

THE SUPREME COURT OF KOSOVO  
PRISHTINË/PRIŠTINA

Case number: PML-KZZ-242/15  
Date: 26 November 2015  
Basic Court: Prishtinë/Priština, PKR nr 18/15

The Supreme Court of Kosovo, in a Panel composed of EULEX judge Elka Filcheva-Ermenkova, presiding and reporting Judge, EULEX Judge Dariusz Sielicki, and the Supreme Court Judge Avdi Dinaj, as panel members, assisted by Adnan Isufi, EULEX legal advisor, acting in the capacity of recording clerk, in the criminal case against the defendants:

ET

[REDACTED]

ML

[REDACTED]

DP

[REDACTED]

AG

[REDACTED]

HT

[REDACTED]

AD

[REDACTED]

SL

[REDACTED]

ET
ML  
 Charged for having allegedly committed the criminal offences as follows: the defendants ██████████ and ██████████ for criminal offences of Fraud and Falsifying Documents in co-perpetration in violation to Article 335 paragraphs 1 and 5 and Articles 398 paragraph 1 in conjunction with Article 31 of the Criminal Code of the Republic of Kosovo (hereafter "CCRK");  
DP ██████████ for the criminal offence of Abusing Official Position of Authority, in violation of Article 422 of the CCRK and criminal offence of Entering into Harmful Contracts, in violation to Article 291 paragraphs 1 and 2 of the CCRK; ██████████ for the criminal offence of Abusing Official Position or Authority in violation of Article 422 of the CCRK; ██████████ for the criminal offence of Abusing Official Position of Authority, in violation of Article 422 of the CCRK; ██████████ for the criminal offence of Incitement to Abusing Official Position or Authority, in violation to Article 422 in conjunction with Article 32 of the CCRK; ██████████ for the criminal offence of Incitement to Abusing Official Position or Authority, in violation of Article 422 in conjunction with Articles 31 and 32 of the CCRK;  
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seized of the Request for Protection of Legality filed by EULEX Prosecutor Claudio Pala, from the Office of the State Prosecutor of the Republic of Kosovo, dated 9 September 2015,

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 having considered the responses of the defence counsels, ██████████ representing the defendant ██████████ defence counsel ██████████ representing the defendant ██████████ defence counsel ██████████ representing the defendant ██████████ defence counsel ██████████ representing the defendant ██████████ defence counsel ██████████ representing the defendant ██████████ defence counsel ██████████ representing the defendant ██████████  
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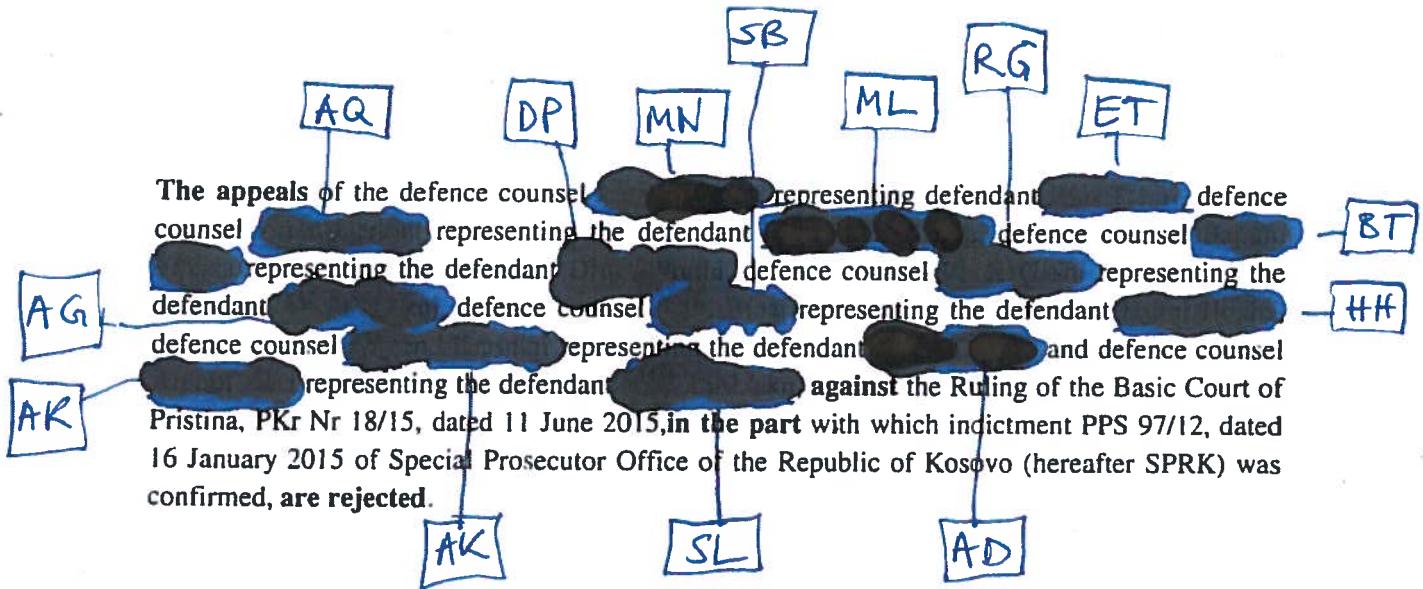
having deliberated and voted on 26 November 2015;

acting pursuant to Articles 432, 433, 434 and 435 of the Criminal Procedure Code of Kosovo (hereinafter "CPC"); with majority of votes renders the following:

### RULING

**The Request for Protection of Legality** filed by EULEX Prosecutor Claudio Pala, from the Office of the State Prosecutor of the Republic of Kosovo, dated 9 September 2015, is hereby granted.

**The challenged Ruling of the Court of Appeals PN 365/15, dated 5 August 2015, in the part which modifies Ruling of the Basic Court of Pristina PKr Nr. 18/15 dated 11 June 2015 and declares Indictment PPS 97/12 dated 16 January 2015 as belated, is modified.**



The case is returned to the Basic Court of Pristina to proceed accordingly.

### REASONING

#### I. PROCEDURAL BACKGROUND

1. This case relates to a tendering process for security services conducted by the Kosovo Energy Corporation J.S.C. ("KEK") in 2012. It is alleged that the defendants' unlawful conduct resulted in the award of a contract to a security company "Security Code", which bid as part of a consortium, the company and WDG (the Consortium), in the tender process. The contract in question was for a period of two years in amount of € 6, 182,609.76, a sum this which KEK is alleged to have been damaged.

2. On 5 October 2012, the Prosecutor issued a Ruling on Initiation of the Investigation against the defendants [redacted] [redacted] [redacted] [redacted] and [redacted] for having allegedly committed the criminal offence of Abuse of Official Position or Authority in violation of Article 339 paragraphs 1, 2 and 3 of the Criminal Code of Kosovo (hereafter "CCK").

3. On 15 March 2013, the Prosecutor expanded the investigation to include the defendant [redacted] in respect of the alleged criminal offence of Abuse of Official Position or Authority, in violation of Article 422 paragraphs 1, 2 and 3 of the CCRK. The prosecutor also expanded the investigation to include the alleged criminal offences of Fraud and Falsifying Documents against the defendants [redacted] and [redacted] and for criminal offence of entering into harmful contracts in violation to Article 192 paragraphs 1 and 2 of the CCK against the defendant [redacted]. The prosecutor requalified the alleged criminal offence of Abuse of Official Position or Authority in violation of Article 339 paragraphs 1, 2 and 3 of the CCK to a similar criminal offence but contrary to Article

422 paragraphs 1, 2 and 3 of the CCRK against the defendants [redacted] and [redacted]

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- The investigations have been expanded again on 12 November 2015 respectively on 10 April 2014, against the defendants [redacted] and [redacted] for alleged criminal offence of Incitement to Abuse Official Position or Authority, in violation of Article 422 paragraphs 1 and 2 of the CCRK.

- On 20 November 2014, Prosecutor filed a motion to extend the period of investigations which was set to expire on 4 October 2014.

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- On 16 December 2014, the Pre-trial Judge retroactively extended the period of investigations against the defendants [redacted] and [redacted] until 16 January 2015. By the same ruling, the pre-trial judge declined to extend the period of investigations in respect of the defendants [redacted] and [redacted] stating the prosecutor's application was premature in this regard.

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- On 17 March 2015, the Court of Appeals granted the appeals of the defence counsels of the defendants [redacted] and [redacted] against the ruling of the Pre-trial Judge dated 16 December 2014, holding that the period of the investigations had expired on 5 October 2014.

HH

AD

- On 16 January 2015, the Prosecutor filed an Indictment and the initial hearing in this criminal case was held on 10 January 2015. During the course of initial hearing defence counsel filed objections to evidence and requested the dismissal of the indictment.

- On 11 June 2015, the first instance court rejected the objections of the defence counsels concerning the evidence and the dismissal of the indictment, thus confirming the latter.

- On 5 August 2015, the Court of Appeals, deciding on the defence counsels appeals against the first instance court ruling dated 11 June 2015, partially granted the appeals and dismissed the indictment as belated.

11. The Court of Appeals rejected as ungrounded the allegations against the evidence findings. In the latter part the ruling is not challenged. Therefore the Supreme Court needs to elaborate neither on the admissibility nor on the merits of such a hypothetical request.
12. In his request the Prosecutor formulated several different *petita* (infra paragraph 21) therefore it is relevant to explain that the impugned Ruling relied on the premise that the time for investigation may not be extended after the end of the second year, because the investigation is already terminated *ex-lege* (see page 8 of the impugned Ruling).
13. On 9 September 2015, EULEX Prosecutor Claudio Pala from the Office of the State Prosecutor of the Republic of Kosovo filed a Request for Protection of Legality against the Ruling of the Court of Appeals dated 5 August 2015.

14. The request for protection of legality was served on the defendants and their defence counsel.

15. Responses were submitted by defence counsels, [redacted] representing the defendant [redacted] defence counsel [redacted] representing the defendant [redacted] defence counsel [redacted] representing the defendant [redacted] defence counsel [redacted] representing the defendant [redacted] Defence counsel [redacted] supplemented later on his initial response to the request for protection of legality.

Handwritten annotations in boxes: AD, MN, AG, RG, AK, ET, AG, ML, AK, SB, HH.

## II. SUBMISSIONS OF THE PARTIES

### A. Request for Protection of Legality of the Public Prosecutor

16. In summary the prosecutor invokes violation of art. 159, paragraph 1 of the Criminal Procedure Code of Kosovo (hereinafter the CPCK), claiming that the Court Appeals wrongfully concluded that the expiration of the time for investigation precludes the possibility for filing of an indictment. Further the Prosecutor elaborates on the system of the CPCK with regard to the different stages of the criminal procedure as defined in article 68 *ibid*. The Prosecutor elaborates as well on the issue whether a request for extension of investigation could be filed after the expiration of the time limits of 2 years under art. 159, paragraph 1 *ibid*. The Prosecutor claims that the mechanism for extension provides for flexibility that limits situations beyond the control of the Prosecutor, concluding that after all a motion for extension would still be admissible even filed after the expiration of the

two years, as long as the pre-trial judge determines it is still admissible under his/her role under art. 245 et seq., which was the case (earlier a pre-trial judge extended the investigation on the basis of the motion of the Prosecutor, filed after the expiration of the 2 years period), but in the impugned ruling the Court of Appeals embraces the opposite view, as mentioned already *supra*, paragraph 12. In addition the Prosecutor argues that the impugned Ruling stands in contrast with previous practice of the courts. The request alleges that the impugned Ruling failed to provide adequate interpretation of law, containing only rudimentary reasoning.




17. The Prosecutor agrees with the Court of Appeals holding that under normal circumstances the motion requesting additional time for conducting an investigation should be filed before the expiration of the time originally allotted for it. However, as mentioned, the pre-trial judge is in the best position to determine if a delay in filing a motion for extension of time was justified. The list of factors to be considered as potentially justifying a delay in filing a motion for extension of investigation is necessarily open-ended. There are many factors which need to be assessed on a case by case basis leaving it to the pre-trial judge to balance any potential prejudice caused by the untimely filing with the one resulting in a diminished protection of law and order in the society.
18. Concerning the time allotted for an investigation in case of its expansion, the prosecutor submits that the so far firm practice of the courts has been to treat every expansion of an investigation as restarting the time allotted to it in relation to a new criminal offence and/or suspect.
19. As far as the time limit for filing an indictment is concerned, the prosecutor submits that the Court of Appeals' interpretation of Article 159 of the CPC was equally rigid. The Prosecutor argues that no provision of the CPC prevents prosecution from filing an indictment after the expiry of the time limit for the investigations and until the expiry of the statutory limitation for the criminal offences. According to the prosecutor, the expiry of the time limit for the investigations only marks the *ex lege* end of the investigation phase, whereas, the criminal proceedings (of which the investigation is only one stage) are terminated only by a final decision of the court as it can be inferred by Article 4 paragraph 1 of the CPC. Prosecutor submits that Article 103 of the CPC merely sets out the rules for the investigative actions and it is therefore not connected with the filing of the indictment which may come later on. According to Article 240 of the CPC an indictment can be filed "after the investigation has been completed" and from which it can be inferred that the filing of an indictment is not an investigative activity. The Prosecutor argues that analysis of the Basic Court whether the delay is justified in a particular case, ensures that the rights of the defendant are sufficiently protected. According to the Prosecutor, the mere belatedness of the indictment is foreseen in the procedural code neither as a legal category nor as a circumstance that bars prosecution and that would entail the dismissal of the indictment.



20. The prosecutor qualified the challenges he made as substantial violations of the provisions of the CPCK pursuant to article 384 paragraph 1, subparagraph 12 as read in conjunction with article 370 of the CPC; and article 384 paragraph 2, subparagraph 1, as read in conjunction with Article 103 paragraph 4, Articles 159, 253, 358 paragraph 1.3 and 416 of the CPC.

21. The Prosecutor moves the Supreme Court of Kosovo:

- to declare that the impugned ruling has violated the provisions of article 384 paragraph 1 subparagraph 12 as read in conjunction with Article 370 of the CPCK with regard to the need that the decision of the judge must contain adequate reasoning;
- to reaffirm the principles already expressed in the jurisdiction that the motion for extension of investigation may be validly filed after the time originally allotted for the investigation by article 159 CPCK, that every expansion of an investigation results in restarting the time allotted to it in relation to a new criminal offence and/or suspect, that an indictment may be validly filed even after the time allotted for the investigation by article 159 of the CPCK lapsed, as long as such a delay is reasonable;
- and to that effect to declare that the impugned ruling has violated the provisions of article 384 paragraph 2, subparagraph 1, as read in conjunction with Article 103 paragraph 4, Articles 159, 253, 358 paragraph 1.3 and 416 of the CPC.

B. Responses of the Defence counsels

22. Defence counsel  representing the defendant  moves the Supreme Court to reject the request for protection of legality as ungrounded. Defence counsel  makes reference to article 438 paragraph 2 and article 432 of the CPCK arguing that the request is in contrast with the grounds for which a request for protection of legality may be submitted. Defence counsel argues that the prosecutor's allegation that every expansion of the investigation, automatically, means also a restart of the time limit or that prosecutor can file indictment after conclusion of the investigation is contrary to the content of the provision of Article 159 of the CPC.

23. Defence counsel  representing the defendant  submits that the request for protection of legality is ungrounded. Defence counsel points out that prosecutor, merely makes reference to other cases. The case law however, in Kosovo, is not source of law, respectively, legally binding. Defence counsel argues that the examples referred to by the prosecutor date back when previous Criminal Code and Procedure Code were in force. Therefore, defence counsel moves the court to reject the request as ungrounded.

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24. Defence counsel [redacted] representing the defendant [redacted] proposes the court to reject the request as ungrounded. Defence counsel argues that the Court of Appeals provided sufficient reasoning on points raised by the prosecutor in the request for protection of legality. Defence counsel submits that prosecution ought to act within the deadlines. Provided that the case is complex, prosecution must request for additional time. According to the defence counsel, the prosecutor has two options either to file an indictment or to request from the court extension of the time of the investigation. In the case at hand, defence counsel argues that prosecutor has failed to act in either ways.

AQ

ML

25. Defence counsel [redacted] representing the defendant [redacted] proposes the court to reject the request as ungrounded and affirm the impugned ruling. Defence counsel argues that the ambiguous provisions, if they are as such, as alleged by the prosecutor, should be interpreted in favor of the defendant. The defendants should not be subjected to restriction of their rights and their legal security should not be impaired. Defence counsel argues that the investigation cannot be extended beyond the set deadline regardless of the fact if the investigations are expanded for a new criminal offence or against a new defendant. Otherwise, defence counsel argues, a person cannot be under investigation merely because the investigation has not expired for other defendants. The defence counsel submits that the court should prevent prolongations of the investigation by the parties to the proceedings and/or misuse of the authorizations, in case that applies for the prosecutor. Defence counsel argues that after expiration of two years, prosecutor should have rendered a ruling for termination of the investigation. This ruling would not have been appealable. The only legal remedy available which could be used in such a case when the criminal proceedings were dismissed before the main trial, would be a request for reopening of the proceedings provided that other criteria are met *i.e* abuse of official duties by the public prosecutor. However, this is not the case in the case at hand. Defence counsel argues that according to article 159 the investigation shall be terminated after two years of the initiation of the investigation. That means, according to the defence counsel that the indictment should be made before the expiration of the investigation. Defence counsel makes reference to a legal opinion of the Supreme Court of Kosovo, dated 19 January 2015, which states that filing of the indictment after the expiration of the legal time limit stipulated in Article 159, is an unlawful action as the law obliges the termination of the proceedings.

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AK

26. Defence counsel [redacted] representing the defendant [redacted] moves the Supreme Court of Kosovo to reject the request for protection of legality as ungrounded. Defence counsel argues that the request is in violation with the provisions of the Criminal Procedure Code, Criminal Code, Constitution of the Republic of Kosovo and European Convention on Human Rights. Defence counsel argues violation of Article 432 (3) of the CPC because a request can be filed by the state prosecutor of the Republic of Kosovo and not EULEX prosecutor. Defence counsel argues violation of Article 4 of the CPC, namely, principle *ne bis in idem*, which stipulates that nobody can be prosecuted and punished for a



criminal offence for which he was acquitted or convicted by a final decision or when the criminal proceedings were terminated by a final decision of the court. Defence counsel submits that pursuant to Article 3 (2) of the CPC, any doubts regarding facts relevant to the case or doubts concerning application of a certain criminal law provision should be interpreted in favor of the defendant. Defence counsel argues that, in the case at hand, the investigation expired on 4 October 2014, while the indictment has been filed on 16 January 2015. Article 159 (1) of the CPC, stipulates that if the indictment is not filed within two years of the initiation of the investigation, the investigation shall automatically be terminated. Defence counsel argues that the deadline is of preclusive character and it cannot be extended. Defence counsel submits that prosecutor failed to file an indictment on time. Faced with this situation, on 20 or 24 November 2014, prosecution filed a motion for extension of the time of investigation (about 40 days after expiration of the time for investigation) in order to make use of the extension to overcome the prosecutor's failure to file the indictment within the deadline. Further, Defence counsels argues contradiction on the applications of the prosecutor which do not contain any protocol date. The motion for extension of the investigation had not been served to the defence, therefore defence counsel submits, it has to be considered as a void document. Defence counsel also argues that prosecutor failed to recognize the mandatory character of the opinions of the Supreme Court of Kosovo. Defence counsel makes reference to a number of rulings, attached as supplement, issued by the courts in Kosovo in this regard. Further, Defence counsel elaborates thoroughly the conduct of the proceedings in the first instance. Defence counsel argues that first instance court failed to hold second hearing in this case which the issues raised by prosecutor and defence would have been clarified. Defence counsel argues that his client did not plead guilty. Defence counsel argues that indictment is incorrect, that prosecuting authorities violated his client right for private life intercepting his communication with his wife. Defence counsel, further, argues violation of the criminal law principle of *nullum crimem nulla poena sine lege* when it comes to qualification of the criminal offence etc.

### **III. Proceedings before the Supreme Court of Kosovo:**

1. The Supreme Court of Kosovo is the competent court to decide on the request [Art. 435 CPC].
2. The Supreme Court of Kosovo decided in a session on deliberation and voting. The parties' notification of this session was not required.

### **IV. Findings of the Supreme Court of Kosovo**

#### **A. Admissibility of the Request**

27. The Supreme Court of Kosovo finds no procedural errors in the challenged Ruling that would have to be taken into account *ex officio*. Pursuant to the provisions of the CPCK, the

Supreme Court of Kosovo shall confine itself to examine those violations of the law which the requesting party alleged in his request.

28. The Court first examines whether the Applicant is an authorized party to submit the Request for Protection of Legality to the Court, in accordance with the requirements of the CPC.

In this respect, Article 432 of the CPC provides:

1. *A request for protection of legality against a final judicial decision or against judicial proceedings which preceded the rendering of that decision may, after the proceedings have been completed in a final form, be filed in the following instances:*
  - 1.1. *on the ground of a violation of the criminal law;*
  - 1.2. *on the ground of a substantial violation of the provisions of criminal procedure provided for in Article 384, paragraph 1, of the present Code; or*
  - 1.3. *on the ground of another violation of the provisions of criminal procedure if such violation affected the lawfulness of a judicial decision.*
2. *A request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation, nor against a decision of the Supreme Court of Kosovo in which a request for the protection of legality was decided upon.*
3. *Notwithstanding the provisions under paragraph 1 of the present Article, the Chief State Prosecutor may file a request for protection of legality on the grounds of any violation of law.*

Further, Article 433 of the CPC provides:

1. *A request for protection of legality may be filed by the Chief State Prosecutor, the defendant or his or her defence counsel. Upon the death of the defendant, such request may be filed on behalf of the defendant by the persons listed in the final sentence of Article 424, paragraph 1 of the present Code.*
2. *The Chief State Prosecutor, the defendant and his or her defence counsel and the persons listed in the final sentence of Article 424 paragraph 1 of the present Code may file a request for protection of legality within three (3) months of the service of the final judicial decision on the defendant. If no appeal has been filed against the decision of the Basic Court, the time shall be counted from the day when that decision becomes final.*
3. *If a decision of the European Court of Human Rights establishes that a final judicial decision against the defendant violates human rights, the prescribed period of time for filing the request for protection of legality shall be counted from the day the decision of the European Court of Human Rights was served on the defendant.*

4. *Notwithstanding the provision under Article 432 paragraph 2 of the present Code, a request for protection of legality based on a decision under paragraph 3 of the present Article shall also be possible against a decision of the Supreme Court of Kosovo.*

29. Having reviewed the impugned ruling, the request for protection of legality and the responses from defence counsels, the Supreme Court of Kosovo establishes that the Request for Protection of Legality is admissible. The panel finds that the request was filed by an authorized person, as indicated in Art. 433 *ibid.* Article 11 paragraph 1 subparagraph 1.4 of the Law nr 03/L-225, on State Prosecutor as amended, states that "The Chief State Prosecutor shall have exclusive jurisdiction over third instance cases before the Supreme Court". The Prosecutorial functions in the Chief State Prosecutor Office are performed by the Chief State Prosecutor and prosecutors in the Office of the Chief State Prosecutor, in accordance with the relevant legislation in force. The Panel finds that, in the case at hand, the prosecutor submitting the request is assigned to cases at the Supreme Court level and is competent to file a Request.
30. The panel finds that the request is filed against a final decision and, therefore, is admissible pursuant to Art. 432 *ibid.* The finality of the ruling is confirmed by the fact that it terminated the procedure in final form.
31. The panel finds that the request is also filed on time, therefore admissible, pursuant to article 433 paragraph 2 of the CPC.

#### B. Legal issues

32. Having reviewed the impugned ruling, the request for protection of legality and the responses from defence counsels, the Supreme Court of Kosovo with a majority of votes concluded that the request for protection of legality is grounded.
33. At outset, the Supreme Court of Kosovo notes that in his request for protection of legality the Prosecutor not only requested the impugned ruling, which puts an end to the criminal proceedings, to be modified/annulled or declared (in the wording used by the Prosecutor) unlawful as violating certain provisions of the CPCK, but the Prosecutor as well requested the Supreme Court to answer in general to the questions as formulated in point 21 of the present ruling. This Panel of the Supreme Court will elaborate on these questions within the context of the current procedure as long as the issues raised are prejudicial to the legality of the impugned ruling. Otherwise the Court may not give general opinions/decisions that should promote unique application of the CPCK. This right is reserved to the General Sessions of the Supreme Court under article 23, paragraph 1 of the Law on Courts.
34. The subject of the request in front of this Panel is whether the impugned ruling violated the CPCK by dismissing the indictment as belated, because it was filed after the expiration of

the 2 years period under article 159, paragraph 1 of the CPCK. The formulated violation would be qualified under article 384, paragraph 2, subparagraph 2.1, second proposal CPCK.

35. In order to respond to this question this Panel made a systematic review of the CPCK reading all provisions related to the different stages of the criminal procedure as described in the CPCK.
36. First, article 68 of the CPCK defines four distinct stages of the criminal procedure, rightfully noted as well by the Court of Appeals. These are the investigation, the indictment and please stage, the main trial and the legal remedy. The formal criminal procedure is further preceded by initial steps taken by the police or information gathering according to Article 84 of the CPC, which is a special stage. Thus, the CPCK itself defines formally that investigation and indictment are two separate stages of the criminal procedure.
37. Second, the investigation and the filing of an indictment differ not only in formal aspect, based on the structure of the provisions of the procedural code, but also in their substance. The threshold of suspicion for filing an Indictment is higher than for initiation of the investigation. Article 102 of the CPCK requires only a reasonable suspicion for initiation of the investigation while the threshold for filing of the indictment is, according to Article 240 of the CPCK, a well-grounded suspicion.
38. Third, under article 159, paragraph 1 CPCK, as rightfully noted by the CoA, with the expiration of the 2 year period of the investigation, if not terminated by the prosecutor it is terminated *ex-lege*. However, and here the majority of the Panel disagrees with the Court of Appeals, this does not preclude the procedural right of the prosecutor to file an indictment. Argument systematically is to be found in the provision of article 240 *ibid* which provides that indictment is filed after the investigation has been completed. The law does not prohibit the prosecutor to file an indictment after the investigation has been completed/terminated *ex-lege*. The logical conclusion would be that the procedural right to file an indictment for the prosecutor precludes and is irreversible after the expiration of the statute of limitation as defined in the material criminal law. In the case at hand, that would be article 106 of the Criminal Code of Republic of Kosovo.
39. The majority of the Panel shares the reasoning given by the CoA in the used as a reference Ruling, dated 15 August 2013, in case number 543/2013, that an indictment has to be filed immediately, "preferably within days after the investigation" (paragraph 70 of the said Ruling). That is because every delay increases the risk, that the right of the defendant to a fair trial within reasonable time, may be violated. In case that such violation would be invoked in the future, if ever, the reasonableness of the length of the proceedings would be assessed according to the particular circumstances of the case (mainly its complexity) and if there would be inordinate delays, it will fall to the Prosecution to explain them. In

addition, again hypothetically, if criminal proceedings (any criminal proceedings, but those related to war crimes and other crimes under the international humanitarian law) would be unjustifiably long and if such proceedings end with a sentencing decision the length itself would be qualified as a mitigation circumstance.

40. However this is not the subject to be considered at the moment. First because formally the indictment is not belated and second because if "too late", being filed 3 months or so after the expiration of the investigation, it cannot be reasonably argued that the fair trial is no longer possible.
41. The majority of the Panel shares the opinion that, in order to prevent inordinate delays in the filing of the indictment, *de lege ferenda*, the legislator may decide to introduce a time preclusion for filing an indictment, following the termination of the investigation. However the law as it is now (*lex lata*) does not prescribe the indictment to be mandatorily filed before the end of the time for investigation in order to be "on time". Therefore this Panel, in its majority disagrees with the notion of "belated" indictment.
42. The majority of the Panel, for the reasons above, disagrees with the opinion expressed in a Circular, signed by the President of the Supreme Court from 19 January 2015 in this regard. The Circular was allegedly issued under the premise of art. 23 of the Law on Courts which provides for the General Session of the Supreme Court to issue opinions/decisions for the unification in the applications of the laws. The Circular contains the opinion of the President of the Supreme Court and undoubtedly reflects the stance expressed by the General Session of the Supreme Court. In either case it is highly respected by the members of this Panel. The majority however does not find it legally binding and does not agree with it.
43. The Panel concurs with the defence that provision related to length of investigation is preclusive, respectively unalterable. The investigation shall *ex lege* be terminated after expiration of period of the investigation. This is true, because, in such a case, the rights of the defendant/s are concerned in a specific way. That means, with other words, no investigative action can be taken by the prosecutor after expiration of the investigation period. The article is very clear as to the time limits of the investigation stage. It does not however entail, as already explained above, that an Indictment must be filed within the time limits for investigation.
44. The panel is mindful of the provision of article 438, paragraph 2 CPCK which stipulates that if the Supreme Court finds that a request for protection of legality filed to the disadvantage of the defendant is well founded, it shall only determine that the law was violated but shall not interfere in the final decision. The provision should be systematically read in connection with article 436, paragraph 3 and article 395 CPCK. The first prescribes

that Court in request for protection of legality would be bound by the prohibition for *reformatio in peius* under article 395 when the request is in favour of the defendant (which is not the case). The latter formulates what the content of the prohibition of *reformatio in peius* entails, which is that in case of a sentencing decision the latter may not be modified with respect to legal qualification of the offence and the criminal sanction imposed. Neither of these issues, qualification and/or punishment is subject of the current review (and the Panel will not elaborate whether this would be possible under Request for Protection of legality in general) thus there is no impediment for the Panel to act according to article 438, paragraph 1, subparagraph 1.1 CPCK. In addition the Majority of the Panel concluded that as long as the defendants are protected by the presumption of innocence they may not be considered as put in a disadvantageous position. More so, they would have the chance their innocence to be given the higher sanction of a decision on the merits of the case and their names cleared of all accusations.

### C. Conclusion

The impugned Ruling of the Court of Appeals PN 365/15, dated 5 August 2015, is modified to grant the Request for Protection of Legality dated 9 September 2015. The Indictment is not belated. The case is returned to the Basic Court of Prishtinë/Priština in order for the Presiding Trial Judge to proceed accordingly.

The Panel took this decision pursuant to Article 435 of the CPC solely on the basis of the requests and motions filed, namely article 384 paragraph 2, subparagraph 1 CPCK, in relation with art. 159 *ibid* as invoked by the Prosecutor. For clarity the Panel notes that it found no violation of article 384 paragraph 1 sub-paragraph 12 as read in conjunction with article 370 of the CPC. The Panel concluded that the issues under consideration are clear, thus making a session of the Panel unnecessary. For the reasons set forth above, it is decided as in the enacting clause.

## THE SUPREME COURT OF KOSOVO

### PRISHTINË/PRIŠTINA

PML-KZZ-242/15

Presiding Judge

Elka Filcheva-Ermenkova,

EULEX Judge

Dariusz Sielcki

EULEX Judge

Members of the Panel

Recording Clerk

Adnan Isufi

EULEX Legal Advisor

Avdi Dinaj

Supreme Court Judge