



REPUBLIKA E KOSOVËS
REPUBLIKA KOSOVA – REPUBLIC OF KOSOVO

GJYKATA SUPREME E KOSOVES
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ANALYSIS OF THE SENTENCING POLICY IN CORRUPTION CASES

Pristina 2019

I. GENERAL INTRODUCTION

After the adoption of the Sentencing Guidelines, by the General Assembly of the Supreme Court, on February 2018, a Sentencing Advisory Commission was established with the purpose of monitoring the sentencing trends in Kosovo and further propose and develop specific guidance to the justice system to ensure more consistency in sentencing.

Twelve (12) roundtables have been organized throughout Kosovo during 2018 focused specifically on introduction of the principles of the Sentencing as per the adopted Guidelines. Audience included judges and prosecutors of all levels, presidents of courts and chief prosecutors, defense attorneys, victim advocates and other legal staff of the courts and prosecution office.

UNDP has also offered support for the Commission by hiring a legal assistant to assist with the process for monitoring and analyzing the corruption cases. Additionally, with the purpose of familiarizing the Commission with the best practices in sentencing, UNDP has sponsored the study visit for Commission members to U.K. Members of the Commission had the opportunity to meet with members of the U.K. Sentencing Commission.

This report presents the first document prepared by the Commission and its purpose is:

- to provide a general overview based on the 2018 corruption related offences and the decisions imposed by the various courts Kosovo-wide; and
- to provide a more thorough analysis on the trends in sentencing in corruption related offences based on the analysis of 27 randomly selected cases.

II. AN OVERVIEW OF THE OVERALL 2018 CORRUPTION CASES

The table below provides for a general overview only on the manner how corruption related offences were handled by the Basic courts throughout Kosovo. The table does not contain details of the level of sentence. This is due to the fact that the Sentencing Commission was established by mid-2018 and did not have mechanisms in place to follow the decision-making by the courts.

2018	Number of cases completed	Jail sentence	Fine	Alternative sentence	Acquittal	Rejection verdict	Procedure suspended
Pristina	86	10	14	18	20	8	16
Ferizaj	8	1	/	4	2	1	/
Prizren	24	5	4	6	6	1	2
Gjakova	20	1	3	4	5	1	6
Gjilan	40	4	5	4	22	2	3
Mitrovica	10	/	5	1	3	1	/
Peja	16	1	2	3	5	2	3
Total	204	22	33	40	63	16	30

Fig.no.1

The below table includes the work of the Appellate Court in handling corruption related cases for 2018:

ARTICLE	Appeal dismissal	1st instance decision:				
		Confirmed	Abrogated	Aggravation of sentence	Mitigation of sentence	Changed for other reasons
	2	69	23	1	3	9
422/339	2	47	16	0	0	6
423	0	2	0	0	0	0
424	0	1	0	0	0	0
425/340	0	3	4	0	0	0
426/341	0	2	1	0	0	1
428/343	0	7	1	1	2	1
429/344	0	3	0	0	0	1
431/345	0	1	0	0	1	0
432/346	0	1	0	0	0	0
433/347	0	1	0	0	0	0
434/348	0	1	1	0	0	0

Fig.no.2

The below table includes the work of the Supreme Court in handling corruption related cases for 2018:

Annual report on corruption cases for the period	Approved	Rejected	Dismissed	Total
01.01.2018-31.12.2018	7	10	3	20

Fig.no.3

III. ANALYSIS OF THE 27 CORRUPTION RELATED CASES

In order to better understand the process used by courts in calculating the sentences, the Advisory Sentencing Commission analyzed 27 randomly selected court decisions in corruption related cases from the various courts in Kosovo. The report provides for decisions of all three of court instances in cases randomly when such decisions were available. Out of these 27 cases, for 32 persons the courts issued guilty verdicts.

During the analysis the Commission focused on the following issues:

- Sentences rendered;
- Supplemental punishments rendered;
- Mitigation & Aggravation factors included in 27 cases reviewed;
- The use of suspended sentence;
- Comparison of similar offences and the respective sentences rendered;
- Analysis on the reasoning provided for the use of mitigation factors in particular when sentencing below the minimum foreseen by law.

The analysis aims to address each of these factors and provides for recommendations for improving the overall performance related to sentencing. Generally, these cases have been adjudicated before the adoption of the Sentencing Guidelines in February 2018 and thus the approach taken in this analysis is to generally reflect the existing sentencing policy in Kosovo and no reference is made on whether the various courts have adhered to or departed from the principles of the Guidelines.

IV. SPECIFIC ANALYSIS

The Commission has identified and used as sample for the purpose of analysis a total of 27 corruption cases for offences committed under articles 56 of the Money Laundering Law¹ and articles 422, 425, 428, 433, 435 and 437 of the CC.

Defendants involved in this analysis included officials at the low, medium and high-level positions. Generally sentences rendered for these offences from 1st instance courts vary from 6 to 60 months. Figure no.4 provides for the sentences for the respective articles.

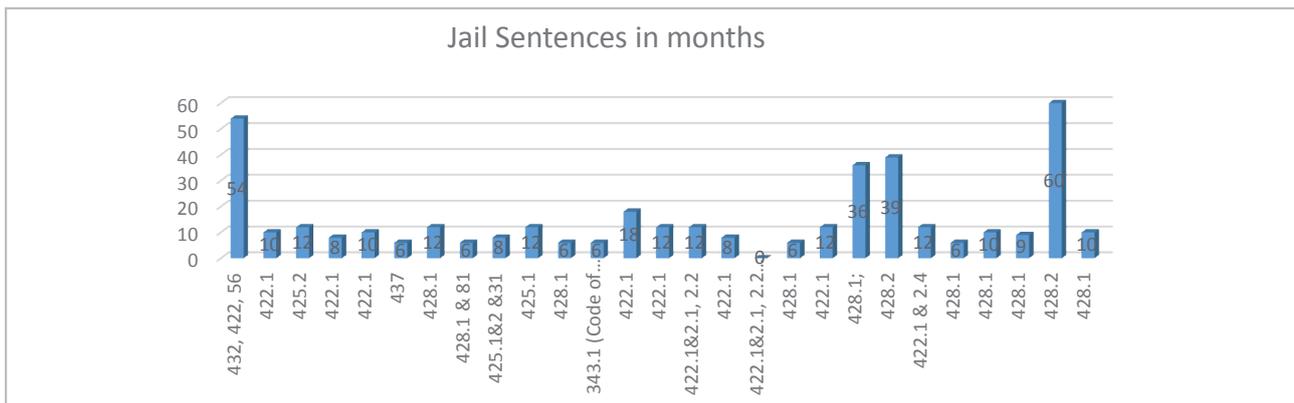


Fig.no.4

The following chart is used for the purpose of showing the percentage of each type of sentence in the cases analyzed.

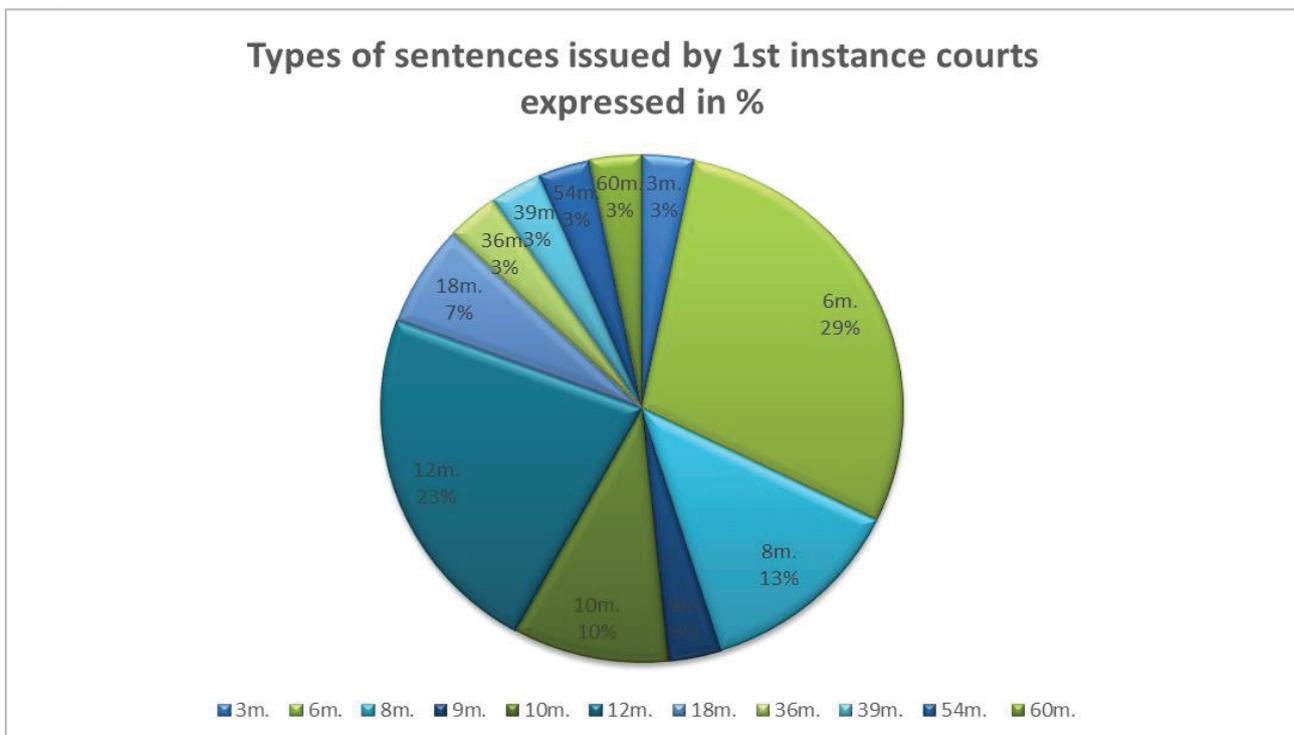


Fig.no.5

¹ Article 56, Criminal offence of Money laundering, Law No.05/L-096, on prevention of Money laundering and fighting terrorist financing, published on the Official Gazette of Republic of Kosovo on 15 June 2016.

a. Imposing a Suspended sentence

A total of eight (8) of the defendants received suspended sentences. The harm specified in these cases included property up to 65,000.00€ See table no.2 below:

Relevant articles	Profession	Jail Sentence in months	Suspended sentence
422.1	Police officer	10	Yes
422.1	Mayor	10	yes
437	Public employee	6	yes
422.1	Factory manager	12	yes
422.1&2.1, 2.2	Municipal Department Director	12	yes
422.1	Factory employee	12	Yes
422.1 & 2.4	Chair of Society	12	Yes
33 related to 428.1	Accountant	8	Yes

Fig. no.6

b. Imposing a Supplemental sentence

In 9 (nine) cases the court issued a Supplemental sentence of ban from public function. Only 3 (three) of the defendants in these cases entered a Plea Agreement. See Table no.7 below:

Profession	Article#	Supplementary sentence	Plea agreement
Procurement official	428.1	1 year ban on working at public admin.	yes
Chief inspector	428.1	3 year Ban in performing his function	yes
Company official	425.2	3 year ban on profession	yes
Director of urban dpt.	428.1	2 year ban from working at public admin.	no
Employee of Public Enterprise	425.1	2 year ban on profession	no
Municipal Department Director	422.1&2.1, 2.2	2 year ban from profession	no
Chair /Society of Blind persons	422.1 & 2.4	2 year ban from profession	no
Tax Administration Inspector	428.1	2 year ban on working at public admin.	no
Former judge	432,422,56	3 year ban from working at public ad- ministration of defense attorney	no

Fig.no.7

c. Decision on restitution

In 8 (eight) cases the defendant/s in cases of misuse of official authority and bribery were ordered to pay restitution to the injured party.

Relevant articles	Harm caused	Profession	Restitution
432, 422, 56 ²	1,200,000.00€	Judge	Return of immov. property
425.2	33,488.00€	Company official	25,061.79 €
422.1	2,394.35€	Municipal official	Full restitution
28.1 & 81	4,500.00€	Manager at Public Enterprise	Full restitution
425.1&2 &31	10,711.16€	Fin. Institution clerk	Full restitution
425.1	3,033.98€	Company employee	Full restitution
343.1 ³	1,000€ requested +10,000€)	Employee of CSW	Full restitution
D#1: 428.1; D#2&3: 431.1 & 31	22,000.00€	Prosecutor &2 other defendants	Full restitution

Fig.no.8

At least in two of the cases where defendants were found guilty of Misuse of official authority the injured parties were advised to seek restitution in civil proceedings. The harm caused in these crimes were 51,267.78€ for one case and 14,319.16 for the second case. Both cases were confirmed by the Appellate court while the Supreme Court sent for re-trial the second one.

² Article 56, Criminal offence of Money laundering, Law No.05/L-096, on prevention of Money laundering and fighting terrorist financing, published on the Official Gazette of Republic of Kosovo on 15th June 2016.

³ Provisional Criminal Code of Kosovo, UNMIK/REG/2003/25, date 6th July 2003.

V. SENTENCE VARIATIONS AS PER THE SAME ARTICLE

A. Misuse of official authority from Article 422

Under the applicable Criminal Code Article 422, the sentence foreseen is 6 months to 5 years.

As part of this analysis it results that generally sentences vary between 6-18 months. Nevertheless, in order to do a full analysis of the sentences rendered there is a need to assess other issues related to the sentencing such as the level of harm, the ordering of the restitution and on whether the court ordered a supplemental sentence. To start with this analysis below we have provided a table of the main sentences rendered and the profile of the defendant:

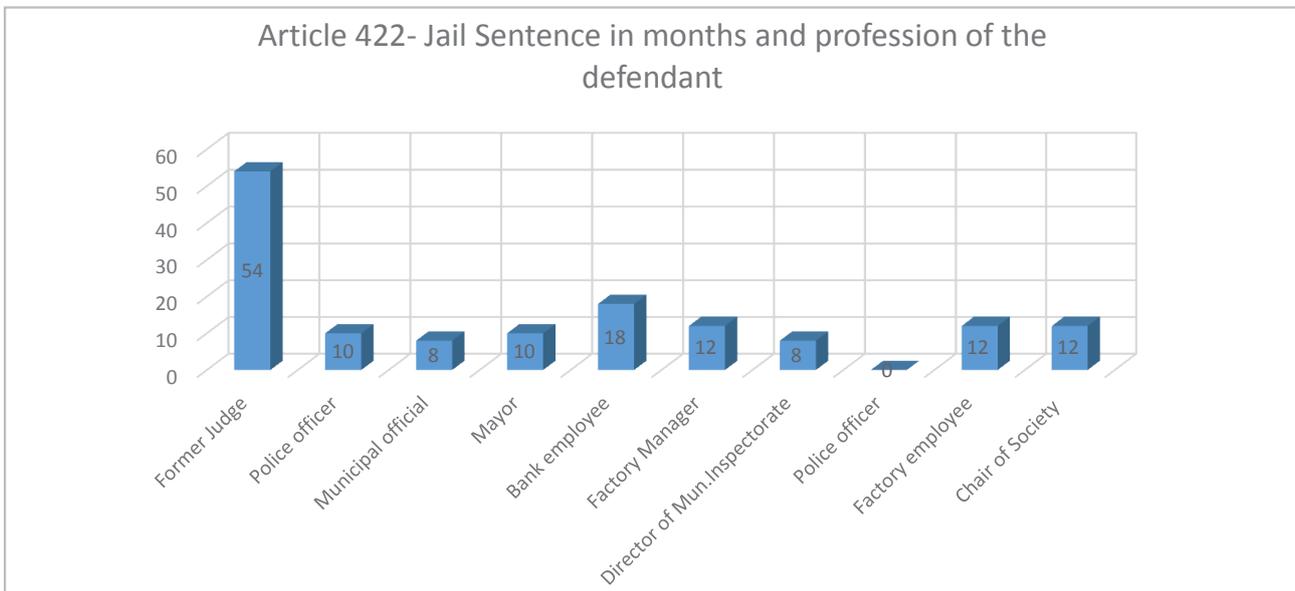


Fig.no.9

Six of the defendants in this category received suspended sentences while the sentence for one of them was converted to fine only. Only in two of these cases the court issued a supplementary sentence of 2 year ban from profession.

For the purpose of comparison on the gravity of the offence committed and how that reflected on the final sentence we will take the example of the two defendants who misused their official authority as police officers. The purpose of this comparison is to reiterate that the gravity of the offence depends not only the amount of the harm caused which in first look could be considered very minimal in these two cases, but more on the social risk of such crime which often can be more aggravating than the material harm associated with a particular offence:

• **Case#PKr.292/16, Officer found guilty for the offence from Art.422 par.1**

Specifics of the case: The defendant is border officer and requested various favors (such as money, phone credit. Etc.) in exchange of enabling them to transport goods and not be stopped transporting goods at the border.

• **Case #PKr.88/15 Officer found guilty for the offence from Art.422 par.1 and 2.1, 2.2 and 2.3 (criminal offence in continuation)**

Specifics of the case: The defendant changed traffic ticket for expired car registration, helping defendant transporting illegal firewood to avoid police patrol & eventually taking woods for himself, hiding a payment order in order to reach stat. limitation.

Summary for both offences: The court was very lenient on the two defendants issuing a suspended sentence for the 1st one and the 6 months jail sentence converted to a fine for the 2nd defendant. None of the officers received a supplementary sentence of banning them from performing their duty.

The mitigating circumstances considered in sentencing of the first defendant were his correct behavior in court, the fact that he was father of four children and not previously sentenced. The court also considered that although the profit of the defendant was very low (profiting from 3 meters of wood) the weight of this factor was minimal considering the aggravating factor of the abuse of official authority and the manner in which the crime was committed by enabling profit to other persons.

It is clear in both instances that the offence was not a one-instance case. The description of the offence included a range of actions in which the defendants misused, in various forms, their official authority which clearly shows a pattern of abuse they had adopted. Additionally, none of the defendants plead guilty nor entered a plea agreement which could be a clear indicator of lack of remorse.

B. Criminal offence of Taking Bribery from Article 428

The criminal offence of taking bribery is considered very important for the purpose of analysis and the sentence foreseen is 6 months to 5 years. This is one of the most difficult offence to prove as in many instances both parties, the one giving and the one taking bribery, have some interest from the offence. Because giving bribery is also a punishable as per the Criminal Code, person giving bribery is also reluctant in reporting such offence or providing evidence that would lead to success of this case. The table below lists the sentences issued in cases when defendants were found guilty of criminal offence of bribery and the profile of the defendants:

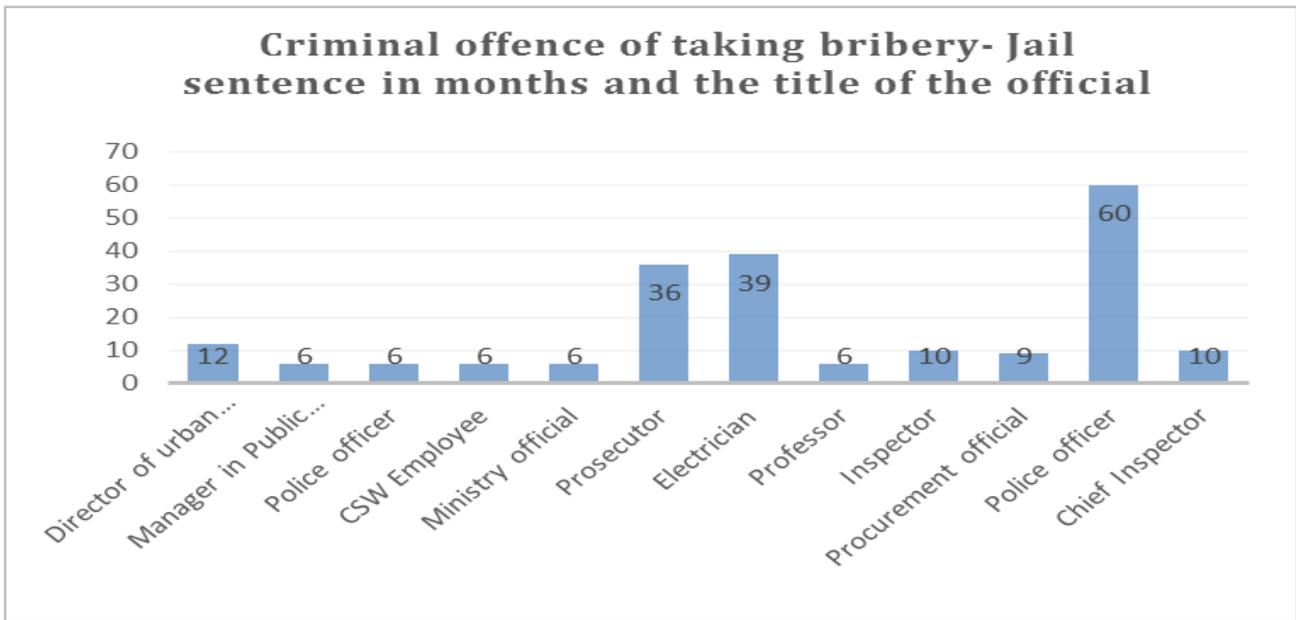


Fig.no.10

As seen from the table above the sentences in 1st instance court range from 6 – 60months and it includes defendants at various levels of duty and management. The below table also lists the same sentences but with a more expanded explanation on the cases:

Relevant articles	Profession	Harm caused	Plea agreement	Sentence in months	Fine	Supplement. sentence
428.1	Dir. of urban dpt.	€ 5,000.00	no	12	€ 2,000.00	2 year ban
428.1 & 81	KEK manager	€ 4,500.00	yes	6	€ 2,000.00	none
428.1	Police officer	€ 10.00	no	6	€ 500.00	none
343.1 (2003)	Employee of CSW	1,000 (requested also 10,000€)	no	6	0	none
428.1	Ministry official	500.00 €	no	6	0	none
428.1	Prosecutor	22,000.00 €	no	36	€ 5,000.00	none
428.2	Electrician	500 €	no	39	€ 1,000.00	none
428.1	Professor		no	6	€ 500.00	none
428.1	Inspector	2,000.00 €		10	€ 500.00	2 year ban
428.1	Procurement official	1,500.00 (100.000€ contract value)	yes	9	€ 400.00	1 year ban
428.2	Police officer	300.00 €	no	60	€ 1,000.00	none
428.1	Chief inspector	1,000.00 €	yes	10	€ 2,000.00	3 year Ban

Fig.no.11

VI. MITIGATING AND AGGRAVATING FACTORS CONSIDERED IN SENTENCING

An analysis has been presented below on the use of various mitigating and aggravating factors in sentencing on the cases analyzed and their relevance. The circumstances listed are mainly only listed in the decisions, but generally, with a few exceptions, their weight in sentencing has not been explained.

A. Aggravating circumstances

The aggravating factors considered for these offences include:

- Damaging the state reputation;
- Manner and circumstances of the crime;
- Scale of criminal liability;
- Social risk;
- Willingness;
- Previous conviction;
- Loss of credibility/public trust;
- Recidivist.

In 8 (eight) instances the court did not list any aggravating factors. Generally, all the above circumstances are considered important for this category of offences. The corruption and other related crimes, considering the fact that they are committed by persons with public authority, as emphasized in some of the court decisions, are harming the public trust in the institution and that is why they deserve more attention also in sentencing.

B. Mitigation

The most cited mitigated offence in the cases analyzed were:

- The correct behavior of the defendant;
- Marital status;
- The fact that the defendant has children;

Other circumstances include:

- Financial situation;
- Sole provider for the family
- First-time offender;
- Age (whether young or old);
- Limited physical capacity;
- Health condition;
- Remorse (in a couple of occasions this was included as extraordinary circumstance).
- Lesser damage and/or profit for the defendant.

Correct behavior of the defendant was used in all cases listed. What is interesting is the fact that correct behavior before the court was listed as mitigating factor for one defendant although the aggravating circumstance in the same case says that the defendant used insulting language towards his colleagues and institutions.

It is significant to emphasize (solely for the purpose of content of the reasoning) that in one instance, although the court considered as mitigating the low profit from which the defendant benefited, nevertheless, the judge in fact compared the value of the mitigating factor as insignificant to have a major weight in calculation of sentence considering the aggravation factor of the level of harm caused since the defendant misused his authority as police officer and as such impacted the loss of public trust in the institution.

In two of the cases analyzed courts used the age of the defendant at sentencing as mitigating factor, more specifically, old age (66 years) and young age (37 years). This shows that the courts in fact do not have a clear understanding on how the age factor applies to mitigation. The consideration of age 37 as young age in the case of misuse of official authority is questionable whether it is justifiable. On the second case where the age of 66 was considered in mitigation the court also considered the fact that the defendant is father of 4 children. Logically, it could be considered that his children would already be adults of a certain age, able to be financially independent. The question posed in this case would be whether the court took any effort to determine if the defendant has actually 'dependent children' or this is more or less an automatic application of the factor in mitigation?

With the exception of two situations where the court emphasized in the reasoning that the specific mitigating circumstances were used as extraordinary mitigating circumstance, in the majority of cases the mitigating factors were only listed, but not properly explained and reasoned why it had such a huge impact in rendering a minimum sentence.

VII. HIGHER COURT REVIEW

As it results from the analysis in the majority of cases analyzed (21 cases) the Appellate Court confirmed the decision of the 1st instance court.

Confirmed the sentence	21cases		
Mitigated the sentence	3 cases	From 54 to 36 m From 12 to 6 months From 60 to 24 months	From 5000€ to 3000€ fine
Aggravated the Sentence	2cases	from 6 months to 12 months; and from 6 to 18 months.	
Appeal not accepted	1 case		

Fig no.12

- **In case no.248/13** the Court mitigated the sentence from **5 to 2 years**. The reason for this mitigation was due to re-qualification of the criminal offence from 428.2 (punishable by 3-12 years) to 428.1 (punishable by 6 months to 5 years) justifying that it is undisputable that the defendant in this case (police officer) took 300 € bribe, yet it was in order to act in accordance with his official duty and not as par.2 states 'in violation of his duty'. Other than the re-qualification, the Court of Appeals also removed some of the aggravating factors considered by the 1st instance court emphasizing that those circumstances represent element of the crime.
- **In case no.642/15** the criminal offences from articles **432, 422 of the CC and Article 56** of the Law on Money Laundering, the Court mitigated the sentence for the defendant (former judge) from **54 months to 42 months**. The court when rendering the decision has not found any mitigating circumstance concluding that the appeal did not contain any such request related to mitigating factors.
- **In case 111/2016** on the criminal offence from **Article 425.1** (punishable by 6 months to 5 years), the Court mitigated the sentence for the defendant (cashier at public company) **from 1 year to 6 months** and from **2 year ban to a 1 year ban of profession**. This court concluded that the 1st instance court has correctly assessed the circumstances impacting the type and height of sentence and in rendering a jail sentence and supplemental sentence. Nevertheless, the court found that there is room to issue a lower sentence considering the amount of money he obtained and that with this lower sentence the purpose of the sentence will be achieved.

In two cases, the Appeal Court has aggravated the sentences:

- **In case no. 1002/13** the court aggravated the sentence from **6 months to 18 months** for the defendant (Manager at Public Enterprise) for the criminal offence of taking bribery from **Article 428.1** (punishable by 6 months to 5 years). The Court of Appeals has considered that the mitigating circumstances (which mainly referred to personal circumstances of the defendant, guilty plea and remorse) compared to the manner for commission of the crime have been overly assessed by the 1st Instance Court. This Court has also concluded that even the defense was not able to find any specific mitigating circumstance that would have an impact in lowering the sentence.

- **In case no.234/14**, the Court aggravated the sentence from **6 months to 18 months** for the defendant (Ministry official) for the criminal offence of Bribery from **Article 428.1** (punishable from 6 months to 5 years), by re-qualifying the offence to **428.2** (punishable by 3-12 years). The Court did not give any reasoning on the aggravating circumstances other than re-qualification of the criminal offence and only emphasized that the 1st Instance Court has overestimated the mitigating circumstances.

In the 27 cases analyzed, the Supreme Court has decided as follows:

- In 4 (four) occasions the case was sent back for re-trial;
- In 1 (one) case, the Court mitigated the sentence to 40 months, from 42months assigned by the Appellate Court, respectively from 54 months sentence rendered by the 1st instance Court. On the same case the Supreme Court has sent for re-trial the part of the case which had to do with the allegation for Money Laundering.
- In 1 (one) case the Supreme Coyrt returned the case which confirmed the right of the defendant to file an appeal which was initially refused by the Appellate Court.
- In 21 cases, the Supreme Coyrt dismissed the Request for Protection of Legality.

CONCLUSIONS

It bears repeating that the particular outcome of a case is not legally obligated by the current Sentencing Guidelines. However, the proper justification of a sentence, including the factual support of circumstances, the weighing of factors and rationale supporting the sentence, **is mandatory in all cases**. A court's failure to adhere has direct consequences for human rights, reduces the professionalism of the judiciary and diminishes public trust.

From the review of these cases, the Commission concludes the following issues exist and strongly urges courts to correct them in the future. While these opinions pre-date the publication of the guidelines, they nevertheless serve as additional concrete examples of deficiencies that compliance with the processes outlined in the guidelines will correct.

- None of the cases reviewed showed any effort by the court to factually explain in any degree of detail why a mitigating or aggravating factor existed - they are simply listed.
- None of the decisions indicate an effort to determine the truth of mitigating personal circumstance such as requesting testimony or supporting documents for the defendant's financial condition, provision of support to the family/children, medical conditions etc.
- Courts must weigh or describe the significance of each factor. If not, the end results are irrational. For example, compare the following in which the possible sentence was identical (6 mo-5 years):
 - 3 aggravating, 1 mitigating – 8 month sentence
 - 4 aggravating, 4 mitigating – 8 month sentence (2 cases)
 - 1 aggravating, 1 mitigating – 6 months suspended sentence
 - 0 aggravating, 3 mitigating – 8 month sentence
 - 3 aggravating, 3 mitigating – 10 month suspended sentence

It is impossible to understand how a defendant could receive a sentence near the bottom of the statutory range when there are a greater or equal amount of aggravating factors compared to mitigating. Only the fourth sentence (no aggravation and 3 mitigation) would even approach justification for a sentence near the bottom of the range. There is absolutely no justification for a 10 month suspended sentence when aggravating and mitigating factors are equal. The above analysis requires once again to strongly emphasize the need that the calculation of sentence must start from the Starting point, in compliance with the principles and instruction provided for in the Sentencing Guidelines and then weigh the relevant aggravating and mitigating circumstances for the case.

- Proper behavior, as explained in the sentencing guidelines, is a confusing mitigating circumstance at best. It has become part of the court terminology at sentencing without specifying at any of the cases what this circumstance in fact means and in particular in the corruption cases addressed in this report. Appearing in court as ordered, not disrupting the proceedings and treating others with minimal respect are basic obligations of being a citizen of the Republic of Kosovo and not deserving of a reward in mitigation. Of course, the law allows the use of this factor, but it must be properly understood and used in limited circumstances. The fact that every court awarded this factor means it is not understood properly, especially considering that in one decision the defendant still received the factor even though the court noted he

was disruptive and abusive to others during the proceeding. The court should seriously consider finding an aggravating factor when the defendant does not cooperate.

- There is an over reliance on personal circumstances. While certainly relevant, specific personal circumstances are not listed in the Criminal Code. As such, factors that are not listed in the Code require additional explanation by the court.
- Failure to describe how suspended sentence will be appropriate. Courts should explain why the purposes of the suspended sentence, that is the threat of punishment, is sufficient for the particular defendant as opposed to requiring they serve the sentence. This is particularly problematic when you consider that there was no substantive difference between the situations where the court imposed a prison sentence and the court imposed a suspended sentence.
- A number of cases cited mitigating circumstances that were not only not listed, but without any merit whatsoever for this nature of offences. These included:
 - Sex of defendant
 - Level of education
 - Passage of time

The analysis provided in this report clearly shows the need for providing more guidance to the courts on the calculation of sentence but also the use of the relevant mitigation and aggravation factors in sentencing. This analysis, also shows the need that the prosecutor, defense attorney and injured party when finding and presenting before the court the mitigating and aggravating circumstances, they need to specifically focus on them and not just refer to them as relevant.

The Advisory Sentencing Commission will continue to monitor the trends in sentencing and in future reports be more thorough in specific case analysis and the need for specific measures for improvement including a more detailed analysis on the role of prosecutor and defense attorneys in presenting aggravating and mitigating circumstances for the court as required in an adversarial system.



Printed by:
United States Embassy in Pristina
U.S. DoJ / Office of Overseas Prosecutorial Development,
Assistance and Training (OPDAT)