reject the appeal of the Public Prosecutor as ungrounded. A. A. ✓. F.

**The OSPK**, with a response dated 16 December 2011 fully supported the appeals as filed by the District Public Prosecutor of Prishtinë/Priština and proposed to approve this appeal.

On 03 April 2012, the Supreme Court of Kosovo held a session pursuant to Article 410 of the KCCP.

The representative of the OSPK and the Defense referred to their respective proposals as filed aforehand.

## **FINDINGS OF THE COURT**

### **A. Erroneous and incomplete determination of the factual situation**

The District Public Prosecutor of Prishtinë/Priština in his appeal has challenged the 1<sup>st</sup> Instance Judgment regarding the defendant A [REDACTED] A [REDACTED], because of alleged erroneous and incomplete determination of the facts. The appeal in particular points out that *the "Court findings that there is no evidence to prove the situation of facts regarding the intent to obtain unlawful material benefit by the accused in question are correct [but that] this situation does not mean that there was no abuse of official position or excess of official authorizations in the actions of the accused..."*. The *"concrete figure of this criminal offence [...as to the ...] intent to obtain unlawful material benefit for himself or*

another person [...] consists of another essential-concrete element namely causing damage to another person [...]"

As to the defendant V. F., the District Public Prosecutor has pointed out his opinion that "there was evidence which proves abuse of official position by way of not fulfilling her official duties [...since...] some fuel deliveries from the supplier [...] clearly show a bigger quantity of fuel than the real amount of fuel received [...]". Therefore, it is considered that the defendant has abused her official position "by way of not fulfilling her work obligations [...]"

The Supreme Court of Kosovo finds that the allegations of the Prosecutor are without merits and therefore unfounded.

Article 339 paragraph 1 of the CCK clearly stipulates the requirements of the respective criminal offense as:

Objective criteria:

1. the perpetrator having the quality of an "official person";
2. who "abuses his or her official duties, exceeds the limits of his or her authorizations [...]"

Subjective criteria:

3. and – having the regular intent regarding all objective elements of the criminal offence as described in Article 339 of the CCK
4. acts "with the (special) intent to obtain an unlawful material benefit for himself, herself or another person or business organization or to cause any damage to another person or business organization"

in order to do so.

As to the objective criteria of Article 339 paragraph 1 of the CCK, the Supreme Court has no doubt that the defendant A. A. as Managing Director of the airport had the quality of an "official person" as required by the Law. However, it may be left open, whether or not he knowingly has exceeded or "abused" his competences, when upgrading and promoting several staff members – obviously on a temporary basis as established already by the District Court.

Reference is made to what already was elaborated in the course of the Confirmation Ruling regarding the required intent as being a "dolus specialis" and to what already the District Court has pointed out in this regard.

The crucial question is whether or not the defendant, with the intent to fulfil the objective criteria as required by Article 339 paragraph 1 of the CCK, in addition has acted "with the intent to obtain unlawful material benefit". As already the Confirmation Judge has pointed out, the requirement refers to a "dolus specialis" in addition to the regular intent as required for each criminal offense that is not based upon negligence only. The element

refers to the subjective requirements of the provision, which cannot be substituted by objective criteria, such as the abuse of official position or excess of official authorizations in the actions of the accused.

Also the other "*essential-concrete element namely causing damage to another person*" as stressed by the Prosecutor needs to be considered in the lights of the required intent, because the requirement of the Law is – as an alternative to the gain of material benefits – the intent to cause damage to another person etc. The latter again was not at all proved by the Prosecutor.

The District Court has already pointed out that in all relevant cases there was sufficient reason to – temporarily – pay additional salary to the respective employees, due to the specific challenges they were facing at the questionable times. Since also the "promotion" decisions of the defendant made reference just to acting positions, this needs to be interpreted to be a just temporary decision until a proper job announcement was publicly made.

Reference is also made to the case of R [REDACTED] et al., where it was decided and repeatedly referred to in many other cases afterwards that the assessments of the 1<sup>st</sup> Instance Court will not be replaced by the Supreme Court, if they are not considered as being 'wholly erroneous'.

As to the defendant V [REDACTED] F [REDACTED] reference is made to what the 1<sup>st</sup> Instance Court has already established as well. Also here, the element of "*intent to obtain an unlawful material benefit*" was not proved. As also established by the District Court, the defendant, approving the fuel bills submitted to her has acted in order to keep the airport running, thus relying upon the correctness of the submitted fuel bills. It was also stated by the financial expert Mr. S [REDACTED] T [REDACTED] that "the procurement office did its duty" and that "the procurement office does not have any responsibility whatsoever; it lies with the financial office" (*challenged Judgment, p.8 of the English version*).

#### **B. Substantial violation of the Criminal Law**

According to the Prosecutor, the consequence of the alleged erroneous determination of the factual state also the Criminal Law is violated, since the defendants have not been found guilty.

Reference is made to what was established before under point A. of this judgment. As a consequence, no violation of the Criminal Law can be established as well.

In addition, reference is made to Articles 90 and 91 of the CCK and the question, whether or not the cases, at least as the respective alleged criminal offences have been finalized before the year 2007, have crossed the deadlines of statutory limitation pursuant to Article 90 paragraph 1 items 5 (for the charges against [REDACTED] according to Count

v. f.

2 of the Indictment) and 6 (for the charges against A [REDACTED] A [REDACTED] according to Counts 2 and 3 of the Indictment) of the CCK. Irrespective from the question if the statutory limitation was not interrupted by the activities of the Prosecutor in accordance to Article 91 paragraph 3 of the CCK, for the charges against A [REDACTED] A [REDACTED] according to Counts 2 and 3 of the Indictment the limit for the absolute bar on criminal prosecution according to Article 91 paragraph 6 has passed. For the charge against V [REDACTED] F [REDACTED] the absolute bar on criminal prosecution would only occur at the end of the year 2012.

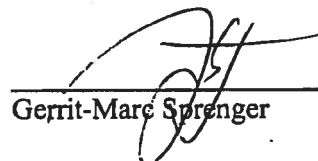
However, the question of statutory limitation does not have to be decided in the case at hand, considering that the acquittals of the District Court are affirmed.

For the foregoing reasons the Supreme Court decided as in the enacting clause.

**Panel Member**

  
Salih Toplica

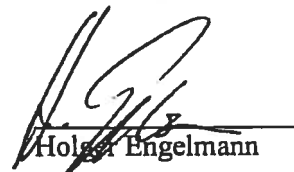
**Presiding Judge**

  
Gerrit-Marc Sprenger

**Panel Member**

  
Marije Ademi

**Recording Clerk**

  
Holger Engelmann

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