DISTRICT COURT OF PRISHTINË/PRIŠTINA

KA no.547/2011
12th December 2011

The EULEX Confirmation Judge Gianfranco Gallo, in the criminal case against the defendants:

1. Hashim Rexhepi, son of Aziz, DOB 05 April 1958, POB in village Celina, Municipality of Rahovec, address Rr e UCK no.17, Prishtinë/Priština, Albanian, Kosovo citizen, ID no: 1004332799
2. Ibish Mazreku, son of Mustafe, DOB 15 July 1969, POB in village Qifllake, Municipality of Rahovec, address Hospital neighborhood, Prishine, Albanian, Kosovo citizen, ID no: 1008189877

Charged with the following criminal offences:

Rexhepi and Mazreku

Count 1

- **Abusing official position or authority**, contrary article 339 paragraph 3 related to article 23 of the CCK, punishable from one to eight years of imprisonment;
- **Trading in influence,** contrary to article 345 par 1 related to article 23 of the CCK, punishable by a fine or imprisonment up to two years;

Rexhepi

Count 2

- **Abusing official position or authority**, contrary to article 339 paragraph 3 of the CCK, punishable from one to eight years of imprisonment,

Rexhepi

Count 3

- **Abusing official position or authority**, contrary to article 339 paragraph 3 of the CCK, punishable from one to eight years of imprisonment;

Rexhepi

Count 4

- **Abusing official position or authority**, contrary to article 339 paragraph 3 of the CCK, punishable from one to eight years of imprisonment;

- **Fraud** contrary to article 261 of CCK, punishable by a fine or imprisonment up to three years;
- **Trading in influence,** contrary to article 345 par 1 of the CCK, punishable by a fine or imprisonment up to two years;

Rexhepi

Count 5

- **Abusing official position or authority**, contrary to article 339 paragraph 3 of the CCK, punishable from one to eight years of imprisonment;
- **Trading in influence,** contrary to article 345 par 1 of the CCK, punishable by a fine or imprisonment up to two years;

Mazreku

Count 6

- **Abusing official position or authority**, contrary to article 339 paragraph 3 of the CCK, punishable from one to eight years of imprisonment;

After having held the confirmation hearing on 20 October 2011 in the presence of the above defendants, their defense counsel and the SPRK prosecutor.

Pursuant to Article 316 of the Kosovo Criminal Code of Procedure, the Confirmation Judge issues the following:

RULING

I. Pursuant to Article 316, par. 1, item 1 of the KCCP, the indictment PPS. No. 64/10 filed with the District Court of Pristina on 09 of August 2011, is DISMISSED with regard to the counts 1, 2 and 5 against the defendant Hashim Rexhepi, because the act charged is not a criminal offence.

II. Pursuant to Article 316, par. 1, item 4 of the KCCP, the indictment PPS. No. 64/10 filed with the District Court of Pristina on 09 of August 2011, is DISMISSED with regard to the counts 3 and 4 against the defendant Hashim Rexhepi, because there is not sufficient evidence to support a well grounded suspicion that the defendant committed the criminal offences indicated in the indictment.

III. Pursuant to Article 316, par. 1, item 1 of the KCCP, the indictment PPS. No. 64/10 filed with the District Court of Pristina on 09 of August 2011, is DISMISSED with regard to the count 1 against the defendant Ibish Mazreku, because the act charged is not a criminal offence.

IV. Pursuant to Article 316, par. 3 of the KCCP, the Indictment PPS. No. 64/10 filed with the District Court of Pristina on 09 of August 2011 is CONFIRMED, with regard to the count 6 against Ibish Mazreku.

V. Pursuant to Article 264 par. 4 of the KCCP, the Confirmation Judge declares that the evidence collected through the covert measures implemented during the investigation is deemed admissible.

VI. After the indictment becomes final, the indictment and the case file will be immediately sent to the Presiding Judge at the main trial.

REASONING

Procedural background

On 21st July 2010, the SPRK prosecutor filed a ruling on initiation of investigation against Hashim Rexhepi, Ibish Mazreku, Ismet Jashanica and Shkendije Himaj in relation to the criminal offences listed above and also to others.

On 27th July 2010 and 22nd March 2011, the Prosecutor filed with the District Court of Pristina a ruling on extension of the investigation and the investigation was extended accordingly.

On 09th August 2011, the Prosecutor filed with the District Court of Pristina, the indictment PPS 64/10 dated 05th August 2011 against Hashim Rexhepi and Ibish Mazreku for the criminal charges mentioned above.

On 20th of October 2011, at the premises of the District Court of Pristina the confirmation hearing took place.

Legal analysis

The Confirmation Judges notes that, at this stage of the proceedings, the evidence presented by the public prosecutor has to be evaluated with the purpose to establish whether it substantiates a well-grounded suspicion that the defendant has committed the criminal offenses he has been charged with.

The Confirmation Judge notes, furthermore, that this evaluation has to be done in a way not to prejudice the outcome of an eventual main trial, as requested by the provisions of Article 317, paragraph 1 of the KCCP.

Despite the indictment being drawn up in accordance with Article 305 of the KCCP and despite the admissibility of the evidence present in the case file (actually nothing suggests that the evidence was obtained in violation of the provision of criminal procedure neither the defence counsel have had objections as to the admissibility of evidence), the indictment must be dismissed as to all the counts against the defendant Hashim Rexhepi.

As to the defendant Ibish Mazreku the indictment must be dismissed in reference to count one and confirmed in relation to count six.

Count 1

The indictment

According to the indictment, during an unspecified period in the year 2007, Hashim Rexhepi together with Ibish Mazreku, in their capacity as official persons, abused their position or authority as members of CBAK (Central Bank Authority of Kosovo) by influencing several member of the board (and particularly the chairman) of the Insurance Association of Kosovo (IAK) in order to make IAK purchase software from the company CREA-KO for the value of 45.000Euro.

The indictment pointed out that Hashim Rexhepi's son, Granit Rexhepi, and the brother of Ibish Mazreku, Halil Mazreku, were among the owners of the CREA-KO company.

According to the prosecutor, the conduct of the two defendants enabled the company CREA-KO to sell software to the IAK for the price of 45.000 Euros, although IAK did not need such software (and in fact that software was never utilized by IAK and finally donated to the Central Bank of Kosovo).

In the perspective of the prosecutor, the above conducts would have caused damage to the budget of the IAK for the amount of 45.000 Euros and a correspondent unlawful benefit for the CREA-KO company; hence the two defendants would have committed in co-perpetration the criminal offences of Abusing official position or authority, contrary to Article 339 par. 3 of the CCK and Trading in influence contrary to Article 345 par. 1 of the CCK.

Court findings

The Insurance Association of Kosovo (IAK) was established pursuant to Article 2.6 of the Regulation 1999/22 and registered as non-governmental organization; the above classification makes it apparent that is governed independently by its own internal bodies and that it is a private institution, managed by a board composed of the managing directors of the insurance companies licensed in Kosovo.

Furthermore the IAK is not supervised by the Central Bank of Kosovo which has authority over the insurance companies, but not over the IAK, since the latter is not an insurance company.

Therefore it is evident that the IAK does not exercise any public authority and that the Central Bank (at that time CBAK) does not have any direct authority or power over the above private institution.

Having clarified that, and even assuming that the factual allegations of the prosecutor as to pressures exerted by the two defendants towards the IAK were sufficiently proven by the evidence in the case file, the above charges do not stand.

Substantially the prosecutor alleges that Hashim Rexhepi and Ibish Mazreku, in their capacity as official persons at the CBAK, "abused their position" by influencing IAK in order to buy a useless software.

However, since IAK was not controlled in any manner by the CBAK there was no official position that could be abused by the two defendants.

In fact, in order to commit the criminal offence envisaged in Art. 339 of the CCK the culprit must either abuse of his or her position, or exceed the limits of his or her authorization, or not execute his or her official duties.

Even assuming that there was a pressure exerted by the two defendants, the intervention could not be linked to the exercise of any official duty, power or position, since the CBAK could not exert any official power towards the IAK.

In fact it is undisputed that the abuse, in order to have a criminal relevance, must be realized through the issuance of an act or the performance of a material conduct which is linked to the exercise of an official power, is unlawful and perpetrated with the intent to cause damage or to gain material benefit.

The pressure, if there was pressure, exerted by the defendants towards the management of the IAK to buy the software was surely inappropriate, thinking of the role of supervision of the insurance companies which was exerted by the CBAK. However, on the other hand, the above material conduct can not be considered as an abuse because there was no exertion of any official power.

The same line of reasoning can be utilized as to the remaining part of the criminal conduct described in Art. 339 of the CCK.

Even if some pressure had been exerted, it can not be said that the governor or Mazreku exceeded their authorization, since there was no relation to the use of any official power: actually both the suspects could not exceed the limits of their authorization, because they did not have any authorization or supervision in relation to the IAK .
Similarly there was no official duty of the CBAK towards the IAK and therefore it can not be argued that the defendants did not execute their official duties.

In any case this Confirmation Judge cannot help noticing the absolute inappropriateness of the conduct of the two defendants in relation to the fact that the CBAK, in the end, received for free the software paid by IAK and sold by a company owned by close relatives of the two defendants.

Furthermore, the prosecutor completely misunderstood the meaning of the provision envisaged in Art. 345 of the CCK (Trading in Influence) which is related to the case of an improper influence over the decision making of an official person: since IAK is a private institution there was not any official person to influence.

Therefore, even assuming that the factual reconstruction of the events proposed by the prosecutor is correct, the act charged is not a criminal offence and therefore the indictment, pursuant to Article 316, par. 1, item 1 shall be dismissed as to count 1 in relation to both the defendants.

Count 2

The indictment

According to the indictment, on 14th of April 2005, Hashim Rexhepi abused his position or authority exerting influence over the management of the bank BpB in order to make the bank conclude a contract of sponsorship with the Pristina Basketball Club (whose president was Hashim Rexhepi) for the amount of 30.000 Euros.

In particular, according to the indictment, the above contract violated the Obligatory Order issued by the Central Bank Authority of Kosovo (the order was issued by Hashim Rexhepi, as Chief Supervision Officer and Eduard Nolan, as General Director of CBAK) on 28 February 2005 which prevented the BpB from authorizing loans due to the worsening financial situation of the bank.

Court findings

It is undisputed that, on 28 February 2005, the Central Bank Authority in Kosovo issued an obligatory order for the BpB bank, owing to its worsening financial situation.
The above order was signed by Eduard L. Nolan and Hashim Rexhepi indicated the concrete steps to be undertaken in order to improve the financial situation in the BPB bank.

According to the above order, the release of loans by the bank was prohibited until the level of deposits of the bank was increased of 70 %.

However, the restrictions were just related to the release of loans and did not say anything about the other contracts subscribed by the bank.

As it is well known the contract of sponsorship is a synallagmatic contract where one party (the sponsor) gives money and the other party (the sponsored) in exchange, usually by showing the name of the sponsor in sport competitions, publicizes it.

Such contract can not be considered as a loan and therefore it is not within the scope of the Obligatory Order issued in 2005.

Hence, already from this consideration it is apparent that the act charged is not a criminal offence, since no illegal action (or, better to say, no action against the above Obligatory Order) was undertaken as to the above contract.

Furthermore, also the factual reconstruction of the events made by the prosecutor is not correct.

In fact, the sponsorship agreement was signed on 19th August 2004, between Islam Zeka in the capacity of managing director of the BPB and Ismet Karanxha, managing director of the Pristina Basketball Club.

On the basis of the above agreement the BpB paid a total amount of 25000 Euros in two installments (the first one on 20th August 2004 and the second one on 05th January 2005). Therefore, the agreement was signed and implemented prior to the issuance of the Obligatory Order dated 28th February 2005.

Moreover, it should be noted that during the period of time when the sponsorship agreement was signed between the BpB bank and the Pristina Basketball Club, Hashim Rexhepi did not have any formal function within the above club.
In fact from the case file it results that Hashim Rexhepi was appointed as a member of the board of the club and elected chairman of the board only on 07th October 2004 (therefore after the agreement on sponsorship had been signed).

So it is apparent that not only the agreement was signed before the issuance of the order by the Central Bank, but that Hashim Rexhepi did not have any role in the basketball club when the agreement was signed.

Finally, in the indictment it is made reference to a transfer of money from BpB which occurred on 14th April 2005 and related to a sponsorship contract.
But actually that transfer of money was made in relation to a sponsorship contract with the Pristina Football Club as to which Hashim Rexhepi has never had any function.

Therefore also from the factual point of view the charge does not stand and it can be said that the defendant was not at all involved in any of the two transfers of money (one to the basketball club, the other to the football club).

Hence it has been demonstrated that the act charged is not a criminal offence and therefore the indictment, pursuant to Article 316, par. 1, item 1, shall be dismissed as to count 2.

Count 3

The indictment

According to the indictment, on 29th December 2005, Hashim Rexhepi abused his official position or authority by forcing the BpB bank to issue a loan to him for the amount of 23.000 Euros.
According to the prosecutor the issuance of the personal loan acted in contravention of the mentioned Order, which prohibited the BpB to give loans owing to the bank worsening financial situation.

Court findings

As it has already been stated in relation to Count 2, it is uncontested that the Central Bank had prohibited the BpB bank to issue loans until the level of deposits of the bank had increased of 70 %.

However, the prosecutor did not mention that, on 21st December 2005, the CBAK clarified to the Director of the BpB that it was actually possible for the bank to issue loans for an amount lower than 10.000 Euro without any restriction, whereas, as to the loans higher than the above amount, the bank could issue them only when the performance of the borrower and his capacity to repay the debt had been favourably assessed.

From the case file (and in particular from the statement of Hyrije Bucaj[1]) it results that the defendant's application for the loan was carefully evaluated and fully approved by the loan committee of the BpB.

And it is worth noticing that Hashim Rexhepi completely repaid the debt and that the repayment was made even before the scheduled deadline.

It might be thought that the letter dated 21 December 2005, which is strikingly very close to the date of the issuance of the loan in favour of the defendant, was inspired by the personal necessities of the defendant himself rather than by the interest of the bank (and in that case there might have been an abuse), but the prosecutor did not provide any evidence as to that.

Although it is undisputed that the above letter was signed by the defendant (and by Edward Nolan), since the provisions therein indicated had a general validity for all the

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[1] Statement dated 18.1.2011:
SP: who has granted this loan?
W: I have processed that request, then I have to submit it to the loans committee and they have decided to grant it.
SP: Do you remember the amount of it?
W: The amount was 20.000 Euros.
...
SP: Was the documentation complete on the occasion of Mr. Rexhepi application?
W: Yes, we had all the documents that were required by our bank

possible borrowers, in the utter absence of any other piece of evidence as to the specific intent required by Article 339 of the CCK, it can not be simply assumed that, by modifying the order issued in February 2005 by the CBAK, the real purpose of the defendant was to gain a material benefit for himself.

~~This judge cannot help noticing the inappropriateness of the conduct of the defendant~~ who first signed the letter which modified the Order prohibiting the BpB to issue loans and, a few days afterwards, asked the same bank for a loan.

However, inappropriateness does not entail a criminal conduct and in this case the prosecutor has not given any evidence as to the existence of the subjective element of the criminal offence.

Therefore, it can be firmly said that in the case file there is not sufficient evidence of a well grounded suspicion that the defendant has committed the criminal offence indicated in the indictment. Hence the indictment shall be dismissed as to the count 3, pursuant to Art. 316, par. 1, item 4 of the KCCP.

Count 4

The indictment

According to the indictment, on 16.07.2009, Hashim Rexhepi, in his capacity as the Governor of the Central Bank of Kosovo, appointed Faton Bajrami as temporary administrator for the insurance company "Dardania".
The latter, under the influence of the defendant, would permit the amount of 1,987,997.19 Euros indicated in the balance of the company as credits (and corresponding to loans or "advanced payments" given by the company to a number of its employees) to be deleted from the above balance.

According to the prosecutor, the above employees were associates of the defendant and the deletion of the above amount was made in order to favour them and resulted in a serious financial loss for the insurance company.

Court findings

It is undisputed that, owing to the very difficult financial situation of the insurance company Dardania, the Central Bank of Kosovo undertook some steps in order to improve the above financial situation. One of these steps was the appointment, on 29th of May 2009, by the Board of the Directors of the Central Bank, of Faton Bajrami as temporary administrator of the IC Dardania with the specific aim to restore the financial situation of the company.

On 07th July 2009, an official meeting took place between the temporary administrator and the Crisis Committee of IC Dardania chaired by Hashim Rexhpi in his capacity as the Governor of the Central Bank of Kosovo. In that meeting it was decided to delete from the balance the amount of 1,987.997.19 related to the so called “advanced payments” given to the employees of the company.

After the above meeting, pursuant to Article 41 of the regulation 8 of the Central Bank of Kosovo, and upon a request of the Board chaired by the CBK Governor, on 16th July 2009, the temporary administrator issued a decision by which the above amount deleted from the balance was “converted into external balance positions” and the company was entitled to act in order to request the restitution of the advanced payments.

Even though the decision taken by the Board chaired by the defendant does not seem to be in compliance with the principles of a fair and correct accountancy, there is no evidence that the above decision was taken with the intent to obtain an unlawful material benefit or to cause any damage.

In fact the circumstance that the employees were “associated” of the defendant is merely alleged by the prosecutor without a single piece of evidence proving it. Hence the statement made by the prosecutor that the deletion was made in order to favour the debtors is a mere allegation lacking of any ground to sustain it.

Actually the real purpose of the deletion was explained by the witness Nexhat Kryziu who stated that the above decision was taken in order to clarify what the real financial situation of the company was. The witness added that, since the above credits of the company (meaning the so called “advanced payments”) were unlikely to be ever collected by the insurance company, the option which was adopted was to classify them differently from the accountancy point of view (even though the witness did not agree on the deletion).

Therefore there is no evidence, actually not even a suspicion, as to the intent of the defendant either to cause a material damage to the company or to obtain a material benefit for the employees who had taken advantage of the “advanced payments”. It is worth noticing that in any case the company, even after the deletion, undertook actions in order to recuperate the above credits, which makes it clear that there was no attempt to conceal the credits.

Hence, it is evident that the charge does not stand, since it has not been proven, not even at a level of well grounded suspicion, the existence of the subjective element of the crime, *i.e.* the special intent required by Art. 339 of the CCK.

The prosecutor also completely misunderstood the meaning of the provision envisaged in Art. 345 of the CCK (Trading in Influence) which is related to the case of an improper influence over the decision making of an official person: since Dardania is a private insurance company there was no official person to influence.

The lack of any intent to obtain a material benefit also excludes that the defendant have committed the criminal offence of Fraud (Art. 261 of the CCK).

Hence, since there is not sufficient evidence to support a well grounded suspicion that the defendant has committed the criminal offence, the indictment has to be dismissed as to count 4, pursuant to Art. 316, par. 1, item 4 of the KCCP.

Count 5

The indictment

According to the indictment, from 2003 to 2010 Hashim Rexhepi, in his capacity as an official person and in particular as the Supervisor for the regulation of insurance companies, influenced the board of the directors of the Insurance Agency of Kosovo (IAK) in order to make employ several close associates and family members of his in the various department of the IAK.

In the narration of the events given by the prosecutor, the above positions were not advertised and were obtained without the candidates meeting any potential job requirements and this resulted in a financial damage for the company.

Court findings

It has already been mentioned that the IAK is a private institution, managed by a board composed of the managing directors of the insurance companies licensed in Kosovo and it is not supervised by the Central Bank of Kosovo.

Therefore it is evident that the IAK does not exercise any public authority and that the Central bank does not have any direct authority or power over the institution.

Having clarified that, and even assuming that the factual allegations of the prosecutor were sufficiently proven by the evidence in the case file, the above charge does not stand.

Substantially the prosecutor alleges that Hashim Rexhepi, in his capacity as official person at the Central Bank of Kosovo having the supervision on the insurance companies, "abused his position" by influencing IAK in order to employ people linked to him.

However, since IAK was not controlled in any manner by the Central Bank, there was no official position that could be abused by the defendant.

Even assuming that there was a pressure exerted by the defendant, the above intervention was not at all linked to the exercise of any official duty, power or position.

The pressure, and from the statements in the case file it appears that a certain pressure was made, was surely inappropriate thinking of the role of supervision of the insurance companies which is exerted by the Central Bank.

However, on the other hand, that material conduct, although inappropriate, was not linked to the exertion of any official power and therefore there could not be any abuse of official position.

The same line of reasoning can be utilized for the exceeding of authorization and failure to execute his duties for the reasons already indicated in the part of the ruling related to count 1.

If the recruitment of personnel without a former public vacancy announcement has violated the rules of IAK, it is just a matter pertaining to the private institution (*i.e.* IAK), without entailing any exercise of public authority or official power.

The prosecutor also completely misunderstood the meaning of the provision envisaged in Art. 345 (Trading in Influence) which is related to the case of an improper influence over the decision making of an official person: since the IAK is a private institution, there could not be any official person to influence.

Therefore even assuming that the factual reconstruction of the events proposed by the prosecutor is correct, the act charged is not a criminal offence and the indictment, pursuant to Article 316, par. 1, item 1 shall be dismissed as to count 5.

Furthermore, it is worth noticing that the material damage caused to the company by the employment of the above people is just alleged by the prosecutor without any evidence proving it. Therefore also the possible charge of Entering into harmful contracts contrary to article 237 of the CCK, which might have committed by the defendant in co-perpetration with the management of IAK, does not stand because of the lack of the necessary objective element of the harm for the legal person.

Count 6

The indictment

According to the indictment, on 01 October 2004, Ibish Mzreku, in his capacity as the Director in the Directorate for the Supervision of the Insurance Companies, abused his position by taking money from the insurance company Dardania in the amount of 36.000 euro.

Court findings

The case file contains documentary evidence of the payment order, dated 01^{st} October 2004, issued by the insurance company Dardania; from the above order it appears that the defendant was the person who withdrew the sum of 36.000 euro.

Moreover the case file contains the statements of the witnesses Isak Gojnovci and Maria Vuksani who confirmed the involvement of Ibish Mazreku as to the withdrawal of the above amount of 36.000 Euros. The money was never given back to the insurance company.

The defendant confirmed that actually the withdrawal took place, but he denied that the signature of the person who withdrew the money was his.

The confirmation judge is of the opinion that even some investigative action should be undertaken in order to identify with certainty the signature of the withdrawer (a graphological expertise is definitively needed), however at this stage of the procedure there is sufficient evidence to support a well-grounded suspicion that the defendant committed the criminal offence indicated in the indictment.

In fact, the only possible explanation for the issuance of the above payment order, which otherwise would appear inexplicable, is that the defendant abused of his position towards the management of the insurance company in order to be allowed to withdraw an amount of money as to which he was not entitled to.

Although the threshold of a well grounded suspicion has been reached by the indictment as to count 6, the prosecutor, in order to obtain full evidence of the criminal offence, should examine the people in charge at that time with the insurance company to understand the reason why the defendant was allowed to withdraw the above amount of money. The above reason is still unexplained and in view of the main trial a clarification must be given as to this point.

For the above reasons it has been decided as in the enacting clause.

Confirmation Judge
Gianfranco Gallo
EULEX criminal Judge

Pursuant to article 317 paragraph 2 read in conjunction with article 431 paragraph 1 and 432 paragraph 2 of the KCCP, the prosecutor may file an appeal against this ruling within three days from its service.