



ADMISSIBILITY DECISION

Date of adoption: 5 October 2012

Case No. 2011-20

X. and 115 other complainants

Against

EULEX

The Human Rights Review Panel sitting on 5 October 2012 with the following members present:

Ms. Magda MIERZEWSKA, Presiding Member
Ms. Verginia MICHEVA-RUSEVA, Member
Mr. Guénaél METTRAUX, Member

Assisted by
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 of 9 June 2010,

Having deliberated, decides as follows:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint was registered on 9 June 2011.
2. The Panel acceded to the complainants' wishes not to have their names disclosed.
3. As Mr. John Ryan was Senior Legal Advisor for the United Nations Interim Administration Mission in Kosovo's (UNMIK) Human Rights Advisory Panel (HRAP) at the time when the complainants' case was

examined by that Panel, he is not participating in the proceedings before the Human Rights Review Panel.

II. THE FACTS

4. The facts of the case, as submitted by the complainants, and as apparent from documents provided to the Panel, as well as from other relevant information from official sources, may be summarized as follows:

Background information on the IDP camps

5. During the 1999 conflict, many Roma from Roma Mahala (also known as the Fabrika or Mitrovica/Mitrovicë Mahala) and other parts of Kosovo fled to the northern part of Kosovo as a result of inter-ethnic violence and the destruction of their homes.
6. Some 600 internally displaced Kosovo Roma, Ashkali and Egyptians were placed into Internally Displaced Persons (IDP) camps.
7. The camps of Cesmin Lug/Cesminlukë (in Mitrovicë/Mitrovica municipality) and Žitkovac/Zhikoc (in Zvečan/Zveçan municipality) were established by the Office of the UN High Commissioner for Refugees (UNHCR) in 1999.
8. A third camp was built in Leposavić/Leposaviq in 1999, some 45 kilometers from Trepča.
9. In 2001, a fourth camp, Kablare, was established near Cesmin Lug/Cesminlukë. The first two camps and the fourth camp were located within 3 kilometres of the Trepča smelter and within 300 meters of two mine tailing sites.
10. The fifth camp, Osterode, was a former Yugoslav military camp used by the French KFOR from 1999-2005, after which it was converted into a camp for the internally displaced persons ("IDPs"). Osterode camp became operational in 2006. The camp is situated within the city of Mitrovicë/Mitrovica, with residential apartment buildings within 20 meters from the camp's gate.
11. Although the camps were built as a temporary measure, efforts to find alternative accommodation were unsuccessful for a long time as suitable land for new housing could not be identified by local authorities.
12. The living conditions in the IDP camps were and continue to be very poor. In addition to that, it was established as early as 2000 by the United Nations Interim Administration Mission in Kosovo (UNMIK), KFOR and World Health Organisation (WHO) that as a result of the former mining activities, the land in the area was severely polluted, especially with lead. Most of the persons living in the camps had blood lead concentrations exceeding medically acceptable levels.

13. The Roma residing in the camps were allegedly informed about the dangers to their health posed by the lead poisoning only in 2005.
14. The Zitkovac/Zhikoc camp was operational from 1999 until 2006, Cesmin Lug/Cesminlukë camp from 1999 until 2010 and the Kablare camp from 2001 until 2006.
15. The Osterode camp has been operational since 2006. The Leposavić/Leposaviq camp has remained operational since 1999.
16. In 2006, some of the residents of Cesmin Lug/Cesminlukë were relocated to Osterode. Some residents refused to move to Osterode as they did not consider it a better option from their current residence.
17. From 2001 until 2008 UNMIK was in charge of the camps. In May 2008, UNMIK handed over the responsibilities on the remaining camps to the Kosovo government, namely the Ministry for Community and Return.
18. In January 2009 the management of the Cesmin Lug/Cesminlukë and Osterode camps was handed over from the Norwegian Church Aid to a local NGO, Kosovo Agency for Advocacy and Development (KAAD), funded by the Ministry for Community and Return. In April 2009, the Office of the Kosovo Prime Minister confirmed in a public declaration that it would deal with the lead contamination problem.
19. Eventually, the local Kosovo authorities allocated suitable land for construction of housing for the families living in the camps. The resettlement project, funded among others by the European Union and USAID, allowed the Cesmin Lug/Cesminlukë camp to be evacuated and demolished in October 2010.
20. After the latest round of resettlements in October 2011, the Osterode camp still accommodates some 10-20 families.¹ It is not known to the Panel how many families reside in the Leposavić/Leposaviq camp.

Background information on the complainants

21. The complainants are 116 Roma families and members of Roma families. Many of the complainants are allegedly suffering from lead induced diseases.
22. At the time of filing the complaint with the Panel in June 2011, most complainants indicated as their address either the Cesmin Lug/Cesminlukë, Osterode or Leposavić/Leposaviq camps.
23. It is not known to the Panel how many, if any, of those approximately 10 families that remain in the Osterode camp are complainants in the current complaint.

¹ Press release by the European external Action Service (EEAS) 20 October 2011.

Proceedings against UN

24. On 10 February 2006 counsel filed a complaint with the UN for Third Party Claim for Personal Injury or Death.
25. On 3 March 2006 counsel filed a complaint with the Office of Internal Oversight Services of the UNHCR.
26. On 4 July 2008 counsel filed a complaint concerning living conditions and health problems in the five UNMIK administered IDP-camps mentioned above before the UNMIK's Human Rights Advisory Panel.
27. On 5 June 2009 the Human Rights Advisory Panel (HRAP) declared the complaint partly admissible. On 11 August 2009 an objection as to the admissibility of the case based on the non-exhaustion of available legal avenues was raised by the UN Special Representative of the Secretary General (SRSG).
28. On 17 October 2009 the SRSG issued an Administrative Direction No. 2009/1 Implementing UNMIK Regulation No. 2006/12 on the Establishment of HRAP. Its Sections 2.1, 2.2 and 2.3 provide that any complaint, new or already pending, to the HRAP that is or may become in the future the subject of the UN Third Party Claims Process or Proceedings shall be deemed inadmissible. If such a complaint was already declared admissible, the question should be reassessed and determined anew.
29. Furthermore, this Administrative Direction restricted the temporal scope of the HRAP's jurisdiction by providing that no complaints filed with the HRAP shall be admissible, if submitted after 31 March 2010.
30. The complainants' case had been pending before the UN Third Party Claims Process since 10 February 2006 without any progress.
31. In its decision of 31 March 2010 the HRAP first considered UNMIK's new objection to admissibility arising from the Administrative Direction No. 2009/1. It first noted that it could be seriously questioned whether the SRSG had the competence to alter some of the basic principles contained in UNMIK Regulation No. 2006/12 by an "implementing" administrative direction. However, it held that the fact remained that the provisions of that Direction formed part of the legal basis of the HRAP's functioning. It noted that the Administrative Direction removed from it the HRAP jurisdiction to examine whether the complainant had, prior to lodging his complaint with the HRAP, exhausted effective legal remedies. It further held that the applicants' substantive complaints fell prima facie within the ambit of the UN Third Party Claims Process and had therefore to be declared inadmissible.
32. The HRAP further held that after the Third Party Claims Process has been concluded, the complainants could request the HRAP to reopen the proceedings, despite the cut-off date of 31 March 2010 imposed

by the Administrative Direction No. 2009/1. The HRAP would then decide whether or not to accept such a request.

33. On 25 July 2011 the UN Office of Legal Affairs declined to act further on the Third party Claims Process stating that it was a claim against the administration of Kosovo by UNMIK rather than a claim for injury of the individual Roma. No further details of the decision have been submitted to the Panel.

Proceedings before OECD

34. In June 2011 counsel lodged a complaint on behalf of 129 Roma in Kosovo before the National Contact Point of OECD in Norway. The complaint alleged that Norwegian Church Aid (NCA), a Norwegian NGO that managed the IDP camps from 1999 until 2009 for UNMIK and Kosovo government, was in breach of the OECD Guidelines on, among other things, human rights.
35. In September 2011 the complaint was dismissed. The National Contact Point held that NCA could not be considered an enterprise in the sense of the OECD guidelines.

Contacts with EULEX

36. On 21 January 2010 a representative for the complainants requested, via an online-form, a meeting with the Head of Mission (HoM) of EULEX to discuss the situation in the IDP camps in North-Kosovo.
37. On the same day, 21 January 2010, the Press & Public Information Office of EULEX replied, on behalf of the HoM EULEX, that no such meeting would be arranged and that the issue did not fall within the frame of the EULEX mandate.
38. On 2 February 2010 the complainants' representative sent a 46-page memorandum to EULEX Chief Prosecutor, requesting investigation and prosecution for serious crimes that had been and were being committed against the Roma residing in the IDP camps.
39. On 4 February 2010 EULEX Chief Prosecutor met the complainants' representative and informed him that no investigation of the alleged criminal offences would be instituted, as the case falls outside EULEX jurisdiction. He also advised that they should approach local institutions regarding the matter.

APPLICABLE LAW

COUNCIL JOINT ACTION 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO

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.

Article 3 Tasks

In order to fulfil the Mission Statement set out in Article 2, EULEX KOSOVO shall:

(...)

(h) assume other responsibilities, independently or in support of the competent Kosovo authorities, to ensure the maintenance and promotion of the rule of law, public order and security, in consultation with the relevant Council agencies; and

Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo

Article 3 Jurisdiction and competences of EULEX judges for criminal proceedings

(...)

3.3. Before the commencement of the relevant stage of the proceeding, upon petition of the EULEX Prosecutor assigned to the case or working in the mixed team identified in Articles 9 and 10 of this law, or upon petition of any of the parties to the proceeding, or upon a written request of the President of the competent court or of the General Session 5 of the Supreme Court of Kosovo where the provisions related to the disqualification of a judge or lay judge foreseen by the PCPCK (Article 40-44 of the PCPCK) are not applicable, the President of the Assembly of EULEX Judges will have the authority, for any reason when this is considered necessary to ensure the proper administration of justice, to assign EULEX judges to the respective stage of a criminal proceeding, according to the modalities on case selection and case allocation developed by the Assembly of the EULEX Judges and in compliance with this law, for the following crimes, when the investigation or prosecution is not conducted by the SPRK:

(...)

h) violating equal status of residents of Kosovo (Art. 158, PCCK)

Article 12 Authority of EULEX prosecutors in case of unwillingness or inability of Kosovo Public Prosecutors

12.1. At any stage of any criminal proceeding, if a Kosovo Public Prosecutor is unwilling or unable to perform his or her duties and this unwillingness or inability might endanger the proper investigation or prosecution of a criminal offence, or whenever there is a grounded suspicion of attempts made to influence the investigation or prosecution of a criminal offence, the Chief EULEX Prosecutor will have the authority to request the Chief Prosecutor of the competent office to assign the case a) to another Kosovo Public Prosecutor working within the same prosecution office, b) or to any EULEX prosecutor who will take the responsibility over the relevant investigation or prosecution.

12.2. If the Chief Prosecutor of the competent office rejects the request of the Chief EULEX Prosecutor, the Chief EULEX Prosecutor will inform the Chief Public Prosecutor of Kosovo and they will find a joint decision which will be respected by the Chief Prosecutor of the competent office.

12.3. In urgent situations, or when the delay might affect the conduct or the result of the investigation, prosecution or the fairness of the proceeding, the Chief EULEX prosecutor will be entitled to undertake any urgent procedural activity or to assign any EULEX prosecutor or Kosovo Public Prosecutor to the case for such purpose.

III. COMPLAINTS

40. The complainants claim that EULEX, as a governing authority and responsible administrator of the IDP camps since 2008, knew about the dangerous living conditions but failed to take action to remove the Roma from the camp or to treat them.
41. Moreover, they claim that there should be an EULEX investigation into possible criminal offences committed against the inhabitants of the camps. They submit that they have been denied access to justice and refused a remedy, judicial or otherwise, capable of dealing with the substance of their complaints about the bad living conditions and the alleged damage to their health and well-being arising therefrom. The applicants rely on Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).
42. The complainants also allege that they were victims of violations of Articles 2 (right to life), 3 (prohibition of torture), and 8 (right to respect for private and family life) of the European Convention on the Protection of Human Rights and Fundamental Freedoms alone, and in conjunction with Articles 13 (right to an effective remedy) and 14 (prohibition of discrimination) of the Convention. They further claim violations of
 - Articles 1, 2, 3, 5, 7, 8, 10, 12, 17, 22, 25, 28 of the Universal Declaration of Human Rights;
 - Articles 2 and 26 of the International Covenant on Civil and Political Rights;
 - Articles 2, 10, 11, 12 of the International Covenant on Economic, Social and Political Rights
 - Articles 1, 2, 3, 5, 12, 16 of the Convention on the Elimination of All forms of Discrimination Against Women;
 - Articles 2, 3, 5, 6, 19, 23, 24, 27, 37 of the Convention of the Rights of the Child.

IV. THE LAW

General

43. 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.

44. In so far as the present case relates to the living conditions at the camp and the danger to the inhabitants' health and well-being which they entail, in their observations EULEX maintained that they were not responsible for the administration of IDPs camp, nor could EULEX be held responsible for any UNMIK shortcomings in this regard.
45. In so far as the present complaint relates to the complainants' submissions about lack of access to justice and about lack of effective remedy in respect of their allegations of breach of human rights, EULEX stated that their prosecutors were not under an obligation to investigate alleged criminal offences committed against the Roma camps' inhabitants. They pointed out that the complainants had claimed that the criminal offence of "causing general danger" (Article 365 of the Criminal Court of Kosovo), had been committed against them. That offence was not listed in article 3.3. of the Law no. 03/L-053 on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (the Law on Jurisdiction) which enumerated criminal offences triggering the competence of EULEX prosecutors. Further, EULEX noted that under Article 12 of the Law on Jurisdiction, EULEX prosecutors had the authority to take over an investigation or prosecution of any criminal offences, in case Kosovo prosecutors were unwilling or unable to perform their duties and this unwillingness or inability might endanger the proper investigation or prosecution. For that possibility to arise, however, the case had first to be referred to a local public prosecutor. If then a local prosecutor was unwilling or unable to deal with the case, the complainants could notify the Chief EULEX Prosecutor, who would then decide whether to assign the case to another Kosovo public prosecutor or to an EULEX prosecutor. EULEX pointed out that the complainants' had not brought their grievances to the attention of the local prosecuting authorities.
46. In reply the complainants maintained that EULEX's claim that the investigation and prosecution of the crimes against the Roma camp inhabitants were not within its executive mandate was unfounded. According to the claimants, under its executive mandate EULEX was tasked to protect and uphold human rights in Kosovo and, especially, to intervene when the contested acts were motivated by racism and local prosecuting authorities did not investigate the matter was refused.
47. They were of the view that EULEX refusal to investigate the case violated the rights of the Roma under the Convention. They referred, in particular, to Articles 6 and 13 of the Convention.
48. 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.
49. The Panel notes that the complainants request, in essence, that the Panel finds a violation of their rights in so far as EULEX has not taken

measures to relocate the remaining Roma from the polluted camps and to provide adequate medical treatment for them and, more generally, about the failure on the part of EULEX to remedy the situation complained of.

50. In this connection, the Panel observes that EULEX has never been in charge of any IDP camps in Kosovo. As stated in paragraph 17 above, UNMIK handed over the responsibility for the remaining camps under its authority to Kosovo authorities in 2008.
51. EULEX is essentially a rule of law mission. Its Mission Statement provides that it “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 recognized standards and European best practices” (see Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, Article 2). It has only a residual executive mandate provided by thus: “[EULEX Kosovo shall] assume other responsibilities, independently or in support of the independent Kosovo authorities, to ensure the maintenance and promotion of the rule of law, public order and security” (see Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo. Article 3, item h)). The overall executive mandate of EULEX does not cover any activities of an administrative character with respect to housing matters, provision of health care, combating pollution, protection of environment or matters of social policy. Consequently, administration or responsibility for the administration of IDP camps is not, and never has been, its competence or responsibility.
52. Hence, the issues raised by the complainants relating to the current general living conditions obtaining in the camp, environmental pollution, alleged damage to the complainants’ health, insufficient medical care and failure to relocate the inhabitants of the camp do not fall within the ambit of the executive mandate of EULEX Kosovo.
53. Therefore these issues do not fall within the ambit of the Panel’s mandate, as formulated in Rule 25 of its Rules of Procedure and the OPLAN of EULEX Kosovo.
54. Furthermore, the Panel cannot but note that most of the relocation activities aiming at improving the situation of persons residing in the camps that took place in recent years have been co-financed by the European Union, USAID, European Commission Liaison Office, the Ministry for Community and Return and the Mitrovicë/Mitrovica Municipality.
55. The Panel observes, in the final analysis, that the Kosovo authorities, are responsible for taking relevant measures to remedy the situation

complained of, such as the closure of the camps, relocation of their inhabitants and providing adequate medical treatment to them. In this context, the Panel attaches importance to the public declaration made by the Office of the Prime Minister in April 2009 to the effect that it would deal with the lead contamination problems in the IDP camps. The Panel is satisfied that the responsibility for addressing the problems lies with the authorities of Kosovo. The Panel has already repeatedly found that it lacks jurisdiction to examine the acts and omissions of the Kosovo authorities (see, among others, HRRP case no. 2011-06, *Milazim Blakqori*, §21).

56. The Panel further notes that the complainants submit that they have been denied access to justice and refused a remedy, judicial or otherwise, capable of dealing with the substance of their complaints. They refer to Articles 6 and 13 of the Convention which, in so far as relevant, provide:

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 Right to an 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.

57. The Panel considers that, in the light of the parties' submissions, this part of the application raises serious issues of fact and law under Articles 6 and 13 of the Convention, the determination of which requires an examination of the merits. The Panel concludes therefore that this part of the complaint is not manifestly ill-founded. No other ground for declaring it inadmissible has been established.

FOR THESE REASONS, the Panel unanimously

holds that it lacks competence to examine the complaint in so far as it relates to the alleged responsibility of EULEX originating in the general living conditions at the camp, environmental pollution, alleged health damage which the complainants had suffered, the lack of adequate medical care and the failure to relocate the inhabitants of the camp;

finds this part of the complaint manifestly ill-founded within the meaning of Article 29 (d) of its Rules of Procedure;

DECLARES THIS PART OF THE COMPLAINT INADMISSIBLE;

DECLARES ADMISSIBLE, without prejudging the merits, the complaints with regard to the alleged violations of Articles 6 and 13 of the Convention and invites the parties to make further submissions on the merits of this part of the complaint.

For the Panel,

Joanna MARSZALIK
Legal Officer

Magda MIERZEWSKA
Presiding Member