



## **DECISION and FINDINGS**

**Date of adoption: 8 June 2011**

**Case No. 2010-07**

**Blerim Rudi**

Against

**EULEX**

The Human Rights Review Panel, sitting on 8 June 2011 with the following members present:

Mr. Antonio BALSAMO, Presiding Member  
Ms. Magda MIERZEWSKA, Member  
Ms. Anna BEDNAREK, Member

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

### **PROCEDURE**

1. The complaint was registered on 8 September 2010. Additional information was requested from the complainant on 2 November 2010. That information was received on 4 November 2010.
2. On 7 December 2010 the Panel decided to give notice of the complaint to the Head of Mission (HOM) of EULEX Kosovo, inviting him to submit written observations on the complaint. It was also decided to examine the merits of the application at the same time as its admissibility (Rule 30 paragraphs 1 and 2 of the Rules of Procedure of the Panel, hereafter ROP).

3. The observations of the HOM were received on 20 January 2011. They were subsequently translated and forwarded to the complainant for his reply.
4. On 10 February 2011 the complainant submitted his reply which was forwarded to HOM for information. HOM wished to submit further clarification. His reply was received on 29 April 2011 and communicated to the complainant.
5. On 6 May 2011 the complainant submitted a letter referring to his previous observations on the matter.

## **FACTS**

### **I. CIRCUMSTANCES OF THE CASE**

#### **Background**

6. *The Financial Intelligence Center (FIC)* was established pursuant to provisions of UNMIK Regulation 2004/02 (see relevant applicable law, below). The FIC is an independent entity which is responsible for collection and analysis of data and information for the prevention of money laundering and related offences and the prevention of financing terrorist activities. EULEX assumed responsibility for the FIC in December 2008 when it became part of the EULEX Police Component's Executive Department. In June 2010 the process commenced for the transfer of the executive functions of the Financial Intelligence Center from EULEX to the Kosovo institutions.
7. The FIC maintains databases of Cash Transaction Reports, (CTRs) and Suspicious Activity Reports (SARs) as well as the data and information collected for the analysis of such reports. Furthermore, the FIC disseminates intelligence data and information related to the matters under its competence to the law enforcement agencies of Kosovo, Police, Tax Administration, Customs, Central Bank of Kosovo, to the international bodies and entities in Kosovo such as EULEX, KFOR and the Independent Judicial and prosecutorial Commission as well as financial intelligence units abroad.
8. *The Disciplinary Board of the FIC* was established pursuant to Administrative Direction 2003/2 implementing UNMIK Regulation 2001/36. Under the Administrative Direction 2003/02 implementing the Regulation No. 2001/36, a decision of the Disciplinary Board can be appealed against to an internal Appeal Board. However, no such appeal board was ever established within the FIC.
9. *The Independent Oversight Board (IOB)* was established in September 2004 under the UNMIK Regulation No. 2001/36 (see relevant applicable law, below). It is a quasi-judicial body charged with hearing and adjudicating appeals made by civil servants in respect of

decisions concerning their appointment and removal as well as employment practices within the civil service.

### **Employment and distribution of duties**

10. The complainant was appointed as a Deputy Director of the FIC on 01 September 2008 through an open competitive selection procedure. He worked in that position from 01 September 2008 until 28 January 2010, when his contract was terminated (see paragraph 22 below).
11. According to the complainant, his duties and responsibilities were assigned to two individuals who were originally recruited as intelligence analysts. They were appointed Deputy Directors for Analyses and Compliance of the FIC on January 2009.

### **Termination of employment contract**

12. According to the documents submitted the complainant gave interviews and statements to at least two journalists which were subsequently published in *Koha Ditore* newspaper on 5 and 30 April, 29 October, 15, 16 and 18 December 2009. The last interview was related to the disciplinary proceedings initiated against the complainant (see paragraph 15 below).
13. On unspecified dates the complainant was orally informed by his superior, the Director of the FIC, that his interviews with the journalists constituted breaches of his duties as his supervisor alleged that he had wrongfully disclosed confidential information.
14. The complainant informed the Chief of the EULEX Executive Police Component, the supervisor of the Director of FIC, a EULEX employee, by e-mail on 25 September 2009 and again on 4 December 2009 about the difficulties which he had encountered with the management of the FIC and about the pressure exerted on him by the Director of the FIC. He received no reply.
15. On 7 December 2009, the director of the FIC instituted disciplinary proceedings against the complainant. The applicant was informed thereof in writing. The complainant was, at the same time, briefly informed of his alleged misconduct and invited to the hearing before the Disciplinary Board scheduled for 14 December 2009. He was invited to submit documentary evidence five (5) days prior to the hearing.
16. On 9 December 2009 the files the complainant had been working on were removed from his office.
17. On 14 December 2009 a disciplinary proceedings hearing was held. The complainant claims he was only informed about the hearing four (4) days in advance instead of five (5) days, as specified by the UNMIK Administrative Direction on the Kosovo Civil Service. The Disciplinary Board consisted of five members, both international and local. The complainant reported to the hearing but refused to attend it

as he did not approve the procedure and composition of the Disciplinary Board.

18. On the same day he was informed in writing that he was suspended with pay until the final decision was given in his case.
19. On 17 December 2009 the complainant was informed that due to further developments a new hearing was to be held in his case and that he would be duly informed officially about its time and location.
20. On 12 January 2010 the complainant was informed of alleged additional breaches of his obligations with which he was being charged after the first hearing and about the time and location of the second hearing.
21. A second disciplinary hearing was held on 20 January 2010. On the same day the complainant sent his pleadings to the Chairman of the Disciplinary Board and the Director of the FIC. He reiterated his earlier complaint about the fact that it was the Director of the FIC and not the personnel manager who had instituted the disciplinary proceedings against him. He further complained that no investigation had been conducted by the personnel manager, as required by Section 31.2 of the Administrative Direction No. 2003/2 before the hearings by the Disciplinary Board were held. In addition, he argued that the composition of the Board was in violation of Section 32.1 of that Direction.
22. On 27 January 2010 the Disciplinary Board of the FIC gave its decision. It held that the complainant's employment contract was to be terminated as of 28 January 2010 on the ground of multiple breaches of the Code of Conduct for Civil Servants which the complainant had committed. The complainant was instructed that the time-limit for lodging an appeal with the IOB against this decision was thirty (30) days.
23. On 19 February 2010 the complainant lodged an appeal with the IOB. On 27 April 2010 the IOB referred the case back to the Appeal Board within the FIC, as the first-instance of appeal by law. The appeal was to be processed within thirty (30) days. No such Appeal Board existed at the time within the FIC. The IOB ordered the FIC to address that deficiency in its decision of 27 April, 2010.
24. As there were no subsequent developments with regard to the review of the case within the FIC, the complainant filed a request on 3 June 2010 with the IOB for review of the decision of 27 January 2010.
25. In its decision of 10 August 2010 the IOB annulled the termination of the complainant's employment contract and ordered the FIC to reinstate him to his post within 15 days after the service of that decision on the FIC. It further ordered the FIC to pay to the applicant his salary from the date of the termination of his contract on 28

February 2010 until such time as he was reinstated to his position. Furthermore, the IOB requested that it be informed of the said reinstatement. It further informed the FIC that a failure to act in accordance with the decision would result in notification of the matter to the Assembly of Kosovo and the Prime Minister of Kosovo.

26. The FIC was served with that decision on 12 August 2010. Its legal officer allegedly refused to accept it while the Director of the FIC was on leave. The Director was ultimately served with it on 16 August 2010. Subsequently, the complainant was not allowed access to his work place within the 15-day time-limit specified in the decision.
27. On 30 August 2010 the complainant was denied access to his work place by the Director of the FIC as allegedly instructed by the legal advisor of EULEX. He was not been allowed to resume his duties since that time.

#### **Criminal proceedings**

28. On 17 December 2009 the EULEX Organised Crime Investigation Unit reported upon a suspicion against the complainant to the prosecuting authorities. He was suspected of having committed the criminal offence of unauthorized disclosure of information, insult and defamation punishable under Articles 169, paragraph 1, 187 and 188 of the Provisional Criminal Code of Kosovo, respectively.
29. On 29 June 2010 the Municipal Public Prosecutor of Prishtinë/Priština decided to discontinue the investigation against the complainant with regard to unauthorized disclosure of information, finding that there was no case to answer. The prosecutor instructed the plaintiff to privately pursue a civil claim against the complainant concerning the alleged insult and defamation, if they so chose.

#### **Review of the final administrative decision by the Municipal Court**

30. The decision ordering the complainant's reinstatement to his position, given on 10 August 2010 by the IOB, is a final administrative decision, subject to judicial review in accordance with the applicable laws.
31. The FIC filed with the Municipal Court of Prishtinë/Priština a request to declare the decision of 10 August 2010 null and void and to maintain in force the decision of the FIC to terminate the complainant's employment contract given on 27 January 2010.
32. These proceedings are pending.

## **II. RELEVANT APPLICABLE LAW**

#### **Council Joint Action 2008/124/CFSP**

33. The Articles 2 and 3 of Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in

Kosovo, EULEX KOSOVO (hereafter: Joint Action), for their relevant parts, read as follows:

**Article 2 Mission Statement**

EULEX KOSOVO shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices.

EULEX KOSOVO, in full cooperation with the European Commission Assistance Programs, shall fulfill its mandate through monitoring, mentoring and advising, while retaining certain executive responsibilities.

**Article 3 Tasks**

In order to fulfill the Mission Statement set out in Article 2, EULEX KOSOVO shall:

(a) monitor, mentor and advise the competent Kosovo institutions on all areas related to the wider rule of law (including a customs service), whilst retaining certain executive responsibilities;

(b) ensure the maintenance and promotion of the rule of law, public order and security including, as necessary, in consultation with the relevant international civilian authorities in Kosovo, through reversing or annulling operational decisions taken by the competent Kosovo authorities;

...

(d) ensure that cases of war crimes, terrorism, organised crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently, and by measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities;

(e) contribute to strengthening cooperation and coordination throughout the whole judicial process, particularly in the area of organised crime;

...

(h) assume other responsibilities, independently or in support of the competent Kosovo authorities, to ensure the maintenance and promotion of the rule of law, public order and security, in consultation with the relevant Council agencies; and

(i) ensure that all its activities respect international standards concerning human rights and gender mainstreaming.

**UNMIK Regulation No. 2004/02 on the Deterrence of Money Laundering and Related Criminal Offences**

34. Section 2 of UNMIK regulation no. 2004/02 on the authority of the Financial Information Centre reads, for its relevant part, as follows:

The Financial Information Centre ("the Centre") is hereby established within the Police and Justice Pillar. It shall receive funding from the Kosovo Consolidated Budget. The Head of the Centre shall be appointed by the Special Representative of the Secretary-General on the recommendation of the Deputy Special Representative of the Secretary-General for Police and Justice. The Centre shall submit reports every quarter to the Deputy Special Representative of the Secretary-General. The composition and structure of the Centre shall be set forth in an Administrative Direction.

## **UNMIK Regulation No. 2001/36 on the Kosovo Civil Service**

35. The relevant sections of UNMIK Regulation No. 2001/36, as amended by Regulations Nos. 2006/20 and 2008/12, on the Kosovo Civil Service read, as follows:

### **Section 1 Definitions**

(a) "Civil servant" means any employee of an employing authority, whose salary is paid from the Kosovo Consolidated Budget, except for:

...

### **Section 6 Code of Conduct**

Civil servants shall be bound by the Civil Service Code of Conduct, attached as an Annex to the present regulation, or such other Civil Service Code of Conduct as may be subsequently approved by a Decision of the Government.

### **Section 10 Functions of the (Independent Oversight) Board**

10.1 The Board shall:

(a) Hear and determine appeals against decisions of employing authorities in accordance with section 11 of the present regulation;

(b) Determine, in accordance with section 12 of the present regulation, whether the appointments of civil servants at the level of heads of department are made in accordance with the principles set out in section 2.1 of the present regulation;

...

### **Section 11 Appeals**

11.1 A civil servant who is aggrieved by a decision of an employing authority in breach of the principles set out in section 2.1 of the present regulation may appeal such decision to the Board in accordance with the provisions of the present section. Each such appeal shall be heard by a panel of three (3) Board members, who shall act for the Board in connection with the appeal assigned to them.

...

11.3 Where the Board is satisfied that the challenged decision breached the principles set out in section 2.1 of the present regulation, it shall order an appropriate remedy by written decision and order directed to the Permanent Secretary or chief executive officer of the employing authority concerned, who shall be responsible for effecting the employing authority's compliance with the order.

11.4 Where the employing authority concerned does not comply with the Board's decision and order, the Board shall report the matter to the Assembly, which shall forward the Board's report to the Prime Minister of Kosovo.

...

11.6 A Board decision constitutes a final administrative decision subject to judicial review in accordance with the applicable law.

## **Administrative Direction 2003/02, implementing the Regulation No. 2001/36**

36. Section 33 of the Administrative Direction 2003/02 obliges the employing authority to establish an Appeals Board:

### **Section 33 Appeals Board**

33.1 Each employing authority shall establish an Appeals Board to hear civil servant appeals against a decision of the Disciplinary Board and claims against management's:

(a) Disciplinary decisions regarding a civil servant;

...

(g) Termination of a civil servant's employment;

- (h) Discrimination or harassment; and
- (i) Other grievances about management practices or internal operations of the employing authority brought to the attention of the Appeals Board by a civil servant.

33.2 The Appeals Board shall be multi-ethnic, gender-balanced and composed of two (2) permanent members and a third member who shall be appointed by the employing authority separately for each case by the employing authority. The members shall be senior civil servants of the employing authority. One (1) of the two (2) permanent members shall be designated to chair the board. The provisions of section 7.3 of this direction shall, *mutus mutandis* be followed in all cases where an exception to the diversity principle is sought to be made

33.3 A member of the Appeals Board shall not be a member of the Disciplinary Board of the employing authority.

33.4 Any member of the Appeals Board who may have a conflict of interest in a particular case shall recuse himself or herself and the employing authority shall appoint another member for that specific case.

33.5 The Appeals Board shall have the following functions:

- (a) In the case of appeals against decisions of the disciplinary board:
  - (i) To decide whether there are *prima facie* grounds to admit an appeal against a decision of a disciplinary board;
  - (ii) If an appeal is admitted, to decide whether it is justified or not after going through the evidence and hearing the parties concerned; and
  - (iii) In case the appeal is held to be justified to pass orders for providing appropriate relief to the appellant; and
- (b) In the case of other types of appeals referred to in section 33.1:
  - (i) To give an opportunity for the production of evidence and hearing of the parties;
  - (ii) To decide whether the appeal is justified or not; and
  - (iii) In case the appeal is held to be justified to decide on the remedy to be provided and by whom.

33.6 The Appeals Board shall as far as possible complete the hearings of a case within thirty (30) days of its receipt.

...

### **Law No. 3/L-192 on Independent Oversight Board for Civil Service of Kosovo**

37. Law No. 3-L-192 was adopted on 15 July 2010. It's Article 14 reads:

"The aggrieved party, alleging that a decision rendered by the Board is unlawful, may appeal the Board's decision by initiating an administrative dispute before the competent court within thirty (30) days from the day of the service of decision.

Initiation of an administrative dispute shall not stay the execution of the Board's decision".

38. Article 23 of this Law provides:

"Upon the entry into force of this Law, UNMIK Regulation 2008/12 amending UNMIK Regulation 2001/36 on Civil Service in Kosovo shall be superseded.

This Law shall enter into force fifteen (15) days after the publication in Official Gazette of the Republic of Kosovo."

39. The Law entered into force on 30 August 2010.

## THE LAW

### ALLEGED VIOLATION OF ARTICLE 6 § 1 and ARTICLE 1 OF PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION ON THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

40. The complainant alleges a violation of Article 6 §1 of the Convention (the right to a fair trial).
41. Furthermore, in essence, he complains under Article 1 of Protocol No. 1 to the Convention (the right to the peaceful enjoyment of one's possessions) that that he has neither been reinstated to his post after a final decision of the IOB nor compensated, in compliance with that decision, for the pecuniary damage he sustained as a result of his dismissal.
42. The relevant provisions of the Convention read as follows:

**Article 6 Right to a fair trial**

In the determination of his civil rights and obligations (...) everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

**Article 1 (Protocol No. 1) Protection of property**

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

...

### Admissibility

43. Before considering the complaint on its merits the Panel has to decide whether to accept the complaints, taking into account the admissibility criteria set out in Rule 29 of its ROP.
44. The complaint was lodged with the Panel on 8 September 2010, thus within three months from the date when the Panel could receive complaints (8 June 2010).
45. According to Rule 25, paragraph 1, the Panel can only examine complaints relating to the human rights violations by EULEX Kosovo in the conduct of its executive mandate. The executive mandate refers to certain matters pertaining to justice, police and customs.
46. The Panel observes that the Head of the Mission acknowledged the involvement of the EULEX in the present case. The Panel therefore

considers it appropriate to accept that the case fell within the ambit of the executive mandate of EULEX.

## **Merits**

### **Submissions by the Parties**

#### *Comments by the HOM of EULEX Kosovo*

47. The HOM did not contest the facts as presented by the complainant and summarised by the Panel on the basis of the available documents.
48. He submitted that the FIC was handed over to EULEX in December 2008. According to the Technical Arrangement on the transitioning of the FIC to Financial Intelligence Unit (FIU), and the Kosovo Law on the Prevention of Money Laundering and Terrorist Financing, EULEX will transfer authority over FIC to FIU whilst retaining certain executive functions in accordance with its Mandate.
49. In his submissions the HOM accepted that Article 6 § 1 of the Convention was applicable to the circumstances of the present complaint.
50. He further noted that the final decision of 10 August 2010 by the IOB was a final administrative decision. It was subject to judicial review in compliance with the applicable law. Such review had been initiated by the FIC and the case was pending before the Municipal Court of Prishtinë/Priština.
51. In their request for review the FIC submitted that the IOB violated procedural rules and applied the law incorrectly. It had further been argued that the IOB failed to correctly establish the facts of the complainant's case. The FIC had requested that the decision given by the IOB should be declared null and void and that the decision to terminate the complainant's contract of employment be upheld.
52. The HOM acknowledged that the court proceedings did not prevent the implementation of the final decision of the IOB, ordering the complainant's reinstatement to his post.
53. However, in his additional submissions dated 26 April 2011 the HOM argued that the Law No.03/L-192 on the Independent Oversight Board for Civil Service of Kosovo which superseded the UNMIK Regulations governing the relevant issues is not applicable to the complainant's case. The IOB decision, as mentioned in the decision itself, was made in accordance with the UNMIK Regulations whereas the Law in question entered into force on 31 August 2010.

54. It was further argued that the FIC considered that the complainant's reinstatement would be contrary to the public interest, to the detriment of the Kosovo budget and the protection of confidentiality of sensitive data gathered by the FIC. It was on these grounds that the FIC had decided not to reinstate the complainant to his post but to temporarily stay the execution of the IOB's decision, with a view to protecting confidential documents and information. The FIC had considered that the reinstatement was not mandatory at this stage and decided to wait for the outcome of the judicial proceedings.
55. The HOM left it to the Panel to determine whether the grounds invoked by the FIC were sufficient to justify its decision not to execute the decision given by the IOB.
56. The HOM acknowledged that that decision had not been executed. However, he considered that the refusal to do so did not amount to a violation of Article 6 of the Convention as the decision was currently being reviewed by the court.
57. As to the complaint under Article 1 of Protocol No. 1 to the Convention, the HOM noted that a "claim" could constitute a "possession" within the meaning of the said Article if it was sufficiently established to be enforceable. He referred to the judgment of the European Court of Human Rights in the case of *Burdov v. Russia*, no. 59498/00, ECHR 2002-III.
58. However, the HOM considered that Article 1 of Protocol 1 had not been violated in the present case because the final administrative decision was under judicial review and its enforcement would be contrary to the public interest, the Kosovo budget and the protection of confidentiality of the FIC data.

#### *Comments by the complainant*

59. The complainant maintained that the fact that he had not been reinstated to his position nor had he been paid his salary despite the final administrative decision to that effect violated his rights.
60. He also maintained that EULEX violated the legislation by failing to enforce the final administrative decision and by making unjustified accusations against him without providing evidence. He referred to Article 14 of Law No. 3/L-192 (see paragraph 37 above) under which initiation of an administrative dispute should not stay the execution of the IOB's decision.

#### **The Panel's assessment**

##### *General Principles on Article 1 of Protocol No. 1 to the Convention*

61. An individual can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions related to his "possessions" within

the meaning of this provision. “Possessions” can be either “existing possessions” or assets, including claims, in respect of which the applicant can argue that he or she has at least a “legitimate expectation” of obtaining effective enjoyment of a property right (see ECHR, *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, § 61, ECHR 2007-X; *Maltzan and Others v. Germany* (dec.) [GC], nos. 71916/01, 71917/01 and 10260/02, § 74 c, ECHR 2005-V; *Kopecný v. Slovakia* [GC], no. 44912/98, § 35 c, ECHR 2004-IX)

62. The concept of “possessions” in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to the ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions” for the purposes of this provision. The issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1 (see, among many other authorities, ECHR, *Öneryıldız v. Turkey* [GC], no. 48939/99, § 124, ECHR 2004-XII; *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 63, ECHR 2007-I; *Broniowski v. Poland* [GC], no. 31443/96, § 129, ECHR 2004-V; *Beyeler v. Italy* [GC], no. 33202/96, § 100. ECHR 2000-I).
63. No legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant’s submissions are subsequently rejected by the national courts (*Anheuser-Busch Inc. v. Portugal*, cited above, § 65; *Kopecný v. Slovakia*, cited above, § 50).

*Application of the general principles in the present case*

64. In so far as the applicant relied in essence on Article 1 of Protocol No. 1 to the Convention and in so far as it could be understood that he was of the view that the decision of IOB created for him either an asset or a legitimate expectation to enjoy his possessions within the meaning of this provision, the Panel has considered as follows:
65. The Panel notes, firstly, that in the present case a distinction must be drawn between the complainant’s claim to have the termination of his contract by way of the decision of 28 January 2010 declared unlawful, null and void, and the issues arising in connection with the non-execution of the IOB’s decision of 10 August 2010.
66. With regard to the decision of 28 January 2010, the Panel notes that the FIC availed itself of the right to request a judicial review of that decision and it notes that that matter is pending before the competent court. Since the complainants claim in respect of the decision of 28 January 2010 is still subject to judicial review, the outcome of which remains to be seen, it would be premature for the Panel to address

this element of the complaint at this time. The Panel cannot therefore accept that in this respect the complainant has currently a claim which falls within the ambit of the notion of “legitimate expectation”, protected by Article 1 of Protocol No. 1 to the Convention.

67. However, with regard to the non-execution of the IOB’s decision of 10 August 2010, the Panel observes that that administrative decision was final.
68. In his initial submissions the HOM acknowledged that the initiation of a judicial review did not prevent the execution of that decision. The Panel, therefore, finds that the IOB’s decision of 10 August, 2010 generates on the part of the complainant, a legitimate expectation that that decision would be executed prior to the final determination of the lawfulness of the termination of the complainant’s employment contract which will be determined by the judicial review in due course.
69. In so far as the HOM argued, in his later submissions, that it was not mandatory to have the decision of 10 August 2010 complied with, the Panel will address this matter from the point of view of the lawfulness of the failure to execute it.
70. The Panel finds that in the circumstances of the case considered as a whole, the complainant may be regarded as having acquired, under the decision of 10 August 2010, a substantive interest protected by Article 1 of Protocol No. 1 to the Convention.
71. The Panel reiterates that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorises a deprivation of possessions only “subject to the conditions provided for by law” and the second paragraph recognises that the States have the right to control the use of property by enforcing “laws” (see ECHR, *The former King of Greece and Others v. Greece* [GC], no. 25701/94, §§ 79 and 82, ECHR 2000-XII).
72. Article 1 of Protocol No. 1 also requires that a deprivation of property for the purposes of its second sentence be in the public interest and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised (see, ECHR, among others authorities, *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, §§ 81-94, ECHR 2005).
73. Article 1 of Protocol No. 1 also requires that any interference be reasonably proportionate to the aim sought to be realised (see *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, §§ 81-94, ECHR 2005-VI). Consequently, an interference must achieve a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. The requisite fair balance will not be

struck where the person concerned bears an individual and excessive burden (see *Sporrong and Lönnroth v. Sweden*, 23 September 1982, §§ 69-74, Series A no. 52).

74. Moreover, the principle of “good governance” requires that where an issue in the general interest is at stake it is incumbent on the public authorities to act in good time, in an appropriate manner and with utmost consistency (see ECHR, *Beyeler v. Italy*, cited above, § 120, and *Megadat.com S.r.l. v. Moldova*, no. 21151/04, § 72, 8 April 2008).
75. In this connection, the Panel notes that the Director of the FIC, acting upon advice emanating from EULEX, prevented the complainant from resuming his work after the final decision by the IOB had ordered that he be reinstated in his post. By the same token, it was decided not to comply with the IOB’s decision in so far as it ordered that the applicant’s salary due for the period from 28 February 2010 onwards should be paid to him.
76. The Panel is of the view that the refusal to comply with the IOB decision amounted to an interference with the complainant’s right to the peaceful enjoyment of his possessions.
77. It must next examine whether that decision was lawful, served the public interest and whether it struck a fair balance between the interests of the community and those of the applicant.
78. As to the lawfulness of the decision not to comply with the IOB’s decision of 10 August 2010, the Panel observes that the complainant was not given any written reasons for it.
79. It is further noted that in its submissions the HOM has not provided an explanation, referring to the concrete facts of the case, of why the complainant’s reinstatement in accordance with the IOB decision would hinder the interests of the service. Likewise, it has not been shown that the complainant has ever been informed of such factual grounds, either orally or in writing.
80. In this context, it is further noted that no argument has been developed by the HOM to show that this refusal had legal basis and no concrete provision of law has been referred to.
81. Only such written grounds of that decision, clearly indicating the legal basis for it with reference to the concrete factual circumstances of the case would have rendered possible an objective *post-hoc* assessment of whether it decision complied with the requirement of lawfulness.
82. Having regard to the absence of grounds for the contested decision and to the failure to indicate a legal provision that could be construed as the basis for it, the Panel finds that the impugned interference with the complainant’s right to the peaceful enjoyment of his possessions,

in the form of a “legitimate expectation”, cannot be considered “lawful” within the meaning of Article 1 of Protocol No. 1.

83. This finding makes it unnecessary to examine whether that interference was made in the public interest and whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.
84. There has therefore been a violation of Article 1 of Protocol No. 1 to the Convention.

*General principles of Article 6 of the Convention and their application in the present case*

85. The Panel further observes that the decisions on the merits of the complainant's case have, so far, been given by the Disciplinary Board established within the FIC, and afterwards by the IOB.
86. It notes from the complainant's submission that no Appeal Board competent to hear civil servants' appeals in disciplinary and employment matters has been created within the FIC as it should have been the case under Administrative Direction 2003/02, implementing Regulation No. 2001/36. The Panel considers that it would have been preferable if such a body had been created in the FIC in compliance with the requirements of that Regulation. However, it is not necessary for the Panel to take a position, in the circumstances of the present case, as to whether the failure on the part of EULEX to create it was, as such, tantamount to a breach of Article 6 § 1 of the Convention.
87. The Panel reiterates that it is not incompatible with Article 6 § 1 of the Convention to confer the power to adjudicate on civil rights and obligations on administrative authorities, provided that their decisions are subject to subsequent control by a “tribunal” that has full jurisdiction (see, among many authorities, ECHR, *Nowicky v. Austria*, no. 34983/02, § 41, 24 February 2005). Nor is it obligatory for the bodies employing persons enjoying the status of civil servants to ensure, in internal proceedings relating to matters concerning employment, career and dismissal, full procedural guarantees of that provision and the first or even second instance determination of such matters by bodies complying with requirements that a “tribunal” within the meaning of Article 6 § 1 of the Convention must meet, provided that an appeal against their decision is subsequently available.
88. However, the issue of fairness of judicial proceedings in carrying out a review of administrative decisions has to be examined not in the abstract, but on a case-by-case basis once the proceedings were terminated. It has already been noted that in the present case the proceedings concerning the termination of the complainant's employment contract are still pending before the courts.

89. Hence, the complainant's allegations about unfairness of the proceedings is premature and must be rejected as manifestly ill founded within the meaning of Rule 29 of the Panel's Rules of Procedure.

**FOR THESE REASONS, THE PANEL, BY MAJORITY,**

1. *Declares* the complaint with regard Article 1 of Protocol No. 1 to the Convention admissible and the rest of the complaints inadmissible;
2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
3. *Finds* it appropriate, in the light of its above findings of fact and law, to make recommendations to the HoM; and
4. *Recommends* the following actions to be taken by the HOM:
  - A declaration should be made acknowledging that the circumstances of the case amounted to a breach of the complainant's rights attributable to the EULEX acts in the performance of its executive mandate; and
  - An examination of specific measures which the HOM could take in order to put an end to a violation found in the case should be undertaken.

The HOM is invited to inform the Panel of the measures he intends to undertake with regard to this decision by 8 August 2011.

Furthermore, the HOM is invited to inform the Panel and the complainant of the measures which have been taken, and about the results they have produced, by 31 November 2011.

For the Panel,

John J. RYAN  
Senior Legal Adviser

Antonio BALSAMO  
Presiding Member