THE COURT OF APPEALS
PAKR 216/15
9 December 2015

IN THE NAME OF THE PEOPLE

The Court of Appeals, in a Panel composed of EULEX judge Dariusz Sielicki, presiding and reporting judge, EULEX judge Elka Filcheva-Ermenkova, and the Court of Appeals judge Xhevdet Abazi, as panel members, assisted by Adam Viplak, EULEX legal officer and Adnan Isufi, EULEX legal advisor, acting in the capacity of recording clerks, in the criminal case against the defendants:

N.V., arrested on 12 November 2012 and in detention on remand since 14 November 2012,

F.B., in house arrest since 14 November 2012 and detained after judgment dated 18 December 2014.

B.B., in house arrest since 14 November 2012 and detained after judgment dated 18 December 2014.

E.D., detained after judgment dated 18 December 2014.

I.F.

N.T., in detention on remand from 18 December 2014 until 25 December 2014.

J.B.

S.S.

Convicted by the Basic Court of Prishtinë/Priština as follows: N.V. and F.B. for having committed the criminal offences of Organized Crime pursuant to Article 274 (3) of the Criminal Code of Kosovo (CCK 2003) in conjunction with the criminal offence of Money Laundering under Article 32 par 2 subsection 2.1 of the Law on the Prevention of Money Laundering and

Terrorist Financing 2010, read in conjunction with Article 23 of the CCK, and N.V. is also convicted of the criminal offence of Fraud, pursuant to Article 335 (2) of the Criminal Code of the Republic of Kosovo (CCRK) and Article 261 (1) and (2) of the CCK; B.B., E.D., I.F. and N.T. for the criminal offence of Organized Crime under Article 274 (1) of the CCK in conjunction with the criminal offence of Money Laundering under Article 32 par 2 subsection 2.1 of the Law on the Prevention of Money Laundering and Terrorist Financing, as read in conjunction with Article 23 of the CCK; J.B. and Seledin Shala for the criminal offence of Receiving Stolen Goods, pursuant to Article 3 (2) of the CCRK and under Article 272 (1) of the CCK,

seized of the appeals filed by defence counsel Ali Beka on behalf of the defendant N.V. on 1 April 2015, defence counsel Mexhid Syla on behalf of the defendant F.B. on 1 April 2015, defence counsel Bajram Tmava on behalf of the defendant B.B. on 1 April 2015, defence counsels Skander Musa and Nike Shala on behalf of the defendant E.D. on 2 April 2015, defence counsel Sabrie Krasniqi on behalf of the defendant I.F. on 2 April 2015, defence counsel Vedali Zejnullahu on behalf of the defendant N.T. on 4 April 2015, defence counsel Naim Kraqini on behalf of the defendant J.B. on 27 March 2015, defence counsel Zymrete Zeka on behalf of the defendant S.S. on 31 March 2015 and the defendant S.S. personally on 31 March 2015, against the judgment of the Basic Court of Prishtinë/Priština,Pkr nr 1046/12, dated 18 December 2014,

having considered the responses of the public prosecutor;

having considered the opinion of the Appellate Prosecution Office of the Republic of Kosovo, dated 3 October 2015,

after public sessions held before the Court of Appeals on 26 October 2015 and 30 November 2015,

having deliberated on 03 December 2015, and on 09 December 2015, and voted on 09 December 2015;

acting pursuant to Articles 360 (2), 364 (1.3), 385 (1.4), 389, 394, 398, and 403 of the Criminal Procedure Code of Kosovo (hereinafter "CPC"), renders the following:

Judgment

I. The appeal of the defence counsel on behalf of the defendant N.V., the appeal on behalf of the defendant F.B., the appeal on behalf of the defendant B.B., the appeal on behalf of the defendant E.D., the appeal on the behalf of the defendant I.F., the appeal on behalf of the defendant N.T., are partially granted. The impugned Judgment of the Basic Court of Prishtinë/Priština Pkr. Nr 1046/12 dated 18 December 2014, is hereby modified with regard to the legal qualification and the decision on punishment as follows:

1. With relation to the defendant N.V.:

1.1. From 13 December 2011 to November 2012, in Prishtinë/Priština, N.V., with intent to obtain an unlawful benefit for herself and other persons deceived the Ministry of Internal Affairs and Osterrreichische Staatsdruckerei by means of a false representation to transfer to her bank account the sum of 1, 420,255.13 Euros, which she unlawfully appropriated,

- By this, N.V. committed the criminal offence;

Fraud under Article 335 of the CCRK, and for this offence she is hereby sentenced to 4 (four) years of imprisonment;

1.2. N.V., having obtained the sum of 1, 420,255.13 Euros by fraud and having mixed it with her legitimately earned money, she withdrew, spent and transferred to other persons different amounts of money, in the lump sum of 669,000 Euros with intention of concealing the nature, source and ownership of the stolen money;

- by this N.V. committed the criminal offence:

Money Laundering committed in co-perpetration, under Article 32 paragraph (2) subsection (2.1) of the Law on

the Prevention of Money Laundering and Terrorist Financing 2010 and Article 31 of the CCRK, and for this offence she is hereby sentenced to 6 (six) years of imprisonment and a fine of 25,000 (twenty five thousand) Euros.

1.3. Pursuant to Article 80 paragraph 1 of the CCRK, for both of the above offences N.V. is hereby sentenced to an aggregate punishment of 8 (eight) years of imprisonment and a fine of 25,000 (twenty five thousand) Euros.

2. With relation to the defendant F.B.:

2.1. From 14 December 2011 until November 2012, in Prishtinë/Priština, F.B., in co-perpetration with N.V. transferred to other persons and companies different amounts of money; specifically transferred the sum of 669,000 Euros to Pirro LLC, Qeramika LB, Kosovo LLC, Ron Ing LLC and Construction Beton LLC, the sum of 342,825 Euros to satisfy his and N.V.'s personal debts and expenses, including the purchase of an apartment for 77,000 Euros for N.V. and 39,000 Euros to F.B.'s company "Fimex", and a further 20,000 Euros to B.B.'s company "Fib Oil", with intention of concealing the nature, source and ownership of the stolen money;

- by this, F.B., committed the criminal offence of Money Laundering committed in co-perpetration pursuant to Article 32 paragraph (2) subsection (2.1) of the Law on the Prevention of Money Laundering and Terrorist Financing 2010 and Article 31 of CCRK, and for this offence he is hereby sentenced to 6 (six) years of imprisonment and a fine of 25,000 (twenty five thousand) Euros.

3. With relation to the defendants B.B., E.D., I.F. and N.T.:

3.1. From 14 December 2011 until November 2012, in Prishtinë/Priština, B.B., as owner of Fib Oil

Company, E.D., as authorized person in Pirro LLC company and a shareholder in Qeramika LB Kosovo LLC, I.F. as a shareholder of the Ron ING company and N.T., as *de facto* controlling person of the Construction Beton LLC company, in co-perpetration with N.V. and F.B., the defendants B.B., E.D., I.F. and N.T. received sums of money (B.B. in the lump sum of 20,000 Euros; E.D., in the lump sum of 400,000 Euros; I.F. in the lump sum of 200,00o Euros; and N.T., in the lump sum of 69,000 Euros) which were proceeds of a crime with intention of concealing the nature, source and ownership of the stolen money;

-by this, B.B., E.D., I.F. and N.T., each of them committed the criminal offence of:

Money Laundering committed in co-perpetration pursuant Article 32 paragraph (2) subsection (2.1) of the Law on the Prevention of Money Laundering and Terrorist Financing 2010, read in conjunction with Article 31 of the CCRK and for this offence they are hereby sentenced as follows:

3.2. B.B. to 1 (one) year of imprisonment and a fine of 3,000 (three thousand) Euros.

3.3. E.D. to 5 (five) years of imprisonment and a fine of 15,000 (fifteen thousand) Euros.

3.4. I.F. to 2 (two) years and 6 (six) months of imprisonment and a fine of 8,000 (eight thousand) euros.

3.5. N.T. to 1 (one) year and 6 (six) months of imprisonment and a fine of 5,000 (five thousand) Euros.

II. The appeals filed on behalf of J.B. and S.S., are granted. Pursuant to Article 364 paragraph 1.1 and 1.2 and Article 4 paragraph 1 of the CPC, J.B. and S.S. are hereby acquitted of the criminal offense

classified as Receiving Stolen Property under the criminal offence of Receiving Stolen Goods under Article 272 paragraphs (1) and (2) of the CCK, because the act that they have been convicted of does not meet the characteristics of this offence.

III. With relation to compensation for the injured party;

Pursuant to Article 463 of the CPC, the decision on compensation for the injured party is hereby modified in its entirety and the injured party is instructed that property claim for compensation of any damages arising for the crimes attributed to the accused may be pursued in civil litigation.

IV. Pursuant to Article 365 par 1.5 of the CPC, the time spent in detention on remand and in house arrest, respectively, is credited against the defendants; for N.V. from 12 November 2014, for F.B. from 12 November 2014, for B.B. from 12 November 2014, for E.D. from 18 December 2014, for I.F. from 18 December 2014 until 25 December 2014, and for N.T. from 18 December 2014 until 25 December 2014.

V. All the remaining parts of the judgment of the Basic Court of Prishtinë/Priština stay in force.

VI. With relation to the confiscation order:

1. The Confiscation Order, identifiable with number PKR nr 1046/14, issued by the Basic Court of Prishtinë/Priština, dated 18 December 2014, is hereby confirmed in point I.a and I.c. Therefore, the following assets are permanently forfeited: Apartment nr A/5, ground floor, surface 100.08m2 and a garage (at level minus 3) sited in Tirana Street, nr 42 in Prishtinë/Priština, Kosovo, with value of 77,000 Euros, purchased by N.V.; and The Apartment B/1, 8th floor, with area of 66.2m2, in the building A1, dwelling 2B+p+8+NK, block A11, Area Mati 1,

Prishtinë/Priština, Kosovo, value of approximately 45,000 Euros, purchased by E.D..

2. The above mentioned order is amended in point I.b in such a way that the request for the confiscation of the assets named in point I.b, is rejected because the assets are not sufficiently identified.

VII. All the remaining parts of the above mentioned Order of the Basic Court of Prishtinë/Priština stay in force.

VIII. Pursuant to Article 450 and 451 of the CPC, the Court of Appeals decides that no costs incurred during the criminal proceedings before the Court of Appeals.

REASONING

I. Procedural background

1. Upon conclusion of the Investigation, the Indictment was filed by Prosecutor of the Prishtinë/Priština Basic Prosecution Office on 7 November 2013, and was subsequently amended on 3 February 2014 and on 27 March 2014.

2. The trial commenced on 22 May 2014 and concluded on 18 December 2014. It consisted of 27 court sessions.

3. On 18 December 2014, the Basic Court of Prishtinë/Priština rendered its judgment in this criminal case. N.V. and F.B. were found guilty of having committed the criminal offences of Organized Crime pursuant to Article 274 (3) of the CCK in conjunction with the criminal offence of Money Laundering under Article 32 par 2 subsection 2.1 of the Law on the Prevention of Money Laundering and Terrorist Financing 2010, read in

conjunction with Article 23 of the CCK. N.V. was also found guilty of the criminal offence of Fraud, pursuant to Article 335 (2) CCRK and Article 261 (1) and (2) of the CCK. B.B., E.D., I.F. and N.T. were found guilty of the criminal offence of Organized Crime under Article 274 (1) of the CCK in conjunction with the criminal offence of Money Laundering under Article 32 par 2 subsection 2.1 of the Law on the Prevention of Money Laundering and Terrorist Financing, as read in conjunction with Article 23 of the CCK. J.B. and S. S. were found guilty of the criminal offence of Receiving Stolen Goods, pursuant to Article 3 (2) of the CCRK and under Article 272 (1) of the CCK.

4. N.V. was sentenced to 11 years of imprisonment, and a fine of twenty five thousand (25,000) Euros for the criminal offence of Organized Crime in conjunction with Money Laundering, and to four (4) years of imprisonment and a fine of one thousand (1.000) Euros for the criminal offence of Fraud. Pursuant to Article 71, N.V. was sentenced to an aggregated sentence of twelve (12) years of imprisonment and a fine of 25,000 Euros.

5. F.B. was sentenced to 11 years of imprisonment, and a fine of twenty five thousand (25,000) Euros for the criminal offence of Organized Crime in conjunction with Money Laundering.

6. B.B., E.D., I.F. and N.T. were found guilty of Organized Crime in conjunction with Money Laundering as part of an organized criminal group, and for this crime they were sentenced:

- B.B. to five (5) years of imprisonment, and a fine of 10,000 Euros,
- E.D. to eight (8) years of imprisonment, and a fine of 20,000 Euros,
- I.F. to five (5) years of imprisonment, and a fine of 8,000 Euros,
- N.T. to four (4) years of imprisonment, and a fine of 8,000 Euros.

7. J.B. and S.S. were found guilty of Receiving Stolen Goods, and therefore they were sentenced:

   - J.B. to one (1) year of imprisonment and a fine of 5,000 Euros,
   - S.S. to one (1) year of imprisonment and a fine of 5,000 Euros.

8. N.V. was acquitted of Breach of Trust.

9. All the accused except B.B. were acquitted of Tax Evasion. B.B. was not charged with this crime.

10. N.V. and F.B. were found jointly and severely liable to compensate the amount of 1,420,255.13 Euros to the injured party, the determination of which may be the subject of civil proceedings, together with following accused:

    - B.B. in the amount of 20,000 Euros.
    - E.D. and J.B. in the amount of 400,000 Euros.
    - I.F. and S.S. in the amount of 200,000 Euros.
    - N.T. in the amount of 69,000 Euros.

11. For classification of the crimes attributed to the accused, the first instance court applied the Criminal Code of Kosovo of 2003 as it appeared to be not less favorable than the law which entered into force after the relevant crimes were committed.

12. It was also determined that the Kosovo Tax Administration may pursue its claims against any of the defendants in a civil or administrative procedure.

13. On 18 March 2015, the Basic Court of Prishtinë/Priština, by a ruling ordered that the following assets to be permanently forfeited:

    1. Apartment nr A/5, ground floor, surface 100.08m2 and a garage (at level minus 3) sited in Tirana Street, nr 42 in Prishtinë/Priština, Kosovo, with value of 77,000 Euros, purchased by N.V.;
    2. All assets of the Restaurant located in the western part of the city stadium in Prishtinë/Priština, Kosovo, with area of 586m2, with value of approximately 250,000 Euros, which were purchased by E.D.;
    3. The Apartment B/1, 8th floor, with area of 66.2m2, in the building A1, dwelling 2B+p+8+NK, block A11, Area Mati 1, Prishtinë/Priština, Kosovo, value of approximately 45,000 Euros, purchased by E.D..

14. All the defendants filed appeals against the judgment through their defense counsel. The defendant S.S. also filed an appeal *pro se*.

15. Defence counsel of N.V. and E.D. also filed appeals against the order dated 18 March 2015, on the basis of wrongful ruling on forfeiture.

II. THE APPEALS

16. Appeals have been timely filed against the judgement by defense counsel:

-Ali Beka representing N.V.,
-Mexhid Syla, representing F.B.,
-Bajram Tmava representing B.B.,
-Skander Musa and Nike Shala, representing E.D.,
-Sabrie Krasniqi representing I.F.
-Vedali Zejnullahu representing N.T.,
-Naim Kraqini representing J.B.,
-Zymrete Zeka representing S.S.,

17. The accused S.S. filed an appeal *pro se*.

18. All the defense counsel invoked all of the grounds of appeal set by Article 383 Paragraph 3:

- substantial violation of criminal procedure;

  Generally all the counsel argued that the enacting clause of the judgment was incomprehensible, contradicting itself and in relation to its reasoning, and based on selective evidence. Some of the counsel presented examples of this assertion.

- violation of the criminal law;

  all the counsel pointed out that the court failed to establish the necessary elements of the offence of

organized crime, especially the structure of the criminal group and the distribution of roles.

- an erroneous or incomplete determination of the factual situation;

- all the counsel argued that no criminal action was performed by the accused.

19. The counsel also challenged the decision on sanctions.

- Counsel Skender Musa and Nike Shala requested exclusively that their defendant was acquitted, while counsel Bajram Tmava and S.S. *pro se* requested only that the case was sent for retrial.

- Counsel Zymrete Zeka requested a more lenient punishment to be imposed against S.S., or for the case to be sent for retrial.

- All the other counsel requested the judgment to be changed and the defendants to be acquitted of all charges, or alternatively the judgment to be annulled and the case to be send for retrial.

20. Appeal of defence counsel Ali Beka on behalf of N.V. refers to:

A. Violation of criminal procedure

It claims that:

A.1) the introduction of the judgment does not contain the date on which it was written as required by Art. 370 paragraph 2 of the CPC);

A.2) the judgment was served 3 months after its announcement (Art. 369 par. 1 of the CPC),

A.3) there was lack of reasoning for the non-acceptance of the defence motion for an independent financial expertise;

A.4) there were contradictions between the enacting clause of the judgment and the reasoning:

a) N.V. was pronounced guilty of the crime under Article 274 Paragraphs 1, 3 and 7 while the reasoning refers only to Article 274 Paragraph 3;

b) The court failed to determine if N.V. was in fact authorized by OeSD or if she made a false representation on its behalf;

A.5) the enacting clause was unclear with relation to the decision on the property claim:

a) N.V. and F.B. were obliged to compensate the injured party "jointly and severally" which means that the injured party would be compensated twice;

b) it leaves determination of the injured party to civil proceedings while the compensation should be paid to the injured party within specified deadline;

c) The amount of compensation is not clearly defined in the judgment;

B. Erroneous and incomplete establishment of the factual situation.

The counsel presented his version of events which differs very much from the findings of the court. The most apparent discrepancy relates to the finding that N.V. was not authorized to act on behalf of OeSD, and all other discrepancies appear as consequences of this one.

C. Violation of Criminal Law

1. With regard to legal classification:

Because:

a) N.V.’s action was erroneously classified as Organized Crime as the requirements for the existence of an organized group were not met.

b) There was no money laundering committed as the origin of the money was known and the money did not originate from an illegal source.

c) There was no Fraud committed as N.V. did not deceive either Österreichische Staatsrduckerei GmbH (hereafter OeSD) or the Ministry of Internal affairs (hereafter MiA), as all her actions were duly authorized.

2. With relation to imposition of punishment for the Fraud, the court imposed against N.V. both imprisonment and a fine, while the CCK provides only for the punishment of imprisonment for this crime.

21. Appeal of Defense Counsel Mexhid Syla on behalf of F.B..

The appeal refers to:

A. substantial violation of the criminal procedure because:

a) the date of drafting the judgment was not given in the judgment;

b) the period of time stipulated for serving the judgment upon the parties had not been observed;

d) the motion for financial expert opinion was denied and the reasons were not presented;

e) there is a contradiction in the judgment because the enacting clause says that F.B. transferred certain amounts of money himself and it is said in the reasoning that he made arrangements with other persons to transfer the money;

e) it had not been established to whom certain amounts of money was transferred.

With relation to property claim:

The decision on property claim is ambiguous because:

a) N.V. and F.B. were obliged to compensate the injured party "jointly and severally" which makes it unclear how much each of them was obliged to pay.

b) The determination of the injured party was left for civil proceedings.

c) the amount of compensation was not justified in the judgment;

B. Erroneous and incomplete establishment of factual situation

The counsel generally argues that the evidence in the case did not support the court's findings. The determination of facts followed the Indictment and closing statement of the prosecutor.

3. The counsel emphasizes that the judgment was taken in essential violation of the provisions of the criminal procedure, and that the factual situation was not determined fairly and fully, and as a result there has been a violation of the criminal law to the detriment of the accused by judging and convicting defendant F.B. of the criminal offense which it is not proven that he committed.

C. Violation of criminal law
1. With relation to organized crime:

The actions attributed to F.B. did not constitute Organized Crime as they did not contain the necessary elements of the crime, as he did not act in an organized and structured group. There were no roles attributed to

the members of the group and there was no evidence that F.B. organized or supervised an organized group.

2. With relation to money laundering

The actions attributed to F.B. do not constitute money laundering because:

a) the determination of money transferred by F.B. in commission of this crime is ambiguous since the court used in the reasoning the expression "approximately";
b) in the judgment the expression "stolen money" was used, although the charge of Receiving Stolen Goods related to the charge of Money Laundering, and this charge was dismissed after the initial hearing;
c) the money that F.B. allegedly laundered did not originate from crime as it was obtained as a payment for contractual obligations.

3. with relation to the decision of criminal sanctions, the determination of the sentence was unlawful because

- F.B. did not commit any crime,
- The court considered the elements of the crime as the aggravating circumstances
- The court did not assess the mitigating circumstances properly.

22. Appeal of Defense Counsel Bajram Tmava on behalf of B.B.

The counsel argues that:

a) There was contradiction between the enacting clause and the reasoning. However the counsel did not indicate any specific example;

b) The findings of the court were not supported by evidence;

c) All of the court's findings were erroneous, especially the assumption that B.B. knew the origin of the money that he received from N.V., which was not supported by evidence;

d) There was a violation of the criminal law because B.B. was not at all connected with the other accused convicted for the same crime; E.D., I.F. and N.T., and he was not a part of any group that included N.V. and F.B.. Therefore B.B.'s actions do not correspond with the characteristics of the crime of an organized group;

e) the decision on criminal sanctions was wrongful because the court found only 3 mitigating circumstances: family status. The defendant is a young student and his involvement in the criminal scheme was only to a small extent. None of the aggravating circumstances applied specifically to the defendant.

23. Appeal of Defense Counsel Skander Musa and Nike Shala on behalf of E.D.

The counsel, in general terms, argued that the judgment was incomprehensible and contradictory. The reasoning did not contain the indication of the evidence which supported the court's findings. The court did not establish any facts proving the criminal action of the accused. In particular the court did not establish any essential elements of the alleged organized group to which the defendant belonged. The money transfer mentioned in the description of the crime attributed to E.D. was a legitimate one.

24. Appeal of Defense Counsel Sabrie Krasniqi on behalf of I.F.

The counsel generally contested the findings of the court and the legal classification of the crimes attributed to the defendant.

a) She points out that certain phone conversations between F.B. and N. V. which were presented to the court as evidence did not refer to I.F. but to another person.

b) She argues that the determination of facts was erroneous because the money transfer mentioned in the description of the crime that I.F. was convicted of was legitimate. I.F. was not aware of the illegal origin of the money that was transferred to him. The determination of the facts as related to the actions of N.V. were also erroneous.

c) Furthermore, she argues that the court did not establish the necessary elements of the crime of Organized Crime.

d) The sentence was wrongful because I.F. should be acquitted. Nevertheless, she also pointed out that he was sentenced to 5 years of imprisonment while N.T. was sentenced to 4 years for the same offence.

25. Appeal of Defense Counsel Sevdali Zejnullahu on behalf of N.T.

The counsel argued that the court assessed the evidence with a prejudice against the defendant, and ignored the evidence presented by the defense.

With relation to the legal classification, the counsel argued that the element of "serious crime" relating to the definition of Organized Crime under Article 274 of the CCK refers to a crime punishable with at least 4 years of punishment. The crime of Money Laundering under Article 32 Paragraph2 subparagraph 2.1 of the Law on Prevention of Money Laundering and Financing of Terrorism, which had been applied by the court as a target offence of Organized Crime, does not meet this criterion. The court erroneously concluded that serious crime means a crime for which a sentence of more than 4

years could be imposed, even if the minimum sentence provided by law is lesser.

With relation to the criminal sanction, the counsel argued that N.T. should be acquitted. Nevertheless the court took as aggravating circumstances the facts that N.T. could not be held responsible, and the delay in the production of passports and other identification documents. The court took into consideration as a mitigating factor that N.T. was involved in the criminal scheme to a lesser extent. The counsel pointed out that the expression "lesser extent" was not clear.

26. Appeal of Defense Counsel Naim Krasniqi on behalf of J.B.

The counsel argued that the judgment was not properly written as it does not consist of all necessary elements required by law.

It was not explained why J.B. knew that he received stolen money, while there were other persons who also received transfers from N.V. and they were not charged at all.

The motion for independent financial expert opinion was rejected without justification.

The counsel argued that J.B. ran a legitimate business activity.

27. The Appeal of Defense Counsel Zymrete Zeka on behalf of S.S.

The counsel, generally, argued that there was no proof that S.S. knew the origin of the money that he accepted, so he should be acquitted of Receiving Stolen Goods.

With relation to the sentence, the counsel presented mitigating factors that the court failed to observe:

- that the accused is young and has two children, and that there are no other proceedings for similar crimes ongoing against him.

28. The Appeal of S.S. *pro se*

The accused alleged that the judgment is not clearly written. He pointed out that he had no intent to receive stolen money as he did not know its origin, and the court failed to substantiate its findings on this matter.

The accused raised that the court did not take into consideration some mitigating factors: his cooperation with the court and his family situation.

III. RESPONSES TO THE APPEALS

29. The EULEX SPRK Prosecutor responded that the appeals failed to properly substantiate any error in the judgment of the Basic Court which would warrant the impugned judgment being overturned or amended.

30. The Appellate Prosecutor, in his Proposal dated 2 June 2015, concurred with the SPRK prosecutor's stance. The Appellate Prosecutor argued that minor procedural mistakes that were pointed out by the defence counsel do not, taken together, qualify as a substantial violation of the provisions of criminal procedure capable of significant prejudice to the right of the accused to a fair trial.

IV. PROCEDURE BEFORE THE COURT OF APPEALS

31. Following the decision of the President of EULEX judges, dated 16 September 2015, the Court of Appeals in Prishtinë/Priština, in composition of EULEX judge Dariusz Sielicki, as a Presiding and Reporting judge, EULEX judge Anna Adamska-Gallant and the Court of

Appeals judge Xhevdet Abazi, as members of the panel, scheduled the session on 26 October 2015.

32. On 26 October 2015, during the course of the session, the defence counsel objected to the composition of the panel. The defence counsel requested disqualification of a panel member, namely of EULEX judge Anna Adamska-Gallant, because of her previous involvement in this criminal case. Defence counsel further argued that the panel should be comprised of a majority of local judges and presided by a local judge insofar as there is no decision issued by the Kosovo Judicial Council which changes the composition of the panel to a majority of EULEX judges.

33. On 26 November 2015, EULEX judge Anna Adamska-Gallant pursuant to Article 39 paragraph 2 of the CPC reported to the President of EULEX judges that she participated in previous proceedings in the same case.

34. On 26 November 2015, the President of EULEX judges ruled to replace EULEX Judge Anna Adamska-Gallant with EULEX judge Elka Filcheva-Ermenkova, accordingly.

35. On 30 November 2015, the Court of Appeals in Prishtinë/Priština, in composition of EULEX judge Dariusz Sielicki, as a Presiding and Reporting judge, EULEX judge Elka Filcheva-Ermenkova and the Court of Appeals judge Xhevdet Abazi, as members of the panel, scheduled the session in the criminal case.

36. In the session before the Court of Appeals on 30 November 2015, no disqualification request was made by the parties to the proceedings.

V. FINDINGS OF THE COURT OF APPEALS

37. In order for the Court to be able to adjudicate the defence counsel appeals, it is necessary to first examine whether the admissibility requirements laid down in the CPC have been fulfilled.

38. The Court of Appeals established the following:

    a. All appeals are admissible. They are 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 was not required pursuant to Article 391 of the CPC.

39. When considering whether there has been violation of the law, the court examined all the evidence presented to it, whether emanating from the defence counsel, the defendants or from other sources, or which it obtained *proprio motu*.

40. After examination of the file records, the panel finds that the appealed judgment does not warrant an *ex officio* intervention pursuant to Article 394 of the CPC. This panel, therefore, shall confine itself to examining those violations of law which the requesting party alleges in their appeals.

41. As regards disqualification issue, EULEX judge Anna Adamska-Gallant, was replaced with EULEX judge Elka Filcheva-Ermenkova.

42. As far as the composition of the panel with a majority of EULEX judges is concerned, the panel notes that the jurisdiction of EULEX judges and the composition of the panels in cases in which EULEX judges exercise their jurisdiction, are regulated by 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) (hereafter the *Omnibus Law)* and also by *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 (hereinafter: the Agreement).

43. Article 1.A. of the *Omnibus Law* stipulates the jurisdiction of EULEX judges in ongoing cases. An ongoing case, for purpose of this law, means:

    1. *Cases for which the decision to initiate investigations has been filed before 15 April 2014 by EULEX prosecutors in accordance with the law.*

    2. *Cases that are assigned to EULEX judges before 15 April 2014.*

44. As regards the panels' composition, Article 3.2 reads as follows:

    3.2. Panels in which EULEX judges exercise their jurisdiction in criminal proceedings will be composed of a majority of local judges and presided by a local judge. Upon the reasoned request of the EULEX competent authority Kosovo Judicial Council will decide that the panel to be composed of majority of EULEX judges.

45. Thus, Article 1. A. of the *Omnibus Law* stipulates jurisdiction of EULEX judges for two types of cases: the cases for which the *decision* to initiate investigations has been filed before 15 April 2014, and the cases that are *assigned* to EULEX judges before 15 April 2014.

46. While Article 1. A. of the *Omnibus Law* deals with jurisdiction, Article 3 of the same law refers to the composition of the panels.

47. The panel notes that while Article 1 A stipulates jurisdiction of EULEX judges for two types of cases, Article 3.2 does not make such a differentiation. Article 3.2 merely states that panels in which EULEX judges exercise their jurisdiction in criminal proceedings will be composed of a majority of local judges and presided by a local judge.

48. In the panel's view, Article 3.2 of the *Omnibus Law* may be applicable for cases according to the Article 1.A. par 1, provided that the investigations are successfully concluded and the indictment is filed. That means, in other words, if the decision to initiate investigations has been filed before 15 April 2014 but the investigation is concluded and the Indictment is filed after entry into force of the Omnibus Law, then, in that case, the provisions of the *Omnibus Law* may be applicable with regard to composition of the trial panel.

49. The situation is, however, different for cases according to Article 1.A. par 2, which are already assigned to EULEX judges before 15 April 2014, respectively, before entry into force of *Omnibus Law.* If a case is assigned to EULEX judges prior to 15 April 2014, then, the case shall continue to be dealt with by EULEX judges. That means that the composition of the panel shall be in accordance to 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 with entry into force of *Omnibus Law*, in the panel's view, cannot have retroactive effect with regard to the composition of the panel.

50. Specifically, in the case at hand, the investigations have been initiated prior to 15 April 2014. As matter of fact, this case, in the first instance, has even been concluded by a panel composed by majority of EULEX judges and presided by a EULEX judge in accordance to the Law on Jurisdiction.

51. The question is, however, whether or not the composition of the panel in the cases from Article 1.A par 2 should continue in instances with legal remedies, *i.e* second instance, with a majority of EULEX judges and presided by a EULEX judge.

52. The panel opines that, in cases defined in Article 1.A par 2, the composition of the panels should continue with a majority of EULEX judges and presided by a EULEX judge, also in the instances with legal remedies, where there is no decision from the President of EULEX judges for

changing the composition of the panel or for handing over the case to the local judiciary.

53. This stance is also supported by the above mentioned Agreement (*supra paragraph 42)*.

54. According to Article 3 paragraph 3.3 of the Omnibus Law upon the reasoned request of the EULEX competent authority, the Kosovo Judicial Council may decide that a panel is to be composed of a majority of EULEX judges. According to item 2 of the Agreement, such a decision was already made in general for the continuation of all phases of the trial for all ongoing cases that were heard in first instance by panels composed of majority of EULEX judges.

55. Pursuant to Article 2 par. 2.3 of the Omnibus Law the Kosovo Judicial Council was explicitly authorized to regulate relevant aspects of the activity and cooperation of EULEX judges with the Kosovo judges working in the local courts.

56. The panel notes that the Agreement, in item 2, states that "*in all ongoing cases the trial panels consisting of a majority of EULEX judges and will continue with a majority of EULEX judges on the panel for the continuation of all phases of the trial and the remainder of the proceedings*".

57. As already stated in the judgment PML.-KZZ. No. 170/2014, dated 19 February 2015, with which this panel fully agrees, by repeating twice the same matter, using different expressions ('for the continuation of all phases of the trial' and 'the remainder of the proceedings'), the parties to The Agreement emphasized that the provision deals with all stages of a criminal proceedings. This means the provision is not limited to the first instance only, but also covers all stages with legal remedies. As indicated by the Supreme Court in the above mentioned judgment, the wording of Count 2 of The Agreement clearly refers to 'continuation' with the panel composition when it states that…' in all ongoing cases

the trial panels consisting of a majority of EULEX judges and will continue with a majority of EULEX judges'. This wording indicates that the purpose was to maintain the previous situation also when it comes to the questions concerning the composition of the Panel.

58. The panel concludes that the procedure regarding the adjudication of an ongoing case by a majority of EULEX judges is not affected by the amendments in force since 30 May 2014.

Allegations of violations of the Provisions of the Criminal Procedure Code:

59. Defence counsel argued that the enacting clause of the judgment of the first instance court is in contradiction with the reasoning. Specifically, defence counsel for N.V. argues that in the enacting clause the court has stated as if N.V. deceived the MIA and OeSD by means of a false representation, while in the reasoning it held that the question is whether MIA is responsible for transferring the money or is OeSD for the issuance of the authorization.

60. In the context of contestation of the enacting clause, similarly defence counsel of F.B. claims that in the enacting clause the court states that "*F.B. transferred the amount of 669,000 Euros*" while in the reasoning it is stated that "*with intent and unlawfully has made arrangements through contracts with representatives of the so-called companies for transfer of 669.000.00 Euros*", or when in the enacting clause it states "*F.B. in co-perpetration with* N.V. *transferred unlawfully 342, 825.00 Euros to satisfy his and* N.V. *personal debts and expenses*", while in the reasoning it states "*arranged for approximately 342,825.00 Euros of this stolen money to be transferred to individuals and businesses to satisfy their personal debts and expenses*". In addition, defence counsel for F.B. states that the enacting clause does not specify the value of the alleged damage, nor does it provide information to whom the alleged stolen money was transferred.

61. The Court of Appeals finds that, apart from the qualification of the criminal acts, which shall be elaborated when discussing the application of the criminal law, no substantial contradictions and/or relevant discrepancies could be found in the enacting clause of the judgment, or between the enacting clause and the reasoning.

62. The Court of Appeals finds that the enacting clause makes adequate reference to all decisive facts. What is required for the enacting clause to contain is a sufficient number of details in order to allow the proper defense of the accused. Any addition that is superfluous to this legitimate purpose must be avoided, because it would risk causing confusion rather than clarity.

63. In the statement of grounds, the first instance court has presented the grounds for each individual point of the judgment. The panel is, therefore, satisfied that the first instance court clearly and exhaustively stated the facts it considered proven or not proven, as well the grounds for this, and specifically indicated the evidence relied upon by the court when rendering the judgment.

64. In the panel's view, the defence counsel allegations of inconsistency in the challenged judgment are merely a partial and/or an isolated reading of the enacting clause from the reasoning.

65. The enacting clause and reasoning must be read in the context of overall circumstances of the case and not in a selective way. The enacting clause and reasoning are, in fact, organic and indivisible parts of a judgment and must be read altogether.

66. The panel finds that, in the case at hand, the enacting clause of the first instance court meets all the legal parameters foreseen by Article 370 of the CPC.

67. As to the lack of date when the judgment was drawn up as a requisite foreseen in Article 369 paragraph 1 of the CPC, the panel finds it as a technical omission. That is, however, *Inritus Irritus (*of no effect) as regards to the substance of the case. The panel notes that Article 369 paragraph 1 of the CPC merely contains a disposition (the requirement of the time within which the judgment has to be drawn up). It does not, however, set forth any sanction when this provision is not fully complied with.

68. The panel concludes that the mere lack of date when the judgment was drawn up does not qualify as a substantial violation of CPC, nor does it amount to a violation of the rights of the defendants to a fair trial. Taking into account the complexity and nature of the case, the length of the judgment being over 200 pages, which also needed to be translated into respective languages, the panel considers defence counsel's allegation without merit.

69. The panel notes that annulment of a judgment may occur only in very exceptional circumstances. That is when and if the legal criteria envisaged by Article 402 of the CPC are met, and/or when and if the Court of Appeals cannot proceed with modification of a mistake pursuant to Article 403 of the CPC.

70. The panel concludes that the lack of date and absence of a decision for extension of the time for drafting of the judgment has not influenced the rendering of a lawful and fair judgment.

Allegation of Erroneous and Incomplete Establishment of the Factual Situation.

71. As explained above, all defence counsel argued that there had been an erroneous and incomplete establishment of the factual situation.

72. Specifically, defence counsel Ali Beka argues that, contrary with what was held by the first instance court, N.V. was the authorized person and then also a representative of the OeSD for the implementation of the Contract for the production of the biometric passports by the OeSD and for the MiA. This is established, the defence counsel argues, by the material evidence and statement of R.G. N.V. did not receive the sum of 1,420,255.13 Euros unlawfully, because she was authorized by OeSD to print and sign the receipts issued on behalf of OeSD for the passports sent to MiA. Defence counsel argues that the changing of the invoices with regard to the sum of 1,420,255.13 Euros, which was not transferred to OeSD, was used to pay the Customs fee, VAT and other obligations towards the companies for the services they provided. Further, defence counsel submits that the two witnesses relied upon by the court, namely R.G. and G.W., are not credible witnesses.

73. Defence counsel of B.B. argues there is no evidence to show that B.B. established, organized or supervised an organized criminal group, as held by the first instance court. Defence counsel submits that the first instance court did not permit independent financial expert opinion, which would have avoided the dilemmas regarding alleged value of damage, the identification of the injured parties, etc.

74. In addressing defence counsel’s allegation, with exception to the defendants J.B. and S.S., this panel is of the view that the court of first instance has appropriately presented the facts which were correctly established, and gave clear and convincing reasons.

75. It was established that on 26 July 2001, MiA transferred directly to OeSD the sum of 273,552.58 Euros, while on 9 November 2011, the sum of 138,370.00 Euros. A total sum transferred from MiA direct to OeSD

was 411,922.58 Euros.[1] This, as matter of fact, is not even contested by the defence counsel.

76. The material evidence relied upon by the first instance court prove that N.V. has altered the bank account details on the OeSD invoices transposing her bank details for those of the OeSD and thereafter fraudulently used this authorization to induce the MiA to pay invoice monies into her account[2].

77. The first instance court established that between 13 December 2011 and 3 August 2012, seven transfers were made by the MiA into the Consulting EU account at NLB bank totaling 3,3611,283.25 Euros. The sum of 1,941,028.12 Euros was subsequently transferred from the account of Consulting EU to the OeSD, leaving a balance of 1,420,255.13 Euros[3].

78. It was also established that N.V. made transfers to various companies. As matter of fact, N.V. admitted that she transferred the sum of 669,000 Euros to different companies[4].

79. The panel considers that it has been correctly proven by the first instance court that N.V. had no authorization to receive the money owed to OeSD.

80. The witnesses R.G. and G.W. testified that the authorization given by OeSD to N.V. did not give her authorization to directly receive payments from the MiA, or to change the invoices.

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[1] See Judgment of the Basic Court of Prishtinë/Priśtina, PKR.nr 1046/13, dated 18 December 2014, page 107, English version.
[2] See Judgment of the Basic Court of Prishtinë/Priśtina, PKR.nr 1046/13, dated 18 December 2014, page 107, English version, referring to invoice 05/12, invoice P/100827-04, invoices 1110076529 and 1110076601.
[3] See Judgment of the Basic Court of Prishtinë/Priśtina, PKR.nr 1046/13, dated 18 December 2014, page 109, English version.
[4] See Judgment of the Basic Court of Prishtinë/Priśtina, PKR.nr 1046/13, dated 18 December 2014, page 111, English version, referring to interview of the defendant N.V. dated 16 January 2013, pages 9 and 11.

81. The panel considers the statements of witnesses R.G. and G.W. credible. It is evident that two transfers were made by MiA directly to OeSD. Nobody contests it and this, as matter of fact, is confirmed by material evidence. Why was it then necessary to change this manner of transfers? The panel finds the conclusion reached by the first instance court was correct, which is that N.V.'s intention was to unlawfully appropriate the money which were intended for OeSD. In order to achieve this, N.V. deceived both the MiA and OeSD by means of falsified invoices.

82. It has been also correctly established that substantial sums had been transferred to different companies owned by other defendants.

83. The panel is satisfied that the first instance court provided sufficient, clear and convincing reasons which prove the sums of the money were unlawfully appropriated and subsequently transferred to different bank accounts.

84. Concerning the financial expertise raised by the defence, the panel finds it crucial to note that the transfers were mainly made through banks which are proven by the invoices. The first instance court has established the amounts which were received and then transferred. The panel, therefore, finds the defence allegation without merit.

85. As far as the identification and/or the compensation of the injured party/parties are concerned, the panel suffices to say that the injured party is instructed to pursue a compensation claim in the civil procedure. It is therefore up to the civil court, based on the principle of disposal of the parties, to establish the passive legitimacy according to the rules on the contested procedure. The panel is confined in its assessment to the evaluation of criminal matters, thus cannot pre-determine which parties may consider themselves affected by the criminal acts.

The Criminal law allegations:

86. It is alleged by the defence that from the erroneous determination of the factual situation stems a violation of the criminal law.

87. While the Court of Appeals considers that the factual situation was correctly established, with the exception mentioned above relating to the defendants J.B. and S.S., it partially concurs with the defence counsel that first instance court erred in the correct application of the criminal law provisions.

88. After thorough analysis of the appealed judgment, the Appeals and Prosecution's motions, this panel evaluates that the first instance court wrongly qualified the acts attributed to the defendants N.V., F.B., B.B., E.D., I.F. and N.T. as criminal offence of Organized Crime pursuant to Article 274 (3) of the CCK.

89. The panel, further, evaluates that it has not been proven beyond any reasonable doubt, as required by the law, that J.B. and S.S. committed the criminal offence of Receiving Stolen Property under the criminal offence of Receiving Stolen Goods according to the Article 272 paragraphs (1) and (2) of the CCK 2003.

90. In relation to Organized Crime, Article 274 of the CCK, provides:

> (1) *Whoever commits a serious crime as part of an organized criminal group shall be punished by a fine of up to 250.000 EUR and by imprisonment of at least seven years.*
> *(2) Whoever actively participates in the criminal or other activities of an organized criminal group, knowing that his or her participation will contribute to the commission of serious crimes by the organized criminal group, shall be punished by imprisonment of at least five years.*

(3) Whoever organizes, establishes, supervises, manages or directs the activities of an organized criminal group shall be punished by a fine of up to 500.000 EUR and by imprisonment of seven to twenty years.

(4) Whoever commits the offence provided for in paragraph 2 of the present article shall be punished by a fine of up to 500.000 EUR and by imprisonment of at least ten years or by long-term imprisonment if the activities of the organized criminal group result in death.

(5) The court may waive the punishment of a perpetrator who commits the offence provided for in paragraph 2 or 3 of the present article if, before the group has committed a crime, such person reports to the police or public prosecutor the existence, formation and information of the organized criminal group in detail to allow the police to arrest or the prosecutor to prosecute the group.

(6) Whoever is punished by the accessory punishment provided for in Article 57 of the present Code for the commission of a criminal offence provided for in the present Article and violates the terms of such accessory punishment shall be punished by imprisonment of up to one year.

(7) For the purposes of the present article,

1) The term "organized crime" means a serious crime committed by a structured group in order to obtain, directly or indirectly, a financial or other material benefit.

2) The term "organized criminal group" means a structured group existing for a period of time and acting in concert with the aim of committing one or more serious crimes in order to obtain, directly or indirectly, a financial or other material benefit.

3) The term "serious crime" means an offence punishable by imprisonment of at least four years.

4) The term "structured group" means a group of three or more persons that is not randomly formed for the immediate commission of an offence and does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

91. Article 120 of the CCRK, provides:

13. Organized criminal group - a structured association, established over a period of time, of three or more persons for the commission of a certain criminal offense that acts in concert with the aim of committing one or more serious criminal offenses in order to obtain, directly or indirectly, a financial or other material benefit.
14. Structured association - an association that is not randomly formed for the immediate commission of an offense, but it does not need to have formally defined roles for its members, continuity of its membership, or a developed structure.

92. Article 283 of the CCRK, in relation to Participation in or organization of an organized criminal group provides:

1. Whoever, with the intent and with knowledge of either the aim and general activity of the organized criminal group or its intention to commit one or more criminal offenses which are punishable by imprisonment of at least four (4) years, actively takes part in the group's criminal activities knowing that such participation will contribute to the achievement of the group's criminal activities, shall be punished by a fine of up to two hundred fifty thousand (250,000) EUR and imprisonment of at least seven (7) years.
2. Whoever organizes, establishes, supervises, manages or directs the activities of an

organized criminal group shall be punished by a fine of up to five hundred thousand (500,000) EUR and by imprisonment of at least ten (10) years.

3. When the activities of the organized criminal group provided for in paragraph 1 or 2 of this Article result in death, the perpetrator shall be punished by a fine of up to five hundred thousand (500,000) EUR and by imprisonment of at least ten (10) years or life-long imprisonment.

4. The court may reduce the punishment of a member of an organized criminal group who, before the organized criminal group has committed a criminal offense reports to the police or prosecutor the existence, formation and information of the organized criminal group in sufficient detail to allow the arrest or the prosecution of such group.

5. For the purposes of Article, "actively takes part" includes, but is not limited to, the provision of information or material means, the recruitment of new members and all forms of financing of the group's activities.

93. The panel notes that there is no substantial difference between the two codes with regard to the material facts attributed to an act in order that one to be qualified as Organized Crime. In both codes, the offence of Organized Crime requires the existence of a structured association, for the commitment of serious crimes, which, *inter alia,* is established over a period of time and which consists of three or more persons. The roles do not need to be formally defined or the structure developed, though for the existence of organized crime such association must not be randomly formed.

94. The panel notes that, in the case at hand, the acts attributed to the defendants N.V., F.B., B.B., E.D., I.F. and N.T. do not meet the specific legal elements (the figure) for the criminal offence of Organized Crime pursuant to Article 274 (3) of the CCK. The panel

finds that the evidence relied upon by the first instance court do not demonstrate that there was in existence a structured association which was established over a period of time consisting of three or more persons with the aim of committing one or more serious criminal offenses in order to obtain, directly or indirectly, a financial or other material benefit. The panel therefore considers improper the qualification of acts attributed to the defendants N.V., F.B., B.B., E.D., I.F. and N.T., as related to the Organized Crime.

95. The panel is satisfied that first instance court correctly established that N.V. fraudulently altered OeSD invoices totaling 3,410,343.91 Euros by adding her company, Consulting EU (CE) and her company bank account number in the lower portions of the invoices. N.V. intentionally concealed from the OeSD the fact that she made these alterations and deceived OeSD into believing that the MiA had failed to pay received transfers of 738,240 EUROS and 64,596 EUROS from the MiA. Further, the panel is satisfied that first instance court appropriately established that N.V. unlawfully transferred the sum of 342,825 Euros in order to satisfy her and F.B.'s personal debts and expenses, including the purchase of an apartment for 77,000 Euros for N.V. and 39,000 Euros to F.B.'s company "Fimex", and a further 20,000 Euros to B.B.'s company "Fib Oil" with intention of concealing the nature, source and ownership of the stolen money thereby realizing a substantial financial benefit.

96. The panel concludes that the above mentioned material facts which the first instance court correctly established during the trial against N.V., fulfill the special legal elements (figure) for offences of Fraud pursuant to Article 335 of the CCRK and Money Laundering pursuant to Article 32 par 2 subsection (2.1) of the Law on the Prevention of Money Laundering and Terrorist Financing, perpetrated in concurrence and for the crime of money laundering in co-perpetration with F.B..

97. The panel is also satisfied that the first instance court correctly established that F.B. in co-perpetration with N.V. transferred the sum of 669,000 Euros to Pirro LLC, Qeramika LB, Kosovo LLC, Ron Ing LLC and Construction Beton LLC. The panel is further satisfied that F.B. in co-perpetration with N.V. unlawfully transferred the sum of 342,825 Euros in order to satisfy his and N.V.'s personal debts and expenses, including the purchase of an apartment for 77,000 Euros for N.V. and 39,000 Euros to F.B.'s company "Fimex", and a further 20,000 Euros to B.B.'s company "Fib Oil", with intention of concealing the nature, source and ownership of the stolen money thereby realizing a substantial financial benefit.

98. The panel concludes that the above mentioned material facts which the first instance court correctly established against F.B., fulfill the specific legal elements (figure) for the criminal offence of Money Laundering pursuant to Article 32 par 2 subsection (2.1) of the Law on the Prevention of Money Laundering and Terrorist Financing, perpetrated in co-perpetration with N.V..

99. As far as it concerns B.B., E.D., I.F. and N.T., the panel is satisfied that the first instance court appropriately established the sums of money received by them with intention of concealing the nature, source and ownership of the stolen money thereby realizing a substantial financial benefit for themselves. In particular, it was established that B.B. (younger brother of defendant F.B.) was owner of Fib Oil and received the sum of 20,000 Euros which was transferred from the account of Consulting EU that was operated by N.V. to the bank account of Fib Oil. Concerning the defendant E.D., the panel is satisfied that the first instance court correctly established that he was formally the authorized person in the company Pirro LLC and a shareholder in Qeramika LB Kosovo LLC. It was established a lump sum amounting to 400,000.00 Euros was transferred from the account of Consulting EU to

the bank accounts of companies Pirro LLC and Qeramika LB Kosovo LLC, with intention of concealing the nature, source and ownership of the stolen money thereby realizing a substantial financial benefit. As regards I.F., the panel is satisfied that the first instance court correctly established that he was a shareholder in Ron ING company. It was established that a lump sum amounting to 200,000.00 Euros was transferred from the account of Consulting EU to the bank accounts of company Ron ING, with intention of concealing the nature, source and ownership of the stolen money thereby realizing a substantial financial benefit. The panel is satisfied that the first instance court correctly established that N.T. was the *de facto* controlling person of the company Construction Beton LLC. It was established that a lump sum amounting to 69,000.00 Euros was transferred from the account of Consulting EU to the bank accounts of company Beton LLC, with intention of concealing the nature, source and ownership of the stolen money thereby realizing a substantial financial benefit.

100. The panel concludes that the above material facts which the first instance court correctly established against B.B., E.D., I.F. and N.T., fulfill the specific legal elements (figure) for the criminal offence of Money Laundering pursuant to Article 32 par 2 subsection (2.1) of the Law on the Prevention of Money Laundering and Terrorist Financing, perpetrated perpetrated in co-perpetration.

101. When it comes to J.B. and S.S., the panel finds that that it has not been proven beyond any reasonable doubt, as required by the law, that they have committed the criminal offence of Receiving Stolen Property pursuant the criminal offence of Receiving Stolen Goods, pursuant to Article 272 par 1 and 2 of the CCK. The panel finds no sufficient evidence which prove beyond reasonable doubt that the above individuals committed this criminal offence. Therefore, they are acquitted of this offence.

102. Concerning the concurrence of the criminal acts, Article 80 of the CCRK provides that "*if a perpetrator, by one of more acts, commits several criminal offences for which he or she is tried at the same time, the Court shall first pronounce the punishment for each act and then impose an aggregate punishment for all of these acts*".

103. The panel notes that for the concurrence of criminal acts to exist, two conditions have to be met: the first condition is that the same person participated in the commission of several criminal acts, and second that the perpetrator is tried for all the criminal acts committed at the same time.

104. N.V. has altered the bank account details on the OeSD invoices transposing her bank details for those of the OeSD and thereafter fraudulently used this authorization to induce the MIA to pay invoice monies into her account. Evidently, between 13 December 2011 and 3 August 20012, seven transfers were made by the MIA into the Consulting EU account at NLB bank. As mentioned above, different sums of money were consequently transferred to different bank accounts.

105. Therefore, the panel notes that, in the case at hand, the criteria for the existence of concurrence of criminal acts have been fully fulfilled in relation to N.V..

Decision on punishment

106. Taking into account the 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. Therefore, Court of Appeals respectfully agrees with the first instance court that this case is particularly serious and demanded a serious sentence. However, although there is no obligation to reduce the

sentence due to the partial modification, the panel finds it appropriate, based on principle of proportionality, to lower the sentence against the defendants. Taking into account that the defendants' involvement in committing the crimes is not of the same intensity as not all of them received same amounts of money, it is appropriate and in interest of proper administration of justice, to individually adjust punishment against each of them. The punishments against the defendants are therefore reduced, accordingly.

ORDER FOR CONFISCATION

107. The panel notes that objects used or destined for use in the commission of a criminal offense, or objects derived from the commission of a criminal offence must be confiscated.

108. The panel is satisfied that, in the case at hand, the first instance court has correctly established that the Apartment of N.V., sited in Tirana Street, nr 42, in Prishtinë/Priština, was purchased from the money she illegally obtained from the MIA and that she did not transfer to the OeSD.

109. It was also correctly established that the Apartment B/1, 8th floor, with area of 66.2m2, in the building A1, dwelling 2B+p+8+NK, block A11, Area Mati 1, Prishtine/Pristina, Kosovo, of value approximately 45,000 Euros, was purchased by E.D., with money which were proceeds of a crime.

110. The panel, however, finds that the Confiscation Order in point I.b does not properly identify the assets of the Restaurant located in the western part of the city stadium in Prishtinë/Priština, Kosovo, with area of 586m2, with value of approximately 250,000 Euros, which were allegedly purchased by E.D..

111. The panel, therefore, confirms the Confiscation Order, identifiable with number PKR nr 1046/14, issued by the

Basic Court of Prishtinë/Priština, dated 18 December 2014, in point I.a and I.c.

112. The above mentioned confiscation order is amended in point I.b, because the request for confiscation of assets named in point I.b, does not sufficiently identify the assets.

V. CONCLUSION OF THE COURT OF APPEALS:

For the reasons above, the Court of Appeals has decided as in the enacting clause of this judgment.

Court of Appeals in Prishtine/Prishtina

PAKR 216/15, date 9 December 2015

Presiding judge: Recording Clerks

_____ _____

Dariusz Sielicki Adam Viplak

EULEX Judges EULEX Legal Officer

_____

Adnan Isufi

EULEX Legal Advisor

Members of the panel:

_____ _____

Elka Filcheva-Ermenkova Xhevdet Abazi

EULEX Judge Court of Appeals Judge