

COURT OF APPEALS

Case number: **PAKR 359/13**

Date: **13 March 2014**

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Hajnalka Veronika Karpati as Presiding and Reporting Judge, and EULEX Judge Gerrit-Marc Sprenger and Kosovo Appellate Judge Fillim Skoro as Panel Members, with the participation of Beti Hohler, EULEX Legal Officer,

in the criminal proceedings against

1. **S. L.**, father's name **M.**, born xxx in P. I U., residing in S., Kosovo Albanian, citizen of Kosovo, ID number xxx, by occupation xxx,

pursuant to the Amended Indictment no. PPS 10/11 filed 24.10.2012 charged with Violating equal Status of residents of Kosovo pursuant to Article 158(1) read with Article 23 of the Criminal Code of Kosovo, in force until 1.1.2013 (CCK) (Count 1 of Indictment) and Threats pursuant to Article 161(1)(2) and (4) CCK read with Article 23 CCK (Count 5 of Indictment);

2. **R. H.1.** father's name **N.**, born xxx in K. M. residing in P., Kosovo Albanian, citizen of Kosovo, by occupation xxx,

pursuant to the Amended Indictment no. PPS 10/11 filed 24.10.2012 charged with Violating Equal Status of Residents of Kosovo pursuant to Article 158(1) CCK read with Article 23 CCK (Counts 1-4 of Indictment) and Threats pursuant to Article 161(1)(2) and (4) CCK read with Article 23 CCK (Counts 5-8 of Indictment);

3. **A. A.**, father's name **T.**, born xxx in T. village in P. Municipality, residing in P, Kosovo Albanian, citizen of Kosovo,

pursuant to the Amended Indictment no. PPS 10/11 filed 24.10.2012 charged with Violating Equal Status of Residents of Kosovo pursuant to Article 158(1) CCK read with Article 23 CCK (Counts 1-4 of Indictment) and Threats pursuant to Article 161(1)(2) and (4) CCK read with Article 23 CCK (Counts 5-8 of Indictment);

4. **R.H.2.** father's name **K**, born xxx in D. Village in G. Municipality, residing in P, Kosovo Albanian, citizen of Kosovo, by occupation xxx,

pursuant to the Amended Indictment no. PPS 10/11 filed 24.10.2012 charged with Violating Equal Status of Residents of Kosovo pursuant to Article 158(1) read with Article 23 of the CCK (Count 2 of Indictment) and Threats pursuant to Article 161(1)(2) and (4) CCK read with Article 23 CCK (Count 6 of Indictment);

5. **Q.M.**, father's name **A**, born 12.03.1953 in K., M, residing in P, Kosovo Albanian, citizen of Kosovo, by occupation xxx,

pursuant to the Amended Indictment no. PPS 10/11 filed 24.10.2012 charged with Violating Equal Status of Residents of Kosovo pursuant to Article 158(1) read with Article 23 of the CCK (Count 3 of Indictment) and Threats pursuant to Article 161(1)(2) and (4) CCK read with Article 23 CCK (Count 7 of Indictment);

the defendants having been found not guilty and acquitted of all charges pursuant to the Judgment of the Basic Court of Pristina no. P 1656/12 dated 05.06.2013;

acting upon the appeal of the Special Prosecutor no. PPS 10/11 filed on 20.08.2013 against the Judgment of the Basic Court of Pristina no. P 1656/12 dated 05.06.2013;

having confirmed that the appeal was served to the Defence and reviewing the response to the appeal filed by defendant **R. H.2.** through his Defence Counsel Sahit Bibaj;

having reviewed the Opinion of the Appellate State Prosecutor no. PPA/I 318/13 dated 24.09.2013 and filed with the Court of Appeals on the same day;

after having held a public session on 13.03.2014 in the presence of defendants **A.A.** and **R. H.2.** and defence Counsel Arianit Koci for defendant **S.L.** and defence Counsel Tahir Rrecaj for defendant **R. H.1.** and EULEX Appellate State Prosecutor Kari Lamberg;

having deliberated and voted on 13.03.2014;

pursuant to Articles 389, 390, 394, 398 and 401 of the Criminal Procedure Code - Law no. 04/L-123 (CPC);

renders the following

JUDGMENT

The appeal of the Special Prosecutor no. PPS 10/11 filed on 20.08.2013 against the Judgment of the Basic Court of Pristina no. P 1656/12 dated 05.06.2013 is hereby rejected as unfounded.

The Judgment of the Basic Court of Pristina no. P 1656/12 dated 05.06.2013 is hereby affirmed.

REASONING

I. Procedural history of the case

1. The State Prosecutor on 15.08.2011 filed the Indictment in the case. The Indictment was first amended on 17.10.2011. The District Court of Pristina with whom the Indictment was filed declared itself lacking subject-matter jurisdiction and the case was referred to the Municipal Court of Pristina.¹ The confirmation of indictment hearing was held on 16.03.2012. The Confirmation Judge on 03.05.2012 issued the 'Ruling on confirmation of indictment and admissibility of evidence no. KA 44/12'. The Confirmation Judge only partially confirmed the Indictment and, amongst other, ordered the redrafting of the Indictment. The Confirmation Judge at the time, notably, dismissed the charge of *Violating Equal Status of Residents of Kosovo* for all defendants. The Special Prosecutor appealed the Confirmation Judge's Ruling on 04.05.2012. The Three-Judge Panel of the Municipal Court of Pristina on 01.06.2012 ruled on the appeal, partially granting the appeal of the Special Prosecutor. The Three-Judge Panel overturned the decision of the Confirmation Judge and reintroduced the charge of *Violating Equal Status of Residents of Kosovo* as well as the charge of *Threat* for all defendants. The Three-Judge Panel also ordered the re-drafting of the Indictment.

2. On 24.10.2012 the Special Prosecutor filed the Amended Indictment no. PPS 10/11 with the Municipal Court of Pristina. The proceedings were thereafter conducted pursuant to this Indictment which also forms the basis of the Impugned Judgment (hereinafter: the Indictment).

3. On 1.1.2013 a new Law on Courts along with a new Criminal Procedure Code and a new Criminal Code entered into force in Kosovo.

4. The main trial commenced before the Basic Court of Pristina on 15.04.2013. Further sessions of the main trial were held on the following dates: 16.04.2013, 17.04.2013, 18.04.2013, 19.04.2013, 22.04.2013, 24.04.2013, 25.04.2013, 26.04.2013, 20.05.2013, 21.05.2013, 27.05.2013, 28.05.2013, 31.05.2013 and 03.06.2013.

¹ Ruling of District Court of Pristina no. KA 557/11 dated 09.11.2011.

5. The trial panel rendered the Judgment in the case on 05.06.2013. The trial panel found all five defendants not guilty of the alleged criminal offences and acquitted them of all criminal charges pursuant to Article 364 Paragraph (1.1.) CPC. Pursuant to Article 454 Paragraph (1) CPC, having entered a judgment of acquittal, the trial panel ordered that the costs of criminal proceedings in relation to all defendants are to be paid from the budgetary resources.

6. The Court of Appeals is now seized with the Special Prosecutor's appeal against the Impugned Judgment.

7. The Court of Appeals held a public session in the case on 13.03.2014 in the presence of defendants **A.A.** and **R. H.2.** and Defence Counsel Arianit Koci for defendant **S. L.** and Defence Counsel Tahir Rrecaj for defendant **R.H.1.** and EULEX Appellate State Prosecutor Kari Lamberg. The remaining defendants and their Defence Counsel were duly summoned to the session of the Court of Appeals but did not attend.

II. Submissions of the Parties

(The appeal)

8. **The Special Prosecutor** on 20.08.2013 filed an appeal on the grounds of substantial violation of the provisions of criminal procedure (Article 383 Paragraph (1.1.) in conjunction with Article 384 Paragraph (1.7.) CPC) and erroneous and incomplete determination of the factual situation in relation to all five defendants (Article 383 Paragraph (1.3.) in conjunction with Article 386 CPC).

9. The Special Prosecutor argues that the Basic Court's reasoning is inconsistent regarding the evaluation of witness statements. Whether the xxx articles in the 2009 Kosovo society constituted a threat or not, all the witnesses gave their personal opinion and the Court failed to provide an explanation why it followed the opinion expressed by witnesses B.H. and H. M. instead of opposite opinion expressed by witnesses A. M, T.J, J.B. and Kosovo xxx S. K.

10. The Special Prosecutor further submits that the xxx articles constituted threats in 2009 and they constituted a concerted media campaign. The Basic Court overlooked that it was not only the labelling of **J.Xh.** as a Serb spy that was the heart of this case, but that the string of xxx publications on this topic, within the short timeframe they came out, mutually enhanced and reinforced the baseless accusations against the injured party and her team. This campaign of false accusations and open or indirect threats went through a number of stages, from 30.05.2009 until 05.06.2009.

11. The trial panel also exceeded its remit by making an assessment and judgment on the programme "xxx". Whether there was a provocation does not obviate the criminal offence, it can only affect the sentence if indeed the defendants were provoked by the programme.

12. The Special Prosecutor submits that all elements of the criminal offence of *Threat* are present in this case as supported by evidence presented during the main trial and that xxx and xxx bear same criminal responsibility as the xxx based on case law of the European Courts of Human Rights. Therefore, the Court should have convicted all defendants based on Counts 5-8 of the Indictment.

13. The Special Prosecutor further submits that the Court was unreasonable and disregarded important evidence when it found no connection between the articles published in xxx and the follow-up threats sent via email to **J. Xh.** and her team. However, this is not even required to establish that the elements of the criminal offence of *Threat* were there. This was just background evidence to show how serious the threats were.

14. Concerning the charge of *Violating Equal Status of Residents in Kosovo* (Counts 1-4 of the Indictment) the Special Prosecutor in her appeal points out that the Three-Judge Panel of the then Municipal Court re-instated this charge after it had been dismissed by the Confirmation Judge and in that Ruling the Panel explained the correct application of elements of Article 158 Paragraph (1) CCK. Despite this guidance, the Basic Court declared the publishing by xxx as an “entirely legitimate” expression of their opinion as to the xxx work of **J. Xh.** and her team and therefore the Judgment did not address Counts 1-4 of the Indictment in any further detail. The Special Prosecutor argues that the xxx articles amounted to a violation of the injured party’s equal status as they did create limitations to the freedoms and rights of the victims. For example **J.A.** felt compelled to leave her job as a xxx due to the pressure she was exposed to. There was no legal basis that xxx could have invoked, as freedom of expression ends where its exercise infringes upon the fundamental rights of others. The articles were published in order to stop **J. Xh.** and her team from pursuing its investigative xxx. Consequently the defendants should have been convicted also on this basis.

15. The Special Prosecutor in her appeal also analyses the statements of the witnesses, pointing out the omissions of the trial panel by failing to take into consideration, what the Prosecutor describes as important aspects of the statements and failing to consider all the relevant evidence. The Special Prosecutor also gives an analysis of the statements of the defendants, arguing that the credibility of these statements was not properly assessed by the trial panel.

16. The Special Prosecutor proposes to the Court of Appeals to accept her appeal and find the accused guilty and convict them on all charges by modifying the Impugned Judgement, or, in the alternative, to order a re-trial in the case, in whole or in part.

(Response to the appeal)

17. Only the Defence of defendant **R.H.2.** filed a response to the appeal. The response was filed by the defendant’s Defence Counsel Sahit Bibaj. He objects to the appeal stating that it is nothing more than a repetition of the Special Prosecutor’s allegations that have been examined

during the trial sessions and not supported by evidence. He points out that **R. H.2.** has never been a journalist and he admitted that he wrote the contested article as a personal opinion piece.

18. The Defence Counsel refers to his closing statements and proposes that the Court of Appeals rejects the appeal of the Special Prosecutor as ungrounded and affirms the Impugned Judgment.

(Motion of the Appellate State Prosecutor)

19. The **Appellate State Prosecutor** in his Motion dated 24.09.2013 makes reference to Articles 40 and 42 of the Constitution of Kosovo and observes that limitation by law to the guaranteed rights of freedom of expression and freedom and pluralism of media is only foreseen if it is necessary to prevent encouragement or provocation of violence and hostility on grounds of race, nationality, ethnicity or religion. Article 158 of the CCK punishes the conduct of unlawfully denying or limiting the constitutionally protected freedom of expression and freedom of media on the basis of – among others – political or other opinions. The same provision however, does not punish attempt or the incitement to deny or limit the freedom of expression, only the actual denial or limitation of the freedom of expression. In fact, the defendants were never charged in conjunction with either Article 20 or 24 of the CCK. The Appellate Prosecutor requests the Court of Appeals to assess whether the conduct of the defendants was able to at least limit **J. Xh.** constitutionally protected right of freedom to express her political and social views and pursue her investigative journalism. The fact that defamation and insults are no longer criminal offences as such should not have prevented the trial panel from assessing the responsibility of the defendants for the criminal offence under Article 158 of the CCK, as the act that has a consequence of denying or limiting constitutionally protected rights does not need to be a criminal offence itself.

20. Concerning the counts of criminal offence of *Threat* the Appellate State Prosecutor opines that the language of the four xxx articles is far from being hyperbolic or even metaphoric as suggested by the trial panel. The published pieces contain defamatory and insulting remarks towards **J.Xh.** but those remarks cannot be considered *per se* as threats in the sense of communicating direct or indirect intent to inflict harm on another person and are therefore relevant for the purpose of civil lawsuit only.

21. However, in **R.H.2** Article “xxx” these remarks culminate in the last threatening sentence logically and grammatically referring to the injured party. The “pure linguistic interpretation” used by the trial panel is wrong and insufficient for the appraisal of the meaning of the last sentence.

22. Concerning the article “xxx”, the trial panel again concentrated on the defamatory content of the article, lost focus and overlooked the threatening content of the sentences referring to the full right of the dutiful Albanian to punish the “ambassador-horr” as terrorist. While it is true that the author of this article was not found and under the current criminal code the owner and editor cannot be held criminally responsible as previously under Article 28 of the CCK, however, the

reference to this provision in the Impugned Judgment is redundant since **R.H.1.** and **A.A.** are charged in co-perpetration of *Threat* by publishing threatening articles. Article 161 of the CCK does not limit the types of *actus reus* by which a threat can be made provided that the intent to frighten or cause anxiety is proven, and co-perpetration in a threat does not require co-authorship or previous agreements among the defendants. Co-perpetration requires only substantial contribution to the commission of the criminal offence, like in the case at hand the intentional publication and thus diffusion of a threatening message.

23. The Appellate State Prosecutor moves the Court of Appeals to assess the claims put forward by the Special Prosecutor in her appeal and to analyze whether the Basic Court has fulfilled its duty to adjudicate the substance of the case with respect to the counts of *Violating Equal Status of Residents in Kosovo*) and with respect to the counts of *Threat*.

III. Findings of the Court of Appeals

III.I. Competence of the Court of Appeals and admissibility of the appeal

24. The Court of Appeals is the competent court to decide on the appeals pursuant to Articles 17 and 18 of the Law on Courts - Law no. 03/L-199.

25. The Panel of the Court of Appeals is constituted in accordance with Article 19 Paragraph (1) of the Law on Courts and Article 3 of the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo - Law no 03/L-053. 13. No objections were raised by the parties against the composition of the Panel.

26. The Special Prosecutor's appeal was filed within the 15-day time limit prescribed by Article 380 Paragraph (1) CPC. The Special Prosecutor was served with the Impugned Judgment on 06.08.2013 as evidenced by the delivery slip in the case file. The appeal was filed on 20.08.2013 as documented by the registry stamp on the appeal.

III.II. Findings on the merits

27. Whilst timely filed and admissible, the appeal is unfounded.

28. The Special Prosecutor invokes as first appellate ground the alleged erroneous determination of factual situation and challenges the findings of the Basic Court on the evidence. The Special Prosecutor engages in a detailed analysis of witness evidence, in an attempt to demonstrate that the Basic Court erroneously placed weight on certain witnesses and neglected the testimony of others. Further, the Special Prosecutor alleges that the Basic Court in its Judgment did not fully adjudicate the substance of the charge. Although the Special Prosecutor does not raise the application of criminal law as a specific appellate ground, it can be deduced from the reasoning of the appeal that she, in particular with regard to Counts 1-4 of the Indictment, also challenges the adopted interpretation of criminal law by the Basic Court.

Alleged substantial violation of the provisions on criminal procedure (Article 384 (1.7.) CPC)

29. The Special Prosecutor alleges that the Basic Court failed to fully adjudicate the substance of the charge.

30. The appeal of the Special Prosecutor is unfounded.

31. The violation pursuant to Article 384(1.7.) CPC exists when the Basic Court fails to address *all* the charges included in the Indictment.² It regulates the relation between the charges and the judgment in a quantitative regard. The court is namely bound to render a verdict in relation to the Indictment as a whole, not leaving a single part of content of the Indictment unresolved.³

32. The Basic Court in the respective cases issued a decision on all charges included in the Indictment, filed on 24.10.2012. The Basic Court entered a verdict of non-guilty for all eight counts of the Indictment thus fully adjudicating all the charges in the Indictment.

33. There has therefore been no violation pursuant to Article 384 Paragraph (1.7.) CPC.

34. The Panel remarks that the Special Prosecutor, although relying on violation pursuant to Article 387 Paragraph (1.7.) CPC effectively challenges the legal interpretation adopted by the Basic Court and its factual findings, by claiming that the Basic Court failed to consider all relevant elements of the charges. This will be dealt with under respective headings below.

Alleged violations with regard to Basic Court's factual and legal findings concerning the two sets of charges - *Threat* (Article 161(1), (2) and (4) CCK) and *Violating Equal Status of Residents of Kosovo* (Article 158(1) CCK)

Assessment with regard to the criminal offence of Threat (Article 161(1), (2) and (4) CCK)

35. The defendants were charged with the criminal offence of *Threat* pursuant to Article 161 Paragraphs (1) and (2) and (4) CCK.

² The Commentary to the Yugoslav law on Criminal proceedings, which included the same provision in Article 364(1.7.) LCP 1986 lists the following example (referring to a Judgment of the Supreme Court): The court has not fully addressed the subject matter of the indictment if acting on charges that the accused assaulted the injured party and caused him light bodily injury in an attempt to rob him of items and money, it finds that there was not such in intention and acquits him for the criminal act of robbery, without finding him guilty of the act of infliction of light bodily injury (Supreme Court of Yugoslavia Kž 38/70, dated 2 March 1979). See further in the Commentary to the LCP 1986, MOMCILO GRUBAC& TIHOMIR VASILJEVIC, COMMENTARY OF THE LAW ON CRIMINAL PROCEDURE, 1982, 2ND EDITION, "SAVREMENA ADMINISTRACIJA", BELGRADE, COMMENTARY TO ARTICLE 364(1.7.).

³ See for a detailed discussion: BRANKO PETRIC, COMMENTARY ON THE LAW ON CRIMINAL PROCEDURE 1986, 2ND EDITION, OFFICIAL GAZETTE OF THE SFRY BELGRADE, COMMENTARY TO ARTICLE 364(1.7.).

36. In the understanding of the Court of Appeals, the Special Prosecutor charged the defendants primarily with the aggravated form in Paragraph (4) CCK, and in the alternative with the general form of *Threat* proscribed in Paragraph (2) and Paragraph (1).

37. Article 161 CCK in the relevant part reads as follows:

(1) Whoever seriously threatens to harm another person in order to frighten or cause anxiety to such person shall be punished by a fine or by imprisonment of up to six months.

(2) Whoever seriously threatens to deprive another person of his or her life, to inflict grave bodily harm, to kidnap or deprive another person of his or her liberty or to inflict harm by fire, explosion or any other dangerous means shall be punished by a fine or by imprisonment of up to one year.

[...]

(4) When the offence provided in paragraph 1 or 2 of the present article is committed against an official person in connection with his or her work or position or against several persons, when the offence causes a major disturbance to persons, when the threatened person is thus placed in a difficult position for an extended period of time, or when the offence is committed by a perpetrator acting as a member of a group, the perpetrator shall be punished by imprisonment of three months to three years.

38. The Panel finds that the Special Prosecutor has failed to establish and prove the elements of the aggravated form of the criminal offence under Article 161 Paragraph (4) CCK.

39. The Special Prosecutor in the first place failed to specify which of the qualified modalities of perpetration she relied on. The Court of Appeals recognizes as the only modality that could potentially apply in light of factual allegations presented by the Special Prosecutor the following: “*when the offence causes a major disturbance to persons, when the threatened person is thus placed in a difficult position for an extended period of time*”.

40. Whereas the Special Prosecutor does argue on the impact the articles in xxx had on the life of **J. Xh**, the factual situation in the view of the Panel does not amount to what could be qualified as “major disturbances” to her life nor has she been “placed in a difficult position for an *extended* period of time”.

41. The Special Prosecutor in the Indictment does not present facts or evidence that would allow qualification under Article 161 Paragraph (4) CCK. The Special Prosecutor asserts that the publication of articles caused fright and anxiety for **J. Xh**. for an extended period of time, however this is just a rephrasing of the criminal provision. The Special Prosecutor does not present *facts* that would allow a conclusion that the Prosecutor is drawing (e.g. specific information on how the alleged fright manifested itself, for how long it actually lasted, etc.).

42. The Panel acknowledges that the injured party likely did feel threatened and did experience anxiety, however this was not of such gravity as to fall within the ambit of Article 161 Paragraph (4) CCK.

43. Having established that the factual allegations do not amount to an intensity necessary under Article 161 Paragraph (4) CCK and thus do not satisfy this element of the aggravated form of the criminal offence, the Panel need not address the remaining elements and the assessment of the Basic Court with regard to them.

44. Instead, the Panel must now assess whether the criminal offence of *Threat* in its general form was committed by the defendants through the alleged actions. In other words, the Panel must assess whether the defendants, although not responsible for the qualified form of the criminal offence under Article 161 Paragraph (4) CCK can be held responsible for committing the criminal offence under Article 161 Paragraphs (1) and (2) CCK.

45. Before analyzing the reasoning of the Basic Court and the arguments raised in the appeal, the Panel must satisfy itself that the prosecution for these criminal offences is (still) legally possible.

46. The Panel, having verified the rules on statutory limitation for criminal offences under Article 161 Paragraphs (1) and (2) CCK finds that they are covered by the absolute bar on criminal prosecution.

47. The CCK in Article 90 prohibits prosecution if the latter had not commenced in a set period of time after the criminal offence had been committed (so called relative bar on criminal prosecution). Article 90 Paragraph (1) CCK sets out these time periods which depend on the maximum prescribed punishment for a specific criminal offence. The Criminal Code includes provisions regulating commencement and interruption of periods of statutory limitation on criminal prosecution in Article 91 CCK. Thereafter, the Criminal Code prohibits prosecution *in every case* when twice the period of time set for statutory limitation in Article 90 Paragraph (1) CCK had elapsed. This is the so called absolute bar on criminal prosecution regulated in Article 91 Paragraph (6) CCK. This means that after a certain period of time, irrespective of reasons for delay, a defendant cannot be prosecuted for a criminal offence. Pursuant to Article 91 Paragraph (1) CCK the period of statutory limitation commences on the day when the criminal offence was committed.

48. Turning now to the circumstances of the respective case, the Panel finds as follows: The criminal offence of *Threat* under Article 161 Paragraph (2) CCK carries a maximum punishment of imprisonment of up to 1 year. Pursuant to Article 91 Paragraph (6) CCK in connection with Article 90 Paragraph (1) Subparagraph 6) CCK, the absolute bar on criminal prosecution exists when 4 years from the commission of the criminal offence had passed. The criminal offences alleged in this case were committed with the publications of incriminating articles, respectively on 30.05.2009, 02.06.2009 and 05.06.2009. The period of statutory limitation thus elapsed on 30.05.2013, 02.06.2013 and 05.06.2013 respectively. The prosecution of the criminal offence under this provision is therefore barred.

49. The same conclusion applies for the criminal offence proscribed under Paragraph (1) of Article 161 CCK. The criminal offence carries the maximum punishment of imprisonment of up to 6 months. Pursuant to Article 91 Paragraph (6) CCK in connection with Article 90 Paragraph (1) Subparagraph 6) CCK, the absolute bar on criminal prosecution exists when 4 years from the commission of the criminal offence had passed. The same reasoning as above applies, the period of statutory limitation elapsed on 30.05.2013, 02.06.2013 and 05.06.2013 respectively. The prosecution of the criminal offence under this provision is therefore barred.

50. Because the prosecution of the criminal offences under Article 161 Paragraphs (1) and (2) CCK is barred, the Panel need not engage in any further analysis of the assessment by the Basic Court nor arguments raised in the appeal, since the defendants cannot legally be prosecuted for these criminal offences. Moreover, the Panel observes that the statutory limitation for these criminal offences had also elapsed already when the Impugned Judgment was announced on 05.06.2013 and thus also when the appeal was filed.

51. The Panel, as a final remark, in this part expresses its disappointment about the lengthy handling of this case and the delays caused in prosecution and adjudication that ultimately led to statutory limitation expiring.

52. The Panel also notes that the facts alleged by the Special Prosecutor do not amount to any other criminal offence that can be legally prosecuted. The Panel notes that the criminal offences of insult and defamation, which could potentially apply in this criminal case, are no longer criminal offences under the now applicable Criminal Code in force since 01.01.2013, as observed already by the Basic Court in the Impugned Judgment. In any event, these criminal offences, even if the old Criminal Code would still apply, would also be time-barred on the same grounds as elaborated in above paragraphs.

Assessment with regard to the alleged criminal offence of Violating Equal Status of Residents of Kosovo (Article 158(1) CCK)

53. The Basic Court acquitted the defendants of the criminal offence *Violating Equal Status of Residents of Kosovo* (Article 158(1) CCK). The Basic Court found the criminalization under this provision serves to protect the basic rights of persons, including freedom of speech. The right for public expression is the extension of freedom of speech and the journalists can openly criticize other journalists. The defendants did exactly that when they criticized **J.Xh.** for the programme xxx. The Basic Court thus rejected the Special Prosecutor's claim that with this criticism the intent of the authors of the articles, the editor and the publisher was to stop journalistic activities and to restrict the right of **J.Xh.** and her staff to free speech.

54. The Special Prosecutor in her appeal effectively asserts that the Basic Court did not apply Article 158 Paragraph (1) CCK correctly. She stipulates that the elements of this criminal offence are met for each of the defendants.

55. The Panel rejects the Special Prosecutor's appeal as unfounded.

56. The Basic Court correctly concluded that the alleged actions of the defendants raised in the Indictment do not amount to the criminal offence of *Violating Equal Status of Residents of Kosovo* pursuant to Article 158 Paragraph (1) CCK.

57. Article 158 Paragraph (1) CCK reads as follows:

“Whoever unlawfully denies or limits the freedoms or rights of a resident of Kosovo, as set forth in the Constitutional Framework and the applicable law, on the basis of a difference of race, colour, sex, language, religious belief or non-belief, political or other opinion, national or social origin, property, birth, education, social status or other personal characteristics or affiliation to an ethnic, religious or linguistic community in Kosovo or whoever unlawfully grants a resident of Kosovo any privilege or advantage on the basis of such a difference or affiliation shall be punished by imprisonment of six months to five years.”

58. The perpetrator of this criminal offence is “whoever unlawfully denies or limits the freedoms or rights” of a resident of Kosovo. The circle of perpetrators of this criminal offence will thus in practice be narrow, extending only to persons who are in a position to actually impact the exercise of rights and freedoms of individuals (official persons and, for example, responsible persons in companies, but also other citizens if they are deciding on one's rights and freedoms). There namely must be *a concrete and direct link* between the act of a defendant and the resulting restriction or limitation of a right or freedom.

59. The Panel emphasizes that Article 158 Paragraph (1) CCK punishes the *actual* denial or limitation of rights and freedoms on the basis of personal characteristics. The provision serves as an anti-discrimination clause. The law however does not extend to a situation where employees of a newspaper and members of the public express their opinions, however harsh, about the content of a TV programme and about the journalists and producers of that programme. To accept the Special Prosecutor's interpretation of Article 158 Paragraph (1) CCK would be to apply it far beyond its intended purpose.⁴

60. The factual allegations in the Indictment do not in any way support the assertion that the defendants restricted **J.Xh.** or her staff member's freedom of expression or any other right through the publication of the articles in xxx in May and June 2009. Whereas the Panel concedes that the published articles were of defamatory nature and some may have even included the

⁴ The same was pointed out also by the Confirmation Judge who originally rejected the charge. See Ruling on confirmation of indictment and admissibility of evidence, KA 44/12, 03.05.2012, para. 81.

elements of threat, their publication as such did not have any *direct* impact on **J.Xh.** or her staff's exercise of constitutional and legal rights.

61. The Panel emphasizes that the Indictment does not contain facts that would support the alleged qualification. Under counts 1-4 alleging the commission of this criminal offence, the Special Prosecutor in the charging part of the Indictment merely asserts that the defendants ran a media campaign against **J.Xh.** and her staff by publishing or instructing the publication of Articles in xxx.

62. For this criminal offence to exist the Special Prosecutor would have to demonstrate concrete actions of defendants that directly resulted in **J.Xh.** being prevented to exercise her constitutional or legal rights. The Special Prosecutor would also have to demonstrate direct or eventual intent of defendants for this criminal offence. None of these elements were neither alleged let alone proven by the Special Prosecutor. The Prosecution's statement that because of the outbreak caused by the articles the injured party left her job is in this regard insufficient and also not supported by evidence with regard to any direct link.

63. The Basic Court having established that the elements of the criminal offence under Article 158 Paragraph (1) CCK were not met, did not have to engage in any further analysis or reasoning, thus there has also not been any violation of procedural law in this regard.

64. The Panel affirms that the Basic Court correctly interpreted Article 158 Paragraph (1) CCK and found that the alleged actions of the defendants do not constitute this criminal offence.

Remarks of the Panel concerning the correct qualification of criminal offences alleged against A.A. and R. H. 1.

65. The Panel acquitted defendants **A. A.** and **R. H.1.** of eight counts of criminal offences pursuant to Articles 158 Paragraph (1) CCK and 161 Paragraphs (1), (2) and (4) CCK, relying on Article 364 Paragraph (1.1.) CPC.

66. The Special Prosecutor charged the two defendants with four separate counts of *Threat* (Article 161(1) (2) and (4) CCK) and four separate counts of *Violating Equal Status of Residents of Kosovo* (Article 158(1) CCK). In other words, the Special Prosecutor alleged that **A. A.** and **R. H.1.** with publication of each article in xxx committed a separate criminal offence. The Basic Court followed this approach instead of properly qualifying the acts as **one criminal offence of Threat committed in continuity and one criminal offence of Violating Equal Status of Residents of Kosovo committed in continuity.**

67. The alleged actions namely form, as argued by the Prosecutor herself, a continued action, thus the proper legal qualification is that of one criminal offence with multiple underlying acts.

68. The Panel makes this observation, however also notes that it has no bearing on the outcome of the criminal case, since the defendants have been acquitted of all charges and the finding of non-guilty has subsequently been affirmed by the Court of Appeals for reasons elaborated above.

69. In conclusion, the Panel rejects the Special Prosecutor's appeal as unfounded and affirms the Impugned Judgment of acquittal for all five defendants.

Done in English, an authorized language. Reasoned Judgment completed on 28.04.2014.

Presiding Judge

—————
Hajnalka Veronika Karpati
EULEX Judge

Panel member

—————
Gerrit-Marc Sprenger
EULEX Judge

Panel member

—————
Fillim Skoro
Judge

Recording Officer

—————
Beti Hohler
EULEX Legal Officer

COURT OF APPEALS OF KOSOVO
Pakr 359/13
13.03.2014