



MISSION IN KOSOVO

Organization for Security and Co-operation in Europe

**THE DEPARTMENT OF HUMAN RIGHTS,
DECENTRALIZATION, AND COMMUNITIES**

Legal System Monitoring Section

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Unreasoned decisions imposing detention on remand breach domestic law and international human rights standards

The OSCE Mission in Kosovo (OSCE) has previously expressed its concerns about inadequate reasoning in decisions imposing detention on remand.¹ However, the OSCE notes that in the vast majority of the monitored cases, the Kosovo courts still fail to properly justify decisions imposing detention on remand.

International human rights standards require courts to provide reasons for their decisions.² A reasoned decision must apply the facts of the case to the law, and must not be “general or abstract”.³ The adequate reasoning of a decision to impose pre-trial detention is necessary for defendants to exercise their right to challenge the lawfulness of the detention through appeal⁴ or a *habeas corpus* petition.⁵

The Provisional Criminal Procedure Code of Kosovo (“Criminal Procedure Code”) requires that, in imposing detention on remand,⁶ the court gives “an explanation of *all material facts*, which dictated detention on remand, including the reasons for the grounded suspicion that the person committed a criminal offence, and the *material facts* under Article 281 [...]”.⁷ The judge also must provide reasons why the measures alternative to custody are not sufficient.⁸

Despite these clear requirements, the OSCE observed that in the majority of the monitored cases the Kosovo courts still do not refer to the facts of the case, thus failing to provide an explanation of how the specific circumstances warrant the suspect’s deprivation of liberty.

¹ See e.g. OSCE Review of the Criminal Justice System (April 2003-October 2004): Crime, Detention and Punishment, (October 2004) page 32; and OSCE Review of the Criminal Justice System (1999-2005): Reforms and Residual Concerns (March 2006), page 52.

² See, e.g., European Court of Human Rights, *Smirnova v. Russia*, Judgment, 24 October 2003, paragraph 65 ff. There, the Court held that the detention of the applicant during the investigation amounted to a violation of Article 5 of the European Convention on Human Rights, since the decisions issued by the court were “terse” and did not “describe in detail characteristics of the applicants’ situation” (at paragraph 70-71).

³ *Id.* at paragraph 63.

⁴ See Article 283(3), Provisional Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation No. 2003/26, 6 July 2003 (Criminal Procedure Code).

⁵ See Article 286(2) and (3), Criminal Procedure Code (“*habeas corpus*” proceedings). Detention on remand is unlawful, unless it is imposed “in accordance with a procedure prescribed by law” (see Article 5(1)(c), European Convention on Human Rights and Article 9(1), International Covenant on Civil and Political Rights).

⁶ In summary, detention on remand may be imposed only if the three following conditions set forth by Article 281 Criminal Procedure Code simultaneously apply: (1) the grounded suspicion that the defendant committed a crime; (2) the danger that the defendant may (a) abscond; or (b) influence witnesses or destroy evidence; or (c) repeat the criminal offence; (3) the non sufficiency of a more lenient measure foreseen in Article 268 of the Criminal Procedure Code.

⁷ See Article 283(1), Criminal Procedure Code (emphasis added).

⁸ See Article 281(1)(3), Criminal Procedure Code. Furthermore, according to Justice Circular 2000/27, of 19 December 2000, all decisions on detention must be based on a fully reasoned written decision detailing the grounds for detention and evidence relied upon in support of those grounds.

In a case before a district court, the pre-trial judge on 16 March 2007 imposed one month of detention on remand against a defendant suspected of murder,⁹ with the following reasoning: *“The prosecutor’s proposal for issuing the detention on remand is justified and supported by evidence. The legal ground, item (ii) is appropriately justified while first legal ground, item (i) lacks reasoning. The pre-trial judge acting in accordance to Article 268 (2) of the [Criminal Procedure Code], came to a conclusion that no other alternative measure could apply in the concrete case besides the detention measure.”*(unofficial translation)

In a case before a municipal court, involving pre-trial proceedings against four defendants suspected of fraud, falsifying documents, and legalization of false content,¹⁰ on 20 October 2006 the court imposed one month of detention on remand with the following justification: *“There is a grounded suspicion, deriving from the case file, that the suspects have committed the criminal offences with which they are charged. Regarding the conditions from point (i) subparagraph 2 and 1 of Article 281 of the [Criminal Procedural Code], the pre-trial judge considers that there are grounds. Respectively, given that suspects have committed criminal offences that are dangerous for the society, the manner of commission, the pre-trial judge considers that if left in liberty or some other alternative measure is ordered against them, there is a fear that they will escape. The pre-trial judge considers the presence of the suspects cannot be ensured by some other measure, except the detention on remand.”* (unofficial translation)

In a case before a municipal court, the pre-trial judge on 30 April 2007 imposed detention on remand against a defendant suspected of accepting bribes¹¹ *“because if at liberty, there is a risk that [he] could obstruct the flow of criminal proceedings by influencing the witnesses, injured party or co-perpetrators. Considering the seriousness of the criminal offence, manner and circumstances under which the criminal offence was committed, the personal characteristics and other personal circumstances, there is a risk that they could repeat the criminal offence.”* (unofficial translation)

In the above cases, the courts failed to refer to the facts of the case, and limited themselves to a (sometimes confusing) paraphrase of the law. Thus, they failed to show that the reasons for detention on remand as required by Article 281 of the Criminal Procedure Code exist in that particular case. Insufficient or no reasoning of a decision violates fair trial standards¹² and possibly the right to liberty,¹³ and consequently the decision imposing detention should be appealed.

⁹ Article 146, Provisional Criminal Code of Kosovo, promulgated by UNMIK Regulation No. 2003/25, 6 July 2003 (Criminal Code).

¹⁰ Articles 332, 261, and 334, Criminal Code.

¹¹ Article 343(1), Criminal Code.

¹² See European Court of Human Rights, *García Ruiz v. Spain*, 30544/96, Judgment, 21 January 1999, paragraph 26.

¹³ See European Court of Human Rights, *Yagci and Sargin v. Turkey*, Judgment, 9 June 1995, paragraph 52 (the risk of absconding as a ground for detention cannot be gauged solely on the basis of the severity of the sentence risked, but must be assessed with reference to a number of other relevant factors); *Tomasi v. France*, Judgment, 27 August 1992, paragraph 98 (the court must explain the risk of absconding and why this danger could not be countered by alternatives to detention measures); and

In light of the above, the OSCE reminds Kosovo attorneys and the judiciary:

- Courts should provide adequate reasons when issuing rulings related to detention on remand.
- In particular, courts should cite relevant evidence and the individual factual circumstances of the case, which warrant detention on remand, and explain why measures alternative to detention are not suitable.
- Attorneys should appeal unreasoned decisions on the grounds provided for by Article 286(3)(2) or Article 283(3) of the Criminal Procedure Code.

Failure to maintain accurate and complete court records in civil proceedings violates applicable domestic law

The OSCE is concerned by an observed failure of courts to maintain accurate records in civil trial proceedings.

The Law on Contested Procedure¹⁴ requires that records be taken “[...] of all actions conducted at court sittings.”¹⁵ Courts must record the “name and composition of the court, place where the action is taken, day and hour of the conducting action, title of the disputed issue, and names of the present parties or third persons or their legal representatives or agents.”¹⁶ Furthermore, “[t]he records of the trial shall particularly include the following information: whether the hearing has been open or closed for the public, content of the statements of the parties involved, their proposals and offered evidence, adduced evidence, along with the quotations of the statements of the witnesses and expert witnesses, and decisions of the court made at the sitting.”¹⁷

Despite these legal requirements, the OSCE has observed that courts in Kosovo often fail to maintain accurate and complete court records. The following cases serve as examples:

In the execution of a municipal court judgment in which the plaintiff was awarded compensation for damages, the defendant failed to appear at the execution procedure on 18 July 2007. Nevertheless, the court record states that the prohibition on selling or in any other way disposing of the movable property was explained to the defendant.

In a case before a municipal court, the minutes of the main trial session, held on 2 July 2007, included the names of lay judges who were not present.

Clooth v. Belgium, 12718/87, Judgment, 12 December 1991, paragraph 40 (the danger of continued criminality must be a plausible one and the measure appropriate in light of the circumstances of the case and in particular the past history and personality of the person concerned).

¹⁴ Law on Contested Procedure, Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 4/77, 36/80, 69/82, 58/84, 74/87, 57/89, 27/90, and 35/91.

¹⁵ Article 123, Law on Contested Procedure.

¹⁶ Article 124, Law on Contested Procedure.

¹⁷ *Id.*

In a property dispute before a municipal court, the judge ordered the defendant's representative to provide the death certificate of the third defendant to the court. The court record of 5 September 2007 failed to reflect this order. Furthermore, two different times are recorded as the beginning of the session.

In a case before a municipal court, involving a family dispute, the court failed to record whether the trial sessions held on 20 August 2007 and on 3 September 2007 had been open to the public. The minutes also did not include information regarding whether the judge had verified the identity of the parties.

The failure of the Kosovo courts to maintain accurate and complete records in these cases breaches domestic law. Moreover, if court records are inaccurate, a party may be unable to effectively appeal violations of procedure, possibly leaving no remedy for violations of domestic law or fair trial standards.¹⁸ In addition, a systemic failure of the courts to maintain complete and accurate records impedes the development of an efficient, accountable, and transparent judiciary in Kosovo.

In light of the above, the OSCE recommends:

- Judges should ensure that all records of court proceedings contain complete and accurate information.

¹⁸ As guaranteed by Article 6(1) of the European Convention on Human Rights.