

**BASIC COURT OF PEJË/PEĆ**

**P.nr. 38/12**

**Dt. 23 January 2013**

The judgments published may not be final and may be subject to an appeal according to the applicable law.

**IN THE NAME OF THE PEOPLE**

The Basic Court of Pejë/Peć, in the trial panel composed of the EULEX Judge Dariusz Sielicki as Presiding Judge, the EULEX Judge Malcolm Simmons and the Kosovo Judge Shaban Shala as panel members, assisted by the Recording Officer Nexhmije Mezini, in the criminal case against the accused:

1. **B.N.** son of father xxx, born on xxx in xxx, residing in xxx, resident of the Republic of Kosovo, in detention since the date of his arrest on 10 June 2011 until 01 June 2012 when he was released on bail,
2. **N.B.** son of father xxx, born on xxx in xxx, residing in xxx, resident of the Republic of Kosovo, in detention since the date of his arrest on 10 June 2011 until 01 June 2012 when he was released on bail,
3. **B.B.** son of father xxx, born on xxx in the village of xxx residing in xxx resident of the Republic of Kosovo, in detention since the date of his arrest on

10 June 2011 until 01 June 2012 when he was released on bail,

4. **A.B.** son of father xxx, born on xxx in xxx, resident of the Republic of Kosovo, in detention since the date of his arrest on 13 June 2011 until 29 May 2012 when he was released into house detention which was terminated on 20 November 2012,
5. **A.By.** son of father xxx, born on xxx in xxx ,residing in xxx, national of the Republic of Kosovo, in detention since the date of his arrest on 11 June 2011 until 29 May 2012 when he was released into house detention which was terminated on 20 November 2012,
6. **M.B.** son of father xxx, born on xxx in xxx, resident of the Republic of Kosovo, in detention since the date of his arrest on 11 June 2011 until 31 May 2012 when he was released on bail,
7. **S.B.** son of father xxx, born on xxx in xxx, resident of the Republic of Kosovo, in detention since the date of his arrest on 10 June 2011 until 29 May 2012 when he was released into house detention which was terminated on 20 November 2012,
8. **A.P.** son of xxx, born on xxx in xxxx, residing in xxx, resident of the Republic of Kosovo
9. **Z.Z.** aka "Z.", son of father xxx, born on xxx in xxx, resident of the Republic of Kosovo

charged with the Indictment of the Special Prosecution Office of Kosovo (SPRK) PPS.no.11/11, dated 28 October 2011 with the following act:

that since an undetermined date until 10 June 2011, acting in a structured group, with the intent to obtain material benefit and by endangering the lives and safety of migrants, they have smuggled citizens of the republic of Kosovo, in such a way that they found migrants interested to go to various European countries, they agreed a price the migrants had to pay, the price being in the amount of 1500 Euro up to 3000 Euro per person and then the same migrants were sent illegally, through various people in Serbia, some of them through Serbia and Hungary and some of them through Montenegro, Croatia and Slovenia, to various European countries, amongst these migrants were E.I., B.Th., S.B., F.F., I.V., A.K., A.M., I.H., I.P., L.C., B.A., A.Th., P.V., Z.H., S.V., B.V., M. H. as well as other unidentified migrants,

which said actions were classified as the following criminal offences:

- Organized Crime, under Article 274 paragraph 2 in conjunction with Article 23 of the Criminal Code of Kosovo (CCK), because they have actively participated in the criminal activities or other activities of an organized criminal group, knowing that their participation will contribute to the commission of serious crimes by the organized criminal group;

- Smuggling of Migrants, under Article 138 paragraph 6, in conjunction with Article 23 of the CCK, since the criminal offence was committed in such a way that it endangered the lives and safety of the migrants,

having held the main trial hearings in public on 10, 23, 24, 29 and 31 May 2012, 24 and 25 July 2012, 6, 8, 14, 15 and 20 November 2012 and on 22 and 23 January 2013 in the presence of:

- the accused B.N. and his defense counsel G.K.,
  - the accused N.B. and his defense counsel L.H.,
  - the accused B.B. and his defense counsel Xh.R.,
  - the accused A.B. and his defense counsel F.K.,
  - the accused A.By. and his defense counsel I.H.,
  - the accused M.B. and his defense counsel B.T.,
  - the accused S.B. and his defense counsel Mr. M.H.
  - the accused A.P. and his defense counsels B.E. and S.Z.
  - the accused Z.Z. and his defense counsel Mr. E.A.,
- after the trial panel deliberation and voting held on 23 January 2013, based on Article 391 Paragraph 1 of the Kosovo Code of Criminal Procedure of 6 November 2008 (KCCP);

on 23 January 2013, pursuant to Article 392 Paragraph 1 of the KCCP, pronounces in public, the following

## V E R D I C T

I. **B.N.** is guilty because:

between 01 June 2011 and 10 June 2011, in the territory of the Republic of Kosovo, with the intention of obtaining for himself the material benefit of Euro 1800 he smuggled B.Th., a national of the Republic of Kosovo, who was not a permanent resident or a citizen of any Schengen Area state, from the territory of the Republic of Kosovo to the territory of the Republic of Austria by arranging for him transportation by bus and facilitating for him in an undetermined way his entry into the Schengen Area without complying with the necessary requirements for legal entry through the border between Serbia and the Schengen Area,

by which B.N. committed the criminal offence of Smuggling of Migrants pursuant to Article 170 Paragraph 1 of the Criminal Code of the Republic of Kosovo of 20 April 2012 (CCRK);

therefore, he is hereby

**sentenced**

pursuant to Article 170 Paragraph 1 of the CCRK to 2 (two) years imprisonment and a fine in the amount of Euro 3000 (three thousand).

II. **N.B.** is guilty because:

1. between 1 January 2011 and April 2011, in the territory of the Republic of Kosovo, with the intention of obtaining for himself the material benefit of Euro 5400 smuggled P.V., B.V. and Z.H., nationals of the Republic of Kosovo, who were not permanent residents or citizens of any Schengen Area state from the territory of the Republic of Kosovo to the territory of Hungary by arranging for them transportation by bus to the Republic of Serbia from where they went on foot across the border with Hungary without complying with the necessary requirements for legal entry into the Schengen Area;
2. in April 2011, in the territory of the Republic of Kosovo, with the intention of obtaining for himself the material benefit of Euro 2200 he smuggled S.V., a national of the Republic of Kosovo, who was not a permanent resident or a citizen of any Schengen Area state, from the territory of the Republic of Kosovo to the territory of the Republic of Austria by arranging for him transportation by bus to Serbia from where he went on foot through the border with Hungary without complying with the necessary requirements for legal entry into the Schengen Area and then was transported by truck to the territory of the Republic of Austria;

3. on 10 June 2011, in the territory of the Republic of Kosovo, with the intention of obtaining for himself the material benefit of Euro 4000 he attempted to smuggle S.B. and F.F., Republic of Kosovo nationals, who were not permanent residents or citizens of any Schengen Area state, from the territory of the Republic of Kosovo to the territory of the Republic of Austria by providing S.B. with genuine passport No. xxx of H.K., issued by the Federal Republic of Yugoslavia, altered by an unidentified person by replacing the photograph of the legitimate holder with S.B.'s photograph and by providing F.F. with genuine passport No. xxx of B.Th., issued by the Federal Republic of Yugoslavia, altered by M.B. by replacing the photograph of the legitimate holder with F.F.'s photograph, and arranging for S.B. and F.F.'s transportation by bus to the Republic of Serbia from where they were supposed to go on foot through the border with Hungary without complying with the necessary requirements for legal entry into the Schengen Area and then to be transported to the territory of the Republic of Austria which was not accomplished because S.B. and F.F. were stopped by the Kosovo Police while crossing the boundary between the Republic of Kosovo and the Republic of Serbia,

by which N.B. committed in continuation as defined by Article 81 of the CCRK:

- the criminal offenses of Smuggling of Migrants contrary to Article 170 Paragraph 1 of the CCRK in relation to the criminal offences described at II.1 and II.2;
- the criminal offense of Attempted Smuggling of Migrants pursuant to Article 170 Paragraph 1 of the CCRK and Article 28 Paragraphs 1 and 2 of the CCRK in relation to the criminal offence described at II.3,

therefore, he is hereby

**sentenced**

pursuant to Article 170 Paragraph 1 and Article 81 Paragraph 1 of the CCRK, for the criminal offences described at II.1, II.2, and II.3 to 4 (four) years imprisonment and a fine in the amount of Euro 10 000 (ten thousand).

III. **B.B.** is guilty because:

1. In April 2011, in the territory of the Republic of Kosovo, with the intention of obtaining for himself the material benefit of Euro 1800, in co-perpetration with A.B., he smuggled A.M., a national of the Republic of Kosovo, who was not a permanent resident or a citizen of any Schengen Area state from the territory of the Republic of Kosovo to the territory of the Republic of Austria by arranging for him transportation by bus to the Republic of Serbia from where he went on foot across the border with Hungary without complying with the necessary requirements for

legal entry into the Schengen Area,

2. In March 2011, in the territory of the Republic of Kosovo, with the intention of obtaining for himself the material benefit of Euro 1650 and with the assistance of Z.Z., who paid him the above mentioned amount of money, smuggled in an undetermined manner E.I., a national of the Republic of Kosovo, who was not a permanent resident or a citizen of the Swiss Confederation from the territory of the Republic of Kosovo to the territory of the Swiss Confederation without complying with the necessary requirements for legal entry into this country,

by which B.B. committed in continuation as defined by Article 81 of the CCRK the criminal offenses of:

- Co-perpetration in Smuggling of Migrants pursuant to Article 170 Paragraph 1 and Article 31 of the CCRK in relation to criminal offence described at III.1;
- Smuggling of Migrants pursuant to Article 170 Paragraph 1 of the CCRK in relation to criminal offence described at III.2;

therefore, he is hereby

**sentenced**

pursuant to Article 170 Paragraph 1 and Article 81 Paragraph 1 of the CCRP, for the criminal offences described at III.1 and III.2 to 3 (three) years of

imprisonment and a fine in the amount of Euro 4000 (four thousand)

**IV. A.B.is guilty because:**

1. In April 2011, in the territory of the Republic of Kosovo, with the intention of obtaining for himself the material benefit of Euro 1800, in co-perpetration with B.B., he smuggled A.M., a national of the Republic of Kosovo, who was not a permanent resident or a citizen of any Schengen Area state, from the territory of the Republic of Kosovo to the territory of the Republic of Austria by arranging for him transportation by bus to Serbia from where he went on foot through the border with Hungary without complying with the necessary requirements for legal entry into Schengen Area,

by which A.B .committed the criminal offence of:

- Co-perpetration in Smuggling of Migrants pursuant to Article 170 Paragraph 1 and Article 31 of the CCRK.
2. In September 2010, in the territory of the Republic of Kosovo, with the intention of obtaining for himself the material benefit of Euro 1100 provided M.H., a national of the Republic of Kosovo, who was not a citizen or resident of Switzerland, with a fraudulent travel document knowing that M.H. intended to use it for entry into Turkey and subsequently into Switzerland without the necessary requirements for legal entry into these states, whereas the said M.H. used the document for that purpose,

by which A.B. committed the criminal offence of:

- Smuggling of Migrants by Providing Fraudulent Travel Documents pursuant to Article 170 Paragraph 2 of the CCRK.

therefore, he is hereby

**sentenced**

pursuant to Article 170 Paragraph 1 of the CCRK, for the criminal offence described under IV.1 to 2 (two) years of imprisonment and a fine in the amount of Euro 3000 (three thousand);

pursuant to Article 170 Paragraph 2 of the CCRK, for the criminal offence described under IV.2 to 1 (one) year of imprisonment and a fine in the amount of Euro 2000 (two thousand);

and pursuant to Article 80 Paragraph 2 subparagraph 2.2 and 2.4 of the CCRK for both of the above offences A.B. is hereby sentenced to an aggregate punishment of 2 (two) years and 6 (six) months imprisonment, and an aggregate punishment of a fine in the amount of Euro 4000 (four thousand).

V. **A.By.** is guilty because:

1. in September 2010, in the territory of the Republic of Kosovo, with the intention of obtaining for himself the material benefit of Euro 2200, and with the assistance of A.P., who had put him in contact with

I.P. and who paid him the above mentioned amount of money, he smuggled I.P., a national of the Republic of Kosovo, who was not a permanent resident or a citizen of any Schengen Area state from the territory of the Republic of Kosovo to the territory of the Republic of Serbia and then to the territory of Austria without complying with the necessary requirements for legal entry into the Schengen Area,

2. between 15 March 2011 and 15 April 2011, in the territory of the Republic of Kosovo, with the intention of obtaining for himself the material benefit of Euro 2200 and with the assistance of A.P., who had put him in contact with L.C., a national of the Republic of Kosovo, who was not a permanent resident or a citizen of any Schengen Area state he smuggled L.C. from the territory of the Republic of Kosovo to the territory of the Republic of Serbia from where he went on foot to Hungary and then in an unknown manner to the territory of Austria without complying with the necessary requirements for legal entry into the Schengen Area,

by which A.By. committed in continuation as defined by Article 81 of the CCRK:

- the criminal offenses of Smuggling of Migrants pursuant to Article 170 Paragraph 1 of the CCRK;

therefore, he is hereby

**sentenced**

pursuant to Article 170 Paragraph 1 and Article 81 Paragraph 1 of the CCRK, for the criminal offences described at V.1 and V.2 to 3 (three) years of imprisonment and a fine in the amount of Euro 4000 (four thousand).

VI. **M.B.** is guilty:

because between 1 May 2011 and 10 June 2011, in the territory of the Republic of Kosovo, he altered a public document, namely a genuine passport xxx of B.Th., issued by the Federal Republic of Yugoslavia, by replacing with the use of a pliers the photograph of the legitimate holder with a photograph of F.F., with the intent that this document be used as genuine for crossing the boundary of Kosovo;

by which M.B. committed the criminal offence of Falsifying Documents pursuant to Article 332 Paragraph 3 of the CCK;

therefore, he is hereby

**sentenced**

pursuant to Article 332 Paragraph 3 of the CCK to 1 (one) years of imprisonment and pursuant to Article 54 Paragraph 1 and 2 subparagraph 1 of the CCK to a fine in the amount of Euro 1000 (one thousand).

VII. **S.B.** is guilty because:

1. In 2011, in the territory of the Republic of Kosovo, with the intention of obtaining for himself the material benefit of Euro 3600 smuggled B.A. and

another unidentified male, nationals of the Republic of Kosovo, who were not permanent residents or citizens of any Schengen Area state, from the territory of the Republic of Kosovo to the territory of the Schengen Area by arranging for them transportation by bus to the Republic of Serbia from where they went on foot through the border with Hungary without complying with the necessary requirements for legal entry into the Schengen Area,

2. between 1 January 2011 and 9 June 2011, in the territory of the Republic of Kosovo, with the intention of obtaining for himself the material benefit of Euro 1600 smuggled an unidentified male named F. from xxx village, who was a national of the Republic of Kosovo and was not a permanent resident or citizen of any Schengen Area state, from the territory of the Republic of Kosovo to the territory of the Schengen Area, by arranging for him transportation by bus to the Republic of Serbia from where he went on foot through the border with Hungary without complying with the necessary requirements for legal entry into the Schengen Area,

by which S.B. committed in continuation as defined by Article 81 of the CCRK:

- the criminal offenses of Smuggling of Migrants pursuant to Article 170 Paragraph 1 of the CCRK;

therefore, he is hereby

**sentenced**

pursuant to Article 170 Paragraph 1, Article 75 Paragraph 1 subparagraph 1.2 and Article 76 Paragraph 1 subparagraph 1.4, and Article 81 Paragraph 1 for the criminal offences described at VII.1 and VII.2 to 1(one) year and 6 (six) months of imprisonment and a fine in the amount of Euro 500(five hundred).

VIII. **A.P.** is guilty because:

1. in September 2010, in the territory of the Republic of Kosovo, he gave assistance to A.By. who acted with the intention to obtain for himself a material benefit of Euro 2200 by putting A.By. in contact with I.P., a national of the Republic of Kosovo, who was not a permanent resident or a citizen of any Schengen Area country and by promising A.P. to pay and subsequently paying him an amount of Euro 2200 for having smuggled I.P. from the territory of the Republic of Kosovo to the territory of the Republic of Serbia and from there to the territory of the Republic of Austria without complying with the necessary requirements for legal entry into the Schengen Area.
  
2. between 15 March 2011 and 15 April 2011, in the territory of the Republic of Kosovo, he gave assistance to A.By., who acted with the intention to obtain for himself a material benefit of Euro 2200, by putting A.By. in contact with L.C., a national of the Republic of Kosovo, who intended to emigrate illegally from the Republic of Kosovo, whereas A.By. smuggled L.C. who was not a permanent resident or a citizen of any Schengen Area country from the territory of the

Republic of Kosovo to the territory of the Republic of Austria by arranging for him transportation by bus from the Republic of Kosovo to the territory of the Republic of Serbia from where he went on foot to Hungary and then in an unknown manner to the territory of the Republic of Austria without complying with the necessary requirements for legal entry into the Schengen Area.

by which A.P. committed in continuation as defined by Article 81 of the CCRK:

- the criminal offense of Assistance to Smuggling of Migrants pursuant to Article 170 Paragraph 1 and Article 33 Paragraph 2 of the CCRK;

therefore, he is hereby

**sentenced**

pursuant to Article 170 Paragraph 1, Article 75 Paragraph 1 subparagraph 1.2 and Article 76 Paragraph 1 subparagraph 1.4, Article 33 Paragraph 1, and Article 81 Paragraph 1 of the CCRK for the criminal offences described at VIII.1 and VIII.2 to 10 (ten) months of imprisonment and a fine in the amount of Euro 500 (five hundred);

pursuant to Article 51 Paragraph 2 and Article 52 Paragraph 2 of the CCRK the punishment of imprisonment imposed against A.P. shall not be executed if A.P. does not commit another criminal offense for the verification time of 2 (two) years.

IX. **Z.Z.** is guilty because:

in March 2011, in the territory of the Republic of Kosovo, he gave assistance to B.B., who acted with the intention to obtain for himself the material benefit of Euro 1650, by promising to pay him and subsequently paying him an amount of Euro 1650 for having smuggled E.I., a national of the Republic of Kosovo who was not a permanent resident or a citizen of the Swiss Confederation, from the territory of the Republic of Kosovo to the territory of the Swiss Confederation without complying with the necessary requirements for legal entry into that country.

by which Z.Z. committed the criminal offence of Assistance with Smuggling of Migrants pursuant to Article 170 Paragraph 1 and Article 33 of the CCRK;

therefore, he is hereby

**sentenced**

pursuant to Article 170 Paragraph 1, Article 75 Paragraph 1 subparagraph 1 and Article 76 Paragraph 1 subparagraph 1.4, and Article 81 Paragraph 1 of the CCRK for the criminal offence described at IX above to 6 (six) months of imprisonment, and a fine in the amount of Euro 300 (three hundred);

pursuant to Article 51 Paragraph 2 and Article 52 Paragraph 2 of the CCRK the punishment of imprisonment imposed against Z.Z. shall not be executed if Z.Z. does not commit

another criminal offense for the verification time of 1 (one) year.

- X. Pursuant to Article 46 Paragraph 2 of the CCRK the deadline for payment of the fines by the accused **B.N., N.B., B.B., A.B., A.By., S.B., A.P.** and **Z.Z.** **is hereby determined as 3 (three) months.**
- XI. Pursuant to Article 39 Paragraph 2 of the CCK the deadline for payment of the fine by the accused **M.B.** **is hereby determined as 3 (three) months.**
- XII. The accused **B.N., N.B., B.B., A.B., A.By., M.B., S.B., A.P.** and **Z.Z.**

are hereby

**acquitted**

of having committed Organized Crime, under Article 274 paragraph 2 in conjunction with Article 23 of the Criminal Code of Kosovo (CCK), because they have not actively participated in the criminal activities or other activities of an organized criminal group, knowing that their participation will contribute to the commission of serious crimes by the organized criminal group.

- XIII. Pursuant to 83 Paragraph 1 of the CCRK the periods of deprivation of liberty of the defendants are to be credited against the punishment of imprisonment imposed on them, respectively:

- for B.N. from 10 June 2011 until 01 June 2012,

- for N.B. from 10 June 2011 until 01 June 2012,
- for B.B. from 10 June 2011 until 01 June 2012,
- for A.B .from 13 June 2011 until 20 November 2012,
- for A.By. from 11 June 2011 until 20 November 2012,
- for S.B. from 10 June 2011 until 20 November 2012.

XIV. Pursuant to Article 83 Paragraph 1 of the CCK the period of deprivation of liberty of the defendant M.B. from 11 June 2011 to 31 May 2012 is to be credited against the punishment imposed on him.

XV. Pursuant to Article 54 Paragraphs 1 and 3 subparagraph 7 and Article 60 Paragraph 1 of the CCK, the accessory punishment of confiscation of the pliers used in the commission of the criminal offence and currently in the possession of Kosovo Police Organized Crime Department Prishtinë/Priština Region is imposed against the defendant, M.B.

XVI. Pursuant to Article 102 paragraph 1 in conjunction with Article 99 paragraph 2, subparagraph 6 of the KCCP, the cost of the criminal proceedings shall be partially reimbursed by the accused as follows:

- by B.N. in the lump sum of Euro 150 (one hundred fifty),

- by N.B. in the lump sum of Euro 300 (three hundred),
- by B.B. in the lump sum of Euro 200 (two hundred),
- by A.B. in the lump sum of Euro 200 (two hundred),
- by A.By. in the lump sum of Euro 200 (two hundred),
- by M.B. in the lump sum of Euro 150 (one hundred fifty),
- by S.B. in the lump sum of Euro 200 (two hundred),
- by A.P. in the lump sum of Euro 30 (thirty),
- by Z,Z, in the lump sum of Euro 30 (thirty).

The remaining cost of the criminal proceedings shall be paid from the budgetary resources, pursuant to Article 102 paragraph 2 of the KCCP.

## **R E A S O N I N G**

### **Procedural Background**

#### **The indictment**

On 28 October 2011 the Special Prosecution Office filed Indictment PPS.nr.11/11 against all the above mentioned accused for the criminal offences of Organized Crime, under

Article 274 paragraph 2 in conjunction with Article 23 of the CCK, and Smuggling of Migrants, allegedly committed in such a way that it endangered the lives and safety of the migrants, under Article 138 paragraph 6, in conjunction with Article 23 of the CCK. According to the indictment, the said offences were committed in the period between an undetermined date and 10 June 2011 in various places in the territory of the Republic of Kosovo.

On 24 January 2012 the confirmation judge of the District Court of Peje/Pec confirmed the aforementioned Indictment through ruling KA.nr. 426/11.

During the confirmation hearing and at the main trial all the accused pleaded not guilty.

#### **Competence of the Court and Panel Composition**

The accused were charged inter alia with an offence of Organized Crime punishable by imprisonment from one to twelve years. This determined the subject matter jurisdiction of the District Court because in accordance with Article 23 (1) of KCCP, the competence to adjudicate at first instance criminal offences punishable by imprisonment of at least five years belonged exclusively to this court.

According to the Indictment, the criminal offences that the accused were charged with, allegedly took place in Kosovo. However, as it was presented in the detailed description of the criminal actions undertaken by some of the accused on numerous occasions the accused were allegedly acting in

Peje/Pec. Therefore, in accordance with Article 27 (1) of KCCP, this court has territorial jurisdiction to adjudicate the case.

No issue was raised by the parties regarding the jurisdiction of this Court.

According to Article 43 of Law No. 03/L-199 on Courts, adopted by the Assembly of the Republic of Kosovo on 20 July 2010, since 1 January 2013 the District Court of Peja/Pec was transformed into the Basic Court of Peje/Pec without any changes to its territorial or subject matter jurisdictions which would be in any way relevant to the proceedings in this case.

### **Main Trial**

The main trial was held in public on 10, 23, 24, 29 and 31 May 2012, 24 and 25 July 2012, 6, 8, 14, 15 and 20 November 2012 and on 22 and 23 January 2013 in the presence of the Special Prosecutor Besim Kelmendi, the accused B.N. and his defense counsel G.K., the accused N.B. and his defense counsel L.H., the accused B.B. and his defense counsel Xh.R., the accused A.B. and his defense counsel F.K., the accused A.By. and his defense counsel I.H., the accused M.B. and his defense counsel Mr. B.T., the accused S.B. and his defense counsel Mr. M.H., the accused A.P. and his defense counsels B.E. and S. Z. the accused Z.Z. and his defense counsel Mr. E.A.

It should be pointed out that the period of time of adjournment between the hearings held on 24 July 2012 and

then on 20 November 2012 exceeded the period of 3 months prescribed in Article 345 Paragraph 3 of the KCCP. However, the trial panel remained the same and following the motions of all the parties the panel decided to continue hearing evidence.

None of the injured parties or their representatives participated in the trial. The indictment indicated the following persons as the injured parties: E.I., B.Th., S.B., F.F., I.V., A.K., A.M., I.H., I.P., L.C., B.A., A.Th., P.V., Z.H., S.V., B.V., M.H.. According to information obtained by the trial panel only F.F., S.B. and E.I. were supposed to be present in Kosovo when the trial started. The places of residence of all the other injured parties remained unknown which made it impossible to summon them for the trial. During the confirmation hearing E.I. waived his rights as an injured party. F.F. appeared in the court for the main trial as he was also summoned to be a witness but he chose not to participate as a party to the proceedings. S.B. failed to appear as the summons could not be delivered because his current place of residence remained unknown. Mr. G.K., the defense counsel for B.N., requested that E.I. would not be considered as an injured party. The prosecutor in his final speech had partially agreed to this motion as he modified the indictment by removing the names of E.I. and I.V. from its enacting clause. According to Article 386 of the KCCP the court was not bound by this agreement on modification of the charges.

In accordance with Article 15 of the KCCP, international interpreters translated the court proceedings and all court

documents relevant to the trial from English into Albanian and vice-versa, as it was necessary.

On 1 January 2013 a new Criminal Procedure Code entered into force therefore the trial panel had to decide on the applicable procedure. According to Article 545 Paragraph 1 of the new code the determination on whether to use the new code of criminal procedure shall be based upon the date of the filing of the indictment. Acts which took place prior to the entry of force of the present code shall be subject to this code if the criminal proceeding investigating and prosecuting that act was initiated after 1 January 2013. Therefore, the panel concluded that the provisions of the KCCP should still be applicable in order to conclude the trial.

### **Summary and evaluation of evidence presented**

The trial panel carefully reviewed and assessed the following statements:

testimony of the injured parties F.F. given in the court on 10 May 2012, testimonies of D.V., N.A., S.B. and Gj.L. given on May 31 2012, testimonies of S.M., S.O., E.M. and H.K. given on May 23 2012, testimonies of witnesses S.Th. and F.B., who testified in the court on 24 May 2012, testimonies of I.V., Z.V., R.D., A.H., D.K., and A.E. given on May 29 2012, testimonies of B.M., D.G., F.Sh. given on 24 July 2012, testimonies M.F. and L.H. given on 25 July 2012, testimonies of B.A., R.Z. and F.Z. given on 8 November 2012, and testimony of I.H. aka Sh. given on 20 November 2012.

The detailed assessment of these pieces of evidence will be presented later along with the findings related to each of the defendant.

The court assessed as credible the testimonies given by F.F., S.B., Gj.L., S.Th., S.M., S.O., E.M., H.K., I.V., Z.V., R.D., A.H., D.K., A.E., B.M., and F.Sh. It should be stressed that almost all these witnesses testified in conformity with their pre-trial statements and in fact did not deny any circumstances that they presented at that stage of the proceedings. At the same time they all appeared to be quite reluctant to incriminate the accused, moreover none of the witnesses actually expressed any resents against the accused. The trial panel came to the conclusion that some minor divergences and disparities in witnesses' testimonies resulted from the time lapse and natural imperfection of human memory. In fact, these divergences and disparities assured the trial panel that the testimonies were fully spontaneous and had not been concocted beforehand by the witnesses.

The trial panel also found the testimonies of two Kosovo police officers, D.V. and D.G. to be reliable and trustworthy. They presented the facts related to the interrogation of F.F. and N.A. in a logical and spontaneous manner and there were no elements in the evidentiary material that was admitted during the trial that would convincingly contradict their version of events.

In addition the trial panel found the testimonies of the two defense witnesses R.Z. and F.Z. to be credible. Their

statements were logical, coherent and corresponded to widely-known facts related to the issuance of Serbian biometric passports.

The trial panel had no doubts about the reliability of the identification of some of the accused performed by witnesses F.F. and N.A. in the course of the pre-trial proceedings. It seems that the way that witnesses were asked by the police to identify suspects from the album of photographs of various persons did not comply with Article 225 Paragraph 1 of the KCCP. As a general rule Witness should first be asked to provide a description of and indicate the distinctive features of a person to be identified. Instead of complying with this requirement witnesses were just shown the album by the interrogating officer. Despite this omission the panel came to conclusion that the circumstances in which the identifications took place gave each of the witness the possibility to make unbiased choices based on factual observations of suspects at the time of the incriminating events.

The panel critically assessed evidence given in the court by witnesses L.H. and B.A. L.H. denied any involvement by the accused A.B. in the arrangement of her brother, M.H.'s trip abroad despite the fact that she presented relevant facts differently during the investigation and which were confirmed by witness I.H (Sh). Therefore the trial panel relied on L H.'s pre-trial statements. B.A. gave evidence which was in contradiction with facts established according to the statement given by his brother, N.A. in the pre-trial proceedings.

The trial panel found the testimony given by F.B. to be credible. Although she was reluctant to recall any details of the events that she described in the pre-trial proceedings she actually confirmed in the court everything she presented previously. She said her friend S.Gj. was interested in going abroad and she discussed it with a certain man in a cafeteria in Pristina. However, neither in her testimony in the pre-trial proceedings nor in front of the trial panel was she able to give more details about the content of that discussion. She indicated that the man was similar to N.B. or B.B. without any further indication that would help to identify him with certainty. S.Gj. was not available to testify in the court as the trial panel received information that she left Kosovo permanently. The parties had no opportunity to challenge by questioning her statement given in the pre-trial proceedings so according to Article 156 Paragraph 2 of the KCCP that statement could not be admitted into evidence. Therefore the facts invoked by F.B. did not contribute to any findings that would be relevant for the charges set out in the indictment.

There were no doubts in relation to the admissibility and accuracy of the following pieces of evidence that were presented at the main trial:

- reports on interception of telecommunications and SMS No. 2011 - DKKO - 005, dated 25.02.2011, 21.03.2011, 13.04.2011, 24.04.2011, 25.04.2011, 27.04.2011, 11.05.2011, 12.05.2011, 15.05.2011, 25.05.2011, 26.05.2011, 01.06.2011, 09.06.2011, 11.06.2011, 15.06.2011, 25.07 .2011, 27.07.2011, 01.08.2011, 08.08.2011;

- reports of phone calls 2011 -DKKO -005, dated 19.10.2011 and 24.10.2011
- report on financial investigations No. 14 -DKKO-SHFI-2011 / 6 dated 25.08. 2011

Additionally, the trial panel has admitted and examined the following pieces of evidence:

- reports on house search of the defendants and confiscated items No0 2011 -DKKO - No. 005, dated 11.06.2011,
- Report 2011 - DKKO - 005, 2011 - SFTI - 053 dated 06.10.2011 relating to the examination of seized phones from defendants B.N., N.B., B.B., A.By., M.B. and S.B.,

These pieces of evidence were obtained in accordance with relevant procedural requirements and their authenticity was not challenged by any of the accused or their defense counsels.

The panel positively assessed the credibility and reliability of the Expertise Report 2011-1584/2011 -1672, dated 8.09.2011 concerning items and tools seized from the defendant M.B. and the passports of H.K. and B.Th. Its conclusions were very general in nature but they are well grounded by the description of the method of forensic analysis performed by the police expert.

### **Reconstruction of facts and legal assessment of findings**

The following facts have been established by the trial panel as the results of its assessment of the evidence:

**In relation to B.N.**

Sometime between end of 2007 and the beginning of 2008 B.N. started a tourist agency. He was selling travel tickets and also cooperated with other tourist agencies by issuing tickets for trips operated by them. Part of his activity was related to rendering help for Kosovo citizens who wished to apply for a Serbian biometric passport.

The trial panel took judicial notice of the facts related to issuing Kosovo citizens with passports by Serbian authorities. The Republic of Serbia introduced biometric passports i.e. passports consisting of records of biometric data of its holders on July 7 2008. The holders of this type of passport could travel freely to some neighboring countries including Hungary although they could stay there for no longer than three months. Since 1999, following UN Security Council Resolution 1244/99, the Republic Serbia has not had the possibility to make any verification regarding persons residing in Kosovo. However, in fact, people born in Kosovo or otherwise legally settled in Kosovo have been considered by Serbian authorities as Serbian nationals and according to Serbian administrative procedure they have been entitled to obtain Serbian passports. During the visa liberalization dialogue between Serbia and the European Union the European Commission noted that the issuance by Serbia of the new biometric passports to persons residing in Kosovo did not guarantee proper verification of the correctness of data submitted by persons residing in Kosovo when applying for new Serbian biometric passports. In order to follow European Commission recommendations and to prevent abuse of this situation in

applications for biometric passports, the Serbian authorities announced the establishment in July 2009 in Belgrade of a specific Coordination Directorate (in Serbian: *Koordinaciona Uprava*), solely in charge of processing all passport applications received from persons residing in Kosovo and persons whose citizenship certificate has been issued for the territory of Kosovo under UNSCR 1244/99. On December 19 2009 European Council Regulation no 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders of the Schengen area and those whose nationals are exempt from that requirement was amended in order to exclude the bearers of passports issued by the Coordination Directorate. In order to obtain a regular Serbian passport that allows for entering the Schengen zone without a visa, citizens of Kosovo must have declared their domicile in the other parts of Serbia.

It was not established what kind of passports B.N.'s customers had obtained in Serbia with his assistance. Besides providing relevant information B.N.'s services covered also arranging for the customer transport to Serbia, sometimes accompanying him on the trip, and arranging for him/her accommodation in Serbia while awaiting the issuance of the passport.

The above presented findings are based on the defendant's statement and corroborated by the testimonies of witnesses R.Z. and F.Z. which were assessed as credible because of their logic and conformity with commonly knowing facts related to the procedure for obtaining Serbian passports.

In 2011 B.N. met with F.Sh. and spoke with him about arranging travel documents for his wife. Since his wife required medical treatment F.Sh. was looking for an opportunity to obtain a visa for entry into the Schengen zone. B.N. did not offer him any help in this regard but he told him he could assist him in obtaining a Serbian passport instead for a total remuneration of Euro 5000. F.Sh. was not interested in this offer. These facts were established in accordance with the testimonies of F.Sh. and A.E. which completely and fully corroborate each other.

Because of his professional activity B.N. engaged in numerous conversations with N.B., B.B., S.B., A.By. (vide-report No 2011-DOC-005 dated 19.10.2011, report No.2011-DOC-005 dated 24.10.2011). For example, on 27.04.2010 at 11:53:27 he received a phone call from B.B. who told him *"There are two guys left in Subotica, their location is hotel Palma and their phone number is xxx.* A few minutes later he received this text message from B.B. *"Remove them from the hotel and take them to the place you are staying."* This conversation clearly indicates a coordinated action between B.N. and B.N. which relied on facilitation of crossing the border between Serbia and Hungary by two unidentified men. However, in favor of the accused, the trial panel presumed these unidentified men were in possession of Serbian passports.

On 29 April 2011 at 14:10:51 B.N. engaged himself in a phone conversation with B.B. about arranging an illegal border crossing by two unidentified persons. However, it was not proven during the trial that this conversation resulted in any further actions. Nevertheless, this

conversation was considered as a piece of evidence corroborating the statement of witness S.Th. as it clearly indicates that B.N. had the necessary contacts and knowledge to arrange an illegal border crossing.

B.N. also engaged in various financial transactions with people living abroad, mainly in Serbia and Germany (-vide the summary report of the Police Nr.14- DHKO -SHFI - 2011/6 dated 25.08.2011 on financial investigations). This included persons called A.M. and I.V., E.M., L.S. and K.A. However, it was not proven that any of these transactions was related to the offenses he was charged with or with any other criminal activity.

On several occasions B.N. consulted M.B. on the matter of authenticity and genuineness of documents that were supposed to be used by B.N.'s customers in the administrative proceedings before Serbian authorities in order to obtain a biometric passport.

The trial panel came to conclusion that none of the above described activities of B.N. could be considered as a criminal offence. In particular, assistance in obtaining a Serbian passport by a citizen of Kosovo is not penalized. The conversation related to illegal border crossing that took place on 29 April 2011 had not led to any further action and therefore cannot be considered even as an act of preparation.

Sometime between 01 June 2011 and 10 June 2011 in the cafeteria in Pristina B.N. met with B.Th. who was a national and resident of Kosovo. They agreed that B.N.

would facilitate his illegal entry into Austria. For this service B.N. received Euro 1800. With the help of B.N. B.Th. went to Serbia by bus and then in an undetermined way he went to Austria. Although the details of B.Th.'s entry into the Schengen zone remain unclear the trial panel assessed that B.N.'s actions were proven. This was established on the basis of testimony given by S.Th.. S.Th.'s statement appeared to the trial panel as being logical and consequent and therefore fully credible. There were no doubts as to the identification of B.N. made by the witness in the course of pre-trial proceedings. The conditions in which the identification was performed gave the witness an opportunity to make his choice without any suggestion or improper hint from the investigators. His selection was made in conformity with the description of the accused that the witness had presented before the identification was made.

The above described activity of B.N. was classified by the trial panel as a criminal offence of Smuggling of Migrants pursuant to Article 170 Paragraph 1 of the Criminal Code of the Republic of Kosovo of 20 April 2012 (CCRK). According to Article 170 Paragraph 8 subparagraph 8.1 8.1. Smuggling of migrants means 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.

The trial panel took into consideration the change in the substantial law which took place after the time of commission of the crime and before the time of sentencing. The trial panel compared the legal provisions provided by the law that was in force before the entry into force of the Criminal Code of the Republic of Kosovo of 20 April 2012. According to the "old code" i.e. the Kosovo Criminal code of 2008 the corresponding offence of Smuggling of Migrants was criminalized under Article 138 Paragraph 1 which provided for punishment of 2 to 12 years while the "new code" provides for punishment of 2 to 10 years of imprisonment for the same offence. Therefore the new law appears more favorable to the perpetrator, and therefore, pursuant to Article 3 Paragraph 2 it should apply in this case. The same remarks concerning legal classification and applicability of the new law also concern the other defendants who are found guilty of Smuggling of Migrants and whose criminal act are described later in this judgment.

**In relation to N.B.**

N.B. (similarly to B.N.) was running a tourist agency. Despite his denials presented in his statement he had a lot of business contacts with B.N.

Between 1 January and April 2011 N.B. made contact with Kosovo Albanians living in Kosovo, namely P.V., B.V. and Z.H. who intended to emigrate from Kosovo despite the fact that they were not in possession of the necessary travel documents. N.B. arranged a trip for them by bus from Kosovo to Serbia and then in an undetermined manner he organized

illegal border crossing between Serbia and Hungary for them. They stayed in Serbia for 3-4 days and then somewhere near the city of Subotica they crossed the border between Serbia and Hungary on foot. N.B. was paid Euro 1800 for each migrant, making a total of Euro 5400.

By this action N.B. committed the criminal offense of Smuggling of Migrants contrary to Article 170 Paragraph 1 of the CCRK

In April 2011, shortly after P.V., B.V. and Z.H. went abroad. N.B. arranged a trip to Serbia by bus for S.V., a relative of P.V. and B.V. He was also a Kosovo Albanian and had no necessary travel document to enter the Schengen zone. N.B. arranged for S.V. to cross the border between Serbia and Hungary although the details of this crossing remain unknown. For this service N.B. received Euro 2200. The above presented facts were proven by the testimonies of Z.V. and I.V. Both testimonies corroborated each other and presented a coherent version of events. There were discrepancies in relation to the amount of money that was paid to the accused for his service but it seems to be a natural consequence of the time lapse and imperfection of human memory. There were also discrepancies between versions presented by witnesses in the pretrial stage of proceedings and at the main trial as to the configuration of the injured parties. Initially the witnesses indicated that P.V., B.V. and Z.H. went abroad at first and then were followed by S.V. It seems that I.V. did not know all the details of his son's emigration as he did not approve of it. Therefore the trial panel concluded that the version of events presented by the witness Z.V. in the pre-trial

proceedings appears as the most probable as that statement was given shortly after the events that the witness described at this time. Further the deviation from the amount paid to N.B. seems to be caused by other expenses covered by the witness on the occasion of his son leaving the country. This action of N.B. also constituted the criminal offense of Smuggling of Migrants contrary to Article 170 Paragraph 1 of the CCRK.

On 10 May 2011 N.B. entered into phone conversation with S.B. S.B. was interested in going abroad together with another person. N.B. agreed to smuggle them through the borders. The other person was F.F. S.B. and F.F. were Kosovo Albanians living in Kosovo and they both wanted to get to Austria without the necessary travel documents. N.B. took passport-type photographs from them. On 10 June 2011 N.B. arranged for S.B. and F.F.'s transportation by bus to the Republic of Serbia. They both boarded the bus at the bridge in Klina. In Pristina, N.B. provided S.B. with genuine passport No. xxx of H.K., issued by the Federal Republic of Yugoslavia, altered by an unidentified person by replacing the photograph of the legitimate holder with S.B.'s photograph. He also provided F.F. with genuine passport No. xxx of B.Th., issued by the Federal Republic of Yugoslavia, altered by M.B. by replacing the photograph of the legitimate holder with F.F.'s photograph. S.B. and F.F. were supposed to get to Subotica in Serbia. They were promised to be picked up from Subotica by taxi and then they planned to go on foot to Hungary and in an undetermined manner to Austria. They agreed to pay N.B. Euro 2000 each upon their arrival in Austria. S.B. and F.F. did not reach their goal because they were arrested by the

police at the border crossing between Kosovo and Serbia as a result of document control procedures. These events were established by the trial panel mainly on the basis of the transcript of a phone conversation that took place on 10 May 2011 at 16:00:51 between N.B. with the telephone number xxx and the telephone number xxxx, used by S.B., and on the basis of F.F.'s testimony given by him in the pretrial proceedings. His version at that time was cogent and logical. In the court he alleged that he wanted to get to Austria in the legal way and that he did not understand that the passport that was issued in another name with his photograph attached was forged. There were no doubts as to the identification of N.B. made by F.F. in the pre-trial proceedings. The testimonies given by police officers D.V. and D.G. described in detail how the identification was performed and their statements were fully convincing. F.F.'s statement given in pre-trial proceedings was well corroborated by testimony presented by M.F. although the witness did not know all the details of the action taken by F.F. and S.B.

Because the criminal goal had not been reached, the above described action of N.B. constitutes attempted Smuggling of Migrants pursuant to Article 170 Paragraph 1 of the CCRK and Article 28 Paragraphs 1 and 2.

All of the above described three offences N.B. committed in continuation as defined by Article 81 Paragraph 1 of the CCRK. This conclusion is based on findings that N.B. on all occasions took advantage of the same situation i.e. the existence of travel restrictions for the citizens of Kosovo which corresponds to Article 1 Paragraph 1

subparagraph.1.3.). Moreover, his criminal actions were committed in the same space i.e. in the territory of Kosovo and Serbia which corresponds to Article 1 Paragraph 1 subparagraph 1.4.

It was established from transcripts of numerous phone conversation that N.B. had extensive phone and SMS communication with B.N., N.B., B.B. and A.B. and also M.B. (vide Nr 2011-DKKO - 005 dated 19.10.2011, police reports dated 13.04.2011, 25.04.2011, 11.05.2011, 26.05.2011, 27.07.2011). The content of the text messages and intercepted conversations indicates that the subject of this communication was related to people crossing various borders and to travel documents. However, the trial panel came to the conclusion that these pieces of evidence cannot lead to the conclusion that this communication was related to smuggling immigrants and not just facilitating of travel to people being in possession of various valid travel documents, including Serbian passports.

**In relation to B.B. and A.B.**

In April 2011 A.M., a national of the Republic of Kosovo, decided to go to Germany. He was in possession of a Kosovo passport and German visa but the visa had expired. In an undetermined manner he entered an agreement with B.B. and A.B.. They arranged a bus trip for him to Serbia. They both met A.M. at the border crossing between Kosovo and Serbia in Merdare. Following their instruction, A.M. boarded a bus that came from Prizren and went to Subotica in Serbia, he spent a night there and subsequently, using arrangements put in place by the accused, he crossed the border between

Serbia and Hungary on foot. Then in an undetermined way he went to Austria. Upon his arrival in Austria he ordered his father to pay Euro 1800 to the people who smuggled him out of Kosovo. His father, E.M. paid the money through an undetermined intermediary in the village of Luzhan. These findings were made on the basis of the testimony of the witness S.M. which was corroborated by the testimonies of B.M. and E.M.. All these statements complement each other and do not contain any discrepancies. In his statement given in the court E.M. deviated from his previous depositions while indicating the amount of money he paid. Having in mind that the witness was an elderly person which explains imperfection in his memory the panel established the amount of money that was actually paid by the witness by referring to his pre-trial statement in this regard. The panel took into consideration that during the identification performed in the pre-trial proceedings the witness S.M. was not absolutely sure that he properly identified the accused as the persons who he met in Merdare. At that time he was shown 8 photographs and he only indicated a probability that B.B. and A.B. were in fact the said persons. The trial panel came to the conclusion that there are facts which strongly support this identification. These facts are: an extensive communication between both of the accused which was already mentioned above and the content of the communication when on other occasions the accused were discussing transporting people abroad. Therefore, the identification made by the witness appears not as coincidental but as a totally accurate one.

The panel came to the conclusion that by the above actions B.B. and A.B. committed the criminal offense of Co-

perpetration in Smuggling of Migrants pursuant to Article 170 Paragraph 1 and Article 31 of the CRRK.

**In relation to B.B. and Z.Z.**

In March 2011 B.B. met with Z.Z. and E.I. E.I. was a citizen and resident of Kosovo. He told B.B. that he would like to go abroad but he had no necessary travel document. Z.Z. agreed to pay B.B. an amount of Euro 1650 for smuggling E.I. Shortly after that in a way that remained undiscovered during the main trial B.N. organized a trip for E.I. to Switzerland. E.I. went there without necessary requirements for legal entry into this country. Z.Z. transferred to B.B. Euro 1250 through the MoneyGram service. The remaining amount of Euro 400 Z.Z. handed over to B.N. at the cattle market in Rugova e Hasit. These facts were established on the basis of the accused Z.Z.'s statement given in pre-trial proceedings. Z.Z. confirmed this statement at the main trial. He presented the facts in a logical and cogent way and therefore the trial panel found his version as fully credible. It was corroborated by the content of the phone conversation between B.B. and Z.Z. dated 30.03.2011 which referred to the above described payment. Again, Z.Z.'s statement was in compliance with the other above mentioned evidence indicating B.B.'s involvement in transporting people abroad.

This action performed by B.B. constitutes the criminal offense of Smuggling of Migrants pursuant to Article 170 Paragraph 1 of the CCRK. The panel took into consideration that Z.Z.'s role in the commission of the offence was rather limited as he only acted as a guarantor and payee on

behalf of the smuggled person. This activity was not so significant that could be considered as co-perpetration. Therefore the panel concluded that Z.Z. committed the criminal offence of Assistance with Smuggling of Migrants pursuant to Article 170 Paragraph 1 and Article 33 of the CCRK.

Taking into consideration both of the offenses that were assigned to B.B. the panel concluded that B.B. committed these offences in continuation as defined by Article 81 of the CCRK because on both occasions he took advantage of the same situation i.e. the existence of travel restrictions for the citizens of Kosovo which corresponds to Article 1 Paragraph 1 sub-paragraph 1.3. and his criminal actions were committed in the same space i.e. on the territory of Kosovo and Serbia which corresponds to Article 1 Paragraph 1 sub-paragraph 1.4.

There were several phone conversations between B.B. and Z.Z. recorded which indicates that they were talking about smuggling people abroad. On 12 April 2012 Z.Z. asked B.B. if he could smuggle a person to England for Euro 5000. B.B. replied that the price should be not less than Euro 6500. However there is no indication that this conversation resulted in any further action therefore it cannot be considered as a criminal act in itself.

#### **In relation to A.B.**

In September 2010 M.H. a national of the Republic of Kosovo decided to go to Switzerland. He had no necessary travel document to enter this country. A.B. provided him with a

fraudulent travel document. M.H. used this document to travel to Turkey and from Turkey to Switzerland. For this service M.H. promised to pay A.B. Euro 1100. It was not discovered during the main trial how A.B. obtained the fraudulent document and what type of document it was. Neither was it determined if A.B. received the payment. These above given facts were established by the trial panel on the basis of testimonies given at the trial by witness I.H (Sh). The witness presented his version of events in a spontaneous and logic way. He admitted that he also wanted to go abroad. A.B. offered him to get him a fraudulent passport for Euro 1100. The amount of money which M.H. was supposed to pay to A.B. was presumed by the trial panel from the offer that A.B. made to M.H. I.H.(Sh.) testimony was fully corroborated by L.H. statement given by her in the pre-trial proceedings. In the court she testified in an evasive way denying knowledge of the fact that M.H. went abroad illegally and contesting the identification of A.B. on the basis of the phone number he used. The trial panel found her testimony not credible because it contradicted common sense and obviously contradicted her previous statement. A.B. was precisely identified by witness I.H (Sh) and this identification was repeated as so called "in-dock" identification made by the witness in the court. There are no doubts that A.B. was the man described by L.H. and I.H (Sh) as the one who provided M.H. with the fraudulent travel document.

Therefore, A.B. committed the criminal offence of Smuggling of Migrants by Providing Fraudulent Travel Documents pursuant to Article 170 Paragraph 2 of the CCRK.

The panel came to the conclusion that there are no elements that would allow classifying both of the offenses attributed to A.B. as a crime in continuation as defined in Article 81 Paragraph 1 of the CCRK. The difference between actions attributed to this accused and the offenses committed by B.B. and N.B. is related to the space of commission of the crime. The crime of providing fraudulent travel documents dealt with Kosovo and Turkey while all the other offences dealt mainly with Kosovo and Serbia.

It should be pointed out the criminal sanctions provided for providing fraudulent travel documents as a form of smuggling of migrants appear to be the same under the old and new codes. However, the other offenses committed by A.B. have to be classified according to the new code (vide remarks on Article 170 paragraph 1 above) and the punishments imposed for each of the offences has to be taken into consideration when imposing an aggregate sentence. Therefore the new code creates a more favorable situation for A.B..

**In relation to A.By. and A.P.**

In September 2010 A.P. contacted A.By. and told him that I.P., a citizen of Kosovo, wanted to go abroad. I.P. had no necessary travel documents. A.P. paid A.B. Euro 2200 for smuggling I.P. abroad. A.B. organized a trip to Serbia and then to Austria for I.P. It remained undiscovered how I.P. managed to cross the border between Serbia and the Schengen zone. By this action A.By. committed the criminal offense of Smuggling of Migrants pursuant to Article 170 Paragraph 1 of the CCRK. The action of I.P. constitutes Assistance

with Smuggling of Migrants pursuant to Article 170 Paragraph 1 and Article 33 Paragraph 2 of the CCRK.

Sometime after I.P. left Kosovo, A.P. put A.By. in touch with L.C. who also wanted to emigrate from Kosovo. L.C. was a citizen of Kosovo and had no necessary travel document to go abroad. A.P. paid A.By. Euro 2200 for smuggling L.C. from Kosovo to Austria. This was received by A.P. from L.C.'s father. A.B. organized a trip to Serbia and then to Austria for L.C. It remained undiscovered how I.P. managed to cross the border between Serbia and the Schengen zone. A.P. did not obtain a material benefit for himself for helping either I.P. or L.C.

These facts were established on the basis of self-incriminating statements given by A.P. in the pre-trial proceedings. A.P. fully referred to these statements during the main trial. His version of events then did not consist of any element which would deny the veracity of the previous statements. Moreover, this version of events was fully corroborated by the testimony of the witness Gj.L.

The above described action of A.By. constituted the criminal offense of Smuggling of Migrants contrary to Article 170 Paragraph 1 of the CCRK while the action assigned to A.P. is to be classified as the criminal offense of Assistance to Smuggling of Migrants contrary to Article 170 Paragraph 1 and Article 33 Paragraph 2 of the CCRK.

The offences committed by A.By. and A.P. were committed in continuation. They both took advantage of the same

situation i.e. the existence of travel restrictions for the citizens of Kosovo which corresponds to Article 1 Paragraph 1 subparagraphs 1 and 3. At the same time their criminal actions were committed in the same space i.e. in the territory of Kosovo and Serbia which corresponds to Article 1 Paragraph 1 sub-paragraphs 1 and 4.

**In relation to M.B.**

M.B. had extensive phone and personal contact with B.N. On several occasion he also had phone contact with A.B. On some occasions they were possibly talking about various documents but it was not proven that those talks resulted in any further action. M.B. possessed knowledge of documents with regard to their authenticity. On several occasions he advised B.N. as to the possibility of use of certain documents for travel purpose. Also another unidentified person consulted M.B. about the possibility to forge documents. On 21 May 2011 an unidentified person sent M.B. an SMS asking "*Baci M. how much does it cost to delete a stamp from the passport?*" M.B. was also in possession of a special tool- a pliers for fastening photographs to passports or other documents with the use of metal eyelets. He also possessed a large number of such eyelets. Sometime between 1 May 2011 and 10 June 2011 M.B. in an undiscovered way obtained a passport no. xxx that was originally issued in the name of the legitimate holder, B.Th. by the Federal Republic of Yugoslavia. The passport was previously used by B.Th. who was smuggled abroad by B.N. as described earlier, and was given to B.N. B.N. was supposed to return the passport to B.Th.'s family but he did not do it. However, there was no evidence that the passport was given to M.B.

directly and knowingly by B.N. M.B. altered this passport by replacing the photograph of the legitimate holder with the photograph of F.F. He did it with the use of the above mentioned pliers and eyelets. He had the intention that the passport would be used for an illegal border crossing. It was not been proven that M.B. acted for material benefit. The altered passport was subsequently transferred in an undiscovered way to N.B. N.B. handed over this passport to F.F. who used it in an attempted border crossing between Kosovo and Serbia.

The fact that M.B. had personally forged B.Th.'s passport was established through the circumstantial evidence. First of all, as it was indicated by the accused B.N., he had a necessary knowledge of documents. Then, according to the search report of his house he was in possession of eyelets and pliers (vide - reports on house search of the defendants and confiscated items, as well as records on control during the course of house search of the defendants, No 2011 - DKKO - No. 005, dated 11.06.2011). The panel made an assessment based on common knowledge that this type of pliers is rather unlikely to be used for typical domestic purpose. The expertise report 2011-1584/2011-1672 dated 8.09.2011 submitted from the Executive Agency - Laboratory of Forensics - Sector of the Traces and Dactilosopic Expertise, established that the traces found on one of the eyelets of the altered photograph might be left by the tool found in the accused's house. The panel came to the conclusion that these pieces of evidence, when analyzed together, indicated that M.B. was indeed the perpetrator of the forgery.

The panel came to the conclusion that by the above described action M.B. committed the criminal offence of Falsifying Public Documents pursuant to Article 332 Paragraph 3 of the CCK. It was not proven that he acted for material benefit which excluded a legal classification based on Article 138 Paragraph 2 of the CCK (old code) or 170 Paragraph 2 of the CKRK (new code). The trial panel reached an opinion that a passport is a type of public document since it is issued by public authorities as opposed to private documents i.e. documents originating from private persons. Article 338 Paragraph 2 of the old code provides for a fine or imprisonment of up to 3 years. Article 398 Paragraph 2 of the new code which refers to falsifying public document provides for a more severe punishment i.e. up to 5 years imprisonment. Therefore the old code was applied as it was more favorable to M.B.

**In relation to S.B.**

In 2011 S.B. organized a trip by bus for B.A. and another unidentified male, nationals of the Republic of Kosovo, who were not permanent residents or citizens of any Schengen Area state, from the territory of Kosovo to Serbia. From Serbia B.A. and the said unidentified male both without necessary valid travel documents and availing of arrangements made for them by S.B. entered into the Schengen Area.

By this action S.B. committed the criminal offenses of Smuggling of Migrants contrary to Article 170 Paragraph 1 of the CCRK;

Sometime later, before 9 June 2011 S.B. made the same kind of arrangements for an unidentified male named F. from xxx village who was a national of the Republic of Kosovo and was not a permanent resident or citizen of any Schengen Area state. F. also entered the Schengen zone without the necessary travel documents. It was not discovered during the main trial what kind of arrangements S.B. made for these men but those arrangements were sufficient to enable them to reach their goal i.e. to enter one of the Schengen zone countries. S.B. was paid altogether Euro 3600 for the service rendered to B.A. and to the unidentified man who went abroad with B.A., while from F. he obtained Euro 1600.

By this action S.B. committed the same criminal offence as indicated above.

The facts related to the offenses committed by S.B. were established on the basis of the witness N.A.'s statement given in the pre-trial proceedings. The trial panel found the statement given by B.A. in relation to the time of his trip abroad arranged by S.B. as unreliable. After examination and evaluation of the testimonies given by N.A. and B.A. the trial panel came to the conclusion that the only credible version of events was the one given by N.A. in the course of pretrial proceedings. At that time N.A. gave quite a precise indication of the time when his brother B. had gone abroad. He was not able to present any convincing explanation of the change of his statement in this matter. It appeared quite obvious to the trial panel that the versions presented by both A. brothers in the court were concocted as they presented the critical time differently than N.A. did in the investigation. As it was

already pointed out there were no doubts as to the admissibility of N.A.'s identification of S.B. as well as to its credibility. N.A.'s testimony was corroborated by the content of an intercepted phone conversation between an unidentified person and S.B.: On 29.03.2011 at 19:26:02, the defendant S.B. received an SMS n his phone number xxx from an unknown person with a phone number xxx, saying: "Hey S, they are leaving now haven't you told me to find the address in order to send them in Vienna, I found the address but they are not sending them there, if you talk to them tell them to know or." It was presumed by the trial panel that message dealt with transportation of migrants abroad. Although there no indications this message was part of any criminal activity it strongly indicates that S.B. had the necessary knowledge and contact to send immigrants abroad.

Both of the offences assigned to S.B. were committed because on both occasions he took advantage of the existence of travel restrictions for the citizens of Kosovo and his criminal actions were committed in the territory of Kosovo and Serbia.

**In relation to all defendants:**

The panel came to the conclusion there is not a single piece of evidence supporting allegations that any of the accused acted in a way that endangered the lives and safety of migrants.

There is also no evidence supporting the allegation any of them acted in a structured group consisting of at least

three persons. In particular the analysis of communication between the defendants performed by the panel led to the findings that were already presented above. This analysis did not give grounds to conclusion that any other of their actions were of criminal nature. Although (as it has been already indicated) the intercepted conversations and SMSs could be related to smuggling of migrants there were no further details discovered that would leave no doubt as to the subject of those conversations. There was no evidence any of the intercepted pieces of communication between the accused, with the exception of those already quoted along with findings assigned to each of them, resulted in criminal action. In particular, there is no evidence any of the conversations or SMS messages was related to the transportation of people abroad without travel documents that means even without documents issued by Serbian authorities. Therefore none of the actions attributed to the accused can be classified as an offence of Organized Crime under Article 274 of the CKK or under Article 283 of the CKRK. This conclusion has resulted in the acquittal of all of the accused of the charge of committing an offence of Organized Crime.

#### **Determination of the Punishment**

When determining the punishment for each of the accused the trial panel was obliged to evaluate all mitigating and aggravating factors, pursuant to Article 73 Paragraph (1) of the CCK and in relation to M.B. pursuant to article 64 paragraph (1) of the CKK.

In relation to all of the accused the trial panel considered as aggravating factors that Smuggling of

Migrants outside Kosovo appears to be a frequently committed crime nowadays. It seriously affects all official effort for visa liberalization. Therefore the punishment for this kind of crime should serve as a general deterrent for all potential perpetrators.

In relation to all of the accused, with the exception of A.P. and Z.Z., the trial panel considered as an aggravating factor the amount of the unlawful income obtained by each of them for smuggling migrants. The income generated by smuggling one person exceeded several times the average salary in Kosovo.

As mitigating factors in relation to all of the accused the trial panel took into consideration that none of the injured parties i.e. none of the smuggled person were in anyway cheated or mal-treated by any of the accused.

In relation to those accused who committed crimes in continuation i.e. N.B., B.B., A.By., S.B. and A.P. the court pursuant to Article 81 of the CCRK imposed one sentence. The trial panel considered as the aggravating factor the number of offenses constituting the crime of continuation attributed to each of them.

When calculating the aggregate sentence against A.B. the trial panel took into consideration that the individual offences that he was sentenced for were committed in a similar way and in a short time interval.

The sentence against M.B. was calculated with consideration given to the fact that the forgery that he committed was a very simply one and did not require any sophisticated instruments or technology.

When imposing sentences against A.P. and Z.Z. the trial panel kept in mind that their roles in committing the offences were minor ones and were limited to giving assistance to the perpetrator. They also did not obtain material benefit for themselves but only for the main perpetrator. Moreover, they both gave credible statements against their own interest that incriminated them and the main perpetrators. This was taken by the trial panel as a form of expiation. These circumstances were applied by the court as the factors mitigating the punishment against A.P. and Z.Z.

Additionally in relation to S.B. the trial panel kept in mind as a mitigating factor that the accused is the head of a family that consists of 7 children.

The same mitigating factors which were taken into account in relation to A.P., Z.Z. and S.B. contributed to suspension of the execution of imprisonment imposed against them. The Trial panel concluded that there are social and economic links which should prevent the said accused from committing a crime in the future.

It was the duty of the trial panel to credit the periods of time that the accused spent in detention on remand into the terms of imprisonment which were imposed respectively on each of them.

The trial panel ordered the confiscation of the tool used for forgery aimed at preventing M.B. from using it for criminal purpose in the future.

**Costs**

Since all of the accused were found guilty they should partially reimburse the cost of criminal proceedings with the exception of the cost of interpretation and translation. A ruling on the amount of the lump sum that each of them should reimburse Pursuant to Article 102 paragraph 1 in conjunction with Article 99 paragraph 2, sub-paragraph 6 of the KCCP was issued with consideration to the number and gravity of offenses that they were found guilty of.

**BASIC COURT OF PEJË/PEĆ**

**P.nr.38/12**

**Dated this 23<sup>rd</sup> day of January 2013**

**Court Recorder**

**Presiding Judge**



---

**Nexhmije Mezini**

---

**Dariusz Sielicki**

**Panel Member**

**Panel Member**

---

**Malcolm Simmons**

---

**Shaban Shala**

Legal Remedy:

An appeal must be announced within 8 days from the announcement of this verdict and shall be filed with the court of first instance, pursuant to Article 400 paragraph 1 of the KCCP.

Authorized persons may file an appeal in written form against this verdict through the Basic Court of Pejë/Peć to the Court of Appeals within fifteen days from the date the copy of the judgment has been served, pursuant to Article 398 paragraph 1 of the KCCP.