

DISTRICT COURT OF PRISTINË/PRISTINA

**P nr. 309/10, P Nr 340/10
KA Nr 278/10 and KA 309/10**

Date 27 April 2011

The Three-Judge Panel comprised of EULEX Judge Malcolm Simmons, acting as Presiding Judge, EULEX Judge Gunnar Oyhaugen and Kosovo Judge Tonka Berishaj as Panel members, appointed to decide on the appeal of the Prosecutor dated 7 March 2011 and the appeal of counsel for Ilir Rrecaj dated 7 March 2011 against the ruling of the Confirmation Judge dated 2 March 2011, in the criminal case against:

1. Lufti DERVISH, son of Hamit and Elfije Mehat, medical doctor urologist and associate professor, PhD in medicine, born on 6 April 1955 in Gradice village, Glllogovc, Kosovo Albanian, Personal ID number 1004105717, married with two children and residing in Pristina;
2. Arben DERVISH, son of Lufti and Vjlloca Syliqi, economist, pursuing masters in economics, born on 3 December 1983 in Pristina, Kosovo Albanian, Personal ID number 03271061, married, one child and residing in Pristina;
3. Driton JILTA, son of Ibrahim and Arife Kurti, medical surgeon doctor, born on 21 August 1962 in Pristina, Kosovo Turk, Personal ID number 02494253, married, two children and residing in Pristina;
4. Ilir RRECAJ, son of Nezir and Hava Avdijaj, medical doctor, maters degree in medicine, born on 14 April 1963 in Lluashe village, Skenderaj, Kosovo Albanian, Personal ID number 02571105, married, two children and residing in Pristina;
5. Sokol HAJDINI, son of Rafip and Stanica Stojiljkovic, medical doctor, specialist in anaesthesiology with reanimation, born on 3 November 1954 ub Pristina, Kosovo Albanian, Personal ID number 02430359, married, three children and residing in Pristina;
6. Islam BYTYQI, son of Ilaz and Remzije Abdullahu, medical doctor, specialist in anesthesiology and intensive care, born on 17 April 1970 in Qylage, Lipjan, Kosovo Albanian, Personal ID number 025656368, married, four children and residing in Pristina;
7. Suleiman DULLA, nick name Syle, son of Bajram and Hana Matoshi, medical doctor, specialist in anaesthesiology and intensive care, born on 14 June 1965 in Magure village, Lipjan, Kosovo Albanian, Personal ID number 02537828, married, three children and residing in Pristina;

Accused in Indictments PPS no 41/09 and PPS no 107/10 of:

- i. Trafficking in persons under Criminal Code of Kosovo (hereinafter "CCK") Articles 139(1) and 23 (Lufti Dervishi, Arben Dervish, Driton Jilta and Sokol Hajdini);
- ii. Organised crime under the CCK Articles 274(3) and 23 (Lufti Dervishi);
- iii. Organised crime under the CCK Article 274(1) (Arben Dervishi, Driton Jilta and Sokol Hajdini);
- iv. Unlawful exercise of medical activity under the CCK Articles 21(1) and 23 (Arben Dervishi, Driton Jilta and Sokol Hajdini);
- v. Abusing official position under the CCK Article 339(3) (Driton Jilta and Ilir Rrecaj);
- vi. Unlawful exercise of medical activity under the CCK Articles 221(1) and 23 (Islam Bytyqi and Sulejam Dulla).

Having considered the said appeals and responses to the prosecutors appeal filed by counsel for Lufti Dervishi, Arben and Driton Jilta and following deliberations held on 27 April 2011 issues the following ruling:

RULING

The Appeal of the prosecutor is hereby GRANTED. The ruling of the Confirmation Judge dated 2 March 2011 is hereby modified in that all charges in respect of all defendants that were dismissed by the Confirmation Judge are now CONFIRMED.

The appeal filed by Florim Vertopi on behalf of Ilir Rrecaj against the confirmation of Count 5 in relation to him was considered on its merits and is hereby DISMISSED.

The said Ruling of the Confirmation Judge is left unmodified in relation to paragraphs numbered 1- 4 and 6 - 8 inclusive of the enacting clause.

In accordance with paragraph number 7 of the said Ruling of the Confirmation Judge the case file shall be sent to the Presiding Judge, for the main trial, immediately.

REASONING

Procedural Background and the Prosecutor's Application

A Ruling on Initiation of Investigation was issued on 12 November 2008.

On 15 October 2010 Indictment PPS 41/09 was filed. On 20 October 2010 Indictment PPS 107/10 was filed. The Indictments were joined on 29 November 2010.

On the 14 December 2010 and 6 January 2011 the EULEX judge Victor Pardal held the confirmation hearing.

On 31 January 2011 the Confirmation Judge issued a Ruling pursuant to Articles 154 and 316 (5) of the Kosovo Code of Criminal Procedure (hereinafter "the KCCP") wherein he ruled certain Prosecution evidence inadmissible.

On 1 March 2011 a Three -Judge panel issued a ruling granting the prosecutor's appeal in respect of the 31 January 2011 ruling.

On 2 March 2011 the Confirmation Judge issued a ruling on confirmation of indictment. This ruling confirmed some counts, dismissed others and returned one charge back to the prosecutor for him to amend the indictment.

Defence Counsel Florim Vertopi filed an appeal on behalf of Ilir Recaj dated 7 March 2011 against the confirmation of Count 5 against Ilir Recaj.

The Prosecution filed an appeal against the decision of the Confirmation Judge to dismiss certain charges dated 7 March 2011.

Defence Counsel Bajram Tmava and Mexhit Sylja representing Lutfi Dervishi and Arben Dervishi filed a response dated 9 March 2011, to the prosecution's appeal.

Defence Counsel Linn Slatengren representing Lutfi Dervishi filed a response dated 12 March 2011, to the prosecution's appeal.

Defence Counsel Aqif Tuhina representing Driton Jilta filed a response dated 14 March 2011, to the prosecution's appeal.

All of the above appeals were received within the time periods specified in the KCCP.

Factual Background

The factual basis for the charges and the investigative background are not agreed. It is not possible or permissible under the KCCP for the Three Judge panel (hereinafter "the Panel") to hear evidence in order to determine the facts in issue. In any event this is the remit of the trial panel.

The factual background is set out according to the prosecutor in his indictment and appeal against the dismissal of certain counts on the indictment. It was analysed by the Confirmation Judge in his ruling and by the defence counsel's in the one appeal and three responses to the Prosecution appeal submitted. The Panel has considered these summaries and looked at the original evidence insofar as it has been necessary to do so.

The Panel refers to these documents and the evidence insofar as it is necessary in order to explain its legal reasoning in relation to each Count below.

Legal Reasoning

Appeal of the Prosecutor

The prosecutor appeals the Confirmation Judge's decision to dismiss:

Count 1 re Lufti Dervishi, Arben Dervishi, Driton Jiltaand Sokol Hajdini,

Count 2 re Lufti Dervishi,

Count 3 re Arben Dervishi, Driton Jilta and Sokol Hajdini, and

Count 5 re Driton Jilta.

Article 316

The requirements of Article 316 are clear, simple and to be read in accordance with their natural meaning. If they were ambiguous (which the Panel considers they are not) they would be read in the way most favourable to the defendant.

In accordance with Article 316 the confirmation judge must render a ruling confirming the indictment provided that none of the conditions in Article 316 paragraphs 1-3 exist.

The provisions of Article 316 paragraphs 2 and 3 clearly do not exist and will not be addressed further.

Article 316 subparagraph 1 states "*The judge shall render a ruling to dismiss the indictment and to terminate the criminal proceedings if he or she determines that:*

- 1) *The act charged is not a criminal offence*
- 2) *Circumstances exist which exclude criminal liability*
- 3) *The period of statutory limitation has expired...*
- 4) *There is not sufficient evidence to support a well-grounded suspicion that the defendant has committed the criminal offence in the indictment."*

It is Article 316 paragraph 1 subparagraph 4 on which the Confirmation Judge relied when dismissing the above mentioned Counts. The provisions of Article 316 paragraph 1 subparagraphs 1 to 3 have been considered by the Panel and clearly do not apply in relation to the Counts that the Confirmation Judge dismissed.

Insofar as the prosecutor appears to be arguing that the Confirmation Judge was not entitled/required to determine the existence of a well-grounded suspicion the Panel

rejects this argument. If a well-grounded suspicion does not exist against any defendant on any Count that Count **must not** be confirmed against that defendant. Any suggestion otherwise is contrary to both the letter of the law and common sense.

Counts 1 and 2

In relation to Count 1 the Confirmation Judge correctly identified the elements of Art139, paragraph 8 subparagraph 1 as:

- a) The Recruitment, transportation, transfer, harbouring or receipt of persons,
- b) By **any** of the following means:
 - (i) threat
 - (ii) use of force
 - (iii) other forms of coercion
 - (iv) abduction
 - (v) fraud
 - (vi) deception
 - (vii) abuse of power or a position of vulnerability
 - (viii) Receiving payments or benefits to achieve the consent of a person having control over another person,
- c) For the purpose of exploitation (which includes the removal of organs, Article 139(8)(2) CCK).

As stated by the confirmation Judge in his ruling dated 2 March 2001 elements (a) and (c) above are easily verified and will not be justified any further as the Panel agrees with the pre-trial judge on this point.

The Panel however disagrees that there is a lack of evidence to show any of the means listed in (b) above.

The persons who had come to Kosovo to donate their organs did not do so to assist a family member or for any of the usual reasons that people in a civilised society chose freely to donate their organs. They did so because of their acute position of vulnerability. To suggest that persons would travel to a foreign country, endanger their health through such an invasive procedure on the say so of a stranger runs (if they were not in a position of vulnerability) contrary to common sense. The vulnerable position of YA and the balance of power in his relationship with those organising the operation is evidenced not only through his statements (statement of YA dated 5 November 2008 '*I needed the money, had a lot of debts and thought of a better life*' and the fact he was approached in a park in Turkey to which he referred in his statement of 8 November 2008) but by the timing between his operation and him being taken to the airport and further by his state of health when he was at the airport. There is a strong inference that if he was not in such a vulnerable position he would have at least been able to demand better aftercare and chose whether or **not** to travel in his weakened physical state. His position of vulnerability is

position of vulnerability is also evidenced by other matters such as his lack of a contract and the complete absence of any lawful enforcement mechanism to obtain payment despite his having donated a Kidney.

The Panel agrees with the Confirmation Judge that there is insufficient evidence for a well-grounded suspicion of fraud as a means of trafficking.

Article 23 CCK states that *when two or more persons jointly commit a criminal offence by participating in the commission of a criminal offence or by substantially contributing to its commission in any other way, each of them shall be liable and punished as prescribed for the criminal offence.*

There is clear evidence of the involvement of all four defendants in the scheme as averred under Count 1. The Panel considers that being involved in the surgery is substantially contributing to the commission of the offence, and that there is a well-grounded suspicion that anyone participating in an organ transplant at a private hospital would know that the donor had been trafficked.

In relation to Counts 2 and 3 it flows from the above decision that there is a well-grounded suspicion in relation to Arben Dervishi, Driton Jilta and Sokol Hajdini. In nearly every case of trafficking in persons there will be a well-grounded suspicion that an Article 274(1) offence has been committed by any significant participant. This case is if anything more complicated and organised than most people trafficking cases. In relation to Lutfi Dervishi there is evidence of him acting as an organiser dating back to 2006. This evidence includes the evidence contained in e-mails and of meticulous planning including the licence application.

Count 5 re Driton Jilta

The evidence in relation to the defendant Ilir Rrecaj is considered below. Looking at Article 339 and breaking it down, the essential elements of the offence are:

- (i) That an official person
- (ii) With intent to obtain an unlawful material benefit for himself... or another person... or a business organisation...
- (iii) Abuses his or her official position, exceeds the limits of his or her authorisations or does not execute his or her official duties...
- (iv) The above mentioned material benefit exceeds 5.000 EUR.

Dealing with each required element in turn. Point (i) is satisfied as the defendant himself accepts that he was an OSCE doctor and therefore an official person. Point (ii) is satisfied as the defendant himself states that it was his duty to inspect medical facilities and report on his findings to his supervisor. There is evidence of him attending Medicus and reporting that it was clean but not providing other information eg the performance of illegal operations. The written documentation clearly shows that Dr Jilta would have been aware of these operations as he was documented as being involved in them. Point

(ii) is clearly satisfied. Point (iv) is clearly satisfied since there is evidence of a material benefit to a business organisation (the Medicus clinic) well in excess of 5.000 EUR.

Appeal of Florim Vertopi filed an appeal on behalf of Ilir Rrecaj

The Panel deliberated on whether to consider this appeal on its merits due to a conflict in jurisprudence in relation to whether the defence are entitled to file an appeal against the confirmation of the indictment. Article 431 KCCP states that "*An appeal against a ruling of a pre-trial judge and against other rulings rendered in first instance may be filed by the parties and persons whose rights have been violated, unless an appeal is explicitly prohibited by the provisions of the present Code*". The Panel notes that Article 317 only refers to the right of a prosecutor and injured party to appeal but that it **does not explicitly prohibit** an appeal against the confirmation of the indictment by a defendant. Therefore the Panel is of the view that the law does entitle the defence to appeal a decision to confirm the indictment. The appeal on behalf of Ilir Rrecaj was filed in time and otherwise in accordance with the provisions of the code and therefore it was considered by the Panel in the normal way.

Count 5 re Ilir Rrecaj

The defence argues that Count 5 should not have been confirmed regarding Ilir Rrecaj.

The defence complains that Mr Ilir Rrecaj was being investigated for an offence under Article 339(1) CCK but was charged with the more serious offence contrary to Article 339(3) CCK. The only difference between these two charges is the value of material benefit (allegedly) gained, in that under Article 339(3) the value must exceed 5,000 EUR. The defence complain that the investigation was never expanded to include this new charge. The three judge panel does not consider this to be a fatal violation. It would have been necessary in the investigation of the lesser charge to investigate identical elements to the greater charge including the value involved. It would be an unnecessary time consuming step to then issue a new ruling expanding the investigation when an indictment could simply be laid. The defence do not argue that the current charge is time barred, in any event the Panel has considered this point and note that this charge is not time barred.

Well Grounded Suspicion

The defence argue that there is no evidence on which the Confirmation Judge could base a well grounded suspicion.

Looking at Article 339 and breaking it down, the essential elements of the offence are:

- (i) That an official person
- (ii) With intent to obtain an unlawful material benefit for himself... or another person... or a business organisation...

- (iii) Abuses his or her official position, exceeds the limits of his or her authorisations or does not execute his or her official duties...
- (iv) The above mentioned material benefit exceeds 5.000 EUR.

Dealing with each required element in turn.

- (i) There is clear evidence that Mr Rrecaj was an official person and he did not argue otherwise in his interview with the prosecutor on 22 June 2010.
- (ii) It is common sense that the purpose of the granting of the licence was to enable the Medicus clinic to carry out organ transplants with an air of legitimacy, in exchange for money. This is clearly a material benefit. Given that this licence was granted irregularly and contrary to Article 46(d) of the Kosovo Health Law which prohibits private institutions carrying out organ transplants, this is an unlawful material benefit.
- (iii) There is clear evidence that he abused his position and exceeded the limit of his authorisations knowingly by breaching the procedure for awarding licences.
- (iv) There is various evidence relating to the final amount of the material benefit.

It is clear that the material benefit to the Medicus Clinic at least is significantly in excess of 5.000 EUR. The Confirmation Judge's decision to confirm the indictment as reasoned at pages 24 to 29 of his ruling on this count was sound in law and based on evidence. The Panel sees no reason to interfere with his decision in relation to this defendant on this Count.

The Panel notes the defence arguments in relation to the guilt of Mr Rrecaj but are of the view that these arguments should be advanced at trial and need not be considered further at this stage.

Counts 4 and 6

The Confirmation Judge's ruling in relation to these charges has not been appealed by either the prosecution or the defence and so the Panel is not charged with looking at the decision in relation to these Counts. In particular the Panel has not been authorised to decide any time bar issue in relation to these Counts.

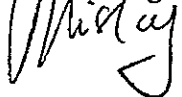

It is therefore decided as in the Enacting Clause.

Panel Member

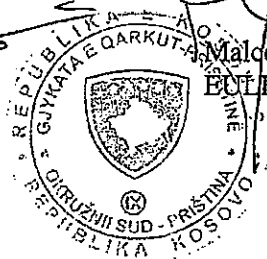
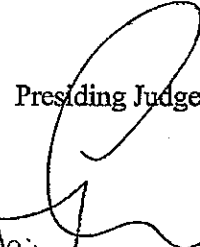
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