



INADMISSIBILITY DECISION

Date of adoption: 14 September 2011

Case No. 2011-02

Chamalagai Krishna Bahadur and others

Against

EULEX

The Human Rights Review Panel, sitting on 14 September 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 13 January 2011. Additional information was requested from the complainant on 9 February 2011. That information was received on 11 February 2011.
2. On 23 February 2011 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 admissibility and the merits of the complaint. It was decided to examine the merits of the application at the same time as its admissibility (Rule 30 paras 1 and 2 of the Rules of Procedure of the Panel, hereafter ROP).

3. On 24 April 2011 and on 16 June 2011 the Secretariat submitted an inquiry to the Constitutional Court of Kosovo to establish the status of the complainants' case. On 20 June 2011 the Constitutional Court informed the Panel that the case would be examined in July 2011. In reply to the Secretariat's further inquiry, the Constitutional Court stated in August 2011 that the case would be reviewed during its September session.
4. The observations of the HOM were received on 21 July 2011. They were communicated to the complainant for his observations.
5. On 17 August 2011 one of the complainants informed the Secretariat that the complainants still remaining in Kosovo were leaving Kosovo on the following day early in the morning. No further observations were received from the complainant.

FACTS

I. CIRCUMSTANCES OF THE CASE

6. The facts of the case, as submitted by the parties, may be summarized as follows.

Background

7. The complainants are four (4) foreign citizens (Nepal). The first complainant arrived in Kosovo in late 2009. He registered a company called "*Goodmorning Global*" and started to run a restaurant "*Mount Everest Restaurant*" in Prishtinë/Priština. Subsequently, the first complainant applied for permission to bring two other persons to Kosovo as employees of the company. They arrived on 31 May 2010.
8. In July 2010 the first complainant closed down the restaurant as the rent was too high. It was decided that a new restaurant was to be opened in partnership with five persons in a new location. The first complainant and the two employee-partners entered into a rental contract with the owner of the new premises for five years. They imported essential equipment for the restaurant from India worth 3,000 Euros (EUR). Approximately EUR 1,000 was paid for the customs duty on the equipment. The new restaurant was opened under the name "*Bollywood Restaurant*". The new name and location of the restaurant were registered with the Kosovo Business Registration Agency on 20 August 2010 as owned by the company "*Goodmorning Global*".
9. The complainants submit that they invested over EUR 30,000 in their restaurant. They submit that they fulfilled all their legal obligations applicable under Kosovo laws. They have provided documents regarding the registration of their company, the fiscal documents as well as receipts of payments of various taxes and pension installments.

The validity of the complainants' permits

10. At the time of lodging their complaint with the Panel in January 2011, the complainants had the following residency and working permits:
 1. Sitaram Chaulagai, citizen of Nepal, Kosovo IID-card, valid until 23 October 2010, D-work permit protocol no. 89, valid until 12 April 2011;
 2. Chandra Chauhan, citizen of Nepal, Kosovo ID-card, valid until 23 October 2010;
 3. Krishna Chamlagai, citizen of Nepal, Kosovo ID-card, valid until 1 April 2011, B-work permit protocol no. 90, valid until 12 April 2011; and
 4. Hom Bhattarai, citizen of Nepal, Kosovo ID-card, valid until 1 April 2011, B-work permit protocol no. 93, valid until 12 April 2011.

Contacts with the immigration police in October 2010

11. On 28 September 2010 the third complainant visited the immigration office to submit all documents necessary to obtain a permit for the entry of his wife and another person to Kosovo. He was ordered to return to the immigration office in 10 days.
12. On 4 October 2010 the Kosovo Police conducted an inspection at the registered address of the company "*Goodmorning Global*". According to the police report drawn up afterwards, no business activity was conducted at that address, where there were residential rooms only. The police also inspected the location of the first restaurant as well as the location of the second restaurant which was not opened yet. The police received a report from the Tax Inspectorate in the Ministry for Trade and Industry indicating that the company had had no transactions, obligations or payments and in fact seemed not to be functioning at all.
13. On 5 October 2010 the police invited the three partners (complainants 1, 2 and 3) to report to the immigration office for an interview with regard to the new partners' invitations to Kosovo. The complainants' passports and Kosovo identity cards were confiscated by the police and they were requested to sign certain documents in Albanian without understanding their meaning.
14. On 6 October 2010 the complainants reported to the immigration office. On this occasion the work permits were taken away from them.
15. Only some days later the complainants found out that the document they had signed during their visit to the police station on 5 October 2010 stated that they were residing illegally in Kosovo. They returned to the police station to inquire about the document. They submitted to the police officers that they all had valid permits to remain in Kosovo and indicated that these permits had already been confiscated by the police.

Contacts with Ombudsperson Institution and a lawyer

16. The complainants subsequently contacted the Ombudsperson Institution. They were advised to contact the Center for Legal Aid and Regional Development. The complainants contacted a lawyer who informed them that he would talk to the police officers concerned as they were his friends.

Proceedings with regard to the termination of residency permits

17. On 26 October 2010 the Committee for Review of Temporary and Permanent Residency Permits of the Ministry of Internal Affairs decided to revoke the temporary residency permits that three of the complainants had been granted. The legal basis for this decision was Article 46, Paragraph 1, Count 1.2, 1.3 and Article 47, Paragraph 1, Count 1.2 of the Law on Foreigners No. 03/L-126 and Article 21 of Administrative Direction No. 01/2010-MPB on the Establishment of Committee for Review and the Committee for Complaints. It was noted that the decision was based on the police reports of 4, 5 and 6 October 2010, which indicated that the company was not operational. An expulsion order was requested for the complainants.
18. On 30 November 2010 the Commission for Reviewing Foreigners Complaints at the Ministry of Internal Affairs upheld the committee's decision to revoke the permits. The complainants had 30 days, from the decision being served on them, to lodge an appeal before the Supreme Court of the Republic of Kosovo. The complainants maintain that the first-instance decision was never served on them and that therefore they were unable to challenge it before the Supreme Court.

Proceedings with regard to the termination of work permits

19. On 29 October 2010 the Director of the Work and Employment Department within the Ministry of Labour and Social Welfare terminated the complainants' work permits due to the cancellation of their residency permits on 26 October 2010 (see paragraph 16 above).

Proceedings with regard to the order to leave Kosovo

20. On 1 November 2010 the police invited the complainants to the police station. They were given back their passports and were ordered to leave Kosovo by 6 November 2010, on the basis of a decision of the Head of the Border Police Department, dated 1 November 2010.
21. The complainants had eight (8) days in which to appeal against the decision setting the time-frame for leaving the country. An appeal against that decision did not have a suspending effect.
22. The complainants were told they faced arrest and forced removal from Kosovo if they failed to leave voluntarily. The complainants further submit that they were requested to sign an unidentified document. They refused to do so. Despite their requests, they were not given any reasons for their removal from Kosovo.

23. In the afternoon of 2 November 2010 the complainants visited the police station with another lawyer as their previous lawyer had refused to return their calls. According to the police memorandum drawn up on that day, the complainants refused to take their passports back and were resisting removal from the country. The police considered that this conduct indicated their refusal to respect the laws of Kosovo.
24. As a result of this resistance, criminal proceedings concerning an illegal stay in Kosovo were initiated against the complainants before the Municipal Court of Minor Offences on 8 November 2010.
25. On 9 November 2010 the Minor Offences Court found that the complainants had stayed in Kosovo illegally without residence permits despite the fact that deportation orders had been issued on 1 November 2010. They were fined in accordance with the Article 53.2, Article 55 and 58, Count 1.2 and 3 of the Law on Foreigners 03/L-126, and Article 2.al.1 of Administrative Direction 19/2009-MIA, based on the Article 73, 74, 195 and 199 of the Law on Offences GZ.KSAK no. 23/79.
26. The fines were to be paid within 15 days from the decision becoming final. In case of non-payment, the complainants faced imprisonment. They were also ordered immediately to leave Kosovo and banned from entering the country within two years.
27. On 22 November 2010 the High Court of Minor Offences upheld the lower court's decisions of 9 November 2010 and ordered the complainants to be immediately expelled from Kosovo. No appeal was available in law against this decision.
28. On 3 December 2010 the complainants requested an *interim* measure against the order to leave with the Constitutional Court of Kosovo. On 13 December 2010 the court approved the request until further notice. The case is currently pending before the Constitutional Court (see paragraph 3 above).

Continued proceedings

29. On 5 January 2011 the immigration police called the first complainant and summoned him to the police station. At the station the complainant was told to leave Kosovo within three days. No reasons were given.
30. On 19 January 2011, allegedly early in the morning, five police officers arrived at the complainants' house with a van and told them to get dressed and to go to a hearing in the Minor Offences Court. One complainant did not go as she was 8 months pregnant at the time.
31. The complainants submit that an interpreter who was present in the court told them that they had a choice between paying EUR 370 and imprisonment. It transpires from the documents submitted by the

complainants that the fines of three times EUR 100 and one of EUR 50 referred to individual traffic violations and were paid to the Kosovo Judicial Council.

Contacts with EULEX

32. On 3 November 2010 and again on 5 January 2011 the complainants communicated with EULEX by e-mail. The complainants explained their situation and noted that before all the proceedings against them had started they had been warned by at least two Nepalese people that one should not open an Indian restaurant in Prishtinë/Priština as it is "not good for one".
33. In reply the complainants were advised by the office of the Chief of Staff of EULEX Kosovo to contact a qualified private lawyer for advice on civil remedies available to them and to appeal with no further delay to the competent public administrative body or to the Supreme Court.

II. RELEVANT APPLICABLE LAW

Joint Action on EULEX KOSOVO

34. 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;
- (c) help to ensure that all Kosovo rule of law services, including a customs service are free from political interference;
- ...
- (e) contribute to strengthening cooperation and coordination throughout the whole judicial process, particularly in the area of organised crime;

(f) contribute to the fight against corruption, fraud and financial crime;
...

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

THE LAW

I. ALLEGED VIOLATION OF THE CONVENTION ON THE HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

A. Complaints

35. The complainants allege violations of The European Convention on Human Rights and Fundamental Freedoms (ECHR, 1950). They invoke Article 6 (right to a fair hearing), Article 13 (right to an effective remedy), Protocol No 1 (protection of property) and Protocol No 7 (safeguards regarding expulsion of aliens).
36. The complainants claim that their travel documents were taken away from them and they are being forced to leave Kosovo, leaving all their property behind, despite the fact that they are law-abiding citizens.
37. The relevant provisions of the Convention read as follows:

Article 6 Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

Article 13 Effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Protocol No 1

Article 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.

Protocol No 7

Article 1 Procedural safeguards

Procedural safeguards relating to expulsion of aliens

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

- (a) to submit reasons against his expulsion,
- (b) to have his case reviewed, and
- (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1 (a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

B. Submissions by the Parties

Comments by the HOM of EULEX Kosovo

38. In his submissions on the admissibility of the complaint the HOM argues that the circumstances of the complaint do not fall within the ambit of the “exercise of the executive mandate” of EULEX Kosovo.
39. According to him the Police Component, in general, is not authorised to use executive powers. The EULEX police retain a corrective capacity, which is a special form of the executive powers. Such powers can be used in relation to any violations of human rights and inappropriate operational or administrative decisions made by the Kosovo Police.
40. The HoM further argues that the Justice Component of EULEX has no executive mandate with regard to judicial proceedings conducted by the courts below the District Court level. In the present complaint, the proceedings were conducted at a lower level, namely before the municipal courts of minor offences. Nor has EULEX any mandate with regard to the Constitutional Court of Kosovo.
41. Furthermore, the HOM submits that the Ministry of Internal Affairs Monitoring Unit (MMU) of EULEX has substitution powers, a special form of executive powers, when requested by the HOM. However, in the present case no such powers were engaged.
42. The HOM argues that the actions and measures contested by the complainants have been taken by the Kosovo Police, the Kosovo Immigration Office, the Committee for Review of Temporary and Permanent Residence Permit of the Ministry of Internal Affairs of Kosovo and by the Kosovo judiciary. None of these actions that are relevant to the current complaint can be attributed to EULEX in its executive capacity.

Comments by the complainant

43. The complainants did not reply to the HOM's observations. According to the information received by the Panel Secretariat, they have left Kosovo.

C. The Panel's assessment

44. 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 (ROP).
45. 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 Rules of Procedure.


46. The Panel notes that the complaints concern proceedings that have taken place before Kosovo authorities with regard to the complainants' stay in the country and their working permits. All the decisions and actions in question have been taken by Kosovo authorities or judiciary.
47. Taking into consideration all the facts in the case, the issues raised in the present complaint do not fall within the ambit of the executive mandate of EULEX Kosovo. The fact the complainant contacted EULEX Kosovo for advice does not bring the case within the ambit of EULEX Kosovo's executive mandate.

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