

DISTRICT COURT OF PRISTINA

P Nr. 71/2007

IN THE NAME OF THE PEOPLE

The District Court of Pristina, in the trial panel composed of:

EULEX Judge, Mr. Ferdinando Buatier de Mongeot	Presiding Judge
EULEX Judge, Mr. Francesco Florit	panel member
Kosovo Judge, Mr. Vehbi Kashtanjeva	panel member

Assisted by the court recorder Jacqueline Ryan, in the criminal case against:

- 1) **Nexhat DACI**, son of Mehmet and Nadire, DOB, 24 July 1944 born in Travce, residing in Pristina-Velania 18/IV, married, father of three children, university professor, member of the Parliament;
- 2) **Ahmet ALISHANI**, son of the Kadri and Fatushe DOB 11 November 1956 in Ternovci Madhe, residing in Pristina-Ulpiana A 5/4 no. 15, Father of four children, chief of the cabinet of the President of LDD political party;

charged with the following criminal offences:

Nexhat DACI:

Count 1.

Embezzlement contrary to Article 219, paragraphs (1), (2) of the Criminal Law of Kosovo, punishable by imprisonment of one to ten years, as made applicable by UNMIK Regulation 1999/24 (equivalent to Misappropriation in Office, contrary to article 340 paragraphs (1), (2), (3) of the CCK, punishable by imprisonment of one to ten years)

Nexhat DACI and Ahmet ALISHANI:

Count 2.

Embezzlement contrary to Article 219, paragraphs (1), (2) of the Criminal Law of Kosovo, punishable by imprisonment of one to ten years, as made applicable by UNMIK Regulation 1999/24, in conjunction with Article 22 of the Criminal Code of the SFRY (equivalent to Misappropriation in Office, contrary to article 340 paragraphs (1), (2), (3) of the CCK, punishable by imprisonment of one to ten years);

Nexhat DACI:

Count 3.

Embezzlement contrary to Article 219, paragraphs (1), (2) of the Criminal Law of Kosovo, punishable by imprisonment of one to ten years, as made applicable by UNMIK Regulation 1999/24 (equivalent to Misappropriation in Office, contrary to article 340 paragraphs (1), (2), (3) of the PCKK, punishable by imprisonment of one to ten years);

Count 4.

Misappropriation in Office, contrary to article 340 of the CCK, punishable by imprisonment of six month to five years;

Nexhat DACI and Ahmet ALISHANI:

Count 5.

Misappropriation in Office, contrary to article 340 of the CCK, punishable by imprisonment of six months to five years;

After having held hearings on 25th of October , 01st and 04th November 2010, in the presence of the district public prosecutor Mrs Fikrije Fejzullahu, of the accused and their defence counsels Bajram Tmava (for Nexhat Daci) and Flamur Bogaj appointed ex-officio (for Ahmet Alishani), and of the representative of the Ministry of Justice for the injured party, publicly announces the following:

VERDICT

Nexhat DACI is

FOUND GUILTY

of the criminal offence described in count 4 of the indictment, because in February and May 2005, Nexhat Daci, at that time President of the Assembly of Kosovo (and therefore official person), with the intent to obtain an unlawful material benefit, appropriated the sum of 590 Euro from the budget assigned to the Assembly of Kosovo and used that money, which was entrusted to him because of his position within the Assembly of Kosovo, to buy two pairs of spectacles for himself, thus committing the offence of *Misappropriation in Office*, contrary to article 340, paragraph 1, of the CCK;

Nexhat DACI and Ahmet ALISHANI are

FOUND GUILTY

of the criminal offence described in count 5 of the indictment (below re-qualified with exclusive regard to the position of Ahmet Alishani). In particular, in October 2005 Nexhat Daci, at the time President of the Assembly of Kosovo (and therefore official person), with the intent to obtain an unlawful material benefit, appropriated the sum of 950 Euro from the budget assigned to the Assembly of Kosovo and used that money, entrusted to him because of his position within the Assembly of Kosovo, to pay for dental work performed in his own interest, thus committing the offence of *Misappropriation in Office*, contrary to article 340, paragraph 1, of the CCK. Ahmet Alishani provided assistance to Nexhat Daci in the commission of the above offence, by liaising with the dentist, instructing him on how to prepare the invoices and on how to receive the payment from the budget of the Assembly for the dental work performed in the interest of Nexhat Daci.

Nexhat DACI and Ahmet ALISHANI are

ACQUITTED

of the remaining charges brought against them in counts 1, 2 and 3 of the indictment;

THEREFORE

Nexhat DACI is sentenced to eight months of imprisonment for the criminal offence described in count 4 of the indictment and to one year of imprisonment for the criminal offence described in count 5 of the indictment

Pursuant to art. 71 paragraph 1 CCK, an aggregated punishment of one year and six months is imposed on Nexhat Daci.

Pursuant to art. 56, paragraph 2 CCK, Nexhat Daci is prohibited from exercising public administration or public service functions for two years after the punishment of imprisonment has been served;

Ahmet ALISHANI is sentenced to six months of imprisonment for the criminal offence described in count 5 of the indictment.

Pursuant to Article 41, paragraph 1 point 1, 42, 43 and 44(1),(2),(3) of the Criminal Code of Kosovo the sentence against Nexhat Daci and Ahmet Alishani is suspended; the punishment shall not be executed if the defendants do not commit another criminal offence for the period of two years;

Nexhat DACI and Ahmet ALISHANI, cumulatively and jointly, shall compensate the injured party, represented by the Ministry of Justice. The data provided in the criminal proceedings does not afford a reliable basis for either a complete or partial award; the Court therefore instructs the injured party to file a civil suit for the entire claim pursuant to article 112 (2) of the KCCP.

The two defendants shall reimburse the costs of criminal proceedings pursuant to Article 102 Paragraph (1) of the PCPCK (with the exception of the costs of interpretation and translation) in the amount of 200,00 Euro.

REASONING

1. Procedural History

On the 17th December 2007, Public Prosecutor filed an indictment PPS 731-4/07 against Nexhat Daci and Ahmet Alishani with the District Court of Prishtinë/Priština, for the criminal acts described above.

On the 12th March 2008 the indictment was entirely confirmed, with the sole correction that all the facts were committed in Prishtina.

On the 25th October 2010 the main trial commenced. No objection was raised as to the composition of the trial panel.

During the same session, the indictment was read by the public prosecutor and the defendants pleaded not guilty.

Pursuant to art. 368 paragraphs 1 number 3 of the KCPC, the parties agreed the following witness statement collected during the investigative stage to be read into the minutes of the main trial:

1. Alajdin Ibrahim, given on 24th May 2007, in front of the Police
2. Parsim Rizaj, given on 27th March 2007, in front of the Police
3. Parsim Rizaj, given on 08th November 2007, in front of the Police
4. Genc Grezda, given on 30th May 2007, in front of the Police
5. Adnan Boshniaku given on 17th May 2007, in front of the Police
6. Shpresa Gosalci given on 17th May 2007, in front of the Police
7. Jasimina Maxhari given on 16th May 2007, in front of the Police.
8. Ahmet Cakaj given on 23rd March 2007, in front of the Police
9. Florije Desku given on 16th May 2007, in front of the Police

No examination of any witness was needed for the completion of the evidentiary proceeding.

On the same day the court provided the parties with the list of material evidence pursuant to art. 367/371 KCCP, as follows:

Statements of the Accused:

1. Statement of Nexhat Daci dated 27th of November 2007.
2. Statement of Nexhat Alishani dated 29th of November 2007

Statements of witnesses :

1. Rizaj Parsim: owner of the company that supplied the spectacles
2. Florije Desku : civil servant of the of the assembly of Kosovo employed in the budget and finance office
3. Alajdin Ibrahim: Assembly procurement officer
4. Ahmet Cakaj: owner of the clinic that preformed dental work.
5. Genc Greznda: owner of the company who supplied generators
6. Shpresa Goslaci: Head of technical division of the Assembly of Kosovo
7. Adnan Boshniaku : Head of technical services of the Assembly of Kosovo

Official notes:

- Official note dated 20.9.2006 signed Adnan Boshnjaku
- Official note dated 20.9.2006 signed Lulzim Latifi
- Official note dated 21.9.2006 signed Burim Latifi

Documents related to the purchase of the spectacles:

1. Invoice dated 26/01/2005 for a sum of 370,00Euro
2. Commitment order form for a sum of 370,00 Euro dated 28/01/2005
3. Payment order form for 370,00Euro dated 02/2005
4. Invoice dated 26/05/2005 for sum of 220,00 Euro
5. Commitment order form for a sum of 220,00 Euro
6. Payment order form for a sum of 220,00 Euro dated 05/05

Documents related to the dental work

1. Invoice dated 23/09/2005 for a sum of 450,00Euro
2. Commitment order form for a sum of 450,00Euro dated 12/10/2005
3. Payment order form for a sum of 450,00Euro dated 10/2005
4. Invoice dated 23/09/2005 for a sum of 500 Euro
5. Payment order form for a sum of 500 Euro dated 10/05

Documents related to the purchases of the generators:

1. Invoice for the sum of 9.487,50 Euro issued on 07th March 2003 by Power Supply Solution
2. "Bid evaluation Report and recommendation for award of contract for competitive shopping" issued on 12th March 2003 by the evaluation committee.
3. "purchase order" compiled on 12th March 2003
4. contract signed on 12th March 2003 between Assembly of Kosovo and the supplier
5. Invoice for the sum of 13.225,00 Euro issued on 11 December 2003 by Power Supply Solution
6. "Bid evaluation report and recommendation for award of contract for competitive shopping" issued on 11th December 2003 by the evaluation committee.
7. contract signed on 11th of December 2003 between Assembly of Kosovo and the supplier
8. "Purchase order" compiled on 18th of December 2003.
9. "Bid evaluation Report and recommendation for award of contract for competitive shopping issued on 29 November 2004 by the evaluation committee.
10. Contract signed between the Assembly of Kosovo and the supplier on 30th November 2004
11. Invoice for the sum of 9.200.00 Euro issued by Power Supply Solution on 06th December 2004
12. "Purchase order" compiled on 16th December 2004

On the 1st of November 2010, during the main trial hearing the examination of the accused Nexhat Daci and Ahmet Alishani took place in which session the accused Ahmet Alishani defended himself in silence.

On the 04th of November 2010, the court proceeded with final speeches of the defence lawyers and the final statements of the accused

On the 10th of November 2010 in the presence of parties (prosecutor and defence lawyers) and the accused, the panel announced publicly the judgment.

2. Applicable law

For counts 1 and 2 of the indictment, the applicable law is the Criminal Law of Kosovo (CLK). Its article 219, paragraphs (1), (2) of the Criminal Law of Kosovo, as made applicable by UNMIK Regulation 1999/24 at the time of the commission of the offences, because it provides for a punishment which is not more severe than the one foreseen by the Criminal Code of Kosovo of 2004. The offences described in counts 3,4 and 5 of the indictment were, on the contrary, committed after the entry into force of the Criminal Code of Kosovo. In particular, the offence of count 3 dates back to December 2004 (and not to December 2003, as wrongly specified in the initial part of the indictment). So art. 345 of the Criminal Code of Kosovo is applicable.

The District Court of Prishtina is competent to adjudicate this criminal case, because the offences were committed in its territory.

Misappropriation in office (and its homologous provision of the Criminal Law of Kosovo) falls within the scope of art. 3, para 3, lett. P) of the Law on Jurisdiction (3 – L053/2008), which provides for the subsidiary competence of EULEX Judges.

In this case, two EULEX judges have been appointed by the President of EULEX Judges. Specifically requested *in limine litis* the parties had no objection on the composition of the panel.

3. The merits of the case

3.1. Nexhat Daci's liability as to counts 4 and 5 of the indictment

The prosecution provided sufficient evidence as to the fact that Nexhat Daci is guilty of the offences described in counts 4 and 5 of the indictment.

The defendant was accused of misappropriation in office contrary to art. 340 of the criminal code of Kosovo. The prosecutor alleged that the defendant had two pairs of spectacles (for a total amount of 590 Euros) and dental works (19 porcelain crowns, for a total amount of 950 Euros) paid with the funds of the budget of the Kosovo Assembly.

Below in synthesis the allegations of the prosecutor:

- on two occasions in January 2005 and in May 2005 the defendant contacted the optician Parsim Rizaj and on both occasions, following a visit, he ordered a pair of eyeglasses (for the price of 370 Euro and 220 Euro respectively);
- on behalf of the President of the Assembly, an unidentified individual picked up the eyeglasses once prepared, and obtained the invoices from Parsim Rizaj in order for the payment to be processed.
- In the same year the defendant personally agreed with the dentist Ahmet Cakaj to have 19 teeth reconstructed, with implantation of porcelain crowns. The work was performed by the dentist and subsequently on 23 September 2005 he issued two invoices (respectively for the amount of 450 and 500 Euros) for the dental work he performed in favor of Nexhat Daci. The two invoices were issued upon instructions given to Cakaj by Ahmet Alishani.
- The payment was subsequently performed on the bank accounts of Parsim Rizaj and Ahmet Cakaj, on the basis of payment orders issued by the administration of the Assembly.
- Prior to the purchases, neither Parsim Rizaj nor Ahmet Cakaj were requested by the competent offices of the Parliament to send their offers for the contract;
- The laws on procurement as set forth by Law 2003/17 were not respected, in that the necessary needs assessment was not done in advance and the procurement office was not involved.
- The spectacles and dental work were for mere personal needs of Nexhat Daci and they were not (if not accidentally) related to his official function.

Based on the above facts the Public Prosecutor argued that the requirements of art. 340 CCK were met.

The defendant did not contest the statements and the documents contained in the case file, agreeing on reading out in the minutes of the main trial all previous statements made by the witnesses pursuant to art. 368 para 1 n. 3 of the Criminal Procedural Code.

He, though, countered the interpretation of the Prosecution, spelling out his grounds for defence as follows.

In his written answer to the charges during the investigation, Nexhat Daci explained that: *"The budget for the Assembly of Kosovo has a separate item, that is the budget for the President of the Assembly. The latter budget contained an item for services and goods. The secretary's office of the Assembly of Kosovo, from the Budget for the President, for services and goods, paid an amount of 590 Euros for a pair of +2,50 dioptre reading glasses to the "Riza Company" eye clinic in Pristina in February 2005. This purchase was an emergency prior to a trip outside Kosovo, because the personal glasses bought from this clinic previously had been lost. In October 2005 the Secretary's office of the Assembly of Kosovo (as budget*

manager) made a payment of 950 Euros for dental health services for the President of the Assembly, considering that the President of the Assembly has the right to be covered the costs for health services from the budget item for services and goods. It should be emphasized that at the time of the work of the Assembly of Kosovo, from December 2001 to March 2006, there has been no specific regulation in place for expenses from the budget for the President of the Assembly, and regulation for the expenses for services and goods from a part of the budget for the president of the Assembly?

On the occasion of the main trial (1 November 2010) he stated:

- that he had no authority with regard to the management of the budget of the Assembly
- that he asked the secretary of the assembly to buy a pair of glasses for him because the previous ones had been lost
- that this purchase was made in the interest of Kosovo, prior to an official journey which was due to start shortly
- that the Chairman of Assembly of Kosovo at that time had a separate budget (and goods and services were included therein)
- that there were no regulations of the parliament at that time regulating the matter.
- That as to the payment of the dental services, it happened without his knowledge. In fact his wife went to the dentist to pay the family invoice and the dentist told her that the services for the chairman of parliament had already been paid for by the parliament.

During the final statements the following further points were highlighted in defence of Nexhat Daci:

- the expenses were paid not by him (who had no direct authority on the budget) but by the Secretariat
- the Secretariat had means allocated by the Treasury for the proper operational needs of the Assembly.

The Panel deems that the conducts of Nexhat Daci, as proved during the main trial, amount to the crime of misappropriation in office contrary to art. 340, paragraph 1, CCK.

In order for a conviction to be pronounced for such offence, the following circumstances must be proved:

- the perpetrator was an official person
- he had money, securities or other movable property entrusted to him or her because of his or her duty or position within a public entity or a legal person and he appropriated such goods
- with the intent to obtain an unlawful material benefit for himself, herself or another person

Now:

A. The defendant was an official person. Indeed, Nexhat Daci was clearly at the time of the facts an official person, pursuant to art. 340 CCK. The definition of official person given by article 107 of the CCK is: “*a person elected or appointed to a public entity*”. This definition surely applies to the members of the Assembly and in particular to its President (who is an elected member of Parliament and thereafter also appointed as the President of the Assembly).

B. Nexhat Daci appropriated the sum of 590 Euros (for the spectacles) and 950 Euros (for the dental work), entrusted to him because of his position in the Parliament.

As to the fact that Nexhat Daci was "entrusted" with the money used to purchase these items, the Panel concurs, first of all, that the notion of entrustment contained in art. 340 CCK is of a wide nature.

It is not necessary, to this extent, that the entrusted goods be in a formal and functional relationship with the tasks of the official person.

For the legal definition it is sufficient that, thanks to his official position and on the occasion of his service, the defendant was – at least de facto - in a position of management, with the power to decide over the use of the property/goods in question.

In the instant case, there is ample evidence that the role and position of Nexhat Daci enabled him control and decision on expenditures made with the funds of budget of the Assembly of Kosovo (and this is true at least with regard to expenses made on the occasions described in the indictment).

Indeed:

B.1. It was ascertained (witnesses Parsim Rizaj and Ahmet Cakaj) that Nexhat Daci himself approached the optician and the dentist and that he personally ordered two pairs of glasses and the execution of 19 porcelain crowns for his teeth.

No mention was made to the optician and to the dentist of any sort of tendering procedure to be undertaken in order for the purchase to be completed.

Nor is there evidence of any involvement of any other offices/officials of the Parliament in ordering such goods/services.

This means that the purchases of the spectacles and of the dental services had been concluded between Daci and his counterparts, before and outside whatever tendering procedure. The budget of the Assembly and the personnel of the assembly was used in order to pay the price of contracts which had previously concluded by the President.

It was, thereafter, the personnel of the Presidency (Ahmet Alishani in the case of the dental works and the "car driver" in the case of the purchase of the eyeglasses) who picked up the invoices, giving instructions to the optician and to the dentist on how to deal with the subsequent payment procedure.

Again, no trace of involvement of the competent technical offices of the Parliament.

B.2. The payment processes which took place afterwards (commitment orders and payment orders) were formally made by the finance office of the Parliament. But it is important to note that several stages of the procurement procedure had been omitted or distorted.

This is made clear by the statements of witnesses Florie Desku and of Alajdin Ibrahim.

The former, budget officer in the Assembly of Kosovo during the year 2005, signed as certifying officer the payment order for the purchases.

The witness was clear in stating:

- that the regular procurement procedures were not followed;
- that someone from the cabinet of the President took care of picking up the glasses;
- that she deemed that it was not possible to use public funds in order to buy the personal spectacles of the President of the Assembly;
- that despite her attempts to follow the rules "*somebody else has the final word*".

The same kind of corroboration is obtained from the statements of Alajdin Ibrahim, head of the procurement office of the Assembly of Kosovo.

In his statement he clarified:

- that, contrary to the law (which foresaw that each and every purchase of more than 100 Euros should go through the procurement office), the same office was not involved in the purchase of the two sets of spectacles and of the dental work in 2005;
- that the procurement officer who, nonetheless, approved the purchase of the spectacles, would not have been authorized to approve the purchase in the absence of a procedure initiated by the procurement office.

Additionally, the Panel notes that the law on procurement requires that the purchases of goods of a value higher than 100 Euros be preceded by the acquisition of three different offers. Also this legal requirement was ignored.

Another point in which the procurement proceeding was skipped consists in the fact that the dental works (worth of 950 Euros) were paid on the basis of two distinct invoices of 450 and 500 Euros instead of one single invoice for a larger sum. The reason of this was nothing else but to avoid the need to recur to the more cumbersome proceeding needed for purchases worth more than 500 Euros.

Finally, and more importantly, according to the law on procurement the technical offices of the secretariat should have performed a needs assessment prior to the purchases.

No documents in the archives prove the proper involvement of the procurement office and the performance of the needs assessment.

Not only: the analysis of the case file enables to ascertain that, irregularly, the commitment order forms are post-dated with respect to the relevant invoices. If the proceeding had been regular, this could not have happened, because the commitment order form should have been completed beforehand.

B.3. The final sentence by witness Florie Desku (*"We tried to follow the right procedures, but in the end somebody else says the final word"*) is meaningful. It clarifies that despite the precise rules on procurement, in practice the office of the President was able to arrogate decisions on the expenditure of the Assembly's budget, also in violation of the law.

B.4. The Panel concurs with witness Desku that the nature of the expenses (eyeglasses and porcelain teeth) was purely personal, with no connection (if not accidental and indirect) to the official functions performed by Nexhat Daci as president of the Assembly.

This conclusion is reached first of all on a merely objective basis.

Secondly, this conclusion finds strong support in the fact (already noted) that the legal requirement of the preliminary needs assessment was got around by the defendants.

This is of great relevance if one considers:

- that a procedure is the legal instrument by which every public function is expressed;
- that, in particular, procurement procedures are the way public administration procures the goods and services needed for the performance of its tasks;
- that in procurement procedure, the needs assessment is the fundamental step foreseen by the law in order to have certainty whether or not a good/service is needed for the performance of the public function.

Therefore the omission of the needs assessment is a strong indicator that the interest of the parliament was not considered at the time of the purchase of the dental services and of the eyeglasses. It is worthy to note that this conclusion is particularly true when (as in the present case) there is no law in place affirming whether or not certain specific expenses are eligible to be covered with public funds.

B.5. The fact (highlighted by the defence) that there was a budget line in the Parliament's budget, among those related to the office of the President, named *"other goods and services"*, by

no means can imply that the budget could be used for the personal expenses of the President (as the defence seems to suggest).

It is a principle, indeed, that in so far an expense is eligible for funding through the budget of the Parliament, as such expense is public in nature and is functional to the aims of the Parliament. The conclusion suggested by the defence is completely unacceptable.

The circumstances described above under B.1, B.2, B.3, B.4 and B.5 mean that (a) not only were the funds used for personal needs of President Daci; (b) not only the decision on the purchases was made by his office, but (c) the overall control of the Presidency office was so penetrating, that the officials who should have managed and overseen the correct application of the procurement rules were either excluded from the proceeding or induced/ordered not to follow the correct proceedings.

It is necessary to conclude, therefore, that the defendant appropriated sums which were entrusted to him.

C. Within the Office of Presidency, the defendant Daci was at the origin of the decision to use the budget funds for the payment of the spectacles and of the dental work.

This conclusion is necessary if we consider the following:

- The nature of the purchases (spectacles and dental work) was intimately personal for Nexhat Daci;
- he undertook all the preliminary contacts with the providers of such goods/services and concluded the contracts. Only from Daci himself could, therefore, the subordinates have known of the very existence of these expenses;
- only Daci could give a decisive input for the use of the Assembly's funds for the payment of such personal kind of goods/services. It is not conceivable that the subordinates of Daci would autonomously arrogate the decision to start the payment procedure without his prior order. They had no sufficient reason and no authority to recur to the budget funds without a prior order from Daci, especially if one considers that this implied serious infringements of the procurement procedure.

D. The *mens rea* requirement (i.e. the intention to obtain an unlawful material benefit) is also proved.

Indeed, Daci had a pivotal role in the decision to use the assembly's budget to pay teeth and spectacles (see on this the elaboration made above *sub B*).

His justification of being unaware of the payment being made by the Parliament is, to say the least, naïve, as it will be better explained below.

Additionally to this, it was already stressed that the goods/services were clearly of a personal nature.

Finally, in order for the teeth and spectacles to be paid with the budget, it was necessary to infringe in several points the procurement law, getting around the competent offices of the Parliament.

This bears relevance as to the defendant's knowledge of the unlawfulness of the purchase (and of his personal material benefit).

The allegation of the defendant that the Budget of the Assembly could cover such kind of expenses not only remained totally groundless, but is also contradicted by the fact (stated by the witnesses Desku and Ibrahim and admitted by the same defendant in the written statement of 27.11.2007) that no specific regulation allows such kind of expenses.

E. The further justifications raised by the defence are groundless and in some parts risible.

In particular:

- The alleged circumstance that the purchase of the eye glasses occurred in an emergency situation, i.e. an official trip abroad: this is ungrounded in the merits (because the payment, anyway, took place only *after* the emergency had ended) and, secondly, it cannot imply that such alleged emergency should be solved through recourse to the public funds.
- It is not true, as alleged by the defence, that Nexhat Daci had no authority on the budget. The issue was already clarified above sub B.;
- It is simply not credible (again in consideration of the strictly personal nature of the expenses and of the fact that nobody but Daci himself could inform others of the existence of such personal expenses) that the dental work and the glasses were paid by the Parliament (through the intervention of personnel of the office of Presidency, i.e. the co defendant Ahmet Alishani) without Daci knowing about it.

3.2. Ahmet Alishani's liability for count 5 of the indictment

The defendant's position in the Parliament at the time of the events was, formally, of "security advisor to the President of the Assembly.

There is sufficient evidence of the fact that Alishani assisted Nexhat Daci in the commission of the offence of misappropriation in office, pursuant to art. 25 CCK.

It has been elaborated above on the commission of the crime by Nexhat Daci, to which Alishani gave assistance.

With specific regard to Alishani's position, what must be proved is whether Alishani committed any of the conducts described in art. 25 CCK (i.e. giving advice or instruction on how to commit a criminal offence, making available for the perpetrator the means to commit a criminal offence, removing the impediments to the commission of a criminal offence, or promising in advance to conceal evidence of the commission of a criminal offence, the identity of the perpetrator, the means used for the commission of a criminal offence, or the profits which result from the commission of a criminal offence).

First of all the evidentiary proceeding showed that the range of tasks entrusted to him was much wider than simply a security advisor.

It is proved:

- That he took part in the proceeding aimed at the acquisition of the power generators described in counts 1, 2 and 3, even if this did not fall within his scope of competence;
- he helped Nexhat Daci by instructing the dentist on how to issue the invoices;
- he collected such invoices in order for the payment proceeding to be performed (and also this activity cannot be considered as typical of a security advisor, but rather of a procurement official);
- he was the person to whom one of the generators was delivered (again, an activity typical of a procurement officer or of a technical officer, not of a security advisor).

With specific regard to the payment of the dental services, the evidence acquired shows that:

- the dental work took place following a direct request of Nexhat Daci;
- It was Ahmet Alishani to subsequently approach the dentist and instruct him on how to arrange the invoices. In particular, he told him that he had to issue two separate invoices due to "*internal needs*" of the Assembly;

- Alishani personally signed the two invoices upon receiving them (even if this clearly fell out of his personal competences of security advisor).

The above implies:

- That Alishani had been informed by Daci about the dental work which had taken place.
- That he was also instructed by him to have the bill of the dentist paid with the budget of the Assembly (as it was better reasoned above).
- That he tried to regularize the payment of the dental services obtaining two distinct invoices, despite not being in charge of budget and procurement. By doing so he exceeded his functions.

To corroborate the mental element, it must be highlighted that Alishani asked the dentist to have two invoices for a small amount of not more than 500 Euros issued, instead of one single invoice for the total amount. The only explanation of this is to get around the mandatory procurement provisions which imposed for such a purchase a more complex procedure which would have probably implied a greater risk of failure.

The existence of the mental element is further corroborated by the fact, already highlighted above, that the expenses which he concurred to charge to the budget of the Parliament were clearly of personal nature and it is not possible to think that this could not be ignored by Alishani.

The conduct of Alishani contributed to the commission of the crime by Daci, providing him the means to commit the criminal offence. This is sufficient to fulfill the requirements of art. 25 CCK.

Therefore Alishani is guilty of assistance in committing misappropriation in office.

3.3. As to counts 1, 2 and 3 of the indictment

It is admitted that the electricity generators listed in the indictment (a generator "Listed Peter 22000", of the value of 9.487,50 Euro, a generator "Himoinsa", of value of 13.225 Euro and a generator "Wilson FG" with insulation cabin of the value of more than 10.000 Euros) were purchased by the Assembly of Kosovo and subsequently placed at the premises of the President of the Assembly in Pristina – Velania and in Brezovica.

Such circumstances find, anyway, full evidentiary support through the statements of the witnesses and the documentation seized.

The prosecution alleges that the mere fact that the generators were placed in Daci's private premises and that they remained there until six months after the expiry of the defendant's position as president of the Assembly of Kosovo amounts to misappropriation in office.

The defence claims that:

- the generators and their fuel were provided by the technical staff of the Assembly
- when Daci was substituted, the technical staff removed the generators from his premises and brought them back to the premises of the Assembly
- therefore, it was the technical offices of the Assembly who were entrusted with the generators
- the legal qualification of the facts should have been, anyway, not of misappropriation in office, but rather of unlawful use of property pursuant to art. 342 CCK (for which the statute of limitations would have elapsed).

The defendant Alishani supported the arguments raised by Daci and added that the purchase of the generators was necessary in order to provide sufficient security to the

President of the Assembly and to his private premises. Without generators, there would not have been the possibility for the police to properly guard the premises of the defendant, especially on the occasions of official meetings.

The Panel concurs that the prosecution was not able to provide sufficient evidence of the fact that Daci appropriated the generators, despite the fact that the procurement proceedings for the acquisition of the same generators were in some part irregular.

The explanation provided by the defendant as to the need to provide, for security reasons (both to the person of the president of the Assembly and to the possible official guests) illumination to the external parts of his houses, appears to the Panel to be logical and sufficiently circumstantiated. Such explanation was not sufficiently countered by the prosecution's evidence.

It must be affirmed, in fact, that the defendant does not have the burden to prove the circumstances which he is alleging in his favor, for which he has a mere duty of sufficiently detailed allegation.

Not only: in this case there are factual elements in support of the credibility justification of the defendant: indeed, it has to be noted that the capacity of the generators purchased was significant, excessive for the ordinary needs of internal lighting of a single apartment/house. This circumstance is made evident not only by their objective size and price. It is also proved by the testimonies of the officials from the technical services of the Assembly, who stated that the generators, once reallocated in the premises of the parliament, would be used for the lighting of significant portions of the whole Parliament's premises. This confirms the fact (alleged by the defendant) that the purpose of the generators was to lighten the external areas of the house of the defendant. But such external lighting was reasonably explainable only admitting that it was being performed for security reasons, i.e. for official reasons.

It must be concluded that the Assembly not only had the power to decide the purchase of generators, but also had the power to decide their temporary allocation outside the premises of the Parliament.

It is unclear from the documents of the case file whether the generators were taken back by the technical services of the Assembly upon request of Daci or without such request.

This uncertainty goes in favor of the defendant. It cannot be said, in other words, that there is proof that the defendant tried to keep for himself the generators despite the expiry of his term as president of the assembly.

And the mere fact that it took six months to the technical services to organize the restitution of the generators cannot by itself mean that the defendant appropriated the generators.

3.4. The property claim and the sentencing policy

The Ministry of Justice is appointed by law 03/L-048 as the legal representative of public authorities.

During the main trial a duly authorized official of such Ministry appeared in court and declared the intention to file a separate claim.

There is no place, therefore, for a decision on the property claim during this criminal proceeding.

According to art. 34 of the CCK, the purposes of punishment are to prevent the perpetrator from committing criminal offences in the future and to rehabilitate the perpetrator; and to deter other persons from committing criminal offences.

When calculating the punishment the panel shall consider *inter alia* the degree of criminal liability, the motives for committing the act, the intensity of danger or injury to the protected value, the circumstances in which the act was committed, the past conduct of the perpetrator, the entering of a guilty plea, the personal circumstances of the perpetrator and his or her behavior after committing a criminal offence.

In the instant case the Panel took into consideration as mitigating circumstance the fact that the misappropriations were for a relatively small amount of money.

It was also considered that both defendants have no previous convictions and they have a relatively old age.

For this reason the Panel decided to keep the punishment towards the lower threshold foreseen by art. 340 para 1 CCK.

On the other hand the Panel notes that some significant aggravating circumstances are present.

First of all, there are multiple violations (three, two of which consolidated in one single indictment). The repetition of similar criminal offences is a symptom of a greater criminal capacity and of the negative attitude of the defendants towards the budget which they could manage.

Secondly, but more importantly, the Panel deems that the from the personal quality of Daci (president of the Assembly) derives a higher standard of behavior and a greater duty of attention in exercising the public function. Thence a stricter meter must be applied. It must be considered also that the impact and negative consequences of the unlawful conducts on the general public are, in such a case, much worse than the average.

The facts prove that Nexhat Daci lived his role as a privilege rather than as a service to the community, recurring to the public funds in order to cover his ordinary expenditures.

Even more disturbing is that he ordered/induced other public officials of the Assembly to distort the procurement proceedings in order to enable him to obtain an unlawful profit. Thirdly, the fact that the defendant during the trial denied circumstances which were evident (the circumstance that he allegedly did not know that there had been the payment, the circumstance that he did not know that somebody was placing the generators at his premises) adds negatively to his profile.

For the above reason, despite the relatively small amount of the misappropriations, the Panel deems that the proper punishment with regard to the crime described in count 5 is one year of imprisonment and eight months of imprisonment with regard to the offence described in count 4 of the indictment.

The aggregated punishment (pursuant to art. 71 CCK) is of one year and a half.

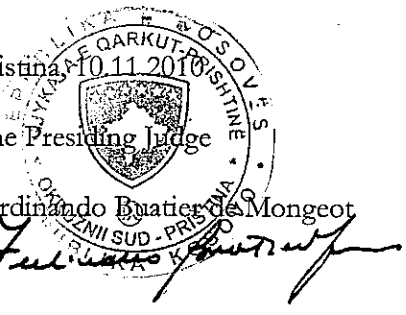
In consideration of the reiteration of the conducts committed by Daci, the Panel deems that the accessory punishment provided for by art. 56, para 2, CCK, must be irrogated.

The defendant Alishani assisted only in the commission of one of the two criminal offences and his contribution, though significant, cannot be compared to Daci's. In consideration of the criteria set forth by art. 25 and 65,2 CCK, the penalty of six months of imprisonment is deemed as sufficient.

The sanction against both defendants can be suspended pursuant to art. 43 and following KCCP, in consideration of the fact that none of them received previous convictions. This leads the Panel to conclude that the aims of the punishment can be reached also without the execution of the punishment.

Both defendants, in solidum, are convicted to the payment of the expenses of the proceeding. The amount is calculated in the enacting clause.

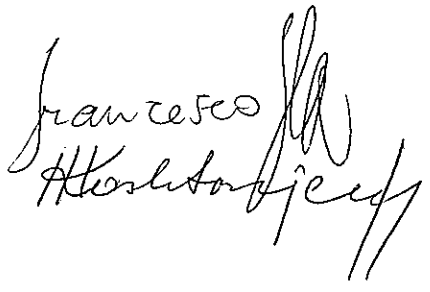
Pristina, 10.11.2010
The Presiding Judge
Ferdinando Buatic de Mongeot



The panel members:

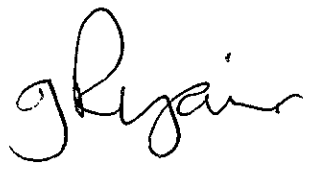
Francesco Florit

Vehbi Kashtanjeva



The Court Recorder

Jacqueline Ryan



LEGAL REMEDY:

The parties have the right to appeal this verdict within fifteen (15) days of the day the copy of the judgment has been served pursuant to Article 398 Paragraph 1 of the Kosovo Criminal Procedure Code (KCPC) to the Supreme Court of Kosovo through the District Court of Prishtinë/Priština.

The appeal must be announced within eight days from the date of the verdict.