SUPREME COURT OF KOSOVO

Pkl-Kzz 71/09

10 November 2009

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Gerrit-Marc Sprenger as Presiding Judge, with Kosovo Judge Miftar Jasiqi as Reporting Judge and Kosovo Judges Osman Tmava, Zait Xhemajli and Agim Krasniqi as members of the panel, and in the presence of Legal Advisor Edita Kusari and Mejreme Memaj as recording clerk, in the criminal case Pkl-Kzz nr.71/09 of the Supreme Court of Kosovo

against the defendant **Florim Ejupi**, nickname Luli, son of Mursel Ejupi and Fatime Berisha, born on 15 June 1978 in Glavnik, Podujeve/Podujevo Municipality, Kosovo Albanian, last permanent residence Sekiraca village, Podujeve/Podujevo Municipality, Kosovo, married, father of two children, ages 8 and 7, finished 8 years of elementary school, farmer, of everage economic status, no known previous convictions in Kosovo, in detention between 19 March and 14 May 2001 and continuously since 08 June 2004 until 12 March 2009,

Convicted in the first instance by the verdict of the District Court of Prishtine/Pristina, dated 06 June 2008, P. No. 202/2005 for having committed the criminal acts of
Murder, contrary to art. 30 par. 1, 2 sub-par. 1, 2, 3 (excluding ruthless revenge and personal gain for benefit) and 5 of the Criminal Law of Kosovo (CLK), as made applicable by UNMIK Regulation 1999/24, in conjunction with art. 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), (equivalent to Murder in violation of art. 146 of the Provisional Criminal Code of Kosovo (PCCK) and Aggravated Murder in violation of art. 147 of the PCCK);
Attempted Murder, contrary to art. 30 par. 1, 2 sub-par. 1, 2, 3 (excluding ruthless revenge and personal gain for benefit) and 5 of the CLK, in conjunction with art. 19 and 22 of the CCSFRY, (equivalent to Attempted Aggravated Murder in violation of art. 146 and 147, Items 1, 3, 9 and 11 of the PCCK, to be read in connection with art 20 of the PCCK);
Terrorism, contrary to art. 125 of the CCSFRY, in conjunction with art. 22 of the CCSRFY (equivalent to art. 110 of the PCCK, to be read in connection with art. 109 and art. 23 of the PCCK);
Causing General Danger, contrary to art. 157 par. 1 and 3 and art. 164 par. 1 of the CLK in conjunction with art. 22 of the CCSFRY (equivalent to art. 291 of the PCCK, to be read in connection with art. 23 of the PCCK);
Racial and Other Discrimination, contrary to art. 154 of the CCSFRY in conjunction with art. 22 of the CCSFRY;
Unlawful Possession of Exploding Substances, contrary to art. 199 par. 1 and 3 of the CLK (equivalent to art. 328 of the PCCK, to be read in connection with art. 291 of the PCCK),

And sentenced to a unified term of forty (40) years of imprisonment, with credit for the time served in detention on remand between 19 March and 14 May 2001, and continuously since 08 June 2004, pending the date when the verdict becomes final,

Acquitted of all charges in the second instance by the judgment of the Supreme Court of Kosovo, Ap.-Kz. No. 409/2008, dated 12 March 2009, pursuant to art. 426 par. 1 of the Kosovo Code of Criminal Procedure (KCCP),

Acting upon the Request for Protection of Legality filed by the Office of the State Prosecutor of Kosovo (OSPK), dated 28 May 2009, directed against the judgment of the Supreme Court of Kosovo, dated 12 March 2009 (Ap.-Kz. No. 409/2008),

In the Name of the People

Issues the following

JUDGMENT

The Request for Protection of Legality of the OPPK dated 28 May 2009 against the judgment of the Supreme Court of Kosovo (Ap.-Kz. No. 409/2008) dated 12 March 2009 is

rejected as unfounded.

REASONING

I. Procedural Background

(1) On 16 February 2001 near the village of Livadice, Podujevo Municipality a group of perpetrators planted and detonated an explosive device, which for that purpose was placed in a culvert located along the route of a convoy of buses that carried passengers of Serbian ethnicity from Nis in Serbia to Gracanica in Kosovo. At around 11.15 hrs the first bus of the convoy carrying 57 passengers was hit by a massive explosion that lifted the bus from the ground, destroyed its front end and instantly killed the driver and all passengers seated in that section. Other passengers were severely injured, some of them died later, while receiving medical attention. The act of violence created a feeling of personal insecurity in the group of citizens of Serbian ethnicity in Kosovo. Moreover, the act turned out to be generally dangerous, thus endangering human life and body in a place where usually a large number of persons gathered and travelled and *de facto* resulted in the death of 11 persons and in the grave bodily injury of another 10 persons. On the basis of their Serbian ethnicity, the injured parties' basic human rights and freedoms as being recognized by the international community have been violated.

(2) On 23 March 2001, the defendant Florim Ejupi and three other suspects after their arrest were detained based on a detention order of the Investigating Judge of the District Court Prishtine/Pristina (Hep. No.47/2001). On appeal of the Defense Counsel, a three-judge panel of the District Court Prishtine/Pristina, composed by International Judge Renate Winter as Presiding Judge and International Judges Guy Van Craen and Jose Manuel Rodriguez as panel members found that the appeal was grounded regarding the three other suspects, but not regarding the defendant Florim Ejupi. The panel found that according to the evidence provided by the case file a grounded suspicion as it is requested by law for detention on remand *"... does (only) exist in the case of Florim Ejupi as DNA analysis of traces found at a smoked cigarette, which was secured at the place where the bomb was triggered, showed a DNA pattern corresponding to a pattern taken previously by German police from Florim Ejupi, who had been charged for grave robbery, attempted murder and other crimes"*.

(3) On 17 May 2006 and based on the results of police and prosecution investigations the International Public Prosecutor filed an indictment against the defendant Florim Ejupi, thus alleging him in co-perpetration with others of having committed the above-mentioned criminal acts, thus qualifying them as follows:.

- **Murder**, contrary to art. 30 par. 1, 2 sub-par. 1, 2, 3 (excluding ruthless revenge and personal gain for benefit) and 5 of the CLK, as made applicable by UNMIK Regulation 1999/24, in conjunction with art. 22 of the CCSFRY, of 12 injured parties who allegedly died during the explosion;
- **Grave Bodily Injury**, contrary to art. 38 par. 1 and 2 of the CLK, in conjunction with art. 22 of the CCSFRY;
- **Illegal Termination of Pregnancy**, contrary to art. 37 par. 1 and 4 of the CLK in conjunction with art. 22 of the CCSFRY, by causing the death the unborn fetus of one of the murdered victims;
- **Terrorism**, contrary to art. 125 of the CCSFRY, in conjunction with art. 22 of the CCSRFY;
- **Causing General Danger**, contrary to art. 157 par. 1 and 3 and art. 164 par. 1 of the CLK in conjunction with art. 22 of the CCSFRY;
- **Racial and Other Discrimination**, contrary to art. 154 of the CCSFRY in conjunction with art. 22 of the CCSFRY;
- **Unlawful Possession of Exploding Substances**, contrary to art. 199 par. 1 and 3 of the CLK.

(4) A Confirmation Hearing was held pursuant to art. 314 of the Provisional Criminal Procedure Code of Kosovo (PCPCK) on 27 April 2007 and the indictment – considering the updated lists of murdered and injured victims - confirmed with the exception of the reference to ruthless revenge and personal gain or benefit (art. 30 par. 2, sub-par. 3 of the CLK) in case of the Murder charges. Moreover, the charge of

Illegal Termination of Pregnancy was expelled. The Confirmation Ruling was issued on 25 June 2007 and became final on 15 August 2007.

(5) Based on the findings of the Confirmation Judge, the International Public Prosecutor filed amended Bills of Indictment dated 25 September, 02 and 18 October as well as 26 December 2007.

(6) On 06 June 2008 in first instance the District Court of Prishtine/Pristina in its' verdict (P. No. 202/2005) after having held seven Main Trial sessions and evaluated all evidence presented to the Court found the accused Florim Ejupi guilty for the criminal offences as mentioned above and sentenced him to a unified term of forty (40) years of imprisonment, with credit for the time served in detention on remand between 19 March and 14 May 2001, and continuously since 08 June 2004, pending the date when the verdict becomes final.

(7) In favor of the defendant Florim Ejupi, the Defense Counsel on 04 September 2008 filed an appeal against the 1st instance judgment of the District Court of Prishtine/Pristina, dated 06 June 2008 (P. No. 202/2005), which was supplemented on 10 October 2008.

(8) On 12 March 2008 after having held a session the Supreme Court of Kosovo pronounced a judgment, thus granting the appeal of the Defense Counsel and finding the defendant not guilty. As a result, the defendant Florim Ejupi was acquitted of all charges.

(9) Dated 28 May 2009, the OSPK filed a Request for Protection of Legality against the said judgment of the Supreme Court of Kosovo, which was registered with the District Court of Prishtina on 29.05.09.

Appeal Issues raised in the Request for Protection of Legality of the OSPK:

The Request for Protection of Legality filed by the OSPK alleges substantial violation of the provisions of the criminal procedure pursuant to art. 451 par. 1 sub-par. 2 and 3 of the PCPCK/ now Kosovo Code of Criminal Procedure (KCCP).

It contends:

1. alleged violation of art. 403 par. 1 sub-par. 1 read in conjunction with art. 40 par. 1 sub-par. 5 of the PCPCK/KCCP. On the opinion of the OSPK, the Presiding Judge of the Supreme Court panel, which had to decide on the Defense Counsels' appeal dated 04 September 2008, Judge Guy Van Craen was disqualified and by law excluded from participating in the second instance panel, after he had been a member of a panel of International Judges who decided as a three-judge panel of the District Court of Prishtine/Pristina on 28 March 2001 about the appeal of the defendant Florim Ejupi against the decision of the Investigating Judge ordering his detention. The OSPK refers to art. 40 par. 1 item 5 of the PCPCK/KCCP

according to which *"a judge ... shall be excluded from the exercise of the judicial functions in a particular case ... if in the same case he or she has taken part in rendering a decision of a lower court ..."*. A grammatical interpretation of this provision would show that its last part is not an additional condition but an independent alternative for the exclusion of a judge.

2. alleged violation of art. 403 par. 2 sub-par. 1 read in conjugation with art. 157 par. 3 of the PCPCK/KCCP. The said judgment of the Supreme Court of Kosovo would be based on a wrong interpretation of provisions of the criminal proceedings that affects the lawfulness of the decision as such. In the first instance, the Public Prosecutor had presented a "witness Alpha" as additional evidence, whose statement in the second instance was considered by the Supreme Court of Kosovo as the statement of an anonymous witness pursuant art. 157 of the PCPCK/KCCP. Because of that, the second instance panel mistakenly had seen itself debarred from giving his statement a decisive weight, thus considering that *"... in any case a judgment can not be grounded, solely, on the statements of an anonymous witness (art. 157 PCPCK/KCCP)"*. OSPK underlines that "witness Alpha" was not an anonymous but only a protected witness according to art. 170 par. 1 item 4 of the PCPCK/KCCP.

In conclusion the OSPK requests the Supreme Court of Kosovo to approve the Request for Protection of Legality as well-founded and confirm the said second instance judgment of the Supreme Court of Kosovo as to contain the aforementioned substantial violations of the provisions of the criminal procedure.

(10) The Defense Counsel filed a response to the OSPK Request for Protection of Legality, which was registered with the District Court of Prishtine/Pristina on 24.06.09. The Defense Counsel contests the positions of the OSPK as laid down in the Request for Protection of Legality, thus pointing out that:

1. Art. 40 par. 1 item 5 of the KCCP finds its equivalent in art. 39 par. 1 item 6 of the CCP (SFRY), which was applicable during the pre-trial period of the case. Referring to the commentary of B. Petriq on the issue, the Defense is of the opinion that a disqualification of a judge only is possible in case the same judge has acted as an investigating judge or as the presiding judge of the first instance panel as well as in the appeal panel, which in the case at hand would not be the case.
2. Art. 157 of the KCCP would not be violated with respect to "witness Alpha", since art 170 of the KCCP provides the right of the judge and the court panel to assign all kinds of protective measures, which are foreseen in the law.

The Defense therefore requests to reject the Request for Protection of Legality as unfounded.

(11) After on 11 June 2009 the President of the EULEX Judges Assembly (PEJ) had issued a decision, which was registered with the Supreme Court of Kosovo on 12 June 2009, thus assigning a full local panel to the case due to the personnel situation of the Supreme Court, the decision was changed in accordance with art. 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation (LoJ) and art. 26 of the KCCP and an international presiding judge assigned to the panel by decision of the PEJ dated 09 November 2009.

II. Supreme Court Findings

Notwithstanding the fact that according to art 457 par. 2 of the KCCP, the Supreme Court of Kosovo shall not interfere in the final decision of the second instance panel even in case the Request for Protection of Legality, thus being filed to the disadvantage of the defendant, turns out to be well-founded, the Supreme Court finds the following:

1. Admissibility of the Request for Protection of Legality

The Request for Protection of Legality is admissible. It was filed with the competent court pursuant to art. 453 of the KCCP and within the deadline of art. 452 par. 3 of the KCCP.

2. Procedures followed by the Supreme Court

The Supreme Court panel has decided in a session as described by art. 454 par. 1 of the KCCP. Parties have not been notified of the session, since according to art. 451 through 460 of the KCCP there is no obligation for the Supreme Court to notify the parties.

3. On the merits of the Request for Protection of Legality

The Request for Protection of Legality is unfounded.

a. Alleged violations of art. 403 par. 1 sub-par. 1 read with art. 40 KCCP
There is no violation of art. 403 par. 1 sub-par. 1 read in conjunction with art. 40 par. 1 sub-par. 5 and/or art. 40 par. 2 sub-par. 1 of the PCPCK/KCCP.

The participation of the International Judge Guy Van Craen in the three-judge panel of the District Court Prishtine/Pristina on 28 March 2001, which was held on the appeal of the Defense Counsel against the order on detention on remand (Hep. No. 47/2001) issued by the International Investigating Judge on 23 March 2001 did not exclude the Judge from the exercise of judicial functions in the case of Florim Ejupi.

This refers especially to the fact that on 12 March 2009 the Judge has presided a five-judge panel of the Supreme Court of Kosovo in the second instance in order to decide on the appeal against the first instance verdict on the merits of the case (Ap.-Kz 409/2008).

aa. On Relation of art. 40 par.1 sub-par.5 and art. 40 par.2 sub-par.1 KCCP

Decision needs to be taken on the questions how art. 40 par. 1 sub-par. 5 and art. 40 par. 2 sub-par. 1 is related to each other and under which conditions and up to which point a judge shall be excluded from the exercise of judicial functions in a particular case.

Art. 40 par. 1 sub-par. 5 KCCP, as it refers to the case in question, reads as follows:

A judge or a lay judge shall be excluded from the exercise of the judicial functions in a particular case: ... if in the same case he or she has taken part in rendering a decision of a lower court... .

Art. 40 par. 2 sub-par. 1 KCCP, in reference to the case in question reads as follows:

A judge shall be excluded ... from the trial panel if in the same criminal case ... he or she has participated in pre-trial proceedings, including in proceedings to confirm the indictment.

Although the **wording of art. 40 par. 1 sub-par. 5 KCCP**, if read isolated leads to the grammatical interpretation that in any case a judge, who had taken part in the rendering of the decision of a lower court in the same case shall be excluded from whatever kinds of judicial functions in the same case, a comparison with art. 40 par. 2 sub-par. 1 shows that in the questionable case the latter is the more specific provision and therefore prevails.

bb. On Interpretation of art. 40 par.2 sub-par.1 KCCP

On this background, the question needs to be answered if **art. 40 par. 2 sub-par. 1 KCCP** refers to any judicial act during the pre-trial stage thus excluding a judge from the whole run of procedures until the case is finalized, or if his or her exclusion is limited to proceedings conducted at first instance.

(1) A **grammatical interpretation** of the law opens for reception in both directions, since the law does not specifically mention any limitation to stages of the proceedings.

(2) Under **systematical aspects** it needs to be mentioned that the provisions on pre-trial proceedings including those ones related to the confirmation of the indictment are concentrated in Part Three (art. 197 through 318) of the KCCP. At the other side, most of the provisions on appeal issues can be found in Part Five (art. 398 through 437) of the KCCP, although the right to appeal as such, but without ruling on any procedural issues in detail is also granted by several provisions under Part Three of the KCCP. However, the position of art. 434 KCCP under Part Five of the said law, which rules on the competence and composition of appeal bodies, indicates that the disqualification rules of art 40 par. 2 sub-par. 1 KCCP do not apply at the appeal stage, but refer to the first instance proceedings only.

(3/4) Since no documentation on the **motives of the law** is accessible, the question for the **purpose of the law** can be used as an additional interpretation tool. It is quite clear that the purpose of art. 40 par. 2 sub-par. 1 KCCP targets to grant the individual right to a tribunal of impartial judges and thus reflect art. 6 of the European Convention of Human Rights (ECHR). On this background, it is also not questionable that a judge who acted as a pre-trial judge might not be impartial anymore in the main-trial stage of the same case in the first instance, where still evidence may need to be collected and evaluated. In this context it however needs to be notified that the appeal stage is of a different quality since here the scope of review is strictly limited to the submitted appeal. Therefore, also the purpose of art 40 par 2 sub-par 1 KCCP shows that a judge who has participated in the pre-trial proceedings of a particular case is not necessarily disqualified at the appeal stage of the same case just because of this fact.

cc. The European Court of Human Rights (EC) on Disqualification of a Judge

Even if **art. 40 par. 2 sub-par. 1 KCCP** would be held applicable in all stages of the procedure, thus excluding a judge from the whole run of procedures until the case is finalized, it needs to be analyzed under which conditions and up to which point a judge has to be involved in the early proceedings of a case in order to be considered as *"participating in pre-trial proceedings"* as requested by the said provision of the KCCP.

(1) On several occasions **the EC** on basis of art. 6 of the ECHR had to deal especially with the question whether or not previous involvement of a judge in a particular case disqualifies him or her at a later stage of the same case.

Art 6 par. 1 of the ECHR, which the EC referred to, rules as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an ... impartial tribunal ...",

(a) In the case of *Hauschildt v. Denmark* (10486/83 [1989] ECHR 7, 24 May 1989) the same Judge had decided on detention on remand against the accused during the investigation stage of the case and later was sitting as a Presiding Judge in the main

trial panel of the first instance, thus taking the evidence from numerous witnesses and finally issuing a judgment and imposing an imprisonment of seven years onto the accused. The EC has accepted that the assessment of the grounds for a detention on remand and the final judgment on a case are object of different types of evaluation. For authorization of detention on remand, information is not presented in the same way as evidence during the hearings before the trial court. The procedure is a summary one. According to the EC, especially the mere fact that a member of the trial court has also taken part as a judge in preliminary decisions in the case does not in itself justify fears as to his or her impartiality. Normally, the strong traditions of the judiciary and the ability of the judges, deriving from their education and training, provide the necessary effective and visible guarantee of impartiality.

(b) In the case of *Padovani v. Italy* (13396/87 [1991], 26 February 1993) the EC has denied the impartiality of a Magistrate and thus violation of art. 6 ECHR, although the Magistrate had interrogated the defendant after his arrest, confirmed the arrest, heard two other accused, issued an arrest warrant against the accused and initiated immediate proceedings against the accused, which he then conducted. Moreover, the same Magistrate after having questioned two co-defendants and two witnesses found the accused guilty during the main trial and imposed a sentence onto him, which exceeded the proposal of the prosecutor. In its reasoning, the EC pointed out that the investigative measures carried out by the Magistrate consisted "merely" of questioning the three accused even though under Article 231 of the Italian Code of Criminal Procedure the magistrate could have carried out further measures. Moreover, in issuing an arrest warrant the Magistrate had relied inter alias on the accused' own statement.

(c) In the case of *Tierce and others v. San Marino* (24954/94; 24971/94; 24972/94 [1994], 25 July 2000) the EC has considered that because of the dual role of a *Commissario della Legge* as investigating and trial judge, who also has made preparations of the file for the appeal stage in the same case, the *Commissario,* in particular to the extent of his powers in preparing the case file, may be regarded as objectively not impartial. In particular and based on the provisions of the Italian Code of Criminal Procedures (art. 174 through 185), during the investigation phase of the case the *Commissario* had summonsed and questioned the parties, allowed further applications for evidence, ordered an expert opinion and questioned the expert as well as defense witnesses. Then the same *Commissario* held the main trial in the first instance, thus taking the evidence from the parties as well as from various defense witnesses and finally delivered a judgment.

In this context it is worth mentioning that the role of the investigating judge in Italy is much stronger than the one of the pre-trial judge in Kosovo. The first one conducts and leads the investigation, whilst the latter is limited to granting or rejecting specific applications filed by the parties.

Based on the aforementioned judgments it needs to be concluded that the EC does not follow the idea of an automatic disqualification of a judge, but favors the case-by-case assessment of the specific actions of a judge during the different stages of a particular case. In particular the EC reiterates that, for the purposes of art. 6 par. 1 of the ECHR, the impartiality of a tribunal must be assessed by means of a subjective test, which consists in seeking to determine the personal conviction of a particular judge in a given case, and by means of an objective test, which consists in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see the judgment in the case of *Padovani v. Italy* (above), p. 20, § 25 and *Tierce and others v. San Marino*, p. 12 § 75 (above)).

(2) On this background, **in the case at hand** the question of a possible disqualification of the concerned Judge, Guy Van Craen, **under subjective aspects** requires a focus on the question whether or not there is any determination for a pre-conviction of the Judge that could be based on his involvement in the pre-trial phase of the case. **Under objective aspects**, a focus has to be at one side on the time, when the Judge was involved in the pre-trial phase of the case and on the other side, on the quality of the specific measures, met by the said panel.

(a) There are no hints to consider that the Judge, when he was Presiding Judge of the appeal panel, subjectively already had a pre-conviction on the case, based on his involvement in the pre-trial proceedings.

(b) As of the time it needs to be considered that the Judge joined a three-judge panel of the District Court of Prishtine/Pristina, which had to decide on the appeal of the Defense Counsel against the order on detention on remand of the international Investigating Judge and therefore assembled on 28 March 2001, thus issuing the said decision. The actions of the Judge and the decision were based on art 191 par. 2 item 1, 2, 3 and 4 of the Law on Criminal Procedure (LCP) of the SFRY, which at that time was in force. This is the **formal reason** why the Judge, although he later, in the year 2009, was the President of the appeal panel of the second instance Court, did not exercise the functions of a pre-trial judge, as required by art 40 par. 2 sub-par. 1 KCCP.

(c) Also the **material quality of the met pre-trial decision dated 28 March 2001** does not provide a sufficient argument for the disqualification of the Judge in the later stages of the proceedings. The said panel has taken care of security matters, thus evaluating on the conditions for detention on remand as provided by art 191 par. 2 item 1, 2, 3 and 4 of the LCP. The panel has found that there was not sufficient evidence for the participation of three other suspects in the crime at hand and therefore released them. As for the defendant Florim Ejupi the panel has confirmed the existence of a grounded suspicion as requirement for detention on remand, since

the case file had provided DNA analysis of traces found at a smoked cigarette, which was found at the place where allegedly the bomb was triggered and corresponded to a pattern taken previously by German police from the defendant Florim Ejupi, who in that context had been charged for grave robbery, attempted murder and other crimes. Considering this it becomes clear that the said pre-trial panel and thus the concerned Judge as a panel member did not go into the merits of the case at all, but have evaluated only on the conditions for detention on remand.

On the background of the aforementioned reasons and despite the question whether or not art. 40 par. 2 sub-par 1 KCCP is applicable also in the appeal stage of a case; no grounded allegation could be established that the concerned Judge in the appeal stage of the case in fact was disqualified, because he had participated in the pre-trial proceedings, as required by art 40 par. 2 sub-par. 1 KCCP.

b. Alleged violations of art. 403 par. 2 sub-par. 1 read with art. 157 par. 1 KCCP

Wrong interpretation of the status of "witness Alpha" by the appeal panel was established as follows:

The appeal panel – without further reasoning - has considered "witness Alpha" as anonymous witness, thus referring to art 157 KCCP in order to conclude that *"... in any case a judgment cannot be grounded, solely, on the statement of an anonymous witness".*

It needs to be underlined that "witness Alpha", thus being a witness of the prosecution, was not an anonymous witness in the meaning of the insofar relevant art. 172 par. 1 KCCP.

Art. 172 par. 1 KCCP reads as follows:

Where protective measures provided under Article 170 paragraph 1 of the present code are insufficient to guarantee the protection of ... (a) witness not proposed by the defense, the judge may in exceptional circumstances make an order for anonymity whereby the ... witness shall remain anonymous to the defendant and the defense counsel.

This was not the case in terms of "witness Alpha", since none of the requirements of art. 172 par. 1 KCCP was met.

A request of the International Prosecutor for anonymity regarding this witness, dated 01 December 2004, was refused by the International Judge by decision dated 06 December 2004. The Judge, thus referring to UNMIK Regulation No. 2001/21 "On Cooperative Witnesses", as amended by UNMIK Regulation 2002/2 and to Sections

2.4, 3.1, 3.3 and 4.4 of UNMIK Regulation 2001/20 "On the Protection of Injured Parties and Witnesses in Criminal Proceedings", granted the status of "witness Alpha" as cooperative witness, but found that the conditions for an order for anonymity were not met, whereas the requirements for protective measures were fulfilled.

On 11 May 2006, the International Prosecutor filed a motion for new protective measures including the assignment of a pseudonym to the witness. Based on this motion, the District Court of Prishtine/Pristina decided on 11 May 2006 that the witness shall be referred to as "witness Alpha" and issued an order for protective measures pursuant to art. 170 par. 2 KCCP.

Therefore, "witness Alpha" rightfully would have had to be considered a protected but not an anonymous witness, thus giving the appeal panel the opportunity to weight his/her statement higher in the context that it was corroborated by other evidence, especially the DNA expertise.

c. Factual impact of the status of "witness Alpha" on the material decision of the case

The International Public Prosecutor of the OSPK in her Request for Protection of Legality has stressed in the context of a rightfully determined status of "witness Alpha" as protected witness that in this case the appeal panel of the Supreme Court of Kosovo might have rendered a different decision and not acquitted the defendant Florim Ejupi, since the witness statement was corroborated by other evidence, especially by the DNA analysis on the cigarette butt found in the crime scene immediately after the explosion. Although, according to art. 415 par. 1 KCCP it is mandatory for the Supreme Court panel in the context of a Request for Protection of Legality to examine *ex officio* only the issues mentioned under items 1 through 4, whilst for the rest the court is bound to the topics challenged by the request, it deems necessary in the case at hand to check whether or not the second instance panel has evaluated the available evidence in a proper way, thus reaching the result as laid down in the enclosing act of the appeal judgment.

aa.
The appeal panel, taking into accounts that according to art. 387 par.1 of the KCCP the judgment can solely be based on the evidence considered at the main trial, has drawn the conclusion that there is no direct evidence of the presence of the defendant at the crime scene while he was preparing or executing the crimes he has been convicted for. Based on this the question arises **whether or not the panel necessarily would have rendered a different decision** and especially not acquitted the defendant Florim Ejupi, if "witness Alpha" rightfully would have been considered a protected witness according to art. 170 par. 1 item 4 KCCP instead of an anonymous witness according to art. 172 par. 1 KCCP.

(1) Reliability of the statements of "witness Alpha"

The appeal panel of the Supreme Court of Kosovo has come to the conviction that the reliability of the statements of "Witness Alpha" is questionable and therefore cannot be sufficient proof for the participation of the defendant in the bus bombing. As for the grounds of this conviction, the panel has noted that the witness was prepared and instructed by investigating police officers in order to infiltrate the group of the defendant in the Dubrava prison, but that those never were ordered or controlled by a pre-trial judge. Moreover, it had to be considered that the witness in return for his cooperation had received promises and advantages. Also, the doubts of the panel concerning the reliability of the witness were strengthened by the fact that the statements of the witness in many cases differ from each other in terms of the times referred to, the wording of conversations with the defendant and other details, although they were related to the same situations and that they do not comply with the statements of other witnesses concerning the same issues. Also the witness personality did not invite the Court to believe him without further consistent supporting evidence, since the witness previously was involved in criminal matters, escape attempts and disciplinary measures in prison.

The Supreme Court of Kosovo in the context of the Request for Protection of Legality finds that there are many contradictions between the different statements given by "witness Alpha" on several occasions. Moreover, the statements of "witness Alpha" do not comply with statements of other witnesses, which are related to the same topics.
It is neither possible nor needed to go through all – even minor – contradictions in the statements of the witness. However, it can be read from the first instance main trial minutes dated 25 January 2008 (p. 6 of the English version) and 10 April 2008 (p. 6 of the English version) that the witness stated differently on the question, when and where he first met the defendant Florim Ejupi, namely whether this was on 17 March 2004 in the streets of Mitrovice/Mitrovica or in his uncle's house. Moreover, according to the main trial minutes dated 25 January 2008 (p. 12 of the English version) and 10 April 2008 (p. 7 of the English version), the witness had stated that he in the Dubrava prison had connected a conversation with the defendant about the Nis bus bombing to a Serbian newspaper article, published in the newspaper "Blic" and that the article that time was handed to him by a correctional officer, immediately after its publication. This had been in the year 2005. Although the witness had identified the article shown to him during the main trial and was informed about the fact that it was published already on 09 June 2004, the witness insisted in his previous statement. Finally the witness on both occasions had stated that the defendant Florim Ejupi had told him that it was a person called "Alban", who had fired a Zola or Bazooka grenade from behind into the bus after it already was exploded (main trial minutes dated 25 January 2008, p. 18 of the English version and 10 April 2008, p. 21 and 22 of the English version). Despite the fact that the witness did not make a difference between the two aforementioned kinds of weapons, it was only him to give such a statement. No complying evidence for the use of one of the described weapons was found; neither in the crime scene nor through other witnesses.

Especially referring to the question how the bomb was exploded, the statement of the witness differed seriously from the expert opinion and statement, given by the expert witness Andrija Blazevic according to the main trial minutes dated 13 May 2008. Whilst "witness Alpha", thus referring to a conversation with the defendant Florim Ejupi stated on 10 April 2008 (p. 10 of the English version) that according to the defendant the bomb was exploded by the support of a car battery as explosive device, the witness expert on explosives stated in front of the first instance panel that a car battery never ever would have been sufficient to explode that bomb. The expert took into consideration the physical resistance of a specific electro detonator capsule as well as of the cables and found that a sufficient detonator would have had to have a minimum power of 2 amperes (94.4 volt), whilst a usual car battery has only 12 volt and even a truck battery provides not more that 24 volt. In this context it is noteworthy that both witnesses, Antony James Davies and Darrell Guy Hodder, thus having been investigating police officers in the crime scene, on request of the first instance panel have given the opinion that a car battery would suffice to explode a bomb like the one of the Nis bus bombing. However, it needs to be underlined that both aforementioned witnesses also have stated that they do not have sufficient experience on explosives and cannot be considered experts on this field.

Therefore, the Supreme Court considering the frames of judicial independence while evaluating on evidence provided to the court finds that the appeal panel was not obliged to follow the in large parts inconsistent statements of "witness Alpha".

(2) On the evaluation of corroborating evidence

In addition it needs to be stressed that the **appeal panel of the Supreme Court of Kosovo** notwithstanding the evaluation of reliability and further consideration of "witness Alpha" as a properly controlled and credible witness has expressed serious doubts concerning the quality of the DNA analysis of the cigarette butt found in the crime scene as valuable evidence. This cigarette butt was considered as the most important corroborating evidence of the case by the first instance Court. It can be read from the reasoning of the second instance judgment that it was not possible to clearly establish, when the cigarette was smoked, especially whether it was smoked before or after the detonation. Despite this fact, the appeal panel has underlined that the file did not contain any sufficient proof for the identity of the cigarette butt found in the crime scene and the one which was subject to the comparative test with the DNA sample of the defendant Florim Ejupi kept in Germany. The appeal decision of the SCK dated 12 March 2009 in this context especially states that "*furthermore, there is not a sufficient proof that indeed the cigarette butt found in the crime scene is the same cigarette butt (no investigation report on the finding, sealing and/or marking of the evidence) which was subject to the comparative test with the DNA sample which was kept in Germany (previous DNA test taken in another criminal case from the accused)*".

The Supreme Court of Kosovo thus considering the Request on Protection of Legality has reviewed all the relevant documents provided in the case file as well as the DNA expert analysis of the German Bundeskriminalamt (Institute for Forensic Sciences) dated 05 March 2001, which is also part of the case file.

As a result it needs to be established that the question, whether or not the chain of custody between the cigarette butts found in the crime scene on 16 February 2001 and the ones being analyzed for DNA traces in the Bundeskriminalamt in Germany on 05 March 2001 is closed, in large parts falls under the requirements set up individually by the judge in charge and thus are to be seen under the aspect of judicial independence.

The case files contain seven relevant documents, which refer to the evidence mentioned.

The crime scene description of the findings on 16 February 2001, dated 04 March 2001 with an attached crime scene sketch already notes the discovery of a *"cigarette butt and control tube"* at the alleged firing point, but still without labeling the evidence as AJD/1, as it can be found in the documents later. The document in this context only points out that the investigating UNMIK police officers *"took measurements of the physical evidences based on their respective locations and collected and packaged them in accordance with their specifications with corresponding labels/numbers"*.

The earliest document to refer to a label number given to the very cigarette butt is the witness statement of the investigating UNMIK Police Officer Anthony James Davies, dated 20 February 2001. The witness states that *"the following items were subsequently recovered sealed in exhibits bags and marked as indicated; ... AJD/1 – 1 x cigarette butt + control tube (location of find: embedded in tree stump at apparent firing point (a)). ... I have signed the labels. ... I retained exhibits AJD/1 ... in my possession until Saturday 17 Feb 01, when I handed them, together with the exposed film to the Forensic Unit, Regional Crime Squad, UNMIK Civil Police, Pristina"*.

From the UNMIK Order for Examination (Analysis) to Crime Laboratories Unit dated 23 February 2001 it can be read that altogether two cigarette butts have been found in the crime scene, out of which one of them was marked as *"AJD/1 Cigarette butt and control tube"*, whilst the other was marked as *" AQC Cigarette butt"*.

It then can be read from the German DNA expertise of the Bundeskriminalamt Wiesbaden dated 05 March 2001 (file number KT 31 – 01/1131/002), which refers to the *"bomb attack on a Serbian bus on 16 FEB 2001 in Podujevo"* as a subject and to a *"request for examination of UNMIK, Investigation Unit RMS Pristina, case # 01/011 dated 23 FEB 2001"* that two *"stubs"* had been sent and were analyzed, out of which one of them (marked as AJD/1) had the DNA profile of Florim Ejupi. The expert opinion in this context says that *"according to the request we got two stubs with the evidence number AJD/1 and AQC/7..."*. The corresponding DNA sample in Germany was taken, since the suspect previously was under investigation and/or charged in Germany for attempted manslaughter, burglary, attempted burglary, theft

committed in compliance with other co-perpetrators, aggravated theft and violation of the Law on Narcotics and other criminal offenses.

According to a handover document of the Bundeskriminalamt Wiesbaden dated 23 May 2003, the " ... *Rest of a cigarette and empty comparing device* ... " with the label AJD/1 was handed back to UNMIK.

Based on the aforementioned results of the DNA analysis, an UNMIK Case Summary dated 26 March 2001 and sent to the International Prosecutor refers to *"... Evidence collected from the scene including a cigarette end found in a tree stump at the firing point ...* "

and an Investigations Report dated 12 April 2005 refers to " ... *this cigarette end (AJD-1) ... analyzed and the DNA of Florim Ejupi ... found (folder C page 70 and 71)".*

Although this chain of evidence may lead to the conclusion that the chain of custody between the cigarette butt found in the crime scene and the one being analyzed in Germany for DNA traces is closed, it needs to be left with the judge in charge thus constituting the appeal panel to require also an investigation report on the finding, sealing and/or marking of the evidence, which indeed is not contained in the case file at hand. Only such a report, which also is part of European standards, can make finally sure that the evidence found in a crime scene indeed is identical with the evidence presented during the investigation and in front of the courts. At least, between the finding of the cigarette butt on 16 February 2001 in the crime scene and its' first mentioning with a label number by the witness Police Officer Anthony James Davies on 20 February 2001 in his witness statement, there is a gap of almost four days, within which the whereabouts of the cigarette butt cannot be established without any doubts. Therefore, the second instance panel was free, but not obliged to accept the chain of custody to be closed as mentioned above.

Additionally, it is noteworthy in this context that according to the expert opinion of the Bundeskriminalamt in Wiesbaden dated 05 March 2001; two cigarette butts have been sent and examined for DNA traces. One of them marked as AJD/1 was found at the alleged firing point and had DNA traces of the defendant Florim Ejupi. The other one was marked as AQC/7. It is not quit clear from the case file where and under which circumstances this cigarette butt was found. It only can be concluded from the index of exhibits, saved by the UNMIK CCIU War crimes Unit that this cigarette butt was found on 20 February 2001 during the search of a vehicle VW Golf of red color, which was registered with Fadil Selmani under the registration number 107-KS-798. Moreover, it is mentioned in the UNMIK Order for Examination (Analysis) to Crime Laboratories Unit dated 23 February 2001. No more information about this cigarette butt can be found in the case file. Also under these circumstances doubts of the appeal panel concerning a closed chain of custody in terms of the corroborating evidence deem reasonable.

While examining the relevant evidence of the case file, **the Supreme Court of Kosovo moreover has found** that indeed it was not possible for the first instance panel to define the exact time, when the cigarette butt, found in the crime scene was smoked. The witnesses Anthony James Davies and Darrell Guy Hodder, who in their functions as investigating police officers had found the cigarette butt, during the main trial session on 17 April 2008 only have stated very generally on the relevant questions of the first instance panel. Witness Antony James Davies has stated, that the butt *" ... was not dry, to suggest that it had been there for some time or days ..."* and that also *" ... it wasn't wet or damp to suggest that it had recently been smoked"* (main trail minutes, p. 10 of the English version). Witness Darrell Guy Hodder has defined the appearance of the butt as *"fresh"*, meaning that *" ... there was no discoloration of the cigarette butt"*, as *" ... if it had been in the weather with rain and sun"*. Therefore, the Supreme Court panel finds that this indeed does not allow the exact definition of whether the cigarette was smoked directly before the explosion, some hours earlier or a bit later.

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As a consequence, it needs to be established that the appeal panel – even if the status of "witness Alpha" properly had been regarded as the one of a protected instead of an anonymous witness – was not obliged to find a judgment different from the one laid down in the enacting clause and moreover most probably would not have been able to overcome its serious doubts regarding the value of the other evidence, especially the DNA analysis. Thus, also the rightful consideration of "witness Alpha" as a protected witness allegedly would not have led the appeal panel to a different decision, especially confirming the first instance judgment in its substantial determinations.

III. Conclusion of the Supreme Court of Kosovo

For the abovementioned reasons, the Supreme Court concludes that the Request for Protection of Legality is unfounded and therefore rejected.

Finally and having in mind the seriousness of the crime committed the question may be raised whether or not the appeal panel as a result of its conclusions was obliged to meet a decision different from the enacting clause in question, especially to annul the first instance judgment and return the case for retrial instead of an immediate modification of the judgment with the content to acquit the defendant from all charges.

However, the appeal panel in application of art. 406 par. 1 through 426 KCCP did not send back the case for retrial, since it was found that the judgment of the Court of first instance has determined the material facts properly but that regarding the determination of the factual situation, especially the absence of convincing evidence against the defendant, a judgment of acquittal should have been passed instead. Thus,

on the background of its' conviction the appeal panel correctly refers to the situation addressed by art. 426 par. 1 KCCP.

Consequently, the Supreme Court of Kosovo decides on the OSPK Request for Protection of Legality as in the enacting clause, based on art. 456 KCCP.

SUPREME COURT OF KOSOVO IN PRISHTINE/PRISTINA
Pkl-Kzz 71/09, 10 ~~October~~ 2009

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