THE COURT OF APPEALS

PRISHTINË/PRIŠTINA

PAKR 487/13

13 September 2016

In the Name of the People

The Court of Appeals, in a Panel composed of EULEX judge Piotr Bojarczuk as presiding and reporting judge, EULEX judge Roman Raab and the Court of Appeals judge Xhevdet Abazi, as panel members, assisted by Adnan Isufi, EULEX legal advisor, acting in the capacity of recording clerk, in the criminal case against:

I.T., father's name xxx, born on xxx, in xxx, currently residing in xxx, xxx, xxx;

A. P.,, father's name xxx, born on xxx, in xxx, currently residing xxx;

H.F. , father's name xxx, born on xxx, in xxx, currently residing in xxx;

I.H. , father's name xxx, born on xxx, in xxx, currently residing in xxx;

Z.K. , father's name xxx, born on xxx, in xxx, currently residing in xxx;

B.F. , father's name xxx, born on xxx, in xxx, currently residing in xxx;

B.B. , father's name xxx, born on xxx, in xxx, currently residing in xxx;

Charged according to the Indictment of the Special Prosecution Office of the Republic of Kosovo (hereafter SPRK), dated 4 July 2012, as amended, for criminal offences of Abusing Official Position or Authority contrary to article 339 paragraphs 1 and 3 in conjunction with article 23 of the CCK (all defendants); Attempted Abusing Official Position or Authority contrary to article 339 paragraphs 1 and 3 in conjunction with article 20 and 23 of the CCK (**A.P**.

and **I.T.);** Mistreatment in Exercising Official Duties contrary to article 164 paragraph 1, in conjunction with article 23 (**I.T**. and **B.F.**); Accepting Bribes contrary to article 343 paragraph 2 of the CCK (**I.H**. , **I.T.** and **H.F**.); Tax Evasion contrary to article 249 paragraph 2 of the CCK (**I.T**.); Obstruction of Evidence contrary to article 249 paragraph 2 of the CCK (**I.T**.);

seized of the appeal of the SPRK dated 16 August 2013 and the appeals of defence counsels Av Rrezarta Metaj on behalf of **I.T**., dated 7 August 2013, Av. Naser Peci on behalf of **A.P.,** dated 30 August 2013, Av. Rame Gashi on behalf of **H.F**. , dated 15 August 2012, and the Additional Submission to the Appeal filed by **I.T.** on 17 July 2013, against Judgment of the Basic Court of Prishtinë/Priština P.nr 709/12, dated 19 July 2013,

having considered replies of the SPRK dated 21 August 2013 and 30 August 2013 as well as replies of **I.T**. dated 4 September 2013, of **A.P**. dated 4 September 2013, the response of defence counsel Osman Mehmeti on behalf of **B.F**. dated 26 August 2013, and response of defence counsel Rame Gashi on behalf of **H.F**. .

having considered the Opinion of the Appellate Prosecution Office of Kosovo, dated 27 February 2014,

having deliberated and voted on 7 September 2016 on the request of the Appellate Prosecutor for joinder of the proceedings;

after public session held on 27 September 2016 before the Court of Appeals, and deliberation held on 13 September 2016,

Pursuant to articles 394, 401 and 402 of the Criminal Procedure Code of Kosovo (hereinafter "CPC"), renders the following:

JUDGMENT

I. The Appeal of the SPRK dated 16 August 2013 against the Judgment of the Basic Court of Prishtinë/Priština P.nr 709/12, dated 19 July 2013 against **I.T., A.P., H.F. , I.H. , Z.K. , B.F.** and **B.B.** , is partially granted.

II. The appealed Judgment of the Basic Court of Prishtinë/Priština P.nr 709/12, dated 19 July 2013 is annulled with regards to counts 1.1, 1.2, 1.3, 1.6, 1.7, 1.8, 1.9, 2, 3.1, 10, and 12 and for these counts the case is remanded back for retrial.

III. The appealed Judgment of the Basic Court of Prishtinë/Priština P.nr 709/12, dated 19 July 2013, is affirmed with regards to count 1.4, 1.5, 11 and also the following counts which prosecutor did not appeal: 1.7, 1.10, 1.11, 1.12, 1.13, 3.2, 6, 8 and 9.

IV. The Appeal of the SPRK dated 16 August 2013 against the Order of the District Court of Prishtinë/Priština, identifiable with number 302-2/08 dated 29 April 2008, is immaterial.

V. The appeal of Counsel Av. Rame Gashi on behalf of **H.F.** , dated 15 August 2012, is rejected as ungrounded.

VI. The appeal of defence counsel Av Rrezarta Metaj on behalf of **I.T.,** dated 7 August 2013, with regard to count 9, is ungrounded. The other part of appeal is immaterial.

VII. The appeal of Av. Naser Peci on behalf of **A.P**., dated 30 August 2013, and the Additional Submission to the Appeal filed by **I.T**. on 17 July 2013, are immaterial.

REASONING

I. Procedural Background

1. On 4 July 2012, SPRK filed the indictment against the above mentioned defendants and another three individuals, namely N. Sh., A. Th. and B. A.,, which are not subject of the current procedure.

2. The defendants in current procedure were charged for having allegedly committed the criminal offences of Abusing Official Position or Authority contrary to article 339 paragraphs 1 and 3 in conjunction with article 23 of the CCK (all defendants); Attempted Abusing Official Position or Authority contrary to article 339 paragraphs 1 and 3 in conjunction with article 20 and 23 of the CCK (**A.P**. and **I.T**.); Mistreatment in Exercising Official Duties contrary to article 164 paragraph 1, in conjunction with Article 23 (**I.T.** and **B.F**.); Accepting Bribes contrary to article 343 paragraph 2 of the CCK (**I.H**. **, I.T.** and **H.F**.); Tax Evasion contrary to article 249 paragraph 2 of the CCK (**I.T**.).

3. The Indictment was amended several times; on 14 July 2012 to include a case of an additional injured party, **A. R.;**; on 09 August 2012 with regards to the accused **B.A**. and **A. Th**. and on 6 March 2013 with regards to the accused **B.B. , I.T.** and **H.F**. .

4. On 03 September 2012 and on 05 September 2012, during the course of confirmation hearings, the SPRK withdrew the charges of Abusing Official Position or Authority against the accused B. A**.** and the charges of Abusing Official Position or Authority (under count 1.1, 1.6, 1.7) and Misuse of Economic Authorizations (in count 4) against the accused I.H. .

5. On 08 October 2012, the confirmation judge dismissed the charge of Abuse of Official Position from article 339 par 1 and 3 of the CCK and terminated the proceedings against B.A.

6. On 8 February 2013, the Basic Court of Prishtinë/Priština severed the criminal proceedings against N. Sh. and I. A. On same date, the proceedings were severed also against A. Th.

7. On 21 February 2013, the SPRK orally withdrew the charge against A. Th.

8. On 28 February 2013, the Basic Court of Prishtinë/Priština by judgment rejected the charge against A. Th.

9. On 19 July 2013, the Basic Court of Prishtinë/Priština by judgment acquitted N. Sh. for the criminal offence of Abuse of Official Position from article 339 par 1 and 3 of the CCK.

10. On 19 July 2013, the Basic Court of Prishtinë/Priština rendered its judgment with regards to **I.T., A.P., H.F. , I.H. , Z.K. , B.F. and B.B**. . The Basic Court found:

- **I.T.** guilty for having allegedly committed the criminal offence of tax evasion (count 9 of the Indictment), contrary to Article 313 of the CCK and incitement to falsify official documents in perpetration (count 1.3 of the indictment as re-qualified by the trial panel) contrary to article 348 read with article 23 and article 23 of the CCK. Pursuant to article 80 of the CCRK, the court imposed unto the defendant an aggregate punishment of eighteen (18) months of imprisonment and a fine in amount of one thousand (1.000) euro to be paid within a period of two (2) years from the date the Judgment becomes final. Pursuant to article 54 of the CCRK, the defendant was imposed an accessory punishment of prohibition to exercise public administration or public functions for the duration of three (3) years. He was acquitted of all other charges.

- **A.P**. for having allegedly committed the criminal offence of incitement to falsify official documents (count 1.6 of the indictment as re-qualified by the trial panel) contrary to article 348 read with article 24 of the CCK and incitement to falsify official documents (count 1.6 of the indictment as re-qualified by the trial panel) contrary to article 348 read with article 23 and article 23 of the CCK. Pursuant to article 71 read with article 52 of the CCRK, the court imposed unto the defendant an aggregate suspended punishment of eight (8) months for a period of two (2) years from the moment the Judgment becomes final. Pursuant to article 54 read with article 56 of the CCRK, the defendant was imposed an accessory punishment of prohibition to exercise public administration or public functions for the duration of two (2) years. She was acquitted of all remaining charges.

- **H.F.** guilty for having allegedly committed two counts of accepting bribe (count 8.2 and 8.3 of the indictment), contrary to article 343 par 2 of the CCK. Pursuant to article 71 read with article 52 of the CCRK, the court imposed unto the defendant an aggregate punishment of eight (8) months with imprisonment. Pursuant to article 54 of the CCRK, the defendant was imposed an accessory punishment of prohibition to exercise public administration or public functions for the duration of three (3) years. He was acquitted of all the remaining charges.

11. **I.H. , B.B. , B.F.** and **Z.K.** have been acquitted from all the charges.

12. On 19 July 2013, with a separate Judgment, the Basic Court of Prishtinë/Priština acquitted I.A from all the charges.

II. THE APPEALS

13. The appeal was timely filed by the SPRK Prosecutor Ms Maria Bamieh against the judgment dated 19 July 2013.

14. The following defense counsels timely filed their appeals against the Judgment dated 19 July 2013:

- Av Rrezarta Metaj on behalf of I.T..
- Av. Naser Peci on behalf of A.P..
- Av. Rame Gashi on behalf of H.F. .

15. **Appeal of the SPRK**

On 16 August 2013, the SPRK appealed the acquittal of:

1) I.T. from counts 1.1, 1.2, 1.3, 1.4, 1.6, 1.7, 1.8, 1.9, 1.10, 1.11, count 2, counts 3.2, count 10 and count 12;
2) A.P. from counts 1.1, 1.3, 1.4, 1.5, 1.6 and count 2;
3) H.F. from counts 1.9, 1.11 and 1.12;
4) Z.K. from counts 1.9 and 1.10;
5) B.F. from count 1.9 and count 3.2;
6) B.B. from count 1.7, 1.8 and count 11.

- The SPRK bases the appeal on the substantial violation of the criminal procedure (article 384 par 1 subpar 1.7 and 1.12 of CPC) and on erroneous or incomplete determination of the factual situation (Article 383 (1.3) in conjunction with article 386 of the CPC); and challenges the decision on criminal sanction imposed to I.T. for convictions on count 1.3 and count 9, to A.P. for the convictions on count 1.3 and 1.6 and to H.F. for the convictions on counts 8.2 and 8.3.

- The SPRK appeals the ruling of the court declaring inadmissible the evidence collected based on the order of the prosecutor PP nr 328-2/08.

- The SPRK proposed the modification of judgment: to convict the defendants and declare the evidence obtained by the order of the prosecutor as admissible, and to keep the imposed punishments the same or increase them. In the alternative, the SPRK proposes that the case be returned for retrial in its entirety or in part.

Specifically, the prosecutor argues that the court failed to establish completely the factual situation and to fully adjudicate the substance of the charges (article 386 and article 385 par 1 subpar 1.7 of CPC), and to explain why certain evidence was not taken into consideration (article 384 par 1 subpar 1.12). Prosecutor argues the following:

Count 1.1

The judgment is self-contradictory. A.P. and I.T. allowed a legally binding contract with Jona Med dated 26 September 2006 to elapse, which caused to the Kosovo budget a loss of over 1.5 million Euros. The court acknowledged that A.P. had a duty to request for the supplies but the court failed to establish the nexus between her failure and the consequent not fulfillment of the contract. I.T. took Office on 9 August 2007 and he was informed about the problem at least by a request which Jona Med made directly to him on 11 September 2007. Tolaj testified on 24 May 2013, that he thought that the damage to be paid to Jona Med for non-fulfillment of the contract would be maximum 200.000 Euro, and admitted that he did not want to find a solution because he was ready to pay that amount from the Kosovo Budget. Witness Fatime Aliu on 22 March 2013 confirmed that Tolaj was not interested in having a solution in this case. As result of non-fulfilment of the contract, two emergency tenders were announced in December 2007, which later were given to the candidate favored by Tolaj.

Count 1.2.

The court erred in acquitting A.P. and I.T. arguing that the act charged does not constitute a criminal offence. If the court did not find enough evidence for a guilty verdict, this does not mean that the charge does not constitute a criminal offence. The evidence introduced by Alban Pozhegu is reliable and coherent. His evidence is enough to prove the count.

Pozhegu testified that Tolaj was present during both evaluations, and was instructing who to select. The presence of Tolaj is also confirmed by I.H. . As stated by Agim Zeqiri on 11 April 2013, Tolaj's presence during the evaluation was an undue influence on its own. The court did not take into account neither contacts between Tolaj and Pajaziti and the winner Burim Shkodra, nor the financial and social connections between Pajaziti and Burim Shkodra. The fact that the bid offered by Shkodra was the cheapest does not have any impact to this criminal conduct as there should be no conflict of interest *per se*. The price of the bid could have been cheaper because Tolaj and Pajaziti might have informed him about the bids of others.

Count 1.3

According to the Prosecutor, Agim Sheqiri explained on 11 April 2013 that the tender had to be annulled, and re-advertised because Raimonda Hyseni did not participate in the evaluation process. Pajaziti and Tolaj told Hyseni, taking advantage of the fact that she was a junior employee with no experience in tendering, to sign the evaluation forms in order to prevent the re-advertisement of the tender and the loss of the material benefit for the companies which won the tender. The court qualified this behavior as incitement to falsify the official documents. The Prosecution submits that court should have confirmed the criminal offence of Abuse of Office and by not doing so the panel contradicts itself. Both defendants acted in their official capacity while putting the pressure on Raimonda Hyseni to sign the documents knowing that she did not participate in the evaluation of that tender. By definition such behavior exceeds the limits of competences attached to the official position and has to be qualified as the abuse of office.

Count 1.4.

A.P. and I.T. admitted that they had a coffee with Burim Shkodra in December 2007, during the time the first set of tenders were advertised under Tolaj's management. The sole purpose was to establish undue contract between the Ministry Official and the economic operators.

Count 1.5

A.P. had an interest in the company owned by the brother of Burim Shkodra. She received a salary from that company. Therefore, the whole process of the evaluation of the tender is affected because she was not impartial when granting the second emergency tender to Burim Shkodra.

Count 1.6

A.P. exceeded the scope of her duties by suggesting the use of the bank guarantee scheme. The scheme was completely illegal. Pajaziti and Tolaj agreed to use it. Pajaziti instructed the receiving commission to sign that they received the goods which have not been delivered yet. Tolaj let this to happen. If the court was not convinced about the abuse of office, certainly this is a fraud. The court had the power to re-qualify the facts. Tolaj is charged for approving this decision.

Count 1.7 and 1.8.

The defendants abused their official position by running a campaign to damage Jona Med. Tolaj in an interview which was broadcasted throughout Kosovo called Jona Med a smuggling company and accused it for organized crimes. The court failed to assess the statements of witnesses Ekrem Maliqi, Alban Pozhegu, Haxhi Kamberi and Berat Marmullahu who all said that Tolaj did not like Jona Med and he would have not signed contracts or approve tenders that they had won. The Court established that many witnesses have stated that Tolaj had a lot of influence on B.B. but it fails to explain why these testimonies are not relied on by the court. The court speaks about the “allegations” but in this case there are no allegations, there is direct evidence produced in the form of statements of witnesses. B.B. did not sign contracts and did not give any reasons for this. Since the contracts were missing his signature, they were considered as not extended. The Court established through the evidence given by Faton Citaku, Alberta Grantolli, Haxhi Kamberi and Ekrrem Maliqi that the Minister had meetings with companies whose contracts were due for extension. The court established that there is a connection between the non-extension and the conversations between Bukoshi and representatives of the companies which did not get the extension of the contract. The court however failed to establish a nexus between the meetings where the representatives of the companies were

interrogated about the law suits they promoted against the Ministry of Health, and the consequences of non-extension of their contracts without any kind of justification. The court also failed to consider the evidence of the expert Agim Sheqiri who stated that the contracts *one plus one* were new, and that in case of non-extension, there should have been a written explanation why the contracts were not extended. The court failed to consider the statement of witness Haxhi Kamberi who gave the contracts to Mr Bukoshi for his signature. The court gave no reasoning as to why Bukoshi is credible as opposed to all witnesses Agim Sheqiri, Haxhi Kamberi, Ekrem Maliqi, Faton Citaku and Alberta Grantolli all of who corroborated each other, whereas there was nothing to corroborate or support Mr Bukoshi's account.

Count 1.9

Berat Marmullaku's account of the facts is consistent, coherent and credible. The conclusion of the court that "he first said that he found the first evaluation in Z.K. 's Office and later admitted that he took it from the file makes his statement less credible", appears to be a blatant erroneous determination of the factual situation. On 21 February 2013, he clarified this discrepancy. Prosecutor quotes " *when I said in my statement on 11 January 2012 that I was not in possession of this report but found it when Z.K. was on annual leave, I referred to a completely different case, which has nothing to do with lot 20*". Further, Marmullaku's statement is corroborated by the existence of the two evaluation reports: one dated 28 March 2011 which chose Jona Med as winner, and the other dated 15 April 2011, which declared Liri Med as a winner. Both Fusha and Fejza said that another evaluation took place in April. There is also an email sent to Fusha and Marmullaku on 14 April by Fejza outlining which companies needs to be disqualified. All suspects admitted that they signed two evaluation forms and it was their signature on the evaluation forms of 28th March 2013. There should have been only one evaluation form as explained by Agim Sheqiri. The procurement expert testified that when the chief officer does not agree with the evaluation report, he is entitled to call for another commission to perform another evaluation. Kuqi chose to convince his colleagues to make a different evaluation of the papers. The court accepted that the required sutures were present in the Demetech catalogue (Jona Med catalogue) and that the catalogue of

Liri Med presents similar products, which can be interchangeable. A tender procedure does not foresee the possibility to choose products which are interchangeable. Once the Court accepted that Demetech catalogue had the requested sutures, while Braun catalogue did not have them, the Court should have questioned how come that Liri Med won and Jona Med lost in these circumstances as they had the exact products which were 1.5 million Euros cheaper.

Count 1.10

The court established rightly the facts underlining the number of tenders the Ministry of Health published and cancelled for Fludarabine and Beta Interferon but failed to establish the responsibility of I.T., Z.K. and B.F. . The Sante Pharm Company which lost the bid was the only one that had the license to bring in Kosovo the said medicine. The procurement expert explained that if there is only one company which can bring a necessary product, then the law foresees the direct negotiation process which excludes a public tender process. The statement of Ekrem Maliqi is corroborated by the statement of Milaim Abdullahu. Ekrem Maliqi told this information to Abdullahu at the time when the events were happening, none of them knew at the time that this conversation is going to become a piece of evidence. The court shows lack of consistency and coherence when accepting the statements of Curr Gjocaj and Besim Bajraktari about the conversation they had with Lubeniqi immediately after Lubeniqi's meeting with Fejza but it does not accept the statement of Abdullahu about the information that he received from Ekrem Maliqi at the time the events were happening. No explanations on why two statements of witnesses are treated so differently.

Count 1.11

Prosecutor argues that there is no any other logical explanation of the non-extension of the contract between the Ministry and Fadil Lubeniqi to supply intravenous drops but the fact that Mr Lubeniqi refused to pay a bribe to Hajrullah Fezja. This is the charge for which the Court convicted H.F. under count 8. The Prosecutor's argument based on the statements of Fadil Lubeniqi and Ekrem Maliqi is that even though I.T. signed the contract with Fadil Lubeniqi, he granted the tender for the same product with a more

expensive supplier because he knew that the contract with Fadil Lubeniqi will not be extended.

Count 2

The court established as a fact that Bekim Deshishku was offered a tender with the amount of 70.000 euros in exchange of withdrawing the claim. Bekim Deshishku was very clear that Arbenita made this offer. Faton Citaku learned this information from Bekim immediately after the events and confirmed it. The court failed to give reasons why the statements of Bekim Deshishku, Faton Cetiaku and Ekrem Maliqi are not credible and are insufficient to prove I.T.' and A.P.'s criminal responsibility under count 2.

Count 3.2

With regards to this count *i.e* the Mistreatment of Berat Marmullaku, the court did not consider Berat Marmullaku's explanations why during his accounts given on 5 January 2012, he denied receiving threats. During his testimony on 21 February 2013, he confirmed the threats. B.F. told Berat Marmullaku "because of you I am having to go to the prosecution, you have caused me damages".

Count 10

Prosecutor refers to the extracts of the intercepts which have been administered during the trial to prove the charge. The conversation between Ilir and Imer shows that a witness has been approached and "neutralized". I.T. was ready to pay. The conversation shows a plan to attempt to influence the experts. This is a clear evidence of obstruction of evidence. Further, Tolaj instructed Albulena Mehmeti what should be given to the investigating officers and what should be delayed. In the view of these conversations showing the attempt to influence the investigation, the prosecution argues that the court erred in law by looking for actual witnesses who had been obstructed.

Count 11

I.T. testified that after his arrest and release on bail, he spoke to Minister Bukoshi and both decided that it is better not to act as his personal advisor anymore in order not to expose Minister to the unnecessary criticism. Bukoshi was told by the deputy Prime Minister that the issue of re-instate Mr Tolaj has to be dealt with by the Prime Minister. Bukoshi simply did not have the authority to deal with the issue but he did this in violation of the law on civil service. He disregarded the order from his supervisor and exceeded the competence of his authority by re-instating Tolaj in his position as Permanent Secretary.

Count 12

Ekrem Maliqi was removed from his position immediately after the meeting with Tolaj because Maliqi refused to sign the tender evaluation. The tender evaluation was signed by Z.K. who was appointed as Acting Director of Procurement the same day Maliqi was dismissed. The procurement expert testified that when the high official orders to the procurement manager to sign an evaluation form, then a written justification must be given. The court failed to assess the contradictory evidence corroborating Ekrem Maliqi's statement *i.e* I.T.'s admission of the request of co-signature by Ekrem Maliqi.

16. **Appeal against the ruling to declare inadmissible the metering results obtained through the order of the prosecutor 328-2/8 dated 28 April 2008**.

The Prosecutor argues that the ruling is admissible because the prosecutor had a competence to issue such orders; the ruling of initiation of investigation was not a condition and there is no any provision which foresees as inadmissible the evidence secured prior to the ruling on initiation of the investigations.

17. **Responses to Appeals:**

- I.T. asserts that the Indictment does not fulfill the legal requirements, and so the Court had no other choice but to acquit the accused. He submits that the Ministry officials spent

the budget for the drug supply already in 2006, before he took up a position in the Ministry for the budgetary year of 2007. He refers to the opening and closing statements and his appeal and proposes that the appeal of the prosecutor is rejected as unfounded on all the grounds.

- Counsel Naser Peci as a general remark submits that the Indictment does not meet the legal requirements. He states that the inadmissibility of evidence obtained through the prosecution order was declared by the ruling of the court which in absence of appeal became final. There is no legal basis to appealing it. With regards to the individual counts on the appeal, counsel submits contra arguments claiming that the appeal is ungrounded.

- Counsel Rame Gashi submits counter-arguments with regards to count 1.9 and count 2.

- Counsel Osman Mehmeti claims that prosecutor failed to describe the elements of the criminal offences in the indictment, provides evaluation on the credibility of the witness Berat Marmullaku, and concludes that the prosecutor's appeal is groundless on both counts.

APPEALS OF DEFENCE COUNSELS:

18. On 7 August 2013, Av Rrezarta Metaj on behalf of I.T. appealed the conviction of Tolaj for count 1.3 and count 9. She bases her appeal on all legal grounds set in article 383 par 1 of the CPC. She proposes the modification of the first instance judgment and acquittal of I.T. from these charges or partial annulment of the Judgment as it relates to the conviction of the accused or to impose a more lenient sentence.

Regarding Count 1.3 of the Indictment, counsel argues:

- the perpetrator of the alleged crime set in article 348 was Rajmonda Hyseni who was allegedly incited by Tolaj and A.P.. This crime is "delicta propria" that can be committed by a specific category of perpetrators- either official persons (in public sector) or responsible persons (with relation to business documents). The court failed to establish that

Raimonda Hyseni was an official person within the Ministry of Health, and that the evaluation forms in question are official documents.

- None of the forms of the commission of the crime was materialized in the case because Raimonda Hyseni with her signature confirmed a content which was not false and the evaluation of the bidders was done in accordance with the law.

- The incitement cannot exist independently; it depends on the existence of the underlining offence. Rajmonda Hyseni has not been prosecuted for committing any crime nor was she a cooperative witness.

- The subjective elements have not been fulfilled. The court did not establish the limits of intent and even less did make assessment of any evidence in this regard.

- It was not established whether the defendant knew that Rajmonda Hyseni did not participate in the evaluation process in order to reach such a conclusion that he asked her to sign the evaluation form.

- The Judgment exceeded the scope of the indictment contrary to article 360 (1) of the CPC. The defence counsel argues that the elements of the criminal offence of Falsifying Official Documents were not included in the Indictment and the Court by the way of adding the sentence "Raimonda Hyseni signed the evaluation form" accomplished the description of the offence.

- Violation of article 370 (7) of CPC, as the court failed to state concisely which relevant facts that led to the conviction it considered proven and what was the basis for such a conclusion.

- The Judgment cannot be properly and efficiently challenged on the basis of determination of facts if there is no comparison of the contradicting evidence.

- The accusations in count 1.3 were not proven and the court should have applied the principle "*in doubio pro reo*".

- From the wording of Judgment it can be concluded that the defendant and A.P. personally and also through Alban Pozhegu asked Rajmonda Hyseni to sign the document. However,

apart Alban Pozhegu who was changing his statements throughout the proceedings, other witnesses and co-defendants confirmed that nobody heard I.T. saying anything to Rajmonda Hyseni or Alban Pozhegu with regards to signing of the evaluation documents.

- Alban Pozhegu was obviously pressured by the police and by the prosecutor. He stated that I.T. was giving him orders to sign the false receipts related to the issue of bank guarantees but I.T. was acquitted of this.

- Rajmonda Hyseni testified that it was Pozhegu who asked her to sign the evaluation form.

Regarding Count 9 of the Indictment defence argues:

- It is true that Ilir Todaj received payments from Switzerland in different installments in total 13,689.85 euros for which he did not pay taxes.

- The subjective elements of tax evasion are absent in the enacting clause of judgment. It is not proven the intent to evade the payment of taxes which is a constitutive element of this offence and which makes the difference between administrative violation of non-declaring all taxes and criminal offence of Tax Evasion as perceived in the criminal law.

- The findings regarding the statute of limitation for this particular criminal offence are legally wrong. Defendant had an obligation to declare taxes in 2008 and his omission to do this occurred on 1st April 2009. The indictment was filed after the relative statutory limitation had already elapsed. Since the absolute term is six years, then all the events that have occurred before 19 July 2007 are considered barred from the prosecution.

- The Judgment exceeds the description of acts that are contained in count 9 of the indictment in violation of article 384 (1) point 10 of the CPC.

- All incomes and all transactions on his bank accounts were completely transparent. This corroborates his testimony that he had absolutely no intent to evade paying taxes. There was no action taken to deceit administration or hide any payments.

- The defendant acted with negligence and he admitted the mistake he made. There is no permanent damage since defendant repaid all taxes to the state budget one year after last omission to declare taxes.

- The individual sentences and aggregating sentence is not proportionate.
- The general prevention had excessively prevailed over individual circumstances as well as over the principle of limitation of criminal law repression, humanity, re-socialization and rehabilitation.
- There is no reason whatsoever for imposing on him the accessory punishment of prohibition on exercising public service functions.

19. On 30 August 2013, Av. Naser Peci on behalf of A.P., filed an appeal. He challenges the Judgment on the ground of erroneous and incomplete determination of the factual situation. He proposes modification of the Judgment to acquit the accused for charges under point 1.3 and 1.6 of the enacting clause.

    Counsel argues:

- that there is no evidence to prove the inciting whether in verbal stamen, order in writing, promise, threat or any other way, which would have influenced any member of Assessment Commission.
- there is no evidence which proves that the assessment document or the receipt of goods was an official document according to article 120 par 1 item 2 of the CCK.
- it does not stand that alleged inciter to be called upon criminal responsibility whereas the one who did the act to be as a witness.
- the conclusion of the court that “Ms Raimonda Hyseni did not have sufficient experience in the Ministry because she had just started to work there” does not stand because she has been working for the Ministry since 2001. Witness Agim Sheqiri stated “it did not matter whether all the commission members had knowledge on the procurement procedure. It was enough if they had professional knowledge for the case which was being assessed, because it was conducted by the procurement officers”.

- Witness Rajmonda Hyseni excludes any allegation that Ms A.P. had influenced her to sign the evaluation documents.
- Witnesses Ekrem Maliqi (Director of the Procurement Office) and Agim Sheqiri (Procurement Expert) explained the role of the assessment commission, which proves that court erred in concluding that Rajmonda Hyseni was incited by A.P. to sign the evaluation report for the tender 7130007737126.
- Witness Lutfi Mulaku gave detailed explanation about the scheme of the bank guarantee while witness Haki Ejupi confirmed that the procedures of receiving the goods was not in the competence of Ms A.P. but was a duty of the Director of Pharmaceutical Department.
- The witness Alban Pozhegu is not credible. He alleged that somebody (he could not confirm that it was Ms A.P.) told him that documents related to the back guarantees are in order.
- Witness Nyrtene Zeqiri confirmed that she had received instruction from the Officials of the Pharmaceutical Department to sign the invoices of the bank guarantees. Nyrtene Zeqiri has signed all invoices/bills related to the cases of Medisan Commerce, Liri Med, Koslabor or Miditrade in which A.P. was not a part of the commission for reception. There is no evidence to attest that A.P. incited or told the members of the commission for reception of goods to sign the reception forms.

20. On 15 August 2013, Av. Rame Gashi on behalf of H.F. bases his appeal on grounds of violation of the provisions of the criminal procedure, violation of the criminal law, the sanction and also the measure on prohibition from exercising public administration or public service functions. The counsel proposes the modification of the first instance judgment and the acquittal of H.F. from these charges or to annul the judgment and send the case back for retrial.

    Counsel argues:

- that in item 8.2 the judgment reads “on an undetermined date in 2011 Milaim Avdullahu was told that he has to give the part/share of 10% if he wanted to win a contract with the Ministry of Health”. This is not supported by any evidence. Mr Avdullahu does not mention the 10% at all but refers to “a certain amount of money”.

- Mr Abdullahu stated that he was invited to a meeting with Mr Fejza but there is no evidence to corroborate this statement.

- Mr Abdullahu denies of having called Mr Fejza; however, the report of the Kosovo Police dated 16 March 2012 on interception of SMS shows that Mr Avdullahu asked him for a meeting and to have a coffee.

- Mr Avdullahu won the tender even although he refused to give bribe as alleged.

- Witness Fadil Lubeniqi is not reliable. He denied having filed a claim against the Ministry of Health; however he has filed a claim. Mr Lubeniqi sometimes stated that he was invited by Mr Fejza and sometimes through his friends Mr Marko Markovic and Mr Xhevdet Matoshi. Later on however he denied to have received any letter or text by Mr Fejza to tell Mr Lubeniqi to go to the Ministry.

- Mr Besim Bajraktari denies having told Mr Lubeniqi to go upstairs as for sure they have called you for the contract and to ask you to give them money.

- Mr Curr Gjoci is also not reliable. He pretends not to recall the name of Lubeniqi although actually they are good friends.

- Mr Curri and Bajrakari state that Lubeniqi was in possession of recording but Lubeniqi denies that there was any recording.

- Lubeniqi confirmed having met Mr Ekrem Maliqi but Mr Maliqi in his statement said that he never talked to Mr Lubeniqi to discuss about the contract.

- Mr Lubeniqi argues that he was asked for a bribe in November while in the Economic Court he states that it was in December.

- Mr Lubeniqi before the prosecutor and the court stated that he had a profit of 40.000, 00 euros whereas in his compensation claim, he asked for more than a million euros.

21. **SPRK Responses to the defence counsels' Appeals**

The EULEX SPRK Prosecutor responded that the defence counsels' appeals moving the court to reject them as unfounded.

22. **Opinion of the Appellate Prosecutor**

- On 6 March 2014, the Appellate Prosecutor submitted to the Court of Appeals its Opinion dated 27 February 2014.

- The Appellate Prosecutor *inter alia* requested a joinder of the proceedings against Imer Ajeti with the proceedings against Tolaj and other defendants. The Prosecutor submits that the conditions set in article 35 paragraphs 3 and 5-8 of the CPC are met since the co-defendant I.T.'s case is also on appeals before the Court of Appeals and the case of Imer Ajeti shares the evidence with that of I.T..

- At outset the Appellate Prosecutor notes the objections to the minutes of the main trial on 11 April 2013 submitted by the SPRK on 27 November 2013 and invites the Court to obtain the unedited minutes from the Court recorders in order to check the accuracy of the evidence provide by the expert witness, Agim Sheqiri.

- The Appellate Prosecutor submits that the Judgment rendered on 14 June 2013 does not fully describe the charges in its enacting clause which is a requirement of article 370 paragraphs 3 and 4 of the CPC. The Prosecutor argues the court failed to make reference to the violation of the Law on Public Procurement in Kosovo (Law nr 2003/17) with regard to counts 1.4, 1.5, 1.9; to describe the benefit and the damage as consequence of the crime regarding counts 1.11,1.13 and count 2; to describe in count 3.2 the threat that Berat

Marmullaku received from the accused *ie* that was made because he agreed to testify in the case PPS 64/11; does not provide description of the acts in count 6; in count 11 provides a description of acts which B.B. was not charged with while it remains silent on the acts he was indicted for, and in count 12 remains silent on I.T.'s additional act of abusing his position when removing Ekrem Maliqi from his position.

- The Appellate Prosecutor concludes that there are substantial violations of the provisions of the criminal procedure according to article 384 par 1 subpar 1.12 of the CPC. The incompleteness of the enacting clause with regards to counts 11 and 12, especially when considered together with the lack of reasoning forecasts that the Court did not fully adjudicate the substance of the charge.

- The Appellate Prosecutor endorses the arguments put forward in the appeal of the SPRK that the court did not provide any evaluation of the evidence in the reasoning of its Judgment which constitutes a violation of article 370 paragraph 7 of the CPC. Specifically, under count 1.12 the court refers to the account of witness Alban Pozhegu and states that it is not supported by the statement of the accused A.P.. The Appellate Prosecutor argues that it finds the attempt of the court illogical to seek support for the statement of a witness- who testifies under obligation to tell the truth- in the statement of the accused- who is not obliged to tell the truth-or in the documents of the corrupted tender, as alleged by the prosecution. The Appellate Prosecutor claims that the reasoning of the Judgment remains silent on the assessment why the Court found A.P.'s account more credible than witness Alban Pozhegu's.

- In count 1.3, while the court established the criminal responsibility for the criminal offence of Falsifying Official Document by making Raimonda Hyseni to sign decisions on the evaluation of the tender in which she did not participate, the court remains silent on the reasons of the otherwise *prima facie* illogical conclusion on the acquittal of I.T. and A.P. from Abusing Official Position of Authority.

- The court failed to assess the evidence and conduct of the accused in counts 1.4 and 1.5 in relation to legal background and provide a complete assessment on these counts on the basis of section 5 and 6 of the Procurement Code of Ethics of the Public Procurement Regulatory Commission of Kosovo.

- In count 2, the court failed to attach any reasoning to the acquittal of I.H. in accordance to article 370 of the CPC even though this is not challenged by the SPRK, while the reasoning is count 8 is significantly incomplete regarding the conviction of H.F. .

- The Appellate Prosecutor endorses the arguments put forward in the appeal of the SPRK that B.B. violated the law on one hand by appointing I.T. as permanent secretary-despite the advice given to him by the Deputy Prime Minister that the issue should be decided by the Prime Minister, and on the other hand for ignoring Article 69 of the Law on Civil Service.

- There is no reasoning with regards to punishment imposed on I.T., A.P. and H.F. to justify the findings of the court related to article 52 par 4 of the CCRK, and no reasoning attached to the decision on the cost of proceedings.

- The reasoning of the Judgment is significantly controversial with regard to the reasons of the acquittals. Moreover, the prosecutor argues that an absolute insecurity of the applicable substantive law may be traced throughout the enacting clause and the reasoning of the Judgment with regards to the convictions of the accused.

- The Appellate Prosecutor argues that there is an essential discrepancy between the original Order of the Public Prosecutor in Albanian and its English translation which had an adverse effect on the Ruling of the Confirmation Judge. The Albanian version of the order reads that the Public Prosecutor required only the registry, *ie.* Records of the incoming and outgoing telephone calls and text messages made to and from the given telephone numbers of A.P. and others during the given period. The public prosecutor did not ask for the disclosure of the content of these telecommunications. The Appellate prosecutor argues

that the Confirmation Judge did not decide on the motion of the defence counsel regarding the metering results and her decision is limited to the exclusion of the interception of telephone calls, including the reading of the text messages from the evidence. Furthermore, the Appellate Prosecutor submits that on 11 April 2013, the trial panel did not decide on the admissibility of the metering results obtained based on the order PP nr 302-2/08 of the public prosecutor but rather interpreted the ruling thus coming to the erroneous conclusion that based on this ruling also the metering results should be excluded from the evidence. Therefore, the prosecutor argues that the results of the metering should not have been excluded from the evidence.

- The appellate prosecutor is of the opinion that the appeals of the SPRK against the Judgments are partially founded as they relate to the substantial violations of the criminal procedure and to the erroneous or incomplete determination of the factual situation. The appellate Prosecutor however does not share the proposal of the SPRK on the remedies.

- Referring to the appeal of defence counsel, Appellate Prosecutor concludes that the appeal is only partially founded as long as it refers to the substantial violation of the criminal procedure regarding count 1.3. The remaining part of the appeal is without merit.

- The appellate prosecutor proposes: to partially grant the appeal of the SPRK and the appeal of defence counsel Rrezarta Metaj, and acting *ex officio* with regards to count 8-H.F. , partially annul the Judgments of the Basic Court, expect for the criminal offences which are affected by the statutory limitation, and return the case to the Basic Court for retrial in accordance with article 402 paragraphs 1 and 3 of the CPK; to examine ex officio if the criminal offences of Incitement to Falsify Official Documents under Count 1.3 against I.T. and A.P. and under Count 1.6 against A.P. would fall under article 91 par 6 of the CCK- Absolute bar on criminal prosecution; to reject the appeals of defence counsels Naser Peci and Rame Gashi as unfounded and affirm the Judgment of Basic Court with regards to the convictions of I.T. for the criminal offence of Tax Evasion (count 9) and in the remaining parts.

III. Proceedings before the Court of Appeals

23. The panel of the Court of Appeals is composed pursuant to the Law On Amending and Supplementing the Laws related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo (No 04/L-273) and also in line with the agreement between the Head of the EULEX Kosovo and the Kosovo Judicial Council on relevant aspects of the activity and cooperation of EULEX judges with the Kosovo judges working in the local courts reached on 18 June 2014.

24. The panel notes that, according to the above legislation, when a case is assigned to EULEX judges prior to 15 April 2014, then, the case is considered an ongoing case. That means, that case shall continue to be dealt with by EULEX judges in accordance with the law which was in force at the time when the case was assigned to EULEX judges. The subsequent changes in the law, as is the case here, in the panel's view, cannot have retroactive effect with regard to the composition of the panel irrespective of what stage of procedure in which is that particular case.

25. The panel notes that there were no objections made by the any of the parties to the proceedings with regards to the composition of the panel with majority of EULEX judges. The panel therefore concludes that the procedure regarding composition of the panel is not affected by the amendments in the legislation.

26. On 7 September 2016, the panel rejected the proposal for joinder of the proceedings against Tolaj case with the proceedings against Imer Ajeti. The panel finds that the criteria of article 35 of the CPC for the joinder in the second instance court are not fully met.

27. The panel notes that the criminal activity, as presented by the Prosecution in both cases, although similar, it is in essence of different nature. The panel therefore is not satisfied that the acts described the indictment against Imer Ajeti and in the indictment against others are interconnected within the meaning of article 35, paragraph 6 of the CPC. The two

proceedings were conducted separately in first instance. This indicates that defendants were not present in both respective cases. Consequently, they did not have the possibility to challenge the evidences and to express their views regarding the evidence administered in the different proceedings.

28. The panel is of the view that the gain in terms of fairness, efficiency, and protection of the interests of justice is of great importance for conducting the two cases separately. There is no reason to suspect any delay, additional financial costs etc. because of conducting the two proceedings separately.

IV. Admissibility of Appeals:

29. In order to adjudicate the merits of the appeals, the Court must first examine whether the admissibility requirements laid down in the CPC, have been fulfilled. For this purpose, the panel established:

   a. The appeals are admissible. They have been filed with the competent court pursuant to article 388 par 1 and within the deadline pursuant to article 380 par 1 of CPC.

   b. The Court of Appeals decided in a session as prescribed by article 390 the CPC. A hearing pursuant to article 392 of the CPC was not required.

V. Findings of the Court of Appeals

30. The court examined all the evidence presented to it, whether emanating from the counsels, defendants, prosecutor or from other sources, or which it obtained *proprio motu*.

31. Insofar the reasons for deciding in favour of the submitted appeals exist also for other defendants who did not file such a request, the Court held as if they had filed such an appeal. *(Beneficium cohaesionis*).

32. The panel finds that the appeal of SPRK is partially grounded. The appealed judgment, as regards the counts which are referred for retrial, is based on violation of the provisions of the criminal procedure (art 383 par 1.1) and an incorrect and an incomplete evaluation of the evidence with the implicit inaccurate application of material law (art. 383 par 1.3 and 383 par 1.2 of the CPC).

33. In making this determination, the panel considered numerous discrepancies between enacting clause and the reasoning in the challenged Judgment and inconsistencies in the incriminating evidence relied upon by the lower court. In the opinion of the Panel the gravity of violations does not allow to modify the judgment with regards to counts remanded for retrial. Accordingly, it has been decided that the judgment be partially quashed and the case be returned for retrial in accordance with art. 398 par 1.3 of the CPC.

34. In order to provide guidance for the re-trial, the Court of Appeals chose to address selected points of law, which may be relevant in the retrial proceedings; these are discussed *infra*.

35. Article 370 of the CPC prescribes the content and form of the written judgment. The structure of each judgment is composed of three main components: an introduction, the enacting clause and the statement of grounds. Concerning the content and form, the code makes no differentiation between different kinds of judgments. Thus, irrespective if a judgment is acquitting, refusing or guilty one, it must contain all decisive facts and circumstances that constitute or not the elements of the criminal offence and those on which depends application of a particular provision of the Criminal Code.

36. The panel finds blatant contradictions between the enacting clause and the reasoning of the judgment with regard to the counts that are remanded for retrial. The impugned Judgment is therefore incomprehensible, internally inconsistent or inconsistent with the grounds of the judgment and did not cite the reasons concerning the decisive facts, contrary to article 370 of the CPC.

37. The first instance court has acquitted A.P. and I.T. that "*they acting together as supply officer respectively permanent secretary in the Ministry of Health on date between 26 September 2007 and 1 October 2007, allowed a legally binding contract with Jona Med dated 26th September 2006, to lapse without compliance with its terms and conditions*" (count 1.1)[1]. In the reasoning, the court established however the A.P.'s duty to request for the supplies[2]. As regards Tolaj, the court established that he was informed about this problem and that he failed to find a solution. Specifically, the court held that "On *"11 August /September 2007 Jonamed requested a meeting with I.T. as the Permanent Secretary because the contract had not been fulfilled and the tender had been re-announced*"[3].

38. The panel finds that the first instance court's finding is self-contradictory with regard to count 1.1. This panel finds numerous contradictions between the enacting clause and reasoning. In one hand, the first instance court established Arbenita's failure to request supplies and in the other hand, it does not explain the nexus between the failure and the consequent non-fulfillment of the contract. It sufficed to only indicating that prosecutor did not proof that the contract was not fulfilled because Pajaziti failed to do so, without giving any further evaluation of any evidence. The first instance court also contradicts itself as regards timeframe of I.T.'s engagement as a Permanent Secretary with the Ministry of Health. The enacting clause contains no indication regarding timeframe of I.T.'s engagement as a Permanent Secretary with the Ministry of Health. In the reasoning, apart indicating that I.T. was not working for the Ministry of Health during August /September 2007[4], there is no explanation whether or not Tolaj had a contribution to non-fulfillment of the contract with Jonamed. During the course of trial, a number of witnesses have been heard. The judgment contains no reasoning as to who has testified and who had said what. The review of case file allows finding out that Fatime Aliu testified that she had informed

[1] Judgment of the first instance court, page 2
[2] Judgment of the first instance court, page 12
[3] Judgment of the first instance court, page 12.
[4] Judgment of the first instance court, page 11.

the board of directors and Tolaj about the lawsuit and the risk that the Ministry might be obliged to pay the damages. Arben Loshi also testified regarding cases in the past when contracts were extended beyond their time line. There was a memorandum of understanding that was signed between Yess Pharm and the Ministry that allowed the fulfillment of the contract beyond its expiry date. The Judgment not only fails to provide analysis of witnesses' statements but it also is silent as to defendants' version over the events. Evidently, Tolaj was informed about the problem. He declared that he thought that the damage for non-fulfillment of contract with Jonamed would not exceed the sum of 200.000. Therefore, the panel concludes that the first instance court not only failed to appropriately assess the witnesses's statements but it also gave no explanations about defendants' statements.

39. The panel finds the finding of the first instance court self-contradictory also with regards to count 1.2 and 1.3. I.T. was acquitted for count 1.2 that "*in December 2007, he told the evaluation committees which operator should be selected for the emergency tenders 71300007737126 and 7130007789126*"[5]. In the reasoning, the first instance court established that alleged act occurred between 30 November 2007 and 27 December 2007[6]. In acquitting Tolaj, the court held that the statement of Alban Pozhegu, who testified that I.T. had told him and A.P. which companies should be awarded as winners, was not supported by the statements of A.P.[7].

40. I.T. and A.P. were found guilty for count 1.3 that "*they on 7 December 2006, asked Rajmonda Hyseni both themselves and through Alban Pozhegu to sign that she took part in the evaluation of tender 71300007737126 when she did not participate"*[8]. The court requalified the criminal offence, holding that I.T. and A.P. committed the criminal offence of Indictment to falsify Official Document in co-perpetration in violation of Article 348 read with article 23 of the CCK. As regards other tender 71300007789126,

[5] Judgment of the first instance court, page 3.
[6] Judgment of the first instance court, page 13
[7] Judgment of the first instance court, page 13.
[8] Judgment of the first instance court, page 3

I.T. and A.P. were acquitted. The court held that it was not established that "*I.T. and A.P. on 27 December 2006, asked Rajmonda Hyseni both themselves and through Alban Pozhegu to sign that she took part in the evaluation of the other tender 71300007789126 when she did not participate*[9]*"*. According to the court, there was no evidence supporting the testimony of Alban Pozhegu because Raimonda Hyseni stated that he came with the documents to her office and no other evidence was presented[10].

41. At outset, the panel notes that the dilemma, referred to above in the count 1.1 concerning the timeframe of I.T.'s engagement as a Permanent Secretary with the Ministry of Health, remains also for the counts under 1.2 and 1.3. There is no explanation whether I.T. was working for the Ministry of Health at material time, respectively during evaluation of the emergency tenders 71300007737126 and 7130007789126. The panel finds it crucial to note that the discrepancies over timeframe is relevant because the court seem to place the same event at a different time, thus casting doubts about the correctness of the approach taken by the court about Tolaj's involvement. The panel also finds that the reasoning of the Judgment does not provide any evaluation of the credibility of conflicting evidence. There is no explanation why the statement of Alban Pozhegu is treated so differently for above two emergency tenders, namely 71300007737126 and 7130007789126, considering they both occurred in almost identical circumstances. The panel finds that first instance court found Alban Pozhegu' statement not credible with regard to tender 7130007789126 because it is not corroborated by the statement of A.P., without however analyzing the entirety of his testimony, and in the context of the testimonies of other witnesses. On this context, the panel deems crucial to note that mere fact that the witness's version is not corroborated by defendant's statement, in absence of other supporting evidence, does render the witness's statement doubtful. The version which a defendant or a witness gives can contradict the version of another defendant or witness. That is to be expected in any proceeding. In every instance the court needs to examine the nature of the contradictions, such as: whether they concern substantive or secondary factual elements, whether they are explicable or not and whether, in the light of the

[9] Judgment of the first instance court, page 3
[10] Judgment of the first instance court, page 14

overall circumstances, they point to a deliberate untruthfulness of the witness. After thorough analyzes, the court must explain which version is credible, more credible or to which extent is credible. In the case at hand, the first instance court provides no evaluation of the witness statements. Evidently, I.H. confirmed Tolaj's presence in the office of Rajmonda Hyseni. Agim Sheqiri testified that presence itself is an undue influence. Agim Sheqiri explained that the tender had to be annulled and whole process be repeated due to the fact that Rajmonda Hyseni did not participate in the evaluation process. The panel shares the view with the SPRK that first instance court did not take into account also the contacts of Tolaj and Pajaziti with the winner, the financial and social connections that Pajaziti had with Burim Shkodra. There is no assessment of the data resulting from the covert measures on this regard either. The panel finds that first instance court did not provide appropriate analysis of the nature of the conversation, possible conflict of interest and the extent of influence this could have had in the tendering process. In the panel's opinion the aforementioned circumstances call for an overall evaluation of the witnesses' testimonies in the aspect of their credibility in addition to evaluating them in an atomized manner for the aspect of internal consistency and in conjunction with the material evidence resulting from the covert measures.

42. The first instance court established the criminal responsibility of Tolaj and Pajaziti for the criminal offence of incitement to falsifying official document (count 1.3 and 1.6). The court held that Tolaj and Pajazi incited Raimonda Hyseni to sign decisions on the evaluation of a tender in which she did not participate (count 1.3). The court requalified the act of Tolaj and Pajaziti as incitement to falsifying official document. A.P. was also found guilty of inciting a member of acceptance commission to sign a declaration of acceptance of medicines from suppliers although the goods had not physically been received (count 1.6). The panel finds that the judgment of the first instance Court does not contain proper reasoning as to the legal classification of the criminal offences attributed to the accused in either count. The panel finds that the court did not explain whether Tolaj and Pajaziti's action (count 1.3), respectively Pajaziti's action (count 1.6) had any relation with their official duty and authorization. There is no explanation whether defendants' behavior

exceeded the limits of competences attached to an official position which may eventually amount to an abuse of office. In the other hand, the subjective elements have not been evaluated at all either. The court did not establish the limits of intent and even less made an assessment of any evidence in this regard. The panel agrees here with counsel of Tolaj that in order for incitement to exist, it is required to establish that the incited person committed a criminal offence prosecutable *ex officio*. That does not mean though that the incited person has to be necessarily convicted, provided that there are no grounds for this. In the case at hand, not only the court did not establish that Rajmonda Hyseni committed any criminal offence even if she would be release from criminal responsibility but throughout the criminal procedure she has been treated as a witness. In the circumstances that the case is sent back for retrial, it is not duty of this panel to provide an assessment over qualification of charges. However, out of abundance of caution, the panel considers appropriate to note that when a certain criminal act is in violation of more than one legal provision of the material law, the court ought to consider applicability of the provisions related to ideal concurrence of crimes.

43. The court acquitted I.T. and A.P. for the acts described under 1.6, that "*they in and around November and December 2007 had meetings with suppliers on various dates between the 15 and 18 November where the suppliers who could not supply by the 21st December 2007 were asked to provide bank guarantees*"[11]. The court however established that the Ministry of Health was damaged because some of the goods that in the end were delivered were of other origin than described in the tender offer. The first instance court held that this was not a consequence of the use of bank guarantees but of negligence of the commission that accepted these goods on actual delivery. The panel finds that the court did not provide evaluation of evidence. In particular, with regard to statements of Rajmonda Hyseni and Musa Rexhaj. They both explained that giving money for goods that had not been received is illegal and the signing that goods have been received when in fact they have not, is a fraud.

[11] Judgment of the first instance court, page 4

44. The panel finds that the situation is similar with regards to counts 1.7, 1.8, 1.9, 1.10, 1.11, count 2, count 3.1, count 10 and count 12. The panel notes that according to article 370 par 7 of the CPC the court must state clearly and exhaustively which facts it considers proven or not proven, as well as the grounds for this. The court must, in particular, make an evaluation of the credibility of conflicting evidence, the grounds for not approving individual's motions of the parties, and the reasons by which the court was guided in settling points of law. The first instance court did not provide a careful assessment of each testimony of witnesses and of defendants separately and in relation to each other and to reach a conclusion as to whether a certain fact has been established or not. As regards counts under 1.7 and 1.8, the court did not provide any assessment of the statements of witnesses Ekrem Maliqi, Alban Pozhegu, Haxhi Kamberi and Berat Marmullahu. They all said that Tolaj did not like Jona Med and he would have not signed contracts or approve tenders that they had won. Evidently, the Court through the evidence given by Faton Citaku, Alberta Grantolli, Haxhi Kamberi and Ekrrem Maliqi established that the Minister had meetings with companies whose contracts were due for extension. B.B. did not sign the contracts. There is also no elaboration over a nexus between the meetings where the representatives of the companies were interrogated about the law suits launched against the Ministry of Health, and the consequences of non-extension of their contracts. Similarly, the panel finds no evaluation of statement of expert Agim Sheqiri who stated that the contracts one plus one were new, and that in case of non-extension, there should have been a written explanation why the contracts were not extended.

45. As regards count under 1.9, the court did not provide analysis of Marmullaku's statement which is corroborated by the existence of the two evaluation reports: one dated 28 March 2011 which chose Jona Med as winner, and the other dated 15 April 2011, which declared Liri Med as a winner. As stated by SPRK, with which the panel fully agrees, both Fusha and Fejza said that another evaluation took place in April. There is also an email sent to Fusha and Marmullaku on 14 April by Fejza outlining which companies needs to be disqualified. All suspects admitted that they signed two evaluation forms. Their signature appears on the evaluation forms of 28th March 2013. Agim Sheqiri explained that there should have been only one evaluation form. The procurement expert testified that when the

chief officer does not agree with the evaluation report, he is entitled to call for another commission to perform another evaluation.

46. As regards count 1.10, it is evident from the case file that the Sante Pharm Company which lost the bid was the only company that had the license to bring sutures in Kosovo. The procurement expert explained that if there is only one company which can bring a necessary product, then the law foresees the direct negotiation process which excludes a public tender process. There is no evaluation of the statement of Ekrem Maliqi or of Milaim Abdullahu *vis a vis* statements of Curr Gjocaj and Besim Bajraktari about the conversation they had with Lubeniqi immediately after Lubeniqi's meeting with Fejza.

47. As regards count 1.11, the panel finds no explanation of the non-extension of the contract between the Ministry and Fadil Lubeniqi to supply intravenous drops. Specifically with regard to allegation that Mr Lubeniqi refused to pay a bribe to Hajrullah Fezja. This is the charge, which as matter of fact, H.F. was convicted for under count 8.

48. Similarly, with regard to count 2, the court established as a fact that Bekim Deshishku was offered a tender with the amount of 70.000 euros in exchange of withdrawing the claim[12]. Bekim Deshishku stated that Arbenita made this offer. Faton Citaku learned this information from Bekim immediately after the events and confirmed it. The court did not provide any reasoning why the statements of Bekim Deshishku, Faton Cetiaku and Ekrem Maliqi are not credible and are insufficient to prove I.T.' and A.P.'s criminal responsibility under count 2.

49. The panel finds no reasoning with regards to count 3.1, count 10 and 12. From the poor wording, it can be understood that there were contradictions among witnesses' statements. The lack of reasoning however poses significant difficulties to the panel to provide

[12] Judgment of the first instance court, page 25

appropriate guidance on these counts. Apart noting that a number of witnesses testified, the Judgment does not provide analysis to satisfactory detail as to the credibility and evidentiary value of their testimonies. The panel is aware that there are discrepancies and contradictions between witnesses. However, it is important to note that whenever there are contradictions and discrepancies pertinent to constituent elements of the criminal act, irrespective of being justifiable or not, they must be explained to such a degree that the evidence eventually leaves no doubt as to the presence of these elements. The first instance court did not provide any evaluation of statements.

50. As regards to counts under 1.4, 1.5 and 11, the panel considers the appeal of the SPRK ungrounded. The panel finds ungrounded the appeal of counsel of Tolaj with regard to count under 9 and the appeal of counsel of Fejza, in its integrity. As regards counts under 1.4 and 1.5, the panel finds that those crimes are overlapping with other criminal offences. The factual description of these crimes leaves no possibility of separate treatment since they relate to the charges explained above. A separate processing of them would means in fact creation of a possibility of trying the defendants twice for same criminal offences. Therefore, the panel considers the appeal of the SPRK is ungrounded. As regards count under 11, the panel is of the view that prosecutor failed to provide any proof that return of Tolaj to his work constitutes a criminal offence. The fact that the Ministry of Health implemented a Supreme Court decision for returning a civil servant to his place of work does not constitute a criminal offence. The issue whether the Prime Minister or the Minister of Health was in charge for the return, is in essence an administrative related issue which goes beyond scope of review in the current criminal procedure.

51. As mentioned above, the panel finds ungrounded also the appeal of counsel of Tolaj with regard to count 9. There is no contestation that Tolaj did not declare his taxes. As matter of fact, counsel does not even deny it. The fact that he had paid the taxes later, this does not release him from criminal responsibility. The first instance court gave appropriate reasoning about statutory limitation. The starting date is 24 August 2010 when income was declared. Since the indictment was filed on 7th July 2012. Thus, the relative statutory

limitation has been interrupted. Therefore, the panel finds no violation of the provision of the criminal code.

52. As regards appeal of counsel of Fejza, the panel finds it also ungrounded. Counsel argued incomprehensibility of point under 8.2 of the judgment that "*on an undetermined date in 2011, Milaim Avdullahu was told that he has to give the part/share of 10% if he wanted to win a contract with the Ministry of Health*". He argues that the judgment is not supported by any evidence since Mr Avdullahu does not mention the 10% at all but refers to "a certain amount of money". The panel finds the argument without merit. The panel is satisfied that the first instance court correctly established that in November 2010, H.F. had a meeting with Fadil Lubeniqi to about the extension of the contract. It was also established that in early 2011, H.F. met with Millah Abdullahu to discuss about a contract with the Ministry of Health. These meetings were proven beyond any reasonable doubt. As matter of fact, even defence does not argue that meetings had not actually occurred. The panel finds that counsel failed to provide any elaboration to what aspect the enacting clause is contradicting the said statements. In the panel's view, the minor inconsistencies, as alleged by the defence regarding the 10% or "a certain amount of money, do not amount to essential violation which would render the Judgment *void* and/or require its annulment as long as the proceedings in general, viewed in their entirety, have been conducted in such a way that raise no doubts about correctness. The mere fact that there are some minor inconsistencies, do not give rise to an arguable claim of a substantial violation of defendant's rights as protected by the applicable laws. The Court did not find that the infringement constituted a manifest breach of law. The Panel is satisfied that the court of first instance, in the reasoning of the challenged judgment, presented the facts which were correctly established and gave clear and convincing reasons for the establishment of the facts of the case. Therefore, there are no contradictions in the enacting clause of the judgment, nor any contradictions between enacting clause and the reasoning. As far as it concerns the alleged violations of the provision of the Criminal Code, the Panel notes that in this case, the provisions of two criminal codes were applicable. In the event of a change in the law applicable to a given case prior to a final decision, as is the case here, the law more favorable to the perpetrator shall apply. Comparing the respective provisions of the

two Criminal Codes relevant to this case, the Panel finds no particular differences between the two codes that would be more favorable to the defendant. Therefore, the Panel finds no violation of the provisions of the Criminal Code. As far as it concerns decision on punishment imposed against H.F. , the panel is satisfied that the first instance court provided an adequate assessment of the circumstances in an exhaustive fashion in accordance to the law. Taking into account the specific circumstances related to the case, the manner in which the crime was committed – modus operandi as well as the intensity of the social risk of the criminal offence, this court concludes that the imposed punishment is fair and lawful, i.e. in compliance with the purpose of punishment, as foreseen by the law.

53. Since the case is remanded for retrial on number of counts, the appeal of counsel representing Tolaj, apart for count under 9 which was elaborated above, is immaterial. The panel is therefore confined in further elaboration of those counts. The panel finds that same situation is applicable with regard to the appeal of counsel representing Pajaziti and the Additional Submission to the Appeal filed by I.T..

54. The Appellate Court is also confined in giving an opinion as far as it concerns the Order of the District Court of Prishtinë/Priština identifiable with nr 302-2/08 dated 29 April 2008. The Basic Court shall conduct the main trial from the beginning, where all the evidence, including the above Order of the District Court of Prishtinë/Priština, identifiable with nr 302-2/08 dated 29 April 2008, shall be subject of review as provided in the Criminal Procedure Code.

CONCLUSION

The Appellate Court does not purport to exhaust all the contradictions and omissions in the judgment of the lower court. Those discussed *supra* are sufficient to call into question the lower court' approach relating to the presentation of findings and assessment of the evidence.

In light of above, the Court of Appeals decided as in the enacting clause of this Judgment.

THE COURT OF APPEALS

PRISHTINË/PRIŠTINA

PAKR 487/13

Presiding Judge	**Recording Officer**
Piotr Bojarczuk	Adnan Isufi,
EULEX Judge	EULEX Legal Advisor

Members of the Panel

Roman Raab	Xhevdet Abazi
EULEX Judge	Court of Appeals Judge