

BASIC COURT OF PRISTINA

(P. No. 144/13 – PPS. No. 30/2010)

[The judgments published may not be final and may be subject to an appeal according to the applicable law.]

ENACTING CLAUSE

On the 21 September 2015, the Basic Court of Pristina in the trial panel composed of EULEX Judge Jorge Martins Ribeiro, as presiding Judge, EULEX Judge Arkadiusz Sedek and Judge Beqir Kalludra, as panel members, in the criminal case P.No. 144/13 – PPS. No. 30/2010 prosecuted by the Special Prosecutors Mr. Besim Kelmendi and, after 31 August 2015, Ms. Merita Bina Rugova, from the Special Prosecution Office of Republic of Kosovo, pronounces in public the following:

IN THE NAME OF THE PEOPLE

The accused are:

1- N. K.

2- A. Z.

3- S. H.

4- S. F.

5- H. B.

All of them initially charged by an indictment dated 5 November 2012, filed with the Basic Court of Pristina on 13 November 2012, and by the amendment to the indictment dated 28 March 2013 and **now charged with the following criminal offences** (now as per the amended indictment

and withdrawal from prosecution of one charge during the closing statements by the Prosecution):

1- N K:

-Abusing official position or authority, committed in co-perpetration (contrary to articles 422, par.1, read with art. 31 C.C.K.);

-Accepting bribes (contrary to article 343, par.1, Provisional C.C.K.) and

-Entering into harmful contracts (contrary to article 237, par. 1, and 2 Provisional C.C.K.).

2-A Z:

-Abusing official position or authority, committed in co-perpetration (contrary to articles 422, par.1, read with art. 31 C.C.K.).

3- S H:

-Abusing official position or authority, committed in co-perpetration (contrary to articles 422, par.1, read with art. 31 C.C.K.) and

-Accepting bribes (contrary to article 343, par.1, Provisional C.C.K.).

4- S F:

-Abusing official position or authority, committed in co-perpetration (contrary to articles 422, par.1, read with art. 31 C.C.K.) and

-Accepting bribes (contrary to article 343, par.1, Provisional C.C.K.).

5- H B:

-Giving bribes (contrary to article 429 C.C.K.) and

-Misuse of economic authorizations (contrary to article 236, pars. 1.2 and 2, Provisional C.C.K.).

After having held the main trial hearings, open to the public, on 14 April 2014, 13, 14, 27 and 28 May 2014, 04 and 05 June 2014, 16, 17 and

18 July 2014, 12, 26 and 30 September 2014/, 04 November 2014, 12 December 2014, 05 and 23 January 2015, 16 February 2015, 17 April 2015, 22 June 2015, 24 June 2015, 31 August 2015 and 17 September 2015, in the presence of the state prosecutor, Mr. Besim Kelmendi and, after 31 August 2015, Ms. Merita Bina Rugova, the said defendants and their defence counsels, Mr. B.T. (for N K), Mr. H. L. (for A Z), Mr. S.G. (for S H), Mr. D.R. (for S F) and Mr. A.A. (initially Mr. Gj.D., for H B) and the representative (when present) of the injured party Ministry of Trade and Industry, and after the trial panel's deliberation and voting held on 17 and on 18 September 2015 (the appointed recording officer to the deliberation and voting session was A Xh).

And pursuant to articles 359 to 366 and 370 of the Criminal Procedure Code of Republic of Kosovo, on this 21 September 2015, in open court and in the presence of the defendants, defence counsels, the SPRK Prosecutor and the injured party, renders the following

VERDICT

Declare the absolute bar on criminal prosecution with regards to the criminal offence of giving bribes, contrary to art. 429 C.C.K., the defendant H B has been charged with (**count 2**). The absolute bar on criminal prosecution has already happened on two moments: on 15/09/2011 (in relation to the alleged bribe to the co-defendants N K and S F – meaning that it had already taken place when the indictment dated 05/11/2012 was filed, on 13/11/2012) and on 31/12/2013 (in relation to the alleged bribe to the co-defendant S H).

Accordingly, pursuant to articles 362, par. 1, and 363, par. 1.3, C.P.C.K., as the period of statutory limitation has long expired, the court rejects this charge in relation to the criminal offense of giving bribes.

And:

In relation to count 1, pursuant to articles 359, 361, 362, par. 1, 365, and 366, and 370, par. 3, C.P.C.K, the court finds the defendants N K,

A Z, S H and S F **guilty** of abusing official position or authority, committed in co-perpetration (contrary to articles 422, par.1, read with art. 31 C.C.K.), because ¹ it has been proven that the said accused have committed acts ² with which they have been charged, namely, it has been established beyond reasonable doubt that the defendants along the execution of the contract for the projection and construction of infrastructure in the industrial park in Drenas Nr. MTi/22/07/2005, to be carried by “Eltoni Company” owned by, H B, on 25/07/2006 have allowed a payment of 135.278,20 Euros to “Eltoni” company that included 50.000 Euros that were not due, as this last amount had already been paid in advance on 07/06/2006 as part of the advanced payment in the amount of 140.689,62 Euros as per the document entitled “situacioni i pare avansues”, dated 31/05/2006, advance payment that was allowed by the defendant N K on 07/06/2006 and at the time the acting permanent secretary was already the defendant A Z, who did not stop it. Instead of paying 135.278,20 Euros on 25/07/2006, 50.000 Euros should have been deducted from it. In the execution of that contract there could not be any advance payment and therefore no advance payment could have been made before, because the contract, in the general conditions (in the payment section, paragraph 20) stated “advanced payment amount shall be 0%”. The defendant N K as director of the procurement department approved the said payment of 135.278,20 Euros on the 25/07/2006, the defendant S H approved it as certifying officer also on 25/07/2006 and the defendant A Z as acting permanent secretary did not stop the payment, despite at the time there was also the pre-existing document situation number 33, dated also 21/07/2006, but signed by the supervising company “North” in which it was clearly stated that the 50.000 Euros had to be deducted. The defendant S F as Chief of Division for Enterprise Support and Regional Development, as per the contract he signed with the Ministry of Trade and Industry on 07/06/2004, also failed to oversee the process and works related to the Industrial Park in Drenas and as an official of the said Ministry involved in the Department of Private Sector Development to which the project belonged, and as foreseen in the contract (article 6, right of inspections and supervision of the works in the Industrial Park Drenas) did not carry on his managing duties on the project as per his contract with the Ministry, in relation to the documents pertaining the said payment, that

¹ The facts in the enacting clause are only an overview to allow the understanding of the decision.

² “Acts” comprises “actions” and “omissions”.

he did not stop or reported about, hence allowing it, as he was also tasked with the supervision of the project.

By acting as said, they abused their official position and damaged the budget of the Ministry of Trade and Industry in excess of 2.500 Euros and the said payment results in a material benefit exceeding 5.000 Euros to “Eltoni” company. Following an internal audit in the Ministry of Trade and Industry conducted in 2007 by the now defendant A Z, the economic operator “Eltoni”, owned by H B, was requested to return the above mentioned amount of 50,000 Euros – out of which up to day only 5.000 Euros were returned by the defendant H B, on 10/04/2007 .

The defendants at the time held official positions in the Ministry of Trade and Industry and through their joint acts, actions and omissions, they violated their duties and substantially contributed to the commission of the criminal offence. At the time the defendants behaved in the way described above, they were able to understand and control their acts, which they desired, knowing that their acts were forbidden and punishable by law.

Also in relation to count 1, and in accordance with the said legal provisions, but now read together with Articles 359, 360, par.2, 361 and 363, par. 3, C.P.C.K., the court finds that the defendant H B committed part of the acts he was charged with, because it has been established that the defendant as owner of the “Eltoni” company during the execution of the contract for projection and construction of infrastructure at industrial park in Drenas Nr. MTi/22/07/2005, in cooperation and coordination with at least other defendant official in the Ministry of Trade and Industry, the defendant N K, as head of the procurement department and signer of the contract dated 07/10/2005, and not excluding other officials in that Ministry, the defendant B presented to the Ministry of Trade and Industry, on behalf of his company “Eltoni”, documents with the logo and stamp of that company, and bearing his signature, documents that were stating facts that were not true in relation to the works performed and their cost, knowing that the contents of the documents presented were false for not corresponding to the reality and would be used in the Ministry of Trade and Industry to formally enable the advance payment and other payments,

including those where the advanced payment would be paid-back by deduction in installments, concerning the said contract of projection and construction of the Industrial Park in Drenas. Namely, the defendant B has presented to the Ministry of Trade and Industry the following documents: **A)** - dated 31/05/2006, “Situacioni i Pare Avansues”, stating in row 6 amount of conducted work according to this situation: 156.321,80 Euros, in row 7 deducted based on the agreement: 15.632,18 Euros, in row 9 for the payment according to this situation 140.689,62; **B)** “Situacioni i Pare 20/06”, without date, under items A, B, C work in the amount of 116.339,26 Euros plus 15% tax and total amount of 135.278,20 Euros; **C)** - dated 21/07/2006, “Situacioni i Dyte 3/2006”, “document 33”, stating in row 6 amount of conducted work according to this situation: 150.309,11 Euros, in row 7 deducted based on the agreement: 15.030,11 Euros, in row 8 for the payment it remains 135.278, 20 Euros, in row 9 advanced payment 140.689,60 Euros, in row 9A deducted from the present situation 50.000 Euros, in row 9B advance payment which remains to be deducted 90.689,60 Euros and on row 10 for the payment according to this situation 85.278,20 Euros and **D)** the invoice 39/06, dated 21/07/2006, produced on an “Eltoni” letterhead sheet, bearing two “Eltoni” stamps (one on the top and one at the bottom), stating works in the amount of 127.762,74 Euros, added by tax 15% in the amount of 22.546,11 Euros, in the total amount of 150.309,11 Euros, deducting from it 10% in the amount of 15.030,91 Euros, and claiming to be paid the total amount of 135.278,20 Euros.

The defendant behaved in the way described above although he was able to understand and control his acts, which he desired, knowing that his acts were forbidden and punishable by law.

In the indictment the Prosecution charged the defendant B for misuse of economic authorizations (contrary to article 236, paragraphs 1.2 and 2, Provisional C.C.K.) but there is one constituent element to the criminal offence that does not correspond to the established facts (“*and in this way **misleads** the managing bodies within the business organization or legal person to err in decision-making*” – **emphasis added**) and therefore the said criminal offence is not the one that was perpetrated, given that the said falsified documents were not what led (or to say it better, what “**mised**”) to the payments; rather the documents were only the necessary means to give inside the Ministry of Trade and Industry (and later at the Ministry of

Finance) an appearance that the payments were lawful, in line with the applicable laws and specially in line with the contract – by which advance payments were not allowed as the percentage for it was 0%.

Therefore, for the lack of one of the elements of the constituent offence of “misuse of economic authorizations”, the court requalifies (as per Article 360, par. 2, C.P.C.K., “*the court shall not be bound by the motions of the state prosecutor regarding the legal classification of the act*”) the acts committed by the defendant H B to the criminal offence of falsifying documents – pursuant to Article 332, par. 1, of the P.C.C.K., “*whoever draws up a false document, alters a genuine document with the intent to use such document as genuine or knowingly uses a false or altered document as genuine shall be punished by a fine or by imprisonment of up to one year*” (the new law is not more favorable, as the foreseen sanction is now a “fine or by imprisonment of up to three years”, Article 398 C.C.K.).

Having come to this stage, and pursuant to Article 90, par. 1, subparagraph 6 of the P.C.C.K., we see that the term to the statutory limitation is 2 years and the absolute bar on prosecution of the criminal offence of falsifying documents is 4 years, as per Article 91, par. 6. P.C.C.K. and such term of 4 years has already elapsed (on 21/07/2010), as the last document of the above mentioned documents ³ is dated 21/07/2006; the said term had elapsed even before the date on which the prosecutor issued a ruling to initiate investigations, 10/12/2011.

Therefore, accordingly, pursuant to Article 363, par. 1.3, C.P.C.K., **the court rejects this charge.**

In relation to count 2, pursuant to Articles 359, 361, 362, par. 1, 364, par. 1.1.3, and 370, par. 3, C.P.C.K, the court finds the defendants N K, S H and S F **not guilty** of the criminal offence of accepting bribes (contrary to article 343, par.1, Provisional CCK), because it has not been proven beyond reasonable doubt that the following accused have committed the acts with which they have been charged, namely, it has not

³ We mentioned only these documents as the court should not go beyond the indictment, Article 360, par. 1, C.P.C.K., “*the judgment may relate only to the accused and only to an act which is the subject of a charge contained in the indictment as initially filed or as modified or extended in the main trial*”.

been established that ⁴ “from 14.09.2005 when the evaluation commission made the report on evaluation and recommendation of bids for awarding the contract concerning the tender for construction of infrastructure at the industrial part in Drenas Nr. MTI/22/07/2005 whereupon “ELTONI” - company owned by H B - was awarded the contract and until the conclusion of contracted works from this company on 31.12.2007, the defendants N K as an official person – Director of the Procurement Department – and S F as an official person – Head of Sector for Businesses and Regional Development – both at the Ministry of Trade and Industry, acting in coordination and cooperation one with another, received bribes from the defendant H B in order not to carry out the official duties they were obliged to, whereas defendant H B as owner of “Eltoni” company gave bribes to the defendants N K and S F in the following way: one day following the conclusion of the evaluation of bids and recommendation for awarding the contract for construction of infrastructure of industrial park in Drenas has invited the defendant H B at the restaurant “Tirana” in Pristina. Present were also the other defendant, S F, as well as the witness H Z. He informed him that his company “Eltoni” had won the tender in question. However, in order to proceed with the implementation of works, he told H that the latter should give them 180,000 Euros an amount which H agreed to either give to S F or witness H Z in the following way: within two days, the amount of 130,000 Euros, whereas the remaining amount during other payments. And, according to this agreement H B through his employee Y C on the same day had send N the amount of 100,000 Euros in Pristina at a place called “Kurrizi”. The money was put inside a black plastic bag and Y C did not know what it contained. The other amount of 35,000 Euros H gave personally to N at “Ana Benz” located in the motor way Pristina-Peja at Sllatina and during the implementation of works the amount of 45,000 Euros at Hotel “Palas” in Mitrovica in the presence of the driver of “Eltoni” company, A SH. The last amount was supposed to be picked up by S F but it was N K himself who came to take the money. H B gave to S F personally 50,000 Euros at restaurant “Qershiat e Llapashtics” located in the entrance to Podujeva near the house of S F. So, in total defendant H B gave the following amounts as bribes: to N K a total amount of 180,000 Euros; and to the defendant S F the amount of 50,000 Euros. Likewise, defendant S H while acting in the

⁴ In this case the facts will be copied directly from their description in the indictment.

capacity of a financial officer received a bribe from H B in order not to carry out official tasks which he was obliged to fulfill in the following way: by the end of 2007, S H called on the phone H B and told him “do you want me to transfer all the money” and as the defendant H B said it was not possible S H replied “that it is possible but you have to give me 3,000 Euros”. H B told him that was not a problem. S H went to H B’s office at the industrial park and received 3,000 Euros. S H then transferred all the money to H B”.

In relation to count 3, pursuant to Articles 359, 361, 362, par. 1, 365, and 370, pars. 3 and 4, C.P.C.K, but now read together with Article 360, par.2, C.P.C.K., the court finds the defendant N K **guilty** after requalifying (as per Article 360, par. 2, C.P.C.K.) the established facts, as the established facts, in relation to any amount of damage, do not match all the elements that are constituent of the criminal offence of entering into harmful contracts (contrary to article 237.1 and 2 Provisional C.C.K., according to which “*the perpetrator shall be punished by imprisonment of one to ten years*”), but are constituent of the more lenient criminal offence of abusing official position or authority, contrary to articles 422, par.1 and par. 2.1, C.C.K., because it has been proven that the accused has committed part of the acts with which he has been charged, namely, it has been established that ⁵ following the announcement of the tender on 22/07/2005 for the “Projection and Construction of the Infrastructure of the Industrial Park in Drenas” the bids “for design and construction of the infrastructure of the industrial park in Drenas” were evaluated, and “Eltoni” company was selected, on 07/10/2005 the contract for the project and construction of infrastructure of the industrial park in Drenas, between the Ministry of Trade and Industry and “Eltoni Company”, represented by H B, was signed, in the amount of 144.000 Euros / price per unit 69.825,25 Euros (without mentioning number of units). Without any other tender, the said contract was changed by the first annex contract dated 20/07/2006, between “Eltoni Company” and the Ministry of Trade and Industry, signed by the defendant N K on behalf of the Ministry, in which it is stated: “Considering that the parties listed above have made a contract for carrying on works in

⁵ The facts in the enacting clause are only an overview to allow the understanding of the decision.

the project Industrial Park Drenas, (...) Based on the works carried out by the contractor and its request in changing the conditions of payment and upon the approval by the MTI, whereby parties agree to mutually change the condition of payment (...) Have agreed as follows: (...) Article 1 (about changing clauses 17.3 to 17.5), Article 2 (about payments made pursuant “situations”) (...) Article 4: The total value of the contract shall be 1.730.000 Euros (...)”. After this change to the contract through the said annex contract dated 20/07/2006, another annex contract was made between the Ministry of Trade and Industry, signed again by the defendant N K, and “Eltoni Company”, represented by its owner, H B, on 28/09/2006, stating: “Considering that the parties listed above have made a contract for carrying on works in the project Industrial Park Drenas based on the works carried out which came after the approval of the request on negotiated procedure before the announcement of the contract with the PPA, hereby we enter this annex contract (...) Article 1: The original contract dated 07/10/2005 as mutual agreement between parties the total value of which is 1.730.000 Euros (...) Article 2 The total value of the annex contract shall be 14.580,00 Euros (...)”. Despite the amount of the initial contract dated 07/10/2005 was changed only with the first annex contract (article 4 of such annex), dated 20/07/2006, one month early, on the 20/06/2006 the defendant N K had already submitted to the Public Procurement Agency, pursuant to section 34, par. 3 (amongst others), of the Law on Procurement 2003/17, a Request To Use Limited or Negotiated Procedures for additional work stating: “approximate value of contract: 1.700.000 Euros, foreseen value: value of additional works: 14.580 Euros”, when at that time (on 20/06/2006) the amount of the contract dated 07/10/2005 (the only contract existing) was 144.000 Euros / price per unit 69.825,25 Euros, not 1.700.000 Euros.

At the time the defendant behaved in the way described above he was able to understand and control his acts, which he desired, knowing that his acts were forbidden and punishable by law. By acting as described, he abused his official position.

For the above the Court imposes the following

Sentencing:

Count 1 (defendants N K, A Z, S H and S F): Abuse of official position as per Article 422 C.C.K., read together with Articles 3, par. 2, and 31 C.C.K., in conjunction with Articles 41, 45, 50, 51, 52 (if suspended) and 73 C.C.K.

The court imposes the following punishments of imprisonment:

N K: 12 months of imprisonment.

A Z: 10 months of imprisonment.

S H: 8 months of imprisonment.

S F: 7 months of imprisonment.

Count 3 (defendant N K):

N K: Abuse of official position as per Article 422 C.C.K., read together with Articles 3, par. 2, and 31 C.C.K., in conjunction with Articles 41, 45, and 73 C.C.K.

The court imposes the following punishment of imprisonment: 1 year and 6 months (18 months) of imprisonment.

The aggregate punishment of imprisonment of the defendant N K

Pursuant Article 80, par. 2.2. C.C.K., between the minimum of 18 months of imprisonment and the maximum of 30 (12 + 18) months of imprisonment is hereby set in 26 months of imprisonment for the commission of two criminal offences of abuse of official position or authority, pursuant to Article 422 C.C.K.

Suspension of the imprisonment sanctions imposed to the defendants A Z, S H and S F:

Pursuant to Article 52, par.2, C.C.K., the punishments shall not be executed if the convicted persons do not commit another criminal offence for the verification time and the court sets the verification period in 2 years for the defendant A Z, S H and S F.

According to Articles 52, par. 3, and 59 C.C.K, the suspension also includes the obligation of refraining from changing residence without informing the probation service.

Accessory punishment(s)

In relation to an accessory punishment to the defendant N K (whose sentence is not suspended), the court decided not to impose the accessory punishment foreseen in Article 62, par. 2.1, read together with Article 65 C.C.K. “*prohibition on exercising public administration or public service functions*”.

Confiscation of objects: There are no objects listed in the indictment subject to forfeiture.

Property claim: The property claimed, compensation for damages, filed with the Court by the Ministry of Trade and Industry on 22 May 2012 is rejected as on that date the Ministry of Trade and Industry was already informed of the decision taken in the case number 164/2008, by a judgment dated 04/05/2011, in which the Supreme Court of Kosovo has refused as ungrounded the appeal of the respondent and confirmed the ruling of the Commercial Court of the District of Pristina, case number 272/2007, dated, 18/06/2008, in which the claimant was also the Ministry of Trade and Industry, in Pristina, against the respondent NNP “Eltoni” and the court has adjudicated in favour of the claimant and as a consequence the respondent was convicted to return to the claimant the amount of 45.000,00 Euros with the annual interest of 2,5%, commencing on 19/04/2007, up to the final payment in the term of 8 days, from the day the judgment would become final (04/05/2011); if failed to do so, there would be a compulsory execution.

The amount is the same and it is now a matter of execution of the final civil judgment as it cannot be subject of another decision.

The costs of the proceedings: Pursuant to Article 450 C.P..K.) shall be paid by the defendants who were convicted. Pursuant to Article 450, par. 2.6, the scheduled amounts are 150 Euros to each of the defendants, in the total amount of 600 Euros.

The court, *ex officio*, sees no need of announcement of this judgment (enacting clause) in the press or radio or television, Article 365, par. 1.1.6, C.P.C.K, to protect the values of Justice and Public Interest.

Legal remedy: Pursuant to Articles 374, par. 1.1, and 380, par. 1, an appeal against this judgment may be filed within 15 days of the day its copy has been served to the parties. The appeal should be addressed to the Court of Appeals through the Basic Court of Pristina.

Basic Court of Pristina

(P. No. 144/13; PPS: No. 30/2010)

Done in English (authorised language)

Date 21 September 2015

The Presiding Judge

EULEX Judge Jorge Martins Ribeiro