

Supreme Court of Kosovo
Pkl-Kzz no. 188/2012
12 December 2012

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel composed of EULEX Judge Horst Proetel as Presiding Judge, EULEX Judges Martti Harsia and Gerrit-Marc Sprenger and Supreme Court Judges Avdi Dinaj and Salih Toplica as panel members assisted by Legal Officer Chiara Rojek acting in the capacity of recording clerk,

In the criminal case P no. 766/2012 with the District Court of Prishtinë/Prishtina against

1) Ne.K.

[REDACTED]

Charged according to the Indictment PPS no. 07/10 filed by the Special Prosecutor of the Republic of Kosovo (SPRK) on 25th July 2011 with the criminal offences of **War Crime against the Civilian Population and War Crime against Prisoners of War** contrary to Articles 22, 142 and 144 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), criminalized under Articles 23 and 120 of the Criminal Code of Kosovo (CCK), in violation of Common Article 3 to the 1949 four Geneva Conventions and Articles 4 and 5 (1) of Additional Protocol II to the 1949 Geneva Conventions (APII) (count 1), **War Crime against the Civilian Population** contrary to Articles 22, 142 of the CC SFRY, criminalized under Articles 23 and 120 of the CCK (count 2), and four counts of **War Crime against Prisoners of War** contrary to Articles 22, 144 of the CC SFRY, criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4, 5 (1) of APII (counts 3 to 6). Ne.K.

2) [REDACTED]

Charged according to the Indictment PPS no. 07/10 filed on 25th July 2011 with the criminal offences of **War Crime against the Civilian Population and War Crime against Prisoners of War** contrary to Articles 22, 142 and 144 of the CC SFRY, criminalized under Articles 23 and 120 of the CCK, in violation of Common Article 3 to the 1949 four Geneva Conventions and Articles 4 and 5 (1) of APII (count 1), five counts of **War Crime against Prisoners of War** contrary to Articles 22, 144 of the CC SFRY, criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4 and 5(1) of APII (counts 2, 3, 4, 5 and 7), and **War Crime against the Civilian Population** contrary to Articles 22, 142 of the CC SFRY, criminalized under Articles 23 and 120 of the CCK (count 6).

3) FL

[REDACTED]

Charged according to the Indictment PPS no. 07/10 filed on 25th July 2011 with the criminal offences of **War Crime against the Civilian Population** and **War Crime against Prisoners of War** contrary to Articles 22, 142 and 144 of the CC SFRY, criminalized under Articles 23 and 120 of the CCK, in violation of Common Article 3 to the 1949 four Geneva Conventions and Articles 4 and 5(1) of APII (count 1), and two counts of **War Crime against Prisoners of War** contrary to Articles 22, 144 of the CC SFRY, criminalized under Articles 23, 120 of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4 and 5 (1) of APII (counts 2 and 3), and

(NS) 4)

[REDACTED]

Charged according to the Indictment PPS no. 07/10 filed on 25th July 2011 with the criminal offences of **War Crime against the Civilian Population** and **War Crime against Prisoners of War** contrary to Articles 22, 142 and 144 of the CC SFRY, criminalized under Articles 23 and 120 of the CCK, in violation of Common Article 3 to the 1949 four Geneva Conventions and Articles 4 and 5 (1) of APII (count 1), four counts of **War Crime against Prisoners of War** contrary to Articles 22, 144 of the CC SFRY, criminalized under Articles 23, 120 of the of the CCK, in violation of Common Article 3 to the four Geneva Conventions 1949, and Articles 4 and 5 (1) of APII (counts 2, 3, 4 and 6), and **War Crime against the Civilian Population** contrary to Articles 22, 142 of the CC SFRY, criminalized under Articles 23 and 120 of the Criminal Code of Kosovo (count 5),

(F.L)

(F.V)

(N.S)

(Xh.M.)

(Ne.K)

(T.R)

Acting upon the Request for Protection of Legality (the Request) filed on 29 November 2012 by Defence Counsels [REDACTED] and [REDACTED] on behalf of Defendant [REDACTED] (Na.K) the Request filed on 30 November by Defence Counsel [REDACTED] on behalf of Defendant [REDACTED], the Request filed on 3 December by Defence Counsel [REDACTED] (B.T) on behalf of Defendant [REDACTED] and the Request filed on 3 December by Defence Counsel [REDACTED] (M.H.) on behalf of Defendant [REDACTED] against the Ruling P no. 766/2012 of the District Court of Prishtinë/Priština dated 24 November 2012 by which detention on remand was imposed for a one-month period until 24 December 2012 against the four aforementioned defendants and against the Ruling Pn-Kr No. 967/2012 of the Supreme Court of Kosovo dated 27 November 2012 by which all the Appeals by the Defence against the District Court Ruling P no. 766/2012 were rejected, and considering the Opinion and Motion to the Requests filed by the Office of the State Prosecutor of Kosovo (OSPK) dated 11 December 2012, after having deliberated and voted on 12 December 2012,

Pursuant to Articles 451 and following of the KCCP, issues the following

(F.L)

JUDGMENT

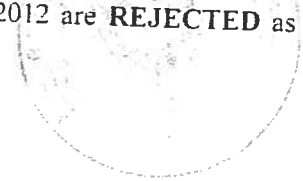
(N.S)

(Na.K)

(Ne.K)

1. The four Requests for Protection of Legality filed for Defendants [REDACTED] (F.L), [REDACTED] (F.V), [REDACTED] (N.S) and [REDACTED] (Xh.M.) against the Ruling P no. 766/2012 of the District Court of Prishtinë/Priština dated 24 November 2012 and the Ruling Pn-Kr no. 967/2012 of the Supreme Court of Kosovo dated 27 November 2012 are **REJECTED** as ungrounded.

2. Both Rulings are **AFFIRMED** in their entirety.



REASONING

I. Procedural background

(F.L.) On 25 July 2011, the Special Prosecutor filed with the District Court of Prishtinë/Prishtina the Indictment PPS No. 07/2010 against the Defendants (N.S.) and others for the aforementioned criminal offences. (A.Z.) (Na.K.) (Ne.K.) On 26th August 2011, the Indictment was confirmed in its entirety by Ruling KA no. 505/11. The Main Trial commenced on 11 November 2011. On 21 March 2012, the Trial Panel issued a Ruling on Admissibility of (N.S.) Statements and Diaries, thus declaring inadmissible all the statements given by the late Witness X. On 2 May 2012, the District Court of Prishtinë/Prishtina issued the Judgment P no. 425/11 by which the four Defendants were acquitted of all the charges. On 20 November, the Supreme Court of Kosovo partially granted the Appeal of the Special Prosecutor, and sent back the case for re-trial. (Na.K.) On 24 November, following a hearing on detention, the Presiding Judge of the District Court of Prishtinë/Prishtina, by Ruling P no. 766/2012, imposed detention on remand onto (Ne.K.) (F.L.) (N.S.) and (F.L.) for a one-month period until 24 December. On 27 November, the Supreme Court Panel rejected the appeals filed by the Defendants through their Defence counsels against the 24 November Ruling.

II. Submissions of the parties

The Requests for Protection of Legality filed by the Defence

(F.V.) (Xh.M.) (Na.K.) Defence Counsels (F.V.) and (Xh.M.) of (Na.K.) filed the request against both Rulings for substantial violation of the provisions of criminal procedure under Articles 403 paragraph 1, sub-paragraph 12 and paragraph 2 sub-paragraph 1 of the KCCP and other violations of the criminal procedural law under Article 270, Article 281 paragraph 1 sub-paragraphs 1 and 2 (i), (ii) and (iii) of the KCCP. They propose to amend the contested Rulings as to terminate the detention on remand measure, or to annul them and send back the case for re-decision.

The Defence alleges that the First Instance Ruling is written in a general and abstract manner and, in addition, does not contain reasons and specific facts as to the existence of a grounded suspicion¹ and other requirements. Substantial violations were committed as the requirements for an order for arrest were not fulfilled and the District Court Presiding Judge was not in possession of the case file. The First Instance Court's reasoning is in contravention with the stance of European Court of Human Rights (ECtHR) as regard to the risk of flight² and also failed to take into account essential elements such as the Defendant's family situation.³ The imposition of detention on remand based on the risk of hampering evidence is unlawful and does not stand as the other witnesses are protected witnesses and anonymous ones.⁴ In respect to the Supreme Court Ruling, the enacting clause is in contradiction with the reasoning, especially as the Second Instance Court amended the first instance ruling by contravening to Article 425 of the KCCP. Moreover, the Supreme Court Panel failed to provide explanations on the other requirements to impose detention on remand and to answer to the Defence's

¹ ECtHR *Cebatar v Moldavia*, Judgement on 13 November 2007, paragraph 45
² ECtHR *Muller v France*, Judgement on 17 March 1997, paragraph 43
³ ECtHR *Letellier v France*, Judgement on 26 June 1991
⁴ ECtHR. *Tomasi v France*, Judgement on 27 August 1992, paragraphs 92-95

arguments.⁵ Referring to the Supreme Court Ruling Pn-Kz 222/11 of 22nd April 2011, the Defence contends the existence of a risk of repetition. The Defence, finally, contends the reference of the Supreme Court of Kosovo to political concerns.

Lawyer **(M.H.)** of Defendant **(Ne.K.)** files a Request against both Rulings because of substantial violations of the provisions of the criminal procedure under Article 403 paragraph 1 sub-paragraph 12 read in conjunction with Article 451 paragraph 1 sub-paragraph 2 and paragraph 4 of the KCCP, and proposes to the Supreme Court of Kosovo to amend the Ruling as to release the Defendant, or to impose an alternative measure (bail or measure of house arrest).

In the Defence's view, the rulings lack of reasoning regarding the grounds to impose detention on remand and also of individualization. The human rights standards enshrined in the Constitution of the Republic of Kosovo and in the ECHR⁶ were violated, particularly by the Second Instance Court. The First Instance Court used the forgotten practice of Article 191 paragraph 1 item 1 of the Criminal Procedure Law of the SFRY providing for the mandatory imposition of the detention on remand. The sole severity of punishment does not constitute a ground for ordering detention on remand. The Defence Counsel refers to the two Rulings issued by the District Court of Mitrovicë/a.⁷ He points out that **(Ne.K.)** has not attempted to flee, and mentions the Defendant's family conditions. Lastly, a court should keep itself away from any political influence.

Defence Counsel **(T.R.)** of **(F.L.)** filed a Request against the Ruling Pn-Kr no. 967/2012 dated 27 November for substantial violation of the provisions of criminal procedure under Article 403 paragraph 1 sub-paragraphs 10, 11 and 12 and paragraph 2 read with Article 281 paragraph 1 sub-paragraph 2 (i), (ii), and (iii) of the KCCP, and proposes to amend the challenged Ruling as to terminate the detention on remand measure or impose a more lenient measure onto the Defendant.

The Defence alleges that the enacting clause of the challenged Ruling is incomprehensible, contradictory in its content and to the reasoning of the enacting clause, notably as the Supreme Court held that it does not need to discuss the risk of flight because another condition of Article 281 paragraph 1 sub-paragraph 2 is met. The reasoning does not provide grounds on crucial facts and on the Defence's arguments submitted in the appeals in contradiction with Article 403 paragraph 2 read with Article 396 paragraphs 6 and 7 of the KCCP. The Supreme Court Panel has supplemented the reasoning to the contested Ruling to the disfavor of the Defendant, thus violating Article 403 read with Article 417 of the KCCP. The Defendant strictly complied with the conditions of house detention. The risk of tampering evidence does not exist as all the main witnesses are protected and the Supreme Court Panel wrongfully assessed Witness X's statement in this respect. The politicians' criticism towards the EULEX judiciary cannot be taken as pressure on witnesses *per se*. At last, the Supreme Court of Kosovo based its evaluation on assumptions and rumor.⁸

Defence Counsel **(B.T.)** of Defendant **(N.S.)** submits a Request, based on allegations of violations of the provisions of Article 135 paragraph 1, Article 287 paragraph

⁵ In the case *Iljkov v. Bulgaria*, ESLJP, ECtHR Judgement, 26th June 2001

⁶ Convention for the Protection of Human Rights and Fundamental Freedoms dated 4 November 1950
District Court of Mitrovicë/a. Ruling GJPP no. 96/12 dated 6 November 2012 and Ruling KP no. 386/12 dated 21 November 2012

⁸ ECtHR case *Blastland v. UK* (52 DR 273): admission of rumour as evidence is not in principle contrary to the guarantee of due process, but if there is no possibility of conducting investigation, this may render a trial unfair.

2. Article 428 of the KCCP and Article 281 paragraph 1, sub-paragraphs 1 and 2 (i) and (ii) of the KCCP. He proposes to annul both rulings and to release the Defendant immediately. The Defence alleges that the Supreme Court Panel has erroneously interpreted Article 135 paragraph 1 of KCCP, by concluding that "a judgment shall become final when it may no longer be contested by an appeal or when no appeal is permitted". The requirements to consider the judgment final are not met and the Supreme Court of Kosovo has erroneously interpreted Article 428 of the KCCP. The Defence Counsel objects the legal competence of the Presiding Judge, as the Motion for detention was based on Articles 282 and 287 of the KCCP. The imposition of detention on remand can only be ordered after the conclusion of the main trial, pursuant to Article 393 paragraph 1 of the KCCP. The legal grounds for the imposition of detention on remand do not stand. The findings of the first and second instance courts in respect to the danger of flight and the risk of obstructing the criminal proceedings are not based on elements of the case file, notably since Naser Shala has not attempted to do so while at liberty.

The Reply of the State Prosecutor

In her Reply, the State Prosecutor moves the Supreme Court of Kosovo to reject the four Requests as ungrounded and to affirm the contested Rulings. She claims that Articles 428 and 429 of the KCCP do not affect the competence of the Presiding Judge to impose detention on remand between the drawing up of the Supreme Court Ruling and the physical return of the case as ascertained in Article 287 paragraph 1 of the Code. The Supreme Court has not modified the First Instance Ruling, only provided additional grounds of detention on remand. It is not required to open a hearing when deciding on an appeal against rulings on detention matters. The State Prosecutor submits that well-grounded suspicion exists against the four Defendants as to the mentioned criminal offences. She specifically refers to the Special Prosecutor's Reply to the Appeals of the Defendants and his Motion for detention on remand in respect to the risk of flight and points out that two new circumstances intensified that risk: admissibility of the evidence of [REDACTED] and higher risk of intimidation of the other witnesses. Neither the Presiding Judge nor the Supreme Court Panel based the rulings on the risk to repeat the criminal offences and more lenient measures are insufficient. Finally, Defendant [REDACTED] previously violated the conditions of his house detention.

III. Findings of the Supreme Court of Kosovo

The Supreme Court of Kosovo is competent to decide on the Request of Protection of Legality pursuant to Articles 451 paragraph 1 and 26 Paragraph 3 of the KCCP. The Supreme Court panel has been constituted in accordance with Article 3 Paragraph 7 of the Law on jurisdiction.

Admissibility of the Requests for protection of legality

The latest challenged Ruling was issued on 27 November 2012. The Defendants [REDACTED] and [REDACTED] received it on 28 November. Due to the lack of delivery slips in the case file, it is impossible to ascertain the date of receipt by Defendants [REDACTED] and [REDACTED]. The Requests were filed with the Registry on 29 November (for [REDACTED]), on 30 November (for [REDACTED] and [REDACTED]) and on 3 December (for [REDACTED] and [REDACTED]). The four Requests for Protection of Legality are in any case filed within the three-month timeline following the service of the final decision, pursuant to Articles 451 paragraph 4 and

452 paragraph 3 of the KCCP.

Merits of the Requests for protection of legality

The Supreme Court of Kosovo considers that the Presiding Judge of the District Court of Prishtinë/Priština was the competent judge to decide on the Application for detention on remand filed by the Special Prosecutor on 20 November. The provisions of Article 424 paragraph 1, 428 paragraph 1 and 429 paragraph 1 provide for the return of the case to the court of first instance which shall proceed 'on the basis of the prior indictment'. Also, Article 429 paragraph 5 of the KCCP which states "[i]f the accused is in detention on remand the panel of the court of first instance shall proceed as provided for in Article 287 paragraph 2 of the present Code" does not leave room for any interpretation: the trial panel, or the presiding judge when the panel is not in session, is competent to decide on detention matters following the return of the case at the first instance level. Consequently, the Supreme Court Panel rejects the Defence's allegations in this respect.

The Supreme Court also considers unmeritorious the Defence's argument regarding the physical move of the case file in contravention with Article 428 of the KCCP. This provision is evidently applicable only once the Supreme Court decision has been issued ("a sufficient number of certified copies of its decision"). This is not uncommon in complex cases like the one at hand, involving a plurality of defendants, that the case file be at the first instance and second instance levels at the same time due to simultaneity of appeals/requests filed by the parties. The fact that the case file was not sent back to the District Court Registry and remained in the Supreme Court premises before the issuance of the ruling imposing detention on remand does not affect the legality of the decision, as long as the competent judge had access to the case file to proceed to a legal and factual assessment to decide upon.

This Panel does not see any contradictions or discrepancies in the enacting clauses of the contested Rulings or between these enacting clauses and the reasoning. They are clear and comprehensible. The contention that the ruling contravenes to Article 396 paragraphs 6 and 7 of the KCCP is irrelevant as this provision is specifically applicable to the 'drawing up and serving of Judgments', not to rulings.

It is noted that the second instance court supplemented the first instance ruling with further justifications on the risk of influencing witnesses.⁹ This Supreme Court Panel considers the appeal Court entitled to such modification of the first instance court as foreseen *inter alia* in Article 434 paragraph 3 of the KCCP. The Court acknowledges the importance of the rule according to which if an appeal is filed only by the Defence, the court may not issue a decision to the detriment of the Accused. This is expressed under Article 417 of the KCCP in relation to the judgments. However, this does not bear any relevance in the instance given, as correctly pointed out by the State Prosecutor, the Second Instance Court only supplemented the District Court Ruling by providing additional details extracted from the case file on a ground for ordering detention on remand. The First Instance Court already ruled on that ground, i.e. risk of influencing witnesses under Article 281 paragraph 1 sub-paragraph 2 (ii) of the KCCP.¹⁰ The prohibition of *reformatio in peius* is therefore not applicable in the case at hand. The Supreme Court of Kosovo rules that no violation of the procedural law has been committed by the first or the second instance courts.

⁹ Supreme Court of Kosovo. Ruling Pn-Kr no. 967/2012. 27 November 2012, page 11, pages 11-12

¹⁰ District Court of Prishtinë/Priština. Ruling P no. 766/2012. 24 November 2012, page 3

Likewise, the Panel considers without merit the allegations of the Defence regarding violations of Article 281 paragraph 1 sub-paragraphs 1 and 2 (i) and (ii) of the KCCP. The Court wishes to emphasize that the law does not require strong elements on the conditions for detention on remand. The wording of Article 281 paragraph 1 sub-paragraph 2 (i) and (ii) of the KCCP ("indicate that there is a danger of flight", "there are grounds to believe that he or she will destroy...") clearly provides that the standard of proof is relatively low and that establishing the existence of factors indicating such risk is satisfactory at this stage of the proceedings.

The Supreme Court admits that the First Instance Ruling is very concise. This amounts a procedural mistake of minor nature which cannot affect the outcome of the criminal proceedings. This Panel, nonetheless, considers sufficient the specific references in this ruling made to the "previous rulings ordering and extending measures against the defendants and in the ruling confirming the Indictment with regard to the existence of a grounded suspicion..."¹¹ Moreover, the First Instance Court specifically referred to the Supreme Court Ruling Ap-Kz no. 453/2012 dated 20 November 2012.

Additionally, the undersigned Panel agrees with the Defence that a 'stereotyped' reasoning to extend detention on remand which does not refer to the individual circumstances of the case, is inadequate.¹² The Panel holds that the First Instance Court failed to carry out a proper assessment of the case in the light of the condition of risk of flight by stating that "the seriousness of the charges together with the potential sentences which could be imposed on the defendants (if found guilty) when taken together are sufficient to establish a risk of flight without considering other factors". The Presiding Judge should have taken into account and mentioned other factors already mentioned in the previous rulings, in particular since those factors continue to prevail for each of the Defendants.

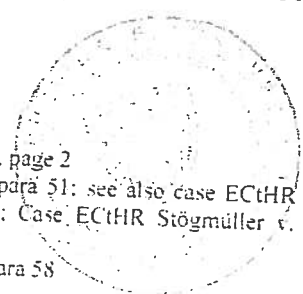
As to the argument regarding the Supreme Court's statement that it does not need to discuss the risk of flight because another condition under Article 281 paragraph 1 sub-paragraph 2 has been met, the Supreme Court Panel concedes that the Second Instance Court should have responded to the contentions of the Defence on this point. Despite this omission, this Court endorses the first instance findings that there are indications that the four defendants may attempt to flee as stipulated in Article 281 paragraph 1 sub-paragraph 2 (i) of the Code. Hence, the Supreme Court Panel considers the personal characteristics of the Defendants as mentioned in the initial ruling that continue to exist at the time the Presiding Judge imposed detention on remand.¹³ To this aim, it refers to the initial Ruling PPS no. 07/10 and GJPP no. 25/10 on detention on remand and house detention dated 17 March 2011 and subsequent rulings. Furthermore, the Panel agrees with the First Instance Court that the following factors are pertinent: as the case was sent back for re-trial, the Defendants may consider themselves in a worse situation and the probability of being convicted higher; the seriousness of the criminal offences; and the potential punishment faced.

To the argument of the Defence that the District Court based its findings on assumptions and rumor, the undersigned Panel finds it ungrounded. Besides, the Supreme Court considers that the Second Instance Court properly assessed witness X's statements and other indications attesting of a risk of influencing the remaining witnesses foreseen under Article 281 paragraph 1 sub-paragraph 2 (ii) of the Code.

¹¹ District Court of Prishtinë/Priština, Ruling P no. 766/2012, 24 November 2012, page 2

¹² Case ECtHR Letellier v. France, Application no. 12369/86, 26th June 1991, para 51; see also case ECtHR Yagei and Sarin v. Turkey, application no. 16426/90, 08 June 1995, para 52; Case ECtHR Stögmüller v. Austria, Application n° 1602/62, 10th November 1969, para 15

¹³ Case ECtHR Becciev v. Moldova, Application no. 9190/03, 4th October 2005, para 58



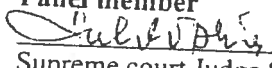
Considering the above, the Supreme Court of Kosovo rejects the requests of the Defence to terminate the measure of detention on remand or to impose a more lenient measure.

It has been decided as in the enacting clause.

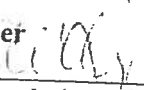
Presiding Judge


EULEX/Judge Horst Proetel

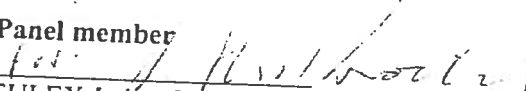
Panel member


Supreme court Judge Salih Toplica

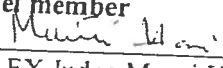
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Supreme Court Judge Avdi Dinaj

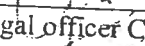
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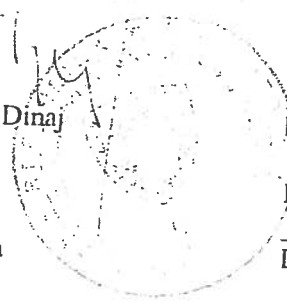

EULEX Judge Gerrit-Marc Sprenger

Panel member


EULEX Judge Martti Harsia

Recording clerk


Legal officer Chiara Rojek



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