



INADMISSIBILITY DECISION

Date of adoption: 20 March 2012

Case No. 2011-23

Mr. Hashim Rexhepi

Against

EULEX

The Human Rights Review Panel sitting on 20 March 2012 with the following members present:

Mr. Antonio BALSAMO, Presiding Member
Ms. Magda MIERZEWSKA, Panel Member
Ms. Verginia MICHEVA-RUSEVA, Panel Member

Assisted by
Mr. John J. RYAN, Senior Legal Officer
Ms. Leena LEIKAS, Legal Officer

Having considered the aforementioned complaint, introduced pursuant to Council Joint Action 2008/124/CFSP of 4 February 2008, the EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel and the Rules of Procedure of the Panel of 9 June 2010,

Having deliberated, decides as follows:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint was registered on 8 July 2011.

II. THE FACTS

2. The facts of the case, as submitted by the complainant, and as apparent from documents provided to the Panel, may be summarized as follows.

Background information

3. On 21 July 2010 the Special Prosecutor Office of the Republic of Kosovo (SPRK) filed an Application for Ruling on the Initiation of an Investigation against the complainant and others.
4. On 22 July 2010 a search warrant was issued by a pre-trial Judge in the District Court of Prishtinë/Priština to authorize a search of the complainant's business premises at the Central Bank of Kosovo, (CBK) in Prishtinë/Priština, the complainant's private residence and the business premises of the private company "Crea-Co".
5. The search was conducted the same day by the Kosovo Police Special Anti Corruption Unit (KP unit)
6. Later the same day the complainant was arrested in the CBK by the KP unit, on the basis of an arrest warrant issued by the SPRK on 22 July 2010. He was suspected of having committed multiple counts of Abuse of Official Position or Authority (5 counts), Trading in Influence (3 counts), Money Laundering, Tax Evasion and Accepting Bribes (1 count each).

Detention on remand

7. On 24 July, 2010 the Pre-trial Judge of the District Court, Prishtinë/Priština imposed detention on remand on the complainant for a period of one (1) month to expire on 23 August, 2010.
8. This ruling was further confirmed by a three Judge Panel in the District Court of Prishtinë/Priština on 27 July, 2010.
9. On the same date, the SPRK extended the investigation to include one additional charge of abusing official position.
10. On 16 August, 2010, the defense counsel filed a fresh motion to lift the detention on remand. The application was rejected by the pre-trial Judge on an unspecified later date.
11. On 17 August, 2010, the Public Prosecutor filed with the District Court of Prishtinë/Priština a motion for an extension of detention on remand, stating inter alia, that there was a justified suspicion that he would flee the jurisdiction if he was released. The defense counsel objected to the request.
12. On 20 August, 2010 the detention on remand was extended for a further period of two (2) months until 23 October, 2010 by a panel of three judges in the District Court of Prishtinë/Priština, on the suspicion that the complainant, in complicity with others, had committed the criminal offences outlined above (see paragraph 6 above).
13. The defense counsel requested a review of the detention of the complainant by the President of the Assembly of EULEX Judges on 6 September, 2010.

14. On 14 September, 2010 the defense counsel requested EULEX Chief Prosecutor, in accordance with Article 286 (2) of the Criminal Code of Kosovo (CCK), to review the lawfulness of the complainant's detention
15. The EULEX Chief Prosecutor replied on 15 September, 2010 that the Supreme Court had already confirmed the lawfulness of the decision to maintain the complainant in detention on remand on 26 August 2010 and that as a result there could be no such review. The complainant was further informed that the Supreme Court had set a deadline for the prosecution to present evidence to corroborate the charges by 23 October, 2010. After that date the complainant's detention order could be lifted in the light of evidence to be submitted by the prosecution.
16. A further motion for the determination of the lawfulness of the complainant's detention on remand was dismissed by the pre-trial Judge on 30 September 2010.

New charges

17. On 18 October, 2010 the SPRK made an application for an extension of detention on remand to the District Court of Prishtinë/Priština. Three new charges (Counts 6 to 8) were added to the application, namely Abuse of Official Position or Authority (three counts) and Accepting Bribes (three counts). The detention on remand was extended by a decision given by the pre-trial judge on 22 October, 2010 for a period of one (1) month set to expire on 23 November, 2010.
18. The defense counsel appealed against the decision on 22 October 2010 but the appeal was rejected as unfounded by a three-judge panel of the District Court of Prishtinë/Priština on 26 October, 2010.
19. In its ruling of 26 October, 2010, the panel stated that: "during the detention hearing on 20 October 2010 the pre-trial judge noted that the charges under Counts 6 to 8 (accepting bribes) were supported only by anonymous letters which cannot be considered as evidence supporting this motion".
20. The three judge panel also stated in its said Ruling, addressing the complainant's submission about an alleged non-disclosure of evidence by the SPRK that: "The same day [20 October 2010] after the detention hearing was over, the SPRK presented additional evidence in support of the charges under Counts 6 to 8 which was joined to the case file ... There are no indications [] either that this evidence was communicated to the defense [] or that another court session to examine the application for extension of the detention on remand took place".

Restrictive measures

21. On 15 November 2010, the SPRK filed with the District Court of Prishtinë/Priština a request for application of restrictive measures against the complainant. The charges under Counts 6 to 8 were retained in that request. The defense counsel objected to it.
22. On 18 November, 2010 a pre-trial judge ruled on the application for restrictive measures. It was decided, inter alia, that bail in the amount of Euros 20,000.00 be set and that he be released from detention on remand with immediate effect once the court received proof that the bail was paid. The charges under Counts 6 to 8 were included in the Ruling.
23. The complainant was released from detention on 18 November, 2010 having paid the bail ordered by the court.
24. The defense counsel objected to the continued application of the restrictive measures on 17 December, 2010.
25. On 18 January, 2011 the SPRK filed a further application for an extension of the investigation in accordance with Article 225 (1) of the CCK. The charges under Counts 6 to 8 were listed as part of the application despite the fact that they had been excluded by a pre-trial judge on 22 October, 2010 and by a panel of judges on 26 October, 2010 (see paragraphs 17 to 20 above).
26. The pre-trial judge held on 18 January 2011 that the investigation against the complainant be extended for a further six (6) months until 21 July, 2011. Once again charges under Counts 6 to 8 were included in the ruling. The defense counsel unsuccessfully opposed the extension.

Filing of Indictment

27. On 5 August, 2011 the SPRK filed the indictment against the complainant with the District Court of Prishtinë/Priština. The charges with regard to Counts 6 to 8 were dropped. He was charged with the following counts:

Count 1

- Abuse of Official Position or Authority and Trading in Influence: specifically, the complainant as Deputy Governor of Financial Supervision at the Central Banking Authority of Kosovo (CBAK) and Supervising Director for Insurance Companies abused his official position by influencing the Insurance Association of Kosovo (IAK) to purchase particular administration software from an IT Company "Crea-K" to the value of Euros 45,000.00. This company was co-owned by the complainant's son Granit Rexhepi and others.

Count 2

- Abuse of Official Position or Authority: specifically, on 14 April, 2005, the complainant abused his position as Chief Supervisory Officer of the CBAK in order to secure sponsorship from Banken per Biznes (BpB) to the Prishtinë/Priština Basketball Club on the amount of Euros 30,000.00. This sponsorship was alleged to be contrary to a prohibition order issued by the CBAK which prevented BPB authorizing loans or other transfers of money over Euros 10,000.00 due to the bank's deteriorating financial situation.

Count 3

- Abuse of Official Position or Authority; specifically on 29 December 2005 the complainant abused his position as the Chief Supervisory Officer of the CBAK to force the BpB to issue a loan to him in the amount of Euros 23,000.00 for personal financial purposes. This loan was in contravention of a Prohibition Order issued by the CBAK which precluded BpB authorizing loans over Euros 10,000.00 due to the bank's worsening financial situation.

Count 4

- Abuse of Official Position or Authority, Fraud and Trading in Influence: specifically on 16 July 2009 the complainant as Governor of the Central Bank of Kosovo with the intention of obtaining unlawful financial benefits for himself or for a third party appointed as administrator, Faton Bajrami, for the Insurance Company, Dardania. This Administrator, allegedly, under the direction and influence of the complainant, permitted the amount of Euros 1,987,997.19 of company funds to be deleted from the financial accounts of the company, even though this amount had been withdrawn by a number of employees over a period of time in the form of advance payments for inducements for prospective companies to agree to enter into contracts. These employees were found to be various associates of the complainant. This allegedly resulted in serious financial loss for the insurance company as it was shown to have a lower capital base than in fact it did have as well as defrauding the Kosovo Tax Authorities of revenue from the issuance of such loans.

Count 5

- Abuse of Official Position or Authority and Trading in Influence: specifically, that the complainant in his official capacity at the CBAK as Regulator and later as Supervisor, for the Regulation of Insurance Companies, traded influence in IAK in order to obtain employment for his close associates and members of his family in all the various departments within this organization.

Confirmation hearing on the Indictment

28. On 20 October, 2011 a confirmation hearing was held in the District Court of Prishtinë/Priština in the presence of the complainant and a co-defendant, their defense counsels and the SPRK prosecutor.

29. On 12 December, 2011, the Confirmation Judge ruled that part of the charges (counts 1, 2 and 5) were to be dismissed because the acts allegedly committed did not amount to criminal offences. It was further held in respect of the charges specified in counts 3 and 4 that there was insufficient evidence to support the indictment.

Appeal against Confirmation Judge Ruling

30. On 19 December, 2011 the SPRK Prosecutor filed an appeal against the confirmation ruling of 12 December, 2011.
31. On 11 January, 2012 a three judge panel in the District Court of Prishtinë/Priština dismissed that appeal and confirmed the earlier decision of the confirmation judge.

III. COMPLAINTS

32. The complainant alleges multiple violations of Articles 5 and 6 of the European Convention on Human Rights and Fundamental Freedoms (Convention, 1950).
33. His complaints are based primarily on
- his allegedly unlawful and unjustified arrest by the Kosovo Police Special Anti Corruption Unit on 21 July 2010,
 - his allegedly unwarranted detention on remand ordered by a pre-trial judge in the District Court of Prishtinë/Priština on 22 July 2010 and the subsequent extensions of his detention on remand on 20 August, 2010 and 26 October, 2010,
 - the non-communication to him of additional evidence, which was added to the file by the SPRK on 20 October, 2010 and relied on by the prosecution in the proceedings concerning his detention on remand, and
 - the reintroduction of the charges under Counts 6 to 8, based on anonymous letters as evidence, by the SPRK on 17 January, 2011, despite the exclusion of those Counts by earlier decisions dated 22 October, 2010 and 26 October, 2010.

IV. THE LAW

General conditions of procedural admissibility

34. Before considering the complaint on its merits the Panel has to decide whether to accept the complaint, taking into account the admissibility criteria set out in Rule 29 of its Rules of Procedure.
35. The Panel can only examine complaints relating to human rights violations by EULEX Kosovo in the conduct of its executive mandate in the justice, police and customs sectors as outlined in Rule 25, paragraph 1 of its ROP.

36. According to the said Rule, based on the accountability concept in the OPLAN of EULEX Kosovo, the Panel cannot review judicial proceedings before the courts of Kosovo. The mandate of the Panel does not authorize it to review court proceedings and court decisions. It has no jurisdiction in respect of either administrative or judicial aspects of the work of Kosovo courts. Those are within the sole competence of the Kosovo courts. Furthermore, the Panel has already found that the fact that EULEX judges sit on the bench of any given court does not detract from that court its character as part of the Kosovo judiciary (see, inter alia, HRRP cases nos. 2011-24, *Predrag Lazig*, paragraph 20; 2011-10, *Dejan Jovanovic*, paragraph 33).
37. In the present case the decisions contested by the complainant were given by Kosovo courts whose task was to determine, upon the complainant's appeals, the lawfulness of actions taken and decisions given by the prosecuting authorities during the investigation against the complainant. However, the Panel is of the view, for the reasons developed below, that for the purposes of the present case it is not necessary to decide whether the limited character of the tasks exercised by the courts in the present case is of any legal significance for the determination whether the Panel has jurisdiction to examine the present case.
38. The Panel will therefore leave open, for the purposes of the present case, the question whether it has jurisdiction to consider allegations relating to the Kosovo courts in so far as their actions are limited to reviewing the lawfulness of actions and decisions given by EULEX prosecuting authorities in the context of criminal investigations.

Compliance with six-month requirement

39. In accordance with Rule 25, paragraph 3 of the Panel's Rules of Procedure¹, complaints must be submitted within six months from the date of the alleged violation.
40. In the present case, the alleged violations concerning the complainant's arrest and detention commenced on 22 July, 2010 when the complainant was arrested and continued until his release from the detention on remand on 18 November, 2010.
41. The complainant filed his complaint with the Panel on 8 July, 2011. In accordance with Rule 25, paragraph 3 of the Rules of Procedures the complaint should have been lodged latest on 18 May 2011, i.e. six months from the date of his release and the end of the alleged violation. This part of the complaint does not therefore satisfy the admissibility criteria set out in Rule 29 of its ROP.

¹ As formulated in the version of 9 June 2010, in force at the time of lodging the current complaint.

42. Consequently, the issues raised in this part of the complaint do not fall within the ambit of the Panel's mandate, as formulated in Rule 25 of its Rules of Procedure and the OPLAN of EULEX Kosovo.

Victim status

43. The complainant challenges the fact that the SPRK, in its request of 18 January 2011, and the pre-trial judge, in his decision of the same date, referred to charges under counts 6 to 8, despite the fact that on 22 and 26 October 2010 the courts had noted that there was insufficient evidence to support these charges.
44. The Panel observes that in accordance with the case law of the European Court of Human Rights, a person may not claim to be a victim of a violation of his right to a fair trial under Article 6 of the European Convention of Human Rights which allegedly occurred in the course of proceedings in which the person was ultimately acquitted or which were discontinued (see, ECHR, *Osmanov and Husseinov v. Bulgaria* (dec.), nos. 54178/00 and 59901/00, 4 September 2003; *Witkowski v Poland* (dec.), no. 53804/00, 3 February 2003; *Oleksy v. Poland* (dec); no. 64284/01, 28 November 2006).
45. In the present case the criminal proceedings against the complainant were discontinued. The District Court of Prishtinë/Priština held, in its decisions given on 12 December, 2011 and 11 January, 2012, that the proceedings were to be discontinued for lack of sufficient evidence supporting charges brought against the complainant and because certain acts with which the applicant had been charged did not amount to criminal offences (see paragraphs 29 to 31 above).
46. The Panel notes that the essence of the complaint alleged procedural unfairness on the part of the authorities which had conducted the investigation against the complainant. The Panel considers that any procedural shortcomings which may have occurred in the investigation must be considered to have been rectified by the discontinuation of the proceedings and clearing of the complainant's name.
47. Thus, the applicant can no longer claim to be the victim of the alleged violations of his right to have a fair hearing. Consequently, the issues raised in this part of the complaint do not fall within the ambit of the Panel's mandate, as formulated in Rule 25 of its Rules of Procedure and the OPLAN of EULEX Kosovo.

FOR THESE REASONS, the Panel, unanimously,

holds that it lacks competence to examine the complaint,

finds the complaint manifestly ill-founded within the meaning of Article 29 (d) of its Rules of Procedure, and

DECLARES THE COMPLAINT INADMISSIBLE.

For the Panel,

John J. RYAN
Senior Legal Officer

Antonio BALSAMO
Presiding Member