



INADMISSIBILITY DECISION

Date of adoption: 21 April 2015

Case No. 2014-33

Arben Krasniqi

Against

EULEX

The Human Rights Review Panel sitting on 21 April 2015 with the following members present:

Ms Magda MIERZEWSKA, Presiding Member
Mr Guénaél METTRAUX, Member
Ms Katja DOMINIK, Member

Assisted by
Mr John J. RYAN, Senior Legal Officer
Ms Joanna MARSZALIK, 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 as last amended on 15 January 2013,

Having deliberated, decides as follows:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint was registered on 24 June 2014.

II. THE FACTS

2. On 6 March 2013, the EULEX Special Prosecutor initiated an investigation against the complainant on suspicion of organised crime, extortion and unauthorised possession of weapons. The complainant was detained on remand on 28 October 2013.
3. On 20 November 2013, the complainant's counsel asked the prosecutor to grant him access to the case file and to be invited to any witness and defendant interviews.
4. On 28 November 2013, the prosecutor agreed that the defence counsel should have access to the case file to the extent that Article 213 par. 3 of the Criminal Procedure Code (CPCK) permits. He could therefore consult records of the examination of the defendant, material obtained from or belonging to the defendant, material concerning such investigative actions at which he had been present or should have been admitted and expert analyses. It was determined, however, that he would not have access to other materials in the case file. The prosecutor relied on par. 6 of Article 213 of CPCK, according to which the prosecutor may refuse the defence access to particular items in the case file if there is a probability that it may endanger the purpose of the investigation or the lives or health of people.
5. On 10 January 2014, the complainant's counsel lodged a request for full access to the complete case file with the Basic Court of Pristina. Alternatively, he asked to be given access to all documents which did not contain privileged information or to a redacted version of the full case file. The response of the prosecutor was submitted to the Basic Court on 14 January 2014.
6. On 20 January 2014, an EULEX pre-trial judge of the Basic Court rejected the request. The court found that the complainant's counsel had been allowed access to the case file in accordance with Article 213 par. 3 of CPCK. It reiterated that Article 213 par. 6 of CPCK foresaw the possibility of denying the defence access to specific parts of the case file for reasons specified there. The court considered that the complainant's rights were not violated by denying him access to witnesses' statements and the ruling on the initiation of the investigation, as these were subject to protective measures ordered by the court. Allowing the complainant access to those documents would conflict with those protective measures. The court held further that, at that stage of the proceedings, providing the defence with redacted versions of the protected witnesses' testimonies would also endanger the purpose of the investigation or the lives or health of people. Having balanced the rights of the defence and the potential danger to life or health of persons under protective measures, the court held that the latter should prevail.

7. On 19 February 2014, the complainant lodged a complaint with the Constitutional Court of Kosovo. He asked the court to compel the pre-trial judge to give him full access to the case file.
8. On 31 March 2014, the Constitutional Court found the complainant's referral inadmissible.

III. COMPLAINTS

9. The complainant invokes Articles 5 (right to liberty) and 6 (right to a fair trial) of the European Convention of Human Rights and Fundamental Freedoms (the Convention). He complains that, without full knowledge of the case file, he is unable to challenge the lawfulness of his detention on remand. Moreover, he maintains that the principles of a fair trial and equality of arms demand that he should have at his disposal the same information as the prosecution.

IV. THE LAW

10. The Panel will examine the case under Article 5 par. 4 of the Convention.
11. As a matter of substantive law, the Panel is empowered to apply human rights instruments as reflected in the EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel. Of particular importance to the work of the Panel are the European Convention on the Protection of Human Rights and Fundamental Freedoms (the Convention) and the International Covenant on Civil and Political Rights which set out minimum standards for the protection of human rights which must be guaranteed by public authorities in all democratic legal systems.
12. According to the established case-law of the European Court of Human Rights proceedings conducted under Article 5 § 4 of the Convention before a court examining an appeal against detention must be adversarial. They must always ensure "equality of arms" between the parties, the prosecutor and the detained person. Equality of arms is not ensured if the applicant, or his counsel, is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his detention (see, among other authorities, *Mooren v. Germany* [GC], no. 11364/03, § 124, 9 July 2009; *Svipsta v. Latvia*, no. 66820/01, § 129, ECHR 2006 III (extracts); *Schöps v. Germany*, no. 25116/94, § 44, ECHR 2001-I; and *Garcia Alva v. Germany*, no. 23541/94, § 39, 13 February 2001). Any restrictions on the right of the detainee or his representative to have access to documents in the case file which form the basis of the prosecution case against him must be strictly necessary in the light of a strong countervailing public interest. Where full disclosure is not possible, Article 5 § 4 requires that the difficulties this causes are

counterbalanced in such a way that the individual still has a possibility effectively to challenge the allegations against him (see *Piechowicz v. Poland*, no. 20071/07, § 203, 17 April 2012, with further reference to *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 205, ECHR 2009).

13. However, 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.
14. According to Rule 25, paragraph 1, of the Rules of Procedure the Panel can examine complaints relating to the human rights violations by EULEX Kosovo in the conduct of its executive mandate in the justice, police and customs sectors.
15. The Panel has already held on many occasions that the actions of EULEX prosecutors taken within the context of criminal investigation are part of the executive mandate of the EULEX Kosovo and therefore fall within the ambit of the Panel's mandate (see, for instance, *E against EULEX*, 2012-17, 30 August 2013, § 20; *Z against EULEX*, 2012-06, 10 April 2013, § 32; *W against EULEX*, 2011-07, 5 October 2012 § 21).
16. Moreover, actions or omissions by EULEX prosecutors during the investigative phase of criminal proceedings are not to be considered, in principle, as forming part of "judicial proceedings" for the purpose of determining the Panel's competence (see *Thaqi v. EULEX*, 2010-02, 14 September 2011, § 64). In this regard, the Panel held that "*the actions and omissions of EULEX prosecutors [...] before the filing of indictment may fall within the ambit of the executive mandate of EULEX*" (see *Thaqi*, cited above, § 93).
17. Furthermore, it cannot be excluded that the Panel might be competent to evaluate the actions of EULEX prosecutors in criminal investigations even if they are subject to judicial review. The Panel would be competent to examine such acts and decisions, for instance, where the subject-matter of acts and decisions subject to such review touches on human rights issues such as, for example, the right to liberty or a right to a fair trial. The Panel would only intervene if and where allegations of human rights violations attributed to the prosecutor have not been fully addressed by the competent judicial authorities (see *E against EULEX*, cited above, § 22; *Z against EULEX*, cited above, § 34).
18. As regards the present case, the Panel notes that the complainant challenges the decisions given by the Basic Court of Pristina and the Constitutional Court in respect of access to his case file compiled by the prosecution and the compatibility of these decisions with relevant human rights standards, in particular the procedural guarantees of the right to liberty guaranteed by Articles 5 par.4 of the Convention.

19. The Panel observes that all decisions regarding the complainant's case file were rendered by competent judicial authorities upon his request. The courts were given an opportunity to fully examine both the complainant's and the prosecutor's arguments. The complainant has not identified any human rights issue that he was unable to raise with the court or that the court failed to properly address (compare, *mutatis mutandis*, *E against EULEX*, cited above, § 24; *Z against EULEX*, cited above, § 34).
20. The Panel has held on numerous occasions that, according to Rule 25, paragraph 1, of its Rules of Procedure, based on the accountability concept in the OPLAN of EULEX Kosovo, it has no jurisdiction in respect of either administrative or judicial aspects of the work of Kosovo courts. The fact that EULEX judges sit on the bench does not detract from the courts the character as part of the Kosovo judiciary (see, *inter alia*, *Rifat Kadribasic against EULEX*, no. 2014-09, of 10 November 2014, § 11, *Shaban Kadriu against EULEX*, 2013-27, 27 May 2014, § 17).
21. Consequently, having regard to the fact that the complainant's request to be given access to his file was fully reviewed by the courts, the Panel lacks jurisdiction to examine his complaints.

FOR THESE REASONS,

The Panel, unanimously, holds that it lacks competence to examine the complaint, as it falls outside its jurisdiction 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

Magda MIERZEWSKA
Presiding Member