



INADMISSIBILITY DECISION

Date of adoption: 10 April 2013

Case No. 2012-06

Z

Against

EULEX

The Human Rights Review Panel sitting on **8 and 10 April 2013** with the following members present:

Ms Magda MIERZEWSKA, member
Mr Guénaël METTRAUX, member
Ms Katja DOMINIK, member

Assisted by
Mr John J. RYAN, Senior Legal Officer
Ms Joanna MARSZALIK, Legal Officer
Mr Florian RAZESBERGER, 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 30 May 2012.
2. On 20 November 2012 the Panel requested the complainant to submit additional information.

3. On 21 November 2012, 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.
4. The observations of the HoM were received on 20 December 2012. They were subsequently communicated to the complainant for his comments.
5. On 1 January 2013, the Panel received documents from the complainant's new legal representative, confirming his power of attorney and submitting additional information.
6. On 7 February 2013, the complainant submitted his additional observations which were sent to HoM for information.
7. The Panel acceded to the complainant's wish not to have the complainant's name disclosed. He will therefore be referred to as Z.

II. THE FACTS

8. The facts of the case, as submitted by Z, can be summarized as follows:
9. On 13 January 2012, following the application of the EULEX prosecutor for the complainant's detention, the pre-trial judge of the District Court of Pristina ordered Z to be detained on remand for 30 days. Z appealed against this decision. On 17 January 2012, a three-judge panel of the District Court of Pristina dismissed his appeal.
10. On 6 February 2012, the pre-trial judge at the District Court of Pristina rejected the petition to determine the lawfulness of detention on remand filed on behalf of Z.
11. On 10 February 2012, following the application of the EULEX prosecutor for an extension of detention, the three judge panel ordered Z's detention to be extended until 12 April 2012. Z appealed against this decision. On 22 February 2012, his appeal was dismissed by the Supreme Court.
12. On 11 April 2012, following the application of the EULEX prosecutor for an extension of detention, the pre-trial judge ordered that Z's detention be extended until 12 May 2012. Z appealed against the decision. The appeal was dismissed by the three judge panel of the District Court of Pristina on 15 April 2012.
13. On 7 May 2012, the EULEX prosecutor again requested the three judge panel of the District Court of Pristina to extend the detention on remand for further two months.

14. On 11 May 2012, the three judge panel at the District Court of Pristina extended the detention on remand against Z until 12 July 2012.
15. In an addendum to this decision, dated 14 May 2012, the District Court of Pristina held that any further applications by the prosecutor to have the complainant's detention on remand prolonged should be supported by a detailed chronology indicating: i) what actions had been undertaken and completed in the investigation since the last decision on detention had been issued; ii) what investigative measures and actions remained to be taken or completed; and iii) an explanation as to why those actions remained outstanding.
16. On 18 May, the Supreme Court of Kosovo rejected the appeal of Z against the decision of the three judge panel of 11 May 2012.
17. On 4 July 2012, the EULEX Prosecutor filed an indictment against the complainant and others.
18. On 9 July 2012, a three judge panel of the Pristina District Court extended the detention on remand for another two month period until 12 September 2012. On 18 July 2012, the Supreme Court of Kosovo dismissed the appeal filed against the extension of detention on remand by Z.
19. On 10 September 2012, a three judge panel of the District Court of Pristina extended the detention on remand for another two month period until 12 November 2012.
20. On 8 October 2012, a bill of indictment dated 4 July 2012 was confirmed by the judge of the District Court of Pristina.
21. On 8 November 2012, the presiding judge of the District Court of Pristina extended the detention on remand until 12 January 2013. Z did not appeal against this ruling, but submitted on 12 December 2012 a request for immediate termination of his detention. On 27 December, the presiding judge of the District Court of Pristina rejected this request.
22. On 7 February 2012, the complainant's representative informed the Panel that Z had been released from detention on remand and put under house arrest.

III. COMPLAINTS

23. The complainant alleges violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In particular, he alleges that neither he nor the defence counsel had access to the documents in the case file and therefore they were "*not able to effectively challenge the need of detention*".

24. The complainant alleges that the prosecutor's requests for detention and corresponding judicial decisions granting the extensions were based on insufficient evidence. He challenges the veracity of arguments submitted in the prosecutor's application for extension of his detention on remand.
25. The complainant refers to Article 5 par. 3 of the European Convention for the Protection of Human Rights (ECHR). He argues that the European Court of Human Rights ("the Court) has repeatedly found violations of a right to be tried within a reasonable time or released pending trial resulting from lengthy periods of inactivity in the handling of a case prior to trial, delays caused by experts, understaffing, inadequate working practices of the authorities and from difficulties arising from the need to protect the identity of a protected witness. He alleges that certain of these reasons were relied on by the prosecution in their applications for his detention to be extended. He submits that his right to a fair hearing within a reasonable time or to be released pending trial has been breached accordingly.
26. The complainant relies on Article 10 and Article 11 par. 1 of the Universal Declaration of Human Rights; on Article 5, par. 1c, 2, 3 and 4, Article 6 par. 1, 2, 3a, 3b and 3d, of the ECHR; on Article 9, par. 2 to 4 of the International Covenant on Civil and Political Rights; and on Article 6 par. 1 and 2 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment.

IV. THE LAW

Admissibility

27. 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.
28. According to Rule 25, par. 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.
29. 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.

Jurisdiction of the Panel

30. The HoM submitted that the circumstances of the present case fall under the executive mandate of EULEX.

31. The Panel 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 of the District Court Pristina and/or the Supreme Court of Kosovo does not detract from the courts the character as part of the Kosovo judiciary (see *inert alia, Halili against EULEX*, 2012-08, 15 January 2013, at par. 21 *Pajaziti against EULEX*, 2012-05, 4 October 2012 at pars. 9-10 *Dobruna against EULEX*, 2012-03, 4 October 2012 at par. 12 *Zeka against EULEX*, 2012-02, 4 October 2012 at par. 21).
32. On the other hand, the Panel has already held that the actions of EULEX prosecutors or the police 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, *W against EULEX*, 2011-07, 5 October 2012 at par. 21; *Hoxha against EULEX*, 2011-18, 23 November 2011 at par. 22; *S.M. against EULEX*, 2011-11, 23 November 2011 at par. 15)
33. The Panel has further held that actions or omissions by the prosecutors during the investigative phase of criminal proceedings may not be considered as being made in the context of "judicial proceedings (see *Thaqi v. EULEX*, 2010-02, 14 September 2011, par. 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 v. EULEX*, 2010-02, 14 September 2011, par. 93).
34. The Panel has already found that it has jurisdiction to examine acts and decisions given by EULEX prosecutors in the context of criminal investigations. Furthermore, it cannot be excluded that in certain circumstances the Panel's jurisdiction would cover decisions and acts of the prosecuting authorities in criminal investigations even when they were subject to a subsequent judicial review. The Panel is of the view that it would have jurisdiction to examine such acts and decisions where the subject matter of acts and decisions subject to such review touches on human rights issues such as, for example, the right to personal liberty and security within the meaning of Article 5 of the ECHR. 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.
35. The Panel will examine the present case having regard to these considerations.
36. Turning to the circumstances of the present case, the Panel notes that the complainant, in essence, challenges the decisions given by the courts in respect of the imposition of his detention on remand and its extension and the compatibility of these orders with the human rights standards, in particular in so far as they guarantee to defendants in criminal proceedings a right to personal liberty and security. Further, the complainant has submitted that in the proceedings concerning the

imposition and extension of his detention on remand his defence counsel did not have access to the documents in the case file and therefore “*has not been able to effectively challenge the need of detention*”.

Article 5, par. 4 ECHR – access to documents in the proceedings concerning pre-trial detention

37. The HoM submitted that the proceedings in which the complainant sought to challenge the lawfulness of his pre-trial detention were in conformity with Article 5 par. 4 of the Convention.
38. The HoM submitted according to the jurisprudence of the ECtHR there was no obligation on the prosecution to disclose every document it had in its possession. It only had to allow access to documents which were essential in order to effectively challenge the lawfulness of detention.
39. The HoM submitted that in the present case the information provided to the defence had been more than sufficient to provide it with an adequate opportunity to comment on the prosecutor’s arguments.
40. The HoM further stated that the complainant had full access to the case file since the end of July 2012, following the filing of the indictment with the court. The HoM further stated that neither the defendant nor his counsel had identified which documents they considered were essential for them to challenge the lawfulness of his detention. In essence, the HoM submitted that no request for inspection of files had ever been submitted for the consideration of the prosecution.
41. In response, the complainant stated that the prosecution had failed to provide access to the documents in the case file, especially at the start of the investigation. He gave an example of a preliminary hearing of 19 November 2012 when the presiding judge could not find the statements of all witnesses the prosecution had proposed in the case file, to which the Prosecutor responded by saying that he had removed two statements, had retaken them and had “adopted everything they said”.
42. Further the complainant submitted that the defense would prepare a list of evidences which was crucial for an effective challenge of his detention on remand. However, no such list was subsequently submitted to the Panel.
43. The Panel observes that the complainant did not specify who, in his view, was responsible for the insufficient access to the case file, the prosecuting authorities or the courts. In its opinion the Panel would have jurisdiction to examine this complaint has it been shown that the prosecuting authorities were responsible for any alleged shortcoming (see paragraphs 31 - 32 above) or that the applicant had raised this

complaint expressly before the courts which failed to respond to it (see paragraph 34 above).

44. However, in the absence of any indication of the evidence which was, in the complainant's view, essential for challenging effectively the need for his detention, and, crucially, having regard to the fact that the complainant has not shown that he raised this issue in his appeals, expressly or in essence, thus giving the courts an opportunity to address it, the Panel is of the view that it lacks jurisdiction to examine this part of the complaint.

Article 5 par. 1 and 5 par. 3 ECHR – Lawfulness and length of pre-trial detention

45. The HoM maintained that the relevant decisions were compatible with the standards of lawfulness within the meaning of Article 5 of the ECHR. It was argued that detention on remand had been reviewed by the courts at regular intervals and on each occasion it had been assessed whether the circumstances continued to justify the deprivation of liberty.
46. The HoM further argued that the complainant's detention had been based not only on a reasonable suspicion of his having committed the offences concerned, but also on the risk of absconding and, most importantly, of a possible interference with the investigation. The detail and consideration given by both the District Court of Pristina and the Supreme Court of Kosovo showed the special diligence displayed by Kosovar authorities in the conduct of proceedings, as required by the ECtHR (ECtHR, *Kudla v. Poland*, GC judgment of 26 October 200 at par. 11).
47. Further, the HoM stated that given the complexity of this case of financial offences, "the prosecutor [had] acted with speed, getting the case indicted within six months of detention".
48. In his reply, Z maintained that that the courts' decisions on the continuation of detention had not been based on relevant and sufficient grounds and that the authorities had failed to display special diligence in the conduct of the investigation.
49. The Panel notes that, as outlined in par. 9 to 22 above, the complainant spent a period of more than a year in detention, before being put under house arrest. During this time, the order for detention was extended six times.
50. The Panel observes that all the decisions on the complainant's detention, both as to its imposition and subsequently about its extension were given by the judicial authorities. These decisions were appealed against by the complainant and subsequently his appeals were examined by the appellate courts. The courts were given an opportunity to examine the complainant's submissions challenging the lawfulness of

his detention order and of the subsequent decisions extending his detention for further periods.

51. Consequently, having regard to the fact that the complainant's detention was imposed by the court and that its lawfulness was subsequently reviewed, following the complainant's appeals, also by the courts, the Panel lacks jurisdiction to examine complaints pertaining to the manner in which the District or Court of Pristina and/or the Supreme Court of Kosovo examined its lawfulness (see paragraph 31 above).
52. As a result, the issues raised in the present will therefore not be reviewed by the Panel, as formulated in Rule 25 of its Rules of Procedure and the OPLAN of EULEX Kosovo.

FOR THESE REASONS, THE PANEL, UNANIMOUSLY,

finds the complaint falls outside of the Panel's 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