Supreme Court of Kosovo

Ap – Kž – 214/2010

11 January 2011

Prishtinë/Priština

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel composed of EULEX Judge Lars Dahlstedt as Presiding Judge and with EULEX Judge Charles L. Smith III and Supreme Court Judge Salih Toplica as members of the panel, assisted by EULEX Legal Officer Sampsa Hakala as the recording officer,

in the criminal proceedings against:

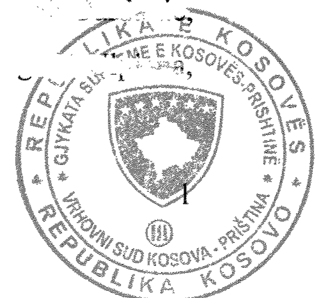
Jahja Lluka,

; Convicted by the District Court of Prishtinë/Priština for the criminal offence of **False Statement or Report** (Counts 1 and 2), contrary to UNMIK Regulation 2004/2, section 10.5, paragraphs (a) and (b), as amended by UNMIK Regulation 2006/53 and for the criminal offence of **Unlawful Acceptance of Contribution** (Count 3) contrary to UNMIK Regulation 2004/2, section 10.8, as amended by UNMIK Regulation 2006/53;

M. – A.

, and

H S ,



Both charged with the criminal offence of **Failure to Report Transactions**, in Co-Perpetration, contrary to UNMIK Regulation 2004/2, section 10.6, paragraph (b), as amended by UNMIK Regulation 2006/53 and Article 23 of the Provisional Criminal Code of Kosovo (PCCK).

Deciding on the appeals of the Special Prosecutor filed on 27 May 2010 and the appeal of defendant Jahja Lluka filed through his Defence Counsels Rame Gashi and Arianit Koci on 27 May 2010 against the Judgment of the District Court of Prishtinë/Priština in case no. P.nr. 504/2007, dated 12 February 2010.

After having received the responses filed on behalf of the defendants M A and H S and the opinion and motion of the State Prosecutor of Kosovo.

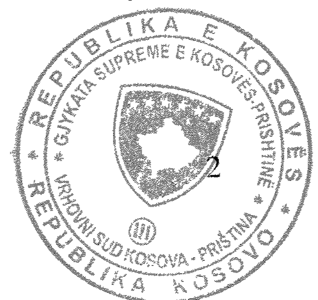
After a session of the Panel held on 11 January 2010 open to public, in the presence of the State Prosecutor and defendants Jahja Lluka, M A and H S and their Defence Counsels Arianit Koci, Zait Xhemajli and Bajram Tmava respectfully.

On 11 January 2011, pursuant to Article 392 and Article 420 of the Kosovo Code of Criminal Procedure (KCCP), pronounces in public the following

JUDGMENT

The appeal of the Special Prosecutor against the judgment of the District Court of Prishtinë/Priština in case P.nr. 504/2007, dated 12 February 2010, is hereby PARTLY GRANTED.

The appeal filed on behalf of the defendant Jahja Lluka against the judgment of the District Court of Prishtinë/Priština in case P.nr. 504/2007, dated 12 February 2010, is hereby PARTLY GRANTED.



The judgment of the District Court of Prishtinë/Priština in case P.nr. 504/2007, dated 12 February 2010 is modified as follows:

Sentence of Jahja Lluka

For Count 1: False Statement or Report, pursuant to UNMIK Regulation 2004/2, section 10.5, as amended by UNMIK Regulation 2006/53 and to Articles 38 and 39 of the CCK is sentenced to 6 (six) months of imprisonment and to a fine of 6.000 (six thousand) Euro.

For Count 2: False Statement or Report, pursuant to UNMIK Regulation 2004/2, section 10.5, as amended by UNMIK Regulation 2006/53 and to Articles 38 and 39 of the CCK is sentenced to 2 (two) months of imprisonment and to a fine of 2.000 (two thousand) Euro.

For Count 3: Unlawful Acceptance of Contribution, pursuant to UNMIK Regulation 2004/2, section 10.8, as amended by UNMIK Regulation 2006/53 and to Articles 38 and 39 of the CCK is sentenced to 2 (two) months of imprisonment and to a fine of 2.000 (two thousand) Euro.

For Counts 1 to 3, pursuant to Article 396 paragraph 5 of the KCCP and Article 71 of the CCK, an aggregate punishment is imposed and determined as 9 (nine) months of imprisonment and a fine of 10.000 (ten thousand) Euro.

The time spent on detention on remand by Jahja Lluka shall be counted as part of the prison sentence pursuant to Article 391 paragraph 1 subparagraph 5 of the KCCP.

Pursuant to Article 43 of the CCK the sentence is suspended. The punishment shall not be executed if the convicted person does not commit another criminal offence for the period of 11 January 2011 to 11 January 2013.

Two technical modifications are done to the judgment:

In the enacting clause Count 2 in the part describing the criminal act the word "Kasabank" is replaced by the words "Banka Ekonomike" and to Count 3 in the part describing the criminal act year "2005" is added after the words "on or about 19 August" and before the words "and continuing on through to and including...".

The judgment of the District Court of Prishtinë/Priština in case P.nr. 504/2007, dated 12 February 2010 is AFFIRMED in the remaining part.

REASONING

I PROCEDURAL HISTORY

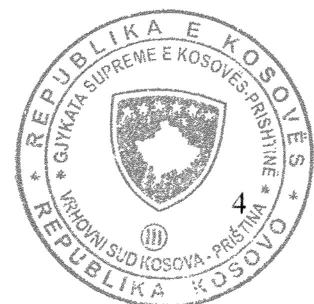
The indictment PP-KT No. 133-7/07 against Jahja Lluka, M A and H S was filed by the International Public Prosecutor on 20 September 2007. The indictment was confirmed by the District Court of Prishtinë/Priština on 8 November 2007.

On 2 February 2009 the President of the Assembly of EULEX Judges assigned EULEX judges to the respective criminal proceedings.

The main trial was held during 10 December 2009 and 9 February 2010 in the District Court of Prishtinë/Priština in the presence of the Special Prosecutor, the defendants and their Defence Counsels.

With a judgment announced on 12 February 2010 the District Court of Prishtinë/Priština found the defendant Jahja Lluka GUILTY of the following charges:

Count 1: False Statement or Report, contrary to UNMIK Regulation 2004/2, section 10.5, paragraphs (a) and (b), as amended by UNMIK Regulation 2006/53.



Count 2: False Statement or Report, contrary to UNMIK Regulation 2004/2, section 10.5, paragraphs (a) and (b), as amended by UNMIK Regulation 2006/53.

Count 3: Unlawful Acceptance of Contribution, contrary to UNMIK Regulation 2004/2, section 10.8, as amended by UNMIK Regulation 2006/53;

Pursuant to Article 396 paragraph 5 of the KCCP and Article 71 of the CCK the District Court of Prishtinë/Priština sentenced Jahja Lluka to an aggregate punishment of 10 (ten) months of imprisonment and a fine of 10.000,00 (ten thousand) Euro.

With the same judgment the District Court of Prishtinë/Priština found M A NOT GUILTY on Count 4 for the criminal offence of Failure to Report Transactions, in Co-Perpetration with H S contrary to UNMIK Regulation 2004/2, section 10.6, paragraph (b), as amended by UNMIK Regulation 2006/53 and Article 23 of the PCCK.

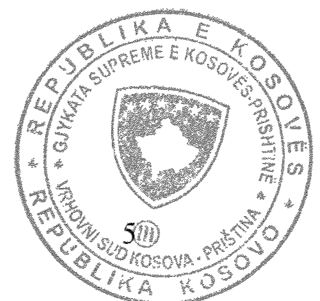
And found H S NOT GUILTY on Count 4 for the criminal offence of Failure to Report Transactions, in Co-Perpetration with M A , contrary to UNMIK Regulation 2004/2, section 10.6, paragraph (b), as amended by UNMIK Regulation 2006/53 and Article 23 of the PCCK.

The judgment was served to the Special Prosecutor on 13 May 2010 and to the defendant Jahja Lluka personally on 16 June 2010.

On 27 May 2010 the judgment was appealed by the defendant Jahja Lluka and by the Special Prosecutor.

Responses to the prosecutor's appeal were filed on 9 June 2010 on behalf of defendant H S and on 11 June 2010 on behalf of defendant M A .

On 2 August 2010 the OSPK submitted an opinion and motion on the appeals.

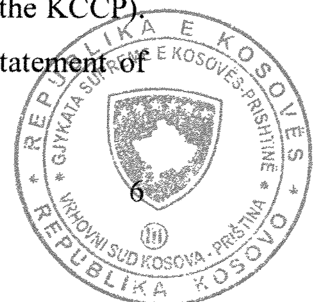


II THE APPEALS AND THE RESPONSES

The appeal on behalf of Jahja Lluka challenges the first instance judgment on grounds of an erroneous determination of the factual state and a violation of the applicable provisions of law. According to the appeal the defendant did not make any intentional false statements or reports when carrying out transactions as authorized by the Non-Government Organization (NGO) Komitet per Mbrojtjen e Ramush Haradinaj (in English "Defence Fund for Ramush Haradinaj") (Fund) because all statements were prepared by some other person on behalf of the Fund. As to the donators to the Fund, the appeal maintains, all details of donators were made well public through the media. As to count 3 of the appealed judgment, the defence argues that Jahja Lluka cannot be found criminally liable for contributions done to the Fund as Jahja Lluka personally was not the recipient of such contributions. In the appeal the defence proposes that the charges against the defendant should be dismissed and that the defendant should be acquitted.

The Special Prosecutor, with his appeal proposes to increase the punishment of defendant Jahja Lluka. The prosecution challenges the length of imprisonment imposed on Lluka arguing that the court of first instance neglected to take into consideration the existing aggravating circumstances while unduly mitigating the punishment of Lluka. The prosecution also finds that a verification period should have been determined by the first instance court upon Lluka, who was ordered to serve a suspended sentence as provided by Article 43 paragraph 2 of the CCK.

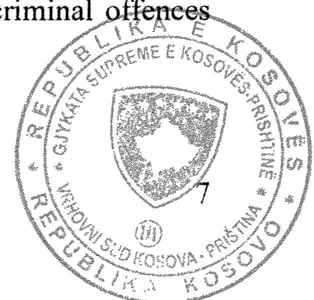
Regarding defendants M. A. and H. S. the Special Prosecutor proposes to annul the appealed judgment and to return the case to the court of first instance for retrial or to modify the judgment by convicting A. and S. for the criminal offences charged. In this regard the prosecution challenges the appealed judgment based on essential violation of provisions of the KCCP (Article 403 paragraph 1 subparagraph 12), a violation of criminal law (Article 404 of the KCCP) and an erroneous and incomplete determination of the factual situation (Article 405 paragraph 1 of the KCCP). The prosecutor finds that the appealed verdict in its reasoning part lacks statement of



grounds relating to material facts or that the presented grounds are unclear and contradictory. The prosecutor notes that even according to the findings of the first instance court A and S were well aware of suspicions on some transactions but nevertheless failed to make the necessary reports. Therefore acquittal based on a lack of intent was not supported by established facts. As his second point the prosecutor argues that A and S ; as General Director of Kasabank (KSB) and Retail Manager of KSB and Branch Manager of the Pristina Branch of KSB respectively, had a general obligation to report, based on Section 3.12 of the UNMIK Regulation 2004/2. Therefore the acquittal of these defendants in the first instance would amount to a violation of criminal law. Thirdly, the prosecutor alleges an erroneous and incomplete determination of the factual situation in the first instance verdict because in his opinion administered evidence clearly proved the defendants guilty and criminally liable.

The Defence Counsels for M A and H S with their responses to the appeal of the Special Prosecutor find that the appeal is unfounded and should be rejected. The defence for A and S argues that the verdict of the first instance court does not contain any violation of the provisions of criminal procedure. The enacting clause and the reasoning in support thereof fulfill all legal requirements. Moreover the factual determinations were done in a just way and were supported from the evidence presented during the main trial. The Defence Counsels maintained that the defendants lacked any criminal intent with regards to the omissions to make reports to the Financial Intelligence Center (FIC) of any suspicious act or transaction or a transaction in currency of 10.000 Euro or more.

The State Prosecutor in his opinion and motion argues that the appeal of defendant Jahja Lluka is ungrounded, thus moving the Supreme Court to reject it whereas the State Prosecutor proposes to grant the appeal of the Special Prosecutor and moves the Supreme Court to annul the first instance judgment and send the case back for retrial or to amend the appealed judgment and impose a more severe punishment on defendant Jahja Lluka and to convict defendants M A and H S for the criminal offences



charged. The State Prosecutor reiterates the same grounds for appeal as in the appeal of the Special Prosecutor.

III COURT FINDINGS

A. Admissibility of the appeals

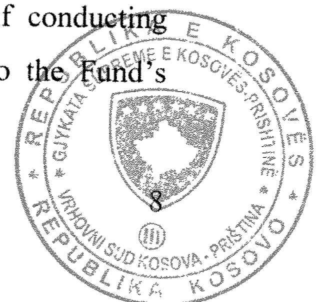
The Supreme Court finds that both the appeals of the defence of Jahja Lluka and of the Special Prosecutor are timely filed and admissible.

The appealed verdict was served to the Special Prosecutor on 13 May 2010 and to the defendant Jahja Lluka personally on 16 June 2010. Both appeals were filed with the District Court of Prishtinë/Priština on 27 May 2010, thus within the limit of 15 days as prescribed in Article 398 of the KCCP. The appeals were filed by authorized persons thereto.

B. Criminal liability of Jahja Lluka

The criminal charges against Jahja Lluka are related to the operation of a Non-Government Organization (NGO) called Komitet per Mbrojtjen e Ramush Haradinaj (in English "Defence Fund for Ramush Haradinaj") (Fund). Ramush Haradinaj, the former Prime Minister of Kosovo, was at the time of the alleged criminal offences indicted by the International Criminal Tribunal for the former Yugoslavia (ICTY).

It was established in the appealed judgment that Mr Lluka is one of the co-founders of the Defence Fund. In May 2005 the Fund was granted the status of Non Governmental Organization (NGO). Already in March that year Lluka had opened a bank account at Kasabank in the name of the Fund and in April 2005 another bank account was opened by Lluka in Banka Ekonomike in the name of the Fund. It has been further established that Lluka was authorized to represent the Fund ie. for the purpose of conducting transactions on behalf of the Fund in regards to depositing donations to the Fund's

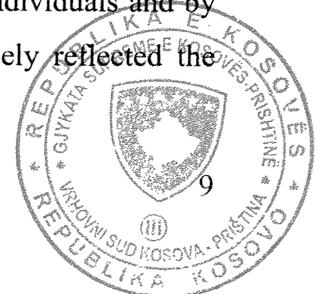


accounts in Kasabank and Banka Ekonomike. The Supreme Court notes that such authorization has not been challenged by the appeal of Jahja Lluka.

Within the Fund's operations Lluka was in charge of making deposits to the Fund's bank accounts and it is *undisputed* that Lluka made numerous deposits to the before-mentioned bank accounts on behalf of the Fund (or the donors to the Fund) and that the total amount of money deposited was more than 1,5 million Euro.

According to the charges Lluka - while performing depositing currency in the Fund's bank accounts in Kasabank and Banka Ekonomike in Prishtinë/Priština – willfully breached the provisions of the *UNMIK Regulation 2004/2 on the deterrence of money laundering and related criminal offences*. The Supreme Court reaffirms that none of the charges against any of the defendants in this matter include the conduct of *Money laundering* as such. The UNMIK Regulation in the part relating to the charges sets forth a mandatory reporting system for the purpose of preventing and detecting Money laundering activities in Kosovo. More specifically the regulation prescribes an obligation to banks to report to the Financial Information Centre certain transactions, including all single transaction in currency of 10.000 (ten thousand) Euro or more. Multiple transactions are treated as a single transaction if the bank is aware that the transactions by or on behalf of one person are in total 10.000 Euro in a single day. Moreover, the regulation prescribes an obligation to all persons engaging in such transactions – including every individual depositor – to provide a bank with information and documents certifying whether the depositor is acting on his own behalf or as an authorized agent for someone else.

It was established in the first instance judgment that between 19 August 2005 and 25 January 2007 Lluka made on numerous occasions deposits in currency of more than 10.000 Euro in a single day to the Fund's account in Kasabank and Banka Ekonomike, Prishtinë/Priština, by splitting up and structuring the deposits into multiple transactions in amounts of less than 10.000 Euro and in the names of multiple other individuals and by completing or causing the completion of deposit documents that falsely reflected the



source and amounts involved. In particular, the charge relates to 8 separate incidents whereby Lluka deposited in the Kasabank account sums amounting from a total 45.000 up to 363.000 Euro in multiple transactions never exceeding 10.000 Euro per transaction and to three different occasions regarding Banka Ekonomike. According to the deposit slips the deposits were done under the name of other individuals rather than Lluka himself while on many occasions Lluka himself signed the deposit slips.

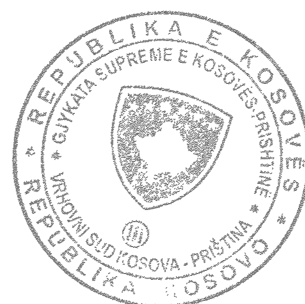
As the first ground for appeal Jahja Lluka's defence maintains that all data and reports made during the transactions were correct. The Supreme Court finds this ground for appeal to be blatantly in contradiction with Lluka's own statements on 17 April 2009 in front of the Public Prosecutor as reflected in the appealed judgment (on page 11 of the English version). According to Lluka's own admissions he split up a donation in currency of more than 500.000 (five hundred thousand) Euro into smaller amounts when depositing the money and carrying out the deposits under the names of other individuals as the real donator. This admission alone renders the ground of appeal insignificant.

Second, Lluka's appeal denies criminal liability on the basis that it was some other person, working for the Fund, who compiled the statements or reports that were presented to the banks and whose content was proven false. The Supreme Court considers this ground for appeal to be not founded since Lluka would not avoid criminal liability even if the reports or statements containing false information had been prepared by someone else than Lluka personally either on behalf of Lluka or of the Fund. The presenting or using such documents is alone criminalized as per Section 10.5 of UNMIK Regulation 2004/2 together with section 3.5 of the same, as is also specified in the enacting clause of the appealed judgment (Counts 1 and 2: "...or used or caused the making or using of documents knowing the documents to contain materially false statements or entries, omissions or errors..."). Moreover, in this particular case it is well beyond reasonable doubt established that Jahja Lluka had not only presented but also made false documents by signing deposit slips bearing a false name as the depositor.

In the appeal it is alleged that Jahja Lluka had no intention of omitting to disclose any information and thus lacked criminal liability. The Supreme Court finds this point of appeal to be without merit. As stated on pages 9-10 of the English version of the appealed judgment it can be concluded from the statements of witnesses M. D. M. M., A. M. and G. S. as well as the statements given by the defendant himself that Jahja Lluka made a large number of deposits, each of the amounts of less than 10.000 Euro, together amounting to up to 100.000 – 363.000 Euro per day. The deposit slips indicated other individuals than Lluka as the donator but in most cases nonetheless baring the signature of Lluka. The Supreme Court observes that Lluka's appeal does not even allege that Lluka had presented any documentation authorizing him to conduct transactions on behalf of the persons under whose names the transactions were being carried out. From all the above-mentioned circumstances it is clear to this Panel that Jahja Lluka intentionally carried out the depositions in the purpose of not exceeding the legal threshold of 10.000 Euro per deposit and thus evading the obligations deriving from the UNMIK Regulation 2004/2, on the deterrence of money laundering and related criminal offences. To this respect the Supreme Court agrees with the assessment of evidence done by the court of first instance and with the conclusions thereof.

Regarding count 3 of the charges the appeal of Lluka finally claims that there was an erroneous determination of the factual situation as Lluka did not personally receive any daily contribution exceeding the amount of 1.000 (one thousand) Euro. The Supreme Court finds also this point of appeal to be unfounded. As it already mentioned above Lluka was an authorized representative of the Fund. Based on established facts the Supreme Court concludes that by taking up the task of depositing these amounts of currency Lluka *de facto* on behalf of the Fund accepted these contributions. As the amounts in currency also far exceeds the threshold of 1.000 (one thousand) Euro, the Supreme Court in conclusion finds no erroneous or incomplete determination of the factual situation in the appealed judgment.

C. The sentencing of Jahja Lluka



Based on both of the appeals and, pursuant to Article 415 paragraph 1 of the KCCP, *ex officio* the Supreme Court will now move on to examine the enacting clause of the appealed Judgment as to the sentencing of defendant Jahja Lluka.

The court of first instance imposed the following punishment to Jahja Lluka:

Count 1: to 6 (six) months of imprisonment and to a fine of 6.000 (six thousand) Euro.
Count 2: to 2 (two) months of imprisonment and to a fine of 2.000 (two thousand) Euro.
Count 3: to 2 (two) months of imprisonment and to a fine of 2.000 (two thousand) Euro.
Pursuant to Article 396 paragraph 5 of the KCCP and Article 71 of the CCK the court of first instance determined an aggregate punishment of 10 (ten) months of imprisonment and a fine of 10.000 (ten thousand) Euro with the time spent on detention on remand by the accused counted as part of the prison sentence pursuant to Article 391 paragraph 1 subparagraph 5 of the KCCP. Pursuant to Article 43 of the CCK the punishment was suspended.

As correctly observed by the prosecution the court of first instance did not impose a verification period pursuant to Article 43 paragraph 3 of the CCK. The Supreme Court finds that this is a violation of the criminal law as foreseen in Article 415 paragraph 1 subparagraph 4 and Article 404 paragraph 1 subparagraph 5. Therefore a verification period shall be ordered.

As to sentencing, the Supreme Court asserts that the term of imprisonment and fine imposed by the court of first instance for each count is appropriate taking into account the pertinent circumstances relating to the criminal offence – the duration and extent of the criminalized conduct and the considerable amount of currency that in total was the object of transactions – and to the defendant – no previous judgments known to the Court. In this case the Supreme Court considers that the purpose of the punishment, the past conduct of the defendant and the degree of criminal liability and other circumstances

under which the criminal offence was committed justify the use of a suspended sentence in this case.

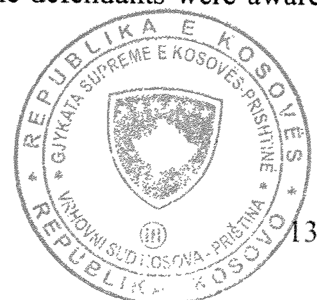
However, the Supreme Court finds court of first instance did not determine the aggregate punishment against Lluka in accordance with Article of the 71 of the CCK where in paragraph 2 subparagraph 2 it is prescribed that the aggregate punishment must be higher than each individual punishment but the aggregate punishment *may not be as high as the sum of all prescribed punishments*. Hence the first instance judgment needs to be amended in this respect.

D. M A and H S

As to defendants M A and H S the charge against them relates to their alleged actions or omissions in their capacities as executives of the Kasabank. It was established in the appealed judgment that between 19 August 2005 and 25 January 2007 M A was the General Director of Kasabank and H S was the Retail Manager and Branch Manager of the Pristina Branch of Kasabank.

According to the charge A and S as officers of Kasabank wilfully failed to report to the Financial Information Centre (FIC) about the above-mentioned transactions made by Jahja Lluka. By omitting to report A and S allegedly violated UNMIK Regulation 2004/2.

The appeal of the Special Prosecutor claims essential violation of the rules of criminal procedure alleging that the appealed judgment in its reasoning part is unclear, insufficient and containing contradictions, in regard to the acquittal of M A and H S . According to the prosecution the court of first instance incorrectly concluded that these defendants had no intention to avoid reporting suspicious transactions to competent authorities. The prosecutor stresses that evidence shows that the defendants were aware of the transactions relating to the charges against Jahja Lluka.



Moreover, the Special Prosecutor maintains that A · and S in their capacities in Kasabank had a "general duty" to report as foreseen in sections 3.12 of the UNMIK Regulation 2004/2.

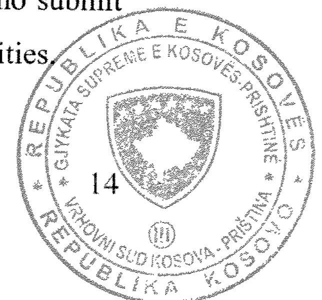
To start with the Supreme Court recalls that Section 3.9 of the UNMIK Regulation 2004/2 prescribes that *"Banks and financial institutions shall report to the Centre ... (b) All single transactions in currency of 10.000 Euro or more. ..."* Hence the obligation to report falls upon *a legal entity*.

The Supreme Court finds that to be able to sentence M A and H S for an offence committed in the operations of Kasabank it should first be established that the defendants were based on their function or special authorization entrusted with the direct duty to implement the said section of UNMIK Regulation 2004/2. In other words it should in the first place be proven beyond reasonable doubt that A and S had the duty to report transactions to the FIC as specified in secton 3.9 of the Regulation.

The Supreme Court agrees that both A and S were in fact aware of the transactions carried out by Jahja Lluka. Nevertheless, criminal liability will follow only if evidence shows that A or S were directly involved in Kasabank's anti-money laundering activities and that, according to the internal policy of Kasabank, it would fall under the direct responsibilities of A and S to personally report suspicious transactions to the FIC.

The defendants in their responses to the Special Prosecutor's appeals have denied being responsible for the non-disclosure of information to the FIC.

There is no special provision to be found in UNMIK Regulation 2004/2 in regard to which individual in the bank had the duty to report. What, however, is evident is that section 3.12 of the regulation – to which the prosecution refers to in the appeal – bears no significance in this respect. This section merely provides that those persons who submit reports shall not disclose any information thereof to unauthorized persons or entities.



Some guidance can be found in section 3.16 of the UNMIK Regulation 2004/2, where it is provided that banks and financial institutions shall appoint *a contact person to be responsible for* interaction and information exchange with the FIC and compliance with *the reporting and record keeping obligations* under the Regulation.

This appeals Panel could not conclude beyond reasonable doubt that M. A. and H. S. had the duty to report their findings about Lluka's transactions to the FIC. The Supreme Court finds that based on evidence presented[1] the court of first instance justly found that the policy of Kasabank was for every employee to report suspicious transactions to a specifically appointed officer of the bank (anti-money laundering officer), who was entrusted with the duty to liaise and report to the FIC directly without the involvement of defendants A. or S. Moreover the court of first instance found no evidence showing that A. and S. had reason to consider that there was something suspicious about the transactions done by Jahja Lluka or that they had intent to conceal information from the FIC.

One of the fundamental principles of criminal procedure as envisaged in Article 3 paragraph 2 of the KCCP is that doubts regarding the existence of facts relevant to the case shall be interpreted in favor of the defendant (*in dubio pro reo*). In criminal proceedings the burden of proof lies with the prosecution (Article 10 paragraph 3 of the KCCP). In this case the guilt of M. A. and H. S. could not be established beyond reasonable doubt and therefore they should be found not guilty.

IV CONCLUSION

Based on all of the above stated reasons it is decided as in the enacting clause.

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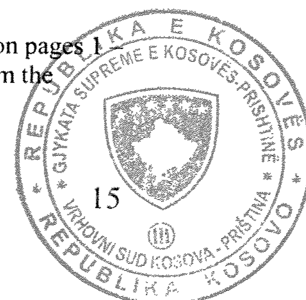
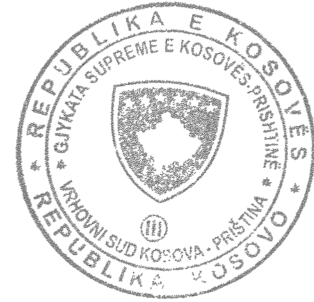
[1] See especially statements of witness A. M. and G. S. during the main trial, on pages 1 – 5 of the record of the main trial from the proceedings on 28 January 2010 and pages 28 – 32 from the proceedings on 18 January 2010.



Ap.-Kž. No. 214/2010

Dated this 11 January 2011.

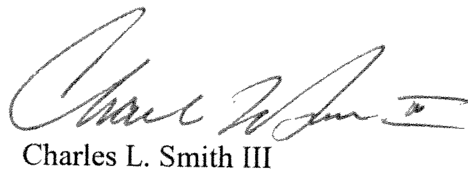
Prepared in English, an authorized language.



Presiding Judge

Lars Dahlstedt

Member of the Panel



Charles L. Smith III

Member of the Panel

Salih Toplica

Recording Officer

Sampsa Hakala