

SUPREME COURT OF KOSOVO

Case number:

Pml.Kzz. 236/2016

Court of Appeals case no. PAKR 158/15 District

Court of Prizren ease no. P 272/13

Date:

11 January 2017

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a Panel composed of Supreme Court Judge Valdete Daka (Presiding), EULEX Judge Elka Filcheva-Ermenkova (Reporting) and Supreme Court Judge Emine Mustafa, assisted by EULEX Legal Officer **Maja Mahl** as the recording officer,

in the criminal case against;

1. **N.U.**, ID no. xxx, born on xxx, residing in xxx,
2. **O.J.**, ID no. xxx, born on xxx, residing in xxx,
3. **S.M.**, ID no. xxx, bom on xxx, residing in xxx,
4. **Sh.Sh.**, ID no. xxx, born on xxx, residing in xxx,
5. **T.M.**, son of xxx and xxx, born on xxx, residing in xxx,
6. **E.A.**, ID no. xxx, bom on xxx, residing in xxx village,
7. **F.B.**, ID no. xxx, born on xxx, residing in xxx,
8. **Rr.R.**, ID no. xxx, bom on xxx, residing in xxx,
9. **H.B.**, ID no. xxx, bom on xxx, residing in xxx,
10. **G.G.**, ID no. xxx, bom on xxx, residing in xxx;

acting upon the requests for protection of legality filed by the Chief State Prosecutor, **T.M., O.J., Sh.Sh. and defence counsel V.V. on behalf of S.M.;**

having considered the responses filed by the Chief State Prosecutor, **T.M., O.J., E.A., Rr.R. and the defence counsels of S.M. and Rr.R.;**

having deliberated and voted on 11 January 2017;

pursuant to Articles 418, 432—441, 384 (1.12) and 370 of the Criminal Procedure Code (hereafter: the CPC);

renders the following

JUDGMENT

- I. The request for protection of legality filed by the Chief State Prosecutor against the judgment of the District Court of Prizren dated 9 September 2014 in case no. P 272/13 and the judgment of the Court of Appeals dated 5 April 2016 in case no. PAKR 158/15 is granted as follows; it is found that in the judgment of the Court of Appeals dated 5 April

2016 in case no. PAKR 158/15, in the acquittal part related to **N.U., E.A., F.B. and Rr.R.**, the law is violated in favour of the defendants.

- II. The requests for protection of legality filed by **T.M., O.J., Sh.Sh. and defence counsel V.V.** on behalf of **S.M.**, against the judgment of the District Court of Prizren dated 9 September 2014 in case no. P 272/13 and the judgment of the Court of Appeals dated 5 April 2016 in case no. PAKR 158/15, are rejected as unfounded.

I. RELEVANT PROCEDURAL HISTORY

1. On 27 July 2012, the Special Prosecution of the Republic of Kosovo (hereafter: the Prosecutor) filed Indictment PPS 253/09 against the abovementioned defendants.
2. Confirmation hearing sessions were held on 30 August 2012, 24 September 2012, 18 October 2012 and 2 November 2012. **F.B. and T.M.** were severed from the case on 24 September 2012. In relation to **T.M.**, the proceedings were re-joined on 18 October 2012.
3. On 27 December 2012, the indictment was dismissed by a ruling issued by the pre-trial judge. The Prosecutor appealed the ruling. In a ruling dated 17 April 2013, the Court of Appeal partially granted the appeal and ruled that the indictment remained in force, subject to amendments. The indictment for all defendants was dismissed insofar as it referred to the legal qualification of Abuse of Official Position.
4. In relation to **F.B.** the proceedings were re-joined on 22 August 2013. The indictment was confirmed against him by a ruling dated 5 December 2013, which was confirmed by the Court of Appeals.

5. The main trial commenced on 21 January 2014 and concluded on 4 September 2014. On 22 January 2014, an amended indictment was filed.
6. On 9 September 2014, the District Court announced its judgment through which:
 - a. **N.U.** was found guilty of the criminal offence of Issuing Unlawful judicial Decision committed in co-perpetration under Articles 346 and 23 of the Provisional Criminal Code of Kosovo (hereafter: the PCCK).
 - b. **O.J., E.A., F.B., Rr.R., Sh.Sh. and T.M.** were found guilty of the criminal offence of Issuing Unlawful Judicial Decision under Article 346 of the PCCK.
 - c. **H.B.** was found guilty of the criminal offence of Assistance in Issuing Unlawful Judicial Decision under Articles 346 and 25 of the PCCK.
 - d. **G.G.** was found guilty of the criminal offence of Falsifying Documents under Article 332 of the PCCK.
 - e. All defendants were sentenced to suspended sentence comprising of the following terms of imprisonment: **N.U.** - two years, **O.J.** - eighteen months, **E.A.** - nine months, **F.B.** - nine months, **S.M.** - six months, **Sh.Sh.** - eight months, **T.M.** - one year, **Rr.R.** - nine months, **H.B.** - one year, and **G.G.** - six months.
 - f. The accessory punishment of prohibition on exercising a profession, activity or duty was imposed for all defendants.
7. The judgment of the District Court was appealed by the Prosecutor and the defendants. The Court of Appeals rendered its judgment on 5 April 2016. By this judgment, the judgment of the District Court was modified as follows:
 - a. **N.U., E.A., F.B., Rr.R. and G.G.** were acquitted.
 - b. The convictions of **O.J., S.M., Sh.Sh. and T.M.** were upheld but with the modification that the defendants committed the criminal offence with the intent to cause damage to another person.
 - c. The accessory punishments against **O.J., S.M., Sh.Sh., T.M. and H.B.** were modified in relation to the referenced provisions and with the clarification that the prohibitions were to start from the day the judgment becomes final.
8. Requests for protection of legality were filed by **T.M.** on 29 June 2016, **O.J.** on 29 June 2016, **Sh.Sh.** on 25 July 2016, defence counsel **V.V.** on behalf of **S.M.** on 22 August 2016 and by the Chief State Prosecutor on 15 August 2016.
- 9, The abovementioned requests were served to the opposing parties. **T.M., O.J., E.A., Rr.R., the defence counsels of S.M. and Rr.R.** and the Chief State Prosecutor have filed responses.

II. THE REQUESTS FOR PROTECTION OF LEGALITY

Chief State Prosecutor

Chief State Prosecutor moves the Supreme Court to establish that the judgments of the District Court and Court of Appeals are in substantial violation of the provisions of criminal procedure pursuant to Articles 384 (1.12) and 370 (7) of the CPC, and in violation of criminal law pursuant to Article 385 (1.5) of the same code. He states:

Violation of Article 370 of the CPC:

The judgments are drawn up in violation of Article 370 (7) of the CPC because: The District Court came to the wrong conclusion when determining the criminal offence committed by **G.G.** He disagrees with the Court of Appeals' conclusion that the evidence is insufficient to establish that **G.G., E.A., F.B., Rr.R. and N.U.** are found guilty. The Court of Appeals did not make an evaluation of the credibility of the evidence, nor did the Panel present clear reasons for settling the points of fact and law. It is unclear how the Panel at the one hand found the judgment of the District Court correct but on the other hand modified it and acquitted some of the defendants. It is not possible to read the judgment of the Court of Appeals and understand reasons for the enacting clause.

Violation pursuant to Article 385 (1.5) of the CPC:

The judgments violate criminal law pursuant to Article 385 (1.5) of the CPC because the imposed punishments do not match the severity of the criminal offences and because the imposition of suspended sentences is inappropriate given the serious nature of the criminal offences.

T.M.

T.M. moves the Supreme Court to modify the judgments of the District Court and Court of Appeals and acquit him of the charge, or alternatively to annul the judgments and return the case for re-trial. He argues that the judgments are in violation of Article 346 of the PCCK, and in substantial violation of the provisions of criminal procedure according to Article 384 (1.3) of the CPC. He states:

Violation of criminal material law:

Criminal law was violated to his detriment because he was found guilty even if the elements set out in Article 346 of the PCCK did not exist. The criminal offence of Issuing Unlawful Judicial Decision can only be committed with direct intent. Direct intent was not proved during the proceedings. He issued the decisions in accordance with applicable law and had no intention to obtain an unlawful material benefit for himself or anyone else or to cause damage. In addition, the Court of Appeals applied the law selectively when the Panel, although the factual circumstances were unchanged, only acquitted the judges of the second instance.

Violation pursuant to Article 384 (1.3) of the CPC:

In substantial violation of the provisions of criminal procedure, the District Court held a session partially in one of the defendant's absence. This happened on 3 September 2014 when the

defendant **F.B.** was allowed to leave the session before it was finished due to health problems. The defendant's presence was mandatory and the District Court should have severed the procedure against him but failed to do so. This complaint was rejected by the Court of Appeals because it was not stated in the minutes. The minutes from the session were never submitted to him and therefore he did not know of this omission until he received the judgment of the Court of Appeals. The Supreme Court can establish what happened during the session by examining the video and audio recording from it.

O.J.

O.J. moves the Supreme Court to modify the judgments of the District Court and Court of Appeals and acquit her of the charge. She claims that the judgment of the Court of Appeals is in violation of Article 346 of the PCCK because the reasoning does not mention any evidence that proves that she intended to cause damage. She stresses that a judgment of conviction cannot be the result of judges' beliefs but must be based on evidence and that there is no evidence that she intended to cause damage. Additionally, she argues that the Court of Appeals applied the law selectively since only the judges of the second instance, who confirmed the decision of the first instance, were acquitted while the convictions of the judges of the first instance were upheld.

S.M.

The defence counsel of **S.M.** moves the Supreme Court to annul the judgments of the District Court and the Court of Appeals and to return the case for re-trial. Pursuant to Article 435 (4) of the CPC, he requests the Supreme Court to order that the enforcement of the judgments be postponed or terminated. The request is based on the grounds of violations of the provisions of criminal procedure, criminal law and the Constitution, as follows:

Violations of the provisions of criminal procedure:

The judgment of the District Court is in violation of Article 370 of the CPC because: The enacting clause is not clear in relation to the imposed accessory punishment because the referenced articles do not regulate the said prohibition. The enacting clause is in contradiction with itself and the reasoning since **N.U.** was the only one of the defendants who was convicted of the criminal offence in co-perpetration with others. The enacting clause derives from a misinterpretation of the Law on Obligations because it is erroneously stated -that the defendant annulled the contracts, whereas from a legal point of view she only confirmed the nullity of them. The reasoning does not address the arguments raised in his final statement. No reasons related to the establishment of material facts are given. The reasoning is contradictory to the evidence because it is erroneously established that **S.M.** processed two land cases instead of one and that she issued the decisions with the intent to obtain an unlawful material benefit for herself or another person. The intent was not supported by any piece of evidence. The intent must be established by evidence and cannot, as erroneously stated in the judgment, be inferred from circumstantial evidence.

The judgment of the Court of Appeals is also in violation of Article 370 of the CPC because: All of the deficiencies of the judgment of the District Court mentioned above were confirmed. The reasoning is incomprehensible; it is not possible to read the judgment and understand why the defendant was convicted. It is not stated in what manner the criminal offence was committed or whether or not the contested judgments can be reviewed when they are still pending at the Special Chamber of the Supreme Court. The enacting clause is not clear as no specification is given on what parts of the appeal that have been accepted or rejected. Only the punishment was confirmed, meaning that the Court of Appeals confirmed the punishment but not the conviction. The Court of Appeals erroneously established that **S.M.** knowingly rendered unlawful decisions and that she handled two cases.

The District Court violated other provisions of criminal procedure as follows: On 3 September 2014, the defendant **F.B.** - whose presence during the session was mandatory - was sent to the

hospital. Instead of adjourning the session, the District Court continued the session in the absence of **F.B.**. In addition, the District Court forged evidence. In the judgment of the District Court it is erroneously stated that no notification was submitted to KTA when in fact the notification was included in the case file and listed in the indictment. The Court of Appeals repeated the District Court's forgery of evidence.

Violations of the Constitution:

Article 104 (5) of the Constitution prescribes that the judicial power is unique, independent and exercised by courts. This means that only higher courts have the authority to review a judicial decision rendered by a lower instance court. To protect this principle Article 107 of the Constitution guarantees immunity for judges. In violation of these constitutionally protected principles, the outcome of this case leaves the authority to review judicial decisions to the prosecutor and put an enormous pressure on the judges of the Special Chamber of the Supreme Court, where the contested decisions are pending.

Violations of criminal law:

The judgments are in violation of criminal law because direct intent was not established. The criminal offence of Issuing Unlawful Judicial Decision can only be committed with direct intent. In this case it is uncontested that **S.M.** did not obtain an unlawful benefit and that no damage was caused. Consequently, direct intent cannot be established. The judgments are also in violation of criminal law because the accessory punishment is unlawful as the contested decisions are pending at the Special Chamber of the Supreme Court and because it is unfair and degrading for a judge.

Sh.Sh.

Sh.Sh. moves the Supreme Court to modify the judgments of the District Court and Court of Appeals and acquit her of the charge, or alternatively to annul the judgments and return the case for re-trial. Pursuant to Article 435 (4) of the CPC, she requests the Supreme Court to order that the enforcement be postponed or terminated. With reference to a number of documents included in the case file, she claims that the judgments are in violation of the provisions of criminal procedure, criminal law and the Constitution, as follows:

Violations of the provisions of criminal procedure:

The judgments are drawn up in violation of Article 370 of the CPC because the reasoning does not include all of the required information specified in Article 365 of the same code. It is not known from the judgments why she was found guilty. The enacting clause of the judgment of the District Court, which was confirmed by the Court of Appeals, does not specify the form of commission of the criminal offence or the facts and circumstances that indicate the criminal nature of the committed act. In addition, the enacting clause of the judgment of the Court of Appeals does not specify what parts of the appeal that have been accepted or rejected. According to the enacting clause, no criminal offence was committed but yet the punishment was confirmed.

The contested decision rendered by her cannot be reviewed as it was confirmed by a second instance court. The confirmation was based on at the time applicable case law. From a legal point of view, it is not possible to consider a judicial decision that has been confirmed by a second instance unlawful. When a judicial decision is confirmed by a higher court, the responsibility lies exclusively on the panel of the higher court.

Evidence was concealed and manipulated to her detriment because it is stated in the judgments that no notification on the claim was submitted to KTA despite the fact that the notification is included in the case file and listed in the indictment.

Violations of criminal law:

The judgments are in violation of criminal law because direct intent was not and could not be established. The criminal offence of Issuing Unlawful Judicial Decision can only be committed with direct intent. In the present case, it is uncontested that she did not obtain any unlawful benefit and that no damage was caused to a third party since her judgment did not result in any changes of register or ownership. In addition, since the judicial decision rendered by her was only confirmatory by nature it could not result in obligations or damage. Because of these circumstances, direct intent cannot be established. The courts have in this regard based their conclusions solely based on suppositions.

The judgments are also in violation of criminal law because the accessory punishment is unlawful and degrading for a judge.

Violations of the Constitution:

The judgments violate the constitutionally protected principle of immunity for **xxx** pursuant to Article 107 of the Constitution as they deprive a judge from the right to independently render judgments based on applicable law, his/her personal judicial view and evaluation of evidence. A judge should not be held criminally liable for judicial decisions taken within his/her responsibility as a judge. Only a higher instance court has the authority to evaluate the quality of a judge performance and professionalism. In addition, the fact that the **xxx** of the second instance were acquitted while she was convicted is a clear example of selective justice and shows that the judgment of the Court of Appeals is discriminating, unfair, incomplete, biased and unlawful.

III. RESPONSES

Response by the Chief State Prosecutor

The Chief State Prosecutor moves the Supreme Court to reject the requests filed by the defendants as unfounded. He argues that the requests do not contain any facts that have not already been considered by the courts and concurs with the judgments in the parts that have been challenged by the defendants.

Responses by the defendants

T.M., O.J., E.A., Rr.R., his defence counsel and defence counsel **V.V.** on behalf of **S.M.** move the Supreme Court to reject the request tiled by the Chief State Prosecutor as unfounded. **T.M., O.J.** and defence counsel **V.V.** refer to the arguments put forward in their requests for protection of legality. **E.A., Rr.R.** and his defence counsel refer to the arguments put forward in their appeals of the judgment of the District Court and the findings of the Court of Appeals.

IV. FINDINGS OF THE SUPREME COURT

Competence and Composition of the Panel

1. Pursuant to Articles 21 and 22 of the Law on Courts no. 03/L-199, the Supreme Court is the competent court to adjudicate upon this matter.
2. Pursuant to the Law on Courts no. 03/L-199 and the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo no. 03/L-053, as amended by Laws no. 04/L-273 and 05/L-103, the case is considered as an "Ongoing case". Consequently, EULEX judges have jurisdiction and competence in this case and the Panel is composed of a majority of local judges and presided by a local judge.

Applicable Laws

3. The Supreme Court procedure is governed by the CPC because the requests for protection of legality were filed after the CPC entered into force on 1 January 2013 (Article 539 CPC).
4. As correctly established and reasoned by the District Court and the Court of Appeals, the CPC was also the applicable procedural law in the criminal proceedings of relevance to the merits of the requests and the PCKK is the applicable substantive law in relation to the charges.

Admissibility

5. The requests are admissible as they are filed by authorized persons, against final judgments and within the prescribed time limits (Article 433 CPC).

Merits of the Requests

6. Pursuant to Article 436 (1) of the CPC, the Panel has confined itself to examine those violations which the requesting parties have put forward in their requests. The Panel's findings are structured as follows: Firstly, the allegations raised by the Chief State Prosecutor will be addressed one by one in paragraphs 7—17. In paragraphs 18—34, the Panel will thereafter address the allegations raised by the defendants. Since several of the allegations are raised by more than one of the defendants, the Panel has decided to structure its findings based on the allegations themselves rather than addressing the requests one by one.

Request of the Chief State Prosecutor

Content of the judgments:

7. Chief State Prosecutor moves the Supreme Court to establish that the judgments are in substantial violation of criminal procedure pursuant to Article 384 (1.12) of the CPC read in conjunction with Article 370 (7) of the same code. For the reasons set out below, the Panel has concluded that this allegation is partially well-founded.
8. Initially, the Panel must address the scope of its adjudication since the request includes arguments that are not allowed as grounds for requests for protection of legality as it is set in the CPC. Article 432 (2) of the CPC clearly prescribes that a request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the

factual situation. This restriction prohibits all arguments that - directly or indirectly - challenge the factual determination. Because of this restriction, the Panel cannot assess the arguments related to the establishment of facts. These arguments are therefore rejected as unfounded pursuant to Article 437 of the CPC.

9. Article 370 (7) of the CPC regulates the form and content of a written judgment in relation to the court's factual evaluation. It stipulates the minimum requirements of the court's reasoning and provides a procedural guarantee that the court in its judgment gives thorough and clear explanations for its conclusions. Article 370 (7) of the CPC reads:
The court shall state clearly and exhaustively which facts it considers proven or not proven, as well as the grounds for this. The court shall also, in particular, make an evaluation of (the credibility of conflicting evidence, the grounds for not approving individual motions of the parties, and the reasons by which the court was guided in settling points of law and, in particular, in establishing the existence of a criminal offence and the criminal liability of the accused, as well as in applying specific provisions of criminal law to the accused and his or her act.
10. As to the arguments related to the content of the judgment of the District Court, the Panel finds that the allegations are unfounded. The Panel notes that the District Court clearly and thoroughly addressed all elements of the charge against **G.G.** in paragraphs 342—353 of its judgment and that the Court of Appeals mainly reiterated these conclusions on pages 30 and 31 of its judgment. The Panel concludes that the judgment of the District Court meets the requirements set out in Article 370 (7) of the CPC. For this reason, the allegations in this regard are unfounded.
11. As to the arguments related to the content of the judgment of the Court of Appeals, the Panel agrees with the Chief State Prosecutor and finds that the judgment does not meet the requirements set out in Article 370 (7) of the CPC in the parts through which **N.U., E.A., F.B. and Rr.R.** were found not guilty. In these parts, the Panel initially noted that the Court of Appeals on page 26 of its judgment concludes that the District Court comes to logical conclusions in the assessment of the evidence and that it found no reason to doubt that a material fact was not established correctly or that the District Court incorrectly interpreted any evidence. Bearing this in mind, the Panel finds the subsequent reasoning through which **N.U., E.A., F.B. and Rr.R.** are found not guilty to be incomprehensible.
12. In relation to **E.A., F.B. and Rr.R.**, the Panel finds that the Court of Appeals failed to present clear reasons for why its assessment with regards to the intent differed between the judges of the first and second instance. From the reasoning in this part, it is not explained why the number of cases was of relevance or the fact that "the appeal was already directed to them". The Panel concludes that it is not possible to read the judgment of the Court of Appeals and understand the reasons for the acquittal of these defendants.
13. In relation to **N.U.**, the Panel finds that the Court of Appeals failed to address the key evidence addressed by the District Court, such as **N.U.'s** response to the KTA letter received in January 2007, his direct involvement in case no. 2333/05 and his communication with the KTA office. In the light of this, the Panel does not understand the conclusion that "the

prosecution failed to present any evidence linking the defendant **N.U.**, other than his formal and general role as **xxx**, to the defendants [...]". Also in this part, the Panel concludes that it is not possible to read the judgment of the Court of Appeals and understand the reasons for the acquittal of **N.U.**,

14. According to Article 384 (1.12) of the CPC, there is a substantial violation of the provisions of criminal procedure if the judgment was not drawn up in accordance with Article 370 of the same code. In paragraphs 11 —13 above, the Panel has concluded that the judgment of the Court of Appeals partially was not drawn up in accordance with Article 370 (7) of the CPC, as duly described above. Because of this, the request of the Chief State Prosecutor is partially well-founded. Pursuant to Articles 438 (1.3) and (2) of the CPC, the Panel establishes this violation but does not interfere with the final decision.

Imposition of punishments:

15. Chief State Prosecutor moves the Supreme Court to establish that the judgments are in violation of criminal law pursuant to Article 385 (1.5) of the CPC. For the reasons set out below, the Panel has concluded that the alleged violation does not exist.
16. Initially, the Panel notes that the arguments put forward by the Chief State Prosecutor do not relate to the referenced provision or alleged violation. Article 385 (1.5) of the CPC prescribes that there is a violation of criminal law if the court exceeds its authority under the law in rendering certain decisions. In relation to a decision on punishment, the court exceeds its authority under the law if it imposes a sentence that is not prescribed for the criminal offence of which the defendant is found guilty. If the court acts within its authority, there is no violation of criminal law pursuant to Article 385 (1.5) of the CPC. A mere statement that the imposed punishments do not reflect the gravity of the criminal offences is therefore not a violation of criminal law in the meaning of Article 385 (1.5) of the CPC.
17. The Panel has thoroughly examined if the courts exceeded their authorities when sentencing the defendants and concludes that the courts did not. The criminal offence of Issuing Unlawful judicial Decisions is pursuant to Article 346 of the **PCCK** punishable by imprisonment of six months to five years. All terms of imprisonment were decided within this scale. With regards to the imposition of suspended sentences, Articles 41—44 of the **PCCK** are applicable. These provisions prescribe that suspended sentence may be imposed for criminal offences punishable by imprisonment of up to five years. Also in this regard, the courts acted within their authorities. The allegation that the courts exceeded their authority is therefore unfounded.

Requests of the Defendants

Establishment of intent:

18. Allegations related to the establishment of intent are raised by **T.M., O.J., S.M. and Sh.Sh.**

Briefly put, they argue that Article 346 of the PCKK was violated to their detriment because a direct intent was not proved or established and because the intent may not be inferred from circumstantial evidence. For the reasons set out below, the Panel has concluded that these arguments are unfounded. Firstly it must however be stressed that the Panel cannot assess the factual determination by the courts as this does not fall within the scope of its adjudication, as described and explained in paragraph 8 above. In the following, the Panel will therefore exclusively assess whether or not criminal material law was violated and not whether or not the courts correctly established facts.

19. Initially, the Panel fully concurs with the District Court as to the legal description of the elements of the criminal offence of Issuing Unlawful Judicial Decision under Article 346 of the PCKK (paragraphs 222—242 of the judgment of the District Court). The Panel does not intend to repeat this background, but wishes to emphasize only a few key points with regards to the intent:

- a. Article 346 of the PCKK reads: A judge [...] who, with the intent to obtain an unlawful material benefit for himself, herself or another person or cause damage to another person, issues an unlawful decision shall be punished [...].
- b. The intent prescribed in Article 346 of the PCKK is one of the specific elements of the criminal offence of Issuing Unlawful Judicial Decision. It is a specific intent and as such it differs from the basic forms of intents prescribed in Article 15 of the PCKK. Article 15 of the PCKK defines the two types of basic intent - direct and eventual - that applies to each criminal offence within the PCKK. The intent prescribed in Article 346 of the PCKK constitutes a specific and defined subjective element of the criminal offence of Issuing Unlawful Judicial Decision. In addition to the basic intent that applies to all criminal actions, this criminal offence requires that the defendant issued the decisions at hand with a specific intent, a purpose.
- c. The factual determination in relation to the specific subjective element as defined in Article 346 of the PCKK does not differ from the factual determination in relation to other elements. The specific intent can therefore be proved in many ways, including through logical inferences that can be drawn from other pieces of evidence, including circumstantial evidence.

20. With reference to the key points elaborated above, the Panel concludes that Article 346 of the PCKK was not violated in relation to the establishment of intent. The Panel notes that both courts correctly established one of the specific intents prescribed in Article 346 of the PCKK. As elaborated above, it was not a violation of criminal law to base the establishment of this particular element on circumstantial evidence. The allegations are therefore unfounded in this regard.

21. In addition to addressing the allegations raised by the defendants, the Panel finds it crucial to add the following with regards to the intent: Based on the facts established by the District Court and confirmed by the Court of Appeals, the Panel finds that the correct legal qualification of these facts is that the defendants issued the decisions at hand not only with the intent to cause damage but also to obtain an unlawful material benefit for another person. By issuing the obviously wrong and clearly illegal decisions, the defendants were in that moment well aware of the legal consequences, namely that another person would obtain material benefit and that damage would be caused to another person. However, as a modification of the enacting clause in this regard would not be to the benefit of the defendants, the Panel confines itself to mention this violation pursuant to Article 438 (1.3) and (2) of the CPC.

"Selective justice":

22. **T.M., O.J. and Sh.Sh.** claim that the Court of Appeals applied the law "selectively" when only the xxx of the second instance were acquitted. Initially, the Panel notes that the arguments in this regard are extremely vague as they are not substantiated by any legal ground. Furthermore, the Panel notes that it is not a violation of either criminal procedure or criminal material law to acquit only some of the defendants based on a different assessment of the established facts. The Panel has under paragraphs 11 —14 established deficiencies of the judgment of the Court of Appeals in relation to the parts through which some of the defendants were acquitted. The Panel has not found that these deficiencies were a result of a biased court or that the law intentionally was applied selectively. Because of this, the allegations are unfounded.

The session on 3 September 2014:

23. **T.M. and S.M.** claim that the District Court substantially violated the provisions of criminal procedure by holding the session on 3 September 2014 partially in the absence of the defendant **F.B.**. In addition, **T.M.** requests the Supreme Court to establish what happened during the session by examining the video and audio recording from it.

24. The Panel initially decided to reject **T.M.'s** request that the Supreme Court should examine video and audio recording from the session on 3 September 2014. This because there is no procedural possibility to grant such request. The Supreme Court procedure when adjudicating requests for protection of legality is governed by Articles 418 and 432—441 of the CPC. None of these articles include a procedural possibility for the Supreme Court to take new evidence or examine video and audio recordings from the District Court's sessions. **T.M.'s** request is therefore rejected.

25. Secondly, the Panel fully concurs with the Court of Appeals that it cannot be derived from the minutes that **F.B.** left the session on 3 September 2014. However, the Panel also wishes to stress that even if this was true it would not lead to the proposal by the defendants since the defendant whose rights allegedly were violated is now acquitted. Consequently, the possible infringement of his rights did not affect his right to a fair trial.

Forged evidence:

26. **S.M. and Sh.Sh.** claim that the District Court forged evidence because it is stated in the judgments that no notification on the claim was submitted to KTA. Initially, the Panel notes that the allegation in this regard is vague as it is not substantiated by any legal ground or example. Secondly, the Panel cannot assess the District Court's establishment of facts as Article 432 (2) of the CPC prohibits arguments that - directly or indirectly - challenge the factual determination. Because of this, and because the Panel did not find any indication of that the courts forged evidence, these allegations are unfounded.

Immunity:

27. Allegations related to violations of the Constitution have been raised by **S.M. and Sh.Sh.** In this regards, the Panel fully concurs with the reasoning of the Court of Appeals that the Constitution only grants immunity to the xxx safe for the criminal offences committed by them. Article 107 (2) of the Constitution prescribes that xxx shall not enjoy immunity and may be removed from office if they have committed an intentional violation of the law. In this case, the defendants have been found guilty of intentionally violating the law. For that reason, the Constitution does not exclude criminal responsibility. The allegation that the Constitution was violated is therefore unfounded.

Imposition of accessory punishments:

28. **S.M. and Sh.Sh.** claim that the imposition of accessory punishments is unlawful. The Panel has concluded that this allegation is unfounded. The accessory punishment of Prohibition on Exercising a Profession, Activity or Duty can according to Article 57 of the PCKK be imposed on a perpetrator if he/she has abused his/her position, activity or duty in order to commit a criminal offence or if there is reason to expect that the exercise of such profession, activity or duty can be misused to commit a criminal offence. The provision does not make a difference between defendants who are xxx and other defendants. In this case, the defendants have clearly abused their positions in order to commit the criminal offences at hand. The allegation that the imposition of accessory punishments is unlawful is therefore unfounded.

Form and content of the judgments:

29. **S.M. and Sh.Sh.** claim that the judgments are in violation of Article 370 of the CPC. They have both argued extensively on this issue.

30. As mentioned above, Article 432 (2) of the CPC clearly prescribes that a request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation. This restriction prohibits all arguments that - directly or indirectly - challenge the factual determination. The Panel finds that this prohibition applies to all of the arguments stating that the reasoning is contradictory to the evidence or that the courts erroneously established material facts. These arguments are therefore unfounded as they fall outside of the scope of the Panel's adjudication.

31. As to the arguments related to the form and content of the judgments, the Panel has in paragraphs 11 —14 above concluded that the judgment of the Court of Appeals does not meet the requirements set out in Article 370 of the CPC in the parts through which some of

the defendants were acquitted. In the parts related to the requesting parties of this case the Panel has concluded that the allegations are unfounded and that the judgments meet the requirements set out in Article 370 of the CPC.

32. With regards to the judgment of the District Court, the Panel initially notes that the enacting clause in relation to the imposition of the accessory punishment was already modified by the Court of Appeals. For this reason it would be superfluous for the Panel to address this issue. The Panel does not agree that the enacting clause is in contradiction with itself and the reasoning in relation to **N.U.** and the fact that he was the only one convicted of the criminal offence in co-perpetration. Furthermore, there is no requirement for the court to address all arguments raised in the final statements. In conclusion, the Panel finds all allegations against the form and content of the judgment of the District Court to be unfounded in these parts.
33. With regards to the judgment of the Court of Appeals, the Panel has already addressed certain deficiencies in relation to defendants that were found not guilty. In relation to the requesting defendants in this case the situation is however different since the Court of Appeals affirmed the conclusions already exhaustively elaborated by the District Court. In situations where the Court of Appeals concur with reasons already given in the first instance, the standard for its reasoning is set lower. The Panel does not agree that the reasoning is insufficient or that the enacting clause is unclear or incomprehensible. In conclusion, the Panel finds all allegations against the form and content of the judgment of the Court of Appeals to be unfounded in these parts.

V. CONCLUSIONS

Having considered the above, the Supreme Court decided as in the enacting clause of this judgment. With this outcome, the Panel found no reason to postpone or terminate the execution of the judgments.

THE SUPREME COURT OF KOSOVO

PRISTINA

PML.KZZ 236/2016, dated 11 January 2017

Presiding judge:

Recording officer:

Members of the Panel

Elka Filcheva-Ermenkova

Emine Mustafa

**EULEX Judge (Reporting)
Judge**

Supreme Court

