



**OMBUDSPERSON INSTITUTION in KOSOVO
INSTITUCIONI I OMBUDSPERSONIT në KOSOVË
INSTITUCIJA OMBUDSPERSONA na KOSOVU**

SPECIAL REPORT No. 6

on

The Conformity with Recognized International Standards of Judicial Practice Regarding a Certain Category of Cases Against Persons Using Invalid Driving Licenses Issued by Authorities of the Federal Republic of Yugoslavia

addressed to

**Mr. Harri Holkeri
Special Representative of the Secretary General of the United Nations**

The Ombudsperson for Kosovo, pursuant to Sections 1.1 and 4.1 of UNMIK Regulation No. 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo and Rule 22, paras. 3 and 4 of the Rules of Procedure of the Ombudsperson Institution, on 20 November 2003:

has presented the following report to Mr. Harri Holkeri, Special Representative of the Secretary General of the United Nations, within the meaning of those provisions:

BASES FOR THE SPECIAL REPORT

1. This Special Report is based on applications lodged with the Ombudsperson by individuals who have been convicted of forgery for carrying invalid driving licenses issued by authorities of the Federal Republic of Yugoslavia (hereinafter FRY), and on other sources of information available to the Ombudsperson Institution.

BACKGROUND

2. Since June 1999, the Internal Affairs Offices of the Federal Republic of Yugoslavia located in Kosovo are no longer in existence. Many of them have, however, moved offices to locations in Serbia, from where they continue to issue certain official documents including driving licenses. These documents carrying the stamp of the FRY are not recognised by UNMIK and local authorities in Kosovo. In March 2003, the Director of the Department of Justice of UNMIK issued a circular on the Validity of Driving Licenses Issued by Authorities of the Federal Republic of Yugoslavia (no. 2003/1). In this circular, the UNMIK, *inter alia*, expressly stated that driving licenses issued by FRY authorities after June 1999 will only be valid if they were issued outside the territory of Kosovo. Driving licenses issued by FRY authorities within the territory of Kosovo which expired after 1 January 1999, were valid until 31 March 2003. After that date, they are considered as invalid.
3. A number of individuals whose driving licenses were issued by FRY or Serbian authorities and thus contain a stamp of the FRY have approached the Ombudsperson to complain about their convictions for forgery under Article 203 of the Criminal Law of the Socialist Autonomous Province of Kosovo. These individuals complained about the alleged lack of a legal basis for their conviction and argued that carrying an invalid driving license cannot be compared to the act of falsifying a document and using a falsified document pursuant to the above-mentioned Article 203.

DISCLAIMER

4. Nothing contained in this Special Report should be construed as implying that the Ombudsperson has waived his right to investigate individual complaints alleging violations of human rights or abuses of authority with regard to issues relating to Article 7 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter European Convention on Human Rights). The Ombudsperson reserves all rights to exercise his jurisdiction regarding these or any related matters in the category of cases dealt with in the present report.

SCOPE OF THE REPORT

5. The primary focus of this Special Report is whether or not the practice of convicting persons carrying invalid driving licenses issued by authorities of the FRY of forgery conforms with the relevant international human rights standards established under Article 7 of the European Convention on Human Rights.

RELEVANT INSTRUMENTS

6. Section 11 of United Nations Security Council Resolution 1244 (1999)(10 June 1999)(hereinafter S/RES/1244(1999) reads in pertinent part,

'The Security Council... [d]ecides that the main responsibilities of the international civil presence will include... (j) protecting and promoting human rights....'

7. Section 1 of UNMIK Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo (25 July 1999) reads, in pertinent part:

1. All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.

8. The relevant laws currently in force in Kosovo are:

- a) The 1977 Criminal Law of the Socialist Autonomous Province of Kosovo (*SFRY Official Gazette 011-25/77, 28 June 1977*)(hereinafter “the Criminal Law”), which reads in pertinent part:

Article 203

- 1) Whoever falsifies document or modifies a true document in order to use that document as the true one or whoever the false document or the modified one, uses as a true document or has in possession an the order to use it, shall be punished up three years in the prison [...]

- b) The 1977 Socialist Federal Republic of Yugoslavia Criminal Procedure Act (*SFRY Official Gazette 26/1986, 16 May 1986*)(hereinafter “the CPA”), which reads in pertinent part:

Chapter 1: Basic Provisions

Article 1

This law sets forth the rules which are to guarantee that no innocent person be convicted and that a penalty be pronounced on a criminal offender under the conditions provided for in the criminal code and on the basis of the legally prescribed procedure.
[...]

- c) The 1988 General Law on the Safety of Traffic on the Roads, which, in pertinent part, reads:

Article 183

- 1) While driving a vehicle, a driver must be equipped with a valid driving license, which he is obliged to show to an authorized person upon request.

[...]

Article 230

The following offences will be punished with a fine of 10.000 Dinars, to be paid immediately:

[...]

23) The failure of a driver to carry with him/her an appropriate driver's license, [...]

9. UNMIK Administrative Direction No. 2001/24 amending Administrative Direction No. 1999/2 implementing UNMIK Regulation No. 1999/4 on the Currency Permitted to be Used in Kosovo reads in pertinent part as follows:

The Special Representative of the Secretary General,

[...]

For the purpose of designating the Euro as currency to be used in Kosovo for all budgets, financial records, and accounts and for all payments, including compulsory payments,

Hereby gives the following Administrative Direction:

[...]

Section 2

Compulsory Payments and Administrative Fees

2.1 Pursuant to section 4.1 of UNMIK Regulation No. 1999/4, the designated currency to be used for compulsory payments shall be the DM or Euro up to and including 28 February 2002 and thereafter payments shall only be made in Euro.

2.2 Pursuant to section 4.2 of UNMIK Regulation No. 1999/4, the administrative fee for a person wishing to make compulsory payments in Dinar shall be ten percent (10%) of the assessed compulsory payment.

2.3 Administrative fees and compulsory payments, if paid in Dinar, shall be calculated in accordance with the most recent exchange rate quoted by The Banking and Payments Authority of Kosovo.

[...]

10. Article 7 of the European Convention on Human Rights reads in pertinent part as follows:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

[...]

ANALYSIS

Overview of principles governing the principle of *nullum crimen, nulla poena sine lege* under Article 7 of the European Convention on Human Rights

11. The Ombudsperson considers that this matter raises issues under Article 7 para. 1 of the European Convention on Human Rights, which reads, in pertinent part:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

12. According to the Court's case law, Article 7 embodies the general principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). This also includes the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (see, as recent cases, *Veeber v. Estonia*, judgment of 21 January 2003 and *E. K. v. Turkey*, judgment of 7 February 2002, see also *S.W. v. the United Kingdom* and *C.R. v. the United Kingdom*, judgments of 22 November 1995 and *Kokkinakis v. Greece*, judgment of 25 May 1993). Instead, it must be construed and applied in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *Veeber v. Estonia* cited above).

13. From these principles it follows that criminal offences must be clearly defined in law, so that each individual will know from the wording of the law, but also, if need be, from the assistance of a court's interpretation of it, what acts and omissions will make him criminally liable (see *S.W. v. the United Kingdom* cited above). The concept of law here also implies qualitative requirements such as accessibility and foreseeability (see *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995).

14. At the same time, every legal provision, no matter how clearly drafted, will always inevitably be in need of judicial interpretation. Doubtful points will always need to be elucidated, the interpretation of law will always need to be adapted to changing circumstances. Article 7 thus cannot be read as outlawing a gradual clarification of the rules of criminal liability through judicial interpretation from case to case, which is primarily a matter for the assessment of domestic courts (see *Veeber v. Estonia* cited above). Instead, it is the Court's task to consider whether such a development of judicial interpretation is consistent with the essence of the offence and could reasonably be foreseen (see *S.W. v. the United Kingdom* cited above).

Whether a conviction of forgery for carrying an invalid driving license is compatible with the above Article 7 principles

15. Bearing in mind the above case law, the Ombudsperson considers that it was impossible for the individuals concerned to foresee that using invalid driving licenses that were issued by authorities of the FRY would make them liable for using forged documents within the meaning of Article 203 of the Criminal Law.

16. In this context, the Ombudsperson notes that in the circular 2003/1 (see para. 2 *supra*), the Department of Justice of UNMIK stated that there is a fundamental difference between an invalid FRY license and a forged FRY license. It stated more precisely that a forged document is one that falsely claims to have been issued by the body stated on the document, or a genuinely issued document which has been fraudulently altered without the consent of the issuing authority. However, even if the UNMIK regards licenses issued by FRY or Serbian authorities as invalid, these licenses are not forgeries. The Department of Justice expressly stated that it was improper to charge or convict any person with an offence under Article 203 for obtaining or using such a license. Instead, persons found operating vehicles with an invalid license issued by FRY authorities are liable to prosecution by Minor Offence Courts for driving without a valid driving license and/or driving with an expired driving license pursuant to the Law of the Safety of Traffic (see para 8 c) *supra*). In the circular, the Department of Justice warned that any prosecutor or judge found to have committed misconduct in the above sense would be subject to disciplinary sanctions which could include dismissal.
17. The Ombudsperson agrees with the interpretation of the legal situation expressed in the circular. Due to the fundamental difference between a forged document and an invalid document, the application of Article 203 of the Criminal Law to such cases could not conceivably be foreseen. Such an interpretation clearly cannot be regarded as necessary or clarifying within the meaning of the above case law. The convictions of the persons concerned are thus not based on law, but on an arbitrarily extensive, if not to say absurd interpretation of the law. This distinctly runs counter to the principles of Article 7 of the European Convention on Human Rights.

Conclusion

18. In light of the above considerations, the Ombudsperson concludes that any conviction of individuals carrying invalid driving licenses issued by FRY authorities for forgery under Article 203 of the Criminal Law constitutes a violation of these individuals' rights under Article 7 of the European Convention on Human Rights.

RECOMMENDATIONS

19. The Ombudsperson recommends that the Special Representative of the Secretary General of the United Nations:

- should, no later than 20 December 2003, ensure that all available and appropriate legal remedies will be taken to reestablish the rule of law in the category of cases dealt with in this report;
- should, upon receiving this report, disseminate it through all appropriate channels to all courts, public prosecutors' offices and police authorities in Kosovo;
- should, no later than 10 January 2004, inform the Ombudsperson of any actions taken in response to this report, in accordance with Section 4.9 of UNMIK Regulation 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo.

Marek Antoni Nowicki
Ombudsperson