



INADMISSIBILITY DECISION

Date of adoption: 23 November 2011

Case No. 2011-01

Family of Mr. Dedë Gecaj

Against

EULEX

The Human Rights Review Panel sitting on 23 November 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:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint was lodged by a lawyer acting on behalf of the family of Mr. Dedë Gecaj. The complaint was registered on 11 January 2011.

II. THE FACTS

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

Background information

3. Mr. Gecaj and his family lived in Switzerland since 1 April 1991. On 11 January 1999 Mr. Gecaj allegedly killed the teacher of his 14 year-old daughter in Switzerland. Soon thereafter he returned to Kosovo.
4. On 2 September 2010 Mr. Gecaj was extradited to Switzerland. He died there in prison on 18 November 2010.

Criminal investigation in Yugoslavia

5. On 25 February 1999 Mr. Gecaj was arrested in Pejë/Peć and charged under the Law on Criminal Proceedings of the Federal Republic of Yugoslavia.
6. On 1 March 1999 he appeared before the District Court of Pejë/Peć and he remained in custody in detention on remand.
7. The United Nations Security Council (hereafter "UNSC") Resolution 1244 establishing United Nations Interim Administration Mission in Kosovo (hereafter "UNMIK") was adopted on 10 June 1999.
8. On 27 September 1999 the Supreme Court of the Republic of Serbia changed the venue of the proceedings to the District Court of Leskovac for the ease of the proceedings, as allowed by the law.
9. The Swiss and Yugoslav authorities cooperated on the matter allowing the District Court of Leskovac and all the parties to access the evidence gathered in Switzerland as well as to carry out procedural activities, such as hearing of fourteen (14) witnesses and experts, in Switzerland in November 2000.

Criminal proceedings in District Court of Leskovac and Supreme Court of the Republic of Serbia

10. On 7 December 2000 the District Court of Leskovac found Mr. Gecaj guilty of murder under Article 47 of the Criminal Code of Serbia. He was sentenced to four years in prison. He was released from pre-trial detention on 7 December 2000, pending final judgment by the Supreme Court of the Republic Serbia. Mr Gecaj did not return to serve the rest of his sentence.
11. The Supreme Court of the Republic of Serbia verified the judgment on 22 March 2002.
12. On 28 May 2003 the sentence was mitigated to three years and six months of imprisonment with credit for time served in pre-trial detention from 27 February to 7 December 2000.

Extradition proceedings

13. On 19 May 2003 and 6 December 2005 the investigative judge in Switzerland issued an arrest warrant against Mr. Gecaj. He was suspected of having committed between 1995 and 1999 the above

mentioned murder and, in addition, possibly intentional homicide, multiple sexual acts with a child, multiple bodily injuries, multiple rapes, multiple coercion, false accusation and/or incitement thereto, violence and threats against authorities and officers and a punishable preparatory act for intentional homicide or abduction, all punishable under Swiss Criminal Code.

14. On 22 February 2006 an international *ad hoc* agreement regarding the extradition/transfer of Mr. Gecaj was concluded between Switzerland and UNMIK.
15. On 6 March 2006 the Swiss authorities requested the transfer of Mr. Gecaj to Switzerland. The transfer proceedings were initiated on 16 March 2006 by the Swiss authorities.
16. Mr. Gecaj was arrested on 4 May 2006 in Kosovo but he was released the same day on an UNMIK pre-trial judge's decision.
17. On 7 May 2006, on the prosecutor's appeal, the UNMIK panel in the District Court of Pejë/Peć ordered Mr. Gecaj to be placed in detention on remand. Mr. Gecaj was finally arrested over one year later, on 13 August 2007.
18. On 20 August 2007, a new *ad hoc* agreement for the extradition/transfer of Mr. Gecaj was signed by the Special Representative of Secretary General of the UN (hereafter "SRSG") and the Swiss Federal Minister of Foreign Affairs. The agreement was based on UNMIK Regulation 2003/34, Sections 2 and 3, that apply to "criminal offences committed prior to the date of entry into force of the present Regulation which would constitute criminal offences at the time of their commission".
19. On 3 September 2007 the UNMIK pre-trial judge of the District Court of Pejë/Peć ruled, under Article 521 of Provisional Criminal Procedure Code of Kosovo (hereafter the "PCPCK"), that the prerequisites for the transfer to Switzerland existed as to the alleged offences of murder, multiple bodily injuries, multiple rape, violence and threats against authorities and officers and a punishable preparatory act for intentional homicide. Those were the same criminal charges for which the detention on remand had been confirmed on 17 August 2007 (see paragraph 33 below).
20. On 5 November 2007 an UNMIK three judge panel of the District Court of Pejë/Peć granted the petition for the transfer of Mr. Gecaj to Switzerland for all the criminal acts allegedly committed by Mr. Gecaj, including also possible intentional homicide and multiple sexual acts with a child.
21. On 28 March 2008 the Supreme Court of Kosovo rejected the petition for transfer to Switzerland pursuant to Article 434 of the PCPCK. The court argued that at the time when the alleged crimes were

committed, Mr. Gecaj was a citizen of Serbia and on the basis of the most favourable law for the defendant he had the right not to be extradited from Yugoslavia which was granted by the Constitutions of the Former Federal Republic of Yugoslavia (FRY) and the Republic of Serbia. Furthermore, at the time, no extradition agreement existed between the FRY and Switzerland. Hence Mr. Gecaj could not be extradited.

Requests for Protection of Legality

22. On 24 July 2008 the public prosecutor filed a request for protection of legality, based on Article 457 of the PCPCK, against the final decision of the Supreme Court of Kosovo of 28 March 2008. The prosecutor requested that the Supreme Court find that the above mentioned constitutions were no longer in force in Kosovo and that there was nothing to prevent the transfer of Mr. Gecaj to Switzerland.
23. EULEX assumed responsibility from UNMIK for the case in December 2008 when it became operational. The president of the Assembly of the EULEX judges decided to maintain the case under the responsibility of EULEX judges in accordance with Article 16.2 of the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (L no. 03/L-053, hereafter, "Law on Jurisdiction").
24. On 6 April 2009 the Supreme Court of Kosovo in a mixed panel of EULEX and local judges, approved the prosecutor's request by concluding that the earlier decision of 28 March 2008 violated the law by claiming that the constitutions of the FRY and Republic of Serbia were in force and applicable at present in Kosovo and as such prevented the extradition of Mr Gecaj.
25. The court stated, *inter alia*, that when the extradition procedure for the transfer of Mr. Gecaj started, the Constitutions of FRY and Republic of Serbia were no longer in force in Kosovo. Both of those constitutions had been superseded by the Constitutional Framework for Provisional Self-Government (UNMIK Regulation 2001/9, which did not include any right of a national not to be extradited), UNMIK Regulation 2003-26, UNMIK Regulation 2003-34 and PCPCK. Article 533 of PCPCK allowed transfer of a resident of Kosovo when the transfer of the person was permitted by an international agreement and when the prerequisites for a transfer set forth in Article 517 of PCPCK were met. A valid international agreement was concluded on 20 August 2007 between UNMIK and Switzerland.
26. On 22 June 2009 Mr. Gecaj lodged a request for protection of legality against the decision of 6 April 2009. On 22 July 2009 the Supreme Court dismissed his request since, according to Article 451 of PCPCK, such request may not be filed against a decision of the Supreme Court in which a request for protection of legality was already decided upon.

Proceedings before the Constitutional Court

27. On 22 June 2009 Mr. Gecaj requested that the Constitutional Court annul the Supreme Court's decision of 6 April 2009. He claimed, *inter alia*, that the principle of "*ne bis in idem*"¹ was violated when the Supreme Court did not take into consideration the final decision in his case by the Supreme Court of Serbia in 2002.
28. Additionally, on 17 September 2009 Mr. Gecaj requested an interim measure, namely the suspension of the procedure for his transfer to Switzerland. The request for an interim measure was rejected on 15 December 2009.
29. On 20 May 2010 the Constitutional Court declared Mr. Gecaj's request inadmissible stating that it was up to Mr. Gecaj to raise the issue of "*ne bis in idem*" with the Swiss authorities when transferred to Switzerland. Also, the Constitutional Court held that extradition might be refused in circumstances, where the applicant has suffered or risks suffering a flagrant denial of a fair trial in the requesting state. No evidence was submitted by Mr. Gecaj that his transfer would subject him to such a risk in Switzerland.

Proceedings with regard detention on remand

30. During his proceedings before the District Court of Leskovac Mr. Gecaj was released from pre-trial detention on 7 December 2000, pending final judgment by the Supreme Court of the Republic Serbia. He never returned to custody, nor did he serve his sentence.
31. Based on the transfer request by the Swiss authorities and the subsequent *ad hoc* agreement (see paragraphs 14 and 15 above) Mr. Gecaj was arrested on 4 May 2006 in Kosovo but he was released on the same day based on an UNMIK pre-trial judge's decision.
32. On 7 May 2006, on the prosecutor's appeal, the UNMIK panel in District Court of Pejë/Peć ordered Mr. Gecaj to be placed in detention on remand. Mr. Gecaj was finally arrested more than one year later, on 13 August 2007.
33. On 17 August 2007, on the defense counsel's appeal, the UNMIK three judge panel of the District Court of Pejë/Peć terminated the detention with regard the crimes of murder, false accusation and multiple coercion. The detention on remand was confirmed for the rest of the criminal acts allegedly committed by Mr. Gecaj.
34. After a request by the public prosecutor on 28 March 2008, the detention of Mr. Gecaj was extended by the District Court of Pejë/Peć on 31 March 2008. He was released to house arrest on 8 July 2008 which was continued until 23 September 2008. The house arrest was later lifted on 4 September 2008 and the complainant was released.

¹ "No one shall be tried more than once for the same criminal act".

35. On 12 May 2009 a EULEX prosecutor issued an order for Mr. Gecaj's arrest.
36. He was eventually apprehended one year later, on 17 May 2010, and on the next day a pre-trial judge ordered him to be placed under detention on remand.
37. On 24 May 2010 a three judge panel dismissed his appeal and ordered him to be placed under detention on remand for a period of one month from his arrest until 17 June 2010. According to the decision the Swiss authorities had three months within which to request his transfer to Switzerland.
38. On 16 June 2010 the District Court of Pejë/Peć extended his detention until 17 August 2010.

Final transfer proceedings

39. On 17 June 2010 the Ministry of Justice of the Republic of Kosovo submitted to the District Court of Pejë/Peć a new request from the Swiss authorities seeking the extradition of Mr. Gecaj.
40. On 14 July 2010 the District Court of Pejë/Peć approved the decision on transfer with regard to the alleged offence of murder, possible intentional homicide, multiple sexual acts with a child and multiple rape. The transfer request was denied for the rest of the alleged offences due to the statute of limitations. In addition, it was decided that Mr. Gecaj should remain in custody until his transfer to Switzerland.
41. On 16 August 2010 the Supreme Court of Kosovo rejected the appeal by Mr. Gecaj against the decision of 14 July 2010.
42. On 2 September 2010 Mr. Gecaj was extradited to Switzerland. He died on 18 November 2010 in prison.

III. RELEVANT LEGISLATION

43. Article 16, paragraph 2 of the Law on Jurisdiction reads:

The Chief EULEX Prosecutor and the President of the Assembly of EULEX Judges will decide in accordance with this law which of the cases handed over pursuant to paragraph 1 of this Article fall within the jurisdiction and competence of the EULEX judges or prosecutors, respectively, and which other cases, for grounded reasons, will have to remain under the authority of EULEX judges and prosecutors after having been under the authority of UNMIK International Judges or UNMIK International Prosecutors.

IV. COMPLAINTS

44. The first part of the complaint claims in essence that EULEX Kosovo is responsible for the death of Mr. Gecaj. According to the

complainants Mr. Gecaj was extradited to Switzerland in contradiction of the relevant principles of international law and human rights, the legal framework applicable in Kosovo and the final decisions of the Supreme Court of Kosovo in 2008 and the Supreme Court of the Republic of Serbia in 2002. The extradition decision was taken by EULEX judges. The complainant requests that all the Kosovo and EULEX judges and prosecutors involved in various stages of the proceedings be prosecuted for the criminal acts they have allegedly committed.

45. The second part of the complaint concerns the death of Mr. Gecaj in a prison in Switzerland and also the various administrative and judicial proceedings before Swiss authorities concerning him and several members of his family.

V. THE LAW

46. 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.
47. According to Rule 25, paragraph 1 of the Rules of Procedure the Panel can examine complaints relating to human rights violations by EULEX Kosovo in the conduct of its executive mandate in Kosovo.
48. 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. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by international human rights law applicable in Kosovo.
49. The Panel notes that in the first part of the complaint the complainant requests that criminal charges be brought against the Kosovo and EULEX judges and prosecutors that had been involved in the case.
50. This part of the complaint concerns judicial proceedings conducted by courts in Kosovo. The fact that EULEX judges sit on the bench of a court assigned to examine a case does not detract from the courts their character as part of the Kosovo judiciary.
51. Furthermore, the panel has no jurisdiction in respect of either administrative or judicial aspects of the work of Kosovo courts and the legislation applied by them. The decisions of Kosovo courts are subject to appeals and the extraordinary legal remedies available under the applicable law. All of these remedies have been exhausted in the case in question.

52. As a result, the issue raised in the first part of the present complaint does not fall within the ambit of the executive mandate of EULEX Kosovo, as formulated in Rule 25 of its Rules of Procedure and the OPLAN of EULEX Kosovo.
53. The second part of the complaint concerns the treatment of Mr. Gecaj and his family members in Switzerland by the Swiss authorities. The Panel notes that it has no jurisdiction over proceedings that took place outside 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 Rule 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