SUPREME COURT OF KOSOVO Pml-Kzz no. 194/2013 2 April 2014

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of Judge Bertil Ahnborg as Presiding and Reporting Judge, and Judges Salih Toplica and Gyltene Sylejmani as members of the panel, in the presence of Lendita Berisha, Legal Advisor, acting in capacity of recording clerk,

In the criminal proceeding against,

S.A.$_1$, Date of birth… of Kosovo citizenship,
Convicted in second instance by final Judgment of the Supreme Court of Kosovo Ap-kz no.61/2012 dated 2 October 2012, found guilty, of the criminal offence of Organized Crime contrary to Article 274, paragraph 4 of the CCK in conjunction with the offence of Smuggling of Migrants contrary to Article 138 Paragraph 6 read with Paragraph 1 of the CCK and sentenced to seventeen (17) years of imprisonment and 200.000 Euros fine;

Represented in the Supreme Court by Defence Counsel F.V.;

F.P., Date of birth… of Kosovo citizenship, Convicted in second instance by final Judgment of the Supreme Court of Kosovo Ap-kz no.61/2012 dated 2 October 2012, found guilty, of the criminal offence of Smuggling of Migrants contrary to Article 138 Paragraph 6 read with Paragraph 1 of the CCK and sentenced to seven (7) years of imprisonment;

Represented in the Supreme Court by Defence Counsel S. P.;

I.K., Date of birth… of Kosovo citizenship,
Convicted in second instance by final Judgment of the Supreme Court of Kosovo Ap-kz no.61/2012 dated 2 October 2012, found guilty, of the criminal offence of Organized Crime contrary to Article 274, paragraph 2 of the CCK in conjunction with the offence of Smuggling of Migrants contrary to Article 138 Paragraph 6 read with Paragraph 1 of the CCK and sentenced to eight (8) years of imprisonment;

Represented in the Supreme Court by Defence Counsel Q.Z.;

S.S., Date of birth… of Kosovo citizenship,

Convicted in second instance by final Judgment of the Supreme Court of Kosovo Ap-kz no.61/2012 dated 2 October 2012, found guilty, of the criminal offence of Organized Crime contrary to Article 274, paragraph 2 of the CCK in conjunction with the offence of Smuggling of Migrants contrary to Article 138 Paragraph 6 read with Paragraph 1 of the CCK and sentenced to eight (8) years of imprisonment;

Represented in the Supreme Court by Defence Counsel N.T.;

A.H., Date of birth… of Kosovo citizenship, Convicted in second instance by final Judgment of the Supreme Court of Kosovo Ap-Kz no.61/2012 dated 2 October 2012, found guilty, of the criminal offence of Organized Crime contrary to Article 274, paragraph 4 of the CCK in conjunction with the offence of Smuggling of Migrants contrary to Article 138 Paragraph 6 read

with Paragraph 1 of the CCK and sentenced to nineteen (19) years of imprisonment and 250.000 Euros fine;

Represented in the Supreme Court by Defence Counsels B.T. and Z.J.;

B.A., Date of birth… of Kosovo citizenship,
Convicted in second instance by final Judgment of the Supreme Court of Kosovo Ap-Kz no.61/2012 dated 2 October 2012, found guilty, of the criminal offence of Smuggling of Migrants contrary to Article 138, paragraph 6 in conjunction with Paragraph 1 of the CCK and sentenced to five (5) years of imprisonment,

Represented in the Supreme Court by Defence Counsel G.K.;

Acting upon the Requests for Protection of Legality filed by Defence Counsel F.V. on behalf of defendant **S.A.$_1$**, by Defence Counsel S.P. on behalf of the defendant **F.P.**, by Defence Counsel Q.Z. on behalf of defendant **I.K.**, by Defence Counsel N.T. on behalf of defendant **S.S.**, by Defence Counsel B.T. and Z.J. on behalf of Defendant **A.H.** and by Defence Counsel G.K. on behalf of Defendant **B.A.** against the judgment Ap-Kz no.61/2012 of the Supreme Court of Kosovo dated 2 October 2012 and judgment P no. 244/2010 of the District court of Prishtinë/Pristina dated 17 June 2011, and considering the Opinion of the Office of the State Prosecutor of Kosovo (OSPK) filed on 20 November 2013 respectively on 26 November 2011,

Acting pursuant to Article 435 paragraph 1 and Article 28 paragraph 2 of the Criminal Procedure Code (CPC), in a session held on 2 April 2014, issues the following

JUDGMENT

The Requests for Protection of Legality filed by Defence Counsel F.V. on behalf of defendant S.A.$_1$, Defence Counsel S.P. on behalf of the defendant F.P., Defence Counsel Q.Z. on behalf of defendant I.K., Defence Counsel N.T. on behalf of defendant S.S., Defence Counsels B.T. and Z.J. on behalf of defendant A.H. and Defence Counsel G.K. on behalf of Defendant B.A. against the judgment Ap-Kz no.61/2012 of the Supreme Court of Kosovo dated 2 October 2012 and judgment P no. 244/2010 of the District Court of Prishtinë/Pristina dated 17 June 2011, are hereby rejected as ungrounded.

REASONING

I. Procedural Background

On 13 September 2010 the Special Prosecution Office of the Republic of Kosovo filed an indictment against **S.A.$_1$**, **F.P.**, **I.K.**, X.H., **S.S.**, **A.H.** and **R.A.**, for commission of the criminal offences of Organized Crime contrary to Article 274 paragraph 4 read with Article 23 of the CCK and of Smuggling of Migrants in co-perpetration contrary to Article 138 paragraph 6 read with Article 23 of the CCK following the investigation in relation to the events at the night between 14 and 15 October 2009 when fifteen persons of Kosovo citizenship died while crossing the border between Serbia and Hungary with a boat through the river Tisza near Subotica (Serbia). On 21 January 2011 an Indictment was filed against **B.A.** charging him with the same criminal offences. Indictment was confirmed by Ruling KA. no.216/2010 dated 19 October 2010.

On 17 June 2011 the District Court of Pristine/Pristina issued a judgment by which:

The defendants **S.A.$_1$** and **A.H.** were found guilty of the criminal offence of Organized Crime contrary to Article 274 Paragraph 4 of the CCK, and of Smuggling of Migrants contrary to Article 138 paragraph 6 read with Article 23 of the CCK. **S.A.$_1$**[1] was sentenced to an aggregated punishment of seventeen (17) years of imprisonment and 200.000 Euros fine, and **A.H.**[2] to an aggregated punishment of nineteen (19) years of imprisonment and 250.000 Euros fine.
I.K. and **S.S.** were found guilty of the criminal offence of Organized crime contrary to Article 274 paragraph 2 of the CCK and sentenced to eight (8) years of imprisonment each and acquitted of the criminal offence of Smuggling of Migrants in co-perpetration contrary to Article 138 paragraph 6 read with Article 23 of the CCK.
F.P. was found guilty of the criminal offence of Smuggling of Migrants in co-perpetration, contrary to Article 138, paragraph 6 and Article 23 of the CCK and sentenced to seven (7) years of imprisonment[3].
B.A. was found guilty of the criminal offence of Smuggling of Migrants in co-perpetration, contrary to Article 138, paragraph 6 and Article 23 of the CCK and sentenced to five (5) years of imprisonment[4].

The judgment was within legal timeframe appealed by the Defence Counsels of the defendants.

On 2 February 2012 the Supreme Court of Kosovo rejected the appeals filed by Defence Counsels and *ex officio* modified the judgment of the District Court of Pristine/Pristina in respect to the legal designation of the offences, as follows:

A.H. and **S.A.$_1$** were found guilty of the criminal offence of Organized Crime contrary to Article 274, paragraph 4 of the CCK **in conjunction** with the offence of Smuggling of Migrants contrary to Article 138 paragraph 6 read with paragraph 1 of the CCK. **I.K.** and **S.S.** were found guilty of the criminal offence of Organized Crime, contrary to Article 274, paragraph 2 of the CCK **in conjunction** with the offence of Smuggling of Migrants contrary to Article 138 paragraph 6 read with paragraph 1 of the CCK. **F.P.** was found guilty of the criminal offence of Smuggling of Migrants, contrary to Article 138, paragraph 6 **in conjunction** with paragraph 1 of the CCK. **B.A.** was found guilty of the criminal offence of Smuggling of Migrants, contrary to Article 138, paragraph 6 in conjunction with paragraph 1 of the CCK. The Supreme Court affirmed the sentences pronounced by judgment of the District Court.

The Defence Counsels of **S.A.$_1$**, **A.H.**, **I.K.**, **S.S.**, **F.P.** and **B.A.** filed the requests for protection of legality against the judgments of the District Court and of the Supreme Court.
In their Requests for protection of legality, the Defence Counsels alleges violation of the provisions of criminal law and procedure law. The Defences proposes the Supreme Court to annul the contested judgments and send back the case for retrial. Alternatively the Defences of **I.K.** and **S.S.** requested the Supreme Court to modify the challenged Judgments so to acquit the Defendants entirely, and the Defence of **S.A.$_1$** requested the Supreme Court to acquit his Defendant of the

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[1] ***S.A.$_1$*** *was sentenced to fourteen (14) years of imprisonment and 200.000 Euros of fine for the offence of Organized Crime contrary to Article 274 paragraph 4 of the CCK; and to two (2) years of imprisonment for each migrant smuggled as to the criminal offences of Smuggling of Migrants in co- perpetration contrary to Article 138 paragraph 6 and Article 23 of the CCK.*
[2] ***A.H.*** *was sentenced to sixteen (16) years of imprisonment and 250.000 Euros of fine as to the criminal offence of Organized Crime contrary to Article 274 paragraph 4 of the CCK, and to two (2) years of imprisonment for each migrant smuggled as to the criminal offences of Smuggling of Migrants in co- perpetration contrary' to Article 138 paragraph 6 read with Article 23 of the CCK.*
[3] ***F.P.*** *was sentenced to two (2) years of imprisonment for each migrant smuggled.*
[4] ***B.A.*** *was sentenced to two (2) years of imprisonment for each migrant smuggled.*

offence of Organized crime and sentence him only for Smuggling of migrants, or impose more lenient punishment on him.

On 20 November 2013 respectively on 26 November 2011 the State Prosecutor filed motions proposing that the requests for protection of legality against the judgments be rejected as unfounded.

II. Findings of the Supreme Court

While assessing the Requests for protection of legality, the Supreme Court of Kosovo has concluded the following:

a. the Requests for protection of legality are admissible. The Requests are filed before the competent court in conformity with Article 454, paragraph 1 of the of the Criminal Procedure Code of Kosovo (KCCP)[5] within the legally prescribed time pursuant to Article 452, paragraph 3 of the KCCP.

b. the requests for protection of legality are unfounded.

The Supreme Court of Kosovo preliminarily refers to Article 432 of the CPC (Article 451 paragraph 2 of the KCCP), which stipulates that a request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation. Therefore, contesting the factual situation at this stage of the proceeding is inadmissible and the Court will limit itself to the assessment of eventual violation in the interpretation or application of the law.

Pursuant to Article 436 of the CPC (Article 451 of the KCCP), the Supreme Court of Kosovo shall confine itself to examination of violations of the material and procedural law as alleged by the Defence Counsels. Additionally, in its evaluation the Supreme Court of Kosovo did not find procedural violations in the challenged judgments which should be considered *ex officio*.

Allegations made by the Defence in the requests for protection of legality

In the request for protection of legality defence counsels basically elaborated on the following themes, a) inadmissible evidence, b) that the courts in their judgments exceeded the indictment, c) that the Supreme Court as second instance violated the principle of *reformatio in peius* when requalifying the criminal acts and imposed single punishments. Apart from these themes other allegations are made against the judgments, which will be commented in the following. As will become clear, this Panel does not find any of the allegations made by the Defence founded.

A. Substantial violations of the provisions of the criminal procedure and other violations of the provisions of the criminal procedure.

[5] *the procedural law which was in force until 31 Dec 2012*

A.l Inadmissibility of evidence

a. *Statement of M.R.*

The Defence counsels claims that the courts of first and second instance have made essential violation of the provisions of the criminal procedure under Article 403 para.l subpar.8 of the KCCP, by admitting as evidence the testimony of witness M.R. given to the police although the defendants and their Defences has not had the opportunity to challenge it.

The Supreme Court has in its Judgment of 2 October 2012, paragraphs 16 - 19, thoroughly addressed this issue. It is however of greater importance to note that the District Court, and also the Supreme Court, in their Judgments obviously did not give any major significance to the statements of M.R. One cannot from the Judgments deduct that there are any conclusions based on what M.R. had said to the police, not even to a smaller extent. This Panel can therefore not find that the rights of the Defendants have been violated.

In regard to the allegation of the Defence of **S.A.$_1$** that the court failed to assess the statement of M.R. signed in front of the notary in Geneva number 3180, dated 22 February 2011 where it is said that "*I do not have any kind of relation with brother* **S.A.$_1$** *and* ***B.A.***", the panel recalls to the defendant and his Defence that the law clearly provides the procedure that has to be followed while the witness gives his/her statement. Since the witness is living abroad then this was supposed to be conducted in accordance with provisions which regulate the procedures for International Legal Assistance. Considering that the document produced by the Defence was not obtained in regular way the Supreme Court fully concurs with the standing of lower courts - meaning not commenting it at all.

The allegations that the Courts have made essential violations in regard to the statements of M.R. are therefore unfounded.

b. Reports on metering of telephone calls

The Defence Counsel argues that the judgments were based on inadmissible reports on exchanged text messages and telephone contacts, obtained with the covered measures as they were taken retroactively. This Panel fully concurs with the findings of the Supreme Court in its Judgment, paragraphs 20 — 23. There is no provision prohibiting a retroactive implementation of an order for covert measures. In fact, this is obviously what in many situations must be done: when the Police is investigating a crime it may be of utmost importance to find out what the suspects have been communicating to each other during the planning stage. This evidence was therefore not inadmissible and there is no violation of the criminal procedure.

c. Statement of ***S.A.$_2$***

The Defence of **B.A.** claims that the statement of the witness S.A.$_2$ given before the police should have been separated as inadmissible evidence in accordance with Article 156 paragraph 2 of the KCCP. The witness S.A.$_2$ was interviewed by the police during the investigation. The witness testified also at the main trial where for unknown reasons he provided another version of testimony. The first instance court while assessing the evidences pointed out that the testimony given during the investigation must be considered as the reliable one. Since there were possibilities

to challenge the witness during the main trial the District Court was fully entitled to base its assessment on the statements given by the witness to the police. Hence, there have been no violations in the proceedings in this respect.

A. 2. Violations of Article 403 paragraph 1 subparagraph 10

The Defence of **S.A.$_1$** claims that contrary to Article 386 paragraph 1 of the KCCP, the Judgments of the first and second instance have exceeded the indictment. According to him the enacting clause of the indictment, as amended, contained only elements of the criminal offense of Smuggling of Migrants in co-perpetration pursuant to article 138, paragraph 6 and Article 23 of the CCK.

Such allegations were already made by the defence in the second instance and thoroughly addressed by the Supreme Court in its Judgment, paragraphs 25-31. This Panel notes that there is nothing new in what the Defence now puts forward, except that the allegations now concerns also the second instance. However this Panel finds the allegations without merit. The enacting clauses in the Judgments of both instances are merely clarifications and do not exceed the indictment. Furthermore, the enacting clauses are all in line with the reasoning of the courts.

A.3 Violations of Article 403 paragraph 1 subparagraph 11

The Defence of **S.S.** and **I.K.** claims that the judgment of the second instance violates the provision of Article 403, paragraph 1, item 11 in conjunction with Article 417 of the KCCP. The judgment was not appealed by the Public prosecution therefore, the court was limited to decide pursuant to prohibition of legal provision and respect the institution "*reformatio in peius*" However, the Supreme Court has modified the judgment of first instance court in detriment of the defendants as it found them guilty for the criminal offence for which they were already acquitted.

The defendants **S.S.** and **I.K.** were acquitted by the judgment of first instance court from the charge of Smuggling with Migrants in co-perpetration pursuant to Article 138 paragraph 6 and article 23 of CCK and they were found guilty for commencement of criminal offence of Organized Crime contrary to Article 274 of the CCK.

The Supreme Court *ex officio* amended the legal designation of the criminal offence the defendants were found guilty for commission of the criminal offence of Organized Crime, contrary to Article 274, paragraph 2 of the CCK, in conjunction with the offence of Smuggling of Migrants contrary to Article 138 Paragraph 6 read with Paragraph 1 of the CCK.

Contrary to the Defence Counsels this Panel considers that the amendments in the judgment of the second instance court were not done in detriment of the defendants.

The term *organized crime* is a wide term which in itself may contain one or several serious criminal offences. From the factual description of the indictment it is understood that the defendants actively participated in a criminal organisation, which main activity was smuggling of migrants. Also from the enacting clauses of the District Court's Judgment, it is quite clear that the criminal activity the defendants were engaged in and sentenced for was smuggling of migrants, although it was under the "umbrella" of the criminal qualification *organized crime.* The second

instance ex officio amendments were all within the frame of factual description of the criminal activities and only made for the sake of legal clarification. None of the Defendants have been sentenced for any other act or anything more in the second instance than in the first instance. It is also here worth underlining that the courts in their Judgments are not bound by the motions of the prosecutor regarding the legal classification of an act (Article 286, paragraph 2 of the KCCP). According to this Panel the second instance has also given sufficient reasoning in its Judgement for the amendments.

On the same theme the Defense of **S.A.$_1$**, **S.S.** and **I.K.** allege that the second instance court Judgment is unclear, contradictory and does not sufficiently reasoned amendments in the enacting clause and legal qualification of the first instance judgment. Further, it lacks description on reasons in which it based its decision, than of the elements of the criminal offence which consist the criminal offence and criminal liability of the accused. The Supreme Court will not further comment on this but only refers to its reasoning above.

A. 4. Violations of Article 403 paragraph 1 subparagraph 12

a. The Defence Counsels of **A.H.** maintains that the enacting clause of the judgment of second instance is incomprehensible, unclear and in contradiction with itself. Defence counsels argue that judgment qualified the actions undertaken by **A.H.** and **S.A.$_1$** as coo perpetration. While in the part of the enacting clause which contains the decision on imposed punishment the defendant is sentence for the criminal offence which is not conducted in coo-perpetration.

The Supreme Court of Kosovo notes that the second instance court found the defendant **A.H.** guilty for the criminal offence of Organized Crime contrary to Article 274, paragraph 4 of the CCK in conjunction with the offence of Smuggling of Migrants contrary to Article 138 Paragraph 6 read with Paragraph 1 of the CCK (judgment Ap-kz no.61/2012 of 2 October 2012, page 2, English version) and for this criminal offence he was sentenced to nineteen (19) years of imprisonment and 250.000 Euros fine (page 4, paragraph 3 of the same judgment). While compering English and Albanian versions of the judgment it is determined that the issue was rightfully raised by the defence as in the Albanian version the defendant was found guilty for the criminal offence described above committed in *coo perpetration.*

Based on the Law on Jurisdiction the case is assigned into the competence of EULEX judges, and the presiding judge was EULEX judge, who was obliged to draft the judgment. The original judgment is the one in English language which prevail the translated version. Discrepancies between the English and Albanian versions are to be considered as the mistakes in translation. Therefore, the Supreme Court of Kosovo finds that in this case the enacting clause of the challenged judgment is sufficiently clear and does not contradict itself.

b. The Defence Counsels of **A.H.** alleges an essential violation of the criminal procedure in contradiction with Article 403 paragraph 2 sub paragraphs 1 and 2 of the KCCP committed by the prosecutor and trial panel, because the First Instance Court admitted pieces of evidence at the commencement of the main trial. According to the defence of **S.A.$_1$**, the court of second instance acted in error when it jointly treated essential violations (foreseen by Article 403 of the KCCP) and violations of the criminal law (foreseen by Article 404). Both Defence councils are strongly critical to how the Presiding Judge was intervening while the witnesses were being questioned by the Prosecution or by the Defence, in contradiction with Article 165 Paragraph 2 of the KCCP.

Just like the Supreme Court as second instance, this Panel cannot find any violations of the procedural law because the District Court admitted evidence at the beginning of die main trial. This Panel fully concurs with the findings of the Supreme Court in its Judgment, paragraph 42. The allegation made by the defence council of **S.A.$_1$** concerning how the second instance treated alleged violations foreseen in various Articles is without merit.

This Panel further fully concurs with the Supreme Court as second instance in its findings concerning the intervention of the Presiding Judge during the questioning of witnesses (see Judgment paragraph 44). It is clear that the rights of the Defendants have not been breached in this case.

B. Alleged violations of the criminal law provisions

Some defence councils put forward various allegations against the courts concerning questions of the criminal liability, lack of essential elements of criminal offence, the casual link between defendant's action and its consequence and that not all criteria have been fulfilled to qualify the offence as organized crime. Also other alleged wrongful qualification of the criminal offences are described by the Defence or if the principle of "in dubio pro reo" has been violated. Much of the argumentation deals with the facts and merits of the case, which cannot be subject to consideration in a request for protection of legality.

The Supreme Court does not find it useful to go into details concerning these allegations. Several of these questions have already been answered in the previous, and for the rest this Panel cannot find any such violations of the Criminal Code as the Defence puts forward.

C. Failure to comply with the rules for imposing an aggregated punishment

Some Defence Counsels assert that the Courts violated the law when imposing the punishment. The alleged violations concern both the District Court and the Supreme Court as second instance. So, for instance, the Defence of Avni Hajdari alleges violation of the law by the *second instance* court claiming that although the court modified the judgment as regard to the criminal offence he was found guilty (establishing that the defendant is guilty of the criminal offence of Organized Crime, Article 274, paragraph 4 in conjunction with the principal offence Smuggling of Migrants, Article 138, paragraph 6) it confirmed in the detriment of the defendant the punishment determined by die first instance court even though the prosecutor did not file an appeal. And that the court failed to consider the mitigating circumstances while it determined the punishments.

The Supreme Court as second instance has rightfully in its Judgment criticised how the District court calculated the punishment for those defendants who were sentenced to "two years for each migrant" when they in the enacting clause were found guilty of only one crime (smuggling of migrants) but sentenced for several criminal offences. The second instance modified ex officio the enacting clauses and imposed one single sentence to each defendant. It is quite clear, that the second instance, in doing so, has not imposed any punishment in the detriment of any of the defendants. All defendants are in reality convicted of the same acts as in the first instance and the punishments and fines imposed are not longer or higher. Requalifying the acts and recalculating the sentences, as the second instance has done, is in no way in the detriment of the defendants.

Final conclusion by the Supreme Court

As stated above, this Panel find the allegations made by the Defence without merit.

Presiding judge:	Recording officer:
Bertil Ahnborg	Lendita Berisha
EULEX Judge	Legal Advisor

Members of the panel:

Salih Toplica	Gyltene Sylejmani
Supreme Court Judge	Supreme Court Judge

SUPREME COURT OF KOSOVO

Pml-Kzz no. 194/2013

2 April 2014